# Fundamental: How the Vote Became a Constitutional Right

*Bertrall L. Ross II*[*]

*ABSTRACT: Does the U.S. Constitution protect the affirmative right to vote? Those focusing on the Constitution's text say no. Yet, the Supreme Court has treated the right to vote as fundamental under the Constitution since the mid-twentieth century. That discrepancy between text and precedent has taken on renewed importance now. Under the Court's current interpretive methodology, rights not explicitly found in the Constitution's text can only be protected as fundamental if there is a basis in history and tradition for protecting that right. Thus far, the Court has not sufficiently grounded the protection of the fundamental right to vote in either text, history, or tradition.*

*In this Article, I present original historical research showing that a fundamental right to vote can be derived from the text, history, and tradition of republican government in the United States. At the founding, the relationship between the right to vote and republican government was indeterminate. Nonetheless, the Framers included in the Constitution a Republican Form of Government Clause recognizing that its meaning would be clarified, or liquidated, over time. In fact, James Madison specified the method for liquidating the Republican Form of Government Clause: States would be responsible for giving meaning to republican government.*

*During the first half of the nineteenth century, the states, in adopting and amending their constitutions, did clarify a critical element of the Republican Form of Government Clause: the relationship between the right to vote and republican government. In repealing property qualifications for voting, the states rejected a conservative conception of republican government in which the right to vote was understood to be a privilege, properly belonging only to the propertied class. By the mid-nineteenth century, the states had converged on a radical conception of republican government that centered popular*

[*] Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. For their helpful feedback and suggestions, I would like to thank William Forbath, Jasmine Harris, Jennifer Laurin, Serena Mayeri, Sandra Mayson, Joy Milligan, Michael Morse, Melissa Murray, Teddy Rave, Larry Sager, David Schwartz, Kate Shaw, Miriam Seifter, Christopher Yoo, and the participants at the University of Wisconsin Law School Symposium on Interpretation in the States, and the University of Texas Law School Faculty Workshop, and the University of Pennsylvania Carey Law School Faculty Workshop.

*sovereignty as participatory self-government and entitled all members of the polity (albeit defined then to include only white men) to the right to vote.*

*That consensus view of the right to vote has persisted to the present, even as the groups deemed eligible to form a part of the polity have expanded to include people of color and women. In that more inclusive polity, the enduring tradition of republican government entitling to all members the right to vote has functioned as a critical defense for individuals and groups against oppression. Judicial recognition of the fundamental right to vote is therefore not only appropriate, but necessary to sustain America's constitutional republic.*

INTRODUCTION ........ 1705

I. THE *DOBBS* THREAT TO THE FUNDAMENTAL RIGHT TO VOTE ...... 1710
   A. *THE* DOBBS *STANDARD* ........ 1712
   B. *THE INSECURE FUNDAMENTAL RIGHT TO VOTE* ........ 1715
      1. Constitutional Text ........ 1716
      2. History ........ 1719

II. THE INDETERMINACY OF REPUBLICAN GOVERNMENT IN ANGLO-AMERICAN HISTORY ........ 1721
   A. *THE ENGLISH FOUNDATIONS OF REPUBLICAN INDETERMINACY* ........ 1722
   B. *REPUBLICAN INDETERMINACY AND THE AMERICAN REVOLUTION* ........ 1729
   C. *REPUBLICAN INDETERMINACY AND THE U.S. CONSTITUTION* ........ 1736

III. TOWARDS DETERMINACY: THE EVOLVING MEANING OF REPUBLICAN GOVERNMENT IN THE STATES ........ 1743
   A. *THOMAS JEFFERSON, REPUBLICAN GOVERNMENT, AND THE STATES* ........ 1746
   B. *PRELUDE TO A RECKONING* ........ 1751
   C. *THE TRIUMPH OF RADICAL REPUBLICANISM* ........ 1753

IV. THE FUNDAMENTAL RIGHT TO VOTE AND THE REPUBLICAN FORM OF GOVERNMENT CLAUSE: TWO LINGERING QUESTIONS ........ 1762
   A. *DID THE STATES LIQUIDATE THE REPUBLICAN FORM OF GOVERNMENT CLAUSE?* ........ 1762
   B. *ARE FUNDAMENTAL RIGHT TO VOTE CLAIMS JUSTICIABLE UNDER THE REPUBLICAN FORM OF GOVERNMENT CLAUSE?* ........ 1764

CONCLUSION ........ 1766

## INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* introduced an existential threat to those fundamental rights not explicitly protected in the Constitution. In *Dobbs*, the Court overturned a long-standing line of precedents protecting women's fundamental right to reproductive autonomy.[1] As support for its decision, the Court first pointed to the lack of explicit protection for the right in the text of the Constitution. "The Constitution," said Justice Alito writing for the majority, "makes no reference to abortion."[2] The Court then found the right had no implicit protection in the Constitution either. Justice Alito reasoned that the right to abortion could not be implicitly derived from the Fourteenth Amendment Due Process Clause because widespread legal restrictions on abortion in the past served as proof that the right was not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."[3]

Much of the debate between the Justices in *Dobbs* and among legal commentators afterwards has focused on the ruling's threat to other privacy rights not explicitly protected in the Constitution.[4] Those include the right to contraceptives, same-sex marriage, and sexual relations in the home.[5] Overlooked thus far is the threat that *Dobbs* poses to the fundamental right to vote.

---

1. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling *Roe v. Wade*, 410 U.S. 179 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) after "hold[ing] that the Constitution does not confer a right to abortion").

2. *Id.* at 2242.

3. *Id.* at 2253 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

4. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's Next Target is Marriage Equality. It Won't Be the Last.*, SLATE (June 24, 2022, 1:41 PM), https://slate.com/news-and-politics/2022/06/supreme-court-dobbs-roe-wade-obergefell-marriage-equality.html [https://perma.cc/TZM4-Q9ZF] ("With *Dobbs*, the majority has torn down the entire doctrine protecting gay rights, marriage, and contraception, among other personal liberties. These rights are now in grave and immediate jeopardy."); Kenji Yoshino, Opinion, *Is the Right to Same-Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html (on file with the *Iowa Law Review*) ("The court could revisit Obergefell and decide that its due process holding should be overruled because the right to same-sex marriage is not 'deeply rooted in the nation's history.'"); Wesley G. Phelps, *The Fall of* Roe *Forecasts Trouble Ahead for Key LGBTQ Rights*, WASH. POST. (July 15, 2022), https://www.washingtonpost.com/made-by-history/2022/07/15/fall-roe-forecasts-trouble-ahead-key-lgbtq-rights (on file with the *Iowa Law Review*) ("By overturning Roe, the U.S. Supreme Court has removed a significant pillar in the foundation of equality and created the potential for dramatic changes in the lives of millions of people who depend on a constitutional right to privacy in their daily lives.").

5. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the use of a contraceptive within a marital relation lies "within the zone of privacy" protected by the Constitution); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the privacy right to use contraceptives to unmarried persons); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (finding same-sex intimacy in the home to be a liberty entitled to protection under the Constitution); Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (protecting the right to same-sex marriage).

In several provisions, the Constitution protects against discrimination in the right to vote on account of race, sex, or age.[6] It also prohibits poll taxes for federal elections.[7] However, the Constitution contains no explicit protections for the affirmative right to vote. Despite the lack of explicit constitutional protections, courts have declared the right to vote to be fundamental since the late nineteenth century.[8] And since the 1960s, the Supreme Court has been active in protecting the fundamental right to vote through rigorous review of regulations that infringe on the right, even when those infringements do not discriminate on the basis of race, sex, or age or establish a poll tax for federal elections.[9] That line of cases might be enough to save the fundamental right to vote, but *Dobbs*'s treatment of precedent suggests it might not.[10] It is therefore necessary to look elsewhere to ascertain the constitutional status of the vote.

The question after *Dobbs* is whether the Constitution implicitly protects the right to vote as fundamental. Under the *Dobbs* methodology, the answer will turn on whether the fundamental right to vote can be implicitly derived from a constitutional source and whether there is a history of protections for that right.[11]

Existing accounts of the fundamental right to vote suggest that the right is vulnerable to challenge.[12] In past cases, the Supreme Court has vacillated between different constitutional sources for the fundamental right to vote. Early opinions pointed to no constitutional source, later ones to the Fifteenth Amendment protection against racially discriminatory deprivation of the right to vote, and still others to Article I, Section 2's grant of authority to the states

6. U.S. CONST. amend. XV, § 1 (prohibiting denial or abridgment of the right to vote on account of race); *id.* amend. XIX, § 1 (prohibiting denial or abridgement of the vote on account of sex); *id.* amend. XXVI, § 1 (applying to persons eighteen years and older and prohibiting the denial or abridgment of the vote on account of age).

7. *Id.* amend. XXIV, § 1.

8. *See infra* text accompanying note 61.

9. *See infra* text accompanying note 89.

10. In *Dobbs*, the Court overturned *Roe v. Wade*, reasoning that it was poorly reasoned, relied on unworkable legal standards, and simply reflected the exercise of "raw judicial power." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (quoting Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting)). Additionally, *Dobbs* suggests that "*stare decisis* . . . 'is at its weakest when . . . interpret[ing] the Constitution,'" as is at issue here. *Id.* at 2262 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

11. *Id.* at 2246–61.

12. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) ("In contrast to the federal Constitution, . . . state constitutions expressly confer the right to vote and to participate in free and equal elections . . . ."); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 96 (2014) ("[N]one of the[] provisions [in the U.S. Constitution] declare that U.S. citizens actually enjoy the right to vote."); Michael Wines, *Does the Constitution Guarantee a Right to Vote? The Answer May Surprise You.*, N.Y. TIMES (Oct. 26, 2022), https://www.nytimes.com/article/voting-rights-constitution.html (on file with the *Iowa Law Review*) ("The Constitution makes reference to voting 15 times in the original document and another 22 in the amendments. But . . . none of those mentions makes an explicit declaration that Americans have a right to vote . . . .").

to establish voter qualifications.[13] Since the 1960s, the Court has settled on the Fourteenth Amendment's Equal Protection Clause as the source of the fundamental right to vote without a clear explanation for why the right should be derived from there.[14]

Furthermore, the Supreme Court has only once examined the history of protections for the right to vote and that decision's historical account does not support the claim that the right is fundamental.[15] The Court has instead advanced functional-democratic justifications for protecting the right as fundamental. For example, the Court has explained that the right to vote is fundamental because it is "preservative of all rights."[16] It has also asserted that "[t]he right to vote . . . is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[17] Those functional-democratic justifications may be persuasive to many, but they are unlikely to appeal to a Court that rejected similar justifications for protecting reproductive autonomy rights as fundamental in *Dobbs*.[18]

In this Article, I argue that the Republican Form of Government Clause protects the fundamental right to vote. My constitutional textual claim is grounded in history, but one different from the founding-era history that originalists and the Court has previously relied upon. I deviate from that history for reasons consistent with originalism and the methodology employed in *Dobbs*.[19]

That history begins with a founding-era struggle between conservative and radical conceptions of republicanism that left indeterminate the relationship between the right to vote and republican government.[20] Unable to decide

---

13. *See infra* text accompanying notes 76–77.

14. *See infra* text accompanying note 62.

15. *See infra* Section I.B.

16. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

17. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

18. *See infra* text accompanying notes 56–57.

19. In this Article, I do not take a position on the validity of the Court's text, history, and tradition methodology. I am only arguing that the right to vote is entitled to protection using that methodology.

20. I agree with scholars who have argued that the meaning of republican government was determinate in some respects. Akhil Amar, for example, argues that "the Republican [Form of] Government Clause . . . reaffirms basic principles of popular sovereignty" defined as "the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule, in these exercises of ultimate popular sovereignty." Akhil Reed Amar, *The Central Meaning of a Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 762 (1994). But I depart from scholarly claims that republican government meant popular self-government or majoritarian administration of government at the founding. *See, e.g.*, Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 823 & n.80 (2002) (arguing that the Constitutional Convention delegates supported majority rule in the administration of government as "central to republican government"); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 185 (2020) (arguing that the Framers "embraced self-government, in the form of representative democracy"). At the founding, republican government as popular sovereignty meant that the people (defined as the then constituted white male polity)

between disputed meanings of republican government that dated back to the seventeenth-century English Civil War and interregnum, the Framers adopted the Republican Form of Government Clause, but left to the states questions regarding the right to vote and its relationship to republicanism.

At the state level, the debate re-commenced in the early 1800s. Questions central to the constitutional debates in the states included: What does republican government require? And how do we amend or construct a constitution that satisfies the requirements of republican government? Despite the diversity of states and the multiplicity of constitutional conventions, state constitutions coalesced around the principle that republican government entitled members of the political community to the right to vote. In doing so, states repudiated as anti-republican limitations restricting the right to vote to property-holders, even though most states at the founding maintained such limits.

Although states continued to define the political community to include only adult white men until after the Civil War, for those white men the provision of the right to vote was deemed indispensable to republican government. And as federal constitutional changes forced the expansion of the political community to include people of color, women, and eighteen-year-olds, the evolved meaning of republican government required that those entrants be entitled to the same fundamental right to vote.

The historical analysis in this Article suggests that in assessing the relationship between republican government and the right to vote, the first half of the nineteenth century, not the late eighteenth-century founding era, is the proper focal point. It was in that latter period when republican government took on a more determinate meaning and the fundamental right to vote came to be understood as a central predicate for that form of government.

Although the account here is grounded in history, it is nonetheless a historical evolutionary account that will need to be defended against potential originalist critique. In this Article, I advance a two-layered defense of the evolutionary account of the Republican Form of Government Clause that explains its consistency with originalism.

First, I argue from the U.S. Constitution's text and the Federalist Papers that the Framers delegated some of the central constitutive features of republican government to the states with the understanding that they would evolve. The U.S. Constitution gave to the states the authority to: (1) establish qualifications for voting; (2) prescribe the times, places, and manner of elections; and

had to consent to the frame of government, but it did not require that the people be able to participate in the administration of government. There was profound disagreement on that latter point. *See* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1955 (2012) (agreeing with Amar's defining of republican government and explaining, "[t]he more debatable point is whether 'republican form' also refers to a system of representative government").

(3) define republican government.[21] Not even an originalist claims that the qualifications to vote or the times, places, and manner of elections that were in place when the U.S. Constitution was ratified were meant to apply until those constitutional provisions were amended. Instead, according to the U.S. Constitution's design, changes over time to state voter qualifications and the times, places, and manner of elections were meant to be incorporated into the Constitution without any requirement for amendment. I argue here that the state definition of republican form of government was also designed to evolve in the same way as state voter qualifications and the times, places, and manner of elections. In other words, changes over time to the meaning of republican government within the states' legal regimes were meant to be incorporated into understandings of the republican form of government in the U.S. Constitution.

Second, I argue that state changes to the meaning of the Republican Form of Government Clause are insulated from originalist challenges to the legitimacy of constitutional change outside the U.S. Constitution's Article V amendment process.[22] Unlike constitutional change produced through judicial doctrine that are prominent targets of originalist attacks, the meaning of republican government evolved through changes to state constitutions. By the middle of the nineteenth century, those changes to state constitutions recognizing the right to vote as a component of republican government were ratified in every state by the voting polity as then constituted.[23] The evolving meaning of republican government, therefore, matched or exceeded the level of popular legitimacy of the U.S. Constitution and its amendments, and was achieved through formal lawmaking processes.[24]

At a time when American democracy is under considerable stress, the stakes associated with protecting the fundamental right to vote are very high.[25]

---

21. *See* U.S. CONST. art. I, § 2 ("[T]he Electors in each State [for the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII ("The electors in each State [for the Senate] shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."); *id.* 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 . . . ."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) (locating in the states the responsibility for determining what government is republican in form).

22. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 18–19 (1977) (arguing that Article V is the exclusive mechanism for constitutional change).

23. *See infra* Section III.C.

24. In contrast to the unanimous embrace of the right to vote in state constitutions evidenced by the repeal, or refusal to adopt, property qualifications, the process for amending the Constitution only requires the approval of three quarters of the states for ratification. U.S. CONST. art. V.

25. For books highlighting the rising threats to U.S. democracy, see generally STEVEN LEVITZKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); ANNE APPELBAUM, TWILIGHT OF

As a matter of constitutional doctrine, deeming the right to vote fundamental has protected against severe infringements on the right to cast ballots and candidate access to ballots.[26] Perhaps more importantly, the fundamental right to vote has also served as the constitutional basis for protecting equal rights to participation through the one-person, one-vote requirement and prohibitions on vote dilution.[27] Without a fundamental right to vote, republican government will be significantly threatened by partisan efforts to manipulate and distort it.[28]

The Article proceeds in four parts. In Part I, I describe the *Dobbs* threat to fundamental rights, focusing on its potential challenge to the fundamental right to vote. In the next two Parts, I develop a historical response to the *Dobbs* challenge. In Part II, I trace the historical sources of indeterminacy regarding the relationship between republican government and voting, which began with English experiments with republican government in the middle of the seventeenth century and continued to the U.S. Constitution's founding era. In Part III, I show how the indeterminacy was resolved at the state level by examining the evolution of the meaning of republican government in state constitutions during the first half of the nineteenth century, focusing particular attention on Virginia. I chose Virginia as my case study because it was one of the last states to embrace the right to vote as central to republican government. Since parts of the Virginia constitutional conventional debates focused on what other states had already done and arguments generated in other state constitutional conventions and what other states had already done, Virginia provides a good vantage point for understanding the broader shift in the meaning of republican government in the states. In Part IV, I address thorny questions surrounding the enforceability of the Republican Form of Government Clause with a focus on the Clause's protection of the fundamental right to vote.

## I. THE *DOBBS* THREAT TO THE FUNDAMENTAL RIGHT TO VOTE

In *Dobbs*, the Court relegated individual reproductive autonomy rights prior to fetal viability from a fundamental right entitled to rigorous constitutional

---

DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM (2020); and YASCHA MOUNK, THE GREAT EXPERIMENT: WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE (2022).

26. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (striking down a state poll tax because it infringed on the fundamental right to vote); Williams v. Rhodes, 393 U.S. 23, 25, 30–31 (1968) (striking down a ballot access provision that making it "virtually impossible" for a third party's candidate to get on the state ballot).

27. Reynolds v. Sims, 377 U.S. 533, 563 (1964) (protecting a right to political equality through one-person, one-vote); Fortson v. Dorsey, 379 U.S. 433, 436–39 (1965) (establishing constitutional protections against vote dilution under the fundamental right to vote doctrine).

