


# Luther v. Borden: A Taney Court Mystery Solved

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# **LUTHER V. BORDEN: A TANEY COURT MYSTERY SOLVED\***

LOUISE WEINBERG†

## *Abstract*

*It has not been generally remarked that Chief Justice Taney wrote surprisingly few of the Taney Court's major opinions—those cases that tend to be anthologized and remembered by generalists. Those major cases which Taney did write are consistently about slavery (or states' rights or state powers, which in Taney's mind may have amounted to the same thing). There is a notable exception: Luther v. Borden—a case about the Guarantee Clause. This raises a question. Setting aside his opinions on slavery or states rights, what could have moved the author of Dred Scott, by consensus the worst Supreme Court opinion in history, to choose Luther v. Borden as one of the few remembered major opinions he did write? To begin to unravel this little mystery of history, a glimpse into the character and judgment of Roger Brooke Taney is offered, with an amusing parallel drawn between the respective nominations to the Supreme Court of Taney and Robert Bork. Luther is reconsidered in light of the Transcripts of Record, and with an unembarrassed presentism rather than historicism. In view of Chief Justice Warren's thinking in Powell v. McCormack, much of Chief Justice Taney's reasoning in Luther is shown not only to be evasive, illogical and unconvincing, but also intellectually dishonest, if he is to be credited with the understandings of law and its processes reasonably attributable to a former Attorney General of the United States. Even more disturbingly, Luther v. Borden can plausibly be read as having a darker side than is conventionally understood, with an impact of surprising magnitude and hurtfulness, placing it well within the ambitions of the author of Dred Scott.*

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**LUTHER V. BORDEN: A TANEY COURT MYSTERY SOLVED**  
**By LOUISE WEINBERG**

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*Introduction: A Little Mystery of History*

The Taney Court is generously remembered today as seeking a laudable accommodating balance between national and state powers—an early progressive example of cooperative federalism. That is the received wisdom. In view of this supposed achievement, Justice Scalia, to take an eminent example, did not hesitate to express admiration for the greatness of Taney’s Chief Justiceship, and to attribute to Taney a lasting regret<sup>1</sup> for his fateful opinion in *Dred Scott*.<sup>2</sup>

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1. See *Planned Parenthood v. Casey*, 505 U.S. 833, 1001-1002 (1992) (Scalia, J., dissenting) (“Those of us who know how the lustre of [Taney’s] great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing [when viewing the Emanuel Leutze portrait of Chief Justice Taney] that [Taney] had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind”). Chris Eisgruber quipped that this was “the Dorian Gray Theory of Constitutional Jurisprudence.” See Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMMENT. 37, 37 (1993). Justice Scalia’s admiring view of Taney has been predominant at least since the segregationist period in American history. See, e.g., 1 HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND ITS CENTENNIAL CELEBRATION* 336 (1891) (commending the Taney Court, except for its slavery cases); Charles Noble Gregory, *A Great Judicial Character, Roger Brooke Taney*, 18 YALE L. J. 10 (1908) (commending Chief Justice Taney).

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857) (holding, *inter alia*, that a black citizen of a state could never be a citizen of the United States):

The question . . . arises, whether the . . . Constitution . . . embraced the negro African race [and] . . . put it in the power of a single State to make [a negro] a citizen of the United States. . . . The court think[s] the affirmative of these propositions cannot be maintained.

*Id.* at 406. However, the operative holding of the opinion was that Congress could not take slave property without due process of law, and therefore that the Missouri Compromise Act of 1820, ch. 22, 3 Stat. 545, was unconstitutional, since by it Congress made territories North of the Compromise line free in perpetuity, and a free territory might strip a visitor of his slave property if he simply entered it with his slave. See *infra* note 28 and accompanying text.

Yet there is something skew in such admiration, and something discordant in the attribution to Taney of a lasting regret for *Dred Scott*.<sup>3</sup> My modest purpose here, embracing an instinctive skepticism and an unapologetic presentism,<sup>4</sup> is to delve into a hitherto unremarked feature of the Taney Court, and an equally unremarked feature of *Luther v. Borden*,<sup>5</sup> and to try to discover, through critical examination of the case in light of later understandings, how *Luther* coheres with Chief Justice Taney's authorship in the seemingly unrelated case of *Dred Scott v. Sandford*.

### 1. *A Characteristic Preference for the Quotidian*

If the defining and most admired characteristic of the Taney Court was one of accommodation to state interests, that accommodation also must bear some responsibility for the Taney Court's widely noted institutional weaknesses. Given the inevitable incoherence of a state-accommodating position which could make serious inroads on John Marshall's authoritative and pragmatic view of national powers in matters

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3. Readers of this essay will be familiar with the Court's long descent from John Marshall's largeness of vision to what amounted, at last, to a narrow anti-Lincoln obstructionism, culminating, even before the War, in Chief Justice Taney's late blooming disingenuous nationalism in *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859) (sustaining the constitutionality of the Fugitive Slave Act of 1850). Chief Justice Taney's obstructionism during the Civil War is seen also in opinions he handed down when sitting on circuit, the most noted of which is *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that only Congress, and not the President, has the power to suspend the writ of habeas corpus, i.e., to declare martial law). See generally CARL B. SWISHER, *THE TANEY PERIOD 1836-64* (rev. ed. 2010); R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* (2006); DANIEL A. FARBER, *LINCOLN'S CONSTITUTION* (2003). See also, e.g., JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS* 12 (2006).

4. See generally KARL POPPER, *THE POVERTY OF HISTORICISM* (2002) (1957) (arguing that placing past events strictly within the understandings of those events as perceived in their own times strips the historian of the critical faculty). But see HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1965) for the classic critique of presentism, at least when it is triumphalist. Butterfield's aversion to fatuous assumptions of progress, persuasive as it is, seems to me to invite moral relativism.

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

of national concern,<sup>6</sup> Chief Justice Taney would not, and with his state-favoring mindset probably *could* not, deliver the kind of guidance on the scope of national power that would have been needed to avoid his Court's dividing over the issue, and, as if by force of habit, dividing over other issues as well.<sup>7</sup> There was so little to unify the Court that the Justices not infrequently returned to the antique practice of writing opinions *seriatim*.<sup>8</sup> A reported case could once more consist of the scattered opinions of individual Justices, leaving to lawyers the task of divining what, if anything, the Court had held, and to lament the want of an opinion for the Court.<sup>9</sup>

What interests me here, however, is the curious fact that a good many of the Taney Court's major cases could lack not only the authority of an opinion for the Court, but also the authority of an opinion for the Court *by the Chief Justice*. Taney seems to have relinquished opinion-writing to the brethren in a surprising number of his Court's most important cases.

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6. The splendid example, of course, is *McCulloch v. Maryland*, 17 U.S. 316 (1819), which—in the course of limning out the national powers over matters “necessary and proper” with visionary understandings of the Union, of the Constitution, and of constitutional interpretation—held that Congress has power to establish a national bank. *Id.* at 325-26.

7. See generally Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1608 (2005); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 141 (1999).

8. *Dred Scott* is a conspicuous example of this phenomenon. Several Justices in *Dred Scott* were concerned about other issues, but in Chief Justice Taney's opinion, which tradition makes the opinion of the Court, the core of the case was the constitutionality, under the Fifth Amendment's Due Process Clause, of the Missouri Compromise Act of 1820, ch. 22, 3 Stat. 545, insofar as that legislation might affect the liberty and “property” of travelers to the free territories from the slave states. *Dred Scott*, 60 U.S. (19 How.) 393, 450 (1857). See *infra* note 28 and accompanying text. Justice Wayne, totting up the votes, concluded that six of the Justices, including the Chief Justice, agreed that the Missouri Compromise was unconstitutional. *Id.* at 455.

9. See, e.g., *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849) (The Passenger Cases); see also, e.g., *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847), in which the Court was unanimous as to the result, but badly fractured as to the rationale.

By “important” cases, I mean cases likely to be anthologized and remembered now, that might well have been of obvious significance then, and that are not in specialty fields but instead are cases of general national interest, often constitutional cases.<sup>10</sup> It is true that every Chief Justiceship is distinguished only by a small fraction of its cases. But in great controversies a significant fraction will be written by the Chief, for the same reason Chief Justice Marshall wrote so many of his own major cases, and for the same reason Chief Justice Warren wrote, and put together a unanimous Court for *Brown v. Board of Education*: to lend authority both to the case and to the Court.

If you or I were called upon to cite a major opinion in the Taney Court, we might think at once of *Cooley v. Board of Wardens*,<sup>11</sup> with its patient unraveling of interwoven federal and state powers. But *Cooley* was written by Justice Curtis. The opinion in *The Amistad*,<sup>12</sup> freeing the slaves involved in a bloody mutiny aboard ship,<sup>13</sup> was written by Justice Story. *Swift v. Tyson*<sup>14</sup> and *Prigg v. Pennsylvania*<sup>15</sup> are cases lawyers

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10. Taney authored several well-regarded important opinions in fields that are the study of specialists rather than generalists. In admiralty, for example, Taney wrote the opinion in the foundational case of *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852), holding that the true test of territorial jurisdiction in admiralty cases is “navigable water,” and not the traditional test inherited from our British cousins, “within the ebb and flow of the tides.” *The Genesee Chief* opened to admiralty jurisdiction our inland seas—the Great Lakes—and the Western rivers. My colleague, John Golden, would add to this several commercial cases, including a major case in patent law, *O’Reilly v. Morse*, 56 U.S. 62, 124 (1853) (sustaining the patent for the Morse telegraph). Importantly, it is in *O’Reilly* that it was held that there could be no patent for a natural phenomenon, for a law of nature, or for an abstract idea. *Id.* at 115.

11. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851) (Curtis, J.).

12. *The Amistad*, 40 U.S. (15 Pet.) 518 (1841).

13. In our time, the interest of the case has been enhanced by Steven Spielberg’s film, *Amistad* (1997).

14. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts were free to provide an independent judgment as to the better rule in cases of general commercial law, notwithstanding state law to the contrary); *overruled*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

15. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (while holding that the nation could not commandeer a state to enforce the Fugitive Slave Act, also holding that slave-owners were at liberty to retrieve their fugitive slave

see today as wrong, but they are remembered, and in their day were prominent and consequential. The opinions in those cases were also written, however, not by Chief Justice Taney, but, again, by Story. *Sheldon v. Sill*,<sup>16</sup> to this day a pillar of the law of federal courts, was written by Justice Grier. *The Prize Cases*<sup>17</sup> were important to the Union's Civil War effort, but were also written by Grier. Chief Justice Taney joined Justice Nelson's *dissent*.<sup>18</sup>

It seems unlikely that the author of *Dred Scott* would be intimidated by any prospect of controversy. Perhaps Chief Justice Taney preferred to influence outcomes indirectly, from behind the scenes. Or, possibly, by falling in with uncongenial majorities, he may have sought an appearance of unity. Or he may have wanted to keep in his own hands, at least, the assignment of the writing of opinions. On the rare occasions when an opinion for the Court failed to satisfy him, Taney certainly was capable of extended dissent.<sup>19</sup> But, for whatever reason, despite the almost 300 workaday opinions written by him during his long tenure, he wrote surprisingly few notable opinions for the Court. With the exception of justly celebrated key cases in specialized fields,<sup>20</sup> the big cases in the Taney

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property found in a free state).

16. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

17. 67 U.S. 635 (1863).

18. *Id.* at 683. For other examples of Taney's hostility to the Union's war effort *see supra* note 3.

19. *See Haney v. Balt. Steam Packet Co.*, 64 U.S. (23 How.) 287 (1859); *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857); *Thomas v. Osborn*, 60 U.S. (19 How.) 22 (1856); *Converse v. Burgess*, 59 U.S. (18 How.) 413 (1855); *Williams v. Gibbes*, 58 U.S. (17 How.) 239 (1854); *Bd. of Trs. v. Indiana*, 55 U.S. (14 How.) 268 (1852) (in which Justices Catron and Daniel also dissented); the better-known case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (in which Justice Daniel also dissented in an opinion in which the Chief Justice joined); *Williamson v. Berry*, 49 U.S. (8 How.) 495 (1850); and the famous "Passenger Cases," *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849). I am finding only one other dissent before 1849. in *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838). Chief Justice Taney purported to concur in the judgment in Justice Story's opinion in *Prigg*, 41 U.S. at 626, but essentially dissented where he believed Story had been too liberal, or too expansive of national power. *Id.* at 627 ff.

20. *See supra* note 10, on Taney's great cases in admiralty and patent law.



Court too often cannot boast the dignity of an opinion for the Court by its Chief Justice.

This is a most puzzling preference for the quotidian. Are we seriously to congratulate the author of *Dred Scott* for his humility? For an unselfish deference to the views of his colleagues in matters of national interest?<sup>21</sup>

But there is an important exception. There is one category of opinions of great general interest that Taney did write. These opinions form an exception to Taney's preference for workaday business. These were his opinions on slavery.<sup>22</sup> And the telling feature of Taney's slavery cases is that they typically take positions that protect and even facilitate slavery.

A prime example is Taney's opinion in *Strader v. Graham* (1850), holding that only the law of an escaped slave's domicile of origin could determine the status, slave or free, of that slave—thus stripping a free state of power to free a slave under its own law.<sup>23</sup> In *Strader*, Taney went so far as to hold that there was no federal jurisdiction over the question of slave status,<sup>24</sup> thus confiding the issue thenceforth to the tender mercies of a slave state.

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21. For the improbability of these suggestions, see 1 GEORGE TICKNOR CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 192 (Benjamin R. Curtis ed. 1879) (recording Justice Curtis's resignation; describing the internecine struggle over the timing of Chief Justice Taney's publication of his final opinion in *Dred Scott*, and revealing that Taney had withheld the final opinion from the Associate Justices until its publication).

22. Taney also wrote several opinions about states' rights—the so-called “police” powers once thought reserved, perhaps exclusively, to the states. In his mind these rights or powers were crucial to slavery. Among the more important of Taney's state powers cases, I would include *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). At least, tradition assigns the authorship of the opinion in that case to Chief Justice Taney, although he kept his name out of the report. But one of the most important Taney Court's federalism cases, *Cooley v. Board of Wardens*, *supra* note 11, was written by Story. I should also remind the reader that Taney occasionally assigned the writing of major opinions on slavery Story. See, e.g., *The Amistad*, *supra* note 12, and *Prigg v. Pennsylvania*, *supra* note 15.

23. *Strader v. Graham*, 51 U.S. (10 How.) 82, 88 (1850).

24. *Id.* at 94, 96.

Taney's slavery cases, of course, include *Dred Scott v. Sandford* (1857).<sup>25</sup> There, arguing that black persons could never be citizens and had no rights,<sup>26</sup> Chief Justice Taney went on to strike down the Missouri Compromise of 1820, an Act of Congress,<sup>27</sup> as unconstitutional under the Fifth Amendment's Due Process Clause. Taney took the position that the Missouri Compromise unconstitutionally authorized deprivations of slave "property" North of the Missouri Compromise line. Furthermore, Taney declared, the Missouri Compromise deprived a slave-owner of *liberty*—his liberty to travel with his slaves into free territory:

Thus, the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.<sup>28</sup>

Other of Taney's opinions display this same concern for slave "property." Think about *Ableman v. Booth* (1859).<sup>29</sup> There, in a case involving an abettor of a slave escape, the Wisconsin high court boldly declared unconstitutional<sup>30</sup> the harsh Fugitive Slave Act of 1850.<sup>31</sup> Under the authority of that

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25. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

26. *Id.* at 406.

27. Act of 1820, ch. 22, 3 Stat. 545, establishing that all territories north of a line 36° 30' degrees of parallel, save Missouri, were free in perpetuity. Taney was quite right that the Missouri Compromise was unconstitutional. But its constitutional defect was not that it endangered the taking of slave property above the 36° 30' line, as Taney held, but, as we can now see, below that line it tacitly *permitted* slavery.

28. *Dred Scott*, 60 U.S., at 450.

29. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

30. *In re Booth*, 3 Wis. 13, 48-49 (1854), *rev'd sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

31. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (amending the Fugitive Slave

legislation, bounty hunters could cross into a free state, kidnap some unfortunate black resident, and spirit him away into a slave state. The Wisconsin high court went so far as to try to block review in the Taney Court by declining to hand up the certified record of the case on writ of error.<sup>32</sup> Chief Justice Taney, for the Court, went ahead with the case anyway, an uncertified copy having been found,<sup>33</sup> and reversed, sustaining the constitutionality of the Fugitive Slave Act.<sup>34</sup>

*Luther v. Borden*<sup>35</sup> is the single notable exception to Taney's general disinclination to write an opinion for the Court in constitutional cases having nothing to do with slavery or states' rights. What could have moved the author of *Dred Scott* to select, among the few major constitutional cases in which he did take up his pen, to write the opinion in *Luther v. Borden*? Why was *Luther*, a case about the arcana of the Guarantee Clause, of special interest to him? But before we approach that question, it will be useful to pause briefly to consider the ideas and character of Roger Brooke Taney.

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Act of 1793).

32. See Louise Weinberg, *Methodological Interventions and the Slavery Cases: Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1357 (1997) (terming this event in the Wisconsin court "surreal." This history indicates a nationwide understanding of Chief Justice Taney's pro-slavery predilections, and the pro-slavery leanings of the Taney Court generally.

33. See Weinberg, *Methodological Interventions*, *supra* note 32, at 1358: "At this point an almost surreal thing happened. The Wisconsin Supreme Court instructed its clerk *not to respond* to the Supreme Court's writ of certiorari, not to comply with the Court's request for a certified copy of the record, and not to record the High Court's demand. For some reason, the local assistant U.S. attorney in Milwaukee, J. R. Sharpstein, obtained a certified copy of the record before the Wisconsin clerk was instructed to withhold it. After months of futile jockeying and a delay of years, the United States Supreme Court went ahead and reviewed the case on the basis of Sharpstein's copy."

34. *Ableman*, 62 U.S., at 525-26 (holding that state courts have no power to release anyone in federal custody, thus supporting the Fugitive Slave Act. The Act was repealed in 1864. Act of June 28, 1864, 13 Stat. 200. After the War, the Chase Court reached the same result in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1871) (holding that a state court had no power to release a Union soldier detained for deserting).

35. *Dred Scott*, 60 U.S., at 393; *Luther*, 48 U.S., at 1.

## 2. *Who Was Roger Brooke Taney?*

Roger Brooke Taney was born on a Maryland tobacco plantation worked by slaves, and his views, I think, are best understood as permanently in sympathy with those of the South.<sup>36</sup> He was born to the planter aristocracy, raised in a big house servanted by slaves, and moved in Maryland's high planter world. He married the daughter of his neighbor, the wealthy poet, Francis Scott Key.

Early in his political career Taney was an opportunistic Federalist, but he transformed himself easily into an anti-Federalist when power swung away from the old party. Eventually, notwithstanding Andrew Jackson's rough ways and Southern populist views, Taney became an ardent Jacksonian Democrat. Jackson's racist contempt for black and Indian Americans suited Taney, as did Jackson's populist antagonism to Northern banks, federal tariffs, and national powers. Taney's views did not change. His was an unshakable ideology of states' rights, at least to the extent that that ideology served slave-state interests—as *Dred Scott* would make all too plain. Throughout the Civil War, whether his opinions continued in their characteristic anti-nationalist vein or could boast a late-blooming national patriotism,<sup>37</sup> the Chief Justice appears to have done what he could, particularly when sitting on circuit,<sup>38</sup> to thwart Lincoln's prosecution of the War.

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36. SWISHER, THE TANEY PERIOD, *supra* note 3, at 677-92. *See generally Strader*, 51 U.S. (10 How.) at 89 (holding that the status, slave or free, of an escaped slave, was determinable exclusively by the law of the slave state from which the slave fled). “[I]t is insisted that [the slaves’] employment in Ohio had made them free when they returned to Kentucky. . . . There is nothing in the Constitution of the United States that can in any degree control the law of [a slave state] upon this subject.” *Id.* at 93-94. *See also* the disingenuous late-blooming nationalism of *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859) (sustaining the harsh Fugitive Slave Act of 1950).

37. On *Ableman*, *see supra* notes 29-34 and accompanying text.

38. The most egregious instance is *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that only Congress, not the President, has the power to suspend the writ of habeas corpus, i.e., to declare martial law). *See generally* DANIEL A. FARBER, LINCOLN'S CONSTITUTION (2003); BRIAN MCGINTY, LINCOLN AND THE COURT (2008); SIMON, *supra* note 3, at 12. *Compare* Michael J. C. Taylor, “A More Perfect Union”: *Ableman v. Booth and*

Taney's fervor for the Southern cause, and anger over what Southerners perceived as Northern aggression, can be seen, for example, in an intemperate, not to say unhinged, letter to his son-in-law, written in the summer just before the decision in *Dred Scott*. There, Taney luridly confided his fear that "[t]he South is doomed to sink to a state of inferiority, and the power of the North will be exercised to gratify their cupidity and their evil passions. . . ."<sup>39</sup>

But even aside from this rabid preoccupation with Southern grievances,<sup>40</sup> there was, I think, a deficiency of character, as well as a want of judgment in the man. One revealing story, an account of Taney's ascent to the Chief Justiceship of the United States Supreme Court, may suffice to give us a glimpse into Taney's character, viewpoints, and judgment.<sup>41</sup>

### 3. *History Repeats Itself: A Tale of Two Nominations*

Let us travel back in time to the Marshall Court in its Jacksonian twilight. It is 1833; we are in the second term of President Andrew Jackson.<sup>42</sup> We find Jackson, invigorated by his re-election, returning to his obsessive war on central banking.<sup>43</sup> Jackson had thought to kill the Second Bank of the

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*the Culmination of Federal Sovereignty*, 28 J. SUP. CT. HIST. 101, 115 (2003), with Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1325, 1358 (1997).

39. Letter from Roger Brooke Taney to Mason Campbell, reprinted in SWISHER, *THE TANEY PERIOD*, *supra* note 3, at 609.

40. For an account of antebellum grievances, legitimate and imagined, see Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

41. I have provided a similarly brief glimpse into the judgment and character of John Marshall in recounting how Marshall came to be nominated to the Chief Justiceship. That portrait makes an interesting contrast with Chief Justice Taney's ascendancy to the Court. See Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1245-60 (2003).

42. For background, see ROBERT V. REMINI, *ANDREW JACKSON* (2d ed. 1999); (John T. Morse ed. 1899).

43. Jackson's thinking was in the Jeffersonian and populist tradition of visceral distrust of the Bank and other of Hamilton's fiscal ideas, as favoring the development of an oligarchy. See James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 493 (1978) (ascribing contemporaneous opposition to Hamilton's fiscal plan to a view of Hamilton

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United States<sup>44</sup> by vetoing Congress's anticipatory renewal of its charter.<sup>45</sup> But although his veto did kill the renewal of the Bank's charter, the Bank itself lived on under its existing charter. Jackson brooded on the question of how to destroy the Bank immediately and utterly. At length, Jackson decided to deliver a blow calculated to be fatal. He would remove the federal government's deposits from the Bank. Jackson's further plan, in keeping with his spoils system, was to place the national moneys in scattered crony state banks.

Congress had foreseen this willful attack on the nation's financial system. When Jackson set about removing the deposits he was acting in defiance of an earlier resolution of Congress declaring that the national moneys must be left in the Bank.<sup>46</sup> To be sure, a congressional resolution could be defied. But Jackson discovered that it was no easy matter to get the deposits removed. From our perspective it would seem that if the credit of the Bank of the United States was to be dealt such a blow, a severe credit crisis—a panic—was likely to ensue.<sup>47</sup> What reasonably competent Secretary of the Treasury

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as “determined to create a large, permanent public debt, to help put the country under governance of a wealthy oligarchy”). Writers point out that there was considerable corruption in the Bank; the petitioner in *McCulloch v. Maryland* was hardly innocent. See William L. Reynolds, *Maryland and the Constitution of the United States: An Introductory Essay*, 66 MD. L. REV. 923, 939 (2007) (describing serious corruption at the Bank in Maryland). For optimistic views of the national debt, see JOHN STEELS GORDON, HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT (1997); and of central banking, see ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE (2015).

44. Jackson's eventual triumph over the Bank explains how the United States came to muddle along without central banking until 1863, when, in the agony of Civil War, the Republican Congress, cleared of southern members, finally restored central banking to the United States. National Bank Act, ch. 58, 12 Stat. 665 (1863). In this the radical Republican Congress exercised the national power envisioned by Chief Justice Marshall in the case sustaining the power of Congress to establish a national bank, the case that had enraged Southerners more than any other, *McCulloch v. Maryland*, 17 U.S. 316 (1819).

45. See generally PAUL KAHAN, THE BANK WAR (2015); JOHN T. HOLDSWORTH, THE FIRST BANK OF THE UNITED STATES 90-98 (1910).

46. See CONGRESSIONAL SERIAL SET 38 (1893).

47. In those days, every bank could issue its own notes, but could refuse to accept notes when loans were called in, some even refusing to accept their

would be party to such recklessness?

Amusingly, if one can be amused by really bad governance, what ensued was a nineteenth-century version of the “Saturday Night Massacre.”<sup>48</sup> The “Saturday Night Massacre,” it may be recalled, was one of the more shocking events of the “Watergate” crisis. “Watergate” is the name by which historians remember the scandal that, in 1974, forced the only resignation of an American president, Richard Nixon. There had been a break-in at the offices of the Democratic National Committee, located in the Watergate building complex in Washington, D.C. The culprits turned out to have connections with the Committee to Re-Elect the President (with its stranger-than-fiction acronym, “CREEP”).<sup>49</sup> CREEP, alas, had

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own notes. It was not improbable that with withdrawal of the federal moneys the Bank of the United States would call in its loans, and not improbable that a cascade of bank failures in the states would follow, with resulting panic and depression. And indeed, panic and depression did follow upon removal of the national moneys from the Bank. In their nature, banks are not fully capitalized, since they use depositors’ money in speculative lending or other investments. There was no program then of federal deposit insurance. Panics and depressions were common and lasting. *See generally* HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY (2003); ERNEST LUDLOW BOGART, THE ECONOMIC HISTORY OF THE UNITED STATES (1923); A BRIEF HISTORY OF PANICS IN THE UNITED STATES (Clement Juglar & Decourcey W. Thom eds., 1916). These sources variously describe the antebellum financial system as even more fragile than our current financial system.

48. The following account is a composite drawn from many sources, including JAMES KIRKPATRICK DAVIS, THE SATURDAY NIGHT MASSACRE: WHAT REALLY HAPPENED ON OCTOBER 20, 1973 (2015); CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT’S MEN (2014); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1992); *United States v. Nixon*, 418 U.S. 683 (1974) (on certiorari before judgment, to review Judge Sirica’s denial of the President’s motion to quash the District Court’s third-party subpoena *duces tecum* directing the President to produce certain tape recordings and documents relating to the prosecution of former government officials and presidential campaign officials in connection with the Watergate break-in and cover-up); *United States v. Mitchell*, 377 F.Supp. 1326 (DDC 1974) (in a prosecution of the Attorney General); see also JOHN SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979). Judge Sirica was the federal district judge issuing the fateful subpoena.

49. Mark Curriden, *The Lawyers of Watergate: How a “Third-Rate Burglary” Provoked New Standards for Lawyer Ethics*, 98 A.B.A. J. 36 (June,

connections with Nixon's administration. An independent prosecutor, Archibald Cox, was appointed to investigate the break-in.<sup>50</sup> But Cox was not, in fact, "independent." A former Solicitor General who had returned to teaching at Harvard Law School, Cox had been named to the independent prosecutor post by Nixon's own Attorney General, Elliot Richardson.<sup>51</sup> Perhaps Cox should not have accepted this inside appointment. Perhaps he should have insisted that an actually independent prosecutor be appointed by independent means, perhaps by the Senate Judiciary Committee. But Cox did accept it, and Elliot Richardson assured the Senate Judiciary Committee that, notwithstanding this tie to the administration, the independent prosecutor would indeed be independent.<sup>52</sup>

Initially, Cox probably believed that Nixon's aides bore sole responsibility for the break-in. But, doubtless to his surprise, his own investigation was becoming increasingly focused on the President himself. It was beginning to appear that Nixon had a rôle, certainly in a cover-up of the break-in, and perhaps even in the break-in itself. As the case against President Nixon became less unclear, Nixon must have been hard driven, for he quite shockingly demanded Cox's resignation.<sup>53</sup> With every appearance of rising to the occasion, Cox refused to resign.<sup>54</sup> But Cox was not taking the stance that might have been hoped for in an independent prosecutor. Cox did not stand on the high ground of his independence. Cox apparently believed, contrary to Elliot Richardson's assurances to Congress, that he, Cox, could have no power independent of the administration

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2012).

50. *See op. cit. supra* note 48.

51. *See* George Lardner, Jr., "Cox Is Chosen as Special Prosecutor, Democrat Served Under Kennedy as Solicitor General," *Washington Post* (May 19 1973), at A01.

52. *Op. cit. supra* note 48.

53. For Bork's own account of this and other events of that night, *see* Robert Bork, *SAVING JUSTICE—WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL* (2013).

54. Jonathan L. Entin, *Learning the Right Lesson from Watergate: The Special Prosecutor and the Independent Counsel*, 20 *CHAP. L. REV.* 151 (2016). The Chapman symposium is particularly comprehensive.



that had authorized his appointment.<sup>55</sup> So Cox simply made the technical argument that, since Attorney General Elliot Richardson had hired him, only Elliot Richardson could fire him. Nixon accordingly ordered Elliot Richardson to fire the “independent” prosecutor. Richardson, no doubt mindful of his assurances to the Senate Judiciary Committee, refused to do it. On Saturday night, October 20, 1973, *Nixon fired Elliot Richardson*.<sup>56</sup>

Nixon then ordered the Deputy Attorney General, William Ruckelshaus, to fire Cox. But Ruckelshaus, no more desirous of infamy than Elliot Richardson, refused as well. Nixon then fired *Ruckelshaus*.<sup>57</sup>

When the smoke of the Saturday Night Massacre<sup>58</sup> cleared, the only ranking Justice Department official left standing was Nixon’s wispy-bearded Solicitor General, Robert Bork. Nixon forthwith appointed Bork Attorney General for the purpose, and, the world watching, transfixed, Bork forthwith shamelessly fired the “independent” prosecutor.<sup>59</sup> Cox’s proffered prerequisite, although now detached from Elliot Richardson, was satisfied, as far as he, Cox, was concerned. And so, Archibald Cox, the “independent” prosecutor, all too obediently bowed out.<sup>60</sup> (Yet, it would seem that a Justice Department appointee could not be *required* to resign, in ordinary course, should the Attorney General resign; nor, would it seem, that a successor Attorney General could *require* him or her to resign without cause. Moreover, the independent duty with which Cox had been charged was ongoing, and I should think there was every reason for him, in this national

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55. *Id.*

56. See generally Maurice N. Nessen, *Stonewall: The Real Story of the Watergate Prosecution*, 1997 COLUM. L. REV. 963.

57. *Id.*

58. Carroll Kilpatrick, “Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor’s Office; FBI Seals Records,” *Washington Post* (Oct. 21, 1973), at A1.

59. Although, after firing Cox, President Nixon had declared his intention to put an end to the very office of independent prosecutor, see *id.*, in the face of outcry, he appointed Leon Jaworski Special Prosecutor to take Cox’s place.

60. *Supra* note 58.

crisis, to stand his ground.<sup>61</sup>)

In 1982, President Ronald Reagan chose to name Robert Bork to the United States Court of Appeals for the District of Columbia Circuit, presumably for Bork's academic credentials,<sup>62</sup> rather than his hatchet job for President Nixon. On the D.C. Circuit bench, even more obviously than in his Yale classroom, Bork soon revealed himself, in the eyes of his critics, as a rigid reactionary. In 1987, President Reagan attempted to promote Judge Bork to a place on the Supreme Court, nominating him to an Associate Justiceship to replace Lewis Powell.<sup>63</sup> But, after bitter hearings,<sup>64</sup> during which

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61. Disclosure: At Harvard, I was among the ten hand-picked students in Archibald Cox's constitutional-law seminar. ("I had thought you to be *Mr.*, not *Mrs.*," Cox said accusingly, as it was my turn to introduce myself.) In extenuation of Cox's awfulness on that occasion, I confess that I was as blind to it at the time as Cox was. Cox was equally blind to the purport of his war stories, and this I did see for what it was. He boasted to us that, as Solicitor General in the Kennedy Administration, in arguing to the Court in the desegregation and "sit-in" cases of that period, his effort had been to provide the Court with "prudent" alternatives to striking down segregationist state laws under the Constitution. Instead, Cox focused his arguments on narrow definitions of state "trespass" laws and similar expedients, enabling him to "spare" the Supreme Court from having to establish the constitutional rights of black Americans. (My colleague, John Robertson, tells me he shares these uncomfortable memories of Cox's pride in this tactic.) Cox was a true believer in "the passive virtues" that had been so important to New Dealers. See Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). These were also the virtues of Louis Dembitz Brandeis, and, further back, of James Bradley Thayer. But in Cox's hands (as in our own times), the passive virtues simply persuaded courts not to provide remedies for proved wrongs.

62. Robert Bork was a law professor and the author of an influential book on antitrust law when President Reagan nominated him to the D.C. Circuit.

63. See Jason Manning, *The Bork Nomination*, at <http://eightiesclub.tripod.com/id320.htm>, accessed on April 17, 2017; Stanley I. Kutler, *The Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743 (1994).

64. Congress's treatment of Bork during his confirmation hearings gave rise to a new verb: "To bork, 1980s: from the name of Robert Bork (1927–2012), an American judge whose nomination to the US Supreme Court (1987) was rejected following unfavorable publicity for his allegedly extreme views.", at [https://www.google.com/?gws\\_rd=ssl#q=to+bork](https://www.google.com/?gws_rd=ssl#q=to+bork). It is still complained that Bork was unfairly depicted during the hearings as an extremist, out of step with mainstream American thinking. *Id.* Cf. THE BORK HEARINGS, HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE

Senator Edward Kennedy controversially, but perhaps accurately, warned that in Bork's America, women would once again face back-alley abortions, the Senate rejected Bork.<sup>65</sup> Efforts today to crush what remains of *Roe v. Wade*,<sup>66</sup> not without success in the Supreme Court,<sup>67</sup> have rendered predictions such as Kennedy's less dismissible. But in rejecting Bork, it seems as likely that the Senate acted in revulsion over Bork's part in the Saturday Night Massacre as over his threat to legal abortion (or even over the wispy beard).

The story of Roger Brooke Taney's successful ascent to the Chief Justiceship<sup>68</sup> bears some striking and amusing parallels to the story of Robert Bork's nomination to the Court. Indeed, in the end both men's nominations to an Associate seat on the Supreme Court failed, and for similar reasons. The difference is that Taney enjoyed a second nomination, his fateful nomination to the Chief Justiceship.

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IN U.S. HISTORY (Ralph E. Shaffer ed. 2005). Subsequently, Bork became a best-selling author of right-wing tracts. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (2010); ROBERT H. BORK, A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES (2005); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1979).

65. *On This Day: Senate Rejects Robert Bork for the Supreme Court*, NATIONAL CONSTITUTION CENTER. (Oct. 23, 2016), <http://blog.constitutioncenter.org/2016/10/on-this-day-senate-rejects-robert-bork-for-the-supreme-court/>.

66. 410 U.S. 113 (1973).

67. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 166-67 (2007) (sustaining the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003); reasoning that the outlawed procedure was not considered necessary for the health of mothers). *But see* *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a state anti-abortion law to similar effect because of its failure to provide for the health of the mother). *See* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (sustaining numerous features of a Pennsylvania anti-abortion law, except its provision for spousal notification).

68. The following account is freely drawn from ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* (1967) and CARL BRENT SWISHER, *ROGER B. TANEY* (1935).

In 1833, as President Andrew Jackson became determined to remove the United States deposits from the Bank of the United States, it turned out that only the Secretary of the Treasury was authorized to move the national moneys.<sup>69</sup> Louis McLane, Jackson's Secretary of the Treasury, understandably declined to carry out this attack on the nation's credit. But McLane managed to insulate himself from the fury of the choleric President—if less successfully from the reproach of history. Although he was unwilling to carry out this particular order, he assured the President he was quite content to let somebody else do it. So the two men amicably agreed that McLane's portfolio should be shifted from Treasury to State when State opened up.

Accordingly, as there was then a reshuffling of the cabinet in the wake of resignations over a private squabble, Jackson was able to move McLane from Treasury to State and to hand the Treasury portfolio to William J. Duane. Jackson forthwith ordered Duane, his new Secretary of the Treasury, to remove the federal deposits from the Bank. To Jackson's fury, Duane, like his predecessor, was not insane, and refused to plunge the country into economic disaster. Stunned, Jackson fired Duane.

Even before these events, Jackson had fired his Attorney General, John M. Berrien, for refusing to assist him in his war on the Bank. At that time, Jackson had replaced Berrien with a more malleable lawyer—a clever man whom he knew to share his enmity to the Bank. Jackson now felt certain that this new man would cooperate in ordering the federal deposits removed. He therefore shifted this new man from the Attorney General post and, as a recess appointment, named him Secretary of the Treasury. This obedient executor of fiscal disaster, this “pliant instrument,”<sup>70</sup> this “supple cringing tool of Jacksonian power,”<sup>71</sup> was none other than Roger Brooke Taney.<sup>72</sup>

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69. *Id.*

70. This was Daniel Webster's barb in the Senate debate on Taney's nomination to the Court. See SIMON, *supra* note 3, at 25.

71. NEWMYER, *supra* note 3.

72. In 1834, Chief Justice Taney's recess appointment as Secretary of the Treasury was rejected by the Senate in a vote of eighteen to twenty-eight. This

As Jackson's Attorney General, Taney had argued long and hard for this economic stupidity. Taney fully shared Jackson's populist suspicion of banks and banking,<sup>73</sup> and, in particular, of the Bank of the United States. It was Attorney General Taney who had penned the message that Jackson sent to Congress with his veto of the bill that would have renewed the Bank's charter. (In the crash that would soon fall upon the nation, Jackson's "specie circular," requiring payment in specie for federal lands, would make hard money even harder to come by.<sup>74</sup>) In 1835, Jackson tried to reward Taney for his complicity in the collapse of the national credit with a nomination to the Supreme Court. But in the midst of the depression then beginning to engulf the country (it would culminate in the Panic of 1837),<sup>75</sup> the Whig Senate's mood was one of outrage. It was said that Taney's role in removing the federal deposits from the Bank would "damn him to everlasting fame."<sup>76</sup> The Senate rejected Taney's nomination to the Court on a motion for indefinite postponement.

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was the first cabinet nomination to be rejected by the Senate.

73. This is a view many readers may share, recalling the global economic collapse of 2008, which has been attributable in large part to improvident banking. In fact, banks take the lion's share of blame in the long history of recurrent "panics" in the United States. *See supra* note 47.

74. The measure was intended in part to ameliorate Jackson's "pet banks" failure to invest the federal moneys conservatively. Instead, the recipient banks had gone on a speculative binge, contributing to the economic chaos. *See* Tony D'Urso, *Specie Circular*, at <http://www.let.rug.nl/usa/essays/1801-1900/andrew-jackson-and-the-bankwar/specie-circular.php> (accessed April 17, 2017).

75. *See* Martin A. Armstrong, *The Panic of 1837*, Princeton Economic Institute, at <https://www.armstrongeconomics.com/panic-of-1837/> (accessed April 17, 2017).

76. "The papers contain a report that the President has appointed Roger B. Taney Chief Justice of the United States in the place of the lamented John Marshall. Mr. [Taney's] . . . slavish devotion to General Jackson . . . led him during his short career as Secretary of the Treasury to perform an act of subserviency which must 'damn him to everlasting fame' . . ." PHILIP HONE, *THE DIARY OF PHILIP HONE, 1828-1851, 148-149* (Bayard Tuckerman ed. 1889).

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Then, on July 6, 1835, John Marshall—the great Chief Justice, the last of the Federalist generation of Founders, the father of American constitutionalism<sup>77</sup>—let go of life. Fatefully, the power of nominating a Chief Justice of the Supreme Court of the United States fell into the hands of Andrew Jackson. And there stood Joseph Story, the obvious choice, one of the great Justices and a great authority.<sup>78</sup> But Andrew Jackson would not bestow the greatest gift in his fading patronage upon the author of *Martin v. Hunter's Lessee*.<sup>79</sup> The Court in that case had simply nailed down an established tradition of Supreme Court review of state judgments raising federal questions, one rather obviously required by the Supremacy Clause and Article III. However, in doing so, the *Hunter's Lessee* Court had crammed down state throats forever (from the states' rights point of view) the overweening power of the Supreme Court of the United States over the states' own high courts. But if not Story, who? Roger Brooke Taney had been rejected for an Associate's seat on the Court. Was there a chance now, for this even greater prize?

Jackson bided his time and awaited the results of the election of 1836. This bet paid off. The Whigs were routed. It was the Democrats who would now dominate the Senate.<sup>80</sup> In his last days in the Presidency, while the country awaited the inauguration of Jackson's hand-picked successor, Martin Van Buren, Jackson re-nominated Taney, this time for the Chief Justiceship. In the new Democratic Senate, the nomination was approved, notwithstanding Taney's supposed damnation to everlasting infamy. But even this Jacksonian Senate was

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77. John Marshall's greatness requires no defenders, but for a thorough refutation of the latter-day revisionism that would dishonor his achievement in *Marbury v. Madison*, see Weinberg, *Our Marbury*, *supra* note 41, at 1235-312.

78. Among his other accomplishments, Justice Story was first Dane Professor of Law at Harvard University, and the author of *JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833).

79. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 304 (1816) (holding that the clear tenor of the Constitution, articles III and VI, requires Supreme Court review of federal questions decided in the state courts).

80. See John Floyd, *The Election of 1836*, at <http://www.u-s-history.com/pages/h350.html> (accessed April 17 2017).

unenthusiastic, and the strenuous opposition of Daniel Webster was not without effect. It was by a sorry vote of twenty-nine to fifteen that the Senate confirmed Roger Brooke Taney as Chief Justice of the Supreme Court of the United States.

For those who had argued before Chief Justice Marshall, the apparition of Chief Justice Taney on the bench seems to have occasioned even a physical shock. “It was seeing Roger Taney in John Marshall’s chair, however, that chilled. . . . [He was] stooped, sallow, ugly. . . .”<sup>81</sup> For all that, the dour Marylander is sometimes said to have established a certain collegiality among the Justices.<sup>82</sup> Alas, the supposed collegiality was exposed as very brittle indeed, if it had ever existed, when Chief Justice Taney—evidently unwilling to permit the brethren to respond to his arguments in *Dred Scott*—shamefully refused to let the Justices see the finished opinion prior to publication.<sup>83</sup>

#### 4. Common Ways of Reading Luther

The 1849 case of *Luther v. Borden*<sup>84</sup> is among the more remembered of the few Taney Court cases in which Chief Justice Taney himself took pen in hand to author an opinion for the Court. What was *Luther* about? One thing *Luther* was *not* about was a wrongful arrest—although that was the way the case was framed.<sup>85</sup> In the Supreme Court, as in the Circuit Court below,<sup>86</sup> the salient facts were argued as posing the

81. NEWMYER, *supra* note 3, at 93.

82. DEL DICKSON, *THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 43 (2001).

83. *See* CURTIS, *supra* note 21, at 220. There was a cherished tradition in Marshall Court days: the brethren stayed together at the same boarding house in Washington, D.C. After hours, John Marshall presided over an easy and jocular camaraderie. But that tradition soon gave way in the Taney Court, and the Justices, less happy, apparently, to join in frivolities hosted by the humorless Chief, took scattered accommodations elsewhere.

84. 48 U.S. (7 How.) 1 (1849) (Taney, C.J.).

85. The original suit was brought in trespass. *Luther*, 48 U.S., at 2. On this and other questionable features of the case *see infra* Part 6.

86. *See* TRANSCRIPTS OF RECORD (reprint ed. 2011), at 23; *Luther*, 48 U.S. (7 How.) at 57 (the *Luther* plaintiff arguing that the election under the Dorr Constitution yielded the true government of Rhode Island). The page

question: Which of two elected state governments is the legitimate state government?<sup>87</sup> The Circuit Court refused to rule on such a question, holding that the Charter government was in full force and effect throughout the ineffective rebellion. But Chief Justice Taney's opinion for the *Luther* Court seized on this two-government argument as the question for decision, and then held that this question for decision (which of the two was the legitimate state government of Rhode Island) was a political question.<sup>88</sup> Taney correctly defined a political question as one confided to the political branches, and therefore beyond the power of courts to decide.<sup>89</sup> Justice Woodbury, dissenting, agreed with Taney about this.<sup>90</sup>

Given this ruling of non-justiciability, it might therefore be said, in disparagement of *Luther's* importance, that all the Court did in *Luther* was decide not to decide. But, for better or worse, *Luther* is still law today on an array of issues.

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numbers are as they appear in the 2011 edition. Handwritten page numbers are also included, apparently encompassing a photographed replica of the original transcripts.

87. *Luther*, 48 U.S., at 3. Cf. Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 646 (2000) (seeing *Luther* conventionally as a dispute over "the legitimacy of competing state governments").

88. *Luther*, 48 U.S., at 39 ("[T]he inquiry proposed to be made belong[s] to the political power and not to the judicial . . .").

89. *Id.* A recent article takes the counter-intuitive position that the political-question doctrine, far from impeding judicial review, functions as a bastion of judicial supremacy, since the courts have the power of choosing which cases to review. See generally Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015).

90. *Luther*, 48 U.S., at 58-59 (Woodbury, J., dissenting). Justice Woodbury stated:

Starting, then, as we are forced to here, with several political questions arising on this record, and those settled by political tribunals in the State and general government, and whose decisions on them we possess no constitutional authority to revise, all which, apparently, is left for us to decide is the other point—whether the statute establishing martial law over the whole State, and under which the acts done by the defendants are sought to be justified, can be deemed constitutional.

*Id.*



To begin with, lawyers commonly read *Luther v. Borden* as posing the question whether the legitimacy of a state government may be challenged under the Constitution's guarantee to each state of a republican form of government.<sup>91</sup> And the answer is "No."

A further conventional reading is that the legitimacy of a state government is non-justiciable because that issue comprises a "political question"—that is, one confided to the political branches of government.<sup>92</sup>

A third reading emerges from the fact that Chief Justice Taney forged boldly ahead on his political question point, setting it down that only *Congress* can determine the legitimacy of a state government.<sup>93</sup> According to Taney, Congress decides whether or not a state government is legitimate when it decides whether or not to seat or exclude a newly elected member.<sup>94</sup> This assertion seems questionable.

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91. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

92. This now standard reading was also the view of the Circuit Court below:

The question which of the two opposing governments was the legitimate one, viz. the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

TRANSCRIPTS OF RECORD, *supra* note 86, at 23. The plaintiff argued that the election under the Dorr Constitution yielded the true government of Rhode Island. *Id.* at 1. This apparently appears as a summary certified by Joseph Story. *Id.* at 19.

93. *Id.* at 42. Interestingly, the question in the court below is earlier described as one customarily held to be confided to the "people" of the state, without specific reference to the political departments of nation or state. *Id.* at 2.

94. *Id.* at 42. The Circuit Court stated:

And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican

Here is the Guarantee Clause in its entirety:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.<sup>95</sup>

As you see, the Guarantee Clause contains the nation's guarantee to the states of a republican form of government, but does not mention a role for Congress in making good on the guarantee. Moreover, a further clause of section 4, the Violence Clause, inferentially places responsibility on the President, in cases of "domestic violence" or "invasion," to enforce the nation's guarantee to the states of a republican form of government. In addition, the Guarantee Clause provides that the governor or legislature of a state can request the assistance of the nation in cases of domestic violence. (In cases of invasion the nation can act on its own.)

Implicit in all this is the fact that it is only the President, in the end, who can make good on the nation's guarantee. As Commander in Chief of the armed forces, it is the President who can order forces into a state to protect that state from domestic "violence" or "invasion."<sup>96</sup> In discussing the power of the President in this context, Chief Justice Taney is able to ignore these facts because he breaks the Guarantee Clause in two, treating the Violence Clause separately. It is the bare guarantee, shorn of the Violence Clause, that is exclusively confided to Congress, according to Taney.

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character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

*Id.*

95. U.S. CONST. art. IV, § 4.

96. See Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 170 (2004) (discussing national emergency powers in the context of *Luther v. Borden*).

There are at least two further views of *Luther*. In a fourth view, *Luther* is read more broadly. Because *Luther* arose in the wake of two competing gubernatorial elections, after *Luther* there arose a feeling in the profession that challenges to any election, federal or state, at any stage of the electoral process (on any theory) might be non-justiciable.<sup>97</sup> This vague suspicion coexisted, however, with a long tradition in this country of challenges to the electoral process at every stage, and *Luther*, in all likelihood, has had no meaningful bearing on such challenges, which continue unabated.<sup>98</sup>

Even more broadly, *Luther* is read in yet a fifth way, to have deleted the Guarantee Clause from the Constitution altogether, as far as judicial review is concerned.<sup>99</sup> Interestingly, David Currie thought *Luther* could have no bearing on the Guarantee Clause, remarking that the Guarantee Clause was a “gratuitous” interjection into *Luther* by Chief Justice Taney.<sup>100</sup> Professor Currie may have viewed as insufficient the uses of the Clause in the briefs and arguments of the parties, but the Guarantee Clause, in terms, does appear in two of the arguments of record.<sup>101</sup> Indeed, it might well be considered a measure of the non-justiciability of the Clause that, in *Luther*, both parties relied on it. It is true,

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97. As late as 2016, the argument was raised in *State v. Berger*, 781 S.E.2d 248 (N.C. 2016). *But see* *Whitford v. Nichol*, 151 F.Supp. 3d 918 (W.D. Wis. 2015) (rejecting the argument). This is the theory of the case that concerned Justice Brennan in *Baker v. Carr*, 369 U.S. 186 (1962). *See* discussion *infra* Part 11.

98. For discussion of this phenomenon, see Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 646-56 (2002). There is an American saying that an election is never over, and in the shadow of allegations of Russian interference in the recent presidential election, the proverb may have some truth in it for the immediate future. See, e.g., “Trump and Russia: Never-ending story,” THE ECONOMIST (April 1st-7th 2017), at 23.

99. *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1324 (2005) (in a broad critique of justiciability doctrines, taking *Luther* as rendering the Guarantee Clause non-justiciable).

100. David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 718-19 (1983).

101. *Cf. Luther*, 48 U.S., at 4, 26, 32.

however, that, after the Civil War, courts often reached the merits in cases raising the Guarantee Clause as an obstacle.<sup>102</sup>

That the Guarantee Clause is considered non-justiciable today is traceable, not so much to *Luther*, as to the 1912 *Pacific States Telephone* case, which, with extensive quotations from *Luther*, revived it and doubled down on it.<sup>103</sup> The sense of *Pacific Telephone* is that the Guarantee Clause itself renders any issue depending upon it altogether non-justiciable, and thus, that the Guarantee Clause can never be a source of individual right.<sup>104</sup>

That conclusion is what is most disturbing about these various readings of *Luther*.<sup>105</sup> In the last resort, it has to be the counter-majoritarian obligation of courts in well-governed countries to protect minorities and the rights of individuals. A proscription of judicial review on any theory will diminish the rule of law, as it is understood in the Anglo-American tradition.

Chief Justice Marshall, in our greatest case, *Marbury v. Madison*,<sup>106</sup> first identified the phenomenon of “[q]uestions, in their nature political.”<sup>107</sup> Marshall was explicit that a violation of individual right can *never* present a political question. While acknowledging that courts should not meddle in government policy, Chief Justice Marshall nevertheless was adamant that

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102. On post-bellum cases in the Supreme Court alone, see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (voting rights of women; The Ku Klux Cases (ex parte Yarborough), 110 U.S. 651 (1874) (intimidation of voters at the polls); *Dubuclet v. State of La.*, 103 U.S. 550 (1880) (Board of Elections illegally changing results); *Ex parte Warmouth*, 84 U.S. 64 (1872) (supervisors instructed to block certain votes illegally). *But see infra* note 142 and accompanying text. For redistricting cases, see *infra* note 162.

103. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding that a tax authorized by referendum could not be challenged under the Guarantee Clause on the ground that the referendum process is inconsistent with a republican form of government). For a discussion of the problems presented by *Pacific States*, see Andrew C. Noll, Note, *A Reversal of Pacific States in Article III Garb*, 26 STAN. L. & POL'Y REV. 639 (2015).

104. *Pacific States*, 223 U.S., at 151.

105. Cf. Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125 (1987) (observing the disconnect between the aspirations of the unjustly disenfranchised and a “political questions” doctrine that would bar them from a day in court).

106. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

107. *Id.* at 163.

an injured individual's complaint of government wrongdoing—as opposed to a general challenge to government policy—is always justiciable.<sup>108</sup> Chief Justice Marshall acknowledged that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court,”<sup>109</sup> and that courts were “not to enquire how the executive, or executive officers, perform duties in which they have a discretion.” Nevertheless, Marshall was clear that courts exist “solely, to decide on the rights of individuals. . . .”<sup>110</sup> In this spirit, Marshall had the courage to declare, to President Jefferson’s lasting resentment, that a government official cannot “sport away the vested rights of others,”<sup>111</sup> and to rule that Marbury’s claim was a *good claim*.<sup>112</sup> In other words, although the Supreme Court did not have jurisdiction over it, Marbury’s claim would be good in any court that *did*.

Thus, although Article IV logically accords the President a certain discretion to enforce the national guarantee to each state of a republican form of government, if the President exercises this discretion in a manner that deprives an individual of some right, it should be a matter of course that courts can, and should, assert jurisdiction to vindicate that right, anything in *Luther* to the contrary notwithstanding.

At a deeper level, after a closer look at the case, I will offer some disturbing fresh perspectives on *Luther*.

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108. *Id.* at 166. See Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994).

109. *Marbury*, 5 U.S. (1 Cranch) at 170.

110. *Id.* at 169-170. For discussion of this class of problems, see for example Grove, *The Lost History*, *supra* note 89 (arguing, correctly, that constitutional questions, historically, were never political questions).

111. *Marbury*, 5 U.S., at 166.

112. *Id.* at 162. As late as 1823, Jefferson was inveighing against Chief Justice Marshall’s 1803 holding that Marbury’s claim was a good claim:

“This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. . . . [T]he Chief Justice went on to lay down what the law would be, had they jurisdiction of the case . . . . [C]ould anything exceed [this] perversion of law?”

Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), reprinted in 1 S.C. HIST. & GENEALOGICAL MAG. 3, 9 (1900).

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5. *A Crisis in Rhode Island*<sup>113</sup>

The following account of this oft-told tale is drawn from copious sources.<sup>114</sup> Those who have had occasion to read a discussion of *Luther*, or the case itself, will recall that *Luther* arose out of the Dorr rebellion in Rhode Island. Rhode Island's original colonial Charter, containing no provision for amendment,<sup>115</sup> had assigned the shaping of the colony's suffrage to the Charter's original grantees. The grantees, exercising this delegated power, had decreed that the right to vote should be extended to all adult white male owners of land to a then-substantial value of \$134.00.<sup>116</sup>

This qualification for the suffrage—significant property in land—was not uncommon in the colonies, and persisted into the early Republic. In the early antebellum period, land ownership was a qualification for the vote in Great Britain as well. In colonial America, the voter with property in land was

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113. Rhode Island was still a slave state *de facto* at the time of the governance crisis seen in *Luther*. Although Rhode Island had formally abolished slavery in 1774, the state had found it convenient to institute a gradual emancipation plan; emancipation was not completed until 1843, with the adoption of a new constitution that eliminated slavery's remaining traces. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990), at n. 84. Rhode Island adopted a constitution in 1843 eliminating the last traces of slavery. *Id.* For a detailed treatment, see CHRISTY MIKEL CLARK-PUJARA, *SLAVERY, EMANCIPATION AND BLACK FREEDOM IN RHODE ISLAND, 1652-1842* (2009) (dissertation available at Iowa Research Online, <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=4956&context=etd>).

114. See ERIK J. CHAPUT, *THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* (2014); RORY RAVEN, *THE DORR WAR: TREASON, REBELLION AND THE FIGHT FOR REFORM IN RHODE ISLAND* (2010); RUSSELL J. DESIMONE & DANIEL C. SCHOFIELD, *BROADSIDES OF THE DORR REBELLION* (1992); PATRICK T. CONLEY, *THE DORR REBELLION: RHODE ISLAND'S CRISIS IN CONSTITUTIONAL GOVERNMENT* (1976); MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833-1849* (1973); William L. R. Gifford, *The Dorr Rebellion in Rhode Island in 1842*, in 4 THE NEW PRINCETON REVIEW 213-26 (1887); see also TRANSCRIPTS OF RECORD, *supra* note 86.

115. *Luther*, 45 U.S., at 36.

116. Peter J. Comerford, *Stoddard v. Martin: A Rhode Island Tale*, 62 R.I. B.J. 13 (Apr. 2014); See William M. Wiecek, "Slavery and Abolition Before the United States Supreme Court," in *ABOLITIONISM AND AMERICAN LAW* 134-40 (John R. McKivigan ed. 1999).

trusted as a responsible man with a stake in the governance of his colony. Landowners retained this position of privilege in the successor States as a matter of course.

Legislators, obviously, are not eager to legislate against the form of suffrage under which they were elected, and Rhode Island's property requirement endured. It could not have helped matters that Rhode Island also lacked a written constitution. Its successive legislative assemblies operated under its original royal charter, and entrenched themselves by maintaining the suffrage as it had existed under that document. But by 1840, Rhode Island was substantially urban, and most adult white males in Rhode Island were then non-landowning residents of its towns. These included members of the learned professions, wealthy merchants, bankers, and other educated citizens. Few of these had a right to vote. On the other hand, few rural Rhode Islanders had \$134 worth of property in land. The upshot was that only relatively *wealthy* country people had the vote. The suffrage produced and perpetuated an elite rural class. This effect was enhanced by a provision in the original Rhode Island Charter mandating equal representation in the state General Assembly for all towns, however small. Thus, a plantation had only to incorporate as a town to gain representation equal to that of a bustling port city.

Most states, by 1840, under pressure from moneyed urban interests, had disembarrassed their election laws of property requirements. But Rhode Island clung to the suffrage under its original Charter, with increasing entrenchment of a ruling rural elite. By 1840, some sixty percent of adult white males in Rhode Island were disenfranchised. This and the following account is taken variously from the above-cited authors.<sup>117</sup>

Thomas Dorr was a young Providence lawyer of good family. He had been educated at Exeter and Harvard, and had read law with Chancellor Kent. He was elected a member of the Rhode Island General Assembly. This brought home to him the peculiar fact that neither he nor his well-off merchant father had the right to vote in Rhode Island. Dorr decided,

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117. See also Weinberg, *Political Questions*, *supra* note 108.

under his own authority, to call a constitutional convention.<sup>118</sup> Rich men and others excluded from the Charter suffrage, and members of the Assembly who agreed with them or sought to please them, came together in Newport<sup>119</sup> at this convention, and worked up a putative constitution for Rhode Island,<sup>120</sup> the important feature of which, as far as the Dorrites were concerned, was that it provided universal adult white male suffrage.

Rhode Island's existing state legislature, stirred to action, attempted to produce an authoritative alternative constitution. But this latter effort did not extend the suffrage as generously as the Dorr constitution did, and the Dorrites in the legislature helped to defeat it. The Dorrites then held a referendum on their own new constitution, a referendum in which all adult white males were welcome to vote, and the Dorr constitution was approved in a landslide.<sup>121</sup>

Push came to shove when, in 1842, the Dorrite and Charterite factions each conducted its own election for governor. Dorr was elected in the Dorrite election, but those voting under the old Charter reelected the incumbent governor, Samuel W. King. King refused to yield to Dorr.<sup>122</sup> He would not give Dorr entry to the governor's offices. Crowds of Dorrites assembled to protest and to listen to angry speeches.<sup>123</sup> At Governor King's instance, the Rhode Island legislature, fearing violence, made a formal request to President John Tyler for federal troops. As we have already reminded ourselves, the Guarantee Clause itself provides for

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118. TRANSCRIPTS OF RECORD, *supra* note 86, at 72.

119. *Id.* at 69.

120. *Id.* at 84.

121. *Id.* at 103. There were also Dorrite elections to scores of offices, and legislation enacted by a Dorrite legislature. TRANSCRIPTS OF RECORD, *supra* note 86, at 112-21. The Dorrites also sought transfer of records and prepared to reorganize the militia. *Id.* at 124-25.

122. For a curious replication of the two-governor facts of *Luther*, see *Baxter v. Brooks*, 29 Ark. 173 (1874). The Arkansas high court relied on *Luther*, but was happy to interpret the Violence Clause of Article IV, Section 4, in its bearing on the Guarantee Clause. Thus, the Arkansas judges more realistically assigned to the President, rather than Congress, the power over the political question presented.

123. TRANSCRIPTS OF RECORD, *supra* note 86, at 5.



this procedure:

“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>124</sup>

President Tyler responded to this request by taking the line that he had better wait until violence was more clearly threatened.<sup>125</sup>

The Dorrites then made a disastrous mistake—an incomprehensible one, seeing that legitimacy must always have been a primary concern with them. They took to the streets, going so far as to launch a futile assault on an arsenal in Providence. Governor King proclaimed martial law on June 25, 1842,<sup>126</sup> and the leaders of the rebellion were arrested.<sup>127</sup> Dorr went into hiding, and the rebellion fizzled out. It was all over in “two days,” as Henry Webster remarked with some exaggeration in oral argument of the case before the Supreme Court.<sup>128</sup> In fact, it was “all over” by June 24th, 1842.<sup>129</sup>

Other states had quite peaceably handled the problem of outmoded suffrage; constitutional conventions had approved new state constitutions providing for universal adult white male suffrage and omitted property qualifications.<sup>130</sup> In elections under these new constitutions, new governments had been elected and taken office without encountering difficulties. Educated urban classes became part of the electorate. In this perspective, Rhode Island’s experience was needlessly turbulent.

124. U.S. CONST. art. IV, § 4.

125. *Luther v. Borden*, 48 U.S. (7 How.) 1, 33 (1849); Conron, *Law, Politics*, *supra* note 87, at 380 (pointing out that by the time the Supreme Court confronted the issue, it was purely “academic”).

126. *Id.* at 8, 15-16.

127. *Id.*

128. *Luther*, 48 U.S., at 34.

129. TRANSCRIPTS OF RECORD, *supra* note 86, at 5.

130. *See, e.g.*, N.Y. CONST. art. III, § 1 (1821) (eliminating property qualifications for white voters).

### 6. *The Framing of Luther*

The framing of the case that became *Luther v. Borden* has created difficulties for commentators. They understand the trespass claim, correctly, as a failed attempt to raise the issue of unfair suffrage in Rhode Island. But that leaves unexplained other peculiarities of the case. It is possible that the original framing of *Luther* also might have been an effort to establish that the Dorrites' case, in essence about unfair suffrage, was one of *individual right*, and not merely "a public action." But the Dorrites wound up pleading a case about one thing as about something else, obscuring the actual issue—unfair suffrage—by pleading a concocted tort: a trespassory arrest.<sup>131</sup> This would have made it difficult for them to introduce evidence about a serious abridgment of voting rights.

A practical further problem for the Dorrites seems to have been that Dorr himself was evidently in custody in Rhode Island at the time the action was brought. The litigation had to be brought not by Dorr himself, but by a Dorrite couple, Martin and Rachel Luther.<sup>132</sup> Federal diversity jurisdiction was also essential to the Dorrites; there was no federal-question jurisdiction at the time. But even had federal-question jurisdiction been in existence, the Dorrites' case, as framed, alas, did not arise under federal law. Their federal question could reach the Supreme Court, but in the Circuit Court below it could appear only as a reply to a defense. Yet, obviously, they would not have wanted to try their case in a state court. So, since the allegedly trespassing arresting officer had to be a citizen of Rhode Island if the pleading of unauthorized arrest made any sense, the plaintiff Dorrites had

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131. After 1875, following the party-of-record rule of *Osborn v. Bank*, 22 U.S. 738, 819 (1824), it was thought necessary, in trying to gain access to a federal injunction against unconstitutional state action, to plead some trespassory conduct on the part of the defendant official. *See id.* This fiction was rendered unnecessary after *Ex parte Young*, 209 U.S. 123, 160 (1908), which held, *inter alia*, that a federal injunction could issue to block a violation of the Constitution directly, without the necessity of pleading a state-law trespass as well). *See Ex parte Young*, 209 U.S., at 123, *supra* note 133.

132. *Luther*, 48 U.S., at 1; TRANSCRIPTS OF RECORD, *supra* note 86, at 2.

to have conveniently moved to Massachusetts after the arrest. So jurisdiction as well as the tort scenario was manufactured. Defense counsel used the term, “pretended.”<sup>133</sup>

And there was more to the pretense than this. *Luther* came to the federal Circuit Court sitting in Providence in an action for damages against a “master mariner” who, nevertheless, was also alleged to be a Charterite officer who lacked authority to arrest the plaintiff.<sup>134</sup> The complaint alleged that the arresting person, without legitimate governmental authority, had trespassed upon the plaintiff’s home, breaking and entering it to arrest him, and “ill-treating his family” as well.<sup>135</sup>

So, it came about that the great question of the constitutionality of the Charterite election in Rhode Island was not raised in some direct challenge to the suffrage under the old charter.

The defendant, anticipating the constitutional question, thought to punt by defending on the ground, not that the King government was legitimate, but rather that he, the arresting officer, was, indeed, *authorized*. This the defendant undertook, with copious documents and testimony as to the need for, and existence of, martial law, under which authorization the defendant militia men were deputed to arrest the plaintiffs. This defense nevertheless did indeed open the case to the reply that the officer, though “authorized,” was not *properly* authorized, because the Charter government was not a legitimate government. So it was that the legitimacy *vel non* of Rhode Island’s suffrage would enter the case only circuitously,

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133. See TRANSCRIPTS OF RECORD, *supra* note 86, at 10, characterizing the alleged trespasses as “pretended. On the other hand, it is not surprising, in the port city of Providence Plantations, that several of the arresting men, apparently citizen deputees, should be listed as mariners, and Luther M. Borden, the alphabetically first named defendant, is described as a “*master mariner*.”

134. *Id.* at 10.

135. *Id.* at 3. The pretended diversity, the concocted arrest, the reliance on raising the issue in chief as a reply to a defense, the whole set of improbable scenarios, has been termed by one writer a veritable “Monty Python sketch.” See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 209 (1994).

and almost speculatively.

What should the Dorrites have done? In retrospect, we can say that an individual voter, having conveniently moved out of state, might have brought a direct challenge to Rhode Island's suffrage law, in a suit in equity. Copious salient evidence was indeed adduced revealing the history and nature of Rhode Island's suffrage, and the extent of its unfairness.<sup>136</sup> An action at law should have been understood to be unhelpful, and the case should not have gone to a jury.<sup>137</sup> Injunctive relief should have been sought. Instead of the militia officers joined as defendants in the actual suit, the Dorrites should have joined state electoral officials competent to halt enforcement of Rhode Island's property qualification, at the point of registration, or even at the polling places.<sup>138</sup>

Chief Justice Taney himself had once stressed the necessity for this typical sort of "officer suit" in equity cases challenging some state act or law. In his well-known opinion in the *Charles River Bridge* case, Taney had stated, "But this court can make no decree which can relieve the complainants,

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136. TRANSCRIPTS OF RECORD, 66-105.

137. Cf. TRANSCRIPTS OF RECORD, *supra* note 86, "Case No. 115," orig. p. 189. See Howard's report, *Luther*, at 1, stating that this case was brought to the Court on a difference of opinion, some of the Justices having felt that the case should not have gone to the jury. I take this to mean that the Justices perceived that, if properly brought as a challenge to Rhode Island's suffrage, the case would have been in equity. The "difference of opinion," like today's certification of a question to a higher court, was provided for in the First Judiciary Act, Section 19, on the assumption of a suit in equity.

138. Chief Justice Taney himself had pointed out the necessity for such joinder in equity cases. He stated.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

*Charles River Bridge*, 37 U.S. at 462.

because there are no parties before it capable of obeying an injunction.”<sup>139</sup> After all, equity acts *in personam*, on threat of contempt. In any injunction suit brought by a Dorrite voter, key legislators and responsible electoral officials should have been joined. So also the very registrar who turned away the plaintiff voter, to provide a sense of standing and help to differentiate a private bill from a public action.

Even with this, our hypothetical bill in equity was unlikely to succeed in the Taney Court (for reasons which, however obvious at this point in our discussion, will become even clearer as we proceed). Nor were later Courts much better. After the turn of the century, the Fuller Court would be confronted with *Giles v. Harris* (1903),<sup>140</sup> a suit challenging discriminatory administration of a state’s suffrage. The registrar in Giles’ district would not enter Giles’ name on the rolls because Giles was black. The Court, by Justice Oliver Wendell Holmes, held that Giles’ case must be dismissed—on the inexcusable ground that relief in a case of “great political wrong”<sup>141</sup> was beyond the powers of a court sitting in equity. I say, “inexcusable” because we know that the powers of a federal court sitting in equity are much greater than Holmes imagined,<sup>142</sup> and were so even in Holmes’ day.<sup>143</sup> Had *Luther* gone the other way it would have furnished the major precedent that would have saved the *Giles* Court from the opprobrium of history.

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139. *Id.*

140. *Giles v. Harris*, 189 U.S. 475 (1903).

141. *Id.* at 487.

142. See Louise Weinberg, *Holmes’ Failure*, 96 MICH. L. REV. 691, 695. 722-23 (1997) (concluding that Holmes’ intellect was so bound up with the common law and its myriad clever defenses that he failed to see the triumph of equity even as it was in his day.).

143. See equity cases reviewed *in extenso* in *ex parte Young*; 209 U.S. 123 (1908) (discussing antebellum and post-bellum injunction suits against state officials).

### 7. Reading Luther Narrowly: Political Questions

*Luther's* broad holding—that courts may not enforce the Guarantee Clause of Article IV of the Constitution of the United States—is troubling to those who tend to fear judicial erasure of any part of the Constitution. The amendment process is prescribed for such a purpose. Yet *Luther* held that, in courts, the Guarantee Clause is self-annihilating because, while offering no judicial remedy, it triggers a judicial defense—a blanket defense that defeats the Guarantee Clause in all cases. This means, for example, that a state may be oppressed by a tyrant governor who prorogues its legislature and governs by decree, but the tyrant governor cannot be made to defend his tyrannical powers in court—at least, not under the Guarantee Clause.

Reading the case narrowly, however, we might see Chief Justice Taney as holding in *Luther* that, however useful the Guarantee Clause might be in other cases, it could not be used to decide the “political question” of the legitimacy of a state government. We should pause to consider that question in its own terms, which are remarkable. What else is the Guarantee Clause *for*?<sup>144</sup>

That a state government is republican in form, Chief Justice Taney would assure us, is guaranteed *exclusively* by Congress.<sup>145</sup> (In cases of violence, Taney had to acknowledge—at great length—that the guarantee also becomes the business of the President.)<sup>146</sup> But the guarantee, for Chief Justice Taney, was quite separate from its enforcement.

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144. See, e.g., Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J. L. & LIBERTY 371 (2007).

145. *Luther*, 48 U.S., at 42.

146. *Id.* at 43.

According to Taney, insofar as the legitimacy of a state government is in question, that is a political question, exclusively for Congress. It is the Constitution itself that confides this question to Congress. Congress's exclusive role is to be found, not in the Guarantee Clause, but in Article I. Under Article I, Section 5, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."<sup>147</sup>

In Taney's view, the constitutional guarantee of a republican form of state government is effectuated solely when Congress is considering debarring a member from taking his seat. At that moment Congress determines whether the newly-elected member is a representative of a state enjoying a republican form of government. This determination is necessarily exclusive, discretionary and final. Thus there can be no judicial review of it.<sup>148</sup>

Taney's logic here, insofar as it merges Congress's power to assess the qualifications of a new member with a presumed power to determine the republican form of a state's government, is hardly convincing. The question before Congress, whether or not to seat a new member, undoubtedly could raise a question about the *member's* legitimacy *qua* elected representative, but it is a leap of logic for Chief Justice Taney to have concluded that the power to decide whether to admit a new member is also a power to decide whether a state is legitimate. One can imagine a scenario in which a member is admitted precisely because the state's had abandoned a republican form of government, and the prospective member the last representative properly elected. It is an even larger leap of logic to have posited that such a power not only resides in Congress, but in Congress *exclusively*, because Article I makes each House the sole judge of the qualifications of its members. However, Article I does not say anything about a "sole" power to judge the qualifications of members of either house. Although in the impeachment clauses of Article I, the

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147. U.S. CONST. art. I, § 5.

148. *Luther*, 48 U.S., at 42-43.

framers use the emphatic word, “sole,”<sup>149</sup> that word does not appear in that Article’s clauses about the power to judge the qualifications of members.<sup>150</sup>

#### 8. *Powell v. McCormack*

This very question, about the justiciability of a decision by Congress to exclude a new member, arose, as it happens, some 120 years after *Luther v. Borden*, in the interesting case of *Powell v. McCormack*.<sup>151</sup> There, Adam Clayton Powell, a representative elected in his New York district, was “excluded” from Congress. That is, he was not permitted to take his seat. It appears that Powell had with inadequate justification kept his first wife on his official payroll.<sup>152</sup> But having met the Constitution’s requirements for election to the House of Representatives, Powell *was* an elected member of the House of Representatives. Thus, in effect, Powell was expelled on a motion to exclude. Had Congress understood its vote as a motion to expel, the vote of the House, it was suggested, might have been otherwise.<sup>153</sup>

Chief Justice Warren, in what may have been his last great opinion for the Court, did not dwell on this apparent irregularity. He held, among other things, that the “political questions” doctrine was no bar to adjudication of the legality of Powell’s exclusion from the House. In other words, the House’s decision not to seat a member *was* justiciable.

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149. Article I, Section 2, provides: “The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. Article I, Section 3 provides: “The Senate shall have the sole Power to try all Impeachments.”

150. Article I, Section 5, provides: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . .”

151. 395 U.S. 486 (1969).

152. See <http://www.greatblackheroes.com/government/adam-clayton-powell-jr/> (accessed June 18, 2017): “In 1967, a House committee suspended Powell’s third wife, Yvette Diago, and accused her of being on the House payroll without doing any work. Diago, in fact, admitted that she had moved to Puerto Rico in 1961, but was paid from Powell’s Congressional payroll from that time until January of 1967 when the allegation came to light and she was fired.”

153. *Powell*, 395 U.S., at 506-07.



*Luther v. Borden* was not mentioned—either in the Chief Justice’s opinion or in Justice Stewart’s dissent. To be sure, the legitimacy of the government of New York State was not an issue, nor was the state’s suffrage. However, Chief Justice Warren’s opinion would have worked as well had Powell been—let us say—a newly-elected senator in Louisiana, in the days when Huey Long was still running the state from Washington D.C. In fact, in 1935, President Roosevelt considered a national takeover of Louisiana to oppose Long, then Roosevelt’s chief rival in political popularity. The idea was to launch a House investigative committee, preparatory to some legal attack, under cover of Article IV’s national guarantee to each state of a republican form of government. However, Long’s dictatorship during the Great Depression was benign—indeed, beneficial. Under Long, Louisiana developed a distinguished university, much-improved infrastructure, employment opportunities, and more.<sup>154</sup> Roosevelt, ever an astute politician, backed off, feeling that Huey Long was too popular to take on. Long would be assassinated that same year.<sup>155</sup>

Chief Justice Warren referred to the historical precedent of the repeatedly-elected and excluded English parliamentarian, John Wilkes.<sup>156</sup> Like Adam Clayton Powell, Wilkes also was under a cloud. Repeatedly elected, he was repeatedly denied his seat. Wilkes, a journalist, had criticized King George III. After a pornographic essay by Wilkes was read in Parliament, Wilkes was expelled. He fled to France, and became a symbol of liberty. Wilkes’ long struggle to take his seat in Parliament made him a hero to Americans. They named their children after him. Eventually, Parliament yielded and Wilkes was seated. Chief Justice Warren reasoned that, like Wilkes, Powell had been elected by his constituency, and, since he, Powell, met all Article I requirements of the office, his voters had a right to be represented by the person whom they had

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154. See, e.g., T. HARRY WILLIAMS, HUEY LONG 492-524 (1981).

155. The story is well told in Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TUL. L. REV. 1 (2008).

156. *Powell*, 395 U.S. at 523, 528-32. For recent comment on John Wilkes’ expulsion from Parliament, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

elected.<sup>157</sup> The Constitution, the Court held, did not make the House a judge of a member's character or past conduct, but only of his or her fulfillment of the requirements stated in Article I. As for the Guarantee Clause, it was pleaded in *Powell*, but the Court declined to reach the Clause's possible relevance.<sup>158</sup> Instead, the Court confined itself simply to the constitutional text and to Wilkes's precedential struggle.

What Taney achieved in *Luther* was a rather tricky exercise in sleight of hand. In effect, taking advantage of the strained pleadings, he was able to hypothesize an irrelevant and falsely exclusive decision-making scenario to justify his refusal to decide the question actually presented,<sup>159</sup> whether or not the Charterite government of Rhode Island, elected by an electorate in which suffrage was denied to sixty percent of adult white males, was "a republican form of government." Although it is not clear that a wrongly-arrested person is the party plaintiff we would choose, we should think it imperative that any individual aggrieved by denial of the right to vote, a denial that, under changed circumstances, had become arbitrary and irrational, and any class of individuals aggrieved by such a thing, should have a right to challenge it in a court of law. Of course, that is what *Baker v. Carr* would eventually hold.<sup>160</sup>

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157. *Powell*, 395 U.S. at 550. Certain voters were joined as plaintiffs in Powell's suit. The difficulties of the case had to do with the defendant and the related remedial difficulties the case presented. *See id.* at 567-68 (Powell, J., dissenting).

158. *Id.* at 521 n.41.

159. *See* Michael A. Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377, 380 (1967) (assuming that the issue for the Court in *Luther* was to decide between two rival governments, but pointing out that, by the time the Supreme Court confronted that issue, it was purely "academic").

160. *Baker*, 369 U.S. at 186; *see infra* Part 11.

9. *Political Questions and the Guarantee Clause  
after Luther*

The “political questions” doctrine is a powerful door-closer, but it was never intended to close the door to vindication of the rights of individuals. As we have been reminded, Chief Justice Marshall created the doctrine in the great case of *Marbury v. Madison*.<sup>161</sup> Marshall made plain that deference to the political branches, in matters not within their sound discretion, is inconsistent with our constitutionalism. For example, a decision by Congress to declare war would be non-justiciable. But a decision by a local draft board to punish protesters against that war by drafting them, in violation of their right of free speech, *would* be justiciable. So also would be any deprivation of the statutory rights of any draftee. At bottom, deprivations of statutory rights by government, state or federal, are deprivations of liberty or property, and are violations of due process as well as of statutory rights.<sup>162</sup>

It is heartening to all who value the American institution of judicial review that, after the Civil War, the Supreme Court began to process Guarantee Clause cases on their merits, *Luther* to the contrary notwithstanding. True, in the post-bellum cases, government misconduct is typically sustained

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161. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); see *supra* note 107 and accompanying text. Were the courts to be guided by Chief Justice Marshall, it would be understood that deference to a political branch is incompatible with the rule of law when *the rights of individuals* are justly asserted. Prudential considerations that counsel “deferential” doctrines to impede the assertion or vindication of individual rights tend to share features of generality and speculativeness, which should unfit them for judicial use. Comity, deference, exclusive powers, the “floodgates” argument, canons of statutory construction that frustrate the very purposes of a statute—all exist at a remove from the particular case. They defeat just claims and diminish the rule of law. In my view, the sort of general rule that *should* apply in a case of actual violation of individual right is probably of the class of rules of which the most prominent member is *ubi jus ibi remedium*.

162. Cf. Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057 (2013) (arguing that due process requires that law be chosen rationally, applied rationally, and enforced rationally, over and above the requirement that law be rational in itself).

anyway, as not in breach of the guarantee.<sup>163</sup> Substantive outcomes are not altered. This interesting disregard of Chief Justice Taney's reasoning appears as early as the late Reconstruction period,<sup>164</sup> and may reflect only that federal-question jurisdiction had become available. It could also reflect a fastidious judicial rejection of the work of the discredited author of *Dred Scott*. The most constructive resort to the Guarantee Clause after *Luther*, albeit in a case that did not involve the suffrage, appears in Justice Harlan's celebrated dissent in *Plessy v. Ferguson*.<sup>165</sup> Justice Harlan challenged the majority's approval of *de jure* racial segregation as inconsistent with the Guaranty Clause, writing:

"Slavery, as an institution tolerated by law, [has] disappeared from our country; but there [should not] remain a power in the states, by sinister legislation, . . . to regulate civil rights, common to all citizens, upon the basis of race. . . . Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government. . . ."<sup>166</sup>

Indeed, by the 1890s, Taney's reading of the Guarantee Clause was more or less in desuetude. However, in 1912, The Supreme Court handed down an opinion amounting to an endorsement of the most extreme reading of *Luther*, rendering the Guarantee Clause wholly non-justiciable. That occurred in 1912, in the *Pacific Telephone* case.<sup>167</sup> That case was a

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163. See, e.g., *Att'y Gen. of Mich. v. Lowery*, 199 U.S. 233 (1905) (state-level districting of schools); *Taylor v. Beckham*, 178 U.S. 548 (1900) (state legislative panel determining contested elections for the office of governor); *Forsyth v. City of Hammond*, 166 U.S. 506 (1897) (state judiciary setting city boundaries); *Duncan v. McCall*, 139 U.S. 449 (1891) (state legislature enacting certain criminal statutes); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (state retaining exclusively male suffrage).

164. See, e.g., *Happersett*, 88 U.S., at 162.

165. 163 U.S. 537, 552 (1896).

166. *Id.* at 563-64.

167. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143 (1912) (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)) (broadly holding non-justiciable a taxpayer complaint claim under the Guarantee Clause). See also *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion) (holding that the Guarantee Clause presents a non-justiciable political question under Pacific States); *Marshall v. Dye*, 231 U.S. 250, 256-57 (1913) (same holding).

challenge, under the Guarantee Clause, to the constitutionality of a tax authorized by a voter initiative.<sup>168</sup> Citing *Luther* for the proposition that the Guarantee Clause is non-justiciable, the *Pacific Telephone* Court ordered the case dismissed for want of “jurisdiction.”<sup>169</sup>

#### 10. Luther Without Blinders: The Suffrage

There are more disquieting aspects of *Luther v. Borden* than I have thus far touched upon. Chief Justice Taney managed, in *Luther*, to do a bit of further damage, beyond any occasioned by his deletion of the Constitution’s guarantee of republican state governance. I do not mean only that he managed once again, in *Luther*, to destroy a part of national power, although that is also true.

The Court, by Chief Justice Taney, as we have seen, affirmed the judgment below in favor of the Charter government of Rhode Island, ruling that the case posed a “political question,” beyond the Court’s powers of decision. But of course the Court actually *did* decide the case by letting stand

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168. There is a body of plausible opinion that initiative and referendum—“direct democracy,” so-called—is inconsistent with the republican form of government—*representational* democracy—bequeathed to us by the Founders. See, e.g., Norman R. Williams, *Direct Democracy, The Guaranty Clause, and the Politics of the “Political Question” Doctrine: Revisiting Pacific Telephone*, 87 OR. L. REV. 979 (2009); Justin Henderson, Comment, *The Tyranny of the Minority: Is It Time to Jettison Ballot Initiatives in Arizona?*, 39 ARIZ. ST. L.J. 963 (2007); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191 (2005); Robert G. Natelson, *A Republic, Not A Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002) (discussion by an expert on the issue); Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994). For an interesting development criticized from the left by a proponent of plebiscites, see Kathleen Garbacz, Note, *Michigan Republicans’ Tactics to Evade Democracy Using Referendum-Proof Laws and Other Means*, 16 J. L. SOC’Y 197 (2014). Cf. Mary Beard, *Power to the People?*, TIMES LITERARY SUPPLEMENT (June 29, 2016) (raising the analogous question, *à propos* of the 2016 “Brexit” referendum, whether “[h]anding us a referendum once every twenty years or so . . . in a fog of slogans and rhetoric, and allowing us all, on both sides, to vent our various discontents and prejudices in a yes/no vote is . . . a way to reach a responsible decision. . . . [or] a way to re-empower a disempowered electorate”).

169. *Pac. States*, 223 U.S., at 150.

the Charter government in Rhode Island.<sup>170</sup> In so doing, the Court left unremedied the real problem in *Luther*<sup>171</sup>—the disenfranchisement of unlanded adult white males in Rhode Island.<sup>172</sup>

Leaving this grievance to fester was hardly an inevitable disposition of the case, however awkwardly the grievance was presented in *Luther*. To accomplish this, Chief Justice Taney shrewdly focused *not* on the very real unsolved problem of the disenfranchised white male residents of Rhode Island, but rather on a false problem—false because it never existed: the supposed problem of a two-government state. In fact, the Charterite government was securely and solely governing Rhode Island throughout Dorr’s clamorous little rebellion, and at the time of the allegedly wrongful arrest, and so the Circuit Court ruled.<sup>173</sup> Taney disingenuously stated outright that the Circuit Court below had ruled on the question, which of two existing rival governments was the legitimate government of the state.<sup>174</sup> In fact, that court had expressly declined to do

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170. See Note, *Political Rights*, *supra* note 105, at 1128 (arguing that the *Luther* Court succeeded in insulating the fairness of the suffrage from judicial scrutiny).

171. For oral arguments before the Supreme Court at the time of an earlier draft of this writing, on the issue that was the real issue in *Luther*—the problem of entrenched rural power—see Oral Argument, *Wittman v. Personhuballah*, 2016 WL 1090257 (U.S.) (No. 14-1504); Oral Argument, *Heffernan v. City of Paterson*, 2016 WL 524811 (U.S.) (No. 14-1280). The Court unanimously disposed of *Wittman* on standing grounds, avoiding decision of the voting rights issue. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016). More recently, however, see *Gill v. Whitford*, 2017 WL 1106512 (S.Ct. 2017) (contemplating hearing on the merits in a case of political gerrymandering in Wisconsin).

172. The suffrage in the United States at the time was generally limited to white males. Rhode Island was not unique in this respect. However, as Justice Curtis pointed out, dissenting in *Dred Scott*, from time to time, a state had permitted freedmen to vote. *Dred Scott v. Sandford*, 60 U.S., at 564 (Curtis, J., dissenting).

173. TRANSCRIPTS OF RECORD, *supra* note 86, at 23 “And the court, . . . refused to give the said instructions or to admit in evidence the facts offered to be proved by the plaintiff, . . . and did rule that the [Charter] government and laws, . . . were in full force and effect as the . . . government . . . of Rhode Island, and did constitute a justification of the acts of the defendants. . . .”

174. *Luther*, 48 U.S., at 35.

so.<sup>175</sup>

Addressing his imaginary two-government case, Chief Justice Taney warned darkly that judicial intervention would threaten the orderliness and stability of civil society within the state. Adjudication would necessarily bring about chaotic conditions. Officials would cease to have authoritative governing power, and the police would cease to keep order, not knowing which government's laws to enforce,<sup>176</sup> or which officials were the true officials.<sup>177</sup>

Yet such confusion would seem an unlikely consequence of judicial review of even a real two-government case. When the parties have put their dispute before a court, they are seeking a final decision by an arbiter, a decision by which both are more or less resigned to be bound, as athletes are more or less resigned to bow to the decisions of umpires. A judicial decision identifying the legitimate government in a two-government case would self-evidently allay, rather than aggravate, a conflict.

The glaring exception that proves the rule is *Dred Scott*. That case was intended to settle for good the question whether slavery should be extended to the remaining territories.<sup>178</sup> *Dred Scott's* answer was that slavery *must* be permitted in the territories, and indeed in the "free" states as well, at least insofar as Congress might wish to abolish slavery in the free states. The Fifth Amendment protects property rights in the whole nation, and in antebellum thinking that included slave "property." By stripping Congress of power to come to a compromise on the question, *Dred Scott* became a chief cause of

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175. TRANSCRIPTS OF RECORD, *supra* note 86, at 38-39.

176. *Id.* at 1, 38-39.

177. For an actual struggle over the question whether officers remain officers *de facto* after arguable displacement, see *State v. McFarland*, 25 La. Ann. 547 (1873).

178. *Cf.* James Buchanan, *Inaugural Address* (Mar. 4, 1857), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 430, 431 (James D. Richardson ed. 1897) (assuring the nation that the Supreme Court had the matter in hand and would settle the question of slavery in the territories for good). Buchanan is now widely known to have been in correspondence with two of the Justices.

the Civil War.<sup>179</sup> *Dred Scott* to the contrary notwithstanding, adjudication is probably the best mechanism we have to provide an answer—certainly in a case in which a two-government case should arise—and thus to settle, rather than augment, the conflict.

Taney also argued that a ruling in favor of the Dorrites could nullify all pre-existing laws and taxes.<sup>180</sup> This awful doom was as imaginary as the aforementioned chaos. A state does not nullify its pre-existing laws when it redistricts, reapportions, or otherwise revises its suffrage. Even when the said laws might have been enacted by a government held to have been illegitimate, expedients suggested by Justice Brennan in *Baker v. Carr*,<sup>181</sup> and in Justice Woodbury's *Luther* dissent,<sup>182</sup> would tend to preserve the legal *status quo* or provide an orderly transition. The experience of even war-ravaged nations is that, in the main life goes on, employees report for work, police report for duty, performing artists gather for rehearsals,<sup>183</sup> stores open. If only in sheer inertia, unless and until driven to flee, a populace keeps calm and soldiers on.

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179. The argument is spelled out in Weinberg, *Dred Scott and the Crisis*, *supra* note 40, at 116-17 (introducing the argument that *Dred Scott* was a leading cause of the Civil War).

180. *Luther*, 48 U.S., at 38-39.

181. *Baker*, 369 U.S., at 219-20.

182. *Luther*, 48 U.S., at 57-58.

183. For a recent illustrative account, *see, e.g.*, PAUL DU QUENOY, *STAGE FRIGHT: POLITICS AND THE PERFORMING ARTS IN LATE IMPERIAL RUSSIA* (2013).



11. *Baker v. Carr*

In *Baker v. Carr*<sup>184</sup> the Warren Court, by Justice Brennan, struck down Tennessee's apportionment of its legislature—that is, the districting of its suffrage.<sup>185</sup> In effect, the Court contemplated that the three-judge federal court below would order reapportionment of the state legislature before the next election. It was a tremendous event in constitutional history.

The *Baker* Court held that the legitimacy of a state's allegedly malapportioned legislature was reviewable after all, *Luther v. Borden* to the contrary notwithstanding.<sup>186</sup> Justice

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184. 369 U.S. 186 (1962).

185. *Baker*, 369 U.S., at 209, 237. For a recent discussion of the relation between *Luther* and *Baker* with respect to the problem in *Baker* of political gerrymandering, see Ari J. Savitzky, Note, *The Law of Democracy and the Two Luther v. Borden: A Counterhistory*, 86 N.Y.U. L. REV. 2028 (2011). The author makes interesting use of Justice Woodbury's opinion, reportedly a dissent, although justly terming it a concurrence, correctly viewing Woodbury's argument from democratic theory as supporting Chief Justice Taney's view of the non-justiciability of the question, which of two state governments is legitimate. *Id.* at 2043. Woodbury was emphatic that the Court "can never with propriety be called on officially to be the umpire" in such a dispute. *Luther*, 48 U.S., at 51. See also, e.g., Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006).

186. In *Davis v. Bandemer*, 478 U.S. 109, 126-27 (1986), the Supreme Court squarely held that political gerrymandering is subject to constitutional challenge, although the Justices differed on the standards that should govern such challenges. Since then, however, while *Bandemer* ostensibly remains good law, the Court has declined to strike down political gerrymanders. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth*, the plurality opinion for the Court again decried a lack of manageable standards for redistricting cases. *Vieth*, 541 U.S. at 267. For recent commentary see, e.g., Michael Parsons, *Clearing The Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107 (2016); Easha Anand, *Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 CAL. L. REV. 917 (2014); J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543 (2011). On the other hand, the Court is committed to strict scrutiny of racial gerrymandering. See *Shaw v. Reno*, 509 U.S. 630 (1993). But given our identity politics, it is becoming apparent that racial gerrymandering is entangled with political gerrymandering. See Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L.

Brennan, for the Court, felt it necessary to deal with *Luther v. Borden*, and found that that case was no obstacle. American courts, with this, and under the Voting Rights Act of 1965,<sup>187</sup> have been scrutinizing state redistricting ever since.<sup>188</sup>

Indeed, the merits of challenges to redistrictings were being reached long before *Baker*.<sup>189</sup> The Supreme Court's recent attempt to gut the Voting Rights Act, striking down its Section 4(b), which had furnished the conditions for imposition of the pre-clearance requirement of Section 5,<sup>190</sup> cannot alter the fact of judicial power under the Equal Protection Clause. And, notwithstanding the apparently dispositive distinction drawn by Justice Brennan between the Equal Protection Clause and the Guaranty Clause, in no important respect is *Baker* distinguishable from *Luther*, insofar as the two cases deal with entrenchment of a rural interest in the state legislature through effectual restriction of urban suffrage.<sup>191</sup>

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REV. 553 (2011).

The inseparability of racial from partisan gerrymandering is also becoming apparent to the Justices. See Oral Argument, *Wittman v. Personhuballah*, 2016 WL 1090257 (U.S.) (No. 14-1504). at 6 (Chief Justice Roberts posing the question). The Court punted in *Wittman*, unanimously disposing of the case on standing grounds. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

187. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 et seq.).

188. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016) (sustaining the Arizona Redistricting Commission's packing of districts with minority voters when done in good-faith compliance with the Voting Rights Act of 1965). What seems to be blocking judicial review now is not the "political-question" doctrine as such, or a lack of manageable standards, but an inability of the Court to distinguish racial gerrymandering from political gerrymandering. See Oral Argument, *Wittman v. Personhuballah*, *supra* note 186 (question by Chief Justice Roberts). That being so, in due course it may be necessary for the Court to begin to recognize the problem inherent in *all* gerrymandering: the problem of entrenchment.

189. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959); *Colegrove v. Green*, 328 U.S. 549 (1946); *Wood v. Broom*, 287 U.S. 1 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932); *Hawke v. Smith*, 253 U.S. 221 (1920); *Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Swafford v. Templeton*, 185 U.S. (1 Cranch) 487 (1802).

190. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

191. *Baker*, 369 U.S. at 220.

*a. The Fourteenth Amendment Saved*

And yet Justice Brennan ruled that there *was* a difference. He distinguished *Luther*. Justice Brennan *distinguished Luther*; he did not overrule it. Justice Douglas, concurring, disagreed on the point, taking the view that *Luther* might as well be dispensed with.<sup>192</sup>

In coming to the rescue of *Luther*, Justice Brennan could draw only a rather weak distinction between *Baker* and *Luther*. *Baker*, he simply said, relies on the Equal Protection Clause, whereas *Luther* had relied on the Guarantee Clause.<sup>193</sup> In support of this he could only add that, although manageable standards had been thought unavailable under the Guarantee Clause, courts possessed quite manageable standards for cases under the Equal Protection Clause.<sup>194</sup> But this was also a bald and unconvincing assertion. Brennan might have argued that the Equal Protection Clause became available only after the enactment of the Reconstruction Amendments, and so could have been distinguished, since after-enacted, as supplying the deficiencies of the Guarantee Clause. Yet Brennan did not make this argument. He strained to state a difference *without* a distinction. He strained to save *Luther* as *in no way modified*. But why strain to save *Luther* at all?

Let us pause for a moment to consider a plausible possibility, one which Justice Douglas, dissenting, seems not to have discerned, despite his usual penetration. Justice Brennan was explicit, in *Baker*, that one of the governmental acts that needed to be protected from judicial scrutiny as a “political question” was *the process by which constitutional amendments take effect*. This subject is not readily apparent to the casual reader of Brennan’s opinion, opaquely captioned as the

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192. *Id.* at 246.

193. Justice Douglas, concurring, expressed the view, *id.* at 297-98, that this a distinction that made little difference, although he acknowledged that equal protection seemed to make a challenge to political malapportionment more a question of individual right than a public action; at the same time, the problem remained the same as the problem in *Luther*—the question whether one man’s vote should weigh more than another’s.

194. *Baker*, 369 U.S. at 223.

amendment process is, as “Validity of enactments.”<sup>195</sup> Consider that the Fourteenth Amendment had been ratified in 1868, by states under military occupation, during Reconstruction. That Amendment’s invaluable grant of individual rights as against state governments could conceivably be struck down if its ratification should be held unconstitutional under the Guarantee Clause. This was *not* an unreal threat. The Fourteenth and Fifteenth Amendments were ratified by states arguably without a republican form of government, but instead, were ratified *coercively*, by states occupied by Union forces, under the Military Reconstructs Acts<sup>196</sup>—by a *military* form of government. Thus, for Justice Brennan, ringing in the Equal Protection Clause as fresh news in no way derogating from *Luther*, was preferable to overruling *Luther*’s neutering of the Guarantee Clause<sup>197</sup> to the extent the guarantee might pose a threat of judicial review of the forms of governments in the defeated South that had ratified the Fourteenth Amendment literally under the gun, and on threat of expulsion once again from Congress. Ironically, in this light, *Luther* turns out to have had a beneficent use after all.

*b. The Entrenchment Problem*

In the situation in Tennessee that gave rise to *Baker*, Tennessee had retained its traditional districting practices, giving each rural voter many times the political power of urban voters, thus denying urban voters, as the Court held, the equal protection of the laws.<sup>198</sup> The *entrenchment* of a permanently malapportioned legislature in Tennessee was obviously the direct consequence of malapportionment itself, in turn the

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195. *Id.* at 214. The obscuring quality of the caption, and its casual placement amid others, suggests that Justice Brennan did not want this item to be particularly noticed—for the same reason that he had included it.

196. Government of the Rebel States, ch. 153, 14 Stat. 428 (1867); Rebel States, ch. 6, 15 Stat. 2 (1867) These statutes are commonly referred to as the Military Reconstruction Acts.

197. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 426 (2001) (connecting this reservation in *Baker* with a need to legitimize the Reconstruction Amendments). The point was first raised, apparently, in Weinberg, *Political Questions and the Guarantee Clause*, *supra* note 109).

198. *Baker*, at 188.

direct consequence of political gerrymandering, in turn (to come full circle) the very manifestation of a desire to protect (*i.e.*, entrench) incumbencies.<sup>199</sup> Tennessee's agrarian legislature had repeatedly, after every decennial census, entrenched itself by bestowing undue voting strength upon its rural electorate. Thus, as Justice Clark memorably wrote, "The people of Tennessee are stymied."<sup>200</sup>

*Stymied*, indeed. Justice Clark might have added that a similar situation could be observed in other states throughout the nation, and that malapportionment affected elections not only to the statehouse, but also to the House of Representatives, and to the Presidency of the United States. To the Warren Court, this pathological injustice to the voters could *not* be allowed to present an unadjudicable "political question." The malapportioned states would have to be reapportioned.

Perhaps it is time to respect the views expressed in *Baker v. Carr* that political entrenchment by political gerrymandering, whether or not it can be seen as politics as usual, whether or not it is intended to protect incumbencies, and whether or not it is, in fact, racial gerrymandering, is a violation of the Constitution. Political gerrymandering is also an affront to certain cherished aspirations in a democracy. It is not enough simply to have a right to vote. There is also a right to have one's vote counted.<sup>201</sup>

Today, moreover, it may be possible to quantify the Court's workhorse concept of vote "dilution" in a meaningful way. A technique of counting "wasted votes" has been proposed, which, if not chimerical, might assist courts in identifying and

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199. For interesting recent discussion of the equal protection problem inherent in intentional political gerrymandering, see, e.g., Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551 (2014).

200. *Baker*, 369 U.S. at 259.

201. For characterization of the Supreme Court's post-*Baker* indifference to the problem of entrenchment in redistricting cases as "ineptitude," see Savitsky, *The Law of Democracy*, *supra* note 40, at 2028. ("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*.").

measuring abusive redistricting.<sup>202</sup> It has also become possible, if only at the state level,<sup>203</sup> to require redistricting to be done by an independent commission.<sup>204</sup> However, it is not clear that this technique defeats either entrenchment of incumbencies or political gerrymandering more generally.<sup>205</sup>

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202. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (arguing that the numbers of “wasted votes” in packed and cracked districts can be ascertained and can supply useful standards for long-awaited judicial review of entrenchment through partisan gerrymandering). *But see, e.g.*, Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, \_\_\_ TEX. L. REV. \_\_\_ (forthcoming 2017) (on file with the *Texas Law Review*) (concluding that it is for the political branches, in the main, to attack the problem of the formation of an oligarchy). For general discussion of the institutional question raised by Fishkin and Forbath, *see, e.g.*, Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016).

203. Bills in the 112th Congress proposing independent redistricting commissions in the states went nowhere. *See, e.g.*, H.R. 453, 112th Cong. (2011); H.R. 590, 112th Cong. (2011); H.R. 3846, 112th Cong. (2012); S. 694, 112th Cong. (2011).

204. *See, e.g.*, Arizona Ind. Redistricting Comm’n, 229 Ariz. 347, 275 P.3d 1267 (2012); *State Legislative Districts*, BALLOTPEdia, [https://ballotpedia.org/State-by-state\\_redistricting\\_procedures](https://ballotpedia.org/State-by-state_redistricting_procedures) (last visited Apr. 8, 2017) (“Independent commissions draw the lines for both state legislative and congressional districts in six states: Alaska, Arizona, California, Idaho, Montana and Washington. Specific membership requirements for these commissions vary from state to state. Generally speaking, however, these commissions do not include legislators or other elected officials.” *Id.*

205. *See generally* Justin Levitt, “All About Redistricting,” at <http://redistricting.lls.edu/>; *see, e.g.*, Reply Brief for Appellants, *McCrorry v. Harris*, 2016 WL 6769006 (2016) (No. 15-1262) (discussing this and related issues).

12. *A Piece of a Puzzle*

What motivated Chief Justice Taney's meretricious opinion in *Luther*? While purporting to insulate courts from "questions in their nature political,"<sup>206</sup> did Taney have some political project of his own in view? Probing *Luther v. Borden* at a deeper level, I would suggest that—beyond its permission to malapportioned state legislatures to entrench themselves—*Luther* has a darker side.

We have already seen that *Luther* functioned to insulate disproportionate rural voting strength from judicial oversight. We can see that the Chief Justice's opinion in *Luther* left in place, with no chance of judicial remediation, significant state disenfranchisements of urban citizens, as well as of rural citizens too poor to have holdings in land. In the slave states, an enfranchised rural class might have included some landowners too poor to own slaves. But even allowing for such possibilities, *Luther* functioned to pump up land-rich voting strength, and this necessarily entrenched the *slave* states' pro-slavery legislatures. In the slave states, this entrenchment of elite rural power made possible the stifling of the states' antislavery urban and hill-country voices in state government, while it created and supported a countryside aristocracy, very like the rich gentry depicted in the novels of Jane Austen.

Interestingly, this oligarchy-forming consequence of suffrage arrangements such as Rhode Island's were well understood at the time in the halls of Congress. Consider the following remarks from a House Report of 1839:

We may shrink from the idea of an aristocracy; but the best historians inform us that there was never yet a commonwealth without . . . its order of hereditary nobility . . . And that there is in this country . . . unavoidably produced by the power, patronage, and influence inseparable from the possession of all the great and minor offices of government, we must be dull indeed not to know. . . . Your committee are too deeply impressed with the importance of the subject . . . to close

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206. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

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this report without presenting at least a partial view . . . of the dangers by which a free people are encompassed, without hope of escape, when the elective franchise is suffered to fall into the hands of those who are at all times the fit and ready instruments of ambitious individuals. Power over the people and their rights, in a free State, can only be obtained, in the first instance, by the aid of voters.<sup>207</sup>

We can trace the effect of skewed slave state suffrage at all levels of government. The planter power that was built into the suffrage of states with property qualifications for office (or other ways of weighing the *elite* rural vote more heavily than other votes, whether through real property qualifications or by overtly malapportioned districting, had pervasive effects on government.

Consider the government of the state. Obviously the governor, being elected by the majority of those voting, is directly affected by a suffrage available only to land-owning voters. The nomination and election of a pro-slavery governor of a slave state was clearly in the hands of the planter class. There would be the important contribution of the yeomen, of course. But, like the rural poor with neither a slave or a vote, the yeomen who had a vote would—as the Civil War was to demonstrate—fight and die for white supremacy, and were as likely to vote for it. Bear in mind that it is the governor who can veto a bill or sign it into law.

Also self-evidently, a planter-favoring suffrage produced pro-planter legislatures. In Rhode Island, elite rural voting power was further enhanced by the number of state representatives the planters and yeomen of the state could vote *for*. Under the terms of Rhode Island's old royal charter, every incorporated village and town was entitled to have the same number of representatives in the state's General Assembly as Providence was accorded. A small plantation could incorporate as a village and be allotted two representatives in the General

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207. See B. Hazard, *Report of the Committee on the Subject of an Extension of Suffrage, House of Representatives* (1839) (referenced in TRANSCRIPTS OF RECORD, *supra* note 86, at 23).



Assembly. In Southern legislatures, the weight of the rural suffrage helped stifle anti-slavery urban, seaport, and hill country voices in the state legislatures, and thus in the very laws. Moreover, legislators have no quarrel with the suffrage that put them in office. In consequence, the South's pro-slavery legislatures could, and did, entrench themselves.

As for the state judiciary, obviously a planter-dominated suffrage in the South meant heavy planter influence in the states' elected judiciaries. This meant that the common law itself, in its bearing on slavery, became distinctive to the South.

It is reasonable to suppose that entrenched antebellum planter hegemony in the courts as well as the legislatures enshrined planters' customs, whether enacted by planters' legislatures and signed into law by planters' governors, or developed as common law by planters' chosen judges. In typical slave states, the presence of free blacks was outlawed.<sup>208</sup> Slaves were stripped of independent will in all matters.<sup>209</sup> There was a racial presumption of slavery, and the will of the slave was the will of the master. Except for occasional local law to the contrary, slave-states' laws put the slaves' very lives at their masters'—and perhaps other whites'—disposal.<sup>210</sup>

Now consider the federal government. The influences we have noted extended beyond the state to the federal government in Washington, D.C. The South's vital coalition with Northern Democrats—the banking, textile, and shipping interests that depended on Southern cotton—functioned as a bulwark of planter hegemony in the coalition that was the

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208. See *Luther*, 48 U.S., at 1 (Howard, Reporter, stating, that there were two cases on these facts brought up from the Circuit Court below; adding, "They were argued at the preceding term of the court, and held under advisement until the present." There was a similar reworking of the question for decision in *Dred Scott*. Originally conceived of by the Court as raising questions of jurisdiction, see *Dred Scott*, 60 U.S., at 518 (opinion of Catron, J.), the question was revised to deal with the constitutionality of the Missouri Compromise.

209. See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* (1996).

210. See, e.g., *Neal v. Farmer*, 9 Ga. 555, 582-83 (1851) (holding it not a felony to kill a slave).

Democratic Party. Stunningly, the malapportioned legislatures of the South were able, in coalition with Northern Democrats, to put the slave interest first even in the halls of the national government.<sup>211</sup>

Consider, first, the Senate. In antebellum days, and indeed until 1913, the *state legislatures* chose the state's senators. It was as late as 1913 that the Seventeenth Amendment was passed, requiring direct election to the Senate. Thus, the entrenched pro-slavery Southern legislatures were peopling the United States Senate with Senators *of their own choosing*. To a significant extent the antebellum Senate had become obedient to planter will. Furthermore, planter power in the Senate was much enhanced by the unamendable provision in the Constitution that accords two, and only two, Senators to each state.<sup>212</sup> This meant that less populous slave states like Arkansas or Delaware could assert planter interests in the United States Senate on a level of equality with the populous free states of the North.

Now consider the House of Representatives. Through the favored rural suffrage typical of the states—and not only those in the special plight of Rhode Island—planter power would have been reflected in the election of members of the House of Representatives in Washington, D.C. This effect was significantly enhanced not only by the planters' disproportionate voting strength, but also by the number of congressmen they could vote *for*. The Constitution's "Three-Fifths Clause"<sup>213</sup> provided that three-fifths of the slave population "counted" for purposes of representation in the House.<sup>214</sup> This, despite the fact that the slaves themselves

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211. For a current analysis, see 2 JOHN ASHWORTH, *SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC* 104 ff. (2007).

212. U.S. CONST. art. I, sec. 3.

213. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons."). The enumerated exceptions were for apprentices and Indians living within a tribe; the count was to be accomplished by decennial census. *Id.*

214. Nothing in *Luther* was needed to protect the three-fifths of slaves added to the voting strength of slave states by the Constitution itself. U.S.

could not vote. Moreover, the effect of the Three-Fifths Clause was magnified over time, as antebellum Northerners, in obedience to “gradual emancipation” laws, simply sold their slaves, literally, down the river<sup>215</sup>—while most Northern states denied the vote to freedmen living there.<sup>216</sup>

But we must not forget the President. The total population in the states determines each state’s number of electors in the Electoral College, but not as a simple proportion. The slave states had the benefit of the Three-Fifths Clause, inflating their voting strength. Their voting strength also benefited from the disproportionate representation of the smaller states in the electoral college. Moreover, from 1831 on, after a novel party nominating convention was held in Baltimore, the nominees for President and Vice-President were selected in national party conventions, the delegates to which were chosen by the political party organizations within each state, and thus by the predominant power within the state—which in the South was planter power.

Bear in mind that the President, almost always, for reasons we are beginning to understand, a Southerner or a South-leaning Northerner, had the naming of Justices of the Supreme Court of the United States, and the Judges of the lower federal courts as well. To be sure, the Senate can control the President’s judicial nominees, but, as we have also seen, in the antebellum period the South generally controlled the Senate. This was the South-dominated Senate which, until 1913, was elected by the rural-dominated state legislatures—in the South, planter-dominated state legislatures.<sup>217</sup>

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CONST. art. I § 2 clearly served as another pillar of slave-state power in Washington, D.C.

215. For recent discussion *see generally* CONGRESS AND THE EMERGENCE OF SECTIONALISM: FROM THE MISSOURI COMPROMISE TO THE AGE OF JACKSON (Paul Finkelman & Donald R. Kennon eds., 2008); Paul Finkelman, *States’ Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449 (2012); and other works of Paul Finkelman cited therein.

216. *Cf. Dred Scott*, 60 U.S., at 413-15 (Curtis, J., dissenting) (pointing out that black persons had an early right to vote in New York and New Jersey, and at the time of decision in *Dred Scott*, had the right to vote in New Hampshire and Massachusetts. Of course this implies that black freedmen lacked the right to vote elsewhere or in other times).

217. Recall that the state legislatures elected the state’s Senators until

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All of these arrangements had their effect, then, not only in the South, but in Washington, D.C., and not only in the Senate but also in the House; and in presidential elections, and, through South-leaning Presidents, with the consent of the South-leaning Senate, in the Supreme Court and indeed all federal courts. The Taney Court was nothing if not a states' rights Court, and not a few of its states' rights opinions could read as pro-South, pro-slavery opinions.

*Luther v. Borden* entrenched the (still persisting!) privileging of rural voters in the suffrage of the states, and in its day the privileging of *elite* rural voters, insulating that unfairness from judicial review. Through this mechanism, *Luther* worked to permit the South virtually to hold the strings of power in this country, in all branches, executive, legislative, and judicial, at all levels, state and federal.

This is a shocking discovery.

### 13. The "Slave Power"

*This, then was the "Slave Power."*<sup>218</sup> This was the mysterious force that yielded the persistent domination of the slave South in all three branches of the federal government throughout the antebellum period. This was the mysterious force that perplexed and frightened Northerners. "Mysterious" because the South was falling *behind*.

Of course the South was very rich—the region comprised one of the world's largest economies. And cotton was king. But the South was not advancing in the way that the developing, industrializing and urbanizing North was advancing. The South blamed its backwardness on the greed of Northern bankers and shippers. The prestige of Southern elites and the wealth of the region were not based on industries and cities, but on the possession of land and slaves. Southerners did not see that the blame for Southern backwardness, at root, lay, not so much with Northern predations as with the Southern commitment to slavery.

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the Seventeenth Amendment provided for direct popular election of Senators.

218. See generally LEONARD L. RICHARD, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION* (2009).

The South's population profited from immigration, but immigrants tended to want to go where the jobs were, where they would not have to compete with slave labor. So the 19th century flood of immigrants to this country was much more of a flood in the North than in the South. And the North's larger share of immigrants threatened Southern dominance in the national government. Political power, in a democracy, ultimately must depend on population.

Early in the period, John C. Calhoun presciently began arguing for a "concurrent voice" for the South as a minority. As the storm gathered, Calhoun published his *Disquisition on Government*, elaborating on this demand.<sup>219</sup>

To aggravate the South's difficulties, there was developing a sad change in the very nature of Southern dependence on slavery, a change that *needed* to be accommodated, from the South's point of view, in national politics. To win the embrace of the new reality by the national government, political power was of the essence. For, on the exhausted soils of the border states of the Old South, cotton had become a king in exile. More and more, the livelihood of the planters, dependent as ever on black slavery, was coming to depend on the awful business of breeding and selling the slaves themselves.

By the 1850s, planters in the border slave states were pushing hard for the extension of slavery into the Western territories, and were joined in their politics by sympathizers in the deep South. Since Western lands were not well adapted to plantation-style agriculture, the push for the extension of slavery into the territories seems to have been a push for an expanded *market* for slaves. The Kansas-Nebraska Act had opened up the unorganized territories to the possibility of slave-state status.<sup>220</sup> To be sure, the West seemed inhospitable to plantation-style agriculture. But Southerners entertained hopes that slaves would be needed for mining, domestic and

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219. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* (1851) (2015). See generally JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY: 1789-1861* (1930).

220. Kansas-Nebraska Act of 1854, 10 Stat. 277 (authorizing the people in the remaining Western territories to elect slave status, and repealing the Missouri Compromise of 1820 to that extent).

ordinary farm uses. It was partly to oppose the territorial extension of slavery—and to seek repeal of the Kansas-Nebraska Act—that Abraham Lincoln had come out of political retirement.<sup>221</sup>

To Northerners, the “Slave Power” that had achieved the Kansas-Nebraska Act, opening up the Western territories to slavery, seemed inexplicable. It is a measure of the force behind this mysterious Slave Power that on the very eve of the Civil War, with Southern grievance at its most acute, and the South threatening secession, the South still had the Senate and still had the Supreme Court. Secession would be precipitated only by the South’s loss of the Presidency.

In my view, the “Slave Power” is best understood, in the main, as a function of the solid South’s position in the coalition that was the Democratic party. But that begs the antecedent question of the solidness of the South. In writing this paper, I have come to think it more accurate to see the phenomenon as specifically *planter*, rather than Southern, dominance, and, more specifically, the dominance of the slave interest. The slave interest was abetted by Northern business and shipping interests in the cotton and tobacco trade, facilitated by the Democratic Party coalition, augmented in the House of Representatives and the Electoral College by the Three-Fifths Clause,<sup>222</sup> by the endowment of two senators for every state (without possibility of amendment,<sup>223</sup>) by a Senate chosen by the state legislatures, and by judiciaries populated by these forces.

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221. The story is told in Weinberg, *Dred Scott and the Crisis*, *supra* note 40.

222. U.S. CONST. art. I, § 2, cl. 3. This clause states:  
Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

223. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . . .”); U.S. CONST. art. V (“[P]rovided that . . . no State, without its consent, shall be deprived of its equal suffrage in the Senate.”).

But something more must be added to the account. Why was it the urban elites who rose up in the Dorr Rebellion? Why was it not the rural poor?<sup>224</sup> And here, the importance of the ideology of white supremacy may be the key. The country poor, who would become the brave soldiers of the Confederate army, are, I think, most plausibly understood as dignified in their very sense of selfhood by white supremacy.<sup>225</sup> The ideology of white supremacy also was current among both urban and rural elites, to be sure, but personal dignity in the upper classes could thrive on the additional nourishment of education and the wealth and social prestige that ownership of land and slaves could provide.

To anti-slavery observers, the predominance of the slave interest in all three branches of the national government, in the face of the superior and advancing wealth and population of the free states,<sup>226</sup> was intolerable—and beyond understanding. It was this feature of antebellum politics—the uncanny ability of the antebellum South, in its relative decline vis-à-vis the industrializing, urbanizing, flourishing North, time and again to control all three branches of the federal government—this persistent triumph of the backward South—that led

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224. I am grateful to Willy Forbath for the important counter-argument that enfranchising the rural poor would have made a difference in Southern and national politics. As always, he is very persuasive, but I do not share that view.

225. See Weinberg, *Dred Scott and the Crisis*, *supra* note 40, at 135 & n. 131.

226. See E. A. POLLARD, *THE LOST CAUSE* (1867) at 54-64 (discussing “The Material Decline of the South in the Union”); JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY: 1789-1861* (1930); Weinberg, *Dred Scott and the Crisis*, *supra* note 40 (arguing that slavery in the South determined the preference of immigrants to settle in the North, and seeing the consequent growth of Northern population as posing a threat to Southern political power in Washington, culminating in the South’s delusional struggle in the 1850s for new slave states to be carved out of the remaining territories, and, in the last agony of the crisis, in the South’s inability to prevent the election of Abraham Lincoln). Also convincingly positing that it was slavery itself that made the under-development and backwardness of the South inevitable, see the contemporaneous views of a Southerner, HINTON HELPER, *THE IMPENDING CRISIS OF THE SOUTH* (1857); see also Weinberg, *Dred Scott and the Crisis*, *supra* note 40.

Northerners to posit a mysterious “Slave Power.”<sup>227</sup>

It is not implausible to impute to Chief Justice Taney, as a conscious intention, these likely consequences of his opinion in *Luther v. Borden*. Such an intention would be consistent with Taney’s efforts, throughout his career, to further the pro-slavery interest, and in that interest to support the powers and autonomy of the states. But intended or not, from the day it was decided, *Luther v. Borden* necessarily functioned as a bulwark of the national power of the slave states.

Seeing *Luther* as the voting-rights case that it was, we can also see that, in shutting down litigation challenging undue rural voting strength, *Luther v. Borden* obviously functioned, in the antebellum slave states, to empower planter voting strength,<sup>228</sup>—that is, pro-slavery power.

To be sure, in myriad other ways, the political power of elite classes everywhere is obvious and explains itself. Numerous hypotheses plausibly suggest how it was that the Southern planter class came to dominate antebellum government, not only in the Southern states, but in Washington, D.C. There has been little consensus on the question, but the phenomenon of planter hegemony will always be unsurprising—it will always be easy to attribute to one or another social or political characteristic of the antebellum period. The contemporaneous observer, John Cairnes, quite rightly thought numerous factors lay behind planter hegemony, although he stressed the power of planter patronage.<sup>229</sup>

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227. See also THEODORE PARKER, *THE SLAVE POWER* (James K. Hosmer ed. 1916); II HENRY WILSON, *HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* (1874) (identifying and decrying planter hegemony even in national politics); LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860* (2000); HENRY WILSON, *HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* (3 vols. 1872) (studying the phenomenon of planter hegemony); but see DAVID B. DAVIS, *THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE* (1970) (taking the view that “the slave power” was a myth). There is little or no reference in these works to *Luther v. Borden*.

228. Southern yeomen, of course, also had the vote in property-qualification states, but would share the white-supremacy ideology of the planters and rural poor alike.

229. JOHN E. CAIRNES, *THE SLAVE POWER: ITS CHARACTER, CAREER, AND PROBABLE DESIGNS* (2d ed. 1863).



Eugene Genovese attributed planter power to adroit marriages and other alliances between planters and capitalists.<sup>230</sup> Alan Gallay focused on the enduring connection between land-ownership and political hegemony.<sup>231</sup> Other writers classify the old planter class with ruling elites in all societies throughout history. And, of course, there were differences among the states. In some slave states, the planters were less powerful than in others, and the views of Southern yeomen did not always coincide with the views of the planter grandees.<sup>232</sup>

*Conclusion: A Taney Court Mystery Solved*

This paper is not intended to explain the wellsprings of planter hegemony in the antebellum slave states. That question hardly wants for answers, as we have just seen. Although our reading of *Luther v. Borden* has identified that case's functioning, in effect, as one support of the antebellum phenomenon of planter power, and thus as one support of the curious power of the slave states in antebellum politics on the national as well as the state scene, other multiple complex causes and effects are undoubtedly involved in malapportioned local suffrage in national politics. Other causes of slave power in national politics certainly included the South's long participation in the Democratic Party coalition. We must remember, too, the well-anthologized states' rights cases handed down in the Taney Court period.

In light of our study of *Luther v. Borden*, it is hoped that that case—its prolix disingenuous discussions of political questions, of the Guarantee Clause, and of supposedly anarchic conditions to be brought about by the Supreme Court's settling of a vanished controversy—will seem a little less plausible to today's reader. And it is hoped that *Luther v. Borden* will

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230. EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* 191 (1967).

231. See generally ALAN GALLAY, *THE FORMATION OF A PLANTER ELITE: JONATHAN BRYAN AND THE SOUTHERN COLONIAL FRONTIER* 55-108 (1989) (discussing the political influence of the planter class). Gallay does not include *Luther v. Borden* or property qualifications for the suffrage in his study.

232. See, e.g., JAMES B. SELLERS, *SLAVERY IN ALABAMA* (Harriet E. Amos Doss ed. 1994).

become somewhat more comprehensibly the work of Chief Justice Roger Brooke Taney. We can now, if we will, see *Luther v. Borden's* darker side. We can see how *Luther* secured from judicial intervention the force that drove and nourished "the Slave Power," extending its reach over all branches of government at all levels, even in the face of the obvious and accelerating decline of the slave South. We can now discern the likely intentions of the author of that darkest of all Supreme Court cases, *Dred Scott v. Sandford*.