The Constitutional Underpinnings of Homelessness

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ARTICLE

THE CONSTITUTIONAL UNDERPINNINGS OF HOMELESSNESS

Ann M. Burkhart*

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In Lindsey v. Normet,1 the U.S. Supreme Court upheld a state wrongful detainer statute against tenants who withheld their rent after the Bureau of Buildings of Portland, Oregon declared their house to be uninhabitable.2 In reaching its holding, the Court stated that it was "unable to perceive in [the Constitution] any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the terms of his lease without the payment of rent."3 The Court did not address the separate issue of a lack of any housing, but subsequent federal court decisions have interpreted Lindsey to mean that housing is not a fundamental constitutional right.4

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1. 405 U.S. 56 (1972).
2. Id. at 58–59, 74 (holding that Oregon's Forcible Entry and Wrongful Detainer statute did not violate the Equal Protection Clause of the Fourteenth Amendment).
3. Id. at 74.
Because housing has been denied fundamental right status with its attendant strict scrutiny standard of review, federal and state courts routinely have rejected attempts by the poor to obtain adequate shelter despite the extremely hard facts that these cases often present.

5. See Lindsey, 405 U.S. at 73–74 (refusing to apply a "more stringent standard" to evaluate legislation affecting access to adequate housing).

6. Lindsey is one such case. Donald and Edna Lindsey lived in a rented house in Portland with their children, aged nine, ten, and fourteen. Record from the United States District Court for the District of Oregon at 42. Mr. Lindsey was frequently confined to a wheelchair. Brief for Appellants at 10, Lindsey (No. 70-5045). The Bureau of Buildings declared the house to be unfit for habitation and gave notice that the house would have to be vacated in thirty days unless the owner could show cause. Lindsey, 405 U.S. at 58 & n.2. The defects in the house's physical condition included, but were not limited to: (1) broken windows; (2) the first floor bathroom had only a toilet that did not work because the top half of it was missing; (3) the first floor "bathroom" apparently had been a closet before the toilet was installed; (4) the plaster was crumbling off the bathroom walls; (5) the back steps were missing; (6) the porch supports were tearing loose from the house; (7) the gutters and eaves were riddled with holes; (8) the only light fixture in a child's bedroom had exposed wires; (9) half the plaster in the kitchen ceiling was gone; (10) only two ceiling light fixtures worked; (11) the bedrooms did not have heat vents; (12) a hall heat vent did not have a cover, which created the risk of a child falling into it; and, (13) the front door could only be locked from the inside and, when unlocked, could be pushed open by a cat. Record from the United States District Court for the District of Oregon at 58–61. An expert witness testified that the house was "one of the worst [she had] seen that people are still living in." Brief for Appellants at 10, Lindsey (No. 70-5045). The Lindseys requested that the landlord repair the house, but she did nothing other than to nail a piece of plywood over one of the broken windows. See Record from the United States District Court for the District of Oregon at 58. In another case, relief was denied to tenants of a public housing project who were attempting to enforce the housing authority's contractual obligation to maintain the housing "in good repair, order and condition." Perry v. Hous. Auth., 486 F. Supp. 498, 499–503 (D.S.C. 1980), aff'd, 664 F.2d 1210 (4th Cir. 1981). The court noted:

Living conditions at the George Legare Homes are alleged to be so deplorable that a listing of the complaints is appropriate. Reportedly, families of present tenants have been treated for lead poisoning from the lead paint on the walls. Poor refuse service has caused serious health problems and is responsible for the large number of rats and other vermin that infest the project. Poor grading has resulted in severe erosion, and there is a lack of sidewalks and paved roads. Planted areas have deteriorated because of poor grading. The roofing, now nearly 40 years old, has not had major repair since it was constructed. Water from leaking commodes has damaged the flooring. The crime rate is high, due in part to inadequate security patrols and lighting. A dangerous electrical distribution system threatens tenant safety, while the apartment's supply of hot water and heating are inadequate.

Id. at 500.

The absence of an express constitutional right is unsurprising in light of the political and social conditions during the colonial and Revolutionary eras. In varying degrees, women, African Americans, Native Americans, Catholics, Jews, Baptists, Quakers, the unpropertied, and a variety of other groups were unable to vote or to hold office. Although both estimates and percentages vary among colonies, generally less than ten percent of the population could vote at the end of the colonial era, and the percentage of eligible voters was often much lower.

The disenfranchised also were barred from participating in the drafting and ratification of the U.S. Constitution. As a result, the Constitution reflects the "naked preferences" of those in power. It includes benefits for the propertied and for creditors, such as the Takings, Due Process, and Contract Clauses, but does not provide for the most basic necessities of life. Moreover, those who were politically excluded before the Revolution largely remained so afterward.

The poor were subject to particularly harsh treatment. The Articles of Confederation expressly excluded them from the
privileges and immunities of citizenship. Poor persons could be whipped and jailed for being poor, and the poor of all ages, including the young and the old, could be sold into indentured servitude.

Legislators and judges justified their inhumane treatment of the poor as they did for the slaves; the poor and slaves were regarded as being not fully human, as people who could not think in a rational or independent manner. In 1776, John Adams wrote:

[V]ery few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property . . . . [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.

As a result, the poor had legal and social statuses far more akin to slavery than to free society. Against this backdrop, the absence of a constitutional provision for housing or other essentials is unsurprising, as is the inclusion of provisions addressing the concerns of the propertied and creditor classes. However, the absence of a constitutional right to housing is in marked contrast to the constitutions of a great number of countries that do provide such a right.

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14. Article Four of the Articles of Confederation begins:
