THE INCORPORATION OF THE REPUBLICAN GUARANTEE CLAUSE

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This Article makes the case for understanding the Fourteenth Amendment to incorporate the Republican Guarantee Clause of Article IV. Incorporation shifts the focus of the Guarantee Clause from the interests of states to the interests of citizens; from protecting popular sovereignty as a political ideal to safeguarding more specifically rights that citizens hold and exercise in a republican system. Once incorporated, the Guarantee Clause should be understood to require states themselves to maintain a republican form of government and to act to correct departures from republicanism within their own governing arrangements. In addition, an incorporated Guarantee Clause informs the meaning of rights protected against state interference under Section 1 of the Fourteenth Amendment: safeguards for privileges and immunities, due process of law, and equal protection of the laws, are all usefully understood with an eye to republicanism. So, too, an incorporated Guarantee Clause informs the meaning of provisions of the Bill of Rights when they are applied to state governments. Incorporation also has implications for the national government: its role shifts from a duty owed to the states to an obligation to protect from state interference citizenship rights that serve republican ends. Finally, incorporation alters the traditional assessment that Guarantee Clause claims are nonjusticiable.

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INTRODUCTION

Reconstruction did not result in a new Constitution for the United States. Instead, during Reconstruction, three amendments—the Thirteenth, the Fourteenth, and the Fifteenth—were added to the nation's pre-existing Constitution. These three amendments worked significant change, but, as mere amendments, they left in place most of what was already in the document. Accordingly, understanding the meaning of the Reconstruction Amendments, and, more generally, of the Constitution after Reconstruction, requires attention to the entire document, as amended. In other words, to make sense of what Reconstruction brought means starting with the Constitution's Preamble and reading forward to the Reconstruction-era Amendments—and then, as necessary, going back again to the beginning—rather than focusing solely on the three amendments themselves. Taking that approach, this Article advances a single claim: that the Fourteenth Amendment should be understood to incorporate the Republican Guarantee Clause of Article IV.[1] The Article was prepared for a symposium to mark the publication of *The Reconstruction Amendments: The Essential Documents*, a collection of materials curated and edited by Professor Kurt Lash. The Article draws heavily on the materials in that collection to set forth some historical evidence for an incorporated account of the Republican Guarantee Clause. Given the constraints of the symposium format, the evidence presented is illustrative rather than exhaustive: more work will be needed to complete the historical record. The Article also explores, again in a preliminary fashion, some implications that emerge from understanding the Fourteenth Amendment to incorporate the Republican Guarantee Clause. Incorporation, the Article suggests, shifts the focus of the Republican Guarantee Clause from the interests of states as states to the interests of citizens, from broad concepts of popular sovereignty to protecting more specifically rights that citizens hold and exercise in a republican

1 U.S. CONST. art. IV, § 4 (providing that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government").

system. The incorporated Republican Guarantee Clause should be understood to require states themselves to maintain a republican form of government—as an obligation that states owe to their own citizens and to the citizenry of the nation as a whole—and to act to correct departures from republicanism in their own governing arrangements. The Republican Guarantee Clause also informs the meaning of rights protected against state interference in Section 1 of the Fourteenth Amendment: safeguards for privileges and immunities, due process of law, and equal protection of the laws, are all usefully understood with an eye to republicanism. So, too, the Republican Guarantee Clause informs the meaning of provisions of the Bill of Rights when, through Section 1 of the Fourteenth Amendment, they are applied against state governments. As to the national government, it has an obligation to protect citizenship rights that serve republican ends from state interference. Finally, the shift from forms of government to citizens' rights should alter the traditional assessment that claims under the Republican Guarantee Clause are nonjusticiable.

Part I presents some historical evidence for understanding the Fourteenth Amendment to incorporate the Republican Guarantee Clause. Part II identifies some implications that flow from the incorporated account. Part III takes a fresh look at Justice Harlan's dissent in *Plessy v. Ferguson* and suggests that it reflects something quite close to the account presented here of the relationship between the Fourteenth Amendment and the Republican Guarantee Clause. A brief conclusion points to some areas of future research.

I. REPUBLICAN GOVERNMENT IN THE HISTORY OF THE FOURTEENTH AMENDMENT

This Part draws on historical materials—particularly congressional debates—to trace the role of the Guarantee Clause in the drafting and ratification of the Fourteenth Amendment. The discussion begins, as the Thirty-Ninth Congress itself began, not with rights but with the question of apportionment: the allocation of House seats after the end of slavery, in the urgent context in which, if the Constitution's original apportionment formula in Article I was left intact, the former slave states stood to gain representation in Congress even as they treated freed slaves as outside of the political community. In the various efforts, culminating in Section 2 of the Fourteenth Amendment, to change the Constitution's apportionment formula, republican government provided a backdrop commitment, a common benchmark for discussion and debate. In this process, there emerged, necessarily, competing accounts of what republicanism in practice meant. As this Part shows, republicanism, debated in the apportionment context, took on sharpened form in the drafting and ratification

of the rights-protecting provisions of Section 1 of the Fourteenth Amendment and of Congress's enforcement power in Section 5.

A. Apportionment

With the ratification of the Thirteenth Amendment, the former slave states stood to increase their representation in the House because there was no longer a slave population subject to the three-fifths discount of Article I of the original Constitution.[2] Further, this increase in state representation would be based on a population—newly freed slaves—the former slave states treated as outside the political community and lacking in political rights. In the Thirty-Ninth Congress, Representative Roscoe Conkling (Republican of New York) described the problem as follows:

> Four million people are suddenly among us not bound to any one, and yet not clothed with any political rights. They are not slaves, but they are not, in a political sense, "persons."
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> This emancipated multitude has no political *status*.
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> . . . The three-fifths rule gave the slaveholding States over and above their just representation, eighteen Representatives beside, by the enumeration of 1860. The new situation will enable those States when relationships are resumed, to claim twenty-eight Representatives beside their just proportion. Twenty-eight votes to be cast here and in the Electoral College for those held not fit to sit as jurors, not fit to testify in court, not fit to be plaintiff in a suit, not fit to approach the ballot box. Twenty-eight votes, to be more or less controlled by those who once betrayed the Government, and for those so destitute, we are assured, of intelligent instinct as not to be fit for free agency.[3]

1. A Single Amendment Penalizing Racial Discrimination

Efforts in Congress to amend the Constitution to alter the original Article I apportionment formula in light of the end to slavery began in 1865. In December of that year, three members of the House offered separate proposals to base apportionment not on each state's total

2 *See id.* art. I, § 2 (providing for an apportionment of representatives based on state population, determined by adding to "the whole Number of free Persons . . . three fifths of all other Persons").

3 CONG. GLOBE, 39th Cong., 1st. Sess. 351, 353–59 (1866) (statement of Rep. Conkling), *as reprinted in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 43, 45–46 (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 2].

population—the source of boosted power for the former slave states—but on the number of eligible voters within each state.[4] The newly free population would thus count only if also enfranchised. These three proposals were referred to the Joint Committee on Reconstruction, which, in January 1866, offered, as a Joint Resolution, its own apportionment amendment by which representation would be based upon a state's entire population (excluding Indians) with the limitation that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation."[5] In other words, under the Committee's approach, if a state denied anybody the right to vote on the basis of that person's race, everybody of the same race would be excluded from the population count that determined the state's number of House seats.

Defending the proposal, Committee co-chair Thaddeus Stevens (Republican of Pennsylvania) announced that the amendment was needed in order to align the Constitution with the principles of the Declaration of Independence, which, he said provided the "intended . . . foundation of our Government."[6] According to Stevens:

> If . . . [our fathers] had been able to base their Constitution on the principles of that Declaration it would have needed no amendment during all time, for every human being would have had his rights; every human being would have been equal before the law; and no oppression could have been effected except through usurpation against the principles of that Government.[7]

Slavery, however, "precluded" the Founders "from carrying out their own principles into the organic law of this Union" and thus the Founders had to "compromise[] their principles for what they deemed a greater good."[8] With slavery now ended, Stevens announced, "[t]he time has come when we can make the Constitution what our fathers desired to make it."[9]

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4 *See* CONG. GLOBE, 39th Cong., 1st Sess. 9 (1865) (proposal by Rep. Schenck for an amendment "to apportion Representatives according to the number of voters in the several States"); *id.* at 10 (proposal by Rep. Stevens for an amendment providing that "[r]epresentatives shall be apportioned among the States . . . according to their respective legal voters; and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners"); *id.* (proposal by Rep. Broomall for an amendment "so as to base the representation in Congress upon the number of electors, instead of the population, of the several States").

5 CONG. GLOBE, 39th Cong., 1st Sess., 1275, 1281–89 (1866), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 133, 135.

6 CONG. GLOBE, 39th Cong., 1st Sess. 536 (1866) (statement of Rep. Stevens).

7 *Id.*

8 *Id.*

9 *Id.*

Stevens's invocation of foundational principles set the stage for the debate over the Committee's proposal. Much of the ensuing discussion in Congress centered on the compatibility of the proposed amendment with the Republican Guarantee Clause—which was treated as encapsulating an unbreachable constitutional commitment. Radical Republicans who opposed the amendment argued that—besides the fact it did not mandate black suffrage—if added to the Constitution it would imply that states actually had power to deny voting rights to a portion of the population so long as they were willing to assume the specified penalty. Such power, opponents urged, was inconsistent with republican government. Thus, Representative William Higby (Republican of California) said the proposed amendment "directly conflicts" with and "may as well blot out" the Constitution's Republican Guarantee Clause because, he claimed, it would permit a state "by implication . . . to exclude a whole class on account of race or color" from the franchise.[10] Senator Charles Sumner (Republican of Massachusetts) said that because the proposal was incompatible with the Guarantee Clause, if ratified, it would introduce "discord and defilement" into the Constitution.[11] Sumner argued that because it made no mention of slavery, the text of the original Constitution "was kept blameless" but the Joint Committee now "proposed to admit in the Constitution the twin idea [to slavery] of Inequality in Rights" in a way that would "openly set at naught the first principles of the Declaration of Independence and the guarantee of a republican government itself."[12] For Sumner, if the proposed amendment were adopted, the Constitution, by authorizing denial of the franchise, would sanction, as compatible with the core commitment to republicanism, a "bare-faced tyranny of taxation without representation."[13]

Notions that the original Constitution was pure, or that the Framers' own aspirations were pure even if the Constitution they adopted was not, were common in the Reconstruction era. As to republicanism itself, there is a vast literature exploring how the founding generation understood the term.[14] In a very general sense,

10 CONG. GLOBE, 39th Cong., 1st Sess. 422–35 (1866) (statement of Rep. Higby), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 55, 56.

