NOTE

Guaranteeing the Vote: Executive Pardon Power and the Guarantee Clause

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Article IV, Section 4 of the Constitution imposes on the United States government the duty to "guarantee to every State in this Union a Republican Form of Government." Many in the legal community have written on the impacts the Guarantee Clause may have on both the legislative and judicial branches. Yet few have discussed what effect, if any, the Guarantee Clause may have on the executive branch. This Note will examine the scope of the presidential pardon power and inquire whether a partial application to collateral consequences of state criminal convictions can be authorized under the Guarantee Clause of the Constitution. Specifically, this Note asks whether the conditional right to vote based on felony status can be minimized, or even eliminated, through a broad understanding of the pardon power and the President's duty to guarantee a "republican" form of government.

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INTRODUCTION

Article IV, Section 4 of the Constitution imposes on the United States government the duty to "guarantee to every State in this Union a Republican Form of Government."[1] Many in the legal community have written on the impacts the Guarantee Clause may have on both the legislative and judicial branches.[2] Yet few have discussed what effect, if any, the Guarantee Clause may have on the executive branch. This Note will examine the scope of the presidential pardon power and inquire whether a partial application to collateral consequences of state criminal convictions can be authorized under the Guarantee Clause of the Constitution. Specifically, this Note asks whether the conditional right to vote based on felony status can be minimized, or even eliminated, through a broad understanding of the pardon power and the President's duty to guarantee a "republican" form of government.

Part I contains a brief history of felon disenfranchisement laws and their modern-day applications.[3] Additionally, attention will be brought to the invocations of the Guarantee Clause during the Reconstruction period, when the federal government sought to counter the imposition of disproportionate and restrictive state voting laws. Lastly, this Note will center the presidential pardon power as a potential response to state felon disenfranchisement laws, focusing on a brief history of

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[1] U.S. CONST. amend. IV, § 4 ("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.").

[2] For an overview of the Guarantee Clause as a source of congressional power for voting rights, see Cormac H. Broeg, *Waking the Giant: A Role for the Guarantee Clause Exclusion Power in the Twenty-First Century*, 105 IOWA L. REV. 1319 (2020); 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); Franita Tolson, *"In Whom is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. 2041 (2021). Similarly, for further reading on the judiciary's role under the Guarantee Clause, see Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); James R. Brakebill, *Gerrymandering, Entrenchment, and "the Right to Alter or Abolish": Defining the Guarantee Clause as a Judicially Manageable Standard*, 44 W. NEW ENG. L. REV. 211 (2022); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

[3] *See infra* Part I.

government-issued clemency, the adoption of the pardon power into the Constitution, and the scope of this power.

Part II will outline three arguments for why the presidential pardon power's reach should extend to state crimes, but specifically be limited to restoring individual voting rights.[4] Principally, felon disenfranchisement laws are excessive and overbroad in their functions as collateral consequences of criminal convictions. Despite their ubiquity and apparent legal basis,[5] absolute disenfranchisement laws that fail to distinguish the severity of the felony and apply the appropriate punishment are inconsistent with the historical intent of the Fourteenth Amendment and the Guarantee Clause. Additionally, the justification for extending the pardon power comes from the expanded authority provided by the Guarantee Clause. The Guarantee Clause emerged as a powerful tool during Reconstruction to combat discriminatory voting restrictions. Thus, one should consider its application to felon disenfranchisement laws a viable approach given the laws' disproportionate impacts on Black and Hispanic voters.

Lastly, Part III will advocate for several paths pardon can take toward a newly expanded "voting restoration," including restoring the right to vote in federal elections, declaring an annual clemency proclamation, or instituting a system of "cloud cover pardons."[6]

I. BACKGROUND

Expanding the presidential pardon power over state disenfranchisement requires a proper understanding of what felon disenfranchisement laws do and why the pardon power is best suited to target those laws under the Guarantee Clause.

A. The History and Current Day Status of Felon Disenfranchisement

The first disenfranchisement laws in America appeared in the 1600s and were typically used as a punishment for morality crimes such as

[4] *See infra* Part II.

[5] *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (held that felon disenfranchisement laws were constitutional).

[6] *See infra* Part III.

drunkenness.[7] Disenfranchisement as a consequence of criminal conviction emerged as the United States gained its independence and the states established their governmental structures. From 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or permitted their statutory disenfranchisement.[8] Eighteen more states followed this trend by the time the states ratified the Fourteenth Amendment in 1868.[9] After the Reconstruction period ended, some southern states passed laws that disenfranchised those convicted of what were perceived to be "black" crimes, while those convicted of perceived "white" crimes did not similarly lose their right to vote.[10] By 1910, more than eighty percent of states had felon disenfranchisement laws.[11]

States normally have the power to determine the conditions under which voting privileges may be exercised, absent discrimination which the Constitution forbids.[12] These conditions can include qualifications based on residence requirements, age, and criminal records, among other characteristics.[13] Despite a recent movement towards the elimination of felony-based disqualifications for voting in various states, laws disenfranchising citizens convicted of felony offenses are still widely applied across the nation. As of 2020, states barred 5.2 million

[7] Angela Behrens, *Voting — Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

[8] Green v. Bd. of Elections of N.Y., 380 F.2d 445, 450 (2d Cir. 1967).

[9] *Id.*

[10] *See* Nathan P. Litwin, *Defending an Unjust System: How* Johnson v. Bush *Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 CONN. PUB. INT. L.J. 236, 238 (2003).

[11] Roger Clegg, *Perps and Politics*, NAT'L REV. ONLINE (Oct. 18, 2004), https://www.nationalreview.com/2004/10/perps-and-politics-roger-clegg/ [https://perma.cc/U8NT-9YAR].

[12] Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50-51 (1959).

[13] *Green*, 380 F.2d at 450.

Americans from voting due to their state felony convictions.[14] Those with felony convictions are disproportionately Black and Hispanic.[15]

As a state-imposed condition on voting, felon disenfranchisement laws attack the heart of American democracy. They authorize an overbroad, non-essential, and excessive punishment that fails to consider nuances between crimes, imposing political silence for a swath of felony crimes ranging from mere drug possession to violent crimes. The ability of the federal government to correct this disproportionate voting restriction and oversee state conditions on voting lies in the history of the Guarantee Clause.

B. Applications of the Guarantee Clause in Voting Contexts

The last time the Guarantee Clause was extensively used to address voting rights was during the Reconstruction period.[16] The Reconstruction Congress and Presidents brought renewed attention and a different interpretation of the Guarantee Clause that veered away from the restrained approach of prior federal officials.[17] In facilitating the re-introduction of Confederate states back into the Union, the Reconstruction Congress stretched the limits of its Article I powers beyond its apparent textual restraints.[18]

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[14] *Voting Rights in the Era of Mass Incarceration: A Primer*, THE SENT'G PROJECT (Jul. 28, 2021), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/NF84-QMXX] [hereinafter *Voting Rights in the Era of Mass Incarceration*].

[15] *See* Tanya Dugree-Pearson, *Disenfranchisement — A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 364 (2002).

[16] *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 778-85 (1994) (analyzing the Guarantee Clause's meaning of "republican government" through three periods of interpretation: the Founding Era, the Antebellum Era, and the Civil War Era); David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 705 (2020) (detailing how the Guarantee Clause was an empowering constitutional basis for Congress during the Reconstruction Period).