28. As John Hart Ely argued four decades ago: "We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason . . . it had better be a very convincing one." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 120 (1980).

protection to a privilege that the state had broad authority to regulate.[29] In the background stood the lurking question of which other fundamental rights might be next to suffer a similar fate. Justice Samuel Alito, writing for the majority in *Dobbs*, disclaimed any threat to other fundamental privacy rights—rights to contraceptives, same-sex intimacy in the home, and same-sex marriage.[30] He asserted that abortion is different because it implicates potential life.[31]

The problem with Justice Alito's account is, that although the meaning and status of potential life has considerable salience in the conflict between supporters and opponents of abortion, it has no clear relevance to the doctrinal test proffered in *Dobbs* for assessing whether a right is fundamental. That assessment turned on text and history and not on the implications of right's exercise on others, potential or not.[32] If we take the *Dobbs* majority's methodology and reasoning seriously, then the dissenters appear to have it right when they warn, "all rights that have no history stretching back to the mid-nineteenth century are insecure."[33]

There was no mention of the fundamental right to vote in any of the opinions. Justice Alito did not disclaim the right to vote as one that would not be threatened by the decision. In his concurrence, Justice Clarence Thomas's request for the constitutional reassignment and reconsideration of privacy rights under the Fourteenth Amendment's Privileges or Immunities Clause did not include a similar request for the right to vote.[34] The right to vote is also absent from the dissenting opinion. Its warning about the insecurity of rights lacking a historical basis came after an assertion about the threat that the *Dobbs* standard posed for other privacy rights.[35]

In one respect, the oversight makes sense. The right to vote is not a privacy right and the Court has never interpreted the Fourteenth Amendment Due Process Clause to protect the right to vote. Therefore, insofar as *Dobbs* was about privacy and due process, the right to vote is distinct. However, in another respect, the oversight is puzzling. Early in his opinion, Justice Alito announced, "[i]t is time to heed the Constitution and return the issue of abortion

29. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (concluding that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion").

30. *Id.* at 2261 (describing the fears as "unfounded" that the decision to strike down the right to abortion will imperil other privacy rights).

31. *See id.* ("The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect.").

32. *Id.* at 2283 (finding that the right to "abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history").

33. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting).

34. *Id.* at 2302 (Thomas, J., concurring) (suggesting the Court abandon the substantive due process doctrine and "consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States'" (quoting U.S. CONST. amend. XIV, § 1).

35. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting).

to the people's elected representatives."[36] Underlying that announcement is a theory of judicial restraint, which says that the permissibility of abortion and other important matters should be resolved "in our democracy[,] by citizens trying to persuade one another and then voting."[37] That theory of judicial restraint depends on a properly functioning democracy.[38] And because of the incentives for candidates, parties, and groups in our current politics to manipulate elections and deprive individuals of their vote, judicial protection of the fundamental right to vote is a prerequisite to a properly functioning democracy.[39]

Yet, paradoxically, through its methodological standard for reviewing fundamental rights, the *Dobbs* majority introduced an existential threat to the fundamental right to vote. That threat could result in the relegation of the vote from a fundamental right to a privilege thereby threatening the properly functioning democracy that the *Dobbs* majority relies on to justify its treatment of reproductive autonomy as a privilege not a right.

In the following, I review the methodological standard applied in *Dobbs* for assessing whether the right to reproductive autonomy was fundamental. I then compare the *Dobbs* standard to those standards the Supreme Court applied in its past fundamental right to vote jurisprudence. The comparison reveals that without further justificatory support, the vote is extremely vulnerable to relegation from the status of a right to that of a privilege.

### A. *THE* DOBBS *STANDARD*

The standard for determining whether a right is fundamental was given a conservative bent in *Dobbs*. The *Dobbs* majority devoted more attention to the question of the textual source of reproductive autonomy rights than any prior majority opinion protecting fundamental rights. It also made history and tradition a dispositive evidentiary factor in its fundamental rights determination, diverging from prior Supreme Court decisions.

Before *Dobbs*, the Court generally drew a rather loose connection between the constitutional text and the fundamental right granted constitutional protection. In *Griswold v. Connecticut*, a case establishing the fundamental right to marital privacy and applying it to a married couple's use of contraceptives, Justice William Douglas famously derived the privacy rights from the penumbras surrounding the First Amendment right of association,

36. *Id.* at 2243 (majority opinion).

37. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)).

38. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 763 (2024) (questioning the Dobbs Court's appeal to democracy describing it as "shallow, underdeveloped, and profoundly cynical").

39. *See, e.g.*, ELY, *supra* note 28, at 117 ("A more complete account of the voting cases is that they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives.").

the Third Amendment ban on quartering troops in the home, the Fourth Amendment protection against unreasonable searches and seizures, and the Fifth Amendment prohibition on self-incrimination.[40] Beyond the penumbras, Justice Douglas advanced a nontextual argument for protecting privacy rights as fundamental when he declared, "[w]e deal with a right of privacy older than the Bill of Rights."[41]

In *Roe v. Wade*, the case establishing a right to reproductive autonomy under the right to privacy umbrella, the Court acknowledged that the right could be derived from the penumbras of rights contained in the Bill of Rights or from the Ninth Amendment.[42] But it ultimately favored the Fourteenth Amendment Due Process Clause as the constitutional source for the right without explaining how the privacy right was derived from that clause.[43] In decisions that followed reaffirming the right to reproductive autonomy and extending the privacy right to same-sex intimacy and marriage, the Court followed *Roe*'s lead both in deriving the right from the Fourteenth Amendment Due Process Clause and in failing to explain how it did so as a matter of textual interpretation.[44]

In *Dobbs*, the majority was quite critical of the Court's textual analysis in the Court's prior privacy rights cases. As a starting point, Justice Alito pronounced, "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means."[45] Justice Alito argued that in prior cases the text did not receive the level of prioritization that he thought should be given to it. For Justice Alito, "*Roe* . . . was remarkably loose in its treatment of the constitutional text."[46] That loose treatment included the holding that "the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[47] Justice Alito claimed that the loose connection the *Roe* Court drew to the constitutional text sent the message "that the abortion right could be found somewhere in the Constitution and that specifying its exact location was not of paramount importance."[48]

---

40. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

41. *Id.* at 486.

42. Roe v. Wade, 410 U.S. 113, 152 (1971).

43. *Id.* at 153.

44. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (deriving a right to privacy to protect abortion access from the Fourteenth Amendment Due Process Clause); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting the right to same-sex intimacy under the Due Process Clause); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (locating the protections of same-sex marriage in the Equal Protection and Due Process Clauses).

45. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244–45 (2022) (first quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824); and then quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (1833)).

46. *Id.* at 2245.

47. *Id.*

48. *Id.*

Justice Alito acknowledged, however, that fundamental rights could be implicitly derived from the text. Consistent with prior Supreme Court decisions establishing fundamental rights, the *Dobbs* majority turned to history in its assessment of whether the right to abortion was entitled to protection as a constitutionally implicit right.[49] The historical analysis in *Dobbs* shared with that in *Roe* a focus on the distant past when women were not autonomous political or lawmaking agents.[50] The opinions drew on ancient Greek and Roman law, eighteenth-century common law, nineteenth-century English and American statutory law, and eighteenth- and nineteenth-century treatises that were all, or mostly, written by men.[51]

The *Roe* and *Dobbs* Courts, however, diverged in their interpretations of history. The *Roe* majority found that pre-quickening abortion was not generally regulated or criminalized in the past, which supported the constitutional protection of abortion rights as fundamental during the first trimester of pregnancy.[52] The *Dobbs* majority found the opposite—that abortion was generally banned in the past—demonstrating abortion's lack of entitlement to protection as a fundamental right at any point during a pregnancy.[53]

Between *Roe* and *Dobbs*, the Court similarly examined the history of regulations prior to declaring other privacy rights fundamental—same-sex intimacy in the home and same-sex marriage.[54] Aside from differences in historical interpretation, what differentiated *Dobbs* from the cases that came before was the *Dobbs* majority's unwillingness to consider evidence other than history as relevant to the fundamental rights inquiry. For example, the *Dobbs* majority considered the effects of an abortion ban on the lives of women to be entirely irrelevant to the fundamental rights analysis.[55] The Court explained

---

49. *See id.* (acknowledging that the right to abortion can be implicitly derived from the Constitution's text).

50. In both *Dobbs* and *Roe*, the Court cited a history and tradition of abortion laws passed by legislatures in which women were either excluded from or extremely underrepresented. *See* Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 341–55 (2023) (quantifying the degree to which women were excluded from the lawmaking processes that the Court cited as evidence that reproductive autonomy was not a fundamental right).

51. For the history and tradition analysis in the two cases, see Roe v. Wade, 410 U.S. 113, 129–41 (1973); *Dobbs*, 142 S. Ct. at 2248–53.

52. *Roe*, 410 U.S. at 132–40 (finding that pre-quickening was historically not criminal in the English common and statutory law, and American statutory law until recently).

53. *Dobbs*, 142 S. Ct. at 2249–53 (finding that abortion was historically criminal in the English common and statutory law and American statutory law at all stages of pregnancy).

54. *See* Lawrence v. Texas, 539 U.S. 558, 568–72 (2003) (assessing the "longstanding history in this country of laws directed at homosexual conduct as a distinct matter"); Obergefell v. Hodges, 576 U.S. 644, 656–63 (2015) (analyzing the history of marriage).

55. *Dobbs*, 142 S. Ct. at 2277 (refusing to sustain precedent based on the argument that women rely on abortion asserting that such "reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women").

that such considerations would "represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'"[56]

In contrast to *Dobbs*, the Court in prior fundamental rights cases did base their fundamental rights determination, in part, on other considerations. The *Roe* Court was quite attentive to "[t]he detriment that the State would impose upon the pregnant woman by denying this choice."[57] It considered the distressful life and future that might be forced upon women by childbirth, the "[p]sychological harm [that] may be imminent, [and the] [m]ental and physical health [that] may be taxed by child care."[58] In *Lawrence v. Texas*, the Court, as part of its reasoning supporting same-sex intimacy in the home as a fundamental right, explained that LGBTQ persons "are entitled to respect for their private lives" and "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[59] Finally, the majority in *Obergefell v. Hodges* explained that the right of same-sex couples to marry is fundamental because marriage "supports a two-person union," and "marriage is a keystone of our social order."[60] After *Dobbs*, however, it is doubtful that any of these other considerations will matter for the Court's fundamental rights determination if the right lacks a strong grounding in constitutional text and history.

The *Dobbs* methodological standard therefore represents a challenge to the fundamental right status of the vote. The right's protection as a fundamental right in the Court's jurisprudence has thus far been only loosely based on text and not at all grounded in history. Even though the right is supported by powerful democratic-functional justifications for its fundamental status, that alone will likely be insufficient under the *Dobbs* standard. In the next Section, I highlight the fundamental right to vote's insecurities.

### *B. THE INSECURE FUNDAMENTAL RIGHT TO VOTE*

In the 1886 case of *Yick Wo v. Hopkins*, the Court declared the vote "a fundamental political right, because [it is] preservative of all rights."[61] Nearly eighty years later, the Court reinforced that declaration in *Reynolds v. Sims* when it announced, "the right of suffrage is a fundamental matter in a free and democratic society."[62] In the half century since *Reynolds*, the Court has

56. *Id.* (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).
57. *Roe*, 410 U.S. at 153.
58. *Id.*
59. *Lawrence*, 539 U.S. at 578.
60. Obergefell v. Hodges, 576 U.S. 644, 666, 669 (2015).
61. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
62. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

consistently treated the right to vote as fundamental, subjecting severe infringements on it to rigorous judicial scrutiny.[63]

It is not clear how much that line of precedent will matter after *Dobbs*. Prior to *Dobbs*, the Court had in several cases, over a fifty-year period, found and reaffirmed that the right to reproductive autonomy was fundamental.[64] Nonetheless, the *Dobbs* majority overruled those past cases citing the nature of the Court's error and the quality of the reasoning.[65] Those considerations turned on the *Dobbs* majority's determination that the fundamental right to reproductive autonomy lacked a constitutional text and historical basis. An examination of the Court's past fundamental right to vote cases suggests the right might be as insecure as the fundamental right to reproductive autonomy was found to be in *Dobbs*.

### 1. Constitutional Text

The Supreme Court has vacillated from opinion to opinion on the constitutional textual sources of the fundamental right to vote. In the aftermath of the Reconstruction Amendments' ratification, the Court in *Ex Parte Yarbrough* looked to the Fifteenth Amendment as the constitutional source for the right to vote.[66] The Court acknowledged that the amendment prohibiting the racially discriminatory denial and abridgement of the right to vote "g[a]ve[] no affirmative right to the colored man to vote."[67] Nonetheless, the Court explained that through its annulment of the word "white" in state suffrage provisions, the amendment "substantially confer[red]" on African Americans "the right to vote."[68] The Court, however, never addressed whether that right to vote provided protections beyond racially discriminatory bans or limits on voting.

Two years later in *Yick Wo*, the Court suggested that it did. In that case, the Court declared the right to vote fundamental.[69] The Court associated the fundamental right to vote with the rule of law and freedom arguing that the

63. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("[W]e have recognized when [the right to vote and associate with others] are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

64. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

65. *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2279 (2022) (overruling *Roe*, 410 U.S. 113, and *Casey*, 505 U.S. 833).

66. *See Ex parte* Yarbrough, 110 U.S. 651, 664 (1884) ("The Fifteenth Amendment of the Constitution . . . clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.").

67. *Id.* at 665.

68. *Id.*

69. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

vote was a necessary concomitant to both.[70] The Court did not, however, ground the more capacious right to vote in any specific constitutional text.

In the last of the post-Reconstruction era cases, *Pope v. Williams*, decided nearly twenty years after *Yick Wo*, the Court without mentioning *Yick Wo* relegated the vote from a right to a privilege. In *Pope*, the Court upheld a Maryland voting restriction explaining, "[t]he privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."[71] The Court, specifically referencing the Fourteenth Amendment Privileges and Immunities Clause, continued: The vote "is not a privilege springing from citizenship of the United States."[72] Instead, "the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."[73]

Over the next four decades, the Court provided some protections against racially discriminatory voting regulations and the people stepped in to extend the nondiscriminatory right to vote to women through the Nineteenth Amendment.[74] But the existence and source of the fundamental right to vote remained unclear until the Court returned to the question in the 1940s. In the 1941 case of *United States v. Classic*, the Court turned to Article I, Section 2 as a constitutional source for the affirmative right to vote.[75] Article I, Section 2 provides, in relevant part, "the Electors in each State [for the U.S. House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[76] The Court in *Classic* interpreted that provision as establishing "the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections."[77] The right to vote recognized in *Classic* broadly extended to all classes of qualified voters, but the protections provided for the right to vote textually derived from Article I, Section 2, were narrow. According to the language of Article I, Section 2 and the reasoning in *Classic*, the states retained the authority to define "qualified voters," without any clear limiting principle, and thereby determine who could exercise the right to vote.

The Court made that point clear two decades later in *Lassiter v. Northampton County Board of Elections* when it upheld a state literacy test against a constitutional challenge.[78] The Court again relied on Article I, Section 2 as the sources of

70. *See id.* at 370–71 (associating the fundamental right to vote with the rule of law and the protection of fundamental freedoms).

71. Pope v. Williams, 193 U.S. 621, 632 (1904).

72. *Id.*

73. *Id.*

74. U.S. CONST. amend. XIX, § 1.

75. United States v. Classic, 313 U.S. 299, 314 (1941).

76. U.S. CONST. art. I, § 2.

77. *Classic*, 313 U.S. at 315.

78. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 45–47, 54 (1959).

the constitutional right to vote, but it explained that the right "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."[79] In addition to upholding the state literacy test, the Court pointed to other nondiscriminatory voter qualifications that states retained broad authority to adopt and maintain.[80]

The Court's position evolved again in a series of cases implicating the right to vote. In the 1960s, the Court entered the political thicket of apportionment and districting holding malapportioned congressional and state legislative districts unconstitutional.[81] In its review of malapportioned congressional districts, the Court in *Wesberry v. Sanders* relied on Article I, Section 2. "[T]he command of Art. I, [Section] 2, that Representatives be chosen 'by the People of the several States,'" the Court explained "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[82] "To say that a vote is worth more in one district than in another," the Court continued, "would cast aside the principle of a House of Representatives elected 'by the People.'"[83]

The language, "the People," in Article I, Section 2 provided the textual basis for holding malapportioned congressional districts unconstitutional in *Wesberry*,[84] but when the Court addressed the constitutionality of malapportioned state legislative districts in *Reynolds v. Sims*, it did not have similar constitutional language to turn to. Article I, Section 2 established the voter qualifications for U.S. House of Representatives elections, not state legislative elections.[85] To support its holding unconstitutional malapportioned state legislative districts, the Court therefore turned to the fundamental right to vote. The Court declared, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[86] Linking malapportioned districts with infringements on the fundamental right to vote, the Court continued, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[87]

79. *Id.* at 51.

80. *See id.* ("Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." (citation omitted)).

81. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

82. *Id.* (quoting U.S. CONST. art. I, § 2).

83. *Id.* at 8.

84. *See id.* at 7–8 (discussing how the Court did not believe the Framers of the Constitution intended for votes to be weighed more heavily in different districts based on their population).

85. *See* U.S. CONST. art. I, § 2.

86. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

87. *Id.*

The constitutional basis for the fundamental right to vote, however, remained undeveloped. Although the Court referred to the Fourteenth Amendment Equal Protection Clause, it never explained how the right was derived from that clause.[88] Nonetheless, in subsequent opinions, the Court, citing *Reynolds*, continued to point to the Fourteenth Amendment Equal Protection Clause as the textual source for the fundamental right to vote.[89]

The fundamental right to vote was thus firmly established by the late 1960s, but the constitutional textual foundations for the right remained weakly defended. Despite the tenuous textual basis established in prior case law, the fundamental right to vote could still be entitled to protections under the *Dobbs* standard if the Court identified a historical basis for protecting the right as implicitly derived from the Constitution's text. In past decisions, the Court, however, has almost entirely ignored history in favor of a functional-democratic justification for protecting the right to vote as fundamental.

### 2. History

In *Yick Wo*, the Court advanced a functional account of the right to vote when it deemed it fundamental because it is preservative of all other rights. Nearly eighty years later, in *Reynolds v. Sims*, the Court added a democratic basis for protecting the fundamental right to vote. After finding that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society," the Court elaborated, "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[90] Both the functional and democratic justifications for protecting the right to vote as fundamental are compelling. But they are unlikely to be compelling enough for a *Dobbs* majority focused exclusively on history as the evidentiary source for fundamental rights implicitly derived from the text.

The vulnerability of the fundamental right to vote is further exposed by the fact that the only historical account of the right in Supreme Court case law suggests the right should not be entitled to fundamental status. During the decade after the Reconstruction Amendments' ratification, the Court in

---

88. *See id.* at 568 (holding, without further explanation, that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"); Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 166 (2015) (supporting as well founded "concerns about relying on the Equal Protection Clause as the source of the right [to vote,] . . . the Court's failure to develop an affirmative theory of voting has allowed varied, sometimes troubling, assessments of state election laws").