11 CONG. GLOBE, 39th Cong., 1st Sess. 673–74 (1866) (statement of Sen. Sumner), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 90, 91.

12 *Id.*

13 *Id.*

14 *See, e.g.*, MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015); DANA D. NELSON, COMMONS DEMOCRACY: READING THE POLITICS OF PARTICIPATION IN THE EARLY UNITED STATES (2016); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION (1994); SUSAN

for the founding generation, republican government meant rule by the people and thus was distinguished from monarchy or aristocracy.[15] James Madison identified a further element of republicanism: majority rule.[16] But that left unanswered the question of who within the governed population counted for purposes of determining whether a majority was exercising power. Madison also famously distinguished a republic from a democracy (or what he often called a pure democracy). In both of those systems, the people are sovereign. In a (pure) democracy, individual citizens themselves exercise governmental power, directly. In a republic, by contrast, governmental power is exercised by representatives.[17] This distinction between republicanism and democracy should not, however, obscure the basic similarity between the two—popular sovereignty—and their shared distinction, to the founding generation, from monarchical and aristocratic systems. In any event, when Stevens, Higby, and Sumner (and, as we shall soon see, many others) invoked republicanism, they were incontestably right about the form of government the founding generation revered. The challenge was determining the meaning of republicanism, in practice, and in the context of amending the Constitution to correct failures that had produced a Civil War, and to unify anew the nation.

If Radical Republicans were correct about the implication of the proposed apportionment amendment for the meaning of republicanism, there was also an implication for the federal government's constitutional obligation (and power) to "guarantee to every State in this Union a Republican Form of Government."[18] Sumner thought the amendment would largely nullify the ability of the federal government—he focused on Congress—to intervene to ensure republican government in the states. He said:

> I denounce the proposition as positively *tying the hands of Congress in its interpretation of a Republican Government*, so that under the

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FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

15 *See, e.g.*, THE FEDERALIST NO. 39, at 193 (James Madison) (Ian Shapiro ed., 2009) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior" and distinguishing republican government from monarchies and aristocracies).

16 *See* THE FEDERALIST NO. 10, at 50 (James Madison) (Ian Shapiro ed., 2009) (describing majority rule as "the republican principle").

17 THE FEDERALIST NO. 14, at 67 (James Madison) (Ian Shapiro ed., 2009) ("[I]n a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.").

18 U.S. CONST. art. IV, § 4.

> guarantee clause it must recognize an Oligarchy, Aristocracy, Caste and Monopoly, founded on color, with the tyranny of taxation without representation as republican in character, which I insist they are not. At present the hands of Congress are not tied. Congress is free to act generously, nobly, truly, according to the highest idea of a republic, discountenancing all inequality of rights and the tyranny of taxation without representation. Let the pending proposition find a place in the Constitution, and the guarantee clause will be restrained in its operation. . . . In other words, the denial or abridgment of the elective franchise on account of race or color, and the tyranny of taxation without representation will be recognized in the Constitution as republican in character.[19]

As Sumner's comments suggest, denial of voting rights to black citizens was not the only concern the proposed amendment triggered. Rather, opponents took the view that the amendment would enshrine in the Constitution a more general notion that states could deny voting to any classes of their citizens they wished and still claim to be republican in nature. Race, in other words, was just one incantation of what would be constitutionalized as broad state power over voting, with the federal government unable to invoke the Guarantee Clause as a basis to intervene. Representative Thomas Eliot (Republican of Massachusetts) argued:

> [T]he amendment . . . enables a State, consistently with its provisions, by making the right to vote depend upon a property qualification, to exclude large classes of men of both races. . . . Yet . . . under the Constitution Congress is bound to see to it that each State shall have a republican form of government.
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> . . . [T]his amendment . . . controls by implication that power, because, while the Constitution now says that Congress shall guaranty to every State a republican form of government, this amendment as reported by the committee admits by implication that, although a State may so legislate as to exclude these multitudes of men, not on account of race or color, but on account of property, yet, nevertheless, she would have a republican form of government, and that Congress will not and ought not to interfere.[20]

On this assessment, the proposed amendment, although designed to promote political membership, would end up narrowing the classes

19 CONG. GLOBE, 39th Cong., 1st Sess. 1224–28 (1866) (statement of Sen. Sumner), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 126, 127 (alteration in original).

20 CONG. GLOBE, 39th Cong., 1st Sess. 403–07 (1866) (statement of Rep. Eliot), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 53, 54.

that hold political power at the state level—and leave the federal government powerless to respond.

From a different perspective, some congressional Democrats argued that because states already had power to allocate the franchise however they saw fit, the problem with the amendment was that it would penalize states for exercising that power in certain ways. Representative Andrew Rogers (Democrat from New Jersey) complained that by imposing a reduction in representation in Congress, the proposed amendment departed from "one of the fundamental principles . . . laid down by our fathers at the formation of the Constitution as an axiom of civil and political liberty, that taxation and representation should always go together."[21] According to Rogers, the penalty provision improperly introduced a suffrage-based element to representation. Rogers complained that the provision "inflicts upon the States a penalty for refusing to the colored population an unqualified right of suffrage which it does not inflict upon them for refusing the same thing to the white population" and thus compels the states, if they are to enjoy "their rights [of full representation] under the present organic law" to extend the franchise to black citizens.[22] In Rogers's view, republicanism was necessarily compatible with restrictions on voting given historical and contemporary practices: "[e]very man in this House knows perfectly well in the several States a person under the age of twenty-one years cannot vote, unnaturalized citizens cannot vote, and the whole class of females, constituting nearly one half of the population of this country, cannot vote; yet for these persons the States are entitled to representation."[23]

Members of the Thirty-Ninth Congress who invoked the Guarantee Clause during their consideration of the apportionment amendment often depicted the Clause as *itself* requiring states to maintain a republican government. In other words, they understood republicanism not just as something the federal government was obligated to protect but as a requirement that states themselves had to follow. For example, Samuel Shellabarger (Republican of Ohio), observing that the proposed amendment "might be construed to give

21 CONG. GLOBE, 39th Cong., 1st Sess. 351, 353–59 (1866) (statement of Rep. Rogers), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 43, 44.

22 *Id.* Rogers's account of the proposed amendment was inaccurate. His claim that it required extending to black citizens "an unqualified right of suffrage" was wrong because the penalty provision would be triggered only when denial of the franchise is based on race or color. Rogers also erred in asserting that states could freely deny the franchise to white citizens without penalty: if such denials were based on race, the same penalty provision would apply.

23 *Id.* at 44–45.

powers to the States regulating the matter of the elective franchise, which they did not even now possess, in the way of excluding an entire race from the right of the elective franchise," described the Guarantee Clause as a direct constraint upon the states themselves: "As our Constitution now is," Shellabarger said, "we have at least this restraint on the power of the States, to wit, that they cannot so limit that franchise that the State shall cease to be republican, cease to be based upon the voice of the people."[24] By altering the meaning of republicanism, Shellabarger argued, "[t]his authorization of the disenfranchisement of race being introduced into the Constitution might be held to modify the present sense of the clause relating to the States being republican, and might thus tend to lessen the power of the people."[25] On this understanding, the Guarantee Clause contains more than an obligation the federal government owes to the states: it also imposes an obligation on the part of the states, to their own citizens, to maintain republican government.

Supporters of the apportionment amendment denied it had implications for the meaning of republican government because, they said, the amendment did not imply a power on the part of states to limit the franchise—and instead punished them for doing so. One form of this argument rejected outright any constitutional power on the part of the states to limit voting and asserted that punishment does not imply power. John Bingham (Republican of Ohio), for example, argued that "a grant of power by implication cannot be raised by a law which only imposes a penalty, and nothing but a penalty, for the nonperformance of a duty or the violation of a right."[26] Bingham invoked common-law approaches to support his point:

> Within the last hundred years, in no country where the common law obtains, I venture to say, has any implication of a grant of power ever been held to be raised by such a law, and especially an implied power, to do an act expressly prohibited by the same law.[27]

Invoking both Article I, Section 2 (which he described as itself a guarantee) and the Republican Guarantee Clause, Bingham argued that the amendment provision rightly penalized states that violated republican requirements in the allocation of political power. It is worth quoting Bingham at length:

> [T]he words of the Constitution [in Article I, Section 2], the people of "the States shall choose their Representatives," is an express

24 *Id.* at 46 (statement of Rep. Shellabarger).

25 *Id.*

26 CONG. GLOBE, 39th Cong., 1st Sess. 422–35 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 55, 63.

27 *Id.*

> guarantee that a majority of the free male citizens of the United States in every State of this Union, being of full age, shall have the political power subject to the equal right of suffrage in the minority of free male citizens of full age. There is a further guarantee in the Constitution, of a republican form of government to every State, which I take to mean that the majority of the free male citizens in every State shall have the political power. I submit . . . that this proviso [i.e., the apportionment amendment] is nothing but a penalty for a violation on the part of the people of any State of the political right of franchise guarantied by the Constitution to their free male fellow-citizens of full age.
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> . . . [T]he proviso is a penalty, and nothing but a penalty, inflicted on the State if its ruling class disregard and violate the guarantees of the Constitution of the political right of all the free people therein, being male citizens of the United States of full age, to participate in the choice of electors, by imposing on any part of one class special disabilities not imposed on the other class.
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> The guarantee in the first article of the second section of the Constitution rightly interpreted is, as I claim, this, that the majority of the male citizens of the United States of full age in each State shall forever exercise the political power of the State with this limitation, that they shall never by caste legislation impose disabilities upon one class of free male citizens to the denial or abridgment of equal rights. The further provision is that the United States shall guaranty to each State a republican form of government, which means that the majority of male citizens of full age in each State shall govern, not, however, in violation of the Constitution of the United States or of the rights of the minority.
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> . . . [The proposed amendment] says in terms that if any of the States of the United States shall disobey the Constitution; that if they shall make distinctions in violation of the second section of the first article of the Constitution, that as a penalty such State shall lose political power in this House, to the extent of the whole class or race against any part of whom the unjust discrimination has been made.[28]

Two points here bear emphasis. One is Bingham's understanding of republicanism as governmental power exercised according to the will of the majority of (male) citizens, but only in a system where the minority of (male) citizens, because of a requirement of an equal right to vote, also has an opportunity to participate and shape outcomes. The second point is Bingham's understanding of the Republican

28 *Id.* at 64.