[17] *See* Louk, *supra* note 16, at 705-06, 712 ("Whatever the term 'republican government' may have conveyed at the founding, the Reconstruction Congress forcefully repudiated the notion that a republican government could tolerate widespread disenfranchisement and inequality — at least on the basis of race.").

[18] *See* Broeg, *supra* note 2, at 1329; Tolson, *supra* note 2, at 2048.

Congressional Republicans seeking a constitutionally legitimate way to achieve the goals of Reconstruction supported their legislative actions under the Guarantee Clause.[19] Using the Clause to justify Federal Reconstruction efforts in the South, Congress actively sought to extend its reach into traditional state powers and oversee the functions of state government.[20] During the Civil War, some members of Congress argued that the Guarantee Clause granted them the authority to assume complete jurisdiction over the southern states.[21] Others proposed provisional government to supervise the states and ensure the franchise in their respective boundaries. The growing consensus among members of the Republican Congress was that the Guarantee Clause was creating a duty, rather than an opportunity, to carry out these actions.[22] Congress's actions fundamentally redefined what a constitutionally "republican form of government" meant and highlighted how the government's application of the Guarantee Clause has always relied on a contemporaneous meaning of "republican government."[23] These expansive interpretations of the Guarantee Clause were a clear contrast to prior interpretations of the Clause.

In the Dorr Rebellion of 1841, warring sides in Rhode Island emerged as two competing state constitutions sought federal recognition under the Guarantee Clause.[24] The federal government was reluctant to engage in this conflict. President Tyler expressed hesitancy to exert his authority under the Clause,[25] and the Supreme Court outright distanced itself from Guarantee Clause issues by declaring them to be "nonjusticiable."[26] In contrast, the Reconstruction presidents Lincoln and Johnson relied on their interpretations of the Guarantee Clause to actively preserve a role for the executive branch during the state-

[19] *See* Chin, *supra* note 2, at 1565-68; Tolson *supra* note 2, at 2048-49.

[20] *See* An Act to provide for the more efficient Government of the Rebel State, ch. 153, pmbl., 14 Stat. 428, 428 (1867).

[21] Cong. Globe, 37th Cong., 2d Sess. 737 (1862).

[22] *See* Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 74 (1974).

[23] *See* Louk, *supra* note 16, at 711-15.

[24] *See* Amar, *supra* note 16, at 774-76.

[25] *See* Louk, *supra* note 16, at 702.

[26] *See* Luther v. Borden, 48 U.S. 1, 42 (1849).

building activities of Reconstruction. President Lincoln disapproved of a bill that would not offer the widest scope possible for executive action,[27] and President Johnson explicitly cited the Guarantee Clause in his presidential proclamations as justification for the establishment of provisional governments in the southern states.[28] Both Congress and the executive branch sought to expand their respective powers under the Guarantee Clause in the hopes of restoring the nation and guaranteeing the franchise to recently freed former slaves.

In the process of re-admitting the former Confederate states, federal actions were met with heavy resistance from the South. After the Civil War, southern states were already creating a de facto system of political inequality by implementing Black Codes.[29] In response, Congress passed the Reconstruction Acts of 1867 that premised federal intervention on the necessity to establish "loyal and republican State governments."[30] The First Reconstruction Act authorized federal intervention in the states' operations of their own state and local elections.[31] This action in itself cannot be justified solely by Congress's powers under Article I, Section 4 (the Elections Clause).[32] While the Elections Clause provides Congress with the power to regulate elections for federal representatives, it is silent about Congress's power, if any, to regulate elections of state officials.[33] The First Reconstruction Act went beyond a constitutional textual limitation and expanded its federal regulatory powers into overseeing state elections — which were traditionally overseen by state officials only — justifying those actions through the authority granted by the Guarantee Clause.

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[27] *See* Louk, *supra* note 16, at 709.

[28] Proclamation No. 38 (May 29, 1865), *reprinted in* 13 Stat. 760, 760-61 (1865).

[29] *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1217 (1992).

[30] *See* An Act to provide for the more efficient Government of the Rebel State, ch. 153, pmbl., 14 Stat. 428, 428 (1867).

[31] *Id.* § 6.

[32] U.S. CONST. art. I, § 4. ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[33] *See id.*

The history of the Guarantee Clause creates important context for the purposes of this Note, specifically that the meaning of "republican form of government" is to be understood contemporaneously and that the Clause has previously justified the extension of federal powers into the state system of voting. To revive the pro-franchise spirit of the Reconstruction period, the executive power to pardon in conjunction with the power bestowed under the Guarantee Clause can be used as a potential tool to mitigate the harmful effects of state felon disenfranchisement laws.

C. The Broad Scope of the Pardon Power

The pardon of criminals is a practice that goes back to Ancient Greece and Rome and was later adopted by English monarchs.[34] In the Colonies, monarchs delegated to colonial governors some form of pardon power.[35] After the American Revolution, limited debate at the Constitution Convention led to an inclusion of the pardon power in the Constitution.[36]

While the two significant plans — the New Jersey plan and the Virginia plan — proposed at the Constitutional Convention did not initially include the pardon power, Congress later revised the Virginia plan to vest the pardon power in the executive branch.[37] The power was to principally be held by the President, with little debate over its placement.[38] Some debate occurred over the specific limitations to be placed on the pardon power, namely whether the power should be restricted solely to individuals convicted of a crime[39] or whether impeachment should be an excludable offense.[40] Still, the pardon power

[34] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

[35] *Id.*

[36] *Id.* at 501.

[37] WILLARD H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 26-27 (1941).

[38] *Id.*

[39] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 426 (Max Farrand ed., 1911).

[40] *Id.* at 626.

emerged as broad, exclusive to the President, and virtually unrestricted by checks and balances.[41]

Article II, Section 2 of the Constitution gives the President the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[42] The broad authority granted to the President allows for both case-by-case and universal pardons.[43] The President can choose to issue a full pardon that terminates the sentence, or a partial pardon that instead reduces a sentence.[44] Presidents can also uphold a conviction while still negating the punishment or collateral consequences.[45] In effect, the President absolves the individual from suffering a condition imposed on them as a result of their conviction, such as criminal fines or criminal forfeitures, while still keeping the sentence in place.[46]

Over the years, judicial challenges emerged to the pardon power that aimed to restrict its application, yet the Supreme Court has continuously affirmed the broad nature of the pardon power.[47] The few limitations imposed upon the pardon power are defined within the text of the Constitution or have been clarified through judicial interpretation. Notably, the Supreme Court has interpreted the scope of the pardon power to extend to offenses "against the United States," which was defined to mean federal offenses.[48] Another textual limitation

[41] *See* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1652 (2008) ("In a Constitution filled with checks and balances among the branches of government, the executive pardon power 'stands alone in its capaciousness,' providing the President 'Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.'").

[42] U.S. CONST. art. II, § 2.

[43] *See* Brown v. Walker, 161 U.S. 591, 601-02 (1896).

[44] Fowler, *supra* note 41, at 1652.

[45] *Id.*

[46] The pardoning of criminal fines is highly relevant if a state requires a convicted criminal to pay off any criminal fines they may owe in full before restoring their voting privileges. *See* Curt Anderson, *Judges: Florida Felons Can't Vote Until They Pay Fines, Fees*, AP NEWS (Sept. 11, 2020), https://apnews.com/article/florida-voting-rights-elections-courts-voting-b4f68dd4f11a6df4430fbdc74ae93de3 [https://perma.cc/KMW8-EQ7H].