89. *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969) ("[W]e have held that, because of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined' where those rights are asserted under the Equal Protection Clause." (citation omitted)).

90. *Reynolds*, 377 U.S. at 555, 562.

*Minor v. Happersett* upheld a Missouri law prohibiting women from voting.[91] In doing so, the Court rejected the claim that the right to vote was a privilege and immunity of citizenship under the Fourteenth Amendment. Although women were clearly citizens, the Court explained, the U.S. Constitution did not make all citizens voters and therefore the privileges and immunities of citizenship does not include the vote.[92]

Using history to reason to that conclusion, the Court focused on the founding era. That era was relevant to the Court because Article IV of the original Constitution included a privileges or immunities clause that the Fourteenth Amendment copied in slightly modified form.[93] The Court assumed that the privileges or immunities protected under the original Constitution had to be the same as the privileges and immunities protected under the Fourteenth Amendment.[94] And if the right to vote was a privilege or immunity of citizenship, then any state prohibitions on the right to vote should have been unconstitutional after the federal constitution was ratified.[95] Yet, "in no state" after the Constitution's ratification "were all citizens permitted to vote."[96] Moreover, the states that joined the union in the decade after the Constitution's ratification also adopted constitutions prohibiting women, African Americans, and other citizens from voting.[97]

The *Minor* Court relayed that history in response to a claim that the Fourteenth Amendment Privileges or Immunities Clause protected the right to vote. But that history could also be told by any future Court applying the *Dobbs* standard to deny constitutional protections to the right to vote under other provisions of the original Constitution.

* * *

Precedent suggests the fundamental right to vote is insecure and could, through the application of the *Dobbs* standard, be relegated to privilege status. In the fundamental right to vote cases thus far, the Court has failed to identify a clear constitutional basis for the right to vote that is grounded in a history of legal protection or noninfringements on that right. To protect the right to vote as fundamental, it will therefore be necessary to develop a textual basis for

---

91. Minor v. Happersett, 88 U.S. 162, 173–78 (1874).

92. *Id.* at 170–73.

93. *Compare* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."), *with id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

94. *See Minor*, 88 U.S. at 174.

95. *Id.* at 174, 176–77.

96. *Id.* at 172.

97. *See id.* at 176–77 (describing the state of the law in some states at the time of the original Constitution's ratification).

the right that is supported by a history of legal protections or noninfringements on that right. In the next two Parts, I argue from text and history that the Republican Form of Government Clause is the constitutional source for the right to vote and show through an excavation of early state constitutional history how the vote became a fundamental right.

## II. THE INDETERMINACY OF REPUBLICAN GOVERNMENT IN ANGLO-AMERICAN HISTORY

The U.S. Constitution guarantees a Republican Form of Government.[98] Americans tend to associate republican government with democracy, and the right to vote is thought to be a foundational pillar of democracy. Yet, the Supreme Court has never looked to the Republican Form of Government Clause as the Constitution's textual source for the fundamental right to vote. That choice can be partially explained by a misunderstanding regarding judicial authority to enforce the Clause; something I address in Part IV.

The choice might also be justified if we look to the history the Court in *Minor v. Happersett* relied on to support its holding that the Fourteenth Amendment Privileges or Immunities Clause was not a constitutional source for the right to vote.[99] The Republican Form of Government Clause is contained in the same article of the U.S. Constitution as the original Privileges or Immunities Clause.[100] Since the Republican Form of Government Clause was ratified at a time when many states restricted the right to vote, it could not protect a fundamental right to vote, or so the argument might go.

In the following, I challenge the Court's historical account of the right to vote and argue that the Court should continue to treat the right as fundamental using a history and tradition methodology. The argument from history and tradition does not signal agreement with the Court's methodology. In fact, I have been quite critical of the approach in a prior co-authored article.[101] But assuming the continued application of the methodology in future cases, I think it is important to defend the fundamental right to vote using the current Court's preferred interpretive approach for identifying fundamental rights.

In this Part, I begin the analysis by tracing the indeterminacy about the relationship between republican government and voting to the political crisis surrounding the mid-seventeenth-century Civil War. I then show how that indeterminacy persisted through the American Revolution and the U.S. Constitution's framing. I conclude this Part by presenting historical evidence that the Framers to the U.S. Constitution delegated to states the responsibility

---

98. U.S. CONST. art. IV, § 4.

99. *See supra* text accompanying notes 93–97.

100. *See* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

101. *See, e.g.*, Milligan & Ross, *supra* note 50, at 339–47 (criticizing the history and tradition methodology for its failure to account for America's exclusionary past).

of developing the meaning of republican government, including its relationship to voting.

### A. *THE ENGLISH FOUNDATIONS OF REPUBLICAN INDETERMINACY*

In the mid-seventeenth century, monarchical absolutism and rule by royal prerogative and decree triggered a civil war in England.[102] The English Parliament won and King Charles became the first and only English monarch to be tried and executed by his subjects.[103] The tumultuous period surrounding the civil war and the King's execution ignited an intense period of theorizing about government that would have impact far beyond seventeenth-century England.[104]

The most important of the theories that would later acquire the republican label were united in their complete rejection of the monarchical absolutism associated with King Charles and his rule by arbitrary decree.[105] Although the republican theories of the period shared a common enemy and point of departure, they developed divergent and sometimes conflicting ideas and principles of government, which resulted in considerable indeterminacy about what republican government required. The several divergent theories of republican government largely fit into two main categories. One category of republican theories was considered radical because of its foundation in the democratic rule of the people. The other category was considered conservative because it rested on the empowerment of virtuous aristocrats in Parliament to rule over the people.

The army was the starting point for radical English republican theory.[106] In 1645, the English Parliament formed the New Model Army to prosecute a war against the King and his forces.[107] When a financially strapped Parliament sought to disband the army without pay at the conclusion of hostilities, the

102. *See, e.g.*, Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 245–49 (2021) (describing the lead up to the English Civil War).

103. *See* Frank Lovett, *Milton's Case for a Free Commonwealth*, 49 AM. J. POL. SCI. 466, 467–69 (2005) (connecting the English republican theorists from the interregnum to the defenders of the American Revolution and proponents to the U.S. Constitution).

104. *See* Blair Worden, *English Republicanism*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700, at 443, 443–48 (J.H. Burns & Mark Goldie eds., 1991) (associating the English Civil War and interregnum period with a "profound reexamination of political belief and practice" in which a republican tradition emerged).

105. *See, e.g.*, CONRAD RUSSELL, THE CRISIS OF PARLIAMENTS: ENGLISH HISTORY 1509–1660, at 310–26 (J.M. Roberts ed., 1971) (recounting the eleven-year period in which King Charles ruled without a Parliament, imposing decrees and raising revenues from the people without Parliament's consent).

106. *See* H.N. BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION 255 (Christopher Hill ed., 1961) (describing how the army took the lead in advancing a constitution designed to secure the liberties of the people of England).

107. *See* RUSSELL, *supra* note 105, at 358–59 (describing the formation of the New Model Army).

army resisted.[108] Members of the rank and file demanded material compensation for their service, while also initiating the radical call for revolutionary reconstruction of government that would center the people in its sovereign operations.[109] Those more radical elements of the army came to be labelled Levellers for their association with Londoners who advanced democratic principles demanding the levelling of the English political hierarchy.[110]

For the army, a question arose from Parliament's cavalier effort to disband the army without pay: What was the war against the King for? For Members of Parliament, dominated by wealthy and aristocratic elements from English society, the war's purpose was to re-establish the rule of law through the empowerment of Parliament to serve as a check on monarchical absolutism.[111] That meant elevating Parliament to a coequal status with the King and delegating to the parliamentary House of Commons central lawmaking authority.[112] The army Levellers agreed with Members of Parliament on the need to check monarchical absolutism. But the Levellers, many of whom could not satisfy the property qualifications to vote for members of Parliament, disagreed with the Members of Parliament on the means towards that end.[113] For the Levellers, coequality between the King and Parliament would merely make the disfranchised people slaves to two masters.[114] The best defense instead against monarchical absolutism, according to the Levellers, was to get rid of the King and establish the people

108. *See* Mark A. Kishlansky, *The Army and the Levellers: The Roads to Putney*, 22 HIST. J. 795, 796–97 (1979) (describing the army's resistance to Parliament's attempt to disband it).

109. *Id.* at 796. In the aftermath of Parliament's attempt to disband the army, "[m]aterial grievances [in the army] had been transformed into political consciousness." *Id.*

110. *See* CHRISTOPHER HILL, THE CENTURY OF REVOLUTION: 1603–1714, at 129 (Christopher Brooke & Denis Mack Smith eds., 1961) (describing the Levellers in London as "a group of democrats [who] were saying that Parliament's resistance to the King, and the sovereignty of Parliament, could only be justified theoretically if that sovereignty derived from the people [and] Parliament . . . be made representative of the people").

111. *See* RACHEL FOXLEY, THE LEVELLERS: RADICAL POLITICAL THOUGHT IN THE ENGLISH REVOLUTION 32 (Ann Hughes, Anthony Milton & Peter Lake eds., 2013) (describing the Parliamentarian view about the proper distribution of power between the King and the two Houses of Parliament under the fundamental constitution that would enable the Parliament "to limit and correct the king").

112. *See* CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 5 (1981) (describing the community-centered ideology embraced by Members of Parliament that positioned Parliament as "the primary law-giver; and the law made there . . . the shared product of king, lords, and commons legislating as three co-ordinate estates").

113. *See* The Putney Debates (1647), *reprinted in* PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647–9) FROM THE CLARKE MANUSCRIPTS WITH SUPPLEMENTARY DOCUMENTS 1, 61–62 (A.S.P. Woodhouse ed., 1938) [hereinafter Putney Debates] (statement of Maximilian Petty) (noting that many poor Englanders could not afford the forty shilling a year requirement to vote thereby denying them freedom from the threat of tyranny).

114. In the Putney Debates, Colonel Rainborough described as the old law of England "which enslaves the people of England—that they should be bound by laws in which they have no voice at all." *Id.* at 61 (statement of Colonel Thomas Rainborough).

as the sovereign authority able to choose and exercise control over their representatives in Parliament.[115]

In the course of pamphlets, two manifestos titled Agreements of the People, and a debate over the manifestos between radical and conservative army members in the General Council of Officers, the Levellers proposed a complete reconstruction of English government. The proposed reconstruction had four principal pillars: (1) nearly universal manhood suffrage in place of property qualifications that disfranchised most Englishmen;[116] (2) officeholding eligibility for all enfranchised Englishmen;[117] (3) majority rule through greater equality of representation;[118] and (4) popular control over government through a single representative body successively assembled and subject to frequent elections by the people.[119] The Levellers' proposed reconstruction would establish a check on monarchical absolutism through popular self-government from below. Although the Levellers did not give a name to their political program, I label it democratic republicanism.[120]

Each of the Levellers' proposals drew opposition from the New Model Army officers and Members of Parliament. Broadened suffrage through the removal of property qualifications on voting was a focal point for opposition because of its direct implications for inclusive officeholding, equal representation, and popular control over government. As property holders, the officers and Members of Parliament shared economic interests with each other, and they perceived broadened suffrage to be a threat to their property rights. The presumed conflict between democracy and property would emerge as a theme in the resistance to democratic republicanism and the promotion of a more aristocratic republicanism that would play out on the other side of the Atlantic over a century later.[121] It is therefore worth deeper exploration here.

---

115. *See* The Agreement of the People (Oct. 28, 1647), *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION: 1625–1660, at 333–34 (Samuel Rawson Gardiner ed., 3d ed. 1906) (declaring that the people are sovereign).

116. *See* THE CASE OF THE ARMIE TRULY STATED 15 (London 1647) (demanding that "all the freeborn at the age of 21 years and upwards, be the electors" with few exceptions); *see also* Putney Debates, *supra* note 113, at 66 (statement of John Wildman) ("Every person in England hath as clear a right to elect his representative as the greatest person in England.").

117. *See* The Agreement of the People (Jan. 15, 1648), *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION: 1625–1660, *supra* note 115, at 359, 364 (arguing for the extension of officeholding privilege to all those "who . . . have voice in elections in one place or other").

118. Apportionment "according to the number of the inhabitants" would secure greater equality of representation. The Agreement of the People (Oct. 28, 1647), *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION: 1625–1660, *supra* note 115, at 333.

119. *See* THE CASE OF THE ARMIE TRULY STATED, *supra* note 116, at 15 (calling for the biennial election of members of Parliament); *see also* FOXLEY, *supra* note 111, at 37–42 (describing the Levellers support for the sovereignty of a single unicameral representative institution).

120. *See* Worden, *supra* note 104, at 443 ("The term republican was not, on the whole, one which they sought, and was more commonly one of abuse.").

121. *See infra* Sections II.A–.B.

The Putney Debates in the General Council of Officers in October 1647 served as the forum for the earliest recorded debate over democratic republicanism.[122] In the context of the civil war and a contest of power between Parliament and the army, the debates exposed uncomfortable divisions within the army. The Levellers, and their demands for democratic republicanism, were pitted against moderate Independents who dominated the officer corps.[123] The Independents sympathized with some of the Levellers' demands, but they resisted what they considered to be the more extreme call for broadened suffrage.[124]

In the debate, Colonel Thomas Rainborough, a commander of an infantry regiment in the New Model Army, defended the Levellers' demand for broadened suffrage. Suffrage, he argued, was the just deserts for poor soldiers who had fought and sacrificed in the war and deserved to be elevated from the status of subject and political slave to citizen.[125] Rainborough and other army Levellers drew a connection between the argument from just deserts to broader claims for political equality and representative rule according to popular consent.[126]

Early in the deliberations, Rainborough defined the terms of the debate. "I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government."[127] "[T]he poorest man in England," Rainborough continued, "is not at all bound in a strict sense to that government that he hath not had a voice to put himself under."[128]

---

122. *See, e.g.*, Samuel Dennis Glover, *The Putney Debates: Popular Versus Élitist Republicanism*, PAST & PRESENT, Aug. 1999, at 47, 48 ("The [Putney] Debates are a key text for understanding the roots of the formulation of our modern concepts of democracy and liberalism, particularly because they appear to be the first recorded expression of demands for universal manhood suffrage within a representative system of government.").

123. *Id.* at 79 (describing the Putney Debates as "an argument about alternative versions of republicanism—one oligarchic and exclusive, and the other popular and democratic").

124. *See generally* PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647–9), *supra* note 111 (describing the views and ideology of the Independents); JONATHAN SCOTT, COMMONWEALTH PRINCIPLES: REPUBLICAN WRITINGS OF THE ENGLISH REVOLUTION 72 (2004) (defining the Leveller project to be broad opposition to "tyranny and oppression . . . under what name or title soever" (quoting JOHN SANDERSON, 'BUT THE PEOPLE'S CREATURES': THE PHILOSOPHICAL BASIS OF THE ENGLISH CIVIL WAR 102 (1989))).

125. Putney Debates, *supra* note 113, at 67 (statement of Colonel Thomas Rainborough) (seeking recognition of the soldiers as Englishmen for the sacrifices that they made during the war).

126. *See id.* at 69 (statement of Edward Sexby) ("We have engaged in this kingdom and ventured our lives, and it was all for this: to recover our birthrights and privileges as Englishmen."); *id.* at 71 (statement of Colonel Thomas Rainborough) (asking what the soldier had fought for and suggesting that it was not "enslave himself, to give power to men of riches, men of estates, to make him a perpetual slave").

127. *Id.* at 53 (statement of Colonel Thomas Rainborough).

128. *Id.*

The radicalism in Rainborough's declaration is both obvious and subtle. The obvious radicalism is in the claim for political equality for the poor. Up until the civil war, the poor were treated as subjects who owed a duty of obedience to the crown.[129] They were also political slaves to a Parliament whose members they played no role in choosing and over whom they had no control due to property qualifications that disfranchised over ninety-five percent of Englishmen.[130]

The more subtle radicalism was contained in Rainborough's idea of consent. His claim was not merely that republican government required the consent of the people to the governing framework; an idea associated with ancient political philosophers that John Locke would popularize four decades later.[131] Instead, Rainborough advanced the more radical claim that the people, the poor as well as the rich, would have to consent to each government that they were put under.[132] In other words, consent meant that every governing body would need to be formed through popular elections.[133]

For the moderate officers in the debate, broadening suffrage to include the poor majority and involving them in the election of every government represented a clear threat to property rights. The officers argued that the poor equipped with the vote would have too much will and would vote representatives into power who would take property from the rich and give it to themselves.[134] The officers also claimed, contradictorily, that the poor had

129. *See, e.g.*, JAMES USSHER, *The Power Communicated by God to the Prince and the Obedience Required of the Subject*, *reprinted in* 11 THE WHOLE WORKS OF THE MOST REV. JAMES USSHER 223, 317 (Charles R. Erlington, ed., n.p. 1847) (1654) (articulating the divine right of kingship account of the obedience owed by subjects to the King).

130. This estimate is based on figures collected by scholars examining the size of the electorate in the early eighteenth century. *See* J.H. Plumb, *The Growth of the Electorate in England from 1600 to 1715*, 45 PAST & PRESENT 90, 111 (1969) (calculating that only 4.7 percent of Englishmen were eligible to vote in the early eighteenth century); *see also* Electors of Knights of the Shire Act 1432, 10 Hen. 6 c. 2 (Eng.) (requiring that individuals possess a freehold of at least forty shillings in order to vote).

131. *See infra* text accompanying note 149.

132. That broader idea of consent was proffered in *The Case of the Armie Truly Stated*, which clearly articulated the Levellers' radical republican theory. THE CASE OF THE ARMIE TRULY STATED, *supra* note 116, at 15.

133. *Id.* (calling for elections every two years).

134. As Colonel Nathaniel Rich, a Cambridge-educated aristocrat who participated in the debate on the side of the officers argued, "[i]f the master and servant shall be equal electors, then clearly those who have no interest in the kingdom will make it their interest to choose those that have no interest." Putney Debates, *supra* note 113, at 63 (statement of Colonel Nathaniel Rich). What might follow is "that the majority may by law, not in a confusion, destroy property; there may be a law enacted, that there shall be an equality of goods and estate." *Id.* (footnote omitted). In a similar vein, Ireton, who led the argument on behalf of the officers, explained:

> If you do extend the latitude [of the constitution so far] that any man shall have a voice in election who has not that interest in this kingdom that is permanent and

too little will and would sell or give their votes to their masters who would use them to accumulate power and rise to the level of despot.[135]

What the contradictory accounts had in common was the lack of faith in the capacity of the poor masses to participate in self-government. The moderate officers assumed the poor lacked the virtue to exercise political power for the public good and that they would instead use their power to act in their own selfish interests.[136]

A year after the Putney Debates, frustrated Leveller soldiers engaged in a mutiny, feeling that officers had betrayed their democracy and equality ideals.[137] The mutiny failed and its leaders were executed, exiled, and imprisoned, dismantling the Leveller movement in the army.[138] Nonetheless, Levellers' democratic republican ideas influenced the writing of prominent political theorists during the English interregnum including Marchamont Nedham and Michael Harrington and would serve as a focal point for American revolutionaries a century later.[139]

In the decade after the failed Leveller mutiny, the officers' reaction to the Levellers' political demands received fuller theoretical treatment. Like the radicals that preceded them, the conservative theorists did not embrace the republican label. But it remains a useful label to employ here because the Americans would later categorize them in that way.

