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WHY THE U.S. FOUNDERS' CONCEPTIONS OF HUMAN AGENCY MATTER TODAY: THE EXAMPLE OF SENATE MALAPPORTIONMENT

*by: Susan D. Carle**

ABSTRACT

This Article links the U.S. founders' ideas about "human agency"—i.e., their understandings of the link between the individual and the social and political structure—with how they designed the Constitution and, in particular, how they designed the U.S. Senate as a non-majoritarian institution. I mine primary sources to show that although the founders struggled with many disagreements in drafting the Constitution, they shared an amalgam of historically received ideas about human agency derived from both liberal and civic republican traditions. I identify five such ideas and then parse which of them continue to pertain today. I argue that although contemporary and mainstream Western political thought continues to regard individuals' pursuit of happiness and enjoyment of liberty as essential ends of government, the founders' views about property and "independence" as prerequisites to having political rights no longer pertain. Yet those views provided the founders' explicit rationale for the Senate's anti-democratic design. This, I argue, is an important yet overlooked reason why that design must be rethought today, even though the Constitution purports to make this feature unamendable through a last-minute revision arguably extracted under duress.

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I. INTRODUCTION

On January 20, 1792, American founder Richard Henry Lee stood before Congress to present a speech.¹ Lee had been at the center of many key happenings during the founding period² and was close to retirement, thus finding himself in the frame of mind to look back on the trajectory of the nation's founding in which he had played such an integral part. Requesting that his colleagues "patiently attend me through the process of my reasonings,"³ and exhibiting his characteristic fondness for abstract principles, a trait he shared with many leading members of the founding generation, Lee explained that he felt it necessary to start with "some general abstract principles, which appear to me important."⁴ These were, to Lee, as follows:

1. See Richard Henry Lee, Senator, U.S. Congress, *Address Before the House of Representatives in the Committee of the Whole on Mr. Madison's Resolutions*, GAZETTE U.S. & EVENING ADVERTISER, Jan. 29, 1794, at 2, <https://chroniclingamerica.loc.gov/lccn/sn83025878/1794-01-29/ed-1/seq-2/#date1=1777&index=0&date2=1820&searchType=advanced&language=&sequence=0&words=ages+all+Future+Lee+Mr@esolutions&proxdistance=5&state=&rows=20&ortext=&proxtext=&phrasertext=and+in+all+future+ages&andtext-resolutions%2C+Mr.+Lee%2C+&dateFilterType=yearRange&page=1f> [https://perma.cc/F6L7-MJ6X].

2. Lee was a member of the first Continental Congress, president of the sixth, and one of three main participants in the initial process of drafting the U.S. Declaration of Independence. He had also been the first to propose the language that would become the Bill of Rights. At the time he spoke, he held the office of U.S. Senator from Virginia. See HARLOW GILES UNGER, *FIRST FOUNDING FATHER: RICHARD HENRY LEE AND THE CALL TO INDEPENDENCE* 118–19, 179, 189, 210–11, 239 (2017). A member of the famous Lee family, which had by the 1770s acquired vast land holdings across Virginia, Maryland, Pennsylvania, and areas that would later become Ohio and Indiana, Lee had received the best education available to a male member of the early American super-elite, including private tutoring by a well-educated Scottish clergyman in an elegant brick school house his father built for him and his brothers, followed by boarding school in England and extensive travel throughout Europe as befitting a gentleman of his station. *Id.* at 15–16.

3. Lee, *supra* note 1, at 2.

4. *Id.*

I consider, Mr. Chairman, human life as a system of expedients, whether viewed individually or collectively. *Man as an individual, is ever in the pursuit of happiness*, and is particularly occupied in applying those expedients which, under existing circumstances, are most likely to produce it. These he varies according to the changes in his own mind; and the obstacles which continually occur against his plans. Every day presents some new evil to be avoided, or some new good to be obtained; He avoids the one and pursues the other, by the best means which the state of things will afford. To do this, he will vary his means, suspend or accelerate the execution of his plans, as circumstances dictate. *At all times he must be the best judge of them, and of what in any existing state of things, is necessary to his happiness. Man also, is a various animal. Hence the diversity of human character and of human pursuits. Each individual takes a different route to happiness; and being the best judge in his own case, has a right to do so. . . . As the circumstances of individuals are various, a mode of life which will produce one man's happiness, may produce another man's misery. . . . This is a true republican doctrine. It is founded on the capacity of the people to judge for themselves.*⁵

During the ratification debates, Lee was what historians now call an “anti-Federalist”; he thought the Constitution took too much power away from the states and failed to sufficiently specify the rights of individuals.⁶ Throughout his political life, he frequently quoted from Blackstone’s *Commentaries*, which emphasized the natural rights of man, and many echoes of Blackstone are evident in his 1792 speech.⁷ John Locke’s influence is apparent as well; Lee instinctively started with the happiness of the individual and emphasized the diversity of human desires and the right of individuals to judge those for themselves. In these respects, Lee sounded, as do Blackstone and Locke, much like what one would describe today as a philosophical liberal. But note that Lee described his ideas as “true republican doctrine,” invoking the classical republican ideas that also motivated the founders.⁸ The founders, in other words, drew from long and complex traditions of political thought as generations of early American historians have explored in literature I draw from below.⁹

In emphasizing the happiness of the individual as the end of government, Lee shared the same perspective as the other leaders of the founding generation, even though these leaders differed in their polit-

5. *Id.* (emphasis added).

6. UNGER, *supra* note 2, at 210, 213–14.

7. Lee’s education and interests led him to become well read in the political and philosophical classics. Although not trained as a lawyer, he was, like many other leaders of the founding generation, also very familiar with English common and constitutional law jurisprudence. His favorites, according to one biographer, included John Locke, the Baron de Montesquieu, and the great English jurist of constitutional and common law, Sir William Blackstone. UNGER, *supra* note 2, at 17.

8. Lee, *supra* note 1, at 2.

9. See *infra* Part I.

ical views in other respects. Federalist John Adams, with whom Lee served in the First Continental Congress and worked on the initial draft of the Declaration of Independence, provides an example.¹⁰ In their backgrounds, Lee and Adams had some similarities and some differences. Lee was wealthier, but both men shared a passion for political philosophy and involvement.¹¹ Adams, however, had a somewhat different way of framing the proper starting point in thinking about the connection between human nature and the best design for government. As is evident below, and as I discuss, Adams's formulation sounds much like Lee's but with subtle yet important differences:

We ought to consider what is the end of government, before we determine which is the best form. Upon this point all speculative politicians will agree, that the happiness of society is the end of government, as all divines and moral philosophers will *agree that the happiness of the individual is the end of man*. . . . All sober inquirers after truth, ancient and modern, pagan and Christian, have declared that *the happiness of man, as well as his dignity consists in virtue*.¹²

What unites the statements of Lee and Adams (as well as many others of the period) is their emphasis on individuals' pursuit of happiness as either the end of government (Lee) or the end of "man" (Adams). (Here and elsewhere, I leave "man" as a gendered word in place since it accurately reflects who counted for the purpose of defining the ends of government for political thinkers of the time.) Adams's statement, however, emphasizes a connection between "virtue" and the happiness of man, while Lee's does not. In this focus, Adams's statement as quoted above sounds more aligned with the classical republican tradition that influenced the founders.¹³ Yet both statements take the happiness of the individual as a starting point, reflecting, I argue, shared understandings that anchored the many disagreements the founding leaders had to resolve in order to create a new constitutional order. Indeed, Adams stated as much in an excited letter he wrote to Lee in 1775, laying out his plan for a new Constitution with a divided

10. See JOHN ADAMS, THOUGHTS ON GOVERNMENT 4–5 (Rise of Douai 2014) (1776).

11. See Richard Henry Lee: Gentleman Revolutionary, AM. REVOLUTION INST.: BLOG (Sept. 13, 2021), <https://www.americanrevolutioninstitute.org/richard-henry-lee-gentleman-revolutionary/> [<https://perma.cc/N9KD-QVZZ>].

12. ADAMS, *supra* note 10, at 7 (emphasis added); see also *A Proclamation by the General Court, 19 January 1776*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-03-02-0195-0005> [<https://perma.cc/7C5T-7ZZ8>] (“[T]he Happiness of the People . . . is the sole End of Government . . .”).

13. A vast literature beginning in the 1970s with the work of J.G.A. Pocock, Bernard Bailyn, and Gordon Wood, as well as others, has revived this tradition. See, e.g., J.G.A. POCOCCO, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (2016); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1972) [hereinafter WOOD, REPUBLIC]; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (Vintage Books 1993) (1992) [hereinafter WOOD, RADICALISM].

form of government, through which “human nature would appear in its proper glory” and erect “such new fabrics as it thinks best calculated to promote its happiness.”¹⁴

As this Article shows, Americans in the founding era were poised between a plethora of new and old concepts. Liberalism and classical republicanism were two sets of important ideas along with others.¹⁵ The Constitution reflected decisions that sometimes required the drafters to choose among a vast inherited amalgam of ideas about human nature and its connection to the best construction of government. I argue that these choices mattered and continue to matter and that for this reason it is important to assess whether the founders’ assumptions continue to reflect contemporary mainstream political values. To the extent that the founders’ ideas no longer reflect current values, especially their ideas about the fit between human flourishing (or “happiness” as the founders put it) and proper government design, the design should be changed as even the founders might agree.¹⁶

Inquiries about the fit between contemporary and founding-era understandings of human personality and the design of the Constitution

14. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), in *THE POLITICAL WRITINGS OF JOHN ADAMS* 642, 644 (George W. Carey ed. 2000) [hereinafter Letter from John Adams to Richard Henry Lee].

15. As a basic definition of these terms, we may take Lance Banning’s clear exposition as follows:

Liberalism is a label most would use for a political philosophy that regards man as possessed of inherent individual rights and the state as existing to protect these rights, deriving its authority from consent. *Classical republicanism* is a term that scholars have employed to identify a mode of thinking about citizenship and the polity that may be traced from Aristotle through Machiavelli and Harrington to eighteenth-century Britain and her colonies. The two philosophies begin with different assumptions about human nature and develop a variety of different ideas.

Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *WILLIAM & MARY Q.* 3, 11 (1986) (emphasis in original) (internal citation omitted).

16. See, e.g., Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *TEACHING AM. HIST.*, <https://teachingamericanhistory.org/document/letter-to-samuel-kercheval/> [<https://perma.cc/4ASH-NLZ7>] (“But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”); see also Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043, 1056 (1988) (quoting Edmund Pendleton, the president of the Virginia 1788 ratifying convention, who stated that if the Constitution turned out not to assure the people’s happiness, “we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse” (citation omitted)); *id.* at 1057 (noting that Madison proposed amending the Constitution with a prefix to the Preamble declaring that “the people have an indubitable, unalienable, and indefeasible right to reform or change their Government,” but this idea was dropped because it was deemed redundant) (citation omitted).

could potentially be pursued in a variety of directions.¹⁷ In this Article, I use one example—namely, the decisions the founders reached, after much heated debate, about how to design the U.S. Senate. Those decisions about the Senate were especially important in that the founders purported to make the decisions virtually inalterable through a last-minute addition of a final clause in Article V,¹⁸ to which historians have thus far not paid sufficient attention. That final clause states that the institutional design of the Senate cannot be changed by the process for amending all other aspects of the Constitution.¹⁹ Instead, change requires the unanimous consent of all states²⁰—consent which, rather obviously, would be quite irrational for small states to provide since it would reduce their political power.

Scholars have pointed out the problems for contemporary U.S. democracy arising from the Senate's design, as I discuss in Part III. Likewise, generations of historians have debated the nuances of the founders' conceptions of human agency in far greater depth than I can cover here. What this Article contributes is a synthesis of the contemporary awareness of a constitutional and policy crisis arising from the Senate's design with the founders' thinking about human nature—or *human agency*, as I refer to this concept, which draws on a useful analytic term employed in the social sciences,²¹ sociology,²² political science,²³ and philosophy.²⁴

17. For example, one might ask whether the present Court's First Amendment absolutism fits with contemporary times. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (holding that a city could not ban cross burnings).

18. U.S. Const. art. V.

19. *Id.* (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

20. *Id.*

21. OXFORD DICTIONARY OF THE SOCIAL SCIENCES 7–8 (Craig Calhoun ed., Oxford Univ. Press 2002) (“Agency commonly refers to the ability of actors to operate independently of the determining constraints of social structure.”).

22. OXFORD DICTIONARY OF SOCIOLOGY 11, 12 (John Scott ed., 4th ed. 2014) (“Agency is often juxtaposed to ‘structure . . . emphasizing implicitly the undetermined nature of human action.’”).

23. A helpful definition of this term as used in political science and political theory is as follows:

[A]gency, the property or capacity of actors to make things happen.

The concept of agency is central to political theory. Political activities are carried out by agents, whose agency inheres in their power to produce effects. In politics, agency is generally reserved for human actors, and, more controversially, it is sometimes attributed only to particular categories of persons. Although human agency and political agency are often equated, they are treated as distinct by some theorists. Niccolò Machiavelli and Max Weber, for example, contended that effective rulers require special capacities in the art of statecraft.

Although the term *agency* is mainly used in a straightforward way, its presuppositions are widely contested. Who counts as an agent, what kinds of ability are deemed necessary for agency (and whether such abilities are, for example, biased in terms of gender or ethnicity), and how effective agents are in determining political outcomes all remain sources of disagreement.

My argument is that if lawmakers' conceptions of human agency matter to the law they construct—which, I posit, they very much do—then historical change in mainstream ideas about these matters may require change in law as well.²⁵ But since Article V does not allow changing the structure of the Senate—due to the last-minute manipulations at the Constitutional Convention, which I detail in Part III.C—then modifications required due to changing conceptions of the relationship between human agency and proper government design probably need to be pursued outside the Article V amendment process. Thus, I demonstrate that a lens focusing on the connection between conceptions of human agency and law provides an important tool in contemporary constitutional debate.

Before proceeding, a note is in order to help set the terms for discussion. The investigation into the influence of classical or civic republicanism in U.S. constitutional history, which started in the 1970s among historians and spread to legal scholarship in the 1980s,²⁶ has established that the founders were not “simple Lockean liberals”²⁷ as earlier generations of historians may have assumed. Instead, the founders were deeply immersed in traditions of political philosophy stretching back to the ancient Greeks and running through Nicolló Machiavelli and English opposition theorists to the American founders.²⁸ Like Adams and Lee, most founding-era leaders read voraciously and widely, and they mixed together ideas and historical examples of all sorts, using whatever pragmatically helped their na-

Diana Coole, *Agency*, BRITANNICA (July 28, 2017), <https://www.britannica.com/topic/agency-political-theory> [<https://perma.cc/9ER5-WMA7>] (emphasis in original).

24. See OXFORD DICTIONARY OF PHILOSOPHY 11 (Simon Blackburn ed., 3d ed. 2016) (“The central problem of agency is to understand the difference between events happening in me or to me, and taking control of events, or doing things.”).

25. I limit my examination to mainstream ideas (which may not in fact be my own favorite ideas) because these are the ideas that are broadly shared. Democratic principles would suggest that when a broad majority—in a stable and calm (or “virtuous”) way—share certain values, such as values promoting greater inclusivity, fairness, or representation, those values should be incorporated into the Constitution, and provisions that contravene them should be read out of the document, just as the Constitution’s language about slavery no longer has effect today. The focus of this Article is not on providing theoretical justification for this proposition; suffice it to say that the founders themselves agreed as I discuss further below.

26. See generally *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493–1538 (1988) (presenting an entire issue devoted to leading legal scholars’ work in this area).

27. JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s 19 (1984).

28. See generally POCOCK, *supra* note 13 (tracing the broad sweep of these ideas throughout several centuries in Europe, England, and the United States).

tion-founding project.²⁹ They read Aristotle and Polybius as well as James Harrington, Locke, and Montesquieu.³⁰

Historians of the U.S. founding period vigorously debate the respective influence on the founders of ideas sounding in classical republicanism versus what we today would label as philosophical liberalism; they also debate the extent to which these two sets of ideas were incompatible.³¹ My examination leads me to the conclusion that the founders were not particularly bothered by the contradictions between their classical republican and liberal ideas. It is instead later-period historians who have been bothered by the inconsistencies between these two traditions.³² Although debates during the Constitution-making process sometimes had roots in the different emphases various participants placed on these two sets of somewhat incompatible perspectives on human agency and government, the founders do not break neatly into camps in this regard. Thus, although I will frequently draw from the work of historians with deep expertise on the intellectual history of the founding period, I try to avoid wading too deeply into these experts' sometimes pitched debates. My purpose here is different from theirs—I seek to contribute to a legal scholarship discourse. While I draw on the rich literature that historians of the founding period have generated, I stay close to original sources. Forcing historical labels onto the ideas that characterized the founders' debates is, for my purposes, largely unnecessary.

This Article proceeds in four parts. Part I sketches, as briefly as possible for purposes of the argument to come, the founders' basic ideas about human agency. I argue that the founders held these basics in common even though they vigorously disagreed about issues only a few steps beyond this foundation. As I have mentioned, the concepts the founders typically did not question in any sustained way included that government should provide the conditions for the individual's pursuit of happiness. They also championed the concept of "liberty," as I discuss below. These concepts, though somewhat changed over

29. See LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 75 (1978) ("In an age that thought it possible to comb the past for lessons applicable to the present, history was an important pursuit. History, for most colonists, meant the classic tales of Roman greatness and decline, often in one of the modern translations that were projects of the [English] opposition writers and vehicles for their own ideas." (citations omitted)); see also BAILYN, *supra* note 13, at 43–45, 52–54 (describing sources of founders' ideas).

30. See BANNING, *supra* note 29, at 75.

31. See, e.g., Banning, *supra* note 15, at 3–11 (providing one participant's view of this debate); see also APPLEBY, *supra* note 27 at 21 (arguing that the classical and liberal conceptions of liberty were "[s]o at odds . . . that it is hard to understand how they could have coexisted in the same political discourse").

32. See Banning, *supra* note 15, at 12 (arguing that "major difficulties will arise if we suppose that the analytical distinctions we detect were evident to those we study" and noting that "[e]ighteenth-century opposition thought was always a complex blend of liberal and classical ideas").

time, continue to be starting points for much mainstream constitutional theory today.³³ In turn, the founders connected concepts about individuals' pursuit of happiness and liberty both to individual rights as against government and other men as well as concepts of civic virtue, defined both as personal virtue and as active participation in government by those most suited to do so.³⁴

Part II then traces the links between these foundational ideas and the founders' specific decisions about government design, with special focus on their decisions about the design of the Senate. Here the founders had many disagreements, as I show, but the victors at the Constitutional Convention and in the ratification process prevailed in the nation's adoption of the Constitution with a non-majoritarian Senate design.

Part III examines contemporary critiques of the founders' design choices for the Senate, especially the effects of its counter-majoritarian structure in undermining democracy, producing unfairness in the distribution of federal government funding, perpetuating racial injustice, blocking Congress's ability to function, and increasing political polarization and alarming levels of civil unrest. As I point out, the contemporary (mal)functioning of the Senate can in part be directly traced to the founders' choices in constructing the Senate as they did—except that the effects of those choices are far more dramatic today than the founders expected. To change the Senate's design is to deviate from the founders' intent, to be sure, but it is imperative nonetheless. Indeed the founders themselves might well agree since they never envisioned that Senate malapportionment would become so extreme.