[47] *See Ex parte* Grossman, 267 U.S. 87 (1925); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Hickey v. Schomig, 240 F. Supp. 2d 793 (N.D. Ill. 2002).

[48] *Hickey*, 240 F. Supp. 2d at 795 ("[N]o federal official has the authority to commute a sentence imposed by a state court.").

is that the President cannot use the pardon power to grant relief if they are impeached.[49] Furthermore, presidents may not pardon a crime before it occurs[50] or apply a pardon to someone held in contempt in a case between private parties.[51]

The Supreme Court further clarified that the only punishment for an abuse of the pardon power is impeachment, leaving the actual interpretation of the power within the political sphere.[52] Despite these limits, the pardon power is a powerful tool that allows presidents to absolve criminal defendants of their crimes or the conditions placed upon them. Extending its scope into state-imposed conditions on criminal convictions is essential to combat felon disenfranchisement.

II. EXCESSIVELY BROAD FELON DISENFRANCHISEMENT LAWS OPPOSE A CONTEMPORANEOUS MEANING OF "REPUBLICAN GOVERNMENT"

In their most general sense, felon disenfranchisement laws work to deprive all convicted felons, regardless of the severity of their crime, of their right to vote. Since felon disenfranchisement laws are within the scope of a state's criminal power, the implementation of these laws varies from state to state, resulting in variances as to severity of the crime and its associated consequence. While there has been recent action on the state level against felon disenfranchisement laws,[53] more than half of the states still implement some form of felon disenfranchisement. Only two states, Vermont and Maine, do not practice any form of felon disenfranchisement.[54] Eighteen states restrict

[49] U.S. CONST. art. II, § 2. ("[E]xcept in Cases of Impeachment.")

[50] *See Garland*, 71 U.S. at 380.

[51] *See Grossman*, 267 U.S. at 110-11.

[52] *Id.* at 121 ("Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

[53] *See* Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENT'G PROJECT (Oct. 25, 2022), https://www.sentencingproject.org/publications/locked-out-2022-estimates-of-people-denied-voting-rights/ [https://perma.cc/93UE-UEGM].

[54] *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Oct. 7, 2022) [https://perma.cc/K4PT-FSGZ] [hereinafter *Felony Disenfranchisement Laws*].

the vote only for people in prison; everyone else can vote.[55] New York and New Jersey restrict the vote for people in prison and on parole, but all other people with criminal convictions, including people on probation, can vote.[56] Nineteen states restore the right to vote to people with felony convictions upon completion of a sentence.[57]

The remaining states impose the most restrictive limitations. In Alabama, Arizona, Florida, Iowa, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming, some individuals with felony convictions can vote, though the restoration of that individual's vote is based on several different factors and processes.[58] They can either petition a court or a state board to restore their rights, as done in Arizona and Tennessee,[59] or they petition their governor for a pardon, as done in Mississippi[60] and Virginia.[61] However, the low likelihood of such pardons occurring in these states makes this option a realistically unlikely one for most people who petition.[62]

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[55] *Id.* (California, Colorado, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah.).

[56] *Id.*

[57] *Id.* (Alaska, Arkansas, Delaware, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, Wisconsin.).

[58] *See id.*

[59] *See id.*

[60] Mississippi imposed a lifetime ban on voting if a person was convicted of certain felonies, and the right was restored only upon a gubernatorial pardon or a two-thirds vote in both the State House and Senate. *See* Patrick Berry, *Court Strikes Down Mississippi's Lifetime Felony Voting Ban*, BRENNAN CTR. FOR JUST. (Aug. 18, 2023), https://www.brennancenter.org/our-work/analysis-opinion/court-strikes-down-mississippis-lifetime-felony-voting-ban [https://perma.cc/9SWT-2RRG]. However, in August 2023, the Fifth Circuit Court of Appeals ruled that Mississippi's disenfranchisement law violated the Eighth Amendment's prohibition against cruel and unusual punishment, leaving the state of Mississippi's disenfranchisement law unclear. *Id.*

[61] *See Restoration of Rights Process*, RESTORATION OF RTS., https://www.restore.virginia.gov/restoration-of-rights-process/ (last visited Apr. 2, 2024) [https://perma.cc/8TKA-76F3].

[62] *See* Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION OF RTS. PROJECT,

A. Felon Disenfranchisement Under the Fourteenth Amendment

The proliferation of felon disenfranchisement laws has not been without pushback,[63] but in 1974 the Supreme Court made challenging these laws much more difficult. In *Richardson v. Ramirez*, three convicted felons who had served their sentences and completed probation brought a class action suit when the California Constitution denied their ability to vote.[64] The California Supreme Court found in favor of the plaintiffs because the disenfranchisement of felons violated equal protection under Section One of the Fourteenth Amendment, and California could not assert a compelling state interest to justify the practice.[65] The U.S. Supreme Court reversed, citing the plain language of Section Two of the Fourteenth Amendment:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[66]

https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ (last visited Oct. 29, 2022) [https://perma.cc/3LGQ-VSD9].

[63] *See, e.g.*, Howard v. Gilmore, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (alleging that Virginia's felon disenfranchisement law violates the First, Fourth, Fifteenth, Nineteenth, and Twenty-Fourth amendments to the Constitution); Perry v. Beamer, 933 F. Supp. 556, 558 (E.D. Va. 1996) (raising an Equal Protection challenge to Virginia's felon disenfranchisement law); Kronlund v. Honstein 327 F. Supp. 71 (N.D. Ga. 1972) (challenging Georgia's felon disenfranchisement law as a violation of the Equal Protection Clause, the Eighth Amendment, and the First Amendment); Beachman v. Braterman, 300 F. Supp. 182 (S.D. Fla. 1969) (class action challenging Florida's felon disenfranchisement law).

[64] Richardson v. Ramirez, 418 U.S. 24, 26-27 (1974).

[65] *Id.* at 27.

[66] U.S. CONST. amend. XIV, § 2 (emphasis added); *Richardson*, 418 U.S. at 56.

The Court based its decision on a historical analysis that led it to conclude that the Reconstruction Congress "affirmatively sanction[ed]" the exclusion of felons from voting.[67] The Court noted that very little legislative history was available regarding Congress's adoption of Section Two.[68] Despite limited sources, however, the Court felt that a general authorization of felon disenfranchisement laws was consistent with the legislative intent.[69]

While the majority permitted the usage of felon disenfranchisement laws, Justice Marshall's dissent highlights the flawed steps the Court took to make its decision. First, Justice Marshall disagreed with the conclusion that because some states permitted felony disenfranchisement at the time the states adopted the Fourteenth Amendment, this practice merited protection.[70] He argued that "[t]here is no basis for concluding that Congress intended by [Section Two] to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment."[71] He highlighted the Supreme Court's decision in *Dunn v. Blumstein* as an example of the Court striking down a form of disenfranchisement, one-year durational residence requirements, authorized specifically by the Reconstruction Act.[72] Thus, felon disenfranchisement existing as a practice at the same time the states adopted the Fourteenth Amendment did not preclude a reasoned interpretation that such practices could later become unconstitutional.

