THE LAW OF DEMOCRACY AND THE
TWO LUTHER V. BORDENS:
A COUNTERHISTORY

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

INTRODUCTION

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

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

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

Law of democracy scholars have addressed the political entrenchment problem, arguing that courts should play a special role in policing the democratic process. Some have debated antitrust-style regulation of the political system, describing self-dealing incumbents and entrenched parties in terms of “political cartels” and “partisan lockups,” or “foxes and henhouses.” Scholars, as well as the Supreme
Court, tend to view these problems through the legacy of *Baker v. Carr*,\(^8\) the seminal case holding that legislative districting claims do not present nonjusticiable political questions.\(^9\) Some have termed judicial ineptitude in dealing with structural democracy and political entrenchment questions “Frankfurter’s revenge,” invoking Justice Frankfurter’s dissent in *Baker*,\(^10\) which warned of the “futility” of judicial regulation of politics.\(^11\)

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

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\(^8\) 369 U.S. 186 (1962).


\(^11\) *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

\(^12\) 48 U.S. 1 (1849).


\(^14\) U.S. Const. art. IV, § 4.
views of nonjusticiable political questions: one based in prudentialism and the other based in democratic theory.

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

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

This Note proceeds in three parts. Part I describes *Luther* itself, focusing on the politics of the decision and the widely divergent opin-
ions of the two judges. Part II describes the clause shift\(^1\) that occurred in *Baker v. Carr*, which allowed the Court to address structural democracy issues via the Equal Protection Clause while leaving *Luther* intact. It examines the arguments made, and missed, in that case about *Luther’s* meaning. Part III describes *Luther’s* influence in *Vieth v. Jubelier*,\(^1\) the Court’s most recent opinion on the constitutionality of partisan gerrymandering, and urges a reevaluation of Woodbury’s *Luther* concurrence to help resolve the confusion in *Vieth*.

I

THE POLITICS OF *LUTHER V. BORDEN*

A. The Unstable Politics of Antebellum America

The first stirrings of mass politics in the 1830s and 1840s unleashed popular revolt against food prices, rents, and established power.\(^2\) Property owners feared Jacobinism,\(^3\) while those with less wealth feared antidemocratic control by landlords, Masons, banks, and immigrants.\(^2\) Democracy was growing faster than the political institutions controlling it.\(^2\)

\(^1\) For more on clause shifting, including the seminal example of the Privileges and Immunities Clause, see infra note 119 and accompanying text.


\(^3\) In modern political vernacular, Jacobinism is “class warfare.” See, e.g., ALEXANDER KEYSSAR, THE RIGHT TO VOTE 41 (2000) (describing Whig characterization of broad franchise as “a system of communism unjust and Jacobinical.” (quoting John Spencer Bassett, *Suffrage in the State of North Carolina (1776–1861)*, 1896 AM. HIST. ASSOC. ANN. REP. 282)).

\(^2\) See, e.g., WILENTZ, supra note 20, at 510 (“Then let the working class, / As a congregated man, / Behold an insidious enemy: / For each Banker is a foe, / And his aim is for our woe— / He’s the canker-worm of liberty!” (quoting a pro–Van Buren broadside)).

\(^2\) See id. at 425 (quoting newspaper editorialist’s complaint that “[t]he Republic . . . has degenerated into a Democracy”). In the 1830s, many states introduced liberal constitutions that expanded voting rights more broadly than ever before. See KEYSSAR, supra note 21, at 26–52 (describing how state constitutions expanded suffrage in the 1820s and 1830s).
Popular fear and fear of the People fed on the fierce debates about human slavery engulfing American politics.\textsuperscript{24} The slavery debate split the newly formed Democratic Party apart—between a populist Northern wing and a pro-slavery Southern wing—even as the party jockeyed with the Whigs for power in an increasingly democratized, party-based political system.\textsuperscript{25}

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

\section*{B. The Dorr Rebellion: Constitutional Rebellion as an Anti-Entrenchment Mechanism}

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

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\item\textsuperscript{24} The Compromise of 1820 over the expansion of slavery may have been a “firebell in the night.” Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), available at http://www.loc.gov/exhibits/jefferson/159.html. By the 1830s, a deep and lasting sectional rift in American politics over slavery and the nature of the Union lay exposed. \textit{See, e.g.,} Sen. Robert Y. Hayne, Speech Before the Senate on Mr. Foot’s Resolution (Jan. 21, 1830), \textit{in Speeches of Messrs. Hayne and Webster in the United States Senate on the Resolution of Mr. Foot, January, 1830}, at 3, 31 (Boston, Redding & Co. 1852) ("[Webster] has . . . ridicule[d] . . . the idea that a state has any constitutional remedy, by the exercise of its sovereign authority, against ‘a gross, palpable, and deliberate violation of the constitution.’ He calls it ‘an idle’ or ‘a ridiculous notion,’ . . . that it would make the Union a ‘mere rope of sand.’").
\item\textsuperscript{25} \textit{See Wilentz, supra} note 20, at 548–50 (describing intraparty divisions when “anti-slavery goes political”); \textit{id.} at 532–34 (describing tension within the Democratic Party on economic issues ultimately related to slavery).
\item\textsuperscript{26} On the Dorr Rebellion, see generally \textit{George M. Dennison, The Dorr War: Republicanism on Trial 1831–1861} (1976); \textit{Marvin E. Gettleman, The Dorr Rebellion: A Study in American Radicalism 1833–1849} (1973).
\item\textsuperscript{27} The charter was liberal for the seventeenth century, but illiberal for the nineteenth. Legislative supremacy was its guiding structural principle, along the lines of the British Parliament. \textit{See In re Advisory Opinion to the Governor (Rhode Island Ethics Commission—Separation of Powers), 732 A.2d 55, 80 n.10} (R.I. 1999) (Flanders, J., dissenting) (noting Rhode Island’s “former parliamentary system of government”). The Constitution’s Framers attacked and explicitly rejected the supremacy of parliament as incompatible with self-government. \textit{See Gordon S. Wood, The Creation of the American Republic 1776–1787}, at 352, 452 (1969) (describing how the founding generation rejected the sovereignty of the British Parliament over the colonies during the debate over the Revolution and then rejected the underlying theory of legislative sovereignty during the debate over the Constitution). Indeed, some Suffragists claimed that “the continuation [after the American Revolution] of the old government without [the non-}
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requirements disenfranchised over fifty percent of white men.\textsuperscript{28} Legislative districts were grossly malapportioned in a “rotten borough” system that placed tiny towns and burgeoning urban centers on equal footing.\textsuperscript{29} Incumbent legislators stymied efforts to adopt a new constitution after the Revolution, and through the 1820s and 1830s, despite wide popular support.\textsuperscript{30} The charter was structurally unable to prevent the entrenchment of a minority in power.