Guarantee Clause as directed not at (or not only at) the interests of the state, but as a protection for the (male) citizens of the state as the rightful holders of political power. On this account, republicanism sounds not in political structure but in rights; and it sounds in the rights of classes of citizens not (or at least not only) the rights of individuals.

Other members of Congress who took the view that states already had power to limit the franchise contended that the proposed amendment did not alter—either by adding to or subtracting from—that pre-existing authority. Thaddeus Stevens, for example, argued that "no good philologist who, upon reading this proposed amendment, will for a single moment pretend that it either grants a privilege or takes away a privilege from any State."[29] Rather, Stevens said, the amendment "punish[es] the abuse of that privilege if it exists."[30] Stevens was treading a fine line. He claimed that "the States have the right, and always have had it, to fix the elective franchise within their own States" and thus the amendment "grants no right."[31] At the same time, according to Stevens, the amendment does not "take it [the pre-existing right] from them [the states]"[32] because the penalty provision is not itself a deprivation of power. Instead, Stevens argued, the penalty

> says . . . to the State of South Carolina and other slave States, true, we leave where it has been left for eighty years the right to fix the elective franchise, but you must not abuse it; if you do, the Constitution will impose upon you a penalty . . . .
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> . . . [N]o more strong inducement could ever be held out to them, no more severe punishment could ever be inflicted upon them as States. If they exclude the colored population they will lose at least thirty-five Representatives in this Hall. If they adopt it they will have eighty-three votes.[33]

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29 CONG. GLOBE, 39th Cong., 1st Sess. 535–38 (1866) (statement of Rep. Stevens), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 80, 81.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id. See also* CONG. GLOBE, 39th Cong., 1st Sess. 351, 353–59 (1866) (statement of Rep. Conkling), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 43, 46 ("If there is an implication [of state power], and if there is a recognition, or even an authorization . . . do we not see, at least, that nothing more is suggested than has always been permitted with universal acquiescence by the courts and the nation? The right to exclude class has been construed into the Constitution or in spite of the Constitution already, and all the restraint we now have would remain, I think.").

On this account, the amendment's penalty does not alter state power because the penalty is triggered only for abuses of power and because inducements to act in certain ways do not undermine power held.

2. The Section 2 Formula

Although the proposed single apportionment amendment, with its penalty for race-based discrimination in voting, failed, Section 2 of the Fourteenth Amendment alters the Article I basis for representation. In place of "adding to the whole Number of free Persons"[34] in a state, three-fifths of the state's slave population, the Fourteenth Amendment requires, with slavery abolished, counting "the whole number of persons in each State" (excluding, as under the original Constitution, "Indians not taxed").[35] But there is also a penalty: if the right of any adult male citizens to vote is "denied . . . or in any way abridged," except on the basis of "participation in rebellion, or other crime," then the state's representation is reduced proportionately.[36] Section 2 says nothing of race; its penalty provision is triggered when states abridge voting rights of any adult (male) citizens, not just on the basis of race. But the provision had a racial origin: it incentivized states to extend to black citizens the same voting rights enjoyed by white citizens,[37] and it ensured that the former slave states would not gain an increase in representation on the basis of newly freed slaves denied the franchise.[38]

Congress's earlier consideration of a single apportionment amendment had already aired arguments about voting, republicanism, and state power over the franchise. Jacob Howard's (Republican of Michigan) speech introducing the proposed Fourteenth Amendment in the Senate navigated these earlier debates. Howard said that the

34 U.S. CONST. art. I, § 2.

35 *Id.* amend. XIV, § 2.

36 *Id.*

37 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Sen. Howard), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 185, 191 (explaining that "this amendment is so drawn as to make it the political interest of the once slaveholding States to admit their colored population to the right of suffrage" because "[t]he penalty of refusing will be severe" and noting that the penalty is not limited to former slave states because it applies "to all States without distinction" if they restrict voting on the basis of race).

38 *See, e.g.*, *id.* at 190 (reporting that if the original Article I formula remained, the former slave states would immediately gain nine or ten congressional seats, and asking: "Shall the recently slaveholding States, while they exclude from the ballot the whole of their black population, be entitled to include the whole of that population in the basis of their representation, and thus to obtain an advantage which they did not possess before the rebellion and emancipation?").

proposed Fourteenth Amendment did not require equality in voting. Section 1, he observed, defined citizenship and protected certain rights against state infringement, but it did not reach the right to vote—a political right beyond the scope of Section 1's protections. Howard explained:

> The right of suffrage is not, in law, one of the privileges or immunities . . . secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.[39]

Echoing arguments made about the prior (rejected) apportionment amendment, Howard contended that Section 2 of the proposed Fourteenth Amendment also did not affect state power over the franchise. While Section 2 penalized denial of the franchise to adult male citizens, Howard insisted that it did not thereby require states to extend the franchise to black citizens—or authorize the federal government, via the Guarantee Clause, to intervene to require states to extend voting rights.[40] Howard himself thought that from the perspective of republican government the proposed Fourteenth Amendment fell short precisely because it did not prohibit states from denying the franchise on the basis of race.[41] However, he recognized, ratification of an amendment with such a prohibition was politically impossible.[42] Other Republicans opposed the amendment, just as they had opposed its predecessor, because it did not make suffrage universal and, as with the prior apportionment amendment, seemed to recognize as a constitutional matter the power of states to deny voting on the basis of race and on other grounds.[43]

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39 *Id.* at 188.

40 *Id.* at 189 ("[T]his section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race.").

41 *Id.* ("[I]f I could have my own way, if my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least; for I am opposed to the exclusion and proscription of an entire race.").

42 *Id.* at 189–90 ("It was our [committee's] opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. . . . The second section [therefore] leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.").

43 *See, e.g.*, Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, 19 ATL. MONTHLY, Jan. 1867, at 112–17, *as reprinted in* LASH, Vol. 2, *supra* note 3, at 323, 327 (urging the Thirty-Ninth Congress to enfranchise black citizens).

Ratification of the Fourteenth Amendment did not resolve questions about the scope of state power, in a republican system, to allocate the franchise. Nonetheless, ratification at least made clear that denial of voting rights to certain classes of (male) citizens was sufficiently problematic to republican government that a federally imposed penalty should result. Whether or not past state limitations on the franchise were compatible with earlier notions of republican government, going forward, republicanism at least put a thumb on the scale against such limitations.

So far, the discussion has focused on Congress. Attention to the ratification process at the state level sheds additional light on the relationship between the Fourteenth Amendment and the Republican Guarantee Clause. Of particular note is the extraordinary analysis by Indiana Governor Oliver Morton in his January 11, 1867, message urging the state legislature to ratify the amendment.[44] Morton teed up his discussion of the Guarantee Clause by contemplating the possibility that the former Confederate states refuse to ratify the Fourteenth Amendment and continue their "reign of terror" and "flagrant disregard of liberty and life."[45] Morton argued that a failure by the former Confederate states to ratify the amendment, and thereby "abandon their sins,"[46] would trigger the federal government's power under the Guarantee Clause—and do so in a particular way. In the context of rebellion, Morton argued, that power could be used to regulate voting rights in the former Confederate states even though in ordinary circumstances states themselves control the franchise.[47]

Morton explained that the Guarantee Clause permits the national government to "interfere in a certain contingency, with the government of a State."[48] While, he said, "the extent of this power . . . has never been settled by any precedent," it must be understood as "a vast undefined power, given to the United States to guard the States against revolution, anarchy or change to monarchical or aristocratic government" such that, "[i]f a State government has been destroyed by rebellion, the United States must set up or re-establish a republican form of government."[49]

Morton emphasized that the Constitution itself does not "mark[] out" how reestablishment of republican government is to occur, and

44 Oliver P. Morton, Ind. Governor, Governor's Message (Jan. 11, 1867), *in* 1 IND. HOUSE J. 21 (1867), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 349, 349–52.

45 *Id.* at 351.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

instead leaves the matter to "the circumstances of each case."[50] Adopting a *McCulloch*-style[51] approach to federal power, Morton contended that "the measure of power must . . . be the extent of the means necessary to accomplish the purpose" because "[i]t is a well recognised principle of Constitutional law, that where a duty is enjoined, all the powers necessary to the performance of the duty are included" and thus in re-establishing republican government the United States "must be held to have the right to employ whatever instrumentalities are necessary for that purpose."[52]

As for voting, Morton said: "Ordinarily, and when the country is in a normal condition, the subject of suffrage is in the control absolutely of the several States, and has been so treated from the first formation of the Government, and may be regarded clearly as one of the reserved rights of the States."[53] However, in Morton's view, the calculation changes when the conditions of state government trigger the guarantee obligation:

> [I]f a State government shall fall into anarchy, or be destroyed by rebellion, and it is found clearly and unmistakably, that a loyal new one can not be erected and successfully maintained without conferring upon a race or body of men the right of suffrage, to whom it has been denied by the laws of the State, it would clearly be within the power of Congress to confer it for that purpose, upon the principle that it can employ the means necessary to the performance of a required duty.
>
> . . . .
>
> If, when other remedies have failed, it be the clear and deliberate judgment of Congress that loyal Republican State governments can not be maintained except by conferring the elective franchise upon the negro race in those States, Congress may confer it upon the ground that it is necessary to the performance of a prescribed duty.[54]

In other words, the federal government is entitled to determine that extension of the franchise is necessary to restore republican government within a state and thereby displace the state's ordinary control over voting rights.