The conservative republican theorists rejected each of the four pillars of popular self-government that the radical republicans promoted: broadened suffrage, inclusive officeholding, equal representation, and popular control over representative assemblies through frequent elections. Instead, the conservatives proposed a republican form of government that was much more aristocratic than democratic. In their proposed government, only a small

> fixed, . . . you will put into the hands of men to choose, [not] of men [desirous] to preserve their liberty, [but of men] who will give it away.

*Id.* at 82 (statement of Henry Ireton) (alterations in original).

135. Colonel Rich associated the fall of the Roman Republic and the rise of Caesar with the broadening of suffrage. He recalled accounts of poor Romans selling their votes to the despot, "[T]hence it came [to be] that he that was the richest man, and [a man] of some considerable power among the soldiers, and one they resolved on, made himself a perpetual dictator." *Id.* at 64 (statement of Colonel Nathaniel Rich) (second alteration in original) (footnotes omitted).

136. Notably, the officers, as the Levellers pointed out, did not make the same assumptions about property-holders. The officers never questioned the political virtue of the wealthy even when confronted with contrary claims about how the wealthy abused their power in ways that infringed on the poor's liberty rights. *See id.* at 59 (statement of Colonel Thomas Rainborough) (identifying the rich as a source of tyranny when the poor are excluded from governing).

137. *See* BRAILSFORD, *supra* note 106, at 288–97 (recounting the army Levellers' unsuccessful mutiny at Ware).

138. *Id.*

139. Both James Harrington and Marchamont Nedham wrote influential pamphlets in the mid-1650s articulating theories of republican government that centered democratic principles. *See generally* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (London 1656); MARCHAMONT NEDHAM, THE EXCELLENCIE OF A FREE STATE (Richard Baron ed., London 1767) (1656).

segment of the people should exercise political power as voters and officeholders with the poor masses retaining the status of politically disenfranchised subjects.[140]

The conservatives claimed that a lawmaking body comprised of the few, the best, or the religiously elect was best positioned to check the absolutist tendencies of executive magistrates and to advance the happiness of the people.[141] The conservatives had no interest in broadening suffrage beyond those who met the property qualifications established for voting. And some even sought to diminish the direct political influence of those who met the property qualification.[142] The limited suffrage proposal reflected conservatives' lack of faith in the capacity of the people to select the best governors.[143]

To further reduce the influence of the people on elected representatives, conservatives proposed infrequent elections that would result in long, and even perpetual, terms of office for lawmakers. The conservatives thus rejected the radical republican goals of popular control over lawmakers and legislative accountability through elections. That rejection comported with conservative republican views that the lawmaking body should be comprised of the righteous, best, or religious elect. Those individuals would not need to be held accountable through frequent elections because they could be trusted to advance the public good.[144]

The conservatives' republican form of government was, in sum, an aristocratic republican government. The lawmaking body would be composed of the best few selected by a narrow segment of the population. Once selected,

---

140. The conservatives' rejection of popular self-government arose out of a belief that the poor masses lacked the capacity and competency to govern and that extending suffrage to them would lead to licentiousness and anarchy. For example, Vane argued that "settling the exercise of the supreme Power, by the free and common consent of the Citizens" would lead to tumult and dysfunction. SIR HENRY VANE, A NEEDFUL CORRECTIVE OR BALLANCE IN POPULAR GOVERNMENT 5 (n.p. 1660). The citizen's "equality in power is apt to make their tempers luxuriant and immoderate, and keep[] them from coming rightly to agree in a matter of such consequence." *Id.*

141. In another pamphlet titled *A Healing Question Propounded and Resolved*, Vane offered a defense of aristocratic republican government against the radicals' claim that only popular self-government could advance the public good. Vane argued that "the supreme power . . . placed in a single person or in some few persons" by the free consent of the people "may be capable also to administer righteous government." SIR HENRY VANE, A HEALING QUESTION PROPOUNDED AND RESOLVED 16 (London 1656). John Milton, a poet and intellectual, concurred. He proposed as the foundation for "every just and free government . . . a general Councel of ablest men, chosen by the people to consult of publick [sic] affairs from time to time for the common good." JOHN MILTON, THE READY AND EASY WAY TO ESTABLISH A FREE COMMONWEALTH 21 (Evert Mordecai Clark ed., 1911) (1660).

142. For example, Milton called for staged elections in which property holders would only be able to select aristocratic electors who would then be responsible for selecting lawmakers. *See* MILTON, *supra* note 141, at 21.

143. *See* Lovett, *supra* note 103, at 470–71 ("[O]ne gets the distinct impression that active popular participation is something in Milton's view to be contained and moderated, not encouraged.").

144. Perpetual officeholding, according to Milton, would promote legislator quality because lawmakers over the course of their long terms in office "will become everie [sic] way skilfullest [sic], best provided of intelligence from abroad, best acquainted with the people at home, and the people with them." MILTON, *supra* note 141, at 22.

the legislature of the best few would either infrequently or never be subject to recall through elections.

The conservatives' account of a system of checks and balances would emerge alongside their aristocratic republican vision, and in turn later influence the U.S. Constitution's Framers' understanding of republican government. According to the English conservatives of the interregnum, an aristocratic legislature would possess the righteousness and the skills to check the executive's potential corruption and abuses of power. In the mind of the conservatives, the system of checks and balances superseded democratic enfranchisement and power as the best means for defending individual liberty.

* * *

The conservative republicans ultimately won the debate during the interregnum. When the crown was restored, property qualifications for voting remained in place limiting democratic participation and entrenching political inequality between the rich and the poor.[145] Monarchical absolutism did not accompany the restoration of the Crown, but a power imbalance between the Crown and Parliament returned.[146] That power imbalance arose from corruption that crept into the English Constitution and gave rise to American colonial discontent, revolution, and ultimately independence.[147] With that independence the Americans sought to improve upon the English framework and establish a truly republican government.[148] But before they could, they had to wrestle with the same republican indeterminacies that haunted the English Civil War and interregnum.

### *B. Republican Indeterminacy and the American Revolution*

Between the English interregnum and the American revolution, there were two major breakthroughs in republican theory. First, in 1689, John Locke published his *Two Treatises of Government*, which developed the principle of popular sovereignty in which government derived its legitimacy from the consent of the governed.[149] Second, in 1748, Baron de Montesquieu published

145. *See* TIM HARRIS, POLITICS UNDER THE LATER STUARTS: PARTY CONFLICT IN A DIVIDED SOCIETY, 1660–1715, at 17–18 (1993).

146. *Id.* at 33–39 (describing the political settlement after the Crown's restoration).

147. *See, e.g.*, BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 28–31 (1965) (describing the successful Crown efforts to corrupt Members of Parliament through bribes in the form of patronage and places in the Crown ministry).

148. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 10 (1998) ("[The colonists] revolted not against the English constitution but on behalf of it.").

149. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 105–07 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1689).

*The Spirit of the Laws*, which elaborated on the theoretical justifications for the system of checks and balances established under the English Constitution.[150]

During the American Revolution, most American leaders agreed that popular sovereignty and checks and balances were core features of republican government.[151] But radical and conservative republicans disagreed on what popular sovereignty required. Popular sovereignty took on two meanings for these groups during the Revolution, a split that was relevant to the dispute regarding the relationship between voting and republican government.

Drawing from Locke, both radicals and conservatives agreed that popular sovereignty meant that the people had to consent to the governing framework established in constitutions. However, radicals and conservatives disagreed as to whether popular sovereignty required anything more. The conservatives held that it did not, which justified treating the vote as a privilege that only the propertied should exercise. But the radicals argued popular sovereignty did require something more—popular self-government, in that the people must be able to participate in the day-to-day administration of government. Such administration could be achieved through popular participation in lawmaking or by extending to the people the right to vote for representatives in the lawmaking process. Due to that disagreement, the relationship between voting and republican government remained unresolved after the Revolution.

Both radicals and conservatives embraced a republican theory that allowed for government by the representatives of the people. For radicals, government through representatives was a mere matter of convenience brought about by the size and diffusion of population in the colonies. Thomas Paine was the most notable contributor to the radical strain of republican thinking during the revolutionary period.[152] His independence-year pamphlet, *Common Sense*, received widespread readership in the colonies.[153] In *Common Sense*, Paine explained in that pamphlet that the growth of colonial populations, the increase in public concerns, and the geographic dispersion of the people "render it too inconvenient for all of [the people] to meet on every occasion as at first, when their number was small, their habitations near, and the public

150. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 172–82 (London 1748).

151. ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 8 (1955) (finding agreement between the conservatives and radicals on maintaining human rights and opposition to arbitrary rule through a system of checks and balances).

152. *Id.* at 13 ("[I]t was Thomas Paine who first identified the Revolution with democracy."); ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 75 (1976) ("'Republic' had previously been used as a term of abuse in political writing; Paine made it a living political issue and a utopian ideal of government.").

153. Gordon S. Wood, *Introduction* to COMMON SENSE AND OTHER WRITINGS, xi, xiii (Gordon S. Wood ed., 2003) ("Paine's most important work was *Common Sense*, the most influential and widely read pamphlet of the American Revolution.").

concerns few and trifling."[154] For convenience sake, the people "leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those who have appointed them, and who will act in the same manner as the whole body would act were they present."[155] Under Paine's conception, the representatives were, therefore, a sampling of the people.

What logically followed from Paine's account of representative government was the need for universal suffrage to secure the fair representation of the polity. Paine did not clearly articulate that point until twenty years after the publication of *Common Sense*.[156] However, the connection between suffrage and republican government was developed in influential anonymous pamphlets and private letters written during the same year as *Common Sense*.

In one pamphlet titled *The People the Best Governors*, the author employed the same reasoning as Paine in claiming that representative government is a matter of mere convenience.[157] But the anonymous pamphleteer was much more explicit than Paine had been in drawing a connection between voting and representative government. Using the language of dependence, which at the time was a word used to describe the principal-agent relationship in government, the author suggested, "the more immediately dependent . . . the authority is upon the people the better, because it must be granted that they themselves are the best guardians of their own liberties."[158]

Democraticus authored a second pamphlet titled *Loose Thoughts on Government*.[159] The pamphleteer emphasized the importance of equality in government as the best means for securing liberty and he defined political equality as that "which gives to every man a right to frame and execute his own laws."[160] That alone, said Democraticus, "can secure the observance of justice, and diffuse equal and substantial liberty to the people; for those laws

154. THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE AND OTHER WRITINGS, *supra* note 153, at 3, 8.

155. *Id.*

156. As Foner writes, "Paine was always more interested in principles than forms of government, but he did call for the creation of a continental legislature and new unicameral state assemblies based on a broad suffrage." FONER, *supra* note 152, at 77.

157. "[T]he people," the author explains, "are very unequally and thinly settled, which puts us upon seeking some mode of governing by a representative body." THE PEOPLE THE BEST GOVERNORS: OR A PLAN OF GOVERNMENT FOUNDED ON THE JUST PRINCIPLES OF NATURAL FREEDOM, *reprinted in* 1 FREDERICK CHASE, A HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER, NEW HAMPSHIRE (TO 1815) 654, 655 (John K. Lord ed., 2d ed. 1928). In delegating authority to representatives, "[t]he freemen give up in this way just so much of their natural right as they find absolutely convenient, on account of the disadvantages in their personal acting." *Id.*

158. *Id.* at 656.

159. Democraticus, *Loose Thoughts on Government* (June 7, 1776), *reprinted in* 6 AMERICAN ARCHIVES: FOURTH SERIES 730, 730–31 (M. St. Clair Clarke & Peter Force eds., Washington 1846).

160. *Id.* at 730.

must necessarily be the most perfect which are dictated or corrected by the sense of parties in one capacity, to whom they are to be applied in another."[161]

The radicals' reference to delegated authority, political equality, and dependence clearly signaled their views regarding the relationship between voting and representative government. Radicals understood that the delegation of authority by the people and the proper dependence of representatives on the people could only be secured through the vote. And political equality required that the vote be broadly distributed throughout the polity as then understood (a white male polity).[162] A letter from James Sullivan to Eldridge Gerry provided one of the clearest articulations of the role of the vote in the radical conception of republican government.[163]

In the letter, Sullivan drew a direct link between consent and voting. He wrote, "[e]very member of Society has a Right to give his Consent to the Laws of the Community or he owes no Obedience to them."[164] "This proposition," he continued, "will never be denied by him who has the least acquaintance with true republican principles."[165] However, that right to give consent, Sullivan noted, had been denied to those colonists who could not meet the property qualifications for voting. In a polity with property qualifications, Sullivan argued, the core republican principle of consent operates as "fictions and Legal Suppositions," which "are only other Names for blinders, and Shackles."[166]

A shared assumption that motivated the radicals' more democratic conception of republicanism was the perfectibility of man. For the radicals, the vote served the critical function of pushing man toward the exercise of a more perfect and enlightened form of public virtue. In *Loose Thoughts on Government*, Democraticus asserted,

> the right of every member of the community . . . to give his own consent to the laws by which he is to be bound . . . can inspire and preserve the virtue of its members, by placing them in a relation to the publick

---

161. *Id.*

162. As political theorist James Burgh determined:

> That a part of the people, a small part of the people, and the most needy and dependent part of the people, should engross the power of electing legislators, and deprive the majority, and the independent part of the people of their right, which is, to choose legislators for themselves and the minority and dependent part of the people, is the grossest injustice that can be imagined.

1 JAMES BURGH, POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECT, AND ABUSES 26 (London 1774) (emphasis omitted).

163. James Sullivan did not appear to be a radical himself, but he did proffer a radical conception of voting in a 1776 letter to his friend, Elbridge Gerry, a decidedly conservative republican. *See infra* note 164.

164. Letter from James Sullivan to Elbridge Gerry (May 6, 1776), *in* 4 PAPERS OF JOHN ADAMS 212, 212 n.2 (Robert J. Taylor ed., 1979) [hereinafter Sullivan Letter].

165. *Id.*

166. *Id.*

> [sic] and to their fellow-citizens, which has a tendency to engage the hearts and affections to both.[167]

Similarly, Sullivan in his letter to Gerry viewed the political participation of the rich and the poor as serving "to correct the morals of the people and habituate their minds to Virtue."[168] It was thus through broad suffrage that virtuous and representative government would arise.

Radical republican thought influenced some early state constitutions. In Pennsylvania, Thomas Paine played a role in framing the state's constitution, which established the closest thing to universal white male suffrage at the time.[169] The Pennsylvania Constitution rejected property freeholder requirements for voting, which had been a common feature in colonial charters, and extended the right to "[e]very freem[a]n of the full age of twenty-one years."[170] To prove suffrage eligibility, white men would only need to demonstrate their connection to the place through proof of residency and their contributions to the government through proof of paid taxes.[171]

Despite the radicals impassioned push for universal white male suffrage, New Hampshire was the only other state during the revolutionary period to follow Pennsylvania and ratify a constitution rejecting property qualifications for voting.[172] The limited progress of the radicals was, in part, a result of the

---

167. Democraticus, *supra* note 159, at 730.

168. Sullivan Letter, *supra* note 164, at 213 n.2.

169. *See* FONER, *supra* note 152, at 107 ("Paine's vision of republican government strongly influenced a group of radical intellectuals, professionals, and artisans who . . . played a leading role in overturning the established government and drafting a new state constitution.").

170. PA. CONST. OF 1776: PLAN OR FRAME OF GOVERNMENT FOR THE COMMONWEALTH OR STATE OF PENNSYLVANIA, § 6, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3081, 3084 (Francis Newton Thorpe ed., 1909).

171. *Id.* When viewing matters through a presentist lens, it is easy to conflate taxpayer and property qualifications. Revolutionary-era radicals, however, considered the two forms of voter qualifications to be distinct. An advocate for broad suffrage wrote an opinion editorial in the *Pennsylvania Evening Post* distinguishing between property and taxpayer qualifications. He considered property qualifications to be the form of financial qualifications that were "hurtful remnants of the feudal constitution." *See* J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 188 (Da Capo Press 1971) (1936) (quoting PA. EVENING POST, July 30, 1776). He asked, "Why should these be made qualifications? . . . Are not many, who have not these . . . , as fit to serve their country . . . as any that are worth money? This I think cannot be denied." *Id.* Another advocate for broad suffrage wrote in the *Evening Post*, to perfect government "all those who 'pay taxes should be entitled to the suffrages of the people,' . . . for to make distinctions between the rich and the poor for public honors, would be excluding perhaps the most useful and virtuous part of the community . . . ." *Id.* (quoting PA. EVENING POST, Sept. 19, 1776). Thus, while advocates for suffrage heavily criticized property qualifications, their acceptance of taxpayer qualifications suggests that they were seen as consistent with the universal male suffrage ideal.

172. *See* N.H. CONST. of 1784, art. 1, § XI, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2453, 2455 ("[E]very inhabitant of the state having the proper qualifications, has equal right to elect, and be elected into office."). Vermonters, in their push

conservative backlash to their ideas. Proponents of a more conservative republicanism were bolstered by a status quo colonial arrangement that many Americans did not want to deviate too far from.[173]

John Adams was the leading and most vocal of the conservative republicans during the revolutionary period. Influenced by political theorists, such as John Milton, Michael Harrington, John Locke, and Baron de Montesquieu, he was skeptical of popular self-government.[174] He expressed that skepticism most clearly in a letter offering his thoughts on republican government, thoughts that greatly influenced the construction of several revolutionary-era state constitutions.[175]

Soon after Eldridge Gerry received the letter from James Sullivan advocating for broad suffrage, Gerry passed the letter on to Adams.[176] Adams wrote a reply to Sullivan in which he criticized the radical view of the relationship between republican government and voting. He expressed agreement with Sullivan "that the only moral foundation of government is, the consent of the people," but he pointedly disagreed with Sullivan's idea "that every individual of the community . . . must consent, expressly, to every act of legislation."[177] If it did, Adams explained, then women and children must also consent. And even if those groups could be denied participation

---

for independence from New York, wrote a constitution that also extended suffrage rights to freemen. VT. CONST. of 1777: A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT, § VIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3737, 3740; ADMISSION OF VERMONT, 1791, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3761, 3761.