Part IV brings together my historical look at the founders' theory of human agency with the contemporary critique of the Senate's design. I

33. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005) (defining a concept of active liberty as a basis for grounding constitutional discourse today).

34. See BANNING, *supra* note 29, at 46 (defining virtue in classical republicanism as “a willingness and an ability to put attention to the common good ahead of selfish ends”); see also *id.* at 107 (discussing the eighteenth-century image of a republic as “conveyed by the word ‘virtue,’ which suggested a powerful, communitarian sense of the common good, an individual readiness to sacrifice selfish interest for the interest of the whole”). Some historians have argued that the Federalists place more emphasis on the importance of civic or public virtue, while the anti-Federalists, and then the Jeffersonian Republicans, were more focused on the private individual rights of men to pursue their self-defined, often commercial, rather than public-regarding, goals. See, e.g., APPLEBY, *supra* note 27, at 96 (arguing that an “instrumental attitude toward government implicit in Locke’s Second Treatise was made explicit by such Jeffersonians as James Cheetham”). However, this is not true of all anti-Federalists, including, for example, the one prominent female political commentator, Mercy Otis Warren, who championed virtue and anti-Federalism at the same time. See ROSEMARIE ZAGARRI, *A WOMAN’S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION* 121–22 (2d ed. 2015) (describing Warren’s antifederalist and classical republican “public virtue” views).

argue that the history presented in this Article helps sort through the many proposals on the table for Senate reform to show why some proposals are better than others. If the flaws in the Senate's design arise out of conceptions of human agency that do not fit contemporary worldviews, then the Senate's design should be reformed under the founders' own logic.

II. THE FOUNDERS' CONCEPTIONS OF HUMAN AGENCY

As I show in this Part, the Constitution rests on historically contingent views of human agency. Those conceptions come from the classical thinkers that the founders all widely read—especially Locke, Blackstone, the ancient Greek philosophers, and the eighteenth-century English opposition thinkers. Although the founders held bitterly opposed views on many issues, they were in basic agreement about these fundamentals and their connection to structuring the best form of government for the United States. These interlinking concepts include ideas about individual pursuit of happiness, as noted in the Introduction, along with liberty, civic virtue, independence, and property, all of which I discuss in turn below.

The founders made their decisions in a particular socio-historical context. As Gordon Wood's particularly authoritative investigation of the intellectual history of the founders emphasizes, the founders were a predominantly self-made, first-generation elite deeply hopeful about the future they could make by creating a new society and legal structure.³⁵ They considered themselves "gentlemen," but in a new, American use of that term. This connoted men of virtue and achieved distinction rather than of inherited aristocratic status, which was the way the term was used to refer to members of the most elite social class in England and throughout Europe.³⁶ Some founding leaders enjoyed great inherited wealth, such as Virginians Lee, Madison, George Washington, and Thomas Jefferson, as well as northerners, including convention delegate Gouverneur Morris. Others did not, including Adams, Alexander Hamilton, Benjamin Franklin, and Thomas Paine. Many of the leaders who lacked extensive formal education prided themselves on their erudition, and all the more so for being self-educated in a wide range of the classics of philosophy, political theory, and history.³⁷ A significant majority of the founding generation leaders were lawyers, but whether they were lawyers or not, they avidly

35. GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 277 (2011) [hereinafter WOOD, *REFLECTIONS*] (describing the American revolutionary leaders as "men of high ambition yet of relatively modest origins" who wanted to "promote the new enlightened standards of gentility and learning in opposition to the traditional importance of family and blood"); *id.* at 278 (noting that almost all the Revolutionary leaders were "first-generation gentlemen").

36. *Id.*; WOOD, *RADICALISM*, *supra* note 13, at 180, 194–95.

37. *Id.*

read and found guidance in the abstractions of English common and constitutional law.³⁸

In this regard, Blackstone was a chief authority; his treatises on the political rights of individuals provided a touchstone for the founding generation.³⁹ In turn, Blackstone drew on the works of Locke and other Enlightenment philosophers. Blackstone's discussions of human rights and the proper role of government closely resemble Locke's discussions on the same subject, which Blackstone frequently cited. Both emphasized the pursuit of "true Happiness as the Foundation of Liberty," the need to avoid mistaking "imaginary for real happiness," and importantly, the need to suspend and examine closely one's desires in order to remain in a state of liberty.⁴⁰ The founders also reached back to Aristotelean views about the relationship between politics and civic virtue.⁴¹

Without question, the founders had these conceptions in mind in their frequent invocations of historically specific, interrelated concepts of human happiness as tied to liberty and virtue. These concepts were fundamental to the understanding of human nature around which the founders intended to build a new government. In the words of Benjamin Rush, a physician who was one of the Constitution's signers and who had received an education in the Scottish Enlightenment philosophers through his higher education in Scotland, "the proposed Constitution [had to] 'coalesce' or 'fit' with human agency," and this assumption "was a commonplace of the ratification debates."⁴² Thus, inquiry into the founders' views of human happiness as connected to liberty and the proper role of government helps illuminate how those views influenced the constitutional structure the founders decided to build.

A. *Human Happiness as Connected to Liberty and the Proper Role of Government*

As well as references to individuals' pursuit of happiness, the language of liberty can be found everywhere in the founders' rhetoric and proclamations.⁴³ In the various states' declarations of indepen-

38. See, e.g., BAILYN, *supra* note 13, at 31–39 (investigating founders' interest in many English law sources).

39. *Id.* at 30–31.

40. See 1 WILLIAM BLACKSTONE, COMMENTARIES 125 (1771); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 132–33, 171 (Lee Ward ed., Hackett Publ'g Co. 2016) (1690).

41. See POCOCK, *supra* note 13, at 507 (describing the intellectual influences on the founders).

42. SARAH KNOTT, SENSIBILITY AND THE AMERICAN REVOLUTION 245 (2012).

43. This proposition sounds basic, but as John Phillip Reid reminds us, what members of the founding generations meant by "liberty" differs significantly from what we mean by that term today, and it behooves us to remember this difference. As Reid notes:

dence referenced in the national Declaration of Independence in 1776, the state constitutions drafted afterward, the drafting of and debates about ratification of a national constitution from 1787 to 1788, and the process that took place to add the Constitution's first ten amendments, the Bill of Rights, from 1789 to 1791, the term "liberty" was pervasive. The Virginia Declaration of Rights, drafted by later anti-Federalist George Mason and adopted by the Virginia Constitutional Convention in June 1776, declares "[t]hat all men are by nature equally free and independent and have certain inherent rights, . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."⁴⁴ The Massachusetts Proclamation by the General Court, drafted in January 1776 by Federalist John Adams, similarly refers to the inalienable rights to life, liberty, and the pursuit of happiness.⁴⁵ The Declaration of Independence's references to liberty and the pursuit of happiness came from John Adams's work, as classicist and political scientist Danielle Allen documents in her examination of the Declaration of Independence's meaning.⁴⁶ So too the Preamble to the U.S. Constitution, despite being a far more pragmatic document, begins by stating its goal to "secure the Blessings of Liberty to ourselves and our Posterity."⁴⁷ The resulting document eloquently captured the Lockean notion that all human beings who count for purposes of constructing a government must enjoy "liberty" as well as physical security and the ability to pursue happiness as they define it, before all else, subject to others' rights to do the same.

Blackstone defined "the natural liberty of mankind" as

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable . . .⁴⁸

Twentieth-century notions of liberty should not be allowed to intrude on eighteenth-century notions. . . . [T]oday's emphasis on liberty, when compared to the eighteenth century's can be labeled either "individualist" or "permissive." . . . Focus today is on the liberty of the individual, on the person being allowed to do "his thing" In the meaning of liberty during the age of the American Revolution the equation was plural, not singular. Liberty meant that individual had rights, true enough, but so did society.

JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF AMERICAN REVOLUTION* 2 (1987).

44. *The Virginia Declaration of Rights*, NAT'L ARCHIVES: AMERICA'S FOUNDING DOCUMENTS, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights> [<https://perma.cc/6HDT-JHQ2>] (click "Section 1").

45. *A Proclamation by the General Court, 19 January 1776*, *supra* note 12.

46. See DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* 47–69 (2014) (tracing the document's drafting).

47. U.S. CONST. pmb1.

48. BLACKSTONE, *supra* note 40, at 125.

This “natural liberty,” according to Blackstone’s mid-eighteenth-century view, was an inherent right.⁴⁹ Some of it, however, men gave up by entering into society “in consideration of receiving the advantages of mutual commerce.”⁵⁰ This analytic step provided the basis for a theory of the proper reach of law. In short, the proper reach of law corresponded with the measures necessary to protect men’s liberty, including both to prevent government overreach into the private affairs of men without justification and to prevent one man from encroaching on the liberty of another by violating his property or security rights through violence or other crimes. Law appropriately should go this far in restraining human liberty but no further. As Blackstone put it:

For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases[;] the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life.⁵¹

Law, in other words, should constrain only insofar as necessary to protect liberty itself. Such law, to Blackstone, Locke, and the founders alike, was legitimate, proper, and public-regarding. On the other hand, to Blackstone and these others, illegitimate laws, i.e., those amounting to “tyranny” and “destruct[ion] of liberty,” were measures involving “wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly.”⁵²

Thus, Blackstone, explicitly invoking Locke for the proposition that there can be no freedom where there is no law, concluded that the “constitution or frame of government” that “is alone calculated to maintain civil liberty” is that frame “which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.”⁵³ Here is the full passage, quoted by Blackstone, in which Locke sets forth the following explanation of the law’s legitimate purpose:

[Law exists] not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings[] capable of laws, “where there is no law, there is no freedom,” [f]or liberty is to be free from restraint and violence from others, which cannot be where there is no law; [but freedom] is not, as we are told, “a liberty for every man to do as he [pleases].” For who could be free, when every other man’s humour might domineer over him? But a liberty to dispose[,] and order as he [pleases,] his person, actions, possessions, and his whole property within the allowance of those laws under

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 126.

53. *Id.*

which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.⁵⁴

This quote, convoluted as it may seem to the modern reader, illustrates an eighteenth-century view linking together liberty and law. Law preserves liberty by protecting the individual from illegitimate restraint and violence from others and from government no matter how popularly imposed.⁵⁵ Law allows persons to freely follow their will in disposing of their possessions and real property and handling their actions and physical selves.⁵⁶

Also embedded in these interlinked ideas about the appropriate reach of law is the line between the legitimate public interest and the illegitimate use of power to advance private ends. The goal of the founders in establishing a new constitution was to set up a system of government that would lead to the making of legitimate laws but avoid the making of illegitimate laws that sought to advance private, selfish ends. Such “bad” law would be highly problematic—tyrannical and vulnerable to criticism and resentment (or even, in extreme cases, possible overthrow of government⁵⁷). As I discuss further in Part III.A, the founders’ fundamental goal in constitution drafting was to set up institutions that would ensure that laws of the public-spirited, liberty-enhancing type would be enacted, while bad laws, i.e., those promoting private interests or based on ill-considered ideas coming from the influence of evil manipulators, would be thwarted. Doing that required systems for both diffusing power and ensuring that political leaders under the new system would be public-spirited rather than selfishly seek private interests.

It is important not to overstate the extent of the founders’ libertarianism. The founders endorsed limits on the reach of law consistent with promoting liberty, but they also recognized that good law could, to some moderate extent, shape human activity and thus help direct the pursuit of human happiness to appropriate ends. As Locke explained, law should prescribe “no farther than is for the general good of those under that law,” but part of doing that meant that law, “in its true notion, is not so much the limitation as the direction of a free and

54. *Id.*; cf. LOCKE, *supra* note 40, at 149–50.

55. See BANNING, *supra* note 29, at 47 (citations omitted) (noting that for proponents of mixed government “freedom from another’s arbitrary will was what was meant by liberty”).

56. Joyce Appleby characterizes this conception of liberty as very different from that of classical republicanism, but the better view may be Pocock’s perspective linking this concept of liberty to classical republicanism and Aristotle. Compare POCOCK, *supra* note 13, at 68 (“Aristotle did not think that the individual as citizen, engaged in the universal activity of pursuing and distributing the common good, should be considered out of relation with the same individual engaged in the particular activity of pursuing and enjoying the particular goods he preferred.”), with APPLEBY, *supra* note 27, at 21 (“[T]he liberal concept of liberty was everything that the classical republican concept was not.”)

57. LOCKE, *supra* note 40, at 237–38.

intelligent agent to his proper interest.”⁵⁸ In this respect, as Gordon Wood notes, the founders were surprisingly modern in their views;⁵⁹ law making and the shaping of human personality could re-enforce each other to some moderate extent.

Likewise, flowing from their “Lockean sensationalism,” as Wood puts it, the founders believed in the power of appropriate law and government not only to shape but indeed to create the society they wanted to build. They were full of optimism and confident of their ability to engineer this new society they envisioned. As Thomas Paine put it, America can be “[a]s happy as she pleases,” as “she hath a blank sheet to write upon.”⁶⁰ Gordon Wood captures this sentiment among the members of the founding generation:

[They] knew—it was the basic premise of all their thinking—that people were not born to be what they might become. Lockean sensationalism told the revolutionaries that human personalities were unformed, impressionable things that could be molded and manipulated by controlling people’s sensations. The mind, said John Adams, could be cultivated like a garden . . . [N]ew habitual principles . . . could be created and nurtured by republican laws.⁶¹

At the same time, the founders were well aware that the reality of lawmaking would involve self-interested perspectives. Dealing with these tendencies created an especially difficult problem under the founders’ conceptions of human agency because, as discussed, those conceptions rested on ideas that individuals should be permitted to pursue happiness along a wide variety of paths suited to each person. As Madison laid out in *Federalist No. 10*, just as it would be anathema to destroy liberty through law, law could not but also should not attempt to give “every citizen the same opinions, the same passion, and the same interests.”⁶² Man’s reason would continue to be fallible, and men should remain at liberty to exercise it so that “different opinions will be formed.”⁶³

B. *Virtue and Its Opposite*

In approving the Declaration of Independence, the founders recognized that what path each man would follow in pursuing happiness

58. *Id.* § 57.

59. WOOD, *RADICALISM*, *supra* note 13, at 236. Locke states his detailed views on education and child rearing in JOHN LOCKE, *SOME THOUGHTS ON EDUCATION* (1693). For a discussion of how Locke proposes to raise children to become wise citizens with strong self-restraint and discipline, see THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* 218–26 (1988).

60. WOOD, *RADICALISM*, *supra* note 13, at 190.

61. *Id.*

62. *THE FEDERALIST NO. 10*, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001) [hereinafter *THE FEDERALIST NO. [#]*, at [#] (author)].

63. *Id.*

would differ, but they combined this idea of liberty with concepts that emphasized both virtue and self-restraint. The men who held the requisite personal qualities to follow their path to human happiness would be the ones who cultivated proper and virtuous personal dispositions. Taking ideas about how one was to live a good life from classical republicanism, the founders saw the pursuit of happiness as depending on cultivating such “virtue,” meaning restraint, moderation, and calm as well as reflective self-understanding. This was a classical republican idea, but a variant of it was part of eighteenth-century liberal thought as well. As Locke stated in his *Essay on Human Understanding* in describing the “[n]ecessity of pursuing true Happiness [as] the Foundation of Liberty,”

the stronger ties we have to an unalterable pursuit of happiness in general, which is our greatest good, and which as such, our desires always follow, the more are we free from any necessary determination of our will to any particular action, and from a necessary compliance with our desire, so upon any particular, and then appearing preferable good, till we have duly examined whether it has a tendency to, or be inconsistent with our real happiness[.] . . . we are, by the necessity of preferring and pursuing true happiness as our greatest good, obliged to suspend the satisfaction of our desires in particular cases.⁶⁴

Or as Locke put it elsewhere, the great privilege of intellectual beings is that they can “suspend their desires, and stop them from determining their wills to any action till they have duly and fairly examined the good and the evil of it.”⁶⁵

On the notion of virtue, classical republicanism and liberalism had different but not clashing emphases. Pocock provides a helpful discussion of two aspects of virtue in Aristotelean philosophy. Virtue for Aristotle consisted of the individual pursuing the particular activities and goods he preferred. But for a subset of individuals, virtue also meant engaging in political or civic pursuits—where the particular skills and priorities of those individuals indicated that path. Thus, Pocock observes, in the polity these “differences between individuals were taken into account in the distribution of political roles and power.”⁶⁶

The founders’ thinking displays different emphases on these two notions of virtue. To some, virtue emphasized participation in the public arena of politics—at least for the political elite with the skills and disposition to carry out this role. For others, “[v]irtue had lost its public character and attached itself instead to the private rectitude essen-

64. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 252–53 (1825).

65. *Id.* at 253.

66. POCOCK, *supra* note 13, at 72.

tial to a system of individual bargains.”⁶⁷ Under either emphasis, the ideal under the founders’ viewpoint was that human beings would behave virtuously in both personal and public affairs. But the founders were extremely aware—perhaps even hyper-aware, as many historians have suggested⁶⁸—of the reality that human beings could often be expected to act unvirtuously. They directed much of their work in crafting a constitution toward preventing the potential disasters they could foresee due to this reality of human beings’ dark side.⁶⁹

Of particular concern were the risks of men using power to pursue rampant self-interest.⁷⁰ In doing so, unvirtuous political actors would create bad law.⁷¹ Almost as high on their list of concerns was the danger that men would be distracted from engaging in measured deliberation about the public good; the founders often referred to this as political “passions,” meaning hot-headed, non-deliberative impulses based on the mood of an inflamed collective manipulated by demagogues.⁷² As Madison pointed out in *Federalist No. 10*, citizens could be expected sometimes to be “actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁷³ Madison argued that these human tendencies, when combined with similar impulses of others similarly situated, led to faction—a key problem he viewed the Constitution’s federalist structure as designed to address.⁷⁴ Indeed, many of Madison’s and the other founders’ general ideas about the benefits of the Constitution’s complex federal system arose from this view about the need to combat the less savory tendencies of the human personality as I explore further in Part III, below.

67. APPLEBY, *supra* note 27, at 96 (arguing that “[t]he instrumental attitude toward government implicit in Locke’s *Second Treatise* was made explicit by such Jeffersonians as James Cheetham who reminded his readers that the security of life, liberty, and property was the only reason for entering civil society and hence the punishment of offenses against violators of it the major task of government” (citation omitted)).

68. See, e.g., WOOD, *REPUBLIC*, *supra* note 13, at 17 (describing early Americans’ “paranoic mistrust of power”); CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 78 (2003) (describing founders’ tendency to paranoia).

69. See Banning, *supra* note 15, at 82 (“To decide that corruption was the fundamental source of America’s ills was to realize that freedom, propertied independence, and civic virtue were the sources of its strengths.”) (citations omitted).

70. THE FEDERALIST NO. 6, at 21 (Alexander Hamilton).

71. See *supra* p. 14.

72. Alexander Hamilton, for example, frequently described men as “ambitious, vindictive, and rapacious,” noting the lessons learned from history wherein “leading individuals in the communities of which they are members” have “in too many instances abused the confidence they possess; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage, or personal gratification.” THE FEDERALIST NO. 6, at 21 (Alexander Hamilton).

73. THE FEDERALIST NO. 10, at 43 (James Madison).

74. See *id.*

C. *Independence and Property*

Other key aspects of the founders' conceptions of human agency involved the importance of independence and property. Jefferson's original draft of the Declaration of Independence stated that "all men are created equal & *independent*."⁷⁵ Both this and the final draft referred to "pursuit of happiness" along with "liberty" as inalienable rights, and eighteenth-century thinkers viewed "liberty" and "independence" as tightly interrelated: Only a person who was not constrained by fetters of "dependence" could possess the liberty to pursue happiness consistent with the rights of others to do the same.⁷⁶

This emphasis on independence had several implications. First, it provided a convenient, if tautological, explanation for why those excluded from the polity could not be included in it. Women, being dependent on men under the existing social order, lacked the independence to possess liberty and thus were owed few political rights.⁷⁷ This, of course, constituted an analytic error since women lacked independence precisely because the law and social order deprived them of this attribute. Regardless, most (though not all) leading thinkers in the founding period pointed to women's traditional social roles as a reason for denying them political rights.⁷⁸ As this thinking went, women were justifiably classified as politically inferior to men because they held inferior status to their husbands in the family.⁷⁹ In addition, commentators sometimes added that women possessed less physical strength and were tied to special, dependency-producing biological functions in childbearing and infancy.⁸⁰ These notions became convenient excuses to explain women's exclusion from the political order. As scholars have pointed out, however, even

75. See *Declaring Independence: Drafting the Documents: Jefferson's "Original Rough Draught" of the Declaration of Independence*, LIBR. CONG. <https://www.loc.gov/exhibits/declara/ruffdrft.html> [<https://perma.cc/EA38-TQJG>] (emphasis added); see also WOOD, *RADICALISM*, *supra* note 13, at 234 (noting that "[m]en were equal in that no one of them should be dependent on the will of another, and property made this independence possible").

76. On the importance of independence to classical republican thought about who had capacity to participate in government, see BANNING, *supra* note 29, at 37 (quoting Harrington stating that "he that is not in his own power cannot have a part in the government of others" (citation omitted)).

77. See MARY BETH NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800*, at 125, 192 (1980) (noting that eighteenth century Americans viewed dependence as "an inherent attribute of the inferior feminine character" and quoting various pronouncements by men of women's inability to participate in politics).

78. *Id.* at 192.

79. *Id.* at 125.

80. Dan Holliday, *Why Did Almost All Societies Believe That Women Were Inferior to Men?*, SLATE (Aug. 23, 2013, 11:12 AM), <https://slate.com/human-interest/2013/08/why-did-almost-all-societies-believe-that-women-were-inferior-to-men.html> [<https://perma.cc/C557-VZM5>].

in this historical period these ideas were contested in ways that would, generations later, set the stage for the Nineteenth Amendment.⁸¹

So too, by tautology, those bound into the institution of chattel slavery lacked rights to liberty and independence. The term political slavery, posed as the polar opposite of a political state of liberty, arises often in the founders' discourse.⁸² As Phillip Reid emphasizes, in these frequent references to political slavery, the founders used the term slavery in a broad rhetorical sense to dramatize the opposite of independence.⁸³ They did not always intend to refer to physical enslavement, although slavery in the U.S. was, of course, often on the minds of the founders as they debated the Constitution.⁸⁴ "Independence" was a citizenship good that government should protect and foster almost at all costs; its opposite—dependence—was an extreme political negative. Important contemporary political theorists—such as Martha Fineman—have pointed out how problematic these assumptions are when viewed through the lens of modern feminist and critical theories. They explore human *interdependence* in relationships in which subordinate members' contributions are rendered largely invisible.⁸⁵ I discuss these implications further in Part V.B.

If independence was indispensable for the founding generation, another attribute key to individuals' political agency in the founders' eyes was the possession of property, especially real property or land. Property had several connotations for the founders. First, property referred to having rights generally. What one possessed as rights were a form of property. As discussed, having a property right to liberty, for example, was a natural right of all free men. That idea, which viewed rights as a type of property, is not so different from today.⁸⁶ The founders thought expansively about property in terms of economics as well; to Madison property meant "not just money and real estate but the possession of a profession or craft" as well as "the right to learn a trade and move where it could be practiced—that is, anything that

81. See, e.g., NORTON, *supra* note 77, at 297–99 (arguing that the Revolutionary period started women's push toward equality).

82. See REID, *supra* note 43, at 38 ("[L]icentiousness was not the opposite of liberty. Slavery was."). In this broader sense of political slavery, the revolutionary leaders argued that the king's failure to respect their natural rights required overthrow of his domination just as their ancestors in England had done in the prior English revolutions from which Locke drew his ideas. *Id.* at 47.

83. *Id.*

84. See, e.g., SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 58–114 (2018) (detailing the founders' debates about slavery while drafting and ratifying the Constitution).

85. See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 28, 31 (2004) (observing that "we want and need the webs of economic and social relationships that sustain us" but that "only some interrelationships among individuals and institutions are seen as constituting dependency").

86. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 264 (1970) (holding that rights to welfare payments are a form of property protected by due process).

contributed to the protection or increase of material goods and economic security.”⁸⁷

In a deep and important sense, however, the founders connected land ownership with rights to political participation and, especially, qualification for political leadership.⁸⁸ This connection is not intuitive today, but eighteenth-century inhabitants’ lives depended crucially on the land from which food and other aspects of their livelihoods came.⁸⁹ These material conditions begin to explain why property ownership and political rights should be so strongly connected in the founders’ minds. To understand that, one must look at early Americans’ inherited historical context, which was based on the social and political experience of Old England. There, the men with the independence to oppose the king’s violations of what they viewed as the natural rights of free men were the members of the landed gentry. Propertied men had the means to secure their livelihoods independent of the king.⁹⁰ Since liberty required independence, and property secured independence, owning property appeared essential to liberty, and thus the political leadership needed to ensure protection of liberty in the future.⁹¹ To the extent that property rights could be safely secured from government interference, men with substantial real property could be expected to have the independence to oppose wrongful exer-

87. CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA* 48 (2007).

88. *See* SOPHIA ROSENFELD, *COMMON SENSE: A POLITICAL HISTORY* 163 (2011) (“The traditional answer, for colonial Whigs as for everyone else, was that the privilege of participating in political decision making, whether as a voter or as an officeholder, was contingent on personal wealth. In English thought on the subject, only those in possession of income-producing land could truly be called independent. And only those who were independent could be counted on to make good judgments in matters of community interest.”).

89. About 90% of white American men were farmers, and even men who were professionals or businessmen typically had small farms that provided their families with food. *See* COLLIER & COLLIER, *supra* note 87, at 17 (providing statistics showing the overwhelming importance of land to colonial Americans).

90. *See* REID, *supra* note 43, at 5 (In Britain, “[m]aterial possessions, especially hereditary landed estates, bolstered liberty by making individuals independent of government. In a mixed, balanced monarchy, a certain number of independent, propertied persons were essential to maintaining the balance against arbitrary government. For that reason, those who possessed property had to possess it absolutely, secured from government interference.”); *see also id.* at 25 (“The defense of property meant the defense of liberty, not merely the preservation of material possessions.”).

91. *See* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 205 (1990) (“Property was important for the exercise of liberty and liberty required the free exercise of property rights.”); *id.* at 207 (The Federalists’ “preoccupation with property had its origins in the connections they presumed between property and other basic human goods, in particular, liberty, and security. In some ways, property is an excellent symbol for individual liberty. First, it is an effective symbol because it is not merely a symbol, but a concrete means of having control over one’s life, of expressing oneself, and of protecting oneself from the power of others, individual or collective.”).

cises of government power in monarchy or any other form.⁹² At least, that is how the founders thought about these matters.⁹³

Many of the founders also thought that owning substantial property tended to make men virtuous and public-spirited rather than self-interested and grasping.⁹⁴ Deficits in material security, these founders feared, would cause men to seek and use power for selfish ends; material security, on the other hand, would increase the chances that men would participate in government in public-spirited ways, just as the members of the House of Lords provided public services in England.⁹⁵ As the delegates gathered in Philadelphia to undertake their constitution-drafting project, recent history provided a vivid reminder of the negative effects of material desperation. The convention started not long after Shay's Rebellion in Massachusetts, in which desperate debtors tried to seize the state capital to demand cancellation of their debts.⁹⁶ Massachusetts's delegates thus knew especially well how financial desperation and lack of material security could produce ill-considered political passions that stood as the very opposite of civic virtue.

References to the importance of men's natural right to own and be secure in the possession of property are legion in founding leaders' pronouncements throughout the period between 1774 and 1792. In 1774, the Continental Congress, in its first Declaration and Resolves, asserted that the colonists were "entitled to life, liberty, and property"; John Adams agreed that property was "a right of mankind as surely as liberty."⁹⁷ Of course this statement was not true, even as to men, since at the time approximately two million persons existed in slavery without rights to property of any sort. But the founders linked property and liberty and used the connection to define which persons

92. *Id.*

93. *See id.*

94. Not every delegate agreed, however. Hamilton, for example, who owned little land himself, thought that the nation's natural elite, in which the electorate would display most confidence, would not be defined by whether they "happen to be men of large fortunes or of moderate property, or of no property at all." *THE FEDERALIST* No. 35, at 171 (Alexander Hamilton). Instead, Hamilton opined, the nation's elected politicians, who could be counted on to come from the classes in which the polity would have the most confidence, would include "landholders, merchants, and men of the learned professions." *Id.*

95. As Hamilton put it at the convention, the English House of Lords "is a most noble institution. Having nothing to hope for by a change, and a sufficient interest by means of their property, in being faithful to the National interest, they form a permanent barrier [against] every pernicious innovation." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 288 (Max Farrand ed., 1911) [hereinafter *FARRAND*].

96. *See* MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 73–126 (2016) (describing the economic turmoil in the states that set the stage for the convention).

97. CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 8–9 (Charles C. Little & James Brown eds., 1851) [hereinafter *CHARLES FRANCIS ADAMS*].

counted for purposes of establishing government and granting rights to political participation.

It is indisputable that a key goal of the founders in creating the new government was the protection of men's rights to property.⁹⁸ What is sometimes overlooked, however, is why property mattered so much to the founders. Protection of property was so important in their eyes in part because property connected to the founders' conception of political agency—i.e., independence and rights to property were what distinguished those who would have rights to political participation.

On the subject of property, the founders' sometimes-professed interest in political equality often clashed with a reality they recognized—and many of them condoned and even championed—in which property necessarily created inequality. Here there are marked differences among subsets of the founders. Some leaders, such as Jefferson, championed greater equality, while others, such as Madison and Adams, held a worldview in which inequality was inherent and inevitable. As Madison explained in *Federalist No. 10*, men's diversity of "faculties," or abilities, supported by rights to property, would lead to "the division of the society into different interests and parties."⁹⁹ The proper goal of law and government was to protect men's differential abilities, especially "the protection of different and unequal faculties of acquiring of property," leading to "the possession of different degrees and kinds of property."¹⁰⁰ This, in turn, could be expected to lead to differences in the "sentiments and views of the respective proprietors."¹⁰¹

Likewise, Adams frequently expressed concern about the leveling effects of too much democracy. He worried that when "[a] citizen perceives his fellow-citizen, whom he holds his equal, [to] have a better coat or hat, a better house or horse, than himself, . . . [h]e cannot bear it"—"he must and will be upon a level with him."¹⁰² Adams feared that a government so influenced "would set on levelling and confus[ing] . . . all men in point of estates; making all things common to all; destroying propriety;" and "introducing a community of enjoyments among men," which would be "an odious thing, a scandal fastened by the cunning of the common enemy upon this kind of government."¹⁰³

The founders were poised between the old and the new on these questions of political equality and energetic democracy. As one early American historian put it, the "Federalists' values embraced the mo-

98. See NEDELSKY, *supra* note 91, at 2 (arguing that the founders were highly pre-occupied with the protection of property).

99. FEDERALIST NO. 10, at 43 (James Madison).

100. *Id.*

101. *Id.*

102. CHARLES FRANDIS ADAMS, *supra* note 97, at 95.

103. *Id.* at 133 (quotation marks omitted).

bility of the meritorious Their political faith represented a modification, not a rejection, of traditional expectations about the role of authority in public life, about the permanence of social classes and the desirable distance between the governed and the governors.”¹⁰⁴ Most leaders of the founding generation, in their different respective ways, worried that too much democracy would easily lead to disastrous effects if left unchecked. Though they championed a contractarian theory in which the authority of those who governed came from the People, they also worried about certain ideas that could arise within a democracy. For example, the idea that property should be more fairly distributed would go too far and undermine inherent rights to the property one possessed.

As a related but analytically distinct concern, the founders worried, based on their extensive study of historical examples, that an excess of democracy could lead to civil disorder or even tyrants or dictators taking over the government. This in turn connected with the founders’ choice of a republican form of government. As Madison put it, the fact that the United States would be a republic, meaning “a government in which the scheme of representation takes place,” was preferable since such a system would pass legislative ideas through elected representatives who would use their “wisdom” to “refine and enlarge the public views” and “best discern the true interest of their country.”¹⁰⁵

Most of the founders did not see any injustice in connecting property ownership, independence, virtue, and good political judgment. From the founders’ perspective, obtaining property was not difficult given the new America with its huge expanses of land. All men of industrious character could be counted on to acquire property. Thus, the proposition that the nation’s political leaders should possess substantial property was not as limiting in early America as it would have appeared in many other places and times. There was a lot of land available—at least for free white men and ignoring the fact that Native Americans owned the land that settlers often brutally confiscated.¹⁰⁶

Those who saw the tension between property and equality of citizenship rights thought that the men who counted should own land in roughly equal amounts. Thus, in 1776, Jefferson proposed that to establish the new State of Virginia, the government should grant each (white) man 50 acres if he did not yet have that amount of real prop-

104. APPLEBY, *supra* note 27, at 59.

105. FEDERALIST No. 10, at 46 (James Madison).

106. On white settlers’ occupation of land rightfully belonging to Indian tribes, see generally CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* (2020), and ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804* 55, 57, 68, 73, 80 (2016) (detailing examples of white settlers occupying land belonging to Native Americans).

erty.¹⁰⁷ Jefferson argued that this step would allow each man independence; as he put it, “dependence begets subservience and venality suffocates the germs of virtue, and prepares fit tools for the designs of ambition.”¹⁰⁸

The state constitutions adopted between 1776 and 1787 differed in the approaches they took to connecting property and rights to the political franchise. These differing experiments provided information the founders considered in drafting the U.S. Constitution. In chart form, the founders saw the following:

FIGURE ONE: TABLE SHOWING VARIOUS PROPERTY AND WEALTH REQUIREMENTS IN EARLY STATE CONSTITUTIONS

State/Colony	Year	Type of Legislature	Property Requirement for Running for State Senator	Property Requirement for Voting for State Senator
<i>Bicameral Legislatures with Property Requirements to Run for Office</i>				
North Carolina	1776	Bicameral ¹⁰⁹	300 acres of land ¹¹⁰	50 acres ¹¹¹
New Jersey	1776	Bicameral ¹¹²	1000 pounds proclamation money ¹¹³	50 pounds clear estate ¹¹⁴
New Hampshire	1776	Bicameral ¹¹⁵	Freeholders ¹¹⁶	[upper house members chosen by lower house] ¹¹⁷
Maryland	1776	Bicameral ¹¹⁸	500 pounds real or personal property ¹¹⁹	50 acres or 30 pounds ¹²⁰

107. Thomas Jefferson, *Third Draft by Jefferson*, in THE PAPERS OF THOMAS JEFFERSON 356, 362 (Julian P. Boyd et al. eds., 1950) (containing Jefferson’s third draft of a constitution for Virginia). Jefferson was in Philadelphia as a member of the Second Continental Congress, and his drafts arrived too late to be incorporated into the ratified constitution prepared by George Mason. See Jack Lynch, *One of the Most Intriguing Might-Have-Beens in American History: Jefferson’s Tardy Constitution*, 29 COLONIAL WILLIAMSBURG 30, 31–32 (2007).

108. S.E. FORMAN, THE LIFE AND WRITINGS OF THOMAS JEFFERSON 136 (2d ed. 1900).

109. N.C. CONST. of 1776, art. I.

110. *Id.* art. V.

111. *Id.* art. VII.

112. N.J. CONST. of 1776, art. I.

113. *Id.* art. III.

114. *Id.* art. IV.

State/Colony	Year	Type of Legislature	Property Requirement for Running for State Senator	Property Requirement for Voting for State Senator
Virginia	1776	Bicameral ¹²¹	Freeholders ¹²²	25 acres with a 12ft x 12ft house or 50 acres of unsettled land ¹²³
Delaware	1776	Bicameral ¹²⁴	Freeholders ¹²⁵	50 acres of property, 12 of which are cleared, or 40 pounds of lawful money ¹²⁶
South Carolina	1778	Bicameral ¹²⁷	Settled estate and freehold valued at least 2,000 pounds (for residents) or 7,000 pounds (for nonresidents) ¹²⁸	50 acres or paid the equivalent in taxes of the tax on 50 acres ¹²⁹

115. N.H. CONST. of 1776.

116. *Id.*

117. *Id.*

118. MD. CONST. of 1776, art. I.

119. *Id.* arts. II, XIV.

120. *Id.*

121. VA. CONST. of 1776, para. 24.

122. *Id.* para. 25.

123. *See id.* para. 26 (“The right of suffrage in the election of members for both Houses shall remain as exercised at present.”); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 355 (1989) (identifying the specific property requirements for voting between the adoption of the 1776 state constitution and 1829, prior to the 1830 state constitution).

124. DEL. CONST. of 1776, art. II.

125. *Id.* art. IV.

126. David Paul Peltier, *Border State Democracy: A History of Voting in Delaware, 1682-1897* 34, 47-48 (June 1967) (Ph.D. dissertation, University of Delaware) (ProQuest).

127. S.C. CONST. of 1778, art. II.

128. *Id.* art. XII.

129. *Id.* art. XIII. As an alternative to the fifty acres of land requirement, those who “hath paid a tax the preceding year, or [were] taxable the present year, at least

State/Colony	Year	Type of Legislature	Property Requirement for Running for State Senator	Property Requirement for Voting for State Senator
New York	1777	Bicameral ¹³⁰	Freeholders ¹³¹	100 pounds ¹³²
Massachusetts	1780	Bicameral ¹³³	300-pound estate or 600 pounds personal property ¹³⁴	60 pounds ¹³⁵
<i>Unicameral Legislatures with Property Requirements to Run for Office</i>				
Georgia	1777	Unicameral ¹³⁶	Protestant, 250 acres or 250 pounds of personal property ¹³⁷	White, male, 10 pounds ¹³⁸
<i>Unicameral Legislatures with <u>No</u> Property Requirement to Run for Office</i>				
Pennsylvania	1776	Unicameral ¹³⁹	N/A	N/A

As Figure One shows, most early state constitutions limited the franchise to men who possessed real property. Almost all states required either land ownership or substantial wealth in the form of personal property or payment of a specified sum in order to vote, and most state constitutions required ownership of even more real or personal property in order to run for office. Only one state, Pennsylvania, did not require property in order to vote or run for office, and this

six months previous to the said election, in a sum equal to the tax on fifty acres of land” could also cast a vote for state senator. *Id.*

130. N.Y. CONST. of 1777, art. II.

131. *Id.* art. X.

132. *Id.*

133. MASS. CONST. of 1780, pt. 2, ch. I, § I, art. I.

134. *Id.* pt. 2, ch. I, § 2, art. V.