More importantly, however, Justice Marshall pushed back against the idea that the Reconstruction Congress intended to allow a blanket disenfranchisement of (ex-)felons. As he noted, "there is little independent legislative history as to the crucial words 'or other crime'; the proposed [Section Two] went to a joint committee containing only the phrase 'participation in rebellion' and emerged with 'or other crime' inexplicably tacked on."[73] Justice Marshall argued the Court failed to

[67] *Richardson*, 418 U.S. at 54.

[68] *Id.* at 43.

[69] *See id.* at 56.

[70] *Id.* at 76 (Marshall, J., dissenting).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 72-73 (Marshall, J., dissenting).

fully parse through the limited sources available to it to understand better the political motivations that would have made sense of the phrase "or other crime."[74] A closer look at the legislative history would vindicate Justice Marshall's argument.

Despite a stated adherence to the legislative intent behind the text, the majority in *Ramirez* fails to clarify or even address what "or other crime" means in the context of Section Two. As an isolated phrase, "or other crime" is devoid of independent legislative intent and only makes sense when read fully as the phrase "participation in rebellion, *or other crime*."[75] The initial version of Section Two was sent to a Joint Committee solely with the phrase "participation in rebellion."[76] Given the aims of the Reconstruction Congress,[77] this language was more likely than not intended to serve as a reference to the Confederate rebels and limit their ability to interfere with the federal government's attempt at establishing "republican governments" in the southern states.[78] When the Reconstruction Congress produced the final version of the bill, they added the phrase "or other crime," with no apparent legislative intent for this addition.[79] Reading "or other crime" in conjunction with "participation in rebellion" creates an implication that "or other crime" is meant to support the former half of the phrase, not stand as its own independent force. The Reconstruction Congress had concerns with former Confederate rebels taking control of the newly re-formed southern governments, so a reasonable interpretation would assume that Congress intended to give itself a broader weapon to use against former Confederate officials, military rebels, and sympathizers alike, if necessary.[80]

Furthermore, if the Reconstruction Congress were authorizing certain state practices under Section Two of the Fourteenth Amendment, it likely would not have intended for disenfranchisement

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[74] *Id.* at 73-74 (Marshall, J., dissenting).

[75] Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 746 n.158 (1973).

[76] H.R.J. Res. 51, 39th Cong. (1866).

[77] *See infra* Part II.B.

[78] *See* Itzkowitz & Oldak, *supra* note 75, at 746 n.158.

[79] *Id.*

[80] *Id.*

based on criminal conviction to be as broad as *Ramirez* authorized. When the Reconstruction Congress convened in 1865, southern states were already in the process of reviving slavery de facto through the imposition of Black Codes.[81] These codes prevented newly freed slaves from achieving equal political and civil rights, including the right to fully engage in the political process.[82] Congress was aware that one particular practice the southern states engaged in was distinguishing between "black" crimes and "white" crimes.[83] "Black" crimes were more likely to result in disenfranchisement compared to "white" crimes.[84] The Reconstruction Congress combatted these practices through the Reconstruction Acts, so it seems highly unlikely they would have also adopted "or other crime" in the Fourteenth Amendment as a stand-alone justification for disenfranchisement, thereby allowing the southern states the ability to deny freed slaves the vote based on *any* criminal conviction. A more appropriate reading of Section Two would take this historical context into consideration and reason that a broad imposition of felony disenfranchisement is inconsistent with the legislative intent of the Reconstruction Congress.[85]

The argument that criminal disenfranchisement was meant to be limited is reinforced through a more recent judicial decision. *Hunter v. Underwood* serves as a strong example of the Supreme Court striking down a disenfranchisement law based on criminal status. There, the Supreme Court struck down an Alabama statute that disenfranchised

[81] Amar, *supra* note 29, at 1217.

[82] *See id.*

[83] *See* Litwin, *supra* note 10, at 192.

[84] *Id.*

[85] For an example of the Supreme Court striking down a criminal-status based disenfranchisement law, see Hunter v. Underwood, 471 U.S. 222 (1985). There, the Supreme Court struck down an Alabama statute that disenfranchised individuals guilty of any crime "involving moral turpitude." *Id.* at 233. For purposes of this Note, *Hunter* is distinguishable as the state law included misdemeanors, not just felony convictions. *Id.* at 224. However, the Court's reasoning serves as a strong basis that supports a limited application of felon disenfranchisement laws. As the Court noted, "[W]e are confident that [Section] 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment." *Id.* at 233.

individuals guilty of any crime "involving moral turpitude."[86] In the context of felon disenfranchisement, *Hunter* is distinguishable as the Alabama law extended disenfranchisement to all levels of crime, including misdemeanors.[87] However, the Court's reasoning serves as a strong basis to support a limited application of felon disenfranchisement laws. The Court noted that the crimes either enumerated in the statute or incorporated by state officials were included because they were "thought to be more commonly committed by blacks."[88] Despite its apparent neutrality in application, Alabama's disenfranchisement law was still unconstitutional because of its racially driven inception.[89] The *Hunter* court affirms a historical approach towards understanding the basis of disenfranchisement laws and clarifies that these historical interpretations can limit the extent of disenfranchisement. While *Hunter's* opinion says very little about the legitimacy of blanket felon disenfranchisement laws, the Court's analysis is a strong framework for looking at the authorization of disenfranchisement laws in Section Two of the Fourteenth Amendment.

Modern-day felon disenfranchisement laws oppose the spirit of the Fourteenth Amendment. Whereas the Reconstruction Framers intended criminal disenfranchisement to be an appropriate response to crimes analogous to "rebellion," the current practice of criminal disenfranchisement fails to distinguish between degrees of severity among felonies. None of the thirty states that impose some form of felon disenfranchisement consider the kind of felony being committed, instead, they revoke the right to vote for a commission of *any* felony.[90] At this point, the perceived goals of felony disenfranchisement laws fail to account for their overbroad and extreme implementations. In *Richardson v. Ramirez*, the Supreme Court approved this practice.[91] Yet, Justice Marshall's dissent conveys the true reality of felon disenfranchisement laws:

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[86] *Underwood*, 471 U.S. at 233.

[87] *Id.* at 224.

[88] *Id.* at 232.

[89] *Id.* at 233.

[90] *See Felony Disenfranchisement Laws* (*Map*), *supra* note 54.

[91] Richardson v. Ramirez, 418 U.S. 24 (1974).

> The individuals involved in the present case are persons who have fully paid their debts to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.[92]

B. Reconstruction: Expanded Federal Authority Under the Guarantee Clause

Despite their controversy, very little has been done on the federal level to address felon disenfranchisement laws. Much of the discussion over what can be done has centered on the role of Congress and its ability to pass federal legislation.[93] In comparison, the role of the executive in addressing these laws has gotten far less attention. Understandably, the federal pardon power has not emerged as a potential tool in the fight against felon disenfranchisement laws.

Felon disenfranchisement laws are traditionally under the scope of state criminal power, with no equivalent on the federal level.[94] This would normally imply a barrier to the usage of the *federal* pardon power to combat the effects of *state* laws, as the Constitution limits the pardon power to federal offenses.[95] Lower federal courts have affirmed this restriction, finding that "no federal official has the authority to commute a sentence imposed by a state court."[96] In *Hickey v. Schomig*, an Illinois district court referenced the presidential pardon power as an example of the limitations of federal officials to negate state convictions.[97] Furthermore, felon disenfranchisement laws also concern

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[92] *Id.* at 79 (Marshall, J., dissenting).

[93] *See* For the People Act of 2021, S. 2093, 117th Cong. § 1403 ("The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.").