Morton's intriguing approach provided for a potential use of the Guarantee Clause—tied to the Fourteenth Amendment—to regulate voting in the former slave states, particularly by extending rights to black citizens, while avoiding the conclusion that universal suffrage is

50 *Id.*

51 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

52 Morton, *supra* note 44, at 351.

53 *Id.*

54 *Id.* at 351–52.

necessarily a requirement of republican government so that loyal states would be subjected to similar interventions.

In justifying his approach, Morton offered a baseline account of republicanism in which, reflective of natural rights, there exists universal suffrage. He said:

> As a political question, our Republican theory, which asserts that "government exists only by the consent of the governed," and that "taxation and representation" should go together, does not admit that suffrage shall be limited by race, caste, or color. As a question of natural right, it is hard to say that suffrage is not a natural right, when upon its exercise may depend the possession and enjoyment of all other acknowledged natural rights. It is hard to say that a man has a right to life, liberty, and the pursuit of happiness, and yet has no natural right to a voice in that government by which these other rights will be protected or denied.[55]

At the same time, Morton argued, in some circumstances restrictions on suffrage could be consistent with republicanism and natural rights because "all . . . natural rights are subject to restriction and limitation for the general welfare of society."[56] That is, a sufficient justification could displace ordinary republican requirements of universal suffrage. As to race-based voting distinctions specifically, Morton said:

> The proposition at once to introduce to the ballot-box half a million of men, who but yesterday were slaves, the great mass of whom are profoundly ignorant, and all impressed with that character which slavery impresses upon its victims, is repugnant to the feelings of a large part of our people, and would only be justified by necessity resulting from inability to maintain loyal republican State governments without them.
>
> But the necessity for loyal Republican State Governments that shall protect men of all races, classes and opinions, and shall render allegiance and support to the Government of the United States, must override every other consideration of prejudice or policy.[57]

In other words, Morton saw a sufficient basis for states to withhold the franchise from newly freed slaves (he said nothing about the free black population): that freed slaves lacked educational (and perhaps other) qualities necessary to evaluate electoral options and meaningfully cast a ballot. Nonetheless, the state power to restrict the franchise, and the justification for its use, could be displaced if the federal government determined that extension of suffrage was

55 *Id.* at 352.
56 *Id.*
57 *Id.*

necessary to restore republicanism. Whatever the merits of Morton's approach, significantly, it, too, reflects the idea that race-based—and other class-based—voting distinctions are at least problematic in a republican system. Such distinctions are permissible, perhaps, but not automatically so.

3. Statutory Implementation

After ratification of the Fourteenth Amendment there were additional debates over its implications—once it is coupled with the Guarantee Clause—for voting rights. In January of 1869, the House took up consideration of a bill along with a proposed amendment—it would become the Fifteenth—to bar states from denying the vote on the basis of race, color, or previous condition of servitude. The bill's sponsor, George Boutwell (Republican of Massachusetts), argued that the Guarantee Clause and the Fourteenth Amendment provided congressional authority for the legislation. Boutwell invoked the statement in Federalist 43, that "[i]n a confederacy founded upon republican principles . . . the superintending Government ought clearly to possess authority to defend the system against aristocratic and monarchical measures,"[58] and James Wilson's assertion at the Pennsylvania ratifying convention that "[t]he right of suffrage is fundamental to republics,"[59] to argue that the Guarantee Clause empowers the federal government to remedy race-based (and other) restrictions on the franchise—as aristocratic and therefore unrepublican. Boutwell explained:

> The essence of an aristocracy is . . . that the Government is in certain families made hereditary to the exclusion of others. . . . You may limit this aristocracy to twelve men, you may enlarge it to a hundred, to a thousand, or to ten thousand; but if limited, if certain persons are included and certain others excluded, not for themselves merely but for all their posterity, you have an aristocracy. There is, I submit to this House, no other possible definition of an aristocracy; there is no other possible honest distinction between an aristocratic and a republican form of government.[60]

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58 CONG. GLOBE, 40th Cong., 3d Sess. 555–61 (1869) (statement of Rep. Boutwell), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 447, 454. Boutwell attributes *Federalist No. 43* to Hamilton, though Madison was the author.

59 *Id.* For Wilson's statement, see THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 482 (Jonathan Elliot ed., 2d ed. 1836).

60 CONG. GLOBE, 40th Cong., 3d Sess. 555–61 (1869) (statement of Rep. Boutwell), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 447, 454.

On this account, because race is hereditary, distinctions based on race are equivalent to the hereditary workings of an aristocracy.

Boutwell also argued that Section 5 of the Fourteenth Amendment was a basis for federal intervention to correct race-based voting restrictions. In his view, Section 1's Privileges or Immunities Clause bars states from denying to black citizens the right to vote enjoyed by white citizens.[61] Careful not to say that Section 1 confers a generalized right to vote, Boutwell emphasized instead equality—without regard to race—of citizenship rights. He argued:

> [W]hen you prove to me that one man in the State of Kentucky votes for President, or for a Representative in Congress, or for members of the State Legislature, you have proved that every man having like qualifications of education or property has the same right. If you deny it to him you deny that to which by the Constitution he is entitled: the enjoyment of equal privileges and immunities as a citizen of the United States, and as a citizen of Kentucky in the State of Kentucky.[62]

We'll return in the next Section to the idea of equal rights. It is enough for now to note Boutwell's understanding of Section 1 and the implications he saw for state regulation of the franchise. Opposition in Congress to Boutwell's claims about federal power repeated some now-familiar arguments about voting, republicanism and the authority of states. Charles Eldridge (Democrat of Wisconsin) argued that the Guarantee Clause, even when fused with Fourteenth Amendment equality, could not support the proposed bill because the implication would be that no state today is republican—and that no state at the Founding was either.[63] In Eldridge's view, the necessary implication of how states have regulated—and still are regulating—the franchise is that republicanism permits a range of state approaches on the issue of who may vote.[64] Eldridge argued also that Section 1 of the Fourteenth

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61 *Id.* at 455.

62 *Id.* at 458.

63 CONG. GLOBE, 40th Cong., 3d Sess. 638–58 (1869) (statement of Rep. Eldridge), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 463, 470. Eldridge explained:

> For Congress to intervene under the pretense that the States to which the bill is to apply have not now a republican form of government is to decide that there are no States now in the Union that have a republican form; for the bill applies alike to all the States. It is to decide that there never have been any States of this Union that have had a republican form. If there be any State that has a republican form, that State ought to be excepted from its operation. I am not aware of any one who has the hardihood to claim that the original States were not republican in form, and if they were, that settles the question of the power of Congress to interfere with them . . . .

Id.

64 *Id.* Eldridge argued:

Amendment does not alter the power of states to limit the franchise because, he said, "citizenship does not necessarily carry with it the right to vote or hold office under our system."[65] Eldridge further invoked the apportionment formula in Section 2 of the Fourteenth Amendment as confirmation of state power to regulate suffrage, free from federal intervention.[66] Aside from the text, Eldridge noted that at the time Congress was considering the Fourteenth Amendment, Thaddeus Stevens and other Republicans had made clear that the Amendment would leave it "optional with the State to grant this right of suffrage to its negroes or have its representation in Congress proportionately diminished."[67] Still, there was no denying that with the penalty provision of Section 2, states that chose to withhold the franchise (from male citizens) would bear a cost.

4. A Note on the Fifteenth Amendment

Boutwell's bill did not make it into law but ratification of the Fifteenth Amendment resolved the question of whether states may limit voting rights on the basis of race. Yet even as it took an amendment to specify that states may not, some observers held fast to the view that republican government itself actually required equal voting rights (at least without regard to race). On this account, the

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> The United States is not to guaranty any particular form of republican government. The States certainly have the right to select or choose for themselves the form, only so that it is republican. All are not by the Constitution required to be Massachusetts. Ohio's form may at least suit her people better, and the United States has no power to dictate or guaranty the one or the other as a choice of particular republican forms.
>
> If it were claimed that no State is republican in form that does not allow all its citizens to vote, then we should have no republican States, because no one of the States does allows [sic] all its citizens to exercise this privilege. . . . Nor can the denial to a citizen of the right to vote by a State destroy the republican form of its government. It was not so understood at the adoption of the Constitution, and has never been so claimed by any sane man. That the question of who shall exercise the right of suffrage is a delicate and most important question I admit. That the power of determining it ought to be dispassionately and wisely exercised is equally true. On its being so used depends greatly the welfare and happiness of the body-politic and the permanence and endurance of our republican Government and institutions. But . . . this power rests in the States, and ought to rest there . . . . [T]he rights and liberties of the people are safer with this power in the control of the States than in the control of the Federal Government . . . .

Id.

65 *Id.*

66 *Id.* at 471. Section 2's penalty provision, Eldridge said, "recognizes and expressly admits the power to be in the State to abridge or deny the right to some of its inhabitants to vote, subject only to have the basis of its representation reduced thereby." *Id.*

67 *Id.*

Fifteenth Amendment did not break new ground but was instead best understood as perfecting a prior constitutional commitment. Georgia Governor Rufus Bullock's message, in March of 1869, urging his state's legislature to ratify the Fifteenth Amendment reflects this perspective. Bullock said:

> The equal right of every man, either by himself or his elected representative, to participate in the framing of the laws by which he is to be governed, and in the selection of the persons who are to execute them, is the very foundation of republican government; and, that one race or color shall undertake to exclude from political privilege any other race or color is . . . a practical denial of the principle on which our independence was originally declared, and the government subsequently founded . . . .
>
> The colored race is free all over this broad land. One more step was needed, and this amendment, if adopted by three fourths of the States represented in the Union, completes it. It will then be written in the fundamental law, above the strike of faction, and beyond the reach of passion, that all men, without distinction of race or color, shall have equal political privileges.
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> . . . .
>
> The adoption of this amendment will, therefore, be hailed as the final triumph of freedom and equal rights for all, and will blot out forever all distinction in political rights, based upon race, color or previous condition as to slavery. Its adoption by the nation will be the consummation of the progress of the last eight years towards a perfect accord between the theory of republicanism and its practical enforcement.[68]

5. Summary

A commitment to republican government, as reflected in the Republican Guarantee Clause, provided the framework for debates that resulted, with the Fourteenth Amendment, in a change to the Article I apportionment formula. During these debates, republicanism was universally understood as a foundational principle of the original Constitution. Among those who supported an apportionment amendment and those who opposed one, the shared view was that any amendment had to be compatible with republican government. That said, the particular meaning of republicanism generated divisions. In one account, republicanism, as reflected in political arrangements at the Founding era and during the antebellum period, means only a general idea of popular sovereignty, one in which there are elections

68 Rufus Bullock, Governor of Ga., Governor's Message (Mar. 10, 1869), *in* GA. HOUSE J. 601 (1869), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 554, 555.

for representatives but with states free to limit voting to certain segments of the population. In a different account, exclusion of some classes of citizens from the franchise is incompatible with republicanism, understood to require rule by all, not some, of the people. On this view, republicanism either took on a new meaning in the Reconstruction era—such that past voting limitations would not be permissible going forward—or, even at their time, historical voting limits were inconsistent with the republican ideal (rather than evidence of its meaning). Likewise, the penalty provision of Section 2 of the Fourteenth Amendment generated different understandings: some viewed the provision to affirm a power of states to limit the franchise (so long as they were willing to accept the penalty), while others saw the provision as a recognition that class-based voting restrictions were unlawful. Regardless of these points of division about the details of republicanism and about the lessons to be drawn from historical practices, there was no disagreement that republicanism involved representation—and ratification of the Fourteenth Amendment plainly meant that a state's choice about how to allocate voting rights impacted, in real numbers, the state's representation in Congress.