173. Favoritism towards the status quo was expressed in pamphlets published during the revolutionary period. For example, Carter Braxton, a member of the revolutionary conventions, Continental Congress, and Virginia Assembly wrote: "The same principles which led the English to greatness animates us. To that principle our laws, our customs, and our manners, are adapted, and it would be perverting all order to oblige us, by a novel government, to give up our laws, our customs, and our manners." Carter Braxton, A Native of This Colony: An Address to the Convention of the Colony and Ancient Dominion of Virginia on the Subject of Government in General, and Recommending a Particular Form to their Attention (1776), *reprinted in* 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA: 1760–1805, at 328, 333 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

174. *See* Letter from John Adams to John Penn (Mar. 27, 1776), *reprinted in* 4 THE WORKS OF JOHN ADAMS 203, 204 (Charles Francis Adams ed., Boston 1851) (identifying the political philosophers influential to his thinking about government); DOUGLASS, *supra* note 151, at 28 (describing Adams's skepticism toward popular self-government).

175. *See* JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 THE WORKS OF JOHN ADAMS, *supra* note 174, at 193, 194–95 (advancing a theory of republican government that seeks to both privilege the "most wise and good" while being representative of the different classes of Americans).

176. Letter from John Adams to James Sullivan (May 26, 1776), *reprinted in* 9 THE WORKS OF JOHN ADAMS, 375, 375 (Charles Francis Adams ed., Boston 1854) (describing how he received Sullivan's letter from Gerry).

177. *Id.*

insofar as the delicacy of women "renders them unfit for practice and experience in the great business of life . . . [and] the arduous cares of state[s]" and because "children have not judgment or will of their own," there was no getting around the need for consent from propertyless men.[178]

For Adams, the political inclusion of the propertyless represented a threat to republican government. Comparing the propertyless to children, he asked, "[i]s it not equally true, that men in general, in every society, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own?"[179] "If this is a fact," Adams continued, "if you give to every man who has no property, a vote, will you not make a fine encouraging provision for corruption, by your fundamental law?"[180]

Adams and other conservative republicans shared a more pessimistic view of man than their radical counterparts. Conservatives did not see man as perfectible or the vote as the means toward perfectibility. Instead, they considered the propertyless' lack of knowledge of public affairs to be an insurmountable obstacle to informed and virtuous participation in republican government. "Such is the frailty of the human heart," Adams explained, "that very few men who have no property, have any judgment of their own."[181] Further, the conservatives argued, any public virtue the radicals thought the property-less might acquire through the exercise of the vote would be subordinated to the private interests of those upon whom they were dependent. The propertyless, Adams argued, "talk and vote as they are directed by some man of property, who has attached their minds to his interest."[182]

The conservatives fought to preserve property qualifications as a component of republican government in America and proved quite successful in doing so. Whereas Pennsylvania and New Hampshire eliminated property qualifications, the nine other states that adopted constitutions during the revolutionary era included property qualifications within their governing frameworks.[183] Two other states kept their colonial charters, which also

178. *Id.* at 376.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. DEL. CONST. of 1776, art. IV, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 562, 562; MD. CONST. of 1776, art. II, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1686, 1691; N.J. CONST. of 1776, art. III, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2594, 2595; N.C. CONST. of 1776, art. IX, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2787, 2790; S.C. CONST. of 1776, art. XI, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL

included property qualifications for voting.[184] For those eleven states, the vote was considered a privilege exercised by the propertied elite not a right that served as a fundamental predicate to republican government.

The conservative view of republican government thus remained the dominant view during the revolutionary era. However, because Pennsylvania and New Hampshire held out an alternative radical vision of republican government, the relationship between voting and republican government remained indeterminate throughout the period. That indeterminacy would persist even after the ratification of the U.S. Constitution.

### *C. Republican Indeterminacy and the U.S. Constitution*

In the constitutional convention debates on republican government, the delegates can be divided into three camps: conservative ideologues, conservative pragmatists, and radicals. The two conservative camps made up the overwhelming majority of those who spoke at the Convention. The conservatives equated popular sovereignty with republican government. But like Locke, they claimed that popular sovereignty required that the people consent to the frame of government, not that the people be able to govern themselves. In fact, American conservatives considered too much democracy to be a threat to republican government.[185]

---

CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3241, 3245; VA. CONST. of 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3812, 3816; GA. CONST. of 1777, art. IX, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 777, 779; N.Y. CONST. of 1777, art. VII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2623, 2630; MASS. CONST. of 1780, ch. 1, § 2, art. II & § 3, art. IV, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1888, 1895–96, 1898.

184. FUNDAMENTAL ORDERS OF CONNECTICUT—1638–39, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 519, 520; CHARTER OF CONNECTICUT—1662, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 529, 531; CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS—1663, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3211, 3214–15.

185. In the decade after the Declaration of Independence, conservative Americans, many who were part of the creditor elite, lost faith in republican government. The conservatives considered the elected legislatures to be too responsive to the debt relief demands of the debtor class. *See* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 23–24 (2007) (describing the states' debt and tax relief measures). And they used a rebellion in Massachusetts to exaggerate the threat that both debtors and democracy posed to the fledgling nation. SEAN CONDON, SHAYS'S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA 151–53 (2015) (describing exaggerated and misleading accounts of Shays's rebellion designed to convince Americans to support amendments to the Articles of Confederation).

Introducing the Virginia proposal that framed the debate over the Constitution, Governor William Randolph of Virginia declared, "[o]ur chief danger arises from the democratic parts of our constitutions."[186] Similarly, Elbridge Gerry of Massachusetts asserted, "[t]he evils we experience flow from the excess of democracy."[187] Referencing a rebellion of desperate debtors in his home state, Gerry continued, he "had been taught by experience the danger of the levilling [sic] spirit."[188]

Consistent with their concerns about too much democracy, the conservatives did not view popular elections to be a key predicate for republican government. The two conservative camps agreed that the legislature should be bicameral and that there should be a Senate selected by the state legislatures and not the people.[189] They also agreed that the President should not be directly elected by the people, ultimately establishing an Electoral College as an institution designed to curb popular preferences.[190] The conservative ideologues and pragmatists, however, diverged on the method for selecting members of the House of Representatives.

When the delegates debated the question of whether the people should directly elect members of the House of Representatives, the conservative ideologues resisted. The direct participation of the people in the composition of even one component of government represented too much of a threat to conservative ideologues, who saw the democratic masses as lacking the will and virtue to govern. Roger Sherman of Connecticut, who opposed the popular election of members of the House and favored their selection by state legislatures, argued "[t]he people . . . should have as little to do as may be about the Government. They want information and are constantly liable to be misled."[191] Gerry agreed, describing the people as "the dupes of pretended patriots."[192]

---

186. Notes of James McHenry (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24, 26 (Max Farrand ed., 1911) (statement of Governor William Randolph).

187. Notes of James Madison (May 31, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 47, 48 (statement of Elbridge Gerry).

188. *Id.*

189. The conservative ideologues supported the selection of Senators by state legislatures because they generally distrusted the people to participate in the direct election of Senators. For pragmatists, such as James Madison, removing the people from the direct choice of Senators was a necessary check on majorities, particularly in the future. *See* Notes of Robert Yates (June 26, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 430, 430–31 (statement of James Madison).

190. Notes of Robert Yates (June 30, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 494, 497 (statement of James Madison) (detailing the electoral college system that the Convention would adopt).

191. Notes of James Madison (May 31, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 47, 48 (statement of Roger Sherman).

192. *Id.* at 48 (statement of Elbridge Gerry). For Gerry, the experience in Massachusetts had fully confirmed that the people "are daily misled into the most baneful measures and opinions by the false reports . . . ." *Id.* Others argued that the propertyless lacked a sufficient stake in government to exercise suffrage. *See* Notes of James McHenry (Aug. 7, 1787), *in* 2 THE RECORDS

The conservative pragmatists seemed to agree with the ideologues that the popular vote was not necessary for republican government, but they still favored giving at least some people the direct opportunity to elect members of the House of Representatives. "[James] Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government."[193] The pragmatists thought that the direct election of members of the House was necessary to secure the proper representation of the people. George Mason of Virginia argued that the House of Representatives should "be the grand depository of the democratic principle of the [Government]."[194] As a governing institution, Mason continued, "[i]t ought to know & sympathise [sic] with every part of the community."[195] Mason, like the conservative ideologues, feared too much democracy, but he was also "afraid we [should] incautiously run into the opposite extreme."[196]

The pragmatists also supported the popular election of House members because they thought the system of checks and balances not only required that minorities be able to defend themselves against majoritarian abuses of power by majorities, but also that majorities be able to defend themselves against minoritarian abuses of power by minorities. As Alexander Hamilton, a delegate from New York, explained:

> In every community where industry is encouraged, there will be a division of it into the few & the many. Hence separate interests will arise[.] There will be debtors & Creditors &c. [sic] Give all power to the many, they will oppress the few. Give all power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself [against] the other.[197]

Finally, the pragmatists recognized that even under their narrow conception of popular sovereignty, the people (defined then as the adult white male polity) would have to ratify the Constitution. The pragmatists were therefore concerned that the Constitution's ratification would be jeopardized if the proposed framework completely excluded the people from direct participation in government.[198]

---

OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 209, 209 (statement of John Dickinson) (speaking in favor of "confining the rights of election in the first branch to free holders" because "[n]o one could be considered as having an interest in the government unless he possessed some of the soil" (emphasis omitted)).

193. Notes of James Madison (May 31, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 47, 49 (statement of James Madison).

194. *Id.* at 48 (statement of George Mason).

195. *Id.*

196. *Id.* at 49.

197. Notes of James Madison (June 18, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 282, 288 (statement of Alexander Hamilton).

198. A repeated concern that pragmatists expressed in the convention regarded proposed innovations to the frame of government that deviated too far from republican principles and that

James Wilson, a delegate from Pennsylvania, was the most vocal proponent of the radical vision of republican government.[199] Like his radical predecessors, Wilson considered the legislature to be a convenient outgrowth of a purely democratic assembly. The legislature should therefore look like and act like that assembly. Wilson explained, "[r]epresentation is made necessary only because it is impossible for the people to act collectively."[200] "The Legislature," therefore "ought to be the most exact transcript of the whole Society."[201] Wilson equated republican government with popular self-government. "If we are to establish a national Government," Wilson argued, "that Government ought to flow from the people at large."[202] For Wilson, that meant that republican government required the direct election by the people of members in both houses of Congress as well as the President.[203]

For the most part, the conservatives won the debate in the Convention. The delegates agreed on a constitution that provided for the selection of Senators by state legislatures and the President through the Electoral College.[204] The conservative ideologues, however, were forced to give way on the method of selecting members of the House of Representatives. The conservative pragmatists sided with Wilson in providing for the direct popular election of representatives.[205] However, towards the end of the Convention, the conservative ideologues made one last attempt to import into the Constitution their definition of republican government.

---

the people would not be approve. *See* Notes of Robert Yates (June 26, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 430, 432 (statement of Elbridge Gerry) ("It appears to me that the American people have the greatest aversion to monarchy, and the nearer our government approaches to it, the less chance have we for their approbation.").

199. *See* Christopher S. Yoo, *James Wilson as the Architect of the American Presidency*, 17 GEO. J.L. & PUB. POL'Y 51, 73–74 (2019) (describing Wilson's embrace of democracy). A few other delegates advanced the radical republican conception of government, including Wilson's fellow Pennsylvanian Benjamin Franklin. Notes of Rufus King (Aug. 7, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 206, 208 (statement of Benjamin Franklin) (expressing his fear of "depositing the rights of Elections in the Freeholders" because "it will be injurious to the lower class of Freemen"). But the radicals were a distinct minority of the convention delegates.

200. Notes of James Madison (June 6, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 132, 132–33 (statement of James Wilson).

201. *Id.* at 132.

202. Notes of James Madison (June 7, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 150, 151 (statement of James Wilson).

203. Wilson "wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures but the Executive also." Remarks of James Wilson in the Federal Convention (June 1, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON 80, 85 (Kermit L. Hall & Mark David Hall eds., 2007).

204. Those selection processes were included in the original Constitution ratified by the people. U.S. CONST. art I, § 3 ("The Senate of the United States shall be . . . chosen by the Legislature thereof . . . ."); *id.* art. II, §§ 2–3 (detailing the electoral college process for selecting the President).

205. The original Constitution, ratified by the people, included that selection process. *Id.* art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

Long after the delegates had agreed to the popular election of members of the House of Representatives, the conservative ideologues proposed to add property qualifications for electors to the House. One of the conservative ideologues, Gouverneur Morris of Pennsylvania, argued that because of the direct popular election of representatives, an "aristocracy will grow out of the House of Representatives."[206] "Give the votes to people who have no property," Morris speculated, "and they will sell them to the rich who will be able to buy them."[207] Morris's argument that the propertyless lacked the will to govern echoed those that conservatives advanced during the English interregnum. Other conservative ideologues argued that the vote should be denied to the propertyless because they had too much will. John Dickinson of Pennsylvania favored limiting to freeholders the right to vote for members of the House. He argued that the freeholders were "the best guardians of liberty."[208] "[T]he restriction of the right to them," therefore, was "a necessary defence [against] the dangerous influence of those multitudes without property & without principle[s], with which our Country . . . will in time abound."[209]

At the time of the Convention, most states already maintained property qualifications for electors to their state legislatures. In the absence of affirmative qualifications established in the Federal Constitution, those property qualifications would also apply to federal elections.[210] Thus, the practical effect of the proposal would have been limited to superseding state constitutional provisions in Pennsylvania and New Hampshire that did not require property to vote. But the proposal would have had the more significant effect of adding meaning to republican government under the Constitution. If adopted, the proposal would have stamped the conservative vision of the relationship between voting and republican government onto the Federal Constitution.

The proposal, however, failed to secure the necessary support. James Madison rejected Morris's claim that the broad right of suffrage leads to aristocracy. He instead suggested the opposite. "A gradual abridgment of [the right to vote]," Madison argued, "has been the mode in which Aristocracies have been built on the ruins of popular forms."[211] Other conservative pragmatists also realized that the white male polity would be very resistant to a constitution that denied to them the vote. Oliver Ellsworth of Connecticut predicted that "[t]he people will not readily subscribe to the [National] Constitution, if it

---

206. Notes of James Madison (Aug. 7, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 196, 202 (statement of Gouverneur Morris).

207. *Id.*

208. *Id.* (statement of John Dickinson).

209. *Id.*

210. Under the formulation that the delegates ultimately adopted, the states would have the power to set voter qualifications for elections to the House of Representatives. *See* U.S. CONST. art. I, § 2.

211. Notes of James Madison (Aug. 7, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 186, at 196, 203 (statement of James Madison).

should subject them to be disfranchised."[212] John Rutledge of South Carolina "thought the idea of restraining the right of suffrage to the freeholders . . . would create division among the people & make enemies of all those who should be excluded."[213]

The delegates instead decided to leave the responsibility over setting qualifications for electors where they found it, with the states. And in the states, a division remained between those that maintained property qualifications and those that did not. The Constitution's delegation to the states the authority to set voter qualifications and the division between the states regarding property qualifications left indeterminate the relationship between the right to vote and republican government.

On the question of how republican government should be defined, however, the Constitution's proponents appeared to recognize that their anti-democratic vision of republican government would not be popular with the people. Therefore, the proponents sought to obscure the antidemocratic features of the Constitution by conflating the two notions of popular sovereignty. Through its ratification, the Constitution would certainly establish a popular sovereign frame of government in that the people consented to it. In a speech to the Pennsylvania ratification convention, James Wilson asked rhetorically, "[w]hat is the nature and kind of that government, which has been proposed for the United States, by the late convention?"[214] He answered that it is a constitution in which "all authority is derived from the people."[215]

That statement obscures the fact that the Constitution did not establish a popularly sovereign frame of government in which the people were direct and active participants in self-government. In their advocacy, the proponents emphasized the House of Representatives's mode of selection, but in doing so appeared to mislead the people on the degree to which its members would be popularly elected.[216]

---

212. *Id.* at 201 (statement of Oliver Ellsworth).

213. *Id.* at 205 (statement of John Rutledge).

214. Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 203, at 178, 193.

215. *Id.*

216. *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Boston, Jan. 9, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 7–8 (Jonathan Elliot ed., 2d ed., Philadelphia 1836) (statement of Fisher Ames) (emphasizing the system of representation by majority rule secured through the election of members of the House of Representatives); *id.* at 29 (statement of Charles Jarvis) ("The right of election, founded on the principle of equality, was . . . the basis on which the whole superstructure was erected."). When the proponents talked about nondemocratic selection processes for the Senate and President, they sought to justify them as necessary for proper government or the system of checks and balances. *See e.g.*, Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (Poughkeepsie, June 27, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 216, at 205, 348 (statement of Alexander

For example, Noah Webster, in a pamphlet supporting the Constitution, praised the construction of a House of Representatives that gave "the people of America . . . an equal voice and suffrage."[217] He asserted that "[t]he choice of men is placed in the freemen or electors at large" and that combined with "the frequency of elections, and the responsibility of the members, will render them sufficiently dependent on their constituents."[218] What Webster, of course, failed to mention was that the Constitution's delegation to the states of authority to set voter qualifications meant that property qualifications would apply to most House elections thereby denying the vote to many white freemen.

Wilson, in a speech to the Pennsylvania ratification convention, acknowledged that states would have the authority to set the qualifications for voting. But then he made a logical inference that was more consistent with his radical views than the Constitution itself. Wilson claimed that the right of suffrage is secure "because the . . . Constitution guaranties to every state in the Union a republican form of government [and t]he right of suffrage is fundamental to republics."[219] Nothing in the Constitution supported Wilson's claim about the fundamental right to vote in a republic. In fact, most of the Convention delegates appeared to disagree with that claim.

Conservative pragmatists joined in the gaslighting of the public. James Madison, defending the Constitution against anti-federalist attacks that it constructed an oligarchic House of Representatives, asked rhetorically "[w]ho are to be the electors of the federal representatives?"[220] According to Madison, it was "[n]ot the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States."[221] The truth was that insofar as most states banned the propertyless from voting, the poor, less educated, and "humble sons of obscure and unpropitious fortune" would be denied the

---

Hamilton) (describing the form of government with democratic and nondemocratic selection processes as incorporating "checks which the greatest politicians and the best writers have ever conceived").

217. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 54 (Philadelphia 1787).

218. *Id.*

219. Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 203, at 178, 293.

220. THE FEDERALIST NO. 57, *supra* note 21, at 351 (James Madison). In other writings, James Madison appeared to be more interested in constructing a frame of government that would allow the natural aristocrats to rule than securing the fair representation of the people. *See, e.g.*, JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), *in* 2 THE WRITINGS OF JAMES MADISON 361, 369 (Gaillard Hunt ed., 1901) ("An auxiliary desideratum for the melioration of the Republican form of such a process of elections as will most certainly extract from the mass of the society the purest and noblest characters which it contains.").