[94] *See Felony Disenfranchisement Laws* (*Map*), *supra* note 54.

[95] *See* U.S. CONST. art. II, § 2, cl. 1.

[96] Hickey v. Schomig, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002).

[97] *Id.*

the ability of states to control their own local elections.[98] Thus, direct federal executive action has not been perceived to be an important tool in attempts to negate the effects of state felon disenfranchisement laws. However, Reconstruction serves as a relevant example in which preserving a "republican form of government" through expansion of the franchise motivated interpreters of the Guarantee Clause to exceed the traditional limits of federalism and create new legal bases.[99]

During the Reconstruction period, the political branches relied on the Guarantee Clause to expand their power into traditional state functions.[100] This view was necessary to uphold the Clause's promise of a "republican form of government."[101] Much of what was meant when referring to this promise stemmed from an evolution in interpretation. Unlike their predecessors, the Reconstruction Congress and presidents were eager to take full advantage of the power vested to it under the Guarantee Clause.[102] Its interpretations of "republican form of government" signified a shift away from a focus solely on the preservation of the structures of state governments to a more expansive view that state governments gained their legitimacy from unburdened electorates.[103]

The Guarantee Clause has always been interpreted through a contemporaneous meaning of "republican government." During the Dorr Rebellion, the warring factions asked President Tyler to intervene on the question of which Rhode Island state constitution was legitimate.[104] There, the interpretation of "republican government"

[98] *See* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50 (1959) ("The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns.").

[99] *See* An Act to provide for the more efficient Government of the Rebel States, ch. 153, § 6, 14 Stat. 428, 429 (1867).

[100] *Id.*

[101] *Id.* § 1 ("Whereas no legal State governments or adequate protection for life or property now exists in the rebel States . . . and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established . . . .").

[102] *See* CONG. GLOBE, 37th Cong., 2d Sess. 737 (1862).

[103] *Id.*

[104] *See* Amar, *supra* note 16, at 774-76; Louk, *supra* note 16, at 702.

more closely aligned with the concerns the Framers had in mind.[105] In Federalist No. 43, James Madison defended the Guarantee Clause as a necessary protection against perverse forms of government: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations."[106] During this period, the Guarantee Clause was viewed as a source of protection for the structures of state government.

In the aftermath of the Dorr Rebellion, the Supreme Court held in *Luther v. Borden* that Guarantee Clause issues are nonjusticiable.[107] The Supreme Court also understood the Guarantee Clause to solely deal with issues of state formation and governmental bodies: "[W]hen 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."[108] Later interpreters of the Guarantee Clause were no longer as worried with the strictly operational structures of government. Instead, they developed an interpretation that better aligned with their concerns over the right to participate in the political process, viewing the Clause as creating a right to establish governments republican in structure and form.

During Reconstruction, both the legislative and executive branches invoked the Guarantee Clause to justify their political actions.[109] Congress passed a series of Reconstructions Acts that expanded the federal government's power and authorized direct intervention in the re-introduction and restructuring of Confederate states.[110] The Republican-led Reconstruction Congress was eager to engage in the

[105] *See* Amar, *supra* note 16, at 774-76.

[106] THE FEDERALIST NO. 43 (James Madison).

[107] *See* Luther v. Borden, 48 U.S. 1, 47 (1849) ("This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.").

[108] *Id.* at 42.

[109] *See* Louk, *supra* note 16, at 700-15.

[110] *See id.* at 711-15.

practice of state-building, believing that the goal of Reconstruction was not only to restore the Confederate states to the Union but to also guarantee "the privileges and immunities of citizenship to recently freed former slaves, including the right to vote and to participate in the state political process – at least as a matter of formal law."[111]

In 1862, Senator Ira Harris of New York introduced a bill that would organize provisional governments in the Confederate states on the basis of the Guarantee Clause.[112] While his initial legislation never reached a vote, the bill was later amended and reintroduced in 1863.[113] This new version added a proposal that Congress could require the states to call new constitutional conventions. This tactic would expressly allow the federal government to direct the actions of southern governments and ensure the prohibition of slavery.[114] Though Senator Harris's bill never became law, the passed Reconstruction Acts built upon his work, with the First Reconstruction Act authorizing the creation of provisional governments under the control of the executive branch.[115] The Act granted assigned district officers to these governments the purpose of "protect[ing] all persons in their rights of person and property," which included "provid[ing] that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates."[116] This promotion of the franchise went beyond guaranteeing the vote for *federal* elections as prescribed by the Elections Clause of the Constitution and authorized the federal government to play a direct role in ensuring that the franchise of freed slaves was also accepted at *both* the state and local levels.[117]

Like their predecessors during the Dorr Rebellion, the Reconstruction Congress similarly judged the "republicanism" of a state based on the

[111] *Id.* at 705.

[112] *See* CONG. GLOBE, 37th Cong., 2d Sess. 737 (1862).

[113] Louk, *supra* note 16, at 707.

[114] *Id.*

[115] *Id.* at 711.

[116] An Act to provide for the more efficient Government of the Rebel State, ch. 153, §§ 3, 5, 14 Stat. 428, 428-29 (1867).

[117] *See id.* § 6; *see also* U.S. CONST. art. I, § 4. ("The Times, Places and Manner of holding Elections for *Senators and Representatives*, shall be prescribed in each State by the Legislature thereof; but the *Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing Senators." (emphasis added)).

legitimacy of its governmental structures. However, the Reconstruction Congress moved away from the simple view that legitimacy is found in procedures and structures and towards a more expansive view that legitimacy stemmed from the unrestricted political participation of a state's electorate. Reconstruction had a bilateral aim, with each goal meant to reinforce the other: (1) reintroduce southern states into the Union through the adoption of "republican forms of government" and (2) ensure the franchise for freed slaves living in those southern states. The franchise could not be secured if southern states continued to impose restrictions such as Black Codes and Jim Crow, which violated the meaning of "republicanism." [118] Consequently, southern states could not entirely demonstrate "republican forms of government" if they did not fully allow their Black citizens to freely participate in the political process. The cyclical nature of these goals showed an evolution in thinking towards the Guarantee Clause, one that was further supported through presidential action.

Presidents Lincoln and Johnson carried differing views on the extent to which the federal government could influence state governments during Reconstruction. Yet, both presidents affirmed that the executive branch could directly intervene against state practices that they felt violated the Guarantee Clause. Lincoln felt that the job of meeting the aims of Reconstruction could be achieved through expansive executive functions.[119] On the other hand, Johnson opposed extensive federal intervention, which put him at odds with the Reconstruction Congress.[120] Despite these views, however, Johnson followed through with his duties under the First Reconstruction Act and helped oversee the system of provincial governments.[121]

Lincoln expressly supported the Reconstruction Congress's interpretation of the Guarantee Clause, affirming the idea that a "republican form of government" was tied to an expansion of the franchise. In his Proclamation of Amnesty and Reconstruction, Lincoln exclaimed that only when the southern states "reestablish[ed] a state government which shall be republican" would they receive the

[118] *See* Amar, *supra* note 16, at 770-71, 781.

[119] Louk, *supra* note 16, at 708-09.

[120] *Id.* at 709.

[121] *See id.* at 710.

constitutional benefits guaranteed to them by the Guarantee Clause.[122] In this proclamation, Lincoln further clarified that federal intervention was justified to meet the aims of emancipation, and such federal intervention could take the shape of modifying "the subdivisions, the constitution, and the general code of laws" of the southern states.[123]

While President Johnson was more hesitant to involve the federal government in state re-formation, he still affirmed Congress's interpretation of the Guarantee Clause instead of pushing back on its expansive view. In establishing the provincial governments, Johnson's proclamations cited the Guarantee Clause as the "constitutional grounds for directly regulating state elections and overseeing the reconstitution of the southern states' constitutions so as to ensure the rights of newly emancipated male African-American citizens."[124] This agreement on what power the Guarantee Clause bestowed onto the political branches and what it required signaled a striking change in the invocation of the Guarantee Clause. As one scholar notes, "Congress and the president did not disagree about the scope of the power conferred by the Clause, but instead were engaging in a 'bitter battle' over *which branch* would serve as the primary guarantor of republican government in the defeated southern states."[125]

This history of the Clause has indicated space has been left for executive interpretation.[126] Given this historical fluidity in what upholding the Guarantee Clause looks like, presidents have the discretion to define "republican government" in accordance with a contemporaneous meaning, which could include an acknowledgment that felon disenfranchisement laws are not in alignment with the creation of a "republican form of government." A challenge can then be set up between the Guarantee Clause and felon disenfranchisement laws, just as the Guarantee Clause was used to challenge the Black

[122] Proclamation No. 11 (Dec. 8, 1863), *reprinted in* 13 Stat. 737, 737-38 (1863).

[123] *Id.* at 738.

[124] Louk, *supra* note 16, at 710.

[125] *Id.*

[126] Much of this argument takes inspiration from Gary Lawson & Christopher Moore's theory of executive interpretation and presidential review. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

Codes.[127] Furthermore, any actions taken under the Guarantee Clause are explicitly left to the interpretations of the political branches.[128] Here, the reason for singling out the presidential pardon power as an effective tool becomes clearer. The pardon power and the Guarantee Clause are alike in that the appropriateness of presidential exercise under these powers is, largely, determined by the presidents themselves.

Guarantee Clause issues are "nonjusticiable," leaving Congress and the President as the sole determiners of what is right or wrong under the Clause.[129] If a President were to believe that they are authorized under the Guarantee Clause to address felon disenfranchisement laws, then Congress could react by passing legislation that either restricts or supports the presidential action.[130] However, if the President chooses to exercise the pardon power, then Congress is far more restricted in its reaction. Congress cannot directly interfere with the President's use of the pardon power, instead, it has to rely on external pressures like media campaigns.[131] The Supreme Court has affirmed that the only punishment for misuse of the pardon power is impeachment.[132] This drastic action has historically been cumbersome, politically dangerous, and mostly unsuccessful in actually removing a president from office.[133] Therefore, presidents have substantial leeway to define their powers under the

[127] *See* Amar, *supra* note 16, at 770-71, 781; Louk, *supra* note 16, at 712.

[128] *See* Luther v. Borden, 48 U.S. 1, 47 (1849).

[129] *See id.*

[130] *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (develops a three-zone analysis for the permissibility of presidential action: In Zone 1, Congress authorizes the President's action. In Zone 2, Congress has not spoken on the matter, so the President's actions are balanced between favored interests and potential harms. In Zone 3, Congress rejects the President's actions, so presidential action is permissible only if the Constitution grants that power.).

[131] *See* Fowler, *supra* note 41, at 1656-60.

[132] *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

[133] For an overview of presidential impeachments, see generally Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 535-47 (2019). For a discussion of the political costs of impeachment, see Albert Broderick, *The Politics of Impeachment*, 60 A.B.A. J. 554 (1974).

Guarantee Clause and use that authority to exercise the pardon power to negate the effects of felon disenfranchisement laws.

Given the negative impact felon disenfranchisement laws have on particular communities in the United States, presidents should conclude that the contemporaneous meaning of "republican form of government" requires an active effort to restore the franchise by limiting the disproportionate effects of felon disenfranchisement.

C. A Contemporaneous Interpretation of "Republican Government" in Alignment with Reconstruction-Era Meaning Addresses the Impact of Felon Disenfranchisement on Black and Hispanic Communities

Much of the criticism levied against felon disenfranchisement laws is that they disproportionately affect Black and Hispanic voters. As of 2020, 5.2 million Americans were prohibited from voting due to felon disenfranchisement laws.[134] A majority of these individuals are no longer in prison or jail, with seventy-five percent of disenfranchised voters living in their communities.[135] Felon disenfranchisement laws have a disparate impact on voters of color, who are more likely to be charged and convicted for felonies compared to their white counterparts, resulting in greater levels of disenfranchisement.[136] Black Americans of voting age are nearly four times as likely to lose their voting rights than the rest of the adult population, with one of every sixteen Black adults disenfranchised nationally.[137] Southern states have a more severe ratio, with one in seven Black adults disenfranchised in Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia.[138] In thirty-four states, the Hispanic population is disenfranchised at a higher rate than the general population.[139]

The negative impacts of felon disenfranchisement are long-lasting. Apart from the civic impact on the individual, felon disenfranchisement

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[134] *Voting Rights in the Era of Mass Incarceration*, *supra* note 14.

[135] *Id.*

[136] *See* THE SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 10-11, 14 (2016), https://www.sentencingproject.org/app/uploads/2022/08/6-Million-Lost-Voters.pdf [https://perma.cc/7CPD-4AX9].

[137] *Voting Rights in the Era of Mass Incarceration, supra* note 14.

[138] *Id.*

[139] *Id.*

has a negative effect on public safety. Studies indicate that the "revocation of voting rights for people with felony convictions compounds isolation from communities."[140] Civic participation has been linked with lower recidivism rates, but felony disenfranchisement prevents individuals from gaining these benefits.[141] One study noted that among individuals who had been previously arrested, twenty-seven percent of non-voters were rearrested, while only twelve percent of voters were rearrested.[142] While these statistics cannot definitively prove direct causation, the study concludes that "voting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[143] As previously noted, felon disenfranchisement laws are erroneously overbroad in practice.[144] Consequentially, states impose felony disenfranchisement on a population primarily made up of Black and Hispanic people without substantiation that these laws improve public safety. The evidence indicates the contrary, which further undermines the validity of these laws.

Felon disenfranchisement laws are more likely to have a consequential impact on key election outcomes, as these laws are more prevalent and severe in modern-day swing states. Georgia, North Carolina, and Wisconsin deny individuals convicted of felonies voting privileges if they are in prison, on parole, or on probation, and voting privileges are only restored upon completion of the sentence.[145] Other swing states like Arizona, Florida, and Virginia have more severe restrictions and can continue to deny felons the vote post-sentence.[146]

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[140] *Id.*

[141] *Id.*

[142] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004).

[143] *Id.* at 214.

[144] *See supra* Part II.A.

[145] *See Felony Disenfranchisement Laws* (*Map*), *supra* note 54.

[146] For repeat felons in Arizona, their right to vote is restored once a state judge chooses to restore that right at the end of probation, or upon a successful petition to a court. *Id.* In Florida, the right to vote is restored upon "completion of sentence," which requires payment of fees and costs. *Id.* Virginia is the only state in the country that disenfranchises all felons, unless the governor approves restoration of those rights. *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST.,

Not only have most of these states been key in deciding the balance of power in the most recent federal elections,[147] most are also states with significant racial minority populations.[148] The overall impact of felon disenfranchisement laws ensures that Black and Hispanic voters are kept out of the political process, a problem that the federal government has previously addressed through the Guarantee Clause.

The most recent history of the Guarantee Clause revolved around enfranchising black citizens.[149] The Reconstruction Congress and Presidents explicitly used their respective powers under the Guarantee Clause to ensure that freedmen obtained and retained all of the

https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia (last updated Apr. 3, 2023) [https://perma.cc/4R2P-78S4].

[147] In the year leading up to the 2020 presidential election, the opinion poll site FiveThirtyEight noted the potential of Georgia, Arizona, Florida, and Wisconsin to change the race results. *See* Perry Bacon, Jr., *How Georgia Turned Blue*, FIVETHIRTYEIGHT (Nov. 18, 2020), https://fivethirtyeight.com/features/how-georgia-turned-blue/ [https://perma.cc/4V2D-JDVF]; Nathaniel Rakich, *How Arizona Became a Swing State*, FIVETHIRTYEIGHT (June 29, 2020), https://fivethirtyeight.com/features/how-arizona-became-a-swing-state/ [https://perma.cc/5ZTL-MZKA]; Nathaniel Rakich, *Why Florida Could Go Blue in 2020*, FIVETHIRTYEIGHT (July 27, 2020), https://fivethirtyeight.com/features/why-florida-could-go-blue-in-2020/ [https://perma.cc/G7EL-CC9B]; Nathaniel Rakich, *Wisconsin Was Never a Safe Blue State*, FIVETHIRTYEIGHT (Oct. 16, 2020), https://fivethirtyeight.com/features/wisconsin-was-never-a-safe-blue-state/ [https://perma.cc/JE43-MGJ9].

[148] In Georgia, racial minorities make up 49.6% of the state population. *See Quick Facts – Georgia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/GA/RHI825222#RHI825222 (last visited Apr. 3, 2024) [https://perma.cc/KQ2C-W5LC] (50.4% of the population is classified as "white alone, not Hispanic or Latino."). In North Carolina, Arizona, Florida, and Virginia, the number is 38.5%, 47.1%, 47.7%, and 40.2%, respectively. *See Quick Facts – North Carolina*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NC/PST045223 (last visited Apr. 3, 2024) [https://perma.cc/EB3C-JQB4]; *Quick Facts – Arizona*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/AZ/PST045223 (last visited Apr. 3, 2024) [https://perma.cc/6V4W-M3MW]; *Quick Facts – Florida*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/FL/PST045223 (last visited Apr. 3, 2024) [https://perma.cc/XC3E-ANSR]; *Quick Facts – Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/VA/PST045222 (last visited Apr. 3, 2024) [https://perma.cc/2GHD-NYE2].

[149] *See* Louk, *supra* note 16, at 712-13 ("Whatever the term 'republican government' may have conveyed at the founding, the Reconstruction Congress forcefully repudiated the notion that a republican government could tolerate widespread disenfranchisement and inequality — at least on the basis of race.").

privileges that came with citizenship, including voting privileges.[150] When states sought to undermine those rights under the justification of state election autonomy, the federal government took direct action and intervened in the structures and practices of southern state governments.[151] Felon disenfranchisement laws similarly restrict access to political power for the same demographic, so an activated federal government would be required to revive the pro-franchise spirit of the Reconstruction period. Looking at what their predecessors had done, future presidents should rely on their authority to define the extent of their powers under the Guarantee Clause and consider that in conjunction with the limitlessness nature of their pardon power.

III. USING THE PARDON POWER TO NEGATE EXCESSIVE FELON DISENFRANCHISEMENT AND UPHOLD THE GUARANTEE CLAUSE

Felon disenfranchisement laws have excessively broad applications that function in opposition to the Guarantee Clause. To correct this imbalance, presidents can rely on their own interpretations of the Guarantee Clause and challenge the application of felon disenfranchisement laws through executive power. One particularly strong power the President can deploy is the pardon power, as the legitimacy of its usage is ultimately a political issue.[152] There are several ways in which the President can use the pardon power to mitigate, or outright eliminate, felon disenfranchisement laws. Given the likely controversial nature of any executive action taken for this purpose, the following solutions range from least expansive to most expansive. First, presidents can restore *federal* voting rights to individuals stripped of their vote. Second, presidents can deploy a system of "cloud cover pardons" that would restore both federal and state voting rights for

[150] *Id.* at 711-12.

[151] *See* An Act to provide for the more efficient Government of the Rebel States, ch. 153, § 6, 14 Stat. 428, 428 (1867).

[152] *See Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

specific days.[153] Lastly, presidents can directly negate the effects of felon disenfranchisement laws through a clemency proclamation.

Under the Guarantee Clause, presidents can extend the reach of the pardon power to address state conditions. Of note for the following options, the pardon power is broad in its application, ranging from complete termination of the sentence to simply a revocation of a punitive condition.[154] The pardon power exercised under the Guarantee Clause would most likely be used to eliminate the condition of disenfranchisement on the individual. Termination of the accompanied sentence would likely be difficult to uphold as it conflicts with the President's inability to commute a sentence imposed by a state court.[155] Elimination of the disenfranchisement condition is less likely to raise these concerns as it leaves the sentence in place, adhering to the authority of state courts, and is what would solely be required to uphold the Guarantee Clause. Furthermore, an effective pardon would consider any other burdens placed on the individual when attempting to restore their vote, so it should also eliminate any financial burdens that a state may require an individual to comply with before regaining the right to vote.[156]

The first pardon option would be a limited pardon that would restore the right to vote solely for federal offices. This solution would keep in mind the concerns of federalism and ensure states retain the ability to control their local elections.[157] While not perfect, the restoration of federal voting rights would do a lot to move the political branches towards amending existing felon disenfranchisement laws or outright disallowing their usage. A pardon of this nature would allow for previously disenfranchised individuals to achieve federal representation in Congress, with the possibility that these officials use their legislative power to pass national legislation that addresses felon disenfranchisement laws. The public may be more amenable to a legislative act rather than executive action aimed at limiting felon

[153] *See* Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 666 (2016).

[154] Fowler, *supra* note 41, at 1652.

[155] *See* Hickey v. Schomig, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002).

[156] *See* Anderson, *supra* note 46.

[157] *See supra* notes 12–13.

disenfranchisement laws.[158] While presidents would have discretion to justify their pardons under the Guarantee Clause, they would not be immune to public backlash.[159] A limited federal-restoration pardon could moderate that backlash.

The limitation of only restoring federal voting rights would also be applicable under the subsequent options. However, a limited restoration fails to fully grasp the harm caused by felon disenfranchisement laws and does not take full advantage of the Guarantee Clause, thus it is not recommended. While it is a step in the right direction, this kind of pardon would fail to address the problem of felon disenfranchisement as it continues to grant states the ability to disenfranchise on the local level. The Reconstruction interpretation of the Guarantee Clause was expressly concerned with the issue of voter suppression happening at all levels of government and explicitly authorized and promoted federal intervention in state affairs.[160] While states are famously known to be "laboratories of democracy,"[161] they should not retain the freedom to experiment with a vital component of democracy such as the right to vote.

A comprehensive solution to felon disenfranchisement laws would be to restore both federal and state voting rights. This would align with the spirit of Reconstruction, as the Framers of the Fourteenth Amendment sought to ensure full political citizenship.[162] A limited way of ensuring this would be establishing a system of "cloud cover pardons," while an inclusive clemency proclamation would be a more expansive option.