B. Rights

As the preceding discussion has shown, while the question of apportionment raised the issue of voting rights, a more general idea was in play: that republicanism involves equality of rights. As we have already seen, commentators disagreed about whether voting was one such right and, if it was, about the circumstances in which equality could be displaced. But the shared understanding was that in a republic there are rights that all citizens enjoy on equal terms. Debates over Section 1 of the Fourteenth Amendment demonstrate this shared understanding of republicanism as protecting equality of rights even as the implications for voting specifically remained disputed.

Just as there were apportionment proposals prior to Section 2 of the Fourteenth Amendment, Section 1 also had predecessors. In the Thirty-Ninth Congress, therefore, articulation of the relationship between equal rights of citizens and republicanism predated consideration of the Fourteenth Amendment itself. In February 1866, the House took up a proposed amendment providing that: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and

property."[69] These "privileges and immunities" were described in terms of republican government and equality among citizens. For example, Frederick Woodbridge (Republican of Vermont) depicted the proposed amendment as "merely giv[ing] the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship."[70] As such, Woodbridge argued, the amendment was consistent with pre-existing state power and would promote republican ends: it did not, in Woodbridge's view, "interfere[] with the sovereign power of a State that adheres to a republican form of government" but instead would "keep the States within their orbits, and . . . insure and secure forever to every citizen of the United States the privileges and blessings of a republican form of government."[71]

When Congress took up the five-part proposed Fourteenth Amendment in May of 1866, there was also an emphasis on equality of rights as a foundational aspect of republicanism. John Farnsworth (Republican of Illinois), for instance, described the "[e]qual protection of the laws" (in Section 1) as "the very foundation of a republican government."[72] In a republic, he reasoned, there must be "equal rights of 'life, liberty, and the pursuit of happiness.'"[73] In the Senate, Jacob Howard, introducing the amendment, likewise emphasized equality of rights and its nexus with republicanism. Howard said that the amendment

> will, if adopted by the States, forever disable every one of them from passing laws trenching upon these fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That . . . is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.[74]

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69 CONG. GLOBE, 39th Cong., 1st Sess. 1083, 1087–95 (1866), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 108, 108–09.

70 *Id.* at 109 (statement of Rep. Woodbridge).

71 *Id.*

72 CONG. GLOBE, 39th Cong., 1st Sess. 2530–45 (1866) (statement of Rep. Farnsworth), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 170, 175.

73 *Id.*

74 CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Rep. Howard), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 185, 189.

Significantly, Howard's description here looks both forward and backward. The amendment, in his view, would accomplish something new, by way of stopping—"forever disabling"—state governmental violations of equal rights. But that new step would be in service of an old, pre-existing commitment to republican government. In other words, the cure is new, but the disease is not.

Other proponents of the amendment likewise argued that its protections for equal rights broke no new ground because the Constitution always prohibited states—properly adhering to republican principles—from denying equality of rights. Now, Congress, in Section 5, would gain specific power to enforce the prohibition. Thus, Representative Bingham argued that the amendment would fill "a want . . . in the Constitution," one demonstrated by the Civil War experience, of

> the power in the people, the whole people of the United States, by express authority of the Constitution . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[75]

Bingham emphasized that the proposed amendment did not alter the pre-existing balance between federal and state power: in his view, the amendment "takes from no State any right that ever pertained to it" because "[n]o State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic" even as in the past states had "assumed and exercised the power . . . without remedy."[76]

Senator Luke Poland (Republican of Vermont) invoked textual similarity to show that the Fourteenth Amendment merely enforced a pre-exiting constitutional requirement. He argued that the Privileges or Immunities Clause of Section 1 "secures nothing beyond what was intended by the original [privileges and immunities] provision in [Article IV of] the Constitution."[77] What Section 1 does, Poland explained, is it cures a problem: "the radical difference in the social systems of the several States" and an excessive reliance on "State rights or State sovereignty" to permit the "peculiar system of the South" (i.e., slavery) historically "led to a practical repudiation of the existing provision" securing privileges and immunities, which was therefore

75 CONG. GLOBE, 39th Cong., 1st Sess. 2530–45 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 170, 178.

76 *Id.*

77 CONG. GLOBE, 39th Cong., 1st Sess. 2960–65 (1866) (statement of Sen. Poland), *as reprinted in* LASH, Vol. 2, *supra* note 3, at 202, 202.

"disregarded in many of the States."[78] Because "no express power was by the Constitution granted to Congress to enforce" that preexisting protection for rights, Poland argued, "it became really a dead letter."[79] Now, with slavery ended, "Congress should be invested with the power to enforce this provision throughout the country and compel its observance."[80] In this view, the relevant development was allocation of specific enforcement power to Congress in Section 5 of the amendment.

So, too, according to Poland, Section 1's due process and equal protection provisions—coupled with the enforcement power of Section 5—represented a proper return to foundational principles. In particular, the amendment would make clear that republican government means equality of rights and reinforce federal power to secure such equality. Poland argued that a commitment to rights equality is "the very spirit and inspiration of our system of government, the absolute foundation upon which it was established" and that this principle was "declared in the Declaration of Independence and in all the provisions of the [original] Constitution."[81] Nonetheless, Poland argued, "State laws exist, and some of them of very recent enactment, in direct violation of these principles."[82] As Congress has endeavored to "uproot and destroy all . . . partial State legislation" its own power "has been doubted and denied."[83] According to Poland, adoption of the proposed amendment would leave "no doubt . . . as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States."[84] Again, it is a clarification of federal enforcement authority that is the notable change.

To summarize, by the time that the Fourteenth Amendment was ratified, there existed a general understanding that republicanism required equal rights of citizenship. To be sure, there remained debates about whether this principle extended to voting, and, if it did, the circumstances in which states were free to displace it. Nonetheless, the baseline approach was one of equality of rights among all citizens. Departures from that principle—whether by carving out from it certain categories of rights, or by adopting inequalities in rights that it covered—were exceptions that required special justification.

78 *Id.* at 202–03.
79 *Id.* at 203.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*

II. INCORPORATION'S MEANING

Understanding the Fourteenth Amendment to incorporate the Guarantee Clause has a series of potential implications. This Part explores some of those implications. It sketches how incorporation informs interpretations and applications of the rights-protecting provisions of Section 1 and sheds light on enforcement mechanisms and issues of justiciability. Finally, the Part offers a broader lesson for discerning the meaning of the Reconstruction-era Amendments by reference to the provisions of the original Constitution that (those amendments notwithstanding) were preserved.

A. Equal Rights of Citizenship

Once incorporated, the Republican Guarantee Clause shapes and informs the meaning of Section 1 of the Fourteenth Amendment and the rights it secures from state government infringement. Section 1, therefore, should be understood with an eye to republicanism and the status and role of citizens in a republican system. In other words, the prohibitions on states abridging privileges or immunities, violating due process, and denying equal protection of the laws are at their strongest when they protect the citizenry of a republican state. This is not to say that Section 1 is only about republican government or that the Section 1 protections only apply to citizens—some clearly do not—but to suggest that the Section 1 rights take on special importance, and merit special safeguards, when republican interests are at stake.

Indeed, the text of Section 1 itself, when read as a whole, sounds in republican themes. This point is easily overlooked when individual clauses, such as "due process" or "equal protection," are plucked out and analyzed separately. Section 1 begins with groups, not individuals, and with groups specifically of citizens.[85] The first sentence of Section 1 makes all persons born or naturalized in the United States citizens of the United States and of the State wherein they reside.[86] The second sentence begins by barring states from abridging the privileges and immunities of U.S. citizens.[87] It is only in the next clauses that we arrive at protections (of due process and equal protection of the laws) for "any person"—individual, and not necessarily a citizen.[88] The ordering of Section 1 tells us that even as it provides individualized safeguards, it also (and perhaps more importantly) secures some collective interests of citizens in the republican state.

85 U.S. CONST. amend. XIV, § 1.
86 *Id.*
87 *Id.*
88 *Id.*

Understanding the core of Section 1 of the Fourteenth Amendment to be tied to and informed by republicanism has several potential implications. One is to provide a framework for identifying the particular rights that Section 1 secures. For example, when provisions of the Bill of Rights are applied to state government, they should be understood, in the first instance at least, in republican terms. That is, application of the Bill of Rights makes most sense with respect to its provisions that serve republicanism—and the core meaning of those provisions, once applied to state government, should be understood primarily for their republican-promoting ends. For instance, First Amendment protections for speech, press, assembly, and petitioning present easy cases for application to state government because all of these things are key to the vitality of a republican system. Indeed, it is difficult to imagine republicanism existing without these First Amendment protections. At the same time, an eye to republicanism can inform the more precise nature and scope of incorporated First Amendment rights. For example, government restrictions on the gathering of a political party would more obviously violate the right of assembly than would, say, a restriction imposed upon a sporting event or other activity disconnected from republican government.