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

The Suffragists used Article IV’s guarantee of a “Republican Form of Government,”\textsuperscript{33} the federal Constitution’s clearest allusion to popular sovereignty, to justify their constitutional creativity.\textsuperscript{34} They advanced an intellectually pedigreed conception of popular power: As a matter of natural and constitutional right, a majority may dissolve
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and reconstitute government at its pleasure.35 “Give us our rights,” they said, “or we will take them.”36

The Suffragists called “a Convention of the Whole People” to form a new constitution.37 Led by urban workers, itinerant organizers, small landholders, and young guns of state politics like Thomas Wilson Dorr—and including, but only initially, free people of color38—the rebel coalition won a series of political victories.39 But the existing charter government refused to give way.40 Rhode Island had two claimants to its constitutional throne.

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

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


37 Id.

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

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

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

41 DENNISON, supra note 26, at 81.

42 Id. at 116.
Maryland warned of “more extensive destructiveness” to come.\(^{43}\) Whig judges entered the political melee,\(^{44}\) while the Whig press maligned Suffragist leader Dorr as a cloven-hoofed abolitionist backed by Locofoco interlopers.\(^{45}\)

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

\(^{43}\) Causin referred specifically to destruction at the hands of immigrants and people of color. H.R. Rep. No. 28-581, at 17 (1844).


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

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

\(^{47}\) See, e.g., DENNISON, *supra* note 26, at 78–81 (describing Dorr’s initial trip to Washington and to Tammany Hall); Conley, *supra* note 44, at 67 (noting support was “drawn overwhelmingly from the . . . Democratic party”). For a disapproving account of Dorr’s trip to Tammany Hall, see generally Arthur M. Mowry, *Tammany Hall and the Dorr Rebellion*, 3 Am. Hist. Rev. 292 (1898).

\(^{48}\) E.g., Levi Woodbury, Speech at Eliot, Maine, Before the Presidential Election (1844), in 1 *WRITINGS OF LEVI WOODBURY*, LL.D. 593, 598 (Boston, Little, Brown & Co. 1852) (“[B]y the Declaration of Independence, by the express doctrines of almost every constitution in the Union, by the opinions of the best jurists . . . , [the free-suffrage] party had a right to accomplish those objects by peaceful conventions of a majority of the people, when no other mode of redress was provided for in their existing laws and charters.”); Letter from Sen. Levi Woodbury to Thomas Wilson Dorr (Apr. 15, 1842), in Rae, *supra* note 32, at 476, 477 (pledging support for Dorr and urging caution); see also Patrick T. Conley, *Popular Sovereignty or Public Anarchy? America Debates the Dorr Rebellion*, 60 R.I. Hist. 71, 72, 80 (2002) (“[N]orthern Democrats . . . sought to make political hay by exploiting the alleged tyranny of the Whig-controlled charter government.”).
government. However, pro-slavery Southern Democrats, including Senator John Calhoun, saw this principle as the “death-blow of constitutional democracy.” The Dorr Rebellion thus played to the deepest fears of landed Whigs and pro-slavery Southern Democrats and implicated the political question of the antebellum period: the nature of state government power under the Constitution.

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

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

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

C. The Political Question Presented

_Luther v. Borden_ presented the question of whether the Court had the power to legitimate the popular dissolution of an entrenched state government—a question which terrified landed Whigs and Southerners. Plaintiff Martin Luther, a Suffragist, had been arrested.
after the declaration of martial law but before the enactment of the
more liberal Rhode Island Constitution of 1843. Martial law troops
had entered his home, arrested him, damaged his property, and
harassed his elderly mother, Rachel. Luther’s trespass action against
the troops depended on which was the lawful government of Rhode
Island at the time of his arrest: the government under the royal
charter or the one under the People’s Constitution.

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

Arguing for the government, Daniel Webster immediately con-
ceded the question of popular sovereignty. The problem, Webster

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

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

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

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

Benjamin Franklin Hallett, The Right of the People To Establish Forms
of Government 35 (Boston, Beals & Greene 1848). Hallett stressed the Wilsonian con-
ception of active popular sovereignty, citing Wilson, Madison, Jefferson, Locke, and Rhode
Island founder and early civil libertarian Roger Williams. Id. at 35–42, 55. Virtually all of
the Framers, even Hamilton, professed allegiance to this idea. See Amar, supra note 34, at
761–66 (noting the Framers’ conception of popular majorities’ right to create, alter, and
abolish constitutions).

Hallett, supra note 59, at 35.

King, supra note 53, at 213.

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

Daniel Webster, Argument Before the U.S. Supreme Court in Luther v. Borden (Jan.
27, 1848), in THE RHODE ISLAND QUESTION: MR. WEBSTER’S ARGUMENT, at 1, 6
(Washington, J. & G.S. Gideon 1848) (“He who would argue against this, must argue
without an adversary.”).
argued, was not the People’s power, but the “anarchy” inherent in popular power without “some authentic mode of ascertaining the will of the people.”\(^{64}\) Without pre-established laws, the American system would become “the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions, and all legislative rights, [would be] prostrated and disregarded.”\(^{65}\) Webster argued that the Constitution proceeds on the assumption that elected state governments will enact the “changes[,] which the people may judge necessary in their constitutions.”\(^{66}\) When the People act outside of the law, even to oust undemocratic entrenchment, the law cannot provide a post hoc remedy.