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[158] *See* Brett Jones, Public Opinion and the President's Use of Executive Orders: Aggregate- and Individual-Level Analyses Across Time, at iii (2016) (Master thesis, University of Central Florida) (Electronic Theses and Dissertations, 2004–2019, 4930).

[159] *Id.* ("[T]his thesis finds evidence indicating the president's issuing of executive orders has a negative impact on the subsequent presidential job approval ratings that individuals report.").

[160] *See, e.g.*, An Act to provide for the more efficient Government of the Rebel States, ch. 153, § 6, 14 Stat. 428, 428 (1867).

[161] *See, e.g.*, Lynn Eisenberg, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 543 (2012) (framing the idea that states are "laboratories of democracy" through an analysis of state felon disenfranchisement laws).

[162] Louk, *supra* note 16, at 705.

"Cloud cover pardons" are regularly recurring pardons that intend to bypass bureaucratic barriers "without repealing or altering the underlying statutes or regulations, which might take a long time for Congress to amend, might prove hard to reenact, and might require costly ancillary legislation to appease holdouts."[163] "Cloud cover pardons" would take the form of the President issuing temporary pardons that grant the pardoned individual the right to vote during a specific period. Given that elections are not daily occurrences, "cloud cover pardons" would likely only be used during brief election periods and may solely authorize the right to vote in that specific election. These pardons could be as restrictive as allowing individuals to vote only on Election Day, or as expansive as conducting daily pardons as soon as early voting for an election is a possibility. The problem with this option is that it would only lift the condition of disenfranchisement for a single period, so problems may arise for individuals who exercise their right to vote but fail to do so within that period of the pardon. With the increased usage of mail-in voting, further issues could arise in considering the temporality point — when does an individual "vote": when they fill out the ballot, mail the ballot, when the county elections office receives the ballot, or when the office counts the ballot? Consequently, "cloud cover pardons" as a practice would require diligence by a president and is easily susceptible to abandonment.

A less confusing option would be for the President to issue a mass clemency proclamation that permanently eliminates disenfranchisement for a large group of people. While not frequently used, such proclamations have been exercised to address critical social and political concerns.[164] Notable large-scale clemency proclamations include President Carter's pardon of the Vietnam draft dodgers[165] or President Biden's recent pardons for individuals convicted of federal marijuana possession offenses.[166] A presidential proclamation that intends to restore the vote to disenfranchised individuals would

[163] Messing, *supra* note 153, at 666.

[164] Fowler, *supra* note 41, at 1656-60.

[165] *Id.* at 1656.

[166] Proclamation No. 10,467, 87 Fed. Reg. 61,441 (Oct. 6, 2022) (Granting Pardon for the Offense of Simple Possession of Marijuana).

similarly address a social and political concern.[167] A pardon of this nature would be the most expansive form of its kind and would require active effort to maintain. Pardons by themselves are not proactive in that they eliminate an existing condition imposed on an individual but are not meant to preemptively protect against future convictions.[168] The pardon does not eliminate the law, so the issue of felon disenfranchisement would continue to occur after the proclamation. Presidents engaged in issuing such proclamations should be compelled to do so frequently, with discretion left up to them to decide the frequency of said proclamations.

An all-inclusive, large-scale clemency proclamation would be preferred, as it offers the fullest protection and addresses most of the concerns raised by the other options. The pardon power is a malleable tool the executive branch can utilize in negating the effects of felon disenfranchisement laws and allows for flexibility and persuasion. Expanding its power under the Guarantee Clause makes available the option of solely restoring a federal right to vote or an all-inclusive right to vote. Presidents can also directly address the overbroad nature of felon disenfranchisement laws, choosing to limit their pardons based on the severity of the crime or on repeat offender status. Furthermore, the history of the Guarantee Clause affirms that presidents have broad discretion to define their authority and are not bound by the prior interpretations of their predecessors.[169] Thus, the limits of the pardon power are unique to them, which allows for greater flexibility in combatting felon disenfranchisement laws.

CONCLUSION

The Guarantee Clause bestows the President an extraordinary responsibility to ensure each state retains a "republican form of government." In doing so, it justifies expanding the presidential pardon power to counter the negative effects of state felon disenfranchisement

[167] *See supra* Part II.C.

[168] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (noting that pardons cannot pre-empt criminal convictions and their consequences).

[169] *See* Louk, *supra* note 16, at 708-10.

laws.[170] These laws impose punitive conditions on voting that are excessive and overbroad.[171] The legal reasoning affirming their use is tenuous at best, and a muddled take on legislative intent puts into question the Supreme Court's broad confirmation offered in *Richardson v. Ramirez*.[172] A proper textual reading of the Fourteenth Amendment would affirm felon disenfranchisement solely for severe crimes akin to "rebellion," making many current state disenfranchisement laws overly broad in their applications.[173]

However, this is not to say that the executive branch alone can solve the problem of overly broad felon disenfranchisement laws, nor may it be the preferred solution. It is simply a solution.[174] While the President may choose to exert an expanded pardon power through the authority vested by the Guarantee Clause, states are surely to pushback against that use of power, and certain limitations of the Guarantee Clause may also hinder the effectiveness of this solution.[175] For example, the President issues a proclamation that re-enfranchises some class of ex-felons; however, a state refuses to recognize that power. A state ex-felon then seeks to sue her state for denying her the right to vote. Suddenly, the Guarantee Clause's benefit of "nonjusticiability" becomes a hindrance. Nor can the ex-felon fight back politically, as the state will not recognize her vote. In addressing these and similar situations, a president must work alongside Congress to achieve the aims of the Reconstruction Framers. This action can take the form of legislation explicitly authorizing this use of presidential pardon power, or it may mean Congress supporting the President by exerting its own Section Two power and proportionally reducing that state's representation in Congress.[176] Either way, the ultimate solution to felon

[170] *See supra* Part II.B.

[171] *See supra* Part II.C.

[172] 418 U.S. 24, 54-55 (1974).

[173] *See supra* Part II.B.

[174] *See supra* Part III.

[175] *See supra* Part III.

[176] U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

disenfranchisement requires broad support from the federal government, and the President can take the first step towards highlighting the vast inequalities such laws produce across the country.[177]

The ability of the federal government to address these concerns is implied through the history of the Guarantee Clause, which in its most recent invocations affirms a right to vote.[178] The power of the government to secure that right is based on a contemporaneous view of that power, allowing a president to expand their pardon authority.[179] Public policy concerns make addressing felon disenfranchisement laws an issue of vital importance, as they disproportionately impact voters of color.[180] The Guarantee Clause was a powerful tool towards ensuring political equality and should be considered an influential source of authority.[181] Presidents can make full use of this authority and proclaim on a large scale the pardoning of disenfranchised felons, eliminating the condition of disenfranchisement, restoring their right to vote on both a federal and state level, and removing any further barriers that may interfere with the restoration of that right.[182] Through this novel step, presidents can move closer towards ensuring the promised guarantee of Reconstruction justice is met.

[177] *See supra* Parts II.C., III.

[178] *See supra* Parts I.B, II.B.

[179] *See supra* Part II.B.

[180] *See supra* Part II.C.

[181] *See supra* Part II.B.

[182] *See supra* Part II.B.