A vast literature has explored the ways in which the meaning of Bill of Rights provisions should be understood, once applied to the states, to have shifted from federalism safeguards to protecting individual rights.[89] Attention to the Republican Guarantee Clause suggests a different orientation, in which even as rights protect individuals from state infringement, they are understood to serve also—and perhaps principally—republican ends and the interests of the citizenry as a collective group. In this regard, modern reliance on the Fourteenth Amendment's Due Process Clause as the vehicle for applying the Bill of Rights to the states rather than on the Privileges or Immunities Clause—textually and historically the better choice—obscures the republican theme. The Privileges or Immunities Clause, recall, has a collectivist and citizenry-oriented element, while the Due Process Clause speaks of individuals. When the Due Process Clause is the provision by which the Bill of Rights is applied to the states, it is natural to think in terms of individualized protections. Importantly, application of the Bill of Rights via the Privileges or Immunities Clause need not mean that those rights would protect only citizens and only in a collectivist manner. But the approach would provide a grounding

89 *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

and context for rights applied to the states in a way that has been lost with the shift to the Due Process Clause.

Understanding the Fourteenth Amendment to incorporate the Republican Guarantee Clause also puts center stage the concept of equal rights, particularly equal rights of citizens, that was dominant in the debates that led to the ratification of the Fourteenth Amendment. The Equal Protection Clause, of course, prohibits states from denying any person in its jurisdiction the equal protection of the laws. The gloss of the Guarantee Clause points to the more specific concern of equality in the rights of citizens. On this account, state governmental action that draws classes of citizens and gives some of them rights that it withholds from others (or gives some of them stronger rights than it gives to others) should be viewed with skepticism. The problem is especially severe when those inequalities interfere with the ability of some classes of citizens to participate in the life of the Republic. Under the original Constitution, republicanism could co-exist, if uneasily, with state government exclusion of classes of individuals from the political community. Once the Guarantee Clause is incorporated, however, states should be deemed to have far less leeway to confer unequal political status on groups of citizens.

An obvious question is the one that the Framers of the Fourteenth Amendment themselves repeatedly grappled with: how about state restrictions on voting? Here, it turns out, the Supreme Court has likely landed on the right spot. Rather than read into the Constitution a free-standing right of all citizens to vote, in a series of cases the Court has imposed equality requirements on state regulation of voting. In other words, state voting regulations that treat some classes of citizens differently from others trigger strict scrutiny.[90] As the Court has explained:

> [S]tatutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
>
> . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and

90 *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating on equal protection grounds state law that limited voting in district school board elections to individuals who owned or leased property in the district or had children attending school in the district); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax on equal protection grounds).

> denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.[91]

This approach, centered not on an individualized right to vote but on equal status in the political community, reflects a republican idea. The approach is also in harmony with the voting amendments ratified *after* the Fourteenth Amendment, themselves framed in terms of equality: of race (the Fifteenth), of sex (the Nineteenth), of wealth (the Twenty-Fourth), and of age (the Twenty-Sixth).[92]

B. Enforcement and Justiciability

Incorporation of the Guarantee Clause has implications also for the role of the federal government in safeguarding rights. Section 5 of the Fourteenth Amendment gives Congress power to "enforce, by appropriate legislation" the prohibitions on state governmental conduct contained in Section 1.[93] Standing alone, this Section 5 power is discretionary: Section 5 does not *require* Congress to enact laws to protect Section 1 rights. The assessment changes, however, once rights protected by Section 1 are tied to the Guarantee Clause because that Clause creates a federal obligation. Incorporation of the Guarantee Clause would thus mean that to the extent that Section 1 rights secure and promote republican government, the federal government must act to protect those rights from state interference. Under this account, for example, the federal government is obligated to take steps to ensure that states do not interfere with political speech, with equality of citizenship, or with other rights that are at the foundation of a republican system. Incorporation of the Guarantee Clause points also to a particular role for *Congress* in protecting republican-oriented rights. Article IV imposes its obligation upon "the United States," and thus arguably upon each of the three federal branches. Once Article IV is read in conjunction with Section 5 of the Fourteenth Amendment, it is reasonable to conclude that, with respect to guaranteeing rights, Congress has the lead role—even as, consistent with Article IV, the other branches of the federal government may have roles to play as well.

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91 *Kramer*, 395 U.S. at 626–27 (emphasis added) (footnote omitted).

92 An equal-rights approach might also explain why it is permissible for states to bar minor citizens (under the age of eighteen) from voting. In one sense, the bar denies minors a citizenship right enjoyed by other (adult) citizens. But in another sense, the bar involves a form of equality: adults today could not vote when they were children and the children of today will, within a fixed time, exercise the franchise.

93 U.S. CONST. amend. XIV, § 5.

Incorporation also alters the common assessment that Guarantee Clause claims present nonjusticiable political questions. Courts routinely invoke the Supreme Court's 1849 decision in *Luther v. Borden*[94] as establishing that claims under the Guarantee Clause are nonjusticiable.[95] But a close reading of *Luther* shows that it did nothing of the kind. *Luther* involved a trespass claim following the Dorr Rebellion in which a group of Rhode Island citizens had rebelled and claimed to be the legitimate government of the state—in place of the government established under the royal charter.[96] After the charter government had declared a state of emergency and dispatched the militia to quell the insurrection, militiaman Luther Borden broke into the home of Martin Luther, a leader of the rebellion, to arrest him for his participation in the rebellion.[97] When Luther sued Borden for trespass, Borden asserted that he had acted on behalf of the charter government and its establishment of martial law.[98] At issue in the case, therefore, was the question of whether the charter government had acted legitimately in imposing martial law, a question that required asking also whether the charter government was indeed the lawful government of Rhode Island.[99] In his opinion for the Court, Chief Justice Taney said that the question of which government was the legitimate government of a state was "to be settled by the political power" and that "when that power has decided, the courts are bound to take notice of its decision, and to follow it."[100] In looking, then, to the determinations of the political branches, Taney said first that

94 48 U.S. (7 How.) 1 (1849).

95 *See, e.g.*, Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930) ("As to the guaranty to every State of a republican form of government . . . it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts.") (citations omitted); Hanson v. Wyatt, 552 F.3d 1148, 1163 (10th Cir. 2008) ("The seminal Supreme Court decision under the political-question doctrine was a Guarantee Clause case, *Luther v. Borden*."); Hawai'i v. Trump, No. 19-00597, 2020 WL 7409591, at *3 (D. Haw. Dec. 17, 2020) ("The 'classic' political question case, *Luther v. Borden*, . . . addressed claims under the Guarantee Clause of the Constitution, where two rival governments disputed which was the lawful government of Rhode Island."). *But see* Kidwell v. City of Union, 462 F.3d 620, 635 n.5 (6th Cir. 2006) (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion)) (writing that "[p]erhaps it is time for the Supreme Court to reconsider its Guarantee Clause jurisprudence" and observing that "[o]ver the following century, . . . [the] limited holding [of *Luther*] 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'").

96 *Luther*, 48 U.S. (7 How.) at 34–35.

97 *See id.* at 35–36.

98 *Id.* at 35.

99 *See id.* at 37–39.

100 *Id.* at 47.

Congress had not resolved the competing claims because the Dorr faction had never sought to send to Congress a rival slate of representatives such that Congress would have to choose between them and the representatives sent by the charter government.[101] Taney next looked to the President and concluded that by signaling a willingness to send militia troops to Rhode Island at the request of the charter government, the President had recognized the charter government (rather than that of the Dorr faction) as legitimate.[102] This determination by the President was binding on the courts.[103] Taney then proceeded to hold that the declaration of martial law was valid[104] and to affirm the lower court's decision in favor of the defendant.[105] Understandings of *Luther* as establishing the nonjusticiability of Guarantee Clause claims trace to two paragraphs of dicta—and a misreading of them—in Taney's opinion.[106] *Luther* did not hold and Taney did not even suggest that courts could not hear and decide Guarantee Clause claims. Indeed, only in the early twentieth century did the Supreme Court (relying on *Luther*) hold that Guarantee Clause

101 *Id.* at 42.
102 *Id.* at 44.
103 *Id.*
104 *Id.* at 46.
105 *Id.* at 46–47.
106 *Id.* at 42. Here is what Taney wrote:

> The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.
>
> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

Id. It doesn't take much to see why the modern take on *Luther* is wrong: the fact (as stated in the above paragraph in what is plainly dicta) that Congress, by admitting members, determines that a state government is legitimate and republican and that that determination is then binding on courts is far removed from the more general proposition that Guarantee Clause claims are nonjusticiable political questions.

claims present nonjusticiable questions to be resolved solely by the political branches[107] and more recent cases have suggested (without elaboration) that some Guarantee Clause claims are indeed justiciable.[108] In any event, even if *Luther* is understood as a political question case, its reach is properly cabined. Once the Guarantee Clause, as incorporated, is understood to serve the interests of citizens (rather than states) and to define and protect rights (rather than political institutions), application of the political question doctrine makes far less sense. Adjudication of rights-based claims is the regular business of courts. In other words, the political question doctrine may have made sense when the paradigm question was which government of a state is legitimate, but it makes far less sense if the paradigm cases involve say, abridgement of political speech or other rights that courts are well-positioned to decide.

C. Preservation

A further implication of an incorporated Guarantee Clause concerns more generally the way to understand the Reconstruction Amendments. Reconstruction was a point of profound constitutional change. Yet, as the role of the Guarantee Clause shows, constitutional change was accompanied by elements of constitutional preservation. To a significant degree, the Reconstruction-era Amendments must, therefore, be understood in terms of continuity and clarification—rather than as rupture.

The Reconstruction Amendments are, importantly, amendments. They are attached to the existing document. They therefore work (and must work) in harmony with the existing Constitution even as they impose change upon it. But to focus on change is to miss a good part of the story. It is impossible to understand Reconstruction without close attention to what was *not* reconstructed but was instead preserved.

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107 *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (dismissing challenge to state adoption of initiative and referendum amendments as inconsistent with republican government because the "issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction").