D. The Luther Opinions

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

1. Chief Justice Taney, Prudentialist

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

\(^{64}\) Id. at 12. Webster conceded that \textit{Luther} involved “consideration . . . of . . . the true principles of government in our American system of public liberty,” but argued that this was a task best “addressed to reason . . . before magistrates and lawyers, and not before excited masses out of doors.” \textit{Id.} at 4.

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

\(^{66}\) Webster, \textit{supra} note 63, at 15. Reading Article IV’s guarantee of a republican form of government and protection from domestic insurrection in this light, Webster placed “proceedings \textit{aliunde}, or outside of the law and the Constitution, for the purpose of amending the frame of Government” as outside of courts’ purview. \textit{Id.}

\(^{67}\) \textit{Luther} v. Borden, 48 U.S. 1, 38–39 (1849).

\(^{68}\) Id. at 39. Rachel Barkow has argued that Taney’s emphasis on the ostensibly severe results at stake indicated that “practical concerns colored the Court’s perception and inter-
Taney found the power to decide which constitution was valid in state officials, in the President, and in Congress—but not in federal court. Brushing aside the vote on the People’s Constitution as proof of its lawful adoption, Taney declared:

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

The lack of established law authorizing popular action was the very core of Taney’s political question argument.

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

Taney rejected the idea that the Court could free those imprisoned by federal troops for defending one ostensibly republican government if the political branches supported the other. If the courts could invalidate congressional or presidential recognition of a state...
government, then the Clause would be “a guarantee of anarchy, and not of order.”76 Even if Rhode Island adopted a military dictatorship, Taney suggested, “it would be the duty of Congress to overthrow it.”77

2. Justice Woodbury, Democratic Theorist

Justice Woodbury, the New Hampshire Democrat who had supported Dorr while a Senator,78 framed the question in terms of democratic political theory rather than institutional politics.79 The nation was debating questions ranging from “the power of the people, independent of the legislature, to make constitutions,—to the right of suffrage among different classes of them in doing this,—to the authority of naked majorities.”80 But, Woodbury wrote, the “merely political” questions implicated by competing claims of state governments to the support of the popular sovereign “belong[ ] to the people and their political representatives” and are “matters not to be settled on strict legal principles.”81 Justice Woodbury recognized that the act of constitutional formation was necessarily the province of the People alone as popular sovereign: “Our power begins,” he wrote, “after theirs ends.”82 An act of the People in their sovereign capacity can “succeed or [be] defeated even by public policy alone, or mere naked power, rather than [by] intrinsic right.”83 Woodbury did not concede that naked majorities were never able to form constitutions \textit{aliunde},...
or outside the legal system. He conceded the Court’s role in blessing
them.84

Woodbury identified a serious problem with the Luther ligi-
tants’ claim: If the Court decides which iteration of the People is sovereign,
it risks “dethron[ing]” the People and making itself the “new sover-
eign power in the republic.”85 This was the core democratic theory
problem with judicial intervention in Luther. Only a revolution could
reverse the Court: “[A]ll political privileges and rights would, in a dis-
pute among the people, depend on our decision.”86

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

popular sovereignty. DENNISON, supra note 26, at 191–92. The notion that this question
must be resolved on the political (or actual) battlefield was prescient.
84 See id. at 52. (“Constitutions and laws precede the judiciary, and we act only under
and after them, and as to disputed rights beneath them, rather than disputed points in
making them.”). In a sense, Woodbury’s take was shrewdly political: He had argued as a
Senator that the American system was a farce without active sovereignty, but at that time
he was trying to win an election. See supra note 48 and accompanying text (providing
examples of Woodbury’s pro-Suffragist claims and political strategy).
85 Luther, 48 U.S. at 52–53 (Woodbury, J., concurring in part and dissenting in part).
Hobbes raised this exact point in his attack on the theory of republican government:
“Which error, because it settheth the Lawes above the Soveraign, setteith also a Judge
above him, and a Power to punish him; which is to make a new Soveraign; and again for
the same reason a third, . . . continually without end, to the Confusion, and Dissolution of
the Common-wealth.” THOMAS HOBBES, LEVIATHAN 256 (G.A.J. Rogers & Karl
to a government’s form as opposed to its existence, we might frame the issue in terms of
judicial supremacy. See Barkow, supra note 68, at 240–41 (discussing the interaction
among the branches of government in relation to the political question doctrine).
86 Luther, 48 U.S. at 52. Ironically, the Taney Court took on such a role with regard to
the question of the expansion of slavery in the Dred Scott decision. See STEPHEN BREYER,
MAKING OUR DEMOCRACY WORK 44–45 (2010) (discussing the political origins and effects
of Dred Scott’s constitutional holding); ETHAN GREENBERG, DRED SCOTT AND THE
DANGERS OF A POLITICAL COURT 309–19 (2009) (explaining that Dred Scott had more to
do with the political interests of the slaveholding South than with constitutional
methodology).
87 Luther, 48 U.S. at 51–52 (“Judges, for constitutions, must go to the people of their
own country, and must merely enforce such as the people themselves, whose judicial ser-
vants they are, have been pleased to put into operation.”).
88 Id. at 53.
89 Id. (“[I]f the judiciary at times seems to fill the important station of a check in the
government, it is rather a check on the legislature, who may attempt to pass laws contrary
to the Constitution, or on the executive, who may violate both the laws and Constitution,
In this sense, Woodbury’s framework expanded considerably the notion of a political question first developed in *Marbury v. Madison*.90 There, Chief Justice Marshall had conceived of political questions as those committed to the discretion of political officials.91 Chief Justice Taney’s *Luther* opinion similarly cast the question of who validly might vote and how as one committed to the discretion of elected legislators, without judicial interference. But Justice Woodbury, in finding that the nonjusticiable act was not the legislature’s structuring of Rhode Island’s old electoral system but the People’s attempt to ordain a new one, defined a new type of political question.

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

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

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90 5 U.S. (1 Cranch) 137 (1803).
91 Id. at 166 (“[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political.”).
92 Indeed, many have argued that *Luther* should be read not to apply to such a situation. See, e.g., Amar, *supra* note 34, at 776 (arguing that *Luther* is inapposite where there is a recognized state government).
93 This is not necessarily Taney’s position but was attributed to him by subsequent Courts. See infra notes 100–09 and accompanying text (discussing the reinterpretation of *Luther* by *Pacific States* and its progeny).
94 See Barkow, *supra* note 15, at 29 (discussing *Luther* as a basis for both prudential and classical political question doctrine).
II
WORKING AROUND LUTHER:
THE ORIGINS OF MODERN POLITICAL QUESTION DOCTRINE

A. Clause Split . . .

1. Luther and the Nonjusticiable Guarantee Clause

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

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

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95 Giles v. Harris, 189 U.S. 475, 487 (1903). In Giles, a black man, during the rise of Jim Crow, sued in federal court alleging that Alabama’s voter registration scheme under the state constitution was racially discriminatory, in violation of the Fourteenth Amendment. Id. at 475. Over three dissents, the Court denied him relief. Echoing Luther, the Court reasoned that “relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.” Id. at 488. Giles was not a Guarantee Clause case, but its reasoning, like Taney’s in Luther, exhibited a limited view of the Court’s powers in political process matters. See Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 CONST. COMMENT. 295, 298 (2000) (describing Giles as emblematic of the early modern Court’s view of democratic rights).
96 See Duncan v. McCall, 139 U.S. 449, 461–62 (1891), for an example of the Court treating a Guarantee Clause case as justiciable.
97 88 U.S. 162 (1874).
98 Id. at 178. Virginia Minor sued the state of Missouri for the right to vote, but the Court found that neither the Equal Protection Clause nor the Guarantee Clause gave Ms. Minor the right to vote. Id. at 164–75.
99 Id. at 176. Ms. Minor should have argued before the delegates assembled in Philadelphia, he opined, because it was “now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.” Id.
100 223 U.S. 118 (1912).
initiative system was unconstitutional. In holding that the company’s claim was nonjusticiable, the Court framed the challenge as requiring, if successful, the destruction of the state of Oregon. The Pacific States Court swaddled its decision in Luther’s prudentialist rhetoric of political recognition and the threat of anarchy.

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

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

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

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

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

105 Pac. States, 223 U.S. at 143. The Pacific States Court reached a plausible result despite its overreliance on Luther. Strong federalism arguments support upholding duly passed voter initiatives to amend state law. See Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 2 (1988) (“[T]he states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government. The guarantee clause, therefore, implies a modest restraint on federal power to interfere with state autonomy.”). More basically, initiatives extend greater control over government to the People. See Amar, supra
and Pacific States became the doctrinal anchors for the nonjusticiability of challenges to states’ democratic structures.106

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

2. The Law of Democracy, Rising

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

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

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

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

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

110 See Samuel Issacharoff et al., The Law of Democracy 208–12 (3d ed. 2007) (discussing the “White Primary” cases). In Nixon v. Herndon, the Court struck down a state-mandated white primary in Texas. 273 U.S. 536, 541 (1927). Justice Holmes, who authored Giles two decades earlier, held that the unconstitutionality of an explicitly white primary “does not seem . . . open to a doubt.” Id. at 540. Such inequality violated not only the Fifteenth Amendment, but also the Fourteenth Amendment, failing rational basis review. Id. at 541. The claim that the Herndon primary was a nonjusticiable political question was a “play upon words.” Id. at 540.
tions under the Equal Protection Clause. By the last of these “White Primary” cases, the Court had begun to look past formal arrangements to ask if politics were functionally fair.

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

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

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

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

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

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

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

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

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

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

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

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

118 Baker v. Carr, 179 F. Supp. 824, 828 (M.D. Tenn. 1959) (noting the court’s inability to “overcome its reluctance to intervene in matters of a local political nature” despite the fact “that the evil is a serious one which should be corrected without further delay”), rev’d, 369 U.S. 186. Counsel for Tennessee pressed a similar point before the Supreme Court. Transcript of Oral Argument at 16, Baker, 369 U.S. 186 (No. 6) (“If the complaint is in the General Assembly of Tennessee, in the halls, and not at the polling places . . . this Court . . . has recognized that distinction, has consistently held, from the Colegrove case up
Luther was a central field of debate for the Supreme Court in *Baker*. The Court decisively entered the political thicket, but just as decisively denied the justiciability of the Guarantee Clause as a basis for entry. Justice Brennan used *Luther* to forge the modern political question doctrine, effecting a clause shift whereby legislative apportionment could be reached through a muscular Equal Protection Clause.\(^{119}\) Justice Frankfurter assailed the Court’s clause shift and entry into the field of structural politics. He, too, relied on *Luther* to support his argument for judicial restraint when dealing with substantive structural democracy questions. Yet, despite *Luther*’s prominence in *Baker*, Justice Woodbury’s *Luther* concurrence received scant attention.

I. The Brennan Majority

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

Brennan dissected *Luther*, tying nonjusticiability to the Guarantee Clause alone.\(^{121}\) Taney, he explained, had ruled out any standards by which the Court could reach the case “acting indepen-
dently,” and only then turned to the Guarantee Clause, which was nonjusticiable for “further textual and practical reasons.”

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

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

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

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

125 Id. at 226.

126 See, e.g., Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (failing to enforce the Guarantee Clause). Brennan’s most elaborate statement about the lack of manageable standards under the Guarantee Clause came in a footnote quoting Minor v. Hapertett’s originalist argument that every state government in the original union was by definition republican in form. Baker, 369 U.S. at 222 n.48 (quoting Minor v. Hapertett, 88 U.S. 162, 175–76 (1874)). Yet footnote 48 suggests that the Guarantee Clause might have some fundamental principles of which violation would be judicially discernable: “[T]he distinguishing feature of [a republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.” Id. (citing In re Duncan, 139 U.S. 449, 461 (1891)). On the Court’s unwillingness to overrule Colegrove, see supra note 120.
The *Baker* majority thus sidestepped the debate in *Luther* about the Court’s power to police political entrenchment or regulate state democratic processes. In doing so, it missed the opportunity to distinguish Taney’s prudential theory of political questions from Woodbury’s democratic theory. Brennan’s opinion did not question whether *Luther* itself actually stood for a per se rule of nonjusticiability for the Guarantee Clause. Rather, *Baker* accepted that interpretation of *Luther* and used it to bolster the new political question framework.127 *Luther* was thus recast as a case about the Guarantee Clause and as not controlling on the question of the Court’s power in political matters. Brennan ignored Taney’s more categorical admonition that prescribing qualifications to vote or inquiring into a recognized political system’s validity was “no part of the judicial function[].”128 Brennan similarly ignored Justice Woodbury’s emphasis on the judiciary’s limitations in reviewing action by the People, which had left open the Guarantee Clause as a standard by which to review action by state or federal actors.