221. THE FEDERALIST NO. 57, *supra* note 21, at 351 (James Madison).

suffrage.[222] The electors would not be the great body of the people of the United States, but rather a much smaller segment of property-holders in most states.

Although the post-convention assertions about the Constitution and, particularly, the House of Representatives, very much accorded with a radical vision of republican government, they were not consistent with what the Convention delegates did and what the Constitution itself said.[223] The Constitution did guarantee a republican form of government, but that republican form of government was not the democratic republican form of government that some of the Constitution's proponents sold to the people. The dissonance between the advocacy for the Constitution and the Constitution itself added indeterminacy to the meaning of republican government at the founding moment.[224] It would take another sixty years for a determinate meaning about the relationship between republican government and voting to emerge in the states. In those years, the states through a series of decisions made in constitutional conventions developed a meaning of republican government that accorded with the radical vision. In that period, the vote came to be seen as a fundamental predicate for republican government and conservative republican efforts to limit popular suffrage to the propertied class were re-characterized as anti-republican.

## III. TOWARDS DETERMINACY: THE EVOLVING MEANING OF REPUBLICAN GOVERNMENT IN THE STATES

What is the republican form of government guaranteed in Article IV of the Constitution? In an oft-quoted letter written in 1807, John Adams, referring to the Clause confessed, "I never understood it, and I believe no other Man ever did or ever will."[225] Adams's confession combined a bit of hyperbole with fact. Some aspects of republican government were clearly defined by the start of the nineteenth century. For example, the principle that government must be derived from the consent of the people was broadly accepted and enforced

222. *Id.*

223. Scholars supporting a democratic republican account of the original Constitution have acknowledged that the description of republican government advanced by the Constitution's advocates after the Convention did not accord with what those advocates said when debating the Constitution behind closed doors in the convention. *See e.g.*, WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 67–68 (1972) ("The guarantee clause emerged from the pages of *The Federalist* with its assurance of popular control of government, rule by majorities in the states with safeguards for the rights of minorities, and emphasis on the substance as well as the form of republican government *enhanced and more explicit* than in the Philadelphia debates." (emphasis added)).

224. *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 526–28 (1962) (describing the persistent confusion regarding the meaning of republican government in the state constitutional ratification conventions).

225. Letter from John Adams to Mercy Otis Warren (July 20, 1807), https://founders.archives.gov/documents/Adams/99-02-02-5195 [https://perma.cc/4WH9-NTMX].

through a process of popular approval of state and federal constitutions.[226] Furthermore, systems of separated powers and checks and balances were infused into all state and federal constitutions as necessary features of republican government.[227]

Adams, however, was right in one important sense. Although republicans seemed to agree that all adult white men were members of the political community, they continued to disagree on whether republican government required that all members of the political community be able to participate in governance through the vote. Property qualifications continued to represent a conservative conception of republican government in which only the propertied stakeholders could be trusted to govern. The propertyless multitude, under this conception, continued to be seen as lacking the will, judgment, or virtue to govern.

Twenty years prior to Adams's expression of puzzlement about the meaning of the Republican Form of Government Clause, one of the Constitution's proponents acknowledged its indeterminacy and marked out a path for its meaning to develop. In *Federalist 43*, Madison asserted that the clause guaranteeing "a republican form of government, . . . supposes a pre-existing government of the form which is to be guaranteed."[228] Despite the differences between the states on the meaning of republican government, including the relationship between voting and republican government, as long as those "existing republican forms are continued by the States, they are guaranteed by the federal Constitution."[229] In other words, it was the states through choices regarding their form of government that defined the meaning of republican government. Since states disagreed on the relationship between voting and republican government, that aspect of the frame of government remained indeterminate at the founding.

Madison further declared that the states would have the authority to develop and change the meaning of republican government. As Madison explained "[w]henever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter."[230] "The only restriction imposed on them," Madison continued, "is that they shall not exchange republican for anti-republican Constitutions."[231] Presumably then, since the states have the power over time to define republican government, they would also have the power over time to determine what is anti-republican.

226. Either the people's representatives in the legislature or the people themselves approved all the federal and state constitutions.

227. *See* WIECEK, *supra* note 223, at 22 (identifying separation of powers as central to republican government and the varying forms that existed in some of the states).

228. THE FEDERALIST NO. 43, *supra* note 21, at 275 (James Madison).

229. *Id.*

230. *Id.*

231. *Id.*

The process that Madison outlined in *Federalist 43* for developing and clarifying the meaning of republican government through state choices about their frames of government needs to be considered alongside another Federalist paper. In *Federalist 37*, Madison acknowledged the indeterminacy of some provisions of the Constitution. Writing about the source of obscurity of law, Madison explained, "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[232] For Madison, writing according to eighteenth-century linguistic conventions, to liquidate meant to clarify, and he saw the Constitution's vague and ambiguous provisions as requiring clarification through a series of decisions relevant to their meaning over time.[233]

Putting the two essays together, *Federalist 37* articulated the methodology for developing the meaning of indeterminate terms and phrases like republican form of government. And *Federalist 43* pointed to the states as authoritative in developing the meaning of republican form of government over time.

After the Constitution's ratification, there developed a trend in the states toward the more radical conception of republicanism. In the late 1780s and early 1790s, Georgia and Delaware excised property qualifications from their constitutions joining Pennsylvania and New Hampshire as original states that excluded such qualifications from their constitutions.[234] In addition, three of the four new states to join the Union in the two decades after the Constitution's ratification omitted property qualifications from their constitutions.[235] Those

232. THE FEDERALIST NO. 37, *supra* note 21, at 229 (James Madison).

233. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 12 (2019) (defining liquidation); *see also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 11–14 (2001) (providing an explanatory account of Madison's interpretive theory of liquidation).

234. *See* GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 785, 789 (extending the right to vote to all citizens and inhabitants who meet age, residency, and taxpayer requirements); DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 568, 574 (extending the right to vote to all free white men who meet age, residency, and taxpayer requirements).

235. The first constitutions of Vermont, Kentucky, and Ohio permitted freemen without property to vote so long as they met age, residency, and taxpaying requirements. VT. CONST. of 1793, ch. II, § 21, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3762, 3768; KY. CONST. of 1792, art. III, § 1, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1264, 1269; OHIO CONST. of 1802, art. IV, § 1, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2901, 2907. Tennessee was the one state that included a freehold requirement for suffrage in its original constitution. TENN. CONST. of 1796, art. III, § 1, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3414, 3418.

choices reflected a growing embrace of a radical republicanism that assigned to the people the power to govern through their vote.

As state constitutions slowly moved in a radical direction, a partisan shift occurred in national-level politics. The once dominant Federalist Party, to which many of the conservative republicans belonged, experienced a precipitous decline in popular support during the 1790s and early 1800s.[236] As it declined, a competing Democratic–Republican Party led by Thomas Jefferson emerged and ultimately supplanted the Federalist Party as the leading party at the national level and in most states.[237] Between 1801 and 1809, Jefferson served two terms as president and after his retirement from public service, Jefferson became the torchbearer for radical republicanism. Jefferson's writings influenced state level political leaders to incorporate changes to state constitutions embracing the radical view of the relationship between voting and republican government.

In the rest of this Part, I describe Jefferson's theory of republican government expressed in pamphlets and letters that reached a broad audience. I then trace the repeal of property qualifications across states in the union, focusing at a more granular level on the debate about the qualification in two constitutional conventions in Virginia. In that analysis, I show that the constitutional repeal of property qualifications did more than extend the right to vote to the propertyless. It also represented the embrace of a radical conception of republican government and a corresponding repudiation of conservative republicanism as anti-republican.

### *A. Thomas Jefferson, Republican Government, and the States*

After authoring the Declaration of Independence, Jefferson stood mostly on the sidelines during the debates over his state of Virginia's first constitution and the Federal Constitution. Jefferson was not a member of the Virginia legislature that adopted the state constitution in 1776 and he was not a delegate to the federal convention that met in Philadelphia in 1787, as he was then a diplomat living in Paris. He did, however, correspond regularly with Madison expressing his views on the state and federal constitutions. Jefferson also wrote pamphlets, letters, and draft constitutional provisions that evidenced his views on the two constitutions more generally, and republican government, in particular.

In his broadly influential *Notes on the State of Virginia*, published in 1785, Jefferson criticized the defects of the Virginia Constitution from the perspective

---

236. *See, e.g.*, GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 276–77, 312–14 (2009) (describing the decline of the Federalist Party).

237. *See, e.g.*, SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 90–98 (2005) (providing an account of the rise of the Democratic–Republican Party).

of republican government.[238] As a document that the legislature adopted but never sent to the people for ratification, Jefferson argued that the constitution failed to meet the Lockean requirement that it be derived from the consent of the governed.[239] Jefferson also criticized the constitution for failing to satisfy the popular sovereignty requirement of popular self-government. The Virginia Constitution kept colonial-era property qualifications in place, which meant for Jefferson "[t]he majority of the men in the state, who pay and fight for its support, are unrepresented in the legislature."[240] That "capital defect[]" in the constitution by those who "were new and unexperienced in the science of government" violated the republican principle of popular self-government and its close cousin, majority rule.[241]

In a series of proposed revisions to the Virginia Constitution, Jefferson called for the elimination of property qualifications in favor of universal white male suffrage.[242] Such suffrage provisions continued to link voting to place through residency requirements, and impose citizenship obligations, through taxpayer requirements.[243] But they were seen as broadly establishing for white male members of the polity "a right to vote."[244]

After his presidency, Jefferson continued to advocate for his vision of republican government in Virginia. At a time of popular tumult in Virginia in 1816 when calls for constitutional change were growing louder, he wrote a series of letters putting forth his vision of republican government.

In the first letter to Pierre Samuel DuPont De Nemours, a Frenchman who had emigrated to America during the French Revolution, Jefferson contrasted American republican government with that of France. Although dubious in its description of American government, the letter did reveal what Jefferson thought republican government ought to be. "We of the United States," Jefferson began, "are constitutionally and conscientiously democrats."[245] He continued,

> We think experience has proved it safer, for the mass of individuals composing the society, to reserve to themselves personally the exercise

238. *See* THOMAS JEFFERSON, NOTES ON VIRGINIA (1785), *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON 68, 222–29 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1894) (identifying defects in the Virginia Constitution).

239. Jefferson noted that even though the propertied segment of the people elected the legislature, it was not elected for the purpose of constructing and ratifying a framework of government that would give it power. *See id.* at 225–26.

240. *Id.* at 222.

241. *Id.*

242. *See* THOMAS JEFFERSON, PROPOSED CONSTITUTION FOR VIRGINIA (1783), *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 238, at 320, 323 (proposing the extension of votes to "[a]ll free male citizens, of full age, and sane mind").

243. *Id.*

244. *Id.*

245. *See* Letter from Thomas Jefferson to P.S. Dupont De Nemours (Poplar Forest, Apr. 24, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 238, at 22, 22.

> of all rightful powers to which they are competent, and to delegate those to which they are not competent to deputies named, and removable for unfaithful conduct, by themselves.[246]

In contrast, Jefferson noted that in France, property qualifications created disparities regarding the exercise of political power, with the propertyless having no power and those with property exercising varying degrees of political power in accordance with their landholding.[247] The result was a system in which the few governed over the many, as "the[] highest councils . . . are in a considerable degree self-elected."[248] Although America and France "both consider the people as our children, and love them with parental affection," Jefferson wrote, "you love them as infants whom you are afraid to trust without nurses; and I as adults whom I freely leave to self-government."[249]

Jefferson concluded the letter with an account of the relationship between republican government and popular sovereignty as self-government. Jefferson explained, "action by the citizens in person, in affairs within their reach and competence, and in all others by representatives, chosen immediately, and removable by themselves, constitutes the essence of a republic."[250]

A month later, Jefferson wrote a letter to John Taylor. Taylor was the author of a book that was critical of John Adams and his conservative republican conception of government.[251] To Taylor, Jefferson argued, republican government "means a government by its citizens in mass, acting directly and personally, according to rules established by the majority."[252] Thus, it is incorrect to say that "the term *republic* . . . 'may mean anything or nothing,'" Jefferson continued, when in "truth and meaning . . . governments are more or less republican as they have more or less of the element of popular election and control in their composition."[253]

Jefferson rejected conservative republican distrust of the people to govern. Unlike his conservative counterparts, Jefferson considered "the mass of the citizens [to be] the safest depositor[ies] of their own rights."[254] He did not see the extension of the vote to the propertyless as threatening republican government because the propertyless might be overly influenced by the propertied elite. Jefferson instead argued "that the evils flowing from the duperies of the people,

---

246. *Id.*

247. *See id.* at 23 (criticizing the French structure of government for "set[ting] down as zero[] all individuals not having lands, which are the greater number in every society of long standing").

248. *Id.*

249. *Id.* at 23–24.

250. *Id.* at 24.

251. *See generally* JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES (1814).

252. *See* Letter from Thomas Jefferson to John Taylor (May 28, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 238, at 27, 28–29.

253. *Id.* at 31.

254. *Id.*

are less injurious than those from the egoism of their agents."[255] In other words, agents of the people who are unaccountable to, because unelected by, the people represent the greater threat to republican government.

In a third letter, this one to Virginia lawyer Samuel Kercheval, Jefferson elaborated on his definition of republican government; a definition that comported with the radical views of the English Levellers and the more radical American revolutionaries. "[L]et it be agreed that a government is republican," Jefferson explained, "in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself, and responsible to him at short periods."[256] Jefferson argued, republican government should operate according to the precepts of democracy, which is according to the direction of the people equally empowered whether they be rich or poor. "I am not among those who fear the people," Jefferson declared.[257] "They, and not the rich, are our dependence for continued freedom."[258]

Jefferson redefined republican government along the radical lines of popular sovereignty as popular self-government in which equal rights to participation were central. For Jefferson, "[t]he true foundation of republican government is the equal right of every citizen, in his person and property, and in their management."[259] Republican government therefore required that every member of the polity who satisfied their citizenship obligations be given the equal vote. As Jefferson proposed for legislators and the executive, "[l]et every man who fights or pays, exercise his just and equal right in their election."[260]

In a fourth and final letter written in 1824 to Virginia journalist, John Hambden Pleasants, Jefferson keyed in on defects in the republican government that was in the process of being corrected everywhere, except Virginia.[261] It was the same defect that he had pointed to forty years earlier in his *Notes on the State of Virginia*: the state's "refusing to all but freeholders any participation in the natural right of self-government."[262] In a statement demonstrating the infusion of misogyny into radical republican thought that was common at the time, Jefferson asserted: "However nature may by mental or physical disqualifications have marked infants and the weaker sex for the protection,

255. *Id.*

256. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 238, at 37, 38.

257. *Id.* at 41.

258. *Id.*

259. *Id.* at 39.

260. Jefferson proposed, "[l]et every man who fights or pays, exercise his just and equal right in their election. Submit them to approbation or rejection at short intervals." *Id.*

261. *See* Letter from Thomas Jefferson to John Hambden Pleasants (Apr. 19, 1824), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 238, at 302, 302–03.

262. *Id.* at 303.

rather than the direction of government, yet among the men who either pay or fight for their country, no line of right can be drawn."[263] Jefferson concluded by finding that the broad extension of the right to vote to all white men was necessary to satisfy another radical tenet of republican government: majority rule. "The exclusion of a majority of our freemen from the right of representation is . . . an usurpation of the minority over the majority; for it is believed that the non-freeholders compose the majority of our free and adult male citizens."[264]

Jefferson's letters to Kercheval and Hambden Pleasants were published in newspapers throughout the country. The broad circulation of those two letters suggests that even after his retirement, people still wanted to hear what Jefferson had to say.

Jefferson's ideas appeared to have some influence nationally as the trend toward the radical definition of republican government grew stronger in the first three decades of the nineteenth century. Five more of the original states—South Carolina, Maryland, Connecticut, New York, and Massachusetts—amended their original constitutions (or charter, in the case of Connecticut) to eliminate property qualifications.[265] In addition, seven states joined the union between 1812 and 1821 and none of them included property qualifications for voting in their constitutions.[266]

---

263. *Id.*

264. *Id.*

265. AMENDMENTS TO THE [SOUTH CAROLINA] CONST. of 1790, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3265, 3267 (amendment was ratified in 1810); MD. CONST. of 1776, art. XIV (1810), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1701, 1705; CONN. CONST. of 1818, art. VI, § 2, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 536, 544; MASS. CONST. of 1780, art. III, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1888, 1912; N.Y. CONST. of 1821, art. II, § 1, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2639, 2642–43.

266. The original constitutions of Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, and Missouri did not include property qualifications for suffrage. LA. CONST. of 1812, art. II, § 8, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1380, 1382; IND. CONST. of 1816, art. VI, § 1, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1057, 1067; MISS. CONST. of 1817, art. III, § 1, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2032, 2035; ILL. CONST. of 1818, art. II, § 27, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 972, 975; ALA. CONST. of 1819, art. III, § 5, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 96, 99; ME. CONST. of 1819, art. II, § 1, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER

By 1830, only five of the twenty-four states maintained property qualifications for at least one branch of their legislatures.[267] Of those five states, only one required landed property to vote for members of both state legislative houses. That state was Virginia, the home of Thomas Jefferson. Virginia remained the most recalcitrant state when it came to suffrage reform. It held on longer than any other states to a conservative conception of republican government premised on maintaining property qualifications for voting. But the state finally relented in 1850 when its amended constitution eliminated property qualifications.[268] With North Carolina following soon thereafter, all the states had eliminated property qualifications by 1857.[269]

Because Virginia was one of the last states to reform suffrage, advocates in the Virginia constitutional conventions could draw on the most compelling arguments made in other state constitutional conventions. The Virginia constitutional convention debates are therefore a good representation of the other state constitutional convention debates on the relationship between the vote and republican government.

### *B. Prelude to a Reckoning*

As Jefferson advocated for suffrage reform consistent with a radical conception of republican government and most other states adopted such reforms, the Virginia legislature remained resistant. That resistance had its genesis in the formation of Virginia's first constitution in 1776 that, for the most part, constitutionalized a conservative conception of republican government.[270]

As in most other states, the American Revolution and independence from Britain changed, but did not fundamentally transform, the governing framework in Virginia.[271] The monarchy was repudiated, but Virginia retained the aristocratic features of the colonial frame of government. Political power in Virginia was simply transferred from one set of aristocrats to another.[272]

---

ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 1646, 1649; MO. CONST. of 1820, art. III, § 10, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2150, 2152.

267. Those five states were New Jersey, Virginia, North Carolina, Rhode Island, and Tennessee.

268. *See infra* note 338 and accompanying text.

269. *See infra* note 333 and accompanying text.

270. *See* Christopher M. Curtis, *Reconsidering Suffrage Reform in the 1829–1830 Virginia Constitutional Convention*, 74 J.S. HIST. 89, 91 (2008) (explaining that "the process of democratization in Virginia, as in the remainder of the South, was colored distinctively by the presence of slavery").

271. *See* WILLIAM G. SHADE, DEMOCRATIZING THE OLD DOMINION: VIRGINIA AND THE SECOND PARTY SYSTEM, 1824–1861, at 47–48 (1996) (describing how "[t]he American Revolution brought relatively little change in the social order of [Virginia as] . . . [t]he [C]ommonwealth contained an aristocratic society composed of gentlemen freeholders presided over by landed gentry committed to conservative republicanism").

272. *See* CHARLES S. SYDNOR, GENTLEMEN FREEHOLDERS: POLITICAL PRACTICES IN WASHINGTON'S VIRGINIA 2 (1952) (describing the aristocratic transfer of power).

With independence, the planter slaveholding legislature assumed power from the crown-appointed governor.[273] The newly empowered aristocrats did not seek a whole new frame of government, but rather to improve upon the English frame of government that Americans felt the crown had corrupted.[274] That frame of government was republican in form, but one that aligned with the conservative vision of republican government.[275]

The Virginia Constitution's Declaration of Rights included the staples of republican government, such as the separation of powers and popular sovereignty understood as the right of the people to consent to the frame of government.[276] The Declaration also included principles relevant to the relationship between the right to vote and republican government. One declaration, the stakeholder declaration, supported the conservative view that voting in republican government should be limited to property holders.[277] But another declaration, vesting political power in the people and making magistrates their trustees and servants could be read to support the radical conception of government.[278]

A provision outside the Declaration of Rights ultimately served as the tiebreaker of sorts between the two conceptions of republican government in the Virginia Constitution. That provision stated, "[t]he right of suffrage in the election of members for both Houses shall remain as exercised at present . . . ."[279] The suffrage provision applicable at the time of the Virginia Constitution's adoption was the colonial era restriction of voting to property holders, which arose out of conservative republican distrust of the propertyless mass to participate in governance.[280] Consistent with the conservative

273. *See* A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 819 (1968) (describing the "very real continuity in the legislative process" as the members of the first Virginia convention were essentially the same as those in the last colonial House of Burgesses).

274. *See* J.R. Pole, *Representation and Authority in Virginia from the Revolution to Reform*, 24 J.S. HIST. 16, 24 (1958) ("The work of the convention, when it turned to the construction of a new form of government, was at all events far from revolutionary.").

275. *See id.* at 16 ("[T]he Revolution in Virginia produced a social upheaval without giving rise to any political consequence of the same order.").

276. VA. CONST. of 1776, §§ 2, 5, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3812, 3813.

277. That section declared, "that all men[] hav[e] sufficient evidence of permanent common interest with, and attachment to, the community, have the right to suffrage[.]" *Id.* § 6, at 3813.

278. According to that section, "all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." *Id.* § 2, at 3813.

279. *Id.* at 3816.

280. According to the act, those who could not meet the property qualification had "little interest in the country" and "oftener make tumults at the elections to the disturbance of his majesties [sic] peace." JULIAN A.C. CHANDLER, THE HISTORY OF SUFFRAGE IN VIRGINIA 10 (1901).

republican presumption, the vote was considered a privilege that could be denied to the propertyless.

In Virginia, property qualifications for voting would remain in place for the next fifty-five years despite persistent calls for reform.[281] The eastern slaveholders who held a monopoly on political power in the state saw broadened suffrage as not only a threat to their political power but also the institution of slavery.[282] Their resistance could only be sustained for so long. Industrialization and urbanization produced population shifts that exacerbated malapportionment and the accompanying disparities in representation between the East and West.[283] As a result, popular pressure for change grew and ultimately proved irresistible as the legislature acquiesced to a popular referendum on the question of constitutional revision.[284] A convention was formed and the longstanding debate over the meaning of republican government that had played out in several other states finally reached Virginia.

### C. *The Triumph of Radical Republicanism*

Two intertwined issues lay at the heart of the Virginia constitutional convention debate: suffrage and representation. A conservative republican property-based conception of voting fed into an unequal system of representation that favored the eastern counties, comprising most of the property holding slaveowners, over the western counties.[285] But it was not only the Virginians of the western counties who were disproportionately excluded from participation and underrepresented, it was also the Virginians who had moved to the cities in the eastern part of the state. Between 1790 and 1830, Richmond experienced a significant increase in population.[286] That population growth, however, was not accompanied by a rise in the city's political power because most of the adult men who took up residence in the city could not meet the property qualifications for voting.[287] Adult white men in the eastern

---

281. The legislature removed any doubts about which conception of republican government prevailed in the Virginia Constitution when it passed a statute in 1785 stiffening property requirements for voting. *Id.* at 17.

282. *See* SHADE, *supra* note 271, at 49 (crediting "the tenacity of the eastern conservative element who continued to exploit the prerogatives granted to them by the constitution of 1776" for the slow pace of democratic reform in Virginia).

283. *See id.* at 21–49 (describing the demographic, economic, geographic, and social changes that transformed Virginia from an agrarian state to a commercial society).

284. Pole, *supra* note 274, at 37. Curtis, *supra* note 270, at 103–04 (describing the buildup in popular pressure for change in the 1810s and 1820s).

285. *See* Curtis, *supra* note 270, at 93 (describing how the 1776 Virginia constitution apportioned the state to give disproportionate political power to the eastern Virginia slaveholding counties).

286. *See* HENRICO CNTY., VA., HISTORICAL DATABOOK: SECTION 1, CENSUS 1 tbl.1.01, https://henrico.us/pdfs/about-henrico/Section_1_Census.pdf [https://perma.cc/KL56-A4UH] (showing that the population in the city of Richmond grew from 3,761 in 1790 to 16,060 in 1830).

287. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 342 (2005) (describing the growth of nonfreeholders in Richmond to "nearly half of the city's free adult male[]" population by the 1820s).

cities therefore emerged as a natural ally to the western Virginians in agitating for the repeal of property qualifications.

The agitation for repeal of property qualifications was most prominently expressed in a memorial to the 1829 Virginia Constitutional Convention that was read at the opening of the debate.[288] The memorial started by drawing from radical republican conceptions of popular sovereignty to challenge the legitimacy of property qualifications. The authors contrasted the majority of white male citizens who "have been passed by, like aliens or slaves, as if destitute of interest, or unworthy of a voice" with "the freeholders, sole possessors, under the existing Constitution, of the elective franchise, [who] have, upon the strength of that possession alone, asserted and maintained in themselves, the exclusive power of new-modelling the fundamental laws of the State."[289] Through their exclusive possession of the franchise, the memorial continued, the freeholders "have seized upon the sovereign authority."[290]

The memorialists argued the freeholders' claim to exclusive sovereign authority contradicted the Virginia Declaration of Rights. The memorialists explained, "[w]e have been taught by our fathers, that all power is vested in, and derived from, the people; not the freeholders: that the majority of the community, in whom abides the physical force, have also the political right of creating and remoulding [sic] at will, their civil institutions."[291] "To deny to the great body of the people all share in the Government," the memorialists continued, "is to depart from the fundamental maxims, to destroy the chief beauty, the characteristic feature, indeed, of Republican Government."[292]

Property qualifications were inconsistent with republican government because they:

> [C]reate[] an odious distinction between members of the same community; rob[] of all share, in the enactment of laws, a large portion of the citizens, bound by them, and whose blood and treasure are pledged to maintain them, and vests in a favoured class, not in consideration of their public services, but of their private possessions, the highest of all privileges one which, as is now in flagrant proof, if it does not constitute, at least is held practically to confer, absolute sovereignty.[293]

288. John Marshall, C.J., U.S. Sup. Ct., The Memorial of the Non-Freeholders of the City of Richmond, Respectfully Addressed to the Convention, Now Assembled to Deliberate on Amendments to the State Constitution, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 25, 25–30 (Richmond 1830) [hereinafter Memorial]; *see also* Curtis, *supra* note 270, at 104 (highlighting the influential status of the memorialists' petition in the arguments for suffrage reform in the constitutional convention).

289. Memorial, *supra* note 288, at 26.

290. *Id.*

291. *Id.* at 28.

292. *Id.*

293. *Id.* at 26.

The memorialists thus defined popular sovereignty as popular self-government and claimed as republican the right to the universal participation of all members of the polity (adult white men) in the process of self-government.

In addition to defining republican government in radical terms, the memorialists also countered conservative republican claims that property holders had a monopoly over republican virtue. "To ascribe to a landed possession, moral or intellectual endowments," the memorialists bemused, "would truly be regarded as ludicrous, were it not for the gravity with which the proposition is maintained, and still more for the grave consequences flowing from it."[294] The possession of property "no more proves him who has it, wiser or better, than it proves him taller or stronger, than him who has it not."[295] It is not "a fit criterion for the exercise of any right" because "[v]irtue [and] intelligence . . . are not among the products of the soil."[296]

Lastly, the memorialists redeployed the republican principle of checks and balances as a defense against the abuse of power to support the radical conception of broad suffrage rights. The memorialists explained, "[n]o community can exist, no representative body be formed, in which some one division of persons or section of country, or some two or more combined, may not preponderate and oppress the rest."[297] Referring to the politically exclusionary effects of property qualifications, the memorialists continued, "[t]o give all power, or an undue share, to one, is obviously not to remedy but to ensure the evil."[298] The "safest check" and "best corrective" against the oppression of one part of the polity by another "is found in a general admission of all upon a footing of equality."[299]

The memorialists' powerful advocacy for the right to vote under a radical conception of republican government faced two obstacles: one that made the constitutional convention necessary and the other that impeded the constitutional change they wanted. The first obstacle was the language in the 1776 Constitution maintaining the colonial-era property qualifications.[300] The arguments drawn from the Declaration of Rights' general language supporting popular sovereignty as popular self-government ran up against the specific constitutional provision recognizing property qualifications and their later codification by the state legislature.[301]

294. *Id.* at 27.

295. *Id.*

296. *Id.* The memorialists also pointed to the hypocrisy associated with placing arms "in the hands of a body of disaffected citizens, so ignorant, so depraved, and so numerous . . . . [i]n the hour of danger" while denying them the right to participate in the government that they fight to protect. *Id.*

297. *Id.* at 28.

298. *Id.*

299. *Id.*

300. *See supra* note 279 and accompanying text.

301. *See supra* notes 278–79 and accompanying text.

The memorialists sought to explain away the 1776 Convention's choice to not disturb the colonial-era property qualifications as the product of a unique moment. That decision, the memorialists explained, arose during the "most unequal struggle for national existence" preventing the mature consideration of "the relative rights of the citizens."[302] The 1776 Convention delegates feared that any change to the suffrage regulation might "generate feuds among those, upon whose harmony of feeling and concert of action, depended the salvation of their country."[303] "They left [the suffrage regulation], therefore, as they found it."[304]

The second obstacle for the memorialists arose from a contradiction in their own definition of republican government. Although they argued the republican government requires that "the great body of the people all share in the Government," they were as willing as other conservatives to exclude most Virginians from participation.[305] The memorialists declared, "[f]or obvious reasons, by almost universal consent, women and children, aliens and slaves, are excluded."[306] The reasons were so obvious that the memorialists deemed it "useless to discuss the propriety of a rule that scarcely admits of diversity of opinion."[307] The problem with the memorialists' conclusory account, however, was that the line drawn between included and excluded members of the polity did require explanation to support a principled distinction between conservative and radical conceptions of republicanism.[308] If both conceptions excluded, but along different axes, what made the radical conception more consistent with the core idea of popular sovereignty as self-government than the conservative conception? The memorialists never offered an explanation. Instead, they simply associated property qualifications with an aristocracy "of a privileged order" without considering how the qualifications embraced in their own account promoted a different kind of aristocracy.[309]

Even accounting for the contradiction, the memorialists drew a much closer connection between the right to vote and republican government than existed under the existing frame of government in Virginia. The arguments from the constitutional delegates in the 1829 Convention favoring universal white male suffrage followed the lead of the memorialists. The radical constitutional reform delegates argued that the property qualifications resulted in an aristocratic and anti-republican frame of government. One reform

---

302. Memorial, *supra* note 288, at 26.

303. *Id.*

304. *Id.*

305. *Id.* at 28.

306. *Id.* at 30.

307. *Id.*

308. *See* Curtis, *supra* note 270, at 106–07 ("[C]onservatives repeatedly chided reform delegates about their inconsistency in arguing that suffrage was a natural right while explicitly denying it to women, children, free blacks, and slaves.").

309. *See* Memorial, *supra* note 288, at 30.

delegate announced, "[i]f you agree that an aristocracy is properly defined to be a Government of the few over the many, and that those few hold their authority by virtue of their estates, I can prove that our Government is an aristocracy."[310] Another reform delegate associated the freeholder qualification with minority rule.[311] And a third described the freeholder qualification as "an invidious and anti-republican test."[312]

The reform delegates defined republican government along radical lines. "[A] free representative Republic," said one delegate, is one "wherein the administrators of public affairs are the agents of the people, and chosen by those of the people, who have, or are supposed to have, a free will, a matured intellect, and an interest in, and attachment to, the community."[313] The delegate defined that attachment in terms of residency and taxpaying, not property.[314]

The reform delegates, like the memorialists, rejected the conservative republicans' assertions that the propertyless lacked the virtue to govern. One reform delegate refused to "confine[] virtue to any description of men," and propounded the radical belief of the perfectibility of mankind through education.[315] "Adopt a well-devised, wise, and economical system of education for all classes," the delegate contended, "and all will be capable of performing the cardinal duties of the citizen, will be worthy to become depositories of political power, and all will love with filial regard, the land of their birth."[316] Another reform delegate rejected the conservative republican canard that enfranchising the poor would make them the dependent corrupt objects of

---

310. Charles S. Morgan, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 377, 378.

311. Philip Doddridge, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 419, 423 ("If I am right in believing the non-freeholders to be a majority of the qualified depositories of power, then I must be right in charging those opposed to us with supporting the pretensions of a minority to govern a majority.").

312. Lucas P. Thompson, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 410, 410.

313. Eugenius M. Wilson, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 350, 351.

314. *See id.* at 350–51. Another reform delegate identified four "postulates in the science of [government]" that accorded with a radical conception of republicanism. Richard H. Henderson, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 354, 355. They included:

> First, that all the men of a society are entitled to a voice in framing its organic law; secondly, that a majority of these men has an undoubted right to decide what that law shall be; thirdly, that as a corollary from the second proposition, this majority has a legitimate authority to prescribe who shall exercise the Right of Suffrage in the ordinary legislation of the society; and, fourthly, that to withhold the exercise of this right from any man in the society, except where it is necessary for the common good, is unjust and tyrannical.

*Id.* (emphasis omitted).

315. *Id.* at 359–60.

316. *Id.* at 360.

the rich. "It is an argument to be found in nearly all the treatises of theoretical writers, who support aristocracies," the delegate explained.[317] "The object is to alarm the people with fear that the poor will be bought, and made engines of their own ruin. It is only for purposes of alarm, and is not true."[318]

Lastly, the delegates elaborated on the memorialists' arguments associating property qualifications with abuses of power. One delegate drawing from the classic republican distinction between citizens and slaves, declared, "a man who has no voice in the Government, holds his rights by the sufferance of him who has; and he that thus holds his liberty at the will of another, is already half a slave."[319]

The reform delegates were entirely aware of Virginia's status as the only state that maintained property qualifications for the election of members of both legislative chambers.[320] They pointed to the examples of other states to counter the fear mongering from the proponents of property qualifications. "[W]e are told," said a reform delegate, "if the Right of Suffrage be extended, the rights of property will be invaded: we shall have an agrarian law, tumults, confusion, civil discord, and finally despotism."[321] And yet, "twenty-two out of twenty-four sister Republics . . . have this Free Suffrage . . . and none of these results have happened, or are likely to happen there, so far as we are informed."[322]

The vocal advocacy of the radical republicans was ultimately not enough to win the day. The conservative republicans from the East remained steadfast in their resistance to universal white manhood suffrage. They continued to interpret the Declaration of Rights as supporting a conservative conception of republicanism. For the conservatives, the best "evidence of permanent, common interest with, and attachment to, the community," was property.[323] In the class of property holders are white men, who "are the most interested

317. Charles S. Morgan, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 377, 382.

318. *Id.*

319. Lucas P. Thompson, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 410, 418.

320. Charles S. Morgan, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 377, 379–81. For one reform delegate the broad repudiation of property qualifications demonstrated "that the freehold Right of Suffrage is contrary to the genius of the people of the present age, and the Republican institutions of the United States." *Id.* at 381.

321. Lucas P. Thompson, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 410, 417.

322. *Id.* Another reform delegate pointed out that "[t]here ha[d] been no instance of war upon property in any of [their] sister States." Charles S. Morgan, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 377, 382. Instead of finding "physical rapine in any of the States where General Suffrage has been adopted[,] [a]ll live in peace, happiness, prosperity and tranquility, and every man is secure in his own person and property, under his own roof." *Id.*

323. Philip N. Nicholas, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 362, 364.

in the administration of justice . . . [and] whose own interests are the most completely identified with the interests of the Commonwealth."[324] Those virtuous "cultivators of the soil" are, according to one of the conservative delegates, "chosen people of God."[325]

The conservative delegates rejected the radical republican concern that freeholders could use their suffrage monopoly to abuse power and oppress the propertyless. "[H]ave not the great body of the freeholders such perfect identity of condition with the non-freeholders," surmised a conservative delegate, "that they could pass no law for the regulation of personal rights which would not equally affect them as well as the non-freeholders."[326] The real threat to republican government, according to conservative delegates repeating a trope from the English interregnum, arises from extending the right to vote to the dependent poor who "will become subservient to the ambition of the rich."[327] As an exclamation point, another conservative delegate declared, "history did not furnish an example of a Government founded upon Universal Suffrage, that had not degenerated to a despotism."[328]

The Convention results were less the product of the competition of ideas than the composition of the delegation. Due to the malapportionment of districts in the state, conservative republicans from the East held a majority of the seats even though most white Virginians lived in the West. And the easterners were able to use their disproportionate representation in the convention to block a constitutional amendment providing for nearly universal white male suffrage. The conservative republicans, however, were unable to resist all revisions to the property qualifications. Delegates from cities throughout Virginia spearheaded a successful reform that enfranchised more of the white male city residents.[329] The propertyless throughout the state, however, remained disfranchised.

---

324. Benjamin W. Leigh, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 393, 400.

325. *See* Howard, *supra* note 273, at 851 (quoting Philip N. Nicholas). One of the lead conservative opponents to suffrage in the convention was Benjamin Watkins Leigh. *Id.* (describing Leigh as "an articulate spokesman for the East in the convention"). At the convention, Leigh lamented:

> In almost every instance, in which our Sister states have broken up old foundations, and departed from the landed qualification of Suffrage, they have proceeded eventually and instantaneously, to Universal Suffrage . . . . [D]own, down they go, to those extremes of democracy, which have always ended, and will always end, in licence and anarchy, and thence, by inevitable consequence, in despotism.