135. *Id.* pt. 2, ch. I, § 2, art. II.

136. *See* GA. CONST. of 1777, arts. VI–VII.

137. *Id.* art. VI.

138. *Id.* art. IX.

139. ROSENFELD, *supra* note 88, at 170–71.

state also had a unicameral legislature.¹⁴⁰ The founders regarded Pennsylvania as a prime example of a state that had gone too far in allowing the People to rule; too much democracy had produced raucous and unwise governance.¹⁴¹ The general consensus at the Convention was that a better design for national government, with a bicameral legislature, as discussed in Part III.B below, would produce wiser and more virtuous public-interested legislators.

Drawing from these state examples, the participants in the 1787 Convention extensively debated the connection between property and rights to participate in government. The issue came up in two ways: (1) in proposals that would have required land ownership or substantial personal wealth in order to exercise voting rights and (2) in proposals that would have required extensive property ownership in order to run for national office.¹⁴² Arguments that property ownership should be required in order to vote included those from Gouverneur Morris, a Pennsylvania delegate (and New York native)¹⁴³ who took the position that “the duration of our government must, humanly speaking, depend on the influence which property shall acquire; for it is not to be expected, that men, who have nothing to lose, will feel so well disposed to support existing establishments as those who have a great interest at stake.”¹⁴⁴ Madison opposed Morris’s proposal, but not because he disagreed that property ownership was important to good political leadership. Instead, Madison believed, a bicameral legislature could be shaped in such a way as to encourage the elite to dominate in the “upper” Senate chamber as I discuss further in Part III.B. Moreover, Madison believed that “voters [would] do a better job of discerning whether candidates were men of substantial property than formal qualifications could.”¹⁴⁵

Thus, although the delegates frequently asserted that owning property helped make men secure, independent, and assertive in the protection of their natural rights, they in the end decided against requiring property ownership to participate in government at the fed-

140. *Id.*

141. On the Pennsylvania experiment and its results, see *id.* at 170–77; see also *id.* at 177 (noting that the Pennsylvania Constitution of 1776 “gained much of its domestic renown as a theoretical counterpoint in early national political and legal wrangling”).

142. For more detail on these proposals and their ultimate defeat at the convention, see RICHARD BEEMAN, *PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 255–56, 279–80 (2009).

143. See KLARMAN, *supra* note 27, at 15 (2016) (providing Morris’s biography). There was another delegate from Pennsylvania, Robert Morris, who shared Gouverneur’s last name; my subsequent references in this Article are all to Gouverneur.

144. NEDELSKY, *supra* note 91, at 83 (quotation omitted).

145. *Id.* at 53 (citation omitted).

eral level.¹⁴⁶ This did not mean that the founders regarded property ownership as unimportant; they simply decided that since the states controlled property qualifications for voting and since most industrious men could be counted on to be freeholders and thus qualified to vote under state requirements, they need not specify in the Constitution any particular property requirements for political participation.

Throughout the ratification debates, proponents of the Constitution extolled the importance of protecting rights in property. In a pamphlet Noah Webster wrote for the Federalists in 1787, for example, he argued “[w]herever we cast our eyes, we see this truth, that *property* is the basis of *power*; and this, being established as a cardinal point, directs us to the means of preserving our freedom”; “the laborious and saving, who are generally the best citizens, will possess each his share of property and power, and thus the balance of wealth and power will continue where it is, in the *body of the people*.”¹⁴⁷

The founders’ view that those who owned substantial property were generally best suited for high political leadership profoundly influenced their decisions about constitutional structure—the topic to which I now turn below.

III. STRUCTURING THE CONSTITUTIONAL ORDER

When the founders drafted, debated, and ratified the national Constitution, they had in mind its fit with their outlook on human agency. The founders set out to create a constitutional order that would promote men’s liberty and their ability to engage in the pursuit of happiness, concepts which involved, as I emphasized above, not the individualist do-whatever-you-want philosophy of contemporary thought but instead the deliberative pursuit of well-considered ends after due reflection and as guided by proper laws and social mores. This fitting of views about human agency to the constitutional order is evident in each of the key structural elements of the 1787 national constitution (or “1787 Constitution”).

A. *Connecting the Structural Constitution to the Founders’ Conceptions of Human Agency*

As they often attested, the founders’ beliefs about “human nature” underlay the entire project of creating a strong national government in limited spheres.¹⁴⁸ The two matters that divided the Federalists

146. CATHERINE DRINKER BOWDEN, *MIRACLE AT PHILADELPHIA* 74 (1986) (noting that “[i]t is significant that . . . in the end the United States Constitution required no property qualifications for the men who were to govern the country”).

147. Noah Webster, *The Constitution Defended*, in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 134 (David Wooton ed., 2003) (emphasis in the original). Webster added that, therefore, “a general and tolerably equal distribution of landed property is the whole basis of national freedom.” *Id.*

148. See, e.g., Letter from John Adams to Richard Henry Lee, *supra* note 14, at 643.

from the Constitution's opponents, or anti-Federalists, were, first, the question of whether such a strong national government should be created at all and, second, whether the Constitution needed an explicit listing of individual rights. The Federalists' argument for granting the national government strong powers over a limited set of matters including interstate commerce and national defense rested on their view of what "the People" (i.e., those who then counted) would need to prosper economically and otherwise. To ensure their liberty, the People most certainly would need security from foreign invasion, which could best be provided at the national level, and to ensure economic prosperity, they would need free and open markets for commerce throughout the nation. These markets would require that commerce not be burdened with state protectionist measures or laws that failed to respect rights to property. Thus, to ensure property-protecting rights, the original Constitution contains, as among its only specified individual rights against state government, the contracts clause,¹⁴⁹ protection for repayment of debts,¹⁵⁰ and the privileges and immunities clause protecting the right to carry out one's trade across state lines.¹⁵¹ The other individual right specified in the 1787 Constitution likewise goes to security of person in the right to habeas corpus.¹⁵²

The focus of the 1787 Constitution was not on individual rights but on governmental structure, especially balancing and checking power through a complex system of both vertical and horizontal separation and sharing of powers. That project rested on the founders' double-edged view of human agency as outlined in Part II, above: The end of a well-designed constitutional system was to promote human liberty and individuals' pursuit of happiness by establishing a structure that could be counted on to allow the creation of laws that advanced the public interest. That structure must also curtail human tendencies to descend into selfish, private interests or to be swept away by misguided popular passions and membership in factions. The founders created a complex, interrelated system resembling the workings of a clock to achieve these objectives.

Through federalism, or vertical separation of powers, the Constitution sought to achieve Madison's objective, outlined in *Federalist No. 10*, to "secure the public good, and private rights, against the danger of [factionalism]," while at the same time "preserv[ing] the spirit and

149. U.S. CONST. art. I, § 10, cl. 2. See generally JAMES W. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* 7–13 (2016) (discussing the origins of the contracts clause and the constitutional convention delegates' concerns about the Pennsylvania state legislature's rescission of the nation's first bank). See also Calder v. Bull, 3 U.S. 386, 390 (1798).

150. U.S. CONST. art. VI, § 1.

151. U.S. CONST. art. IV, § 2, cl. 1.

152. U.S. CONST. art. I, § 9, cl. 2.

the form of popular government.”¹⁵³ Madison’s plan was to create a government large and complex enough to ensure that factions would be pitted against each other and so “be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”¹⁵⁴ In addition, Madison emphasized, the existence of both smaller and larger electoral districts within the republic would help: In large districts, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens” and “more difficult for” groups with such motives “to act in unison.”¹⁵⁵ But smaller districts would be important too because in large districts representatives might be “too little acquainted with all their local circumstances and lesser interests.”¹⁵⁶ Thus “[t]he federal constitution forms a happy combination” in that the state legislatures would focus on the “local and particular” interests while the national government would attend to “the great and aggregate interests” and avoid the misguided passions Madison saw brewing at the time, including such anti-property rights initiatives—or “improper and wicked project[s]”—as “a rage for paper money, for an abolition of debts, [and] an equal division of property.”¹⁵⁷

Likewise, the founders’ views on human agency shape the Constitution’s horizontal separation of powers, i.e., the separation of powers between and within branches of government at the national level. As already noted, these views led the founders to adopt a bicameral legislature. John Adams’s extensive writings provide helpful background here. Although he was not at the Philadelphia convention (he was instead in England carrying out his duties as the first U.S. Ambassador¹⁵⁸), Adams’s widely circulated essay, *Thoughts on Government*, proposed how the founders could achieve balance or mixed government at the national level while at the same time moving from a monarchy to a democratic republic.¹⁵⁹ If Madison’s views, as quoted above, reflect a primary preoccupation with the influence of the members of the non-propertied class and their “wicked” ideas about paper money and property redistribution and if Hamilton was concerned about the underside of human agency generally,¹⁶⁰ Adams’s greatest concern was with the pernicious effects arising from the social power of elites. As he would later explain, a division of powers within the legislative branch was necessary because a unicameral assembly would facilitate the “pursuit of the private interest of a few individuals; a few

153. THE FEDERALIST NO. 10, at 45 (James Madison). This, said Madison, was “the great object to which our inquiries are directed.” *Id.*

154. *Id.*

155. *Id.* at 48.

156. *Id.* at 47.

157. *Id.* at 47–48.

158. BERKIN, *supra* note 68, at 127.

159. See ADAMS, *supra* note 10.

160. THE FEDERALIST NO. 6, at 48 (Alexander Hamilton).

eminent conspicuous characters will be continued in their seats . . . from one election to another . . . by superior art, address, and opulence, by more splendid birth, reputations, and connections . . . and introduce their friends; to this end, they will bestow all offices, contracts, privileges in commerce, and other emoluments, on the latter and their connections.”¹⁶¹

In this and many other works, Adams wrote to import the political theory of classical republicanism, especially its focus on balanced government and separation of powers, into making the U.S. government.¹⁶² In his writings on horizontal separation of powers, Adams expressed concerns about diffusing power that are similar to Madison’s preoccupation with achieving vertical separation of powers through federalism. Adams argued that just as in England, where the House of Lords and House of Commons checked the power of the monarch, a non-monarchal republic should have a representative or legislative branch to mirror the interests of “the people at large” in proportion to the interests represented there; an executive to carry out the functions that are too cumbersome for many representatives to carry out efficiently; a judicial function; and, most importantly for purposes of this Article, a “distinct assembly” to serve “as a mediator” between “the legislature, that which represented the people, and the branch which is vested with executive power.”¹⁶³ That assembly was the U.S. Senate.

This scheme, drawn from classical republicanism, formed the basic structure of government in the first three articles of the proposed constitution, which correspond to each of the branches: Article I for Congress, Article II for the Executive, and Article III for the federal judiciary. And separation of powers should be even more complex

161. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 58 (1789) reprinted in CHARLES FRANCIS ADAMS, *supra* note 97, at 58; see also LUKE MAYVILLE, JOHN ADAMS AND THE FEAR OF AMERICAN OLIGARCHY 41 (2016) (arguing that in Adams’s view, the institutions of balanced government “functioned above all to control society’s social and economic elite, a class that Adams would later describe as ‘the most difficult animals to manage of any thing in the whole theory and practice of government.’” (citation omitted)); see also WOOD, REPUBLIC, *supra* note 13, at 567–92 (discussing Adams’s views); POCOCC, *supra* note 13, at 526 (discussing Adams’s post-ratification writings sounding in classical republicanism); APPLEBY, *supra* note 27, at 75 (noting that Adams claimed in his political treatises that “inequality was rooted in human nature”).

162. An excellent summary of classical republican thought on mixed balanced government, a topic I do not have the space to cover in any depth here, can be found in BANNING, *supra* note 29, at 21–41.

163. Letter from John Adams to Richard Henry Lee, *supra* note 14, at 643. Adams had propounded his theory of balanced government from the very beginning of the nation. As he had written to Richard Henry Lee in 1775: “A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.” *Id.* at 642.

than this: It should separate the powers of government *within* branches just as it should limit each branch's powers by sharing or checking these powers across branches. Creating a bicameral legislature, with each legislative chamber possessing different characteristics and a different design, could accomplish this goal. This was the thinking that led to the Senate's ultimate design as an elite chamber with a voting scheme that did not reflect the will of the People in proportion to population.

B. *Connecting the Founders' Conception of Human Agency to Their Design of an Explicitly Elitist, Malapportioned Senate*

As already noted, one of Adams's key ideas in his 1776 *Thoughts on Government*, which both the state and national constitution writers consulted,¹⁶⁴ was that the legislative branch ought to be more complex than a unicameral assembly.¹⁶⁵ That idea came directly from classical republicanism. As that tradition held, just as societies contained two types of men, the ordinary and the elite, so too did each need "for their own protection the control of one branch of the government, each, [] contributing a special virtue to the state."¹⁶⁶ Almost all the delegates, except Benjamin Franklin,¹⁶⁷ agreed that the legislative branch should be divided into two bodies. The experience of raucous politics in Pennsylvania's unicameral legislature convinced many, especially its own delegates, to view the bicameral option as far superior. Madison reminded the delegates that their shared goals in creating a Senate were

to protect (the people) [against] the transient impression into which they themselves might be led. A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of [Government] most likely to secure their happiness, would first be aware, that those charg[e]d with the public happiness, might betray their trust. An obvious precaution [against] this danger w[oul]d be to divide the trust between different bodies of men, who might watch & check each other.¹⁶⁸

164. See Richard Samuelson, *John Adams: America's Original Conservative*, HERITAGE FOUND. 1 (Apr. 2020), <https://www.heritage.org/american-founders/report/john-adams-americas-original-conservative> [<https://perma.cc/X234-WGZE>].

165. See ADAMS, *supra* note 10, at 486 (arguing that a unicameral legislature would be "liable to all the vices, follies, and frailties of an individual; subject to fits of humor, starts of passion, flights of enthusiasm, partialities, or prejudice, and consequently productive of hasty results and absurd judgments"; "apt to be avaricious"; and "to grow ambitious," so that "all of these errors ought to be corrected and defects supplied by some controlling power").

166. See BANNING, *supra* note 29, at 86.

167. See BEEMAN, *supra* note 142, at 111.

168. FARRAND, *supra* note 95, at 421.

The issue of Senate design proved far more contentious. Wrapped in this question was the balance of power between large and small states.¹⁶⁹ In addition, the delegates emphasized the importance of ensuring that the “best”—which, in most of their views, were the most elite—men would be chosen for this “upper” legislative body.

The founding convention lurched through several stages of debate on these questions. At the beginning of the convention, Virginia delegate and state Governor Edmund Randolph presented the so-called Virginia Plan, which Madison had largely drafted.¹⁷⁰ This proposal created a new national government consisting of three branches: the legislative, the executive, and the judiciary.¹⁷¹ The Virginia plan further divided legislative power through bicameralism with one house elected through popular vote and the other by state legislatures, but both were elected based on the principle of proportional representation by population.¹⁷² This principle of proportional representation was extremely important to nationalists (or Federalists), including Madison and delegates James Wilson, Morris, and Hamilton, because it hewed to the concept that the national government arose from the People rather than from a confederation of states. That latter alternative was the old notion that had proved ineffective under the Articles of Confederation, which Madison and other Federalists desperately wanted to discard.¹⁷³

Randolph proposed that the number of senators should be less than the number of representatives in the lower house and that the Senate’s purpose would be “for offering such a check as to keep up the balance, and to restrain, if possible, the fury of democracy.”¹⁷⁴ The delegates agreed on this principle, but two other questions stymied them for several months, namely, whether senators should be chosen (1) by the People or state legislatures as well as by proportional representation in relation to population or (2) by allocating the same small number of senators to each state as had been the case under the Articles of Confederation.

The lineup of delegates on each of these decision points was complex, but those complexities are not important here. The bottom line was that all the delegates who spoke on these questions, except Wilson, agreed that the purpose of the Senate was to counteract the negative effects of too much democracy and that the Senate should be composed of the elite, explicitly defined as those men with the most substantial property. Wilson, the outlier, believed that both direct

169. See KLARMAN, *supra* note 96, at 182–92 (discussing the divide between large states and small states at the convention).

170. BEEMAN, *supra* note 142, at 86–87.

171. See FARRAND, *supra* note 95, at 20; Berkin, *supra* note 68, at 73.

172. BERKIN, *supra* note 68, at 73.

173. *Id.* at 98–99. For a short biography of Wilson, see KLARMAN, *supra* note 96, at 146.

174. FARRAND, *supra* note 95, at 58.

election by the People and proportional representation were best because the People could be trusted with democracy in both legislative chambers. He valiantly but unsuccessfully maintained this position until the bitter end.¹⁷⁵ With him on the matter of proportional representation were Madison, Morris, and Hamilton, though no one other than Wilson trusted the People to select these senators. The decision to permit the People to elect senators would await the Seventeenth Amendment in 1913, which instituted election of senators by the People but did not otherwise alter the Senate's explicitly elitist, counter-majoritarian, and malapportioned design.¹⁷⁶

The delegates' rhetoric as they argued to convince others of their positions sounded in concerns about how to maintain the Senate as a "firm" and "independent" branch, invoking the concerns about human agency discussed in Part II.C.¹⁷⁷ As I discuss in Part III.C, one perspective came from delegate Roger Sherman of Connecticut, who would be key to the delegates' eventual compromise and the mastermind behind the last-minute addition of the irrevocability clause to Article V. Sherman expressed concerns that having state legislatures appoint the members of the Senate "would make them too dependent[] and thereby destroy the end for which the Senate ought to be appointed."¹⁷⁸ Other delegates, such as Delaware delegate John Dickinson, who was, like Sherman, a staunch advocate of the small states' viewpoint that every state should enjoy "equal suffrage," thought "the sense of the States would be better collected through their Governments" rather than "immediately from the people at large."¹⁷⁹ In support of his position, Dickinson laid out the qualities he believed the delegates wanted the Senate to embody: "[H]e wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible," and he thought such "characters more likely to be selected by the State Legislatures[] than in any other mode."¹⁸⁰

Wilson countered, "There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue them-

175. *Id.* at 58–59.

176. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.")

177. *See, e.g.,* FARRAND, *supra* note 95, at 218 (Madison's notes reporting on Randolph's call for "a firm Senate" and one that would displace "independence" to guard the Constitution against the Executive and the "demagogues of the popular branch.")

178. *Id.* at 59.

179. *Id.* at 150.

180. *Id.* at 151; THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY-SEPTEMBER, 1787 94–95 (Gaillard Hunt ed., 1908).

selves into office.”¹⁸¹ Note here the fear of the non-virtuous obtaining high public office, a central concern of the founders as discussed in Part II.B above.¹⁸² Madison spoke to oppose Dickinson’s proposal as well and argued for the doctrine of proportional representation, reminding the delegates that the “use of the Senate is to consist in its proceeding with more coolness, with more system, [and] with more wisdom, than the popular branch.”¹⁸³ For these reasons, he wanted a small body. “Enlarge their number[,] and you communicate to them the vices which they are meant to correct”; the weight senators would exert in government “would be in an inverse ratio to their number.”¹⁸⁴ Moreover, Madison noted, “the Senate ought to come from, [and] represent, the Wealth of the nation,” an outcome he believed Dickinson’s motion would not ensure.¹⁸⁵ Accepting that underlying principle, Delegate Elbridge Gerry of Massachusetts opposed both the principles of proportional representation and direct election, arguing that “the commercial [and] monied interest [would] be more secure in the hands of the State Legislatures, than of the people at large.”¹⁸⁶ Noting that many states had bicameral legislatures, Gerry argued that since “one of [these branches] is somewhat aristocratic, . . . [t]here would therefore be so far a better chance of refinement in the choice.”¹⁸⁷

On June 11, 1787, a committee of the whole voted in favor of proportional representation for both the lower and upper legislative chambers.¹⁸⁸ But an opposition bloc composed of delegates from the smaller states stood to lose power under a proportional representation plan as compared to the one-state, one-vote model of the Articles of Confederation. They quickly countered, warning that “[t]he smaller States would never agree to any plan that did not give them equality of suffrage in this branch.”¹⁸⁹ Recognizing a stalemate, the delegates dropped the issue and discussed the length of term for members of the

181. FARRAND, *supra* note 95, at 84–85.

182. For an in-depth discussion of Wilson’s thought as an outlier who advocated for more democracy in the Constitution, see NEDELSKY, *supra* note 91, at 96–140.