108 *See* New York v. United States, 505 U.S. 144, 184–85 (1992) ("In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. . . . More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . We need not resolve this difficult question today." (citations omitted)); Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guaranty Clause are nonjusticiable.").

Federalism was preserved. The jurisdictional boundaries of the states were preserved. With the Reconstruction Amendments, Congress obtained new powers (principally of enforcement), but its powers remain limited to those enumerated; the Tenth Amendment is still in place, unchanged. The federal executive branch was retained, unaltered. Because the three Reconstruction Amendments foretell new kinds of cases and controversies, the work of federal courts expands but their role also continues circumscribed. The Fourteenth Amendment overturned *Dred Scott* but there was no sweeping away of all the decisions of the antebellum Supreme Court so as to start constitutional interpretation anew. Depictions of Reconstruction as a second Founding[109] obscure the extent to which it involved retention and fortification of the old structure.

Textually, the words of the Reconstruction Amendments track, echo and draw upon the words of the original Constitution in important and influential respects. The "[n]o State shall" language of Section 1 of the Fourteenth Amendment repeats that of Article I, Section 10.[110] Both provisions limit what states can do—thereby reinforcing a commitment to presumptive and general state power except where power is denied. That Section 1 of the Fourteenth Amendment, like its Article I predecessor, is framed in the negative—*no state shall*—means also there is no *obligation* on the part of the states to act; so long as the state does *not* do what is prohibited, the Constitution is satisfied. The "shall not" language of Section 1 of the Thirteenth Amendment and Section 1 of the Fifteenth Amendment follow the exact same approach: they impose prohibitions on action, not obligations to act.[111]

The "Congress shall have power to" language of Section 2 of the Thirteenth Amendment, of Section 5 of the Fourteenth Amendment, and of Section 2 of the Fifteenth Amendment echoes Article I, Section 8.[112] As a result of the Reconstruction Amendments, Congress, therefore, gains additional powers that—as is true of the Article I powers—Congress *can* exercise if it chooses. But there is no obligation to exercise the power. Congress thus need not "enforce, by appropriate legislation," the substantive provisions of the Reconstruction Amendments—any more than Congress is required (under Article I) to regulate commerce among the states, coin money, or establish post offices.[113] To underscore the point, the "no state shall" language of

109 *See, e.g.*, ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

110 U.S. CONST. amend. XIV, § 1; *id.* art. I, § 10.

111 *Id.* amend. XIII, § 1; *id.* amend. XV, § 1.

112 *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* art. I, § 8.

113 *Id.* amend. XIV, § 5.

the Fourteenth Amendment is *not* mirrored by "and Congress shall enforce" the designated prohibitions on state action. Textually, at least (and viewed apart from the account of the incorporated Guarantee Clause), the arrangement leaves an enforcement gap. Consistent with the design of the original Constitution, the Reconstruction Amendments appear to impose no affirmative obligation upon any governmental entity to take action to ensure that the new legal rights—privileges and immunities, due process, and equal protection—are safeguarded.

In other ways, too, the choice to amend rather than replace the original Constitution has important implications for the shape and scope of the Reconstruction Amendments. The three Amendments arrive not as a single package but as a sequence over a period of five years. This, too, produces some significant effects. The Thirteenth Amendment, which abolishes slavery and involuntary servitude, contains an "except" clause: involuntary servitude (at least)[114] *may* exist as punishment for crime. (Convict leasing in the southern states after the Civil War manifested this authority.)[115] Section 2 of the Fourteenth Amendment, which sets the new basis for congressional apportionment, also contains an except-for-crime provision.[116] As we have seen, Section 2 provides for apportionment based on a state's entire population ("excluding Indians not taxed") and that if the right of adult male citizens to vote is "denied . . . or in any way abridged" the state's representation is reduced proportionately—but that penalty does not apply if the denial or abridgement is for "participation in rebellion, or other crime."[117] Layered as it is on top of the Thirteenth Amendment, the Fourteenth Amendment's crime exception links the

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114 Some interpreters view the ban on slavery as also subject to a criminal punishment exception. Here for example, is what the Virginia Supreme Court wrote six years after ratification of the Thirteenth Amendment about a felon hired out to work on the Chesapeake and Ohio Railroad:

> [D]uring his term of service in the penitentiary, . . . [a convicted felon] is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus* . . . .
>
> The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land.

Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

115 *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

116 U.S. CONST. amend. XIV, § 2.

117 *Id.*

criminal system with voting rights in a way that incentivizes states to expand criminal punishment as a basis for (besides generating a supply of labor) denying the franchise to disfavored segments of the population. Section 1's grand "no State shall" language can easily obscure Section 2's loophole—a "but states may" clause—for denying voting rights by gearing up the criminal justice system.[118]

Section 2 of the Fourteenth Amendment must also be understood in terms of what it is amending. We have already seen that Section 2 amends the original apportionment formula of Article I, by which three-fifths of a state's slave population was counted. Article I gave slave states an incentive to increase the number of slaves within the state and ensure they were accurately counted so as to collect extra seats in the House. There was, thus, a built-in accounting mechanism. Although Section 2 of the Fourteenth Amendment was designed to promote rights and equality, it lacks a comparable mechanism. Individual states have little incentive to report back on the numbers of their own (male) citizens *prohibited* from voting because of a criminal conviction (and no incentive at all if the prohibition is for another reason). Monitoring by sister states is not a reliable mechanism if all states limit voting in one way or another, view regulation of voting as an important attribute of state sovereignty, or lack information about voting practices elsewhere. Federal oversight is the obvious alternative. Congress has its Section 5 enforcement power, but Section 5 itself appears a discretionary provision. Section 2, by contrast, says that "the basis of representation . . . shall be reduced."[119] That certainly sounds like an obligation. But Section 2 does not specify *who* is responsible for determining that a state has impermissibly denied or abridged the right to vote and for ensuring imposition of the accompanying penalty. One answer returns to Section 5 and Congress. This Article has pointed to the Guarantee Clause, with its obligation of action, as holding the enforcement key.

Just as the Fourteenth Amendment echoes and builds upon the Thirteenth, so does the Fifteenth Amendment with respect to the Fourteenth. Section 1 of the Fifteenth Amendment contains the same "denied . . . or abridged" language of the Fourteenth Amendment.[120] And, while the Fifteenth outright bars denying or abridging voting "on account of race, color, or previous condition of servitude,"[121] it, too, invites states to find alternative grounds on which to limit or deny the franchise. Further, the Fifteenth Amendment represents a doubling-down on the except-for-crime incentive of Section 2 of the Fourteenth,

118 *Id.* §§ 1, 2.
119 *Id.* § 2.
120 *Id.*
121 *Id.* amend. XV, § 1.

which remains in place (with no penalty in representation), unaffected by the Fifteenth Amendment ban. Moreover, read together, the Fourteenth and Fifteenth Amendments might well be understood as permitting states to deny the right (of adult men) to vote for reasons other than race or crime so long as the state is willing to assume the accompanying penalty in representation. Finally, the Fifteenth Amendment also has no guaranteed enforcement mechanism: as with the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment gives Congress power—discretionary authority—to enforce the Section 1 prohibition.

Tying these points together leads to some sobering conclusions. A person who knew nothing about Reconstruction and sought to understand it from the three amendments to the Constitution would likely conclude that change had been modest. In many nations, where a civil war ends, a new constitution begins. After the American Civil War, however, constitutional change took the form of three—and just three—constitutional amendments. That itself is quite remarkable. Even more striking (in light of the causes of the Civil War) is what would seem limited attention within those three amendments to issues of race. The Thirteenth Amendment eliminates slavery. The Fifteenth Amendment bars denying voting rights to adult males on the basis of their race. These are important changes. But that is all the three amendments have to say about race specifically. The Fourteenth Amendment, the longest of the three, says nothing, anywhere, about race. Our otherwise uninformed observer might well conclude that as to race, the end of slavery in the Thirteenth Amendment and the protection for voting in the Fifteenth Amendment are as far as Reconstruction goes.

Yet the change produced by the Reconstruction Amendments cannot be fully understood by reading those amendments in isolation, nor by identifying the existing constitutional provisions they alter or repeal, nor even by tracing how they echo terms and approaches contained in the amended document. Understanding the full nature and scope of the change that occurred with the Reconstruction Amendments requires reading the *entire* Constitution with fresh eyes—with the addition of, and in light of, the three amendments made. The discussion in this Article of the Guarantee Clause's relationship to the Fourteenth Amendment demonstrates that a full accounting of what Reconstruction produced requires attention to elements of the Constitution preserved and, in particular, given new and important meaning.

III. *PLESSY* REVISITED

An incorporated account of the Republican Guarantee Clause invites a fresh look at early court decisions involving claims under the Reconstruction Amendments. This final Part of the Article revisits *Plessy v. Ferguson*, in which the Supreme Court rejected challenges under the Thirteenth and Fourteenth Amendments to an 1890 Louisiana statute requiring "equal but separate" railroad cars for white and non-white passengers.[122]

Plessy, today, is widely disparaged and Justice Harlan's solitary dissent in the case has carried the day. Harlan's dissent is regularly quoted for its unflinching insistence, in paragraph after paragraph, that, with the addition of the Reconstruction Amendments, the Constitution bars government from treating individuals differently, indeed from treating them at all, on the basis of their race.[123] "Our constitution," Harlan thus famously said, "is color-blind, and neither knows nor tolerates classes among citizens."[124]

Harlan's concluding paragraph in his *Plessy* dissent has received less attention than other portions of his opinion, but it might well contain the key to understanding Harlan's approach. Here is what Harlan wrote at the end of his dissent:

> I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the "People of the United States," for whom, and by whom through representatives, our government is administered. Such a system is

122 Plessy v. Ferguson, 163 U.S. 537, 540, 552 (1896).

123 *See id.* at 554 (Harlan, J., dissenting) ("In respect of civil rights, common to all citizens, the constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."); *id.* at 563 (arguing that the Reconstruction Amendments "obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law"); *id.* at 562 ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution.").

124 *Id.* at 559.

> inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.[125]

In this final, rich paragraph, Harlan explicitly ties the Reconstruction Amendments—and his assessment of the Louisiana railway law under them—to the Republican Guarantee Clause of Article IV. It is worth parsing the words of the paragraph carefully. In Harlan's account, equality of rights—equal liberty—protected by the Fourteenth Amendment is an essential condition of Republican government. Laws, and particularly laws drawn on racial lines, that interfere with equal rights do more than injure those they designate and treat as unequal. By negating the equal status of members of the "political community,"[126] such laws are "hostile" to the Constitution itself and thus undermine the "personal liberty of [all] citizens, white and black."[127] The "system[ic]" effect of laws imposing inequality is therefore to undermine the "republican form of government" that serves the interests of the People as a whole.[128] In this approach, the Equal Protection Clause serves distinctly republican ends. Harlan also depicts citizenship as reinforcing the relationship between the Fourteenth Amendment and the Guarantee Clause. Section 1 of the Fourteenth Amendment makes individuals born or naturalized in the United States simultaneously citizens of the United States and of their state of residence. These citizens, in Harlan's view, enjoy equal rights under the Constitution; equality of citizenry is itself a hallmark of republican government.

Harlan sees also that the relationship between the Fourteenth Amendment and the Republican Guarantee Clause has important implications for enforcement of rights. As discussed already, Section 1 of the Fourteenth Amendment bars states from "deny[ing] to any person within [their] jurisdiction[s] the equal protection of the laws" and Section 5 says Congress "shall have power to enforce" the prohibition "by appropriate legislation."[129] But as to enforcement, the Republican Guarantee Clause is different. It speaks not in power but in obligation: the United States *shall* guarantee government of republican form. Harlan recognized this point—and thus viewed the majority in *Plessy* as having failed to perform a constitutional duty.

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125 *Id.* at 563–64.
126 *Id.* at 563.
127 *Id.*
128 *Id.* at 564.
129 U.S. CONST. amend XIV, §§ 1, 5.

Congress, Harlan explains, can respond to violations of equal protection—Section 5 makes that clear—and in so doing promote republican government. But Harlan insists also that the courts can and must respond when (as in *Plessy*) they are asked to do so.[130] In his discussion of the Guarantee Clause, Harlan makes no mention of *Luther*. One obvious explanation is that in contrast to readers today, Harlan did not understand *Luther* to render Guarantee Clause claims nonjusticiable. Or, if he did, perhaps he viewed the Reconstruction Amendments to have altered the *Luther* landscape. Harlan frames judicial power as the "solemn duty" of "the courts" "to maintain the supreme law of the land."[131] That approach bypasses Guarantee Clause justiciability issues by pivoting to the Supremacy Clause—which encompasses, as "supreme Law,"[132] the Reconstruction Amendments, and arguably provides separate grounds for judicial intervention. If the Supremacy Clause imposes an obligation to enforce the Equal Protection Clause, the lack of justiciability under the Guarantee Clause is no barrier.

Readers might discern in this depiction a sleight of hand. Look closely: Harlan writes of the duty of "the courts"[133] but under the Supremacy Clause, it is state (not federal) judges who are "bound thereby," and it is in reference to state (not federal) judges that the phrase (a source of Harlan's duty), "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," appears.[134] Federal judges, like those on state courts, and like all federal and state governmental officials, do take an oath to "support this Constitution"[135]; like all governmental personnel, federal judges are also, of course, bound by the Supremacy Clause just as they are bound by other provisions of the Constitution. But the Supremacy Clause itself makes no mention of federal courts.

Perhaps, then, Harlan is making loose use of text to support his argument for the Supreme Court to invalidate the Louisiana law. There is, however, another explanation. Perhaps Harlan *did* have *Luther* in mind all along. When Harlan says "the courts" can and should act, he might himself be referring to the *state* courts. On this reading, even if *Luther*, a case that began in federal court, precludes federal judges from adjudicating Guarantee Clause claims, it should not be read to impose that same justiciability restriction upon the state courts—nor even upon the Supreme Court in reviewing state court

130 *See Plessy*, 163 U.S. at 564.
131 *Id.*
132 U.S. CONST. art. VI.
133 *Plessy*, 163 U.S. at 564.
134 U.S. CONST. art. VI.
135 *Id.*

rulings, in cases like *Plessy*, which arrive by writ of error.[136] On this account, in upholding the segregation law, the Louisiana Supreme Court failed to correct an impediment to republican government. Once that happened, Harlan tells us, the Court was obligated to reverse the decision.

While Harlan's *Plessy* dissent offers some intriguing insights, Harlan himself does not get all the credit for linking, in the case, the Reconstruction Amendments to the Republican Guarantee Clause. Harlan's invocations of the Guarantee Clause tracked arguments made in Plessy's briefs to the Supreme Court. The briefs did not refer specifically to the Guarantee Clause but the arguments they offer are very much grounded in ideas of republicanism, citizenship, and equality, and in a claim of obligatory federal action to protect rights.

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136 Harlan's fusion of the Guarantee Clause and the Fourteenth Amendment as a basis for judicial intervention appears in other opinions as well. One example is Harlan's dissenting opinion in Taylor v. Beckham, 178 U.S. 548 (1900), in which the Court dismissed for lack of jurisdiction a petition by candidates for governor and lieutenant governor in Kentucky seeking review of a state court decision in an election dispute. The case involved a ruling by the state board of elections, later adopted by the state legislature, that the candidates' opponents had received more votes in the election and were to be installed in office. *See id.* at 549–51. The petitioners asserted that they had actually won the election and that the action of the board and the legislature deprived them of property—the right to hold elected office—without due process of law in violation of the Fourteenth Amendment and violated also the Guarantee Clause by interfering with the ability of Kentucky voters to choose their representatives. *Id.* at 573–74. The Court rejected the petitioners' argument that holding elected office was a Fourteenth Amendment right of property. *See id.* at 577–78, 580. Thus, the state court decision (also refusing the petitioners relief) had worked no denial of a constitutional right that could be a basis for jurisdiction under Section 25 of the 1789 Judiciary Act. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (granting certain Supreme Court appellate jurisdiction over states' highest courts). The Court also rejected review on the basis of the Republican Guarantee Clause. *See id.* at 578–80. Harlan, dissenting, reasoned that the linkage between Fourteenth Amendment liberty and the Guarantee Clause required the Court to review the state court ruling. He wrote:

> What more directly involves the liberty of the citizen than to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow citizens? . . . The liberty of which I am speaking is that which exists, and which can exist, only under a republican form of government. "The United States," the supreme law of the land declares, "shall guarantee to every state in this Union a republican form of government." And "the distinguishing feature of that form," this court has said, "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." But of what value is that right if the person selected by the people at the polls for an office provided for by the Constitution . . . may be deprived of that office by the arbitrary action of the legislature proceeding altogether without evidence?

Id. at 603–05 (Harlan, J., dissenting) (quoting *In re* Duncan, 139 U.S. 449, 461 (1891)).

Plessy's lawyers argued, for instance, that the Fourteenth Amendment's citizenship clause "is a guaranty . . . of *equality* of right . . . *and the free enjoyment of all public privileges.*"[137] They urged that "assortment of citizens by race in the enjoyment of public privileges . . . is . . . an interference with the personal liberty of the individual as is impossible to be made consistently with his rights as an equal citizen of the United States and of the State in which he resides."[138] This equality of rights, Plessy's brief stated, "look[s] to national power for its preservation."[139] All citizens, the brief argued, had an interest in countering racially discriminatory laws: *"[I]t is as much a constitutional privilege and duty of a White citizen to resist any attempt to make him an instrument for enforcing such legal inequality as it is for a Colored citizen to resist being made a victim thereof.* The constitutional liberty of the party so acted upon is as much offended in the first case as in the second."[140] State designation of an individual as being "of either a superior or an inferior class of citizens," the brief said, is "injury to any citizen of the United States."[141] Thus, echoing the language of the Guarantee Clause, Plessy's brief insisted that "[a] law assorting the citizens of a State in the enjoyment of a public franchise on the basis of race, is obnoxious to the spirit of republican institutions,"[142] and "the United States cannot allow the matter of the Color of its citizens to become a ground of legal disparagement, or legal offense within the States, unless with a disparagement of itself."[143]

It is all there: the fusion of the Guarantee Clause and the Fourteenth Amendment; the requirement of equal rights of citizenship; the relationship between such rights and republican government; and the duty of the federal government to intervene to protect rights and preserve republicanism.

CONCLUSION

In making a case for understanding the Fourteenth Amendment to incorporate the Republican Guarantee Clause and in identifying some implications of the claim, this Article aims to inspire rather than foreclose future analysis and debate. The Article itself is necessarily limited: in the historical record it develops (the Article relies largely

137 Brief of Plaintiff in Error by Walker at 11, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210).

138 *Id.*

139 *Id.* at 12.

140 Brief of Plaintiff in Error by Phillips & McKenney at 6, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210).

141 *Id.* at 12.

142 Brief of Plaintiff in Error by Walker, *supra* note 137, at 14.

143 Brief of Plaintiff in Error by Phillips & McKenney, *supra* note 140, at 15.

on congressional debates, leaving (for now) most other sources untapped), and in its analysis of the implications that flow. Perhaps the Article best succeeds in laying some groundwork for future work. Such work could, for example, usefully examine the role notions of republican government played in state-level debates over the ratification of the Fourteenth Amendment, in the context of readmission of the Confederate states to the Union and the adoption of the Reconstruction Acts, in the passage of other landmark federal legislation (such as the 1871 Ku Klux Klan Act and the 1875 Civil Rights Act), and in state laws and practices implicating rights and representation. There is also very likely great value in tracing the meaning of republicanism—and its evolution—in the popular press and other non-governmental sources, and particularly in examining perspectives on the relationship between republican government and the Reconstruction-era Amendments. Other work could helpfully seek to pin down specific implications for the meaning and scope of rights and the obligation of the federal government to protect them. Notably, a settlement on the idea that republican government requires equality of citizenship still leaves to be worked out many details about which rights deserve protection, and how those protections are best secured. Using an incorporated account to revisit past court decisions involving the Fourteenth Amendment and the Republican Guarantee Clause, to evaluate current constitutional claims or to bring future constitutional challenges, will likewise require additional historical research and sustained reflection on the contemporary implications of what that research yields.