In *Baker*, according to Brennan, the Court was engaged in the routine judicial function of evaluating state laws against a constitutional standard—a function described approvingly by Justice Woodbury even in 1849.129 The Court was not, as Justice Woodbury had cautioned, rendering itself a new sovereign by choosing which government was truly of the People; it was not “enter[ing] upon policy determinations for which judicially manageable standards are lacking.”130 The *Baker* clause shift thus transformed nonjusticiable Guarantee Clause questions into justiciable equal protection questions.131 But even as it rewrote the law of political questions, *Baker*

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

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

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

131 The clause shift envisioned a muscular Equal Protection Clause, capable of reaching functionally unfair or unequal structural political arrangements, or which “reflect[ ] no policy, but simply arbitrary and capricious action.” *Baker*, 369 U.S. at 226; see, e.g., ISSACHAROFF ET AL., *supra* note 110, at 112 (“In searching for a more robust under-
did not explain the purpose of the political question doctrine in the structural democracy context. To do so would have required a more careful analysis of Justice Woodbury’s *Luther* concurrence and a more forceful repudiation of Justice Taney’s outmoded majority opinion.

2. The Frankfurter Dissent

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

Frankfurter assailed the majority’s sidestepping of *Luther* and characterized the clause shift as unworkable: “To divorce ‘equal protection’ from ‘Republican Form’ is to talk about half a question.” 135 Whether a citizen is accorded equal protection of the law governing
democratic structures depends on substantive judgments of “what frame of government . . . is allowed.”

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

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

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

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

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

138 See infra notes 139–45 and accompanying text (discussing Douglas’s concurrence).
ocratic government. It made sense in historical context that the Luther Court failed to answer this question. However, the Baker majority’s failure to recognize and answer that same question—a century later, in the context of normal constitutional adjudication—vexed both Justice Frankfurter and those justices who believed Baker did not go far enough.

3. The Douglas Concurrence

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

Douglas recognized the functional purpose of the Court’s move into the political thicket. Without the “prophylactic effect” of potential judicial review, “entrenched political regimes [will] make other relief . . . illusory.”\(^ {144}\) Justiciability barriers in structural democracy cases invited new forms of entrenchment.\(^ {145}\)

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

\(^{139}\) Baker, 369 U.S. at 242 n.2 (Douglas, J., concurring). Douglas found the opportunity to do so in “the modern decisions of the Court that give the full panoply of judicial protection to voting rights.” Id.

\(^{140}\) See, e.g., Issacharoff et al., supra note 110, at 122 (omitting the Douglas concurrence from the casebook).

\(^{141}\) Baker, 369 U.S. at 242 n.2 (paraphrasing Taney’s opinion in Luther that “abdication of all judicial functions respecting voting rights, however justified . . . at the time of Dorr’s Rebellion, states no general principle”); see also supra note 70 and accompanying text.

\(^{142}\) Id. at 246 n.3; see Luther v. Borden, 48 U.S. 1, 45 (1849) (arguing it would be Congress’s duty to overthrow a dictatorship in a state).

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

\(^{144}\) Baker, 369 U.S. at 248 (Douglas, J., concurring).

\(^{145}\) See infra note 159 and accompanying text (describing Douglas’s prescience).
from regulating structural politics if the Court is both willing and able to check “entrenched political regimes”? Douglas’s rejection of the Luther majority allowed him to envision a world in which the Court could deal directly with political entrenchment. His dissent also came closer than any other Baker opinion to acknowledging Justice Woodbury’s alternate framework. Justice Douglas predicated his functionalism on the fact that Baker challenged the legal architecture of an entrenched regime rather than an act by the People of Tennessee themselves.

C. What Luther Wrought

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

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

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

146 Baker, 369 U.S. at 226.
147 Id. at 248 (Douglas, J., concurring).
149 See id. (“[D]octrinalization substantially reduced the possibility of the Court’s deploying the political question and standing doctrines in the service of prudential judgments about what would be the best structures of governance in a democratic society.”). Scholars at the time saw Baker’s “political questions, not political cases” distinction as weakening Luther significantly. See, e.g., WIECEK, supra note 13, at 289 (expressing excite-
Taney’s prudentialist *Luther* opinion. *Baker* thus both clause shifted from the Guarantee Clause to the Equal Protection Clause and sublimated an alternate, more substantive theory of the political question doctrine: the Woodbury concurrence.

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

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

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


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

**III**

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

**A. Luther and the Modern Law of Democracy**

*Baker* made possible what Richard Pildes has called “the constitutionalization of democratic politics.” Today, the Supreme Court routinely takes highly political cases, as *Bush v. Gore* vividly illustrated. The Court’s docket is full of voting rights cases, campaign finance cases, and apportionment cases. Yet, in the modern era, the shift from the Guarantee Clause’s textual focus on substantive republicanism to a broader application of the Equal Protection Clause appears to have failed in some respects. As Richard Pildes and Samuel Issacharoff have argued, our party-based political system creates serious principal-agent problems. Parties are self-aggrandizing institutions by nature, and they seek to create political rules that benefit themselves. The Court’s reluctance to engage with the substan-
tive questions of what republican government should look like, rooted in *Luther*, leaves the law of democracy without guiding principles to resolve structural political entrenchment problems, such as lock-ups and party duopoly.

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

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

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

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

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

161 This assumes that voting is a fundamental right, though. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (fundamental under the Fourteenth Amendment); *Baker*, 369 U.S. at 242 (Douglas, J., concurring) (fundamental based in the Guarantee Clause); see also Pildes, supra note 9, at 45–46 (explaining the fundamental right to vote). *Compare Vieth*, 541 U.S. at 293–94 (plurality opinion) (arguing that districting based on party affiliation does not receive strict scrutiny), *with id.* at 324–25 (Stevens, J., dissenting) (arguing for applying strict scrutiny). But see *Crawford*, 553 U.S. 190–91 (2008) (applying intermediate scrutiny in a challenge to voter ID requirements).
expense of political competition.¹⁶² When one political party “packs
and cracks” legislative districts, drawing districts to make the other
party less competitive while maintaining an equal number of voters in
each, “one person, one vote” does not provide a remedy.¹⁶³ Manipu-
lating election rules for political self-dealing is wrong, if it is wrong,
because it is antidemocratic—not because it is unequal.¹⁶⁴ Unfairness
and the extent of unjustified entrenchment are in turn structural, not
individual, questions.¹⁶⁵

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

¹⁶² See, e.g., Issacharoff et al., supra note 110, at 841–43, 880–84 (discussing the
judicial response to equipopulous and bipartisan gerrymanders).
¹⁶³ See Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census,
50 Stan. L. Rev. 731, 736 (1998) (arguing that “one person, one vote” is a placeholder for
concerns about substantive fairness).
¹⁶⁴ See Ely, supra note 6, at 118 n.* (characterizing the Baker line of districting cases as
Guarantee Clause cases about political fairness); Richard H. Pildes, The Theory of Political
Competition, 85 U. Va. L. Rev. 1605, 1606 (1999) (“[S]cholars . . . have begun to argue
that this familiar framework inappropriately atomizes or disaggregates the issues at stake
in ‘political rights’ cases. . . . [T]hese cases are best analyzed in terms of more comprehen-
sive structural perspectives on democratic politics—in constitutional decisionmaking, this
means the appropriate constitutional conception of democratic politics.”); Saul Zipkin,
Democratic Standing, 26 J.L. & Pol. 179 (2011) (arguing for use of the liberal standing
document where the claimed harm is to democracy).
¹⁶⁵ See, e.g., Karlan, supra note 163, at 745 (“[T]he Court’s reliance on the Equal
Protection Clause as its source of judicial power . . . has ‘situated apportionment claims
within an individual rights framework,’ thereby focusing the Court’s attention on fairness
to individuals rather than on fairness in the allocation of power among groups.” (quoting
Lani Guinier & Pamela S. Karlan, The Majoritarian Difficulty: One Person, One Vote, in
Reason and Passion: Justice Brennan’s Enduring Influence 207, 210 (E. Joshua
Rosenkranz & Bernard Schwartz eds., 1997))); see also Samuel Issacharoff & Pamela S.
Rev. 541, 578 (2004) (arguing similarly in the context of the Court’s gerrymandering juris-
prudence). These claims allege, in other words, “democratic harm.” Vieth, 541 U.S. at 355,
361 (Breyer, J., dissenting).
¹⁶⁶ Vieth, 541 U.S. at 307 (Kennedy, J., concurring) (noting the “absence of rules to limit
and confine judicial intervention” in redistricting).
B. A Brief History of Partisan Gerrymandering Claims

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

Three years later, in Davis v. Bandemer, the Court found partisan gerrymandering claims to be justiciable on grounds independent from “one person, one vote” violations. A plurality in Bandemer held that partisan gerrymandering claims may succeed when plaintiffs demonstrate a structural and continued inability to effectively “influence . . . the political process as a whole.” This standard certainly addressed the real-world problem of political entrenchment, although it set a high bar for plaintiffs. It was, however, a problematic conception of equal protection. The move away from the mathemati-
cally rigid and manageable “one person, one vote” standard drew the Court back into a debate about the justiciability of political entrenchment questions. By the time the Court decided Vieth v. Jubelirer, in the wake of the 2000 census redistricting, the equal protection basis for Bandemer was coming apart.

C. Luther, Baker, Vieth

The Vieth Court was unanimous in finding that at least some partisan gerrymandering may be unconstitutional. But the Court was badly fractured on the question of the judicial role in providing redress. Justice Scalia, writing for the plurality, accepted the principle that “a majority of individuals must have a majority say.” But Scalia argued categorically that no manageable standard exists for the Court to determine who comprises a majority. Justice Kennedy, concurring in the judgment, joined four other Justices in leaving open the possibility that some forms of partisan gerrymandering may be judicially cognizable constitutional violations. Faced with the dissenters’
three competing views of when partisan gerrymandering becomes unconstitutional, Justice Kennedy proposed using the First Amendment as a better prism through which to view the question.180

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

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

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

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

182 See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (indicating that a “more exacting judicial scrutiny under the . . . Fourteenth Amendment” may be appropriate for “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”); Ely, supra note 6, at 117 (arguing that voting cases protect rights “that are essential to the democratic process” and “whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo”); Pildes, supra note 9, at 81 (describing Vieth as at odds with the Baker Court’s “rejection . . . of the view that the modern Congress was an effective forum for addressing problems such as malapportioned election districts” and noting that the political branches are additionally inadequate because the Framers did not anticipate the rise of political parties); cf. Michael J. Klarman, The Puzzling Resistance to Political Process Theory, 77 U. VA. L. REV. 747, 748 (1991) (charting the “[r]ise and [f]all” of political process theory and arguing that it remains “a viable theory of constitutional interpretation”). But courts may more easily identify political wrongs in the racial context. In League of United Latin American Citizens v. Perry, 548 U.S. 399, 442 (2006), for instance, the Court held that certain congressional districts violated section two of the Voting Rights Act but found no partisan gerrymandering claim stated despite rampant corruption and partisan manipulation of the districting process. See, e.g., R. Jeffrey Smith, DeLay Indicted in Texas Finance Probe, WASH. POST, Sept. 29, 2005, at A1 (discussing the indictment of House Majority Leader Tom DeLay for criminally conspiring to use corporate contributions to fund Texas state elections in order to help the Republican Party reorganize Texas congressional districts).
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Scalia’s central concern was the problem of distinguishing “good politics and bad politics.”183 This is a doubly difficult question to answer under the Equal Protection Clause because formal equality does not offer a ready distinction.184 Scalia’s argument reflected both Taney’s concept of the tightly limited judicial role and Woodbury’s concern about the necessity of strict legal principles to prevent the judiciary from becoming a sovereign itself.185 But again, in Woodbury’s conception, the key distinction is not between good and bad politics but between acts of the sovereign People and those of reviewable state actors.

Here, Justice Scalia’s political science arguments undermined his opinion. Of course political parties “compete for specific seats.”186 But what they are really competing for is control.187 Justice Scalia’s argument—that the shifting winds of politics and the ability of incompetent candidates to lose in their registration strongholds render the effects of districting impermanent188—is inapposite even if it is correct. Voters can dislodge individual incumbents, but by what mechanism may voters dislodge incompetent parties?

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

183 Vieth, 541 U.S. at 299 (plurality opinion).
184 Id. at 290 (“[R]equiring judges to decide whether a districting system will produce a statewide majority for a majority party . . . asks them to make determinations that not even election experts can agree upon.”); see also Issacharoff, supra note 170, at 1653–54 (“Reynolds provided no analytic tool for measuring aggregative claims beyond those based on the simple arithmetic function of ensuring equally populated districts.”); supra notes 160–65 and accompanying text (describing mismatch between equal protection and structural democracy problems).
185 Courts must “be governed by standard, by rule.” Vieth, 541 U.S. at 278; see Luther v. Borden, 48 U.S. 1, 41 (1849) (“[B]y what rule could [the court below] have determined the qualifications of voters . . . unless there was some previous law of the State to guide it?”); id. at 52 (Woodbury, J., concurring in part and dissenting in part) (stating that courts are governed by “precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules”).
186 Vieth, 541 U.S. at 287 (quoting Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. REV. 1, 60 (1985)) (internal quotation marks omitted).
187 See, e.g., KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY 236 (2008) (defining a “two-party system” as one in which “two major political parties compete for control of the government”).
188 Vieth, 541 U.S. at 287. Of course, this argument is not categorically correct, as at least some candidates and incumbents are elected and reelected despite corruption, senility, or felony convictions. Interestingly, Scalia wrote in the judicial nominations context that a candidate’s “fair shot” is a legislative—a political—judgment. N.Y. State Bd. of Elections v. Lopez-Torres, 552 U.S. 196, 205–07 (2008).
189 Issacharoff & Karlan, supra note 165, at 560 (“[Scalia] proposes to stand aside . . . even though national [political] intervention [of the type the Framers intended] now actu-
behavior by long-term players such as political parties may be analyti-
cally difficult, particularly under the Equal Protection Clause,190 but if
partisan gerrymandering is unconstitutional, then there is a strong
argument that the Court should regulate it. The notion that manage-
able standards for judging partisan entrenchment categorically cannot
exist demands, for instance, a first-order claim that these decisions are
made on pure “public policy alone” by the People themselves, in their
sovereign capacity.191 Justice Scalia did not make this argument.

The Vieth debate about “manageable standards,” drawn from
Baker, is a red herring. As Joshua Stillman notes, Scalia’s demand for
a clear, predictable, and readily administrable standard as a predicate
for justiciability “could tear down most of constitutional law as we
ally exacerbates the problems of partisanship rather than dampening them.”). National
Republicans pressured Pennsylvania legislators to create the gerrymanders in Vieth. 541
U.S. at 272; see also Baker v. Carr, 369 U.S. 186, 248 (1962) (Douglas, J., concurring)
(noting the probability that “entrenched political regimes” will continue to entrench them-
selves). This was true at the time of Luther as well. See generally Conley, supra note 44
(describing national parties’ involvement in the Dorr Rebellion conflict).

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

191 Luther v. Borden, 48 U.S. 1, 51 (1849) (Woodbury, J., concurring in part and dis-
senting in part). Clearly interparty political competition can constitute “the people in politi-
cal affairs”: Woodbury himself was referring, in part, to a political conflict between a
nascent party movement, the Suffragists, and an established group of powerful Whigs, one
which culminated in the attempt to ordain a new People’s Constitution. But must it?
Where such interparty competition spills not into the streets and the realm of constitution-
making, but is directed inwards towards the laws governing politics, in an effort to choke
off future competition, a court is arguably called on to evaluate the constitutionality of a
law rather than the level of support for a political movement or for a proposed constit-
ution. Perhaps when judges stop political parties from bending the rules in their favor, they
truly are imposing impermissibly on the messy, cutthroat process by which the People
determine their representatives and govern themselves. Perhaps, on the other hand, such
judicial intervention is necessary to maintain governments which are republican in form, to
prevent parties from distorting the People’s voice and usurping popular power. See Vieth,
541 U.S. at 310 (Kennedy, J., concurring) (“Our willingness to enter the political thicket of
the apportionment process with respect to one-person, one-vote claims makes it particu-
larly difficult to justify a categorical refusal to entertain claims against this other type of
gerrymandering.”).
Moreover, while Scalia attacked each dissenter’s proposed standards, the dissents show that it is clearly possible to fashion a standard by which to judge partisan gerrymanders. The real debate in Vieth is about whether reviewing partisan gerrymanders constitutes control of “the people in political affairs.” That debate requires the Court to reengage with Woodbury’s Luther concurrence.

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

D. The Guarantee Clause as an Answer in Vieth

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

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192 Stillman, supra note 190, at 1309.
193 Vieth, 541 U.S. at 367–68 (Breyer, J., dissenting) (arguing against the claim that the existence of competing standards is evidence that there is no standard at all); see supra note 179 (listing standards proposed by different Justices).
194 Luther, 48 U.S. at 53 (Woodbury, J., concurring in part and dissenting in part).
195 Vieth, 541 U.S. at 305 (plurality opinion).
196 See id. at 309–10 (Kennedy, J., concurring) (criticizing the categorical refusal of justiciability in Scalia’s plurality opinion).
197 Id.; see also id. at 317 (Stevens, J., dissenting) (noting the agreement among five Justices that gerrymandering claims are justiciable).
of incumbents and political parties at the People’s expense. Kennedy’s invocation of the First Amendment as a way to extricate the Court from the Equal Protection Clause in the context of partisan gerrymandering seeks to exploit the richness of First Amendment law in the political realm. But this workaround of a workaround might again simply ask “half a question,” allowing the Court to avoid defining the norms of republican government.

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

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

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

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

201 For example, the Justices have explained that, in our republic, the right to vote means a “fair and effective” vote, Reynolds v. Sims, 377 U.S. 533, 533 (1964), that elections should result in a legislature “collectively responsive to the popular will,” id. at 565, and that they should be free from “[c]umbersome election machinery [that] can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote,” Williams v. Rhodes, 393 U.S. 23, 38 (1968) (Douglas, J., concurring). The Court has also noted that public deliberation during campaign season may need protection from the “corrosive and distorting effects of immense aggregations of wealth,” Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), overruled by Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010), and that states, in setting election rules, must “govern impartially,” Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring). See also Vieth, 541 U.S. at 356 (Breyer, J., dissenting) (“In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators
In *New York v. United States*, thirty years after *Baker*, Justice O'Connor described a republican form of government as one “accountable to the local electorate” and independently able “to set [its] legislative agenda[.]”\(^{202}\) The meaning *New York* ascribed to the Guarantee Clause might help the Court militate against *Luther*’s revenge—against the stultifying failure to address clearly the first-order question of the Court’s role in our constitutional democracy—by providing a framework of popular accountability for structural democracy cases.\(^{203}\) An anti-commandeering approach, focused on legislators’ accountability to the People, also comports with Woodbury’s view of the political question doctrine as preventing the Court from controlling “the people in political affairs.”\(^{204}\)

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

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

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

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

\(^{205}\) The argument that the Guarantee Clause can be a shield against federal intervention, for example, might alter the application of *Citizens United* to state campaign finance laws by allowing states’ democracy-enhancing policy choices to function in a manner similar to provisions in state bills of rights. Cf. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986) (“While the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity.”).
by their principal.\footnote{206 For example, in \textit{Timmons v. Twin Cities Area New Party}, 520 U.S. 351 (1997), the Court dealt with fusion voting, the practice of minor parties nominating major party candidates. The Court held that the Minnesota legislature’s interest in the two-party system trumped minor parties’ right to nominate candidates of their choice. \textit{Id.} at 362–65. The Guarantee Clause might add force to challenges to the self-serving structural benefits enjoyed by the two-party system and instead favor competition and broader representation. Other areas might not change. Verifying voters’ identities, without more, does not necessarily smack of entrenchment because accurate elections ensure majority rule and full minority representation. See \textit{Crawford v. Marion Cnty. Election Bd.}, 553 U.S. 181, 204 (2008) (holding that Indiana’s interest in preventing fraud justifies its mandatory voter identification rule and that the fact that the vote on the law was partisan does not militate the law’s neutral justification). A re-emergence of the Guarantee Clause also might give constitutional depth and heft to a critical public debate about political entrenchment in America. See, e.g., Jack M. Balkin, \textit{Occupy the Constitution}, \textit{BALKINIZATION} (Oct. 19, 2011, 8:31 AM), http://balkin.blogspot.com/2011/10/occupy-constitution.html (“A republican form of government is a government that pays attention to the welfare of the vast majority of its citizens, or in the words of OWS, it is a government that cares about and is responsive to the 99 percent, rather than a government that is captured by the 1 percent and to do that 1 percent’s bidding.”); see also Andrew Sullivan, \textit{You Say You Want a Revolution}, \textit{D AILY B EAST: N EWSWEEK} (Oct. 22, 2011, 11:30 PM), http://www.thedailybeast.com/newsweek/2011/10/23/how-i-learned-to-love-the-goddammed-hippies.html (“The theme that connects [Occup Wall Street and the Tea Party movements] is disenfranchise-ment . . . . [A] ‘democratic deficit’ gets to the nub of it.”).} Reengaging Justice Woodbury’s People-centered view of the political question doctrine, and borrowing from the Court’s more recent development of the Guarantee Clause, may help move the debate over districting and democracy beyond the stale quest for manageability.\footnote{207 Adding the Guarantee Clause to the partisan gerrymandering analysis would not change the fact that it is nearly impossible to separate politics from the practice of legislative districting by legislators. See, e.g., \textit{Vieth}, 541 U.S. at 299 (noting that politics will and should play a role in creating district boundaries); \textit{id.} at 308–09 (Kennedy, J., concurring) (arguing that districting is always political whether intentionally or not); \textit{id.} at 358 (Breyer, J., dissenting) (noting that district boundaries make political sense because they are designed with politics in mind); Issacharoff, \textit{supra} note 7, at 643 (“T]he Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post.”); Michael Waldman, Op-Ed, \textit{Sucker Avoidance May Be Step to Presidency}, \textit{BLOOMBERG NEWS}, Feb. 14, 2011, \textit{available at} http://www.bloomberg.com/news/2011-02-15/sucker-avoidance-may-be-step-to-presidency-commentary-by-michael-waldman.html (arguing for nonpartisan commissions). But it might change the political question analysis, forcing the Court to distinguish between acts by the People in their role as a political sovereign and acts by partisan intermediaries like parties, and, in doing so, force the Court to deal squarely with the structural issue of democratic fairness.}  

\section*{Conclusion} 

This Note has presented a narrative, stretching from a nineteenth-century rebellion to contemporary politics, about the Court’s role in dealing with political entrenchment. The \textit{Luther-Baker-Vieth} narrative is important precisely because it shows how
doctrinal limits and the rationales behind them have developed and remained intact since the Court’s early history. While contemporary scholars have demonstrated enormous concern for the problem of the judicial role in policing political entrenchment, neither they nor the Court have fully acknowledged the central role of the two Luther v. Bordens in this very modern problem.

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