183. FARRAND, *supra* note 95, at 151.

184. *Id.*

185. *Id.* at 158.

186. *Id.* at 154.

187. *Id.* at 155; *see also id.* at 156, 158. In so arguing, Gerry had changed his position somewhat from earlier when he argued that in his state “the worst men get into the Legislature,” including “[s]everal members [who] had lately been convicted of infamous crimes” and that in state legislatures “[m]en of indigence, ignorance & baseness, spare no pains however dirty to carry their point [against] men who are superior to the artifices practiced.” *Id.* at 132. In both of his statements, however, Gerry, like other delegates, expressed the flip side of the delegates’ desire to ensure that the Senate would be composed of men distinguished by rank and “their weight of property”; he felt it essential to prevent “bad” men from gaining office. *Id.* at 150.

188. *Id.* at 201.

189. *Id.* (quoting Madison’s notes on Sherman’s statement (which he spelled as Sharman) on June 11).

Senate. Again, the delegates looked to their experiences with their own state legislatures for guidance. Some delegates proposed short terms, but Randolph supported terms of seven years, arguing that “[t]he Democratic licentiousness of the State Legislatures proved the necessity of a firm Senate. The object of this [second] branch is to controul the democratic branch of the Nat[ional] Legislature The Senate of Maryland constituted on like principles had been scarcely able to stem the popular torrent.”¹⁹⁰ Moreover, Randolph noted, “[a] firmness [and] independence may be the more necessary also in this [Senate] branch, as it ought to guard the Constitution [against] encroachments of the Executive who will be apt to form combinations with the demagogues of the popular branch.”¹⁹¹ Madison agreed, noting, “What we wished was to give to the [government] . . . stability. . . . His fear was that the popular branch would still be too great an overmatch for it.”¹⁹²

The delegates’ discussions did not solve their stalemate, and a few days later, on June 15, the small states came forward with another proposal.¹⁹³ That proposal, called the New Jersey plan, would have retained the Articles of Confederation’s basic structure, including its unicameral legislature in which each state had one vote.¹⁹⁴ The New Jersey plan seemed unlikely to gain a majority of delegate votes, but the disagreement surrounding the plan threatened to derail the convention altogether if the disgruntled smaller states chose to walk away.¹⁹⁵

On Sunday, June 17, a group of delegates met informally to search for a compromise and came up with what would later be called the Connecticut Compromise.¹⁹⁶ The compromise would create a bicameral legislature with one house containing representatives elected by proportional representation and the other containing two representatives per state regardless of the size of the state’s population with these representatives to be chosen by state legislatures.¹⁹⁷ Another period of debate ensued, in which the delegates made plain their respective views of the proposal.¹⁹⁸ At many moments, it appeared as if this question might derail the entire convention.¹⁹⁹ Other matters, including the structure of the executive branch and the voting weight to give slave-holding states in the House of Representatives, preoccupied the delegates over the long, hot summer of the convention as well, but

190. *Id.* at 218.

191. *Id.*

192. *Id.*

193. *Id.* at 241–46.

194. *Id.*

195. See BERKIN, *supra* note 68, at 107; BEEMAN, *supra* note 142, at 160–62.

196. BEEMAN, *supra* note 142, at 150–51.

197. *Id.* at 150–51, 181, 244.

198. See *id.* 150–51.

199. *Id.* 150–51, 223.

none presented a more dangerous threat to the convention's success than the question of the Senate's design.²⁰⁰ Small states repeatedly threatened to walk away if they did not achieve what they referred to as equal suffrage rights.²⁰¹

By the same token, Madison and Wilson proved remarkably stubborn in continuing to pursue their objective of proportional representation. Wilson presciently noted that, as the country grew, the compromise would increasingly lead to a small minority of states controlling the Senate.²⁰² He asked, "[f]or whom do we form a constitution, for men, or for imaginary beings called states, a mere metaphysical distinction? Will a regard to state rights justify the sacrifice of the rights of men?"²⁰³ Equally presciently, Madison predicted that the real division of interests in the union would turn out to be between northern and southern slave-holding states rather than small versus large ones.²⁰⁴ As Madison predicted, equal suffrage for states in the Senate would enable "a minority to . . . compel the majority to submit to their particular [i]nterest or they will withhold their [a]ssent to essential [and] necessary measures."²⁰⁵ Madison further foresaw that "if the States have equal votes[,] a minority of the people or an [a]ristocracy will [appoint] the [government] Officers."²⁰⁶

It is important to emphasize that Madison's support for proportional representation in the Senate did not diminish his commitment to creating the Senate as an elite institution. Madison simply regarded large districts and long terms for senators as the best means of ensuring that members of the elite would win elections while at the same time maintaining the abstract idea that the government came from the People.²⁰⁷ Thus, Madison supported terms of nine years for senators in order to counter what he predicted the nation would experience in its future: "[a]n increase [in] the proportion of those who will labour under all the hardships of life, [and] secretly sigh for a more equal distribution of its blessings."²⁰⁸ These people, Madison worried, "may in time outnumber those who are placed above the feelings of indigence" so that "power will slide into the hands" of the less well off.²⁰⁹ Indeed, Madison noted, already these "symptoms of a leveling spirit . . . have sufficiently appeared . . . to give notice of the future dan-

200. FARRAND, *supra* note 95, at 50, 62–69, 580–81.

201. *Id.* at 201, 517, 552 (providing examples of threats and references to threats by small states' delegates to walk away if they did not achieve equal voting rights in the Senate).

202. *Id.* at 494.

203. *Id.*

204. See BEEMAN, *supra* note 142, at 183.

205. FARRAND, *supra* note 95, at 554.

206. *Id.*

207. *Id.* at 421–23.

208. *Id.* at 422 (citing and quoting Madison's notes of June 26).

209. *Id.*

ger.”²¹⁰ To guard against this danger and “to oppress the minority,” one among other means was “the establishment of a body in the Gov[ernment] sufficiently respectable for its wisdom [and] virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale.”²¹¹

By early July, Madison was deeply discouraged, writing in his notes that “[t]he small States[,] aware of the necessity of preventing anarchy, and taking advantage of the moment, extorted from the large ones an equality of votes, . . . [thus] demand[ing] under the new system greater rights as men[] than their fellow Citizens of the large States.”²¹² The heat of the debate between the small-state advocates and the nationalists turned up even further as Morris rose to speak. Morris had long political experience as one of the drafters of the New York Constitution as well as a member of the Continental Congress. In one particularly heated exchange, after delegate Martin of North Carolina threatened that if the convention did not agree to give each state equal suffrage, “our business is at an end,” Morris laid out his view in strong terms. Starting with points on which the delegates agreed, Morris stated:

It is confessed, on all hands, that the second branch ought to be a check on the first[.] . . . The first branch, originating from the people, will ever be subject to *precipitancy*, *changeability*, and *excess*[.] . . . This can only be checked by ability and virtue in the second branch[.] . . . The second branch ought to be composed of men of great and established property—an *aristocracy*[.] . . . Such an aristocratic body will keep down the turbulence of democracy.²¹³

However, Morris, sounding much like Adams, was willing to admit that history had proven that “men of large property will uniformly endeavor to establish tyranny.”²¹⁴ To counter this tendency, Morris argued, these men should be given the second legislative branch in order to “secure their weight for the *public good*.”²¹⁵ Through the second legislative branch, these men “become responsible for their conduct” and would be “checked by the democratic branch and thus form a stability in your government.”²¹⁶ Morris continued, “I avow myself the advocate of a strong government, still I admit that the influence of

210. *Id.* at 423.

211. *Id.* at 423. Hamilton, too, made a lengthy speech, defining the object of the Senate as “to afford a double security against [f]action in the house of representatives,” which was the “branch of the proposed Gov[ernment] . . . so forme[d] as to render it particularly the guardians of the poorer orders of citizens.” FARRAND, *supra* note 95, at 424–25, 435. He also disputed Madison’s pessimistic view that the poor would come to resent the rich by predicting that the United States would not be like England in that “the great body of lands [are] yet to be [parsed] out [and] settled.” *Id.*

212. *Id.* at 552.

213. *Id.* at 517 (emphasis in original).

214. *Id.*

215. *Id.* (emphasis in original).

216. *Id.*

the rich must be guarded; and a pure democracy is equally oppressive to the lower orders of the community.”²¹⁷ Morris further spoke in favor of long terms for senators and for weighting representation in the Senate based on both population and the amount of wealth each state possessed. He argued that “[l]ife and liberty were generally said to be of more value [] than property” but that “[a]n accurate view of the matter would nevertheless prove that property was the main object of Society,” so “[i]f property then was the main object of Gov[ernment,] certainly it ought to be one measure of the influence due to those who were to be affected by the Governm[en]t.”²¹⁸ Going even further, Morris proposed that senators should not be paid to help ensure the Senate would be composed of the wealthy elite with public-minded objectives.²¹⁹

Despite these many arguments, the small states’ intransigence ultimately tipped the scale. The Connecticut Compromise won provisional acceptance through the delegates’ vote on July 16, 1787, very much to the continued unhappiness of Federalist delegates like Randolph, Madison, Morris, and Wilson.²²⁰ Except for the passage of the Seventeenth Amendment in 1913—which would provide that voters in each state, rather than the state legislatures, choose their two senators²²¹—the Connecticut Compromise reflects the design for the Senate the delegates adopted at the founding convention.²²²

In short, the founders shared a general view that they should create a constitutional order that would protect individuals’ rights to property, promote the public interest, and check the improper or excessive influence of private interests. Today, we can perceive the great extent to which, quite obviously and somewhat ironically, the delegates’ disagreements about the Senate’s design arose from the interests of their respective states and their shared social class.²²³ But they couched their disagreements as being about how to produce the most faithful

217. *Id.* at 518.

218. *Id.* at 533 (quoting Madison’s notes from July 5).

219. *Id.*

220. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 15–20 (Max Farrand ed., 1911) [hereinafter 2 FARRAND] (recording delegates’ votes and reactions); see also BEEMAN, *supra* note 142, at 218–25 (summarizing the nuances of the delegates’ reaction to the July 16 vote).

221. For extensive analysis of the Seventeenth Amendment, which was designed to make the Senate more responsive to the electorate, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 38–54 (1996) [hereinafter Smith, *Rediscovering the Sovereignty of the People*]. The Seventeenth Amendment did not change the disproportional representation scheme I am focused on here, so I will not delve into its history.

222. U.S. CONST. arts. I–III.

223. For example, Hamilton, a lawyer by profession, wrote in *Federalist No. 35* that in his view the members of the learned professions will “truly form no distinct interest in society; and according to their situation and talents, will be indiscriminately the objects of confidence and choice of each other, and of other parts of the community.” THE FEDERALIST NO. 35, at 170 (Alexander Hamilton).

and wise leaders for the country. The founders generally agreed that more well-to-do people, such as themselves, were naturally superior and belonged in the elite social class. And historians widely agree that the founders deliberately created the Senate to be an institution composed of legislators with high social status and substantial property. Almost all the delegates thought that the Senate should be designed toward these goals; the primary evidence is overwhelming and clear on this matter.²²⁴ What has been far less appreciated, however, are the implications of these facts to reform the Senate today.

The next two centuries of U.S. constitutional history would see great change in the People's conceptions of who has political agency; what is entailed in this concept; and how self-interest, situated perspective, and life experience shape political perspectives and viewpoints about the public good. Under modern conceptions, having a legislative body that is intentionally designed to promote the interests of the most privileged classes undermines, rather than supports, the proper functioning of government. Today, the compromises baked into the founders' final choice of a selection process for members of the U.S. Senate impede the nation's attempts to achieve the ideals of political equality and fair opportunity, as I discuss in Part V, below.

The founders had a somewhat self-interested focus on the merits of privileging a natural elite they believed would arise on the basis of merit in their new social order. Their beliefs in the superiority of a natural elite illustrates the gap between eighteenth-century and contemporary worldviews.²²⁵ Many of the founders saw the existence of

224. For example, in his fair-minded survey of the Constitution-making process, Professor Richard Beeman emphasizes "the fear and distrust" with which the founders regarded the common people and the fact that "most of the wealthy and privileged men serving in the Convention were convinced that true republican government depended on a virtuous, property-owning citizenry." BEEMAN, *supra* note 95, at 281.

This view about the natural superiority of the elite who resembled themselves continued among the Federalists as they ran for election and governed in the period immediately following ratification. As Appleby notes, "That they could be so explicit about the political superiority of the rich, the well-born, and the able few and so frank about the inadequacy of the ordinary many, while appealing for their votes, only reveals how commonplace these convictions had been." APPLEBY, *supra* note 27, at 59.

Change was in process, however, as the Jeffersonian Republicans began to rise in power and various economic sectors began to develop, including not only agriculture but also commerce, trade, and manufacturing. See WOOD, *RADICALISM*, *supra* note 13, at 247. This post-Federalist period, occurring after the Constitution's ratification, lies outside the scope of this Article.

225. Thus, when Wood says, somewhat confusingly on first blush, that the founding generation "could not as yet conceive of society apart from government," *id.* at 5, he does not mean that eighteenth-century thinkers failed to understand that there was a social order; they most certainly did, and Madison's writings about faction and the conflict between interests among social classes, as well as Adams's writings about the political dominance of the wealthy, vividly reveal their understanding. What Wood appears to mean is that the founding generation believed in a "natural" social order that should affect the design of government but not be changed by government. In

economic, social, and political hierarchies as part of the natural order. And those who did not hold this view, such as Jefferson, thought they could build a new social order in which equality would replace inherited hierarchies. On this view, men would have the liberty to rise to their deserved positions in life based on their work and natural abilities. What the founders did not have the vocabulary to think about in this era was, first, the great extent to which their perspectives derived from their own social positions and implicitly advanced their own self-interest as determined by class and relative social advantage. Second, as products of their historical period, the founders did not consider whether the social hierarchies of which they were well aware might be unjust rather than the natural fruits of work and talent. Nor did they consider that a proper function of government might be to intervene in these social orderings so as to make life opportunities fairer for those facing historical and structural subordination. Those ideas would arise later in U.S. constitutional (and Western political) thinking—i.e. in the adoption of the Reconstruction-Era amendments after the Civil War, which was fought because the founders failed to end the moral wrong of slavery.²²⁶ Examining those ideas requires another article; in this one, I continue to focus on the implications of the differences between the founders' and contemporary conceptions of human and political agency.

Before proceeding toward that end, one more historical question requires an answer—namely, how the founders' hotly contested decision about how to apportion representation in the Senate strangely ended up being the *only* aspect of the Constitution that is inalterable through amendment. I tell that story below.

C. *Article V's Last Clause: Making the Senate's Design Unamendable*

Article V describes a process for constitutional amendment and then contains two clauses restricting the use of this process in two situations. First, Article V forbids any amendments affecting the slave trade before the year 1808, a provision that is now a nullity.²²⁷ Second, Article V prohibits amendment, without the consent of each state, of the rule requiring equal suffrage in the Senate.²²⁸ Examination of the records of the Constitutional Convention reveals that this last clause

light of the hierarchy and intense competition among many interests the founders observed in society, they considered how to construct a constitutional government that would protect what they valued, especially security of property, from the pernicious effects of inevitable social conflict.

226. See WILENTZ, *supra* note 84, at 112–14 (discussing the founders' handling of the institution of slavery in the Constitution).

227. U.S. CONST. art. V (“Provid[ing] that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.”).

228. See *id.*

was added on the very last day on which the delegates made edits to the Constitution, two days before they voted to approve the final version they would send to the people of the states for ratification.²²⁹ The delegates did not officially vote on it but appear to have accepted it by acclamation.²³⁰ It was, moreover, the product of last-minute hijacking, so to speak, and thus arguably is not entitled to the weight given other aspects of the Constitution that were more deliberately considered.

A bit of historical digging is required to determine the facts about the last-minute addition of Article V's last clause.²³¹ The upshot is that at the very end of the convention, delegate Roger Sherman of Massachusetts made a motion to add language to the end of Article V stating "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate."²³² Madison addressed the convention before the vote on Sherman's motion, prudently cautioning, "[b]egin with these special provisos, and . . . every State will insist on them."²³³ The delegates then voted to defeat Sherman's motion, after which Sherman countered by moving to strike the entirety of Article V.²³⁴ The delegates once again voted against that motion. At this point, Morris entered a motion to add a narrower version of Sherman's language stating "that no State, without its consent shall be deprived of its equal suffrage in the Senate."²³⁵ Madison's notes then read, "[t]his motion *being dictated by the circulating murmurs of the small States* was agreed to without debate, no one opposing it, or on the question, saying no."²³⁶ Thus, Madison's notes in-

229. See 2 FARRAND, *supra* note 220, at 622–33, 649 (containing Madison's notes from September 15, 1787). The convention ended on September 17. See *id.* In fact, the final version of the Constitution was approved that day, September 15, with fewer than 10 votes after the final clause in Article V was added. See *id.*

230. See *id.* at 631.

231. I offer special thanks to research assistant John Olorin here. As he explains, in Madison's voting record for September 15, 1787, some votes include Madison's usual brief description of what question is being voted on, but a gap exists between questions 547 and 566. See 2 FARRAND, *supra* note 220, at 622 (reproducing this voting chart). It is in that gap that the delegates voted on amending the language of Article V. If one compares this voting table to the rest of Madison's notes, one can ascertain the sequence of events described below. See Memorandum from John Olorin (Aug. 15, 2021) (on file with author).

232. See 2 FARRAND, *supra* note 220, at 630.

233. *Id.* ("Begin with these special provisos, and every State will insist on them, for their boundaries, exports[,] [*et cetera*].").

234. *Id.* at 630–31 (recording the motion's defeat by two ayes, eight noes, and one state divided). Connecticut and New Jersey voted in favor of the motion while Delaware was divided. Note that this vote count matches Vote 559 in Madison's table. *Id.* at 622.

235. *Id.* at 631.

236. *Id.* (emphasis added). The notes then describe a motion from Virginia delegate George Mason to add yet another clause to Article V, stating "that no law in nature of a navigation act be passed before the year 1808, without the consent of 2/3 of each branch of the Legislature." *Id.* (recording that Col. Mason's motion failed by three ayes, seven noes, and one absent). The vote count for Mason's motion matches Vote 563 in Madison's table shown in Appendix B, not Vote 560, because the North Caro-

dicate that the delegates adopted the final clause in Article V, without a vote or debate, due to small states' "circulating murmurs," which must have raised alarm among the delegates that their entire summer of hard work and difficult compromises were at risk of falling apart in the very final stretch.²³⁷ In effect, the small states held the convention hostage on this matter until the very end and then extracted an even more onerous provision than they had previously bargained for under the Connecticut Compromise.²³⁸ They made the equal state representation rule unamendable through the Article V process, thus violating the basic principle recognized in Article V that the People should have the power to amend their Constitution.