Benjamin W. Leigh, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 393, 394.

326. Philip N. Nicholas, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 362, 367.

327. *Id.*

328. James Trezvant, Remarks to the Committee, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, *supra* note 288, at 369, 370.

329. The convention debate and negotiations ultimately yielded a complex compromise amendment that shifted the property qualification measure from acreage to monetary value and

After radical republicans fell short in their efforts to reform the Virginia Constitution in 1829, over the next two decades three of the five remaining states that maintained property qualifications, repealed them. In the constitutional conventions repealing property qualifications, the suffrage restriction came to be broadly associated with aristocratic or anti-republican government while the alternatives connecting citizenship obligations to voting were considered truly republican.[330] Most state constitutional convention delegates now embraced the radical definition of republican government that linked popular sovereignty to participatory self-government.[331]

By the time the next Virginia constitutional convention met in 1850, it was a foregone conclusion that the property qualification would be repealed.[332]

---

extended voting rights to leaseholders and heads of householders among others. VA. CONST. of 1830, art. III, § 14, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3819, 3825–26.

330. There was a strain of radical republican thought in state conventions throughout the early nation in which property qualifications for voting and officeholding were broadly criticized by suffrage reform advocates as anti-republican. *See, e.g.*, Samuel Dana, Statement, *in* JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 254, 254 (Boston 1853) ("[R]equiring [a property] qualification was an aristocratical and anti-republican principle."); John M. Clayton, Statement, *in* DEBATES OF THE DELAWARE CONVENTION FOR REVISING THE CONSTITUTION OF THE STATE, OR ADOPTING A NEW ONE 41, 41 (William M. Gouge ed., Wilmington, Del. 1831) ("It was not republican to make the possession of land, the qualification for an office."); David Purviance, Statement, *in* 2 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION 534, 534 (Harrisburg, Paker, Barrett & Parke 1837) ("Tax qualification and property representation are relics of Governments unfit to be the models of a free republican people, where distinctions do not exist, and where the humble citizen has equal chance of attaining the highest office and honor of the county."); Isaac Burr, Statement, *in* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1034, 1034 (William G. Bishop & William H. Attree eds., Albany 1846) (opposing "all property qualification whatever, as anti-republican and preposterous").

331. Those delegates consistently rejected the notion that the propertyless lacked the republican virtue to govern and adhered to the idea that through education, all white male Americans can be virtuous citizens. But as in the Virginia Convention, the delegates to the other state conventions relied on justifications for the exclusion of women and African Americans from voting that were premised on misogyny and racism. *See, e.g.*, Jonas Platt, Statement, *in* A REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW YORK 186, 186 (L.H. Clarke ed., New York 1821) (noting that he "agreed that a large portion of the blacks were not capable of exercising the right of suffrage discreetly, and ought to be excluded"); Mr. Martin, Statement, *in* 2 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION, *supra* note 330, at 477, 477 (expressing with certainty that "any attempt of the black population to exercise the right of suffrage would bring ruin upon their own heads"); Mr. Blake, Statement, *in* JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS, *supra* note 330, at 411, 412 (defending the denial of suffrage to women because "[t]he home department was one in which women have not only the right of suffrage, but the right of sovereign control").

332. *See* CHANDLER, *supra* note 280, at 47–48 (explaining by the time of the 1850 Convention, "a majority of the people of the State had undoubtedly made up their minds in favor of the extension of suffrage to all free whites over twenty-one years of age").

Virginia stood as an outlier holding on to the remnants of conservative republican framework. Only North Carolina, which maintained property qualifications for electors to its Senate, remained aligned with Virginia.[333] One reform delegate from Virginia, seeing that his side had the upper hand, declared, "what an unenviable position gentlemen are striving to place this proud old State in! [C]linging to the relics of an exploded aristocracy, under the blazing splendor of American liberty."[334] Following the trends in other states the delegate remarked, "[s]tar after star has been added to the glorious galaxy of American States, to increase the lustre [sic] of the great doctrine of popular sovereignty, undimmed by the faintest shadow of the dark dogma of property representation."[335] Most of the delegates to the 1850 Constitutional Convention appeared to agree with the radical republican sentiment "that upstart pretension to superior political authority, founded upon the simple possession of lands and tenements, goods and chattels . . . is downright presumptio[us], wrong in principle, disastrous in its practical effects, and anti-republican in its nature."[336]

Although there continued to be a few conservative republican holdouts who claimed that the propertyless lacked the virtue to govern and associated broad suffrage with despotism, even some of them saw the writing on the wall. One conservative delegate seeking to hold on to the constitutional system that gave disproportionately favorable representation rights to the East conceded that the right of suffrage "is a practical incident of citizenship."[337]

The suffrage amendment extended the vote to "[e]very white male citizen of the commonwealth, of the age of twenty-one years who" met residency

333. North Carolina adopted property qualifications for Senate and House electors in its Constitution of 1776. N.C. CONST. of 1776, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2787, 2790. In 1835, North Carolina repealed property qualifications for House electors but maintained them in amended form for Senate electors. *See* JOURNAL OF THE CONVENTION, CALLED BY THE FREEMEN OF NORTH-CAROLINA, TO AMEND THE CONSTITUTION OF THE STATE 97–98 (Raleigh, J. Gales & Son 1835). The three other states that maintained property qualifications after 1830 repealed them prior to 1850. *See* TENN. CONST. of 1834, art. IV, § 1, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3426, 3433–34; N.J. CONST. of 1844, art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 2599, 2601; R.I. CONST. of 1842, art. II, § 2, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3222, 3225–26.

334. Mr. Wiley, Statement, *in* REGISTER OF THE DEBATES AND PROCEEDINGS OF THE VA. REFORM CONVENTION 334, 338 (William G. Bishop ed., Richmond, Robert H. Gallaher 1851).

335. *Id.*

336. Mr. Wiley, Statement, *in* REGISTER OF THE DEBATES AND PROCEEDINGS OF THE VA. REFORM CONVENTION, *supra* note 334, at 331, 333.

337. Mr. Purkins, Statement, *in* REGISTER OF THE DEBATES AND PROCEEDINGS OF THE VA. REFORM CONVENTION, *supra* note 334, at 326, 326–27.

requirements in the State and the county, city, or town.[338] What had been considered a radical republican measure two decades prior passed with so little controversy that the local newspapers did not even report the vote.[339]

## IV. THE FUNDAMENTAL RIGHT TO VOTE AND THE REPUBLICAN FORM OF GOVERNMENT CLAUSE: TWO LINGERING QUESTIONS

By 1857, a radical conception of republican government prevailed in all states in the union. Under that conception, the vote was considered a right belonging to all members of the polity and a fundamental predicate to republican government. Two questions remain related to the enforceability of the Republican Form of Government Clause. First, should the universal embrace in the states of a radical conception of republican government through the rejection of property qualifications count as constitutional liquidation? Second, even if we accept the liquidated meaning of republican government, should that clause be considered enforceable for purposes of protecting the fundamental right to vote?

### *A. DID THE STATES LIQUIDATE THE REPUBLICAN FORM OF GOVERNMENT CLAUSE?*

When the U.S. Constitution was ratified, aspects of the meaning of Republican Form of Government remained indeterminate. Madison's acknowledgment in *Federalist 43* that the states would have the authority to define republican government meant that there was no generally accepted relationship between voting and republican government.[340] Most states treated voting as a privilege limited to the property classes consistent with the conservative vision of republican government, but two states held onto a radical vision of republican government in which voting was a fundamental right belonging to all members of the polity (white men).[341]

Madison also determined in *Federalist 43* that states should have the power to redefine government up to the point of "exchang[ing] republican for anti-republican Constitutions."[342] It is only at the point when an aspect of republican government has been liquidated can a substitute for it be considered anti-republican. When aspects of republican government remained indeterminate, their alternatives could not be considered anti-republican since there was insufficient agreement on what was, in fact, republican. Thus, at the founding,

338. VA. CONST. of 1850, art. III, § 1, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, *supra* note 170, at 3829, 3832–33.

339. *See* CHANDLER, *supra* note 280, at 51 (noting the lack of newspaper coverage of the suffrage debate and votes and suggesting that this silence probably meant that the vote on the suffrage reform "was almost unanimously adopted").

340. *See supra* text accompanying notes 228–29.

341. *See supra* text accompanying notes 170–71.

342. THE FEDERALIST NO. 43, *supra* note 21, at 275 (James Madison).

neither the form of government treating voting as a privilege extending only to the propertied nor the form of government treating voting as a right belonging to every white male could be considered republican or anti-republican.

When Madison theorized about liquidating constitutional provisions and then specified a state role in clarifying the meaning of republican form of government, he never marked an endpoint to the process. That omission opens a series of questions: Should we understand liquidation as an ongoing evolutive process without an end? Or is there a point during the evolution at which vague or ambiguous constitutional provisions should be considered clear? If so, at what point? For constitutional provisions lacking a specific method of liquidation, those questions are complicated by indeterminacies about which sources should be considered authoritative for clarifying constitutional meaning.

In regard to republican government, it seems clear that the Constitution delegated to the states the responsibility to liquidate the meaning of republican government and the states did so in the various state constitutional conventions in the early nineteenth century.[343] By the middle of the nineteenth century, the radical conception of the relationship between voting and republican government triumphed in every state of the union. No state constitution required property holding to vote and the only barriers that remained for the white male polity were citizenship-based requirements associated with taxpaying and residency. The citizen members of the polity, therefore, had a fundamental right to vote.

If, as Madison suggests, the meaning of the Republican Form of Government Clause can be liquidated, then, at the very least, the unanimous agreement of the states that the individual right to vote is fundamental to republican government, must count as liquidation. The Republican Form of Government Clause's protection of the fundamental right to vote should therefore be enforceable against state laws to the contrary until the Clause is amended through the Article V process or updated through a subsequent process of liquidation.[344]

If the fundamental right to vote is part of the liquidated Republican Form of Government Clause, then which institutions should have the authority to enforce that clause? Are such claims justiciable? I turn to that question next.

343. For purposes of the claim in this Article, I do not need to decide the thorny question of what to do about the meaning of republican government when the majority of states disagree with the minority of states or even when there is a single holdout state.

344. *See* U.S. CONST. art. V. The point at which liquidation ends is not clearly specified in the Federalist Papers nor is the process for updating the meaning of a constitutional provision through liquidation. Those are difficult questions that I do not need to resolve here because as of this date no state has attempted to revive property qualifications, suggesting that the radical conception of republicanism still holds.

### B. ARE FUNDAMENTAL RIGHT TO VOTE CLAIMS JUSTICIABLE UNDER THE REPUBLICAN FORM OF GOVERNMENT CLAUSE?

Supreme Court nonjusticiability holdings have put the Republican Form of Government Clause into constitutional purgatory. This Article's excavation of a meaning of republican government that is connected to an individual right presents an opportunity to rescue at least one application of the Republican Form of Government Clause from that purgatory.

In finding Republican Form of Government Clause claims nonjusticiable, the Court has been motivated by two concerns, the first rooted in the indeterminacy of the clause, and the second in the judicial remedies that claimants seek from the Court.

The clause, which says, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," is said to be indeterminate in two respects.[345] First, "Republican Form of Government" lacks a clear meaning. Second, "United States" lacks a clear institutional reference.

As to the clause's indeterminacy, this Article has shown that "Republican Form of Government" is determinate in at least some respects. At the founding, there was general agreement that republican government required popular sovereignty in the sense that the people had to consent to the frame of government.[346] There was also agreement that checks and balances in some form was necessary for republican government to prevent a turn towards tyrannical government.[347] Finally, as I have shown in this Article, republican government has evolved to mean popular sovereignty as participatory self-government. Under this definition, members of the polity have a fundamental right to vote for their representatives.

As to the question regarding which institution is responsible for enforcing the clause, the Supreme Court has in the past determined that it is for Congress, and not the Court, to guarantee republican government. But importantly, that determination was made in two seminal cases involving structural claims in which the remedy sought was one that the Court did not think it could provide.

In *Luther v. Borden*, the Court was asked to decide which of two competing governments in Rhode Island was republican and had the authority to pass and enforce laws against a person accused of trespassing.[348] Lacking the capacity to force a government to disband and thereby void all its laws, the Court declined to intervene.[349] The Court concluded that under the Republican

345. U.S. CONST. art. IV, § 4.

346. *See supra* text accompanying note 222.

347. *See supra* text accompanying note 223.

348. Luther v. Borden, 48 U.S. (7 How.) 1, 35 (1849) (describing the legal challenge to "[t]he existence and authority of the government under which the defendants acted").

349. *Id.* at 40 ("Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States . . . . But the power of determining that a State government has been lawfully established . . . is not one of them.").

Form of Government Clause, "it rests with Congress to decide what government is the established one in a State."[350]

Similarly, in *Pacific States Telephone & Telegraph Co. v. Oregon*, the Court was again asked to address a structural question and provide a remedy. The case involved a challenge to a tax law adopted through a citizen initiative process that the Oregon Constitution permitted.[351] The challenger argued, "the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character" under the Republican Form of Government Clause.[352]

The Court cited *Borden*'s finding that enforcement of the Republican Form of Government Clause was solely committed by the Constitution to the judgment of Congress.[353] But it emphasized that it was because the questions to be raised under the clause were presumed to be purely political in nature.[354] Thus, one of the reasons why the Court did not consider the corporation's claim to be justiciable in that case was because the challenged conduct did not "violate[] any of its constitutional rights."[355]

The other reason why the Court chose not to intervene arose from the remedy requested. The Court explained, if "the adoption of the initiative and referendum destroyed all government republican in form in Oregon," then the Court would have had to invalidate not only the tax law being challenged, "but [also] every other statute passed in Oregon since the adoption of the initiative and referendum."[356] For the Court, a remedy that "strange, far-reaching and injurious" could only be provided by the political branches of government.[357]

The two seminal Republican Form of Government Clause cases share in common the need for the Court to address purely political questions and impose remedies with retrospective and sweeping effect. They are therefore distinguishable from cases remedying violations of the fundamental right to vote. Those latter cases involve rights claims that are not purely political in

350. *Id.* at 42.

351. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133–34 (1912) (holding that the Oregon constitutional provision reserved to the people the "power to propose laws and amendments to the constitution and to enact or reject the same at the polls") (quoting OR. CONST. art. IV, §1 (amended 1902)).

352. *Id.* at 137.

353. *Id.* at 143–50.

354. *Id.* at 150. The Court explained that the claim was nonjusticiable because "[i]t [was] addressed to the framework and political character of the government by which the statute levying the tax was passed." *Id.* (assigning purely political questions under the Republican Form of Government Clause to the legislature).

355. *Id.* As the Court explained, the corporation "does not assert . . . that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power." *Id.*

356. *Id.* at 141.

357. *Id.* at 142.

nature as individual rights are at stake. They also involve remedies that are much more limited, in that the Court prohibits the prospective application of voting restrictions, rather than sweeping away an entire government or years of legal enactments.

Most importantly, judicial actions protecting the fundamental right to vote have not involved the Court in questions of whether past governments that maintained voting restrictions were republican in form. In decisions protecting the fundamental right to vote, the Court has been able to develop manageable standards for adjudicating fundamental right to vote claims with remedies more limited in effect and within the judicial capacity to impose.[358] Applying the Republican Form of Government Clause to fundamental right to vote claims would not require the Court to change the way it has addressed such claims in the past. But understanding the vote to be a fundamental feature of republican government has the power to insulate the right from a seemingly inevitable challenge under the *Dobbs* standard.

## CONCLUSION

By the mid-1850s, property qualifications were a thing of the past, but threats to the fundamental right to vote remained. As the polity expanded to include people of color and women, variations in state enforcement of the right to vote helped produce disparities in political participation between groups in different states.[359] Constitutional prohibitions on voter discrimination proved no match for the legal innovations some states developed to infringe on the right to vote. State courts neglected their duty to enforce state constitutional rights to vote and federal courts, not recognizing the tools available in the Federal Constitution to block infringements on the right, looked the other way.[360] In the background, state legislatures distorted America's democratic republic further without check through districting practices rendering some people's votes less valuable than others.[361]

358. Since the 1960s, when the Court found that a law violates the fundamental right to vote, it invalidated any prospective operation of the law. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667–70 (1966) (invalidating and prohibiting the prospective operation of a state poll tax). In 1992, the Court developed a standard, which subjects severe infringements on the right to vote to strict scrutiny and nonsevere restrictions on the right to reasonableness review. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

359. *See, e.g.*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 486–97 (9th ed. 1944) (presenting data on the voting rates of African Americans in northern and southern states in the early twentieth century).

360. *See supra* text accompanying notes 71–73, 91–92.

361. *See, e.g.*, STEPHEN ANSOLABEHERE & JAMES M. SNYDER JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 28–34 (2008) (describing the historically malapportionment of legislative districts that resulted in minority rule prior to the Supreme Court establishing the constitutional requirement of one-person, one-vote on the basis of the fundamental right to vote in *Reynolds v. Sims*).

It was not until the federal government intervened in the 1960s that the United States began to realize its potential as a truly democratic republic. The courts partnered with Congress and the people to protect the fundamental right to vote and prohibit discriminatory infringements on that right.[362] The judiciary struck down barriers to voting and registration and checked distortions to the representative process as violations of the fundamental right to vote.

As the Court has weakened voter antidiscrimination laws over the past decade, the fundamental right to vote has emerged as an even more important tool to sustain our constitutional republic.[363] Downgrading the vote from a fundamental right to a privilege would therefore have negative consequences throughout the country. Courts would rely on state constitutions to robustly protect the right to vote in some states, but that would likely not be the fate for all. Instead, due to partisan capture of legislatures and judiciaries in some states, exclusionary voting rules and democratic distortions would likely be sustained, threatening the rights, liberties, and interests of Americans.

If the Supreme Court takes its own constitutional interpretive methodology seriously, it should find the constitutional right to vote to be deeply rooted in the Constitution's text, as well as the nation's enduring history and tradition, and confirm its role in securing democratic republics throughout the United States.

362. *See, e.g.*, U.S. CONST. amend. XXIV, § 1 (banning federal poll taxes); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Reynolds v. Sims, 377 U.S. 533, 561–65 (1964) (applying the fundamental right to vote to protect against the unequal weighing on individual votes); *Harper*, 383 U.S. at 667–70 (applying the fundamental right to vote to invalidate a state poll tax).

363. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013) (striking down Section 4 of the Voting Rights Act rendering Section 5 of the Act moot); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337–40 (2021) (narrowing the scope of Section 2 of the Voting Rights Act).