IV. CRITIQUES OF THE SENATE TODAY

A. *The Problem of Senate Malapportionment*

Madison, as we have seen, approved of the Senate's small size but fervently opposed the Connecticut Compromise's lack of proportional representation for the Senate.²³⁹ He foresaw that the voting weight gap in the Senate between small and large states would grow over time.²⁴⁰ His expectations have been wildly exceeded.

At the time of the Constitution's ratification, the ratio of voting weight in the Senate between citizens in the smallest state and the largest state stood at approximately 9:1 or 12:1, depending on whether enslaved persons are included in this count.²⁴¹ Today, that ratio has

lina delegation was recorded as absent. *Id.* at 622. Vote 560 was also recorded as receiving three ayes and seven noes but recorded New Hampshire as divided and North Carolina as voting in favor of the motion, meaning it could not be the vote on Mason's motion. *Id.* The only vote in the table that matches the vote on Mason's motion as described in Madison's notes is Vote 563, indicating that the addition of the final clause in Article V occurred between Votes 559 and 563. *Id.* The details of Votes 560–562 are not accounted for in Madison's notes, but since none of the votes passed, none of these questions could be the ones in which the delegates voted to approve Morris's narrower language adding the last clause of Article V to the final draft of the Constitution. *See id.* This confirms that the clause was added to the Constitution without a vote.

237. *Id.* at 631. Other notes from the day do not record a vote on the clause either. *See id.* at 634 (containing McHenry's notes which read, in part, "Added to the V article amended "No State without its consent shall be deprived of its equal suffrage in the Senate."").

238. In the next meeting of the convention on September 17, the delegates unanimously agreed to a final draft of the Constitution, and the gathering officially closed. *Id.* at 641.

239. *See supra* Part I. Indeed, he long "persisted in believing that the Connecticut Compromise was a serious blow to the fundamental principle that the new government was to be directly representative of the people of the nation." BEEMAN, *supra* note 142, at 367; *see also* KLARMAN, *supra* note 96, at 681 (describing Madison as "vexed" about the Connecticut Compromise).

240. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 10 (1999).

241. Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1984 (2019) (citing 1790 census reports).

grown to 67:1.²⁴² Moreover, the nation's more populous states are growing faster than many of the smaller ones, leading observers to estimate that this disparity will continue to worsen. According to one estimate, by 2040, "two-thirds of American citizens will be represented by only thirty senators."²⁴³ Currently, the nine largest states contain 50% of the nation's population but hold only 18 (i.e., 18%) of the Senate votes.²⁴⁴ Conversely, senators from the twenty-six smallest states represent only 18% of the nation's population but hold 52 of the Senate's 100 votes (i.e., 52%).²⁴⁵ Thus, 18% of the nation's population commands more than a majority of the Senate's voting power, while another half of the country's voters command less than 20% of that voting power. Given this situation, it is no wonder that critics claim that the Senate's work fails to represent the will of the People.²⁴⁶

The drastic malapportionment of the Senate has many pernicious effects.²⁴⁷ As I discuss, Senate malapportionment exacerbates economic inequality, perpetuates racial injustice, and contributes to increasing political polarization²⁴⁸ by locking in the disproportionate influence of wealthy and otherwise privileged interests. This is just as the founders intended but contrary to contemporary mainstream worldviews, which do not regard those with privilege as necessarily having better judgment or a stronger claim to lead. Finally, the Senate's design prevents representation in that body from changing to reflect changing demographics and popular opinion. Senate malapportionment leads to the increasingly frequent election of presidents who lack the support of a popular majority of U.S. voters. This occurs through the electoral college, which is tied to the Senate's malapportioned design.²⁴⁹ It also causes the Senate to confirm U.S. Supreme Court justices whose ideologies are drastically out of sync

242. *Id.*; see also KLARMAN, *supra* note 96, at 626–27 (presenting similar statistics).

243. Orts, *supra* note 241, at 1984–85.

244. Lynne A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 81 (1997).

245. *Id.* at 54.

246. See, e.g., Parker Richards, *The People v. the U.S. Senate*, ATLANTIC (Oct. 10, 2018), <https://www.theatlantic.com/politics/archive/2018/10/senators-kavanaugh-represented-44-percent-us/572623/> [<https://perma.cc/D2GZ-7QE3>] (summarizing criticisms of the Senate, including its confirmation of Justice Kavanaugh by the votes of senators who cumulatively represented less than a majority of the nation's population).

247. See generally LEE & OPPENHEIMER, *supra* note 240.

248. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/3A98-63YJ>] (discussing the evidence that political polarization in the United States is higher than any point since 1994); *U.S. Is Polarizing Faster Than Other Democracies, Study Finds*, BROWN UNIV. (Jan. 21, 2020), <https://www.brown.edu/news/2020-01-21/polarization> [<https://perma.cc/66NP-HPE6>] (noting that political polarization in the United States has grown more rapidly than it has in Canada, the United Kingdom, Australia, and Germany).

249. See *infra* discussion accompanying note 278.

with the mainstream views of the American public, thus further exacerbating the acute culture wars that currently bedevil U.S. politics. I sketch these problems below and then outline and assess solutions commentators have proposed before offering my own thoughts based on my assessment of the founders' ideas about human agency discussed in Parts II and III, above.

1. Malapportionment and Economic Inequality

One of the ways that Senate malapportionment has pernicious effects today stems from the not surprising fact that states with more relative voting power in the Senate receive more federal funds. Professors Lynn Baker and Samuel Dinkins have studied this phenomenon.²⁵⁰ They start by predicting what would happen if the Senate operated as the sole national legislature. In this situation, one would expect that the amount of federal expenditures for each state would be approximately equal because each state would have equal representation.²⁵¹ In contrast, if the House of Representatives were the sole legislature, the residents of each state could be expected to receive a substantially equal share of per capita benefits from federal spending since representation in the House is allocated proportionally based on federal census population counts. Since there are in fact two chambers, the allocation of federal spending can be expected to fall somewhere between these two extremes. This hypothesis proves consistent with Baker and Dinkins' empirical findings. In a 1996 study, they found a per capita negative income transfer in 1995 of “-\$446 for residents of the ten largest states” and a per capita positive income transfer of “+\$356 for residents of the ten smallest states.”²⁵² The largest per capita surplus income transfers were to North Dakota (+\$1,608), Delaware (+\$1,378), and Alaska (+\$1,224), and the largest per capita income deficits were from New Jersey (-\$2,055), Illinois (-\$1,517), and New Hampshire (-\$1,313).²⁵³

These findings do not necessarily signal unfairness, of course.²⁵⁴ Consistent with the founders' expectations, the non-representative nature of the Senate might allow senators to act on the interests of the

250. Baker & Dinkin, *supra* note 244, at 37–38, 61; *see also* Lynn A. Baker, *Re-thinking the Senate*, 44 HARV. J.L. & PUB. POL'Y 39, 42–45 (2021).

251. Baker & Dinkin, *supra* note 244, at 37. In other words, legislation dividing \$1 billion among the states would give each state \$20 million dollars, which would be divided by the number of residents in each state. In the end each resident of California, with a population at the time of 29.76 million, would end up with \$34, and each resident of Wyoming, with a population at the time of 453,000, would receive \$2,220. *Id.*

252. *Id.* at 39–41.

253. *Id.* at 39–40.

254. *See id.* at 41–42 n.63 (discussing the possibility, for example, that disproportionate federal wealth redistribution could be just compensation for the disproportionate amount of land taken by the federal government from lower-populated states for national parks and other public services).

inhabitants of the nation as a whole. But Baker and Dinkin's findings prove the opposite: In fact, the smallest states tend to have the lowest poverty rates and the largest states tend to have the highest poverty rates.²⁵⁵ In other words, allocation of poverty relief or income redistribution through federal spending is both vastly disproportionate and occurs in the wrong direction given the economic need of residents in various states.

Baker and Dinkin are careful to point out that causal conclusions can be drawn from their data.²⁵⁶ What is clear is that the current allocation of federal funds through a non-representative Senate is not helping to alleviate disproportionate poverty in the nation. Baker and Dinkin further consider the impact of the Senate malapportionment on racial justice as I discuss below.

2. Malapportionment and Racial Injustice

Some of the most serious effects of Senate malapportionment relate to racial injustice, a matter about which contemporary Americans hold dramatically different worldviews than the founders, as reflected in the Reconstruction Era Amendments as well as many other anti-discrimination laws reflecting the values of the contemporary legal order. A number of scholars have presented compelling critiques of the Senate in this regard, showing that the racial injustice that arises out of the Senate's design has at least three aspects: (1) greatly reducing racial minorities' voting weight; (2) diluting minority voters' voting power; and (3) drastically diminishing Black and other racial minority candidates' opportunities to win Senate seats.²⁵⁷ These are related but distinct problems; together they operate to compound the nation's problems of racial injustice in ways that cannot be undone under the Senate's current design.

In much the same way that Senate malapportionment diminishes the voting weight of persons in large states, it likewise reduces the voting weight, and thus the overall political power, of minority voters. This is because minority voters disproportionately tend to live in large states such as New York, California, and Texas. Indeed, in both California and Texas, persons identifying as white are now in the minority.²⁵⁸ Conversely, a much higher percentage of white-identity voters

255. *Id.* at 39–40 (showing that poverty rates in the ten largest states average 17.4% as compared to 12% in the ten smallest states).

256. *Id.* at 103 (noting that their statistical model could not account for approximately 15% of the total variation of state balance of payments despite being a “statistically significant predictor” and suggesting that future statistical examinations should consider adding more data and potential explanatory variables, including the percentage of the very wealthy living in certain states and the disproportionate power some politicians have in shaping federal wealth distribution).

257. *See, e.g., id.* at 43–47.

258. *See Population Distribution by Race/Ethnicity*, KAISER FAM. FOUND. (2019) <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?current->

live in many of the least populous states.²⁵⁹ Thus, the greatest voting weight in the Senate is concentrated in the states that are not only the least populous but are also populated with the nation’s historically privileged racial majority.

The fact that U.S. senators must run for statewide districts compounds racial minorities’ political disadvantage. It is well established that large and at-large voting districts dilute minority voting strength; as the Court stated in *Thornburg v. Gingles*, such districts act to “minimize or cancel out the voting strength of racial [minorities in] the voting population.”²⁶⁰ The Court likewise made this observation in *City of Mobile v. Bolden*, noting that at-large, statewide elections “place one or more minority groups at a significant disadvantage in the struggle for political power.”²⁶¹ For this reason, some proposals for alleviating the Senate malapportionment problem call for breaking up statewide Senate elections into smaller districts, as I discuss further in Part IV.B.1 below.

A related problem is the severe lack of representation of persons of color in the ranks of U.S. senators. This problem is part of a long history of minority voter disfranchisement, continuing with recent voter suppression efforts.²⁶² That Senate malapportionment contributes to this problem should not be surprising given that, as Part III.B has shown, the founders explicitly intended for the Senate’s design to perpetuate the advantage of the most privileged in running for those offices.

Timeframe=0 [<https://perma.cc/S2FZ-8REU>] (showing, for example, that California reported that 36% of its residents identify as white and that Texas reported that 41.1% of its residents identify as white).

259. *Id.* Despite the trend, Alaska, though less populous, reports that 60% of its residents identify as white and that 15.1% of its residents identify as American Indian/Alaskan Native, the highest in-state percentage of that racial identification. *Id.*

260. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

261. *City of Mobile v. Bolden*, 446 U.S. 55, 92–93 (1980) (Stevens, J., concurring).

262. For a discussion of Black voter disfranchisement in the post-Reconstruction era, see generally SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915* (2013). On contemporary voter suppression, see Lisa Hagen & Susan Milligan, *How Voting Laws Suppress the ‘New South’*, U.S. NEWS (Apr. 9, 2021, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2021-04-09/how-voting-laws-suppress-the-new-south> [<https://perma.cc/C3YQ-7WXQ>] (presenting arguments that voting laws in the South enacted after the 2020 presidential election, which impose stricter identification requirements and limit absentee ballots and ballot drop boxes, are much like Jim Crow laws of the past in making it more difficult for Black and poor people to vote); David Leonhardt & Ian Prasad Philbrick, *What’s at Stake in the Fight over Voting Rights*, N.Y. TIMES, <https://www.nytimes.com/2021/07/13/briefing/texas-voting-rights-bill-legislature.html> (Aug. 19, 2021) [<https://perma.cc/8TN5-J3J9>] (noting that 17 states have enacted laws to restrict ballot access); Charles M. Blow, *The Voter Fraud Fraud*, N.Y. TIMES (July 11, 2021), <https://www.nytimes.com/2021/07/11/opinion/texas-elections-black-people.html> [<https://perma.cc/R27L-7P3Q>] (discussing how proposed voter suppression laws in Texas would disproportionately harm Black voters).

The record of minority representation in the Senate tells this tragic tale. After the Mississippi state legislature appointed two Black senators during the brief period of Reconstruction,²⁶³ no Black senators won office until Massachusetts voters elected Senator Edward Brooke in 1967.²⁶⁴ Since then, only eight additional Black candidates have won senate seats.²⁶⁵ Today only three Black senators are serving,²⁶⁶ a drastic underrepresentation as compared to the approximately 13% share of Black people in the current U.S. total population.²⁶⁷ The story is similar for all racial minorities. Today, there are six Latino senators compared to more than 18% of the national population, two senators of Asian descent compared to total population reaching 6%, and not one Native American U.S. senator compared to a population of 1%.²⁶⁸

That the Senate's lack of minority representation stems from its design is further proved by comparison to the House of Representatives. By the early 1990s, minority representation among members elected to the U.S. House had begun to match relatively well with the racial diversity of the national population.²⁶⁹ Three decades later, racial diversity in Congress has continued to grow as every legislative election cycle breaks the previous record for reaching the most racially diverse group of House members.²⁷⁰ But such progress marks only the House, not the Senate.²⁷¹

3. Malapportionment and Political Polarization

The problems discussed above all contribute to political polarization in the United States today. Most basically, the Senate's malapportionment, especially as purportedly preserved for all time by the last clause of Article V, renders this aspect of the Constitution so rigid

263. *African American Senators*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm [<https://perma.cc/84HP-68DS>] (noting that Senator Hiram Revels was elected in 1870 and that Senator Blanche K. Bruce was elected in 1875).

264. *Id.*

265. *See id.*

266. Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress> [<https://perma.cc/3Dw5-ZX8S>].

267. *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/VZY9-WPZM>]. Thus, if all 11 Black senators ever elected, including today's incumbents, were to be seated in the same term, their representation would still fall short of the proportional share of the Black population in America today.

268. *Id.*; Schaeffer, *supra* note 266.

269. Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 281 (1998) [hereinafter Smith, *Reinventing Black Politics*].

270. Schaeffer, *supra* note 266.

271. *Id.*

that the legislative policies produced through governance by “the People” cannot effectively evolve as the demographics and mainstream political views of the nation change. Frustration builds as the results of U.S. political processes appear contrary to the democratic principles upon which they are supposed to rest. U.S. Representative John Dingell’s dramatic article, published after he retired, calling for the complete abolition of the Senate or its merger into the House to create a unicameral legislature, provides one prominent example of this frustration.²⁷² As the longest-serving member of Congress in history, Dingell represented a Michigan congressional district of 700,000 people—a population he noted was greater than that of Wyoming and Vermont.²⁷³ Criticizing these overwhelming population differences between states, Dingell blamed the Senate and the disproportionate influence of less populated states for the “national legislative paralysis” plaguing the nation.²⁷⁴ To accomplish his asserted goal of complete Senate abolition, Dingell called for a “national movement, starting at the grassroots level, [which] will require massive organizing, strategic voting, and strong leadership over the course of a generation.”²⁷⁵

Another example arises from the founders’ decision to rest confirmation of U.S. Supreme Court nominees in the non-representative Senate. Today, the ideology of the nation’s highest court is proving in many respects to be drastically out of sync with majority popular opinion. Of course, the Court was not intended to—and, indeed, should not—simply track popular sentiment. However, a situation in which the Court’s viewpoint clashes with the core values and worldview of most of the U.S. population threatens to destabilize the Court’s legitimacy and foment the nation’s culture wars and political unrest.²⁷⁶

Compounded with this problem is the increasingly more frequent election of U.S. presidents without the support of a national majority of voters.²⁷⁷ This occurs because the electoral college counts as presidential electoral voters all federal legislative representatives from each state. This boosts the voting power of inhabitants of smaller states whose two senators count toward their state’s total electoral

272. John D. Dingell, *I Served in Congress Longer Than Anyone. Here’s How to Fix It.*, ATLANTIC (Dec. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/johndingell-how-restore-faith-government/577222/> [<https://perma.cc/FZU7-D3AU>].

273. *Id.*

274. *Id.*

275. *Id.*

276. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

277. Philip Bump, *A Remarkable GOP Admission: Undermining the Electoral College Threatens Our Best Path to the White House*, WASH. POST (Jan. 4, 2021), <https://www.washingtonpost.com/politics/2021/01/04/remarkable-gop-admission-undermining-electoral-college-threatens-our-best-path-white-house/> [<https://perma.cc/G6RW-YWSX>] (noting the White House was controlled by a Republican president who won the popular vote for only 4 out of the past 20 years despite Republicans controlling the White House for 12 out of the past 20 years).

power even though they represent far fewer voters than the senators from more populous states.²⁷⁸ As a result, the nation has not only increasingly elected presidents who lacked the support of a popular majority but has also recently confronted several instances in which a Senate that does not represent the will of the majority of the People has confirmed U.S. Supreme Court justices nominated by a president who was not elected by a popular majority, creating what some have called a “minority-minority” problem.²⁷⁹ Not limited to U.S. Supreme Court justices, this problem leads to a nonrepresentative lower federal bench as well.²⁸⁰

On top of these problems, the Senate’s design and the difficulties candidates face in running for statewide districts perpetuate the problem of money in politics.²⁸¹ Again, this was a result the founders wanted: As discussed in Part III.B, they purposefully designed the Senate so that persons with inordinate wealth and superior social status would have an advantage in obtaining Senate seats. The founders regarded—and repeatedly and explicitly emphasized that they regarded—men of this type to be the superior choice.

B. *Fixing the Senate’s Design*

If the Senate’s design is currently causing all the problems discussed above, then a fix is surely required, as even some of the founders would agree.²⁸² The founders’ last-minute decision to disable the country from correcting malapportionment through the language of Article V’s last clause stating that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,”²⁸³ complicates this problem, as discussed in Part III.C, above. Since small states cannot

278. See Dingell, *supra* note 272.

279. See Orts, *supra* note 241, at 1986 (discussing this minority-minority problem).

280. *Id.* at 1986–87 (noting that President Trump nominated and the Senate confirmed a record number of such minority-minority judges in inferior federal courts).

281. For example, the top 10 most expensive Senate races in history have all occurred since 2018, with nine of them in 2020, and cost a combined total of \$2.1 billion. Eliana Miller, *Nine of the 10 Most Expensive Senate Races of All Time Happened in 2020*, OPEN SECRETS (Dec. 9, 2020, 5:10 PM), <https://www.opensecrets.org/news/2020/12/most-expensive-races-of-all-time-senate2020> [<https://perma.cc/8AKP-8W4C>]. The highest expenditures occur, not surprisingly, in close races, such as the 2021 Georgia race between Jon Ossoff and David Perdue, in which Ossoff spent a little over \$149 million to emerge narrowly as the winner. See *Georgia Senate 2020 Race Summary Data*, OPEN SECRETS, <https://www.opensecrets.org/races/summary?cycle=2020&id=GAS1&spec=N> [<https://perma.cc/T6K3-8NPL>]. The exorbitant costs of Senate elections exclude those whom Smith describes as “[n]on-traditional candidates,” including minorities and women, who have more difficulty fundraising than white male candidates. See Smith, *Rediscovering the Sovereignty of the People* *supra* note 221, at 66 (citations omitted). The expense of making a successful bid for the Senate thus partially explains why there are only 3 Black senators in the Senate in 2021 and 24 female senators. See *Women Senators*, U.S. SENATE, <https://www.senate.gov/senators/ListofWomenSenators.htm> [<https://perma.cc/Y32S-LVVX>].

282. See sources cited *supra* note 16.

283. U.S. CONST. art. V.

rationally be expected to consent to giving up their advantage under the Senate's current design, it appears Senate malapportionment cannot be fixed consistent with the Constitution's instructions. Several scholars have thought through this problem and presented a range of possible solutions. Some seek to work within Article V's strictures, and some do not, so I will present them in those categories below.²⁸⁴

1. Fixes Within the Strictures of Article V

The brilliant critical race scholar Professor Terry Smith has presented perhaps the most comprehensive and compelling treatment of problems of racial disfranchisement in the Constitution's design, including, but not limited to, Senate malapportionment.²⁸⁵ Seeking to work within Article V's stricture, Smith proposes dividing each state into two senate districts with an eye to ensuring a fair chance by minority voters to elect the senator of their choice from at least one of those districts.²⁸⁶ Smith's proposal arguably runs afoul of the Court's ruling in *Shaw v. Reno*,²⁸⁷ which held that race cannot be taken into account in drawing district lines.²⁸⁸ Smith argues, however, that the Court wrongly decided *Shaw v. Reno* in ignoring the Seventeenth Amendment's "re-ratification of the Fifteenth Amendment."²⁸⁹ On Smith's argument (which he supports with a host of evidence I will not go into here), Congress drafted the Seventeenth Amendment "with the expectation that Congress would retain all powers allowed under the Fifteenth Amendment to protect the Black franchise in Senate elections."²⁹⁰ Smith further points to the Voting Rights Act of 1965,²⁹¹ enacted under the Fifteenth Amendment, to show that it, too, was designed to protect the right of racial minorities to effectively carry out their constitutional right to vote and have their votes influence the outcome of elections.²⁹²

In support of his argument that the Constitution permits district elections of senators, Smith points out that the Constitution nowhere

284. In a third category, some proposals do not address Article V but are less feasible from a legal perspective. See *infra* note 311 and accompanying text.

285. See generally Smith, *Reinventing Black Politics*, *supra* note 269, at 293–99; Smith, *Rediscovering the Sovereignty of the People*, *supra* note 221, at 61–62. See also TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* 96–103 (2020) (applying his general analysis about racism and voting rights to the Trump era) [hereinafter SMITH, *WHITELASH*].

286. See Smith, *Rediscovering the Sovereignty of the People*, *supra* note 221, at 61–62.

287. *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993).

288. *Id.* (holding that the Fourteenth Amendment prohibits redistricting based solely on race).

289. Smith, *Rediscovering the Sovereignty of the People*, *supra* note 221, at 5; Smith, *Reinventing Black Politics*, *supra* note 269, at 313.

290. Smith, *Reinventing Black Politics*, *supra* note 269, at 284.

291. 52 U.S.C. § 10101 (1965).

292. Smith, *Reinventing Black Politics*, *supra* note 269, at 284.

forbids such a voting system, provided, of course, that the equal weight of each state's suffrage is not altered.²⁹³ Finally, Smith argues, pointing to *Federalist Paper No. 10*, *Federalist Paper No. 62*, and *Federalist Paper No. 63*, his proposal does not clash with the founders' vision of bicameralism.²⁹⁴ Smith argues that the founders wanted the Senate to act as a "counterweight to the House in much the same way the legislative branch would act as a check on the presidency," and the Senate would continue to do so under his proposal.²⁹⁵ Madison wanted, as shown in *Federalist Paper No. 10* and *Federalist Paper No. 63*, to create a separate chamber elected from large electorates to more effectively guard against "unworthy candidates [who] practise with success the vicious arts, by which elections are too often carried."²⁹⁶ However, Smith argues, the framers could not have anticipated the birth of "nation-sized states like California and Texas."²⁹⁷ Dividing today's at-large districts in two would still result in Senate districts being much larger than most, if not all, House districts.²⁹⁸ At the same time, Smith asserts, the benefits of splitting at-large districts by half could be expected to make each district's senator more responsive to their particular electorates, which would hopefully also create greater minority voting weight.²⁹⁹ All other distinctions between the two chambers, such as size and length of terms, would be retained. Nor, Smith points out, would his proposal affect any of the Senate's unique enumerated powers.³⁰⁰

Smith's proposal has many merits, but it does not completely solve the many problems of Senate malapportionment sketched in Part IV.A above. Voters in some states still would have far disproportionate voting weight compared to others, and minority voters still would face significant difficulties electing candidates in many states.³⁰¹ An-

293. Smith, *Rediscovering the Sovereignty of the People*, *supra* note 221, at 9–10.

294. *Id.* at 71–72.

295. *Id.* at 71.

296. *Id.* at 71–72 (alteration in original) (quoting THE FEDERALIST NO. 10, at 63 (James Madison)).

297. *Id.* at 72.

298. *Id.* The obvious exceptions are states with only one at-large representative in the House of Representatives.

299. *Id.* at 56–57.

300. *Id.* at 70, 73.

301. Smith argues that Senate elections will be less expensive if candidates need only appeal to smaller groups of constituents in districts, Smith, *Rediscovering the Sovereignty of the People*, *supra* note 221, at 66, but he fails to recognize that the most expensive races are the most contested races where each party has a chance at winning the seat. See, e.g., Karl Evers-Hillstrom, *Georgia Senate Races Shatter Spending Records*, OPEN SECRETS, (Jan. 4, 2021, 1:23 PM), <https://www.opensecrets.org/news/2021/01/georgia-senate-races-shatter-records/> [<https://perma.cc/8YWP-PAUQ>] (reporting that well over \$400 million was spent on the highly contested 2021 senate race in Georgia). Smith's plan to elect senators by districts thus may increase the amount of money spent in Senate races because more races will become highly contested. Moreover, Senate races may remain more expensive than House races because a senate seat, in a chamber that is smaller, has more power and is thus more valuable

other proposal by Professor Eric Orts builds on Smith's work to make an even more ambitious proposal. Orts's proposal promotes Smith's idea that constitutional authority for reforming the Senate's design lies not only in the Seventeenth Amendment but also "in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments."³⁰² Orts notes that all these amendments addressing voting rights grant Congress enforcement power to carry out their purpose of furthering fairness in voting. Furthermore, Orts makes the important observation that a number of provisions in the Constitution, such as the Fugitive Slave Clause and the 3/5 Clause—as well as, one might add, the language referring to the president, representatives, senators, and persons as "he"³⁰³—are now simply read out of the Constitution because current constitutional principles nullify them.³⁰⁴

Orts also makes an argument based on constitutional interpretation of the text of Article V.³⁰⁵ The last clause in Article V, according to Orts, can be read to mean that protection of equal suffrage in the Senate only applies to amendments, since Article V starts by addressing amendments only and is written as one paragraph without sentence breaks.³⁰⁶ Thus, Orts concludes, the final clause only bars constitutional *amendments* that would abridge states' equal suffrage in the Senate and Congress can alter the Senate's design by statute instead.³⁰⁷

With the Article V problem thus cleverly evaded through this interpretive move, Orts proposes a statute that would change the number of senators allocated to each state.³⁰⁸ But Orts's proposal also has drawbacks. His interpretation of Article V runs contrary to its legislative history, as explained in Part III.C, above. The "murmurs" of the small states that drove the last-minute addition of that clause certainly suggest that they did not intend to allow their equal suffrage promise to be rescinded by legislation. Moreover, Orts's proposal again depends on the will of Congress, and there is no reason to believe that

politically, than a house seat. If political parties and other contributors make rational decisions to spend their resources where they can achieve the most power for their investment, they will invest in the Senate.

302. Orts, *supra* note 241, at 1982.

303. See generally U.S. CONST.

304. Orts, *supra* note 241, at 2027 ("My reading here is analogous to how various pro-slavery provisions, such as the Fugitive Slave Clause and statutes enacted under it, were simply ignored after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. . . . Statutes enacted under the voting-rights amendments that conflict with original pro-slavery or sexist constitutional provisions prevail by virtue of the new statutes' constitutional grounding in later amending text.").

305. *Id.* at 2027–31.

306. *Id.* at 2027.

307. *Id.*

308. *Id.* at 1999. The details of his proposal are complex and need not detain us here.

the unrepresentative Senate would approve legislation to strip power from its now dominant members.

A third approach that seeks to avoid violating Article V's strictures involves splitting states. Professor Burt Neuborne has advocated this approach, and a political initiative along these lines achieved momentum, but not final success, in California in 2018.³⁰⁹ Neuborne's elegantly simple idea is that, once a state reaches a certain population ratio as compared to the least populated state, that state should split into two states.³¹⁰ Neuborne proposes legislation that would do this, using the decennial census results to automatically trigger a state-splitting mechanism when the ratio between the largest and smallest state becomes more than twenty to one.³¹¹

As Neuborne emphasizes, this proposal does not violate Article V since it maintains equal suffrage of the states and does not require a constitutional amendment. However, Article IV, Section 3, of the Constitution states that "no new State shall be formed or erected within the Jurisdiction of any other State."³¹² Historical precedent establishes that, in order to add a new state within the bounds of an existing state, the new state territory must first secede from both the original state and the Union after a majority vote by its inhabitants,

309. Silicon Valley venture capitalist Tim Draper led such an initiative, nicknamed "Cal3," in California in 2018, but that proposal met legal defeat once challenged in the California Supreme Court. Cal3 would have split California into three states: North California, California, and Southern California. See Andrea Diaz, *3 Californias? The Initiative to Break Up the State May Be on the Ballot in November*, CNN, <https://www.cnn.com/2018/04/13/us/california-closer-to-split-into-three-states-trnd/index.html> (May 6, 2018, 3:05 PM) [<https://perma.cc/AD8R-DCVU>]; see also Vikram David Amar, *What California Voters Should Focus on When Voting on Tim Draper's "Cal3" Initiative*, VERDICT JUSTIA (Apr. 19, 2018), <https://verdict.justia.com/2018/04/19/california-voters-focus-voting-tim-drapers-cal-3-initiative> [<https://perma.cc/E5PQ-7VRV>]. Although Draper collected enough signatures to allow Cal3 to appear on the 2018 statewide ballot, the state Supreme Court ruled against Cal3 three days before ballots were scheduled to start printing, holding that the initiative could not appear on that or any future ballot without stating why. See Phil Helsel, Associated Press, *Initiative to Split California into Three Parts Removed from Ballot by State's Supreme Court*, NBC NEWS, <https://www.nbcnews.com/news/us-news/initiative-split-california-three-parts-removed-ballot-state-s-supreme-n892581> (July 18, 2018, 5:49 PM) [<https://perma.cc/S7QV-VGJS>].

310. Burt Neuborne, *Divide States to Democratize the Senate*, WALL ST. J. (Nov. 20, 2018, 7:13 PM), <https://www.wsj.com/articles/divide-states-to-democratize-the-senate-1542672828> [<https://perma.cc/E2YB-GPDC>] (noting that "[a] Californian has only 1/65th the representation of a Wyoming resident in the upper chamber"—"[t]hat's undemocratic, but there's no way around Article V").

311. Neuborne examines several different ratios using data from the 2010 census. *Id.* If the ratio were 20:1, six states containing a combined total of 41% of the U.S. population would be able to split, including California, Texas, New York, Florida, Pennsylvania, and Illinois, generating 12 new senators. *Id.* If the ratio were 10:1, 19 states could split to generate 38 senators. *Id.* If the ratio is 6:1, 29 states could split, generating 58 senators. *Id.*

312. U.S. CONST. art. IV § 3.

and then Congress must readmit the new state.³¹³ Thus, Neuberne's proposal presents complex constitutional and logistical problems that make it infeasible.

2. Fixes Outside the Strictures of Article V

If these proposals that purport to work within the strictures of Article V fall short, perhaps proposals that squarely take on Article V's legitimacy end up being the way to go. There are two leading proposals that serve as examples. The first, from Akhil Amar, begins with the proposition that by the very principles under which the Constitution was drafted, "the People" retain the unenumerated right to amend the Constitution in ways other than those specified by Article V.³¹⁴ I will not go into all of the arguments Amar raises as to why this is so; his main point is that, as a first principle, the founders rested the formation of a new government on "the People" as the ultimate sovereign; thus, the People must always have the right to change their government if they collectively decide to do so.³¹⁵ Amar quotes examples of the founders' statements reflecting their belief that the People always retain the power to change their government,³¹⁶ and he further argues

313. Despite the Article IV § 3 language just quoted, Kentucky, Maine, and West Virginia all came into existence by seceding from their existing state and then quickly gaining admission to the Union as separate states. Vermont and Tennessee were admitted under the first clause of Article IV § 3, which reads, simply, "[n]ew States may be admitted by the Congress into this Union"; both territories were already independent of their original state in 1790 when they were admitted into the Union. Kentucky became a state separate from Virginia in 1791 after Virginia passed legislation enabling it to become an independent state and a convention of Kentucky representatives voted in favor of this step. See LOWELL H. HARRISON, *KENTUCKY'S ROAD TO STATEHOOD* 80 (1992). Maine became a separate state in 1819 after the Massachusetts legislature voted to grant Maine permission to separate on the basis of a vote of the people in the then "district" of Maine in favor of separation. See *Report of the Massachusetts Executive Council Committee Regarding Votes for and Against Statehood, 1819*, ME. ST. ARCHIVES (Aug. 24, 1819), https://digitalmaine.com/cgi/viewcontent.cgi?article=1007&context=act_of_separation [https://perma.cc/V57Z-SSNR]; see also *An Act in Addition to an Act, Entitled "An Act Relating to the Separation of the District of Maine from Massachusetts Proper, and Forming the Same into a Separate and Independent State"*, Laws of the Commonwealth of Massachusetts Passed by the General Court, ch. CCLXXXVII 425–427 (Feb. 25, 1820). In a more complex and potentially constitutionally dubious historical story, West Virginia seceded from Virginia in 1863, at the start of the Civil War, after a unionist government that formed in the northwest region of Virginia declared itself to be the real government of Virginia and voted to allow West Virginia to separate from Virginia, after which the U.S. Congress voted to approve West Virginia as a separate state provided it adopt a measure that would free enslaved persons in the territory. See Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 380 (2002).

314. See Amar, *supra* note 16, at 1057–58 (providing examples of sources Amar quotes in support of his claim that the founders would agree that the People should always have the option to change features of their government).

315. *Id.* at 1050 (presenting quotes from Madison and the U.S. Declaration of Independence).

316. See *id.* at 1058.

that the First Amendment's protection of the People's right to assemble provides additional support for his position.³¹⁷

Amar's argument, as he points out, does not render Article V "a nullity" but simply renders it "nonexclusive."³¹⁸ Moreover, logically, Article V's amendment processes cannot be the only way of changing government because a host of problems may preclude that path even when the majority of the People want change.³¹⁹ Amar acknowledges that his proposal is fraught with dangers³²⁰ and should be resorted to only rarely when the regular institutions of government cannot suffice. He cites as one such instance the existence of the last clause of Article V, which, he argues, can only be seen as valid to the extent that it can be approved by, and thus is subordinate to, "a process which weights all Americans equally."³²¹ Thus, Amar concludes that "[i]ndividual rights, federalism, separation of powers, and ordinary representation all exist, *under* our Constitution, but they all derive from a higher source, unbounded by these principles."³²² That source is the People themselves.

Professor Michael Klarman likewise endorses reforming the Senate's design through methods outside the Article V constitutional amendment process.³²³ Klarman first acknowledges that there may be methods to fix Senate malapportionment within the bounds of the Constitution, either by admitting new states or by dividing existing states.³²⁴ However, he argues, a more direct way to pursue a fairer apportionment would be to "simply ignore" Article V and reapportion the Senate through statute or national referendum.³²⁵

In support of his position, Klarman notes that the Supreme Court has employed solutions different from those specified in clear constitutional language more than once before. For example, the Court extended equal protection principles to the federal government even though the Fourteenth Amendment explicitly only applies to the states, and it applied the First Amendment to the executive and judicial branches even though the First Amendment is "plainly limited" to

317. *Id.* at 1060.

318. *Id.* at 1054.

319. *Id.* at 1065, n.80 (noting, as examples of such collective action problems, malapportionment, gerrymandering, bicameralism, and the fact that the majority of the nation's electorate may be geographically distributed so as to make it impossible to get enough legislatures to apply for a convention even though this is the desire of the majority of the People).

320. *Id.* at 1096 ("Popular sovereignty is strong stuff. My argument here . . . may scare you. To be honest, it scares me a little too. However . . . the alternatives seem even scarier.").

321. *Id.* at 1099.

322. *Id.* at 1103 (emphasis in original).

323. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 1 (2020).

324. *Id.* at 237–38.

325. *Id.* at 238.

Congress.³²⁶ In these instances, the Court's decisions found legitimacy because there was strong social backing for the Court's steps to ameliorate "particularly egregious" examples of "dead-hand" control.³²⁷ Klarman argues that Senate malapportionment falls within this category of egregious, facially undemocratic institutions that should be read out of the Constitution through one means or another.³²⁸

In the end, I concur with Amar and Klarman's conclusions, but for somewhat different or additional reasons resting on the anachronistic quality of the founders' explicitly stated rationale for the Senate's design. At bottom, the anachronism of some of the founders' viewpoints comes from changing views about democracy and political agency. In the founding period, the nation's political leaders regarded the People as the basis for the constitutional structure in the abstract; however, the primary evidence and countless scholars show that the founders' views about democracy were deeply ambivalent.³²⁹ They believed that the People provided the basis for the government's legitimacy, but they also expressed distrust of the common people, as shown by the sampling of quotes from the Convention delegates that I highlight in Part III.B. What the founders wanted was a mixed or balanced system through which the views of the People would be tempered and checked by a natural meritocracy or aristocracy of the elite.³³⁰ That elite, from their historically situated perspective, meant men who enjoyed privileged social status as landed, wealthy, and professional class members.

Today, views about the democratic underpinnings of the U.S. constitutional order have greatly changed. The People no longer serve merely as an abstraction on which to base republican government; they are instead regarded as the active source of the government's legitimacy as Amar, along with most other leading mainstream constitutional theorists, insist.³³¹ I discuss the consequences of this shift below.

326. *Id.*

327. *Id.*

328. *Id.*

329. *See, e.g.,* KRAMER, *supra* note 276, at 6–8 (discussing this ambivalence).

330. Here is how John Adams put this point:

These sources of inequality, which are common to every people, and can never be altered by any, because they are founded in the constitution of nature; this natural aristocracy among mankind, has been dilated on, because it is a fact essential to be considered in the institution of a government. It is a body of men which contains the greatest collection of virtues and abilities in a free government; is the brightest ornament and glory of the nation; and may always be made the greatest blessing of society, if it be judiciously managed in the constitution. But if it is not, it is always the most dangerous; nay, it may be added, it never fails to be the destruction of the commonwealth.

ADAMS, *supra* note 161, at 93.

331. *See generally* Amar, *supra* note 16; BREYER, *supra* note 33.

V. WHAT TO DO TODAY

As already noted, a major reason why some of the founders' assumptions no longer fit with contemporary viewpoints is that the constitutional definition of "the People" has radically changed since the founding period. Today, the People includes people of color, women, and people without wealth along with the landed free men who constituted the polity in the founders' days.³³² These dramatic shifts in definitions of who possesses political agency call for auditing the founders' work to determine if it still accords with contemporary views about the fit between human agency and proper government structure. Today, for example, individuals' pursuit of happiness involves all the People's flourishing, not just that of men, members of majority race identity categories, and the nation's economic elite. Government design should promote the interests of all who count.

In some respects, the founders' views of human agency and its fit with proper government design still work well enough with the needs and outlook of the People. In other respects, however, the founders' views no longer pertain. Where the founders' decisions no longer fit with contemporary values in fundamental ways, adjustments in the Constitution's design may be in order. Indeed, the People, the Congress, and the Court have made such adjustments before, as already discussed in Part IV.B.³³³ Here, I argue that the founders' decisions about the Senate's design require revisiting to the extent that they were based on assumptions about human agency that no longer enjoy general acceptance. This is both because the founders' earlier decisions no longer reflect the Constitution's explicit language after the People amended the Constitution and because some of the founders' decisions are patently anachronistic as compared to contemporary mainstream political values. The founders' assumptions underlying the Senate's design meet both conditions for requiring revision.

In arguing that the design of the Senate should be reformed based on the lack of fit between the assumptions that led the founders to adopt its design and contemporary mainstream political values, I am not professing to offer proposals about how this should be carried out.

332. As already noted, this is due to major constitutional amendments, federal enforcement legislation, and Court opinions, along with popular constitutionalism that sometimes brings about change in a law's interpretation without explicit change in the law's language. See, e.g., U.S. CONST. amends. XIII, XIV, XV, XIX, XXIV. See generally KRAMER, *supra* note 276 (discussing popular constitutionalism); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 308–17 (2001) (discussing how the campaign for passage of the ERA changed constitutional interpretation even though it failed).

333. For more examples of how constitutional interpretation has absorbed changes based on changed circumstances, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 122, 135 (2010) (noting that most jurists today accept that federal administrative agencies are legal even though the Constitution does not contemplate such a vast federal bureaucracy and that the Seventeenth Amendment adopted a practice of direct election of senators that was already in use prior to its ratification).

It may be holding a general plebiscite, along the lines Professor Amar (and, implicitly, Congressman Dingell) suggest in their writing on this topic.³³⁴ Or it may be that the constitutional amendment process could be used despite Article IV's last proviso since, as Amar argues, no provision of the Constitution should be placed off limits from reform by the People, whose continued consent is what gives the Constitution its legitimacy.³³⁵ It is unlikely that democratic apportionment of the Senate could simply be adopted as a practice, along the lines through which the process of popular constitutionalism has sometimes produced *de facto* change without constitutional amendment since, as already discussed, the vested interests of the smaller states would stand in the way of their consent to any such practice change. In this respect, reform of the Senate's design is different from many constitutional reforms that occurred without a court ruling or explicit amendment. But change is necessary nonetheless. It may be that change could at least start through the state-splitting proposals offered by Neuberne and others as discussed in Part IV.B.1, above. My project here is not to propose *how* Senate design reform should be brought about, but to offer new arguments about *why* it should occur in order to fix a major problem contributing to the brewing constitutional crisis the U.S. is facing in the current period.

Below I parse which aspects of the constellation of ideas about human agency the founders held, as charted in Parts II and III, still fit "well enough" with contemporary outlooks and which aspects do not. I then discuss what consequences arise where there have been major shifts.

A. *The Pursuit of Happiness, Liberty, and the Republicanism vs. Liberalism Balance*

Among the ideas that continue to fit—well enough at least—is the assumption that the goal of government is to promote individuals' pursuit of happiness. John Rawls offers a contemporary definition: "[A] person is happy when he is in the way of a successful execution (more or less) of a rational plan of life drawn up under (more or less) favorable conditions, and he is reasonably confident that his intentions can be carried through."³³⁶ Some leading philosophers and legal scholars substitute the concept of human flourishing or human capabilities for happiness.³³⁷ This change signals a somewhat different connotation in implying that it may be the government's duty to provide

334. See text accompanying *supra* notes 16, 272 (citing these scholars on this point).

335. Amar, *supra* note 16, at 1072–73.

336. JOHN RAWLS, A THEORY OF JUSTICE 480 (1999) (citation omitted).

337. See, e.g., CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 130–38 (1997) (arguing that the phrase "pursuit of happiness" imposes an affirmative duty on Congress to secure basic material livelihood for the nation's inhabitants).

resources so that individuals may develop the capabilities necessary for happiness.³³⁸ Nonetheless, generally speaking, mainstream views do not take issue with the foundational concept that the end of government is to promote the ability of individuals to pursue happiness—just as Lee and Adams agreed.³³⁹

Other concepts inherited from the founders that differ somewhat today but still reflect contemporary values involve ideas about liberty.³⁴⁰ Again, Rawls talks a great deal about liberty in his definitive articulation of modern liberal theory.³⁴¹ Modern libertarians tend to go much further than the founders in their views on the limits to government's legitimate reach.³⁴² Liberty in modern usage tends to mean freedom to do whatever one wants rather than to follow well-considered, virtuous ends, which is how the founders conceived of liberty, as discussed in Part II.A, above.³⁴³ But leading commentators continue to emphasize the importance of liberty under the Constitution, as do many important Court opinions.³⁴⁴ An example of the invocation of liberty by a mainstream contemporary jurist is Justice Stephen Breyer's idea of "active liberty."³⁴⁵ Justice Breyer uses this term to refer to the right of the people to participate in government and shape constitutional interpretation—an idea that resonates with the founders' classical republican emphasis on public virtue.

Justice Breyer's conception is also illustrative in demonstrating how contemporary mainstream constitutional perspectives continue to offer various blends of ideas sounding in both civic republicanism and

338. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996) (evaluating concepts of human flourishing in relation to commodification and law). See also MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 123–43 (2011) (mapping the philosophical history of the human flourishing and capacities approaches).

339. See *supra* Part I.

340. On the many modern meanings of the concept of liberty, see ISAAH BERLIN, *LIBERTY* 55–94 (Henry Hardy ed., 2002) (1969).

341. See, e.g., RAWLS, *supra* note 336, at 176–80.

342. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26 (1974) (discussing the concept of the minimal state).

343. REID, *supra* note 43, at 2 (noting that "today's emphasis on liberty, when compared to the eighteenth century's, can be labeled either 'individualistic' or 'permissive'").

344. One striking example is *Planned Parenthood v. Casey*, where a plurality, including two anti-abortion Catholic Justices, wrote against extinguishing women's right to decide about abortion, stating:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. *Our obligation is to define the liberty of all*, not to mandate our own moral code.

Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter) (emphasis added).

345. See BREYER, *supra* note 33, 13–34 (introducing his concept of active liberty).

liberalism. The proper balance between these two sets of ideas continues to be a major preoccupation of American political theorists such as Rawls, Michael Sandel, and many others.³⁴⁶ Indeed, these various proposed blends sometimes draw directly on the founders' words.³⁴⁷ The results are of course somewhat different from, but still sufficiently tied to, the central ideas about human agency underlying the founders' drafting of the Constitution.³⁴⁸ Thus, contemporary worldviews are not drastically out of sync with the founders' assumptions based in both classical republicanism and liberalism with their associated ideas of liberty and virtue and individual and community.

B. *Dependency, Land Ownership, and Wealth*

Although many of the founders' assumptions about human agency offer a "good enough" fit with contemporary constitutional values, some ideas of the founders no longer fit at all. It is some of those outmoded ideas that underlie the problem of Senate malapportionment discussed in Part IV, above. First, as noted briefly, contemporary mainstream political theory, as influenced by feminist thought, no longer posits that to be fully free persons must be "independent."³⁴⁹ Political theorists now much better recognize that human beings are all *interdependent*.³⁵⁰ What looks like independence is in fact disguised dependence in relationships in which, due to social privilege, the seemingly independent member does not owe reciprocal duties to those on whom they in fact rely. Women appeared dependent to the founders because women provided care work in families without compensation just as enslaved persons received no pay for their labor even though, in both situations, supposedly independent men were in fact dependent on the non-compensated work of persons excluded from the polity.

Feminist scholars from many disciplines have made important contributions to deconstructing the concept of dependency.³⁵¹ Professor

346. See generally RAWLS, *supra* note 336. See also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 1–5 (1998) [hereinafter *DEMOCRACY'S DISCONTENT*] (comparing liberalism to a more community-based perspective and critiquing Rawls and liberalism for the notion of a self without attachments to others); JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (laying out and defending a comprehensive contemporary theory of liberalism); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 184–218 (2d ed. 1998) (1998) [hereinafter *LIMITS OF JUSTICE*] (responding to Rawls's early articulation of contemporary liberal theory).

347. See, e.g., *DEMOCRACY'S DISCONTENT*, *supra* note 346, at 123–167 (presenting a long discussion of "economics and virtue" in the early U.S. republic).

348. See *supra* Parts II, III.

349. See *supra* Part II.C.

350. See, e.g., *DEMOCRACY'S DISCONTENT*, *supra* note 346, at 207 (noting other philosophers' writings about human beings' interdependence).

351. See, e.g., EVA FEDER KITTAY, *LOVE'S LABOR* 76–77 (2d ed. 2020) ("The point of the dependency critique is to show that, as long as the bounds of justice are drawn within reciprocal relations among free and equal persons, dependents will continue to remain disenfranchised, and dependency workers who are otherwise fully capable and

Martha Fineman is a leading pioneer of this important work, crafting theory that starts with the observation that all persons are “dependent” at certain points in their lives, starting with infancy.³⁵² Fineman proceeds to develop the concept of “derivative dependency,” noting that those who use their energies to provide care to others become themselves dependent in needing support in order to deliver the caretaking labor on which everyone in the society relies.³⁵³ The founders, in dismissing women and enslaved persons as dependents and thus not deserving of political rights, were oblivious to this reality of derivative dependency. But contemporary mainstream political thought, influenced by these compelling arguments, largely uncouples political rights from so-called dependency status. Almost all adult persons have political rights regardless of social station, under the Thirteenth, Fourteenth, Fifteenth, and Nineteenth amendments as well as federal legislation enacted under these amendments and interpretive judicial precedents.³⁵⁴

Another set of ideas that no longer resonates in contemporary democratic political discourse and constitutional theory involve the founders’ perspectives on property ownership. The founders regarded substantial property ownership as the touchstone of good political leadership, political judgment, and the capacity to gauge and pursue the public interest as a leader or participant in government.³⁵⁵ Today, those assumptions no longer accord with contemporary democratic political discourse and constitutional theory. In its jurisprudence the Court has forcefully rejected property ownership as a prerequisite for political participation. It did so in a series of cases striking down property and wealth classifications for voting and running for political office. In *Harper v. Virginia State Board of Elections*, for example, the Court struck down as unconstitutional state requirements that residents pay poll taxes in order to vote, holding that “a state violates the Equal Protection Clause . . . whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no rela-

cooperating members of society will continue to share varying degrees of the dependents’ disenfranchisement.”); see also EVA FEDER KITTAY & ELLEN K. FEDER, *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* 1–85 (2002) (presenting various perspectives on “contesting the independent man”).

352. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 232 (1995) (arguing that we should “become a society that recognized and accepted the inevitability of dependency” and “face, value, and therefore subsidize, caretaking and caretakers”). In later work, Fineman moves to the concept of “vulnerability analysis” in asking policy makers and others “to embrace a more complex reality by bringing human dependency and vulnerability back into the center of the inquiry.” See *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 17 (Martha Albertson Fineman & Anna Grear eds., 2013).

353. FINEMAN, *THE AUTONOMY MYTH*, *supra* note 85, at 35–36 (explaining this concept of “derivative dependency”).

354. See *supra* note 304 and accompanying text.

355. See *supra* Subsection II.C. and Parts III.

tion to wealth”³⁵⁶ In *Kramer v. Union Free School District*, the Court examined the constitutionality of a state law that required that, in order to vote in school board elections, persons must be either the parents of children attending local public schools or own or rent real property in the school district.³⁵⁷ The Court struck down the state law on the ground that property qualifications for voters generally infringe on individuals’ fundamental right to vote. The Court reached the same conclusion in *Cipriano v. City of Houma*, where it held unconstitutional a statute requiring property ownership in order to vote on municipal utility bonds.³⁵⁸

The Court similarly condemned property and wealth restrictions for candidates running for state offices in *Bullock v. Carter*, where the Court struck down the substantial filing fees required for candidates running in primaries for state office in Texas. The Court held that the “very size of the fees” gave the system “a patently exclusionary character” by precluding “in a practical sense” those aspiring office seekers “lacking both personal wealth and affluent backers . . . no matter how qualified they might be, and no matter how broad or enthusiastic their popular support.”³⁵⁹ The Court reached the same conclusion in *Lubin v. Panish*, holding that California could not bar from the ballot an indigent person who lacked the funds to pay that state’s candidate filing fees. In so concluding, the Court noted the historical trend towards “enlarged demand for an expansion of political opportunity,” as shown by constitutional amendments expanding voting rights as well as federal voting rights laws and judicial precedents, and further noted, quoting Chief Justice Warren’s opinion in *Reynolds v. Sims*, that “[l]egislators are elected by voters, not farms or cities or economic interests.”³⁶⁰

Finally, in *Turner v. Fouche*, the Court examined a voting system that required members of school boards to be “freeholders,” meaning that they must own real estate.³⁶¹ The Court described such a freeholder qualification as a classification “wholly irrelevant to the achievement of a valid state objective,” a distinction that “violate[s] federal constitutional guarantees,”³⁶² and stated that “[i]t cannot be seriously urged that a citizen in all other respects qualified to sit on a

356. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665–66 (1966).

357. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 622–23 (1969).

358. *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969). The Court still sometimes allows property requirements for very limited votes affecting property owners only. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973) (upholding a state law that apportioned voting power in water storage district elections based on the assessed valuation of land within the voting districts).

359. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

360. *Lubin v. Panish*, 415 U.S. 709, 713–14 (1974) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

361. *Turner v. Fouche*, 396 U.S. 346, 348 n.1 (1970) (defining “freeholder” under Georgia law as “any person who owns real estate”).

362. *Id.* at 362–63.

school board must also own real property if he is to participate responsibly in educational decisions.”³⁶³ In short, in *Turner*, as in the other cases just discussed, the modern Court had no patience with coupling political rights to vote or run for office with property ownership or substantial wealth. The Court’s conclusions and reasoning highlight the now anachronistic quality of the founders’ worldview. Just as property ownership is no longer so essential to material survival,³⁶⁴ the U.S. historical experience has moved far from that of Old England, where the House of Lords provided a model for how a landed class, possessing independence and material security, might stand up to an overreaching government.³⁶⁵

Yet while these anachronistic ideas have been roundly discarded, they form much of the rationale for the Senate’s design described in Part III.B. These anachronisms also undermine concepts that have become stronger over time, especially the importance of democracy, inclusion, proportional representation, and control of the government by the People.³⁶⁶ This problem is rendered even more severe in the Senate due to the “minority-minority” problem through which election of the president and then judicial and other government appointments can occur without majority or popular support.³⁶⁷

A final important way in which the founders’ assumptions about human agency and links to proper government design may be outmoded today involve questions about the growing influence of wealth in politics. The Court’s rulings on money in politics have provoked calls for major reform;³⁶⁸ what the future will bring in this area will be fascinating but must remain outside the scope of this Article—beyond noting that the current structure of the Senate implicates this topic too.³⁶⁹

363. *Id.* at 362–64.

364. *Cf. supra* discussion and text accompanying note 89 (highlighting the practical importance of property ownership in the 18th century “for food and other aspects of [property owners’] livelihoods”).

365. *See supra* discussion and text accompanying note 95 (describing the historical context and importance of the House of Lords and its influence on the founders).

366. On the growing importance of democracy through U.S. history, see ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137–39 (2006).

367. On the “minority-minority” problem, see *supra* notes 279–80 and accompanying text.

368. *See, e.g.,* *Citizens United v. F.E.C.*, 558 U.S. 310, 365–66 (2010) (holding that restrictions on independent political expenditures by corporations and unions are unconstitutional); *see also* Ciara Torres-Spelliscy, *The Supreme Court’s Looming Dark Money Decision*, BRENNAN CTR. FOR JUST. (Apr. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-looming-dark-money-decision> [<https://perma.cc/LQH3-C6G3>] (summarizing the Court’s rulings).

369. *See supra* note 281 and accompanying text (discussing the problem of money in politics).

VI. CONCLUSION

Fundamental contemporary principles of democracy hold that a constitution must be capable of change through civic participation on the part of all those who count.³⁷⁰ Today, a much broader set of persons count than the founders viewed as worthy of political rights in 1787. The idea of political equality stated in the Declaration of Independence has taken on increasing significance through, among other developments, the ratification of the Reconstruction-Era amendments, the Nineteenth Amendment giving women the right to vote, a slew of Supreme Court decisions, the passage of a host of civil rights laws, and the process of popular constitutionalism.³⁷¹ Americans retain a commitment to a number of key ideas inherited from the founders about the proper relationship between human agency and government design, including the ideas that the goal of government is to promote individuals' pursuit of happiness, or flourishing or capacities; that both active liberty and personal freedom are key values; and that a mix of civic republican and liberal principles should guide government. At the same time, Americans must be able to discard—and often have discarded—anachronistic aspects of the Constitution that were the product of particular historical conditions and no longer speak to contemporary values.³⁷² As I have shown here, those anachronistic concepts include the ideas that some persons are independent while others are not, and that only those viewed as independent should enjoy political rights. A related outmoded idea views substantial property ownership and wealth as prerequisites to good political leadership. Once those ideas are discarded, the grounds for the malapportioned design of the U.S. Senate emerge as dubious indeed.

370. See generally Amar, *supra* note 16 (developing the point that the Constitution must be capable of change through popular involvement).

371. See generally KRAMER, *supra* note 276 (examining how the People exert influence over the interpretation and enforcement of the Constitution).

372. As well as constitutional theorists Akhil Amar and Michael Klarman, whose ideas along these lines I discussed in Part IV, *supra*, leading constitutionalists espousing various versions of so-called “living” constitutionalism include David Strauss and Jack Balkin. See generally STRAUSS, *supra* note 333. *But see id.* at 106 (disavowing “fancy forms of interpretation that would permit us to question the requirement of equal representation in the Senate”). See also JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1129 (2012) (comparing Balkin’s version of living constitutionalism to Strauss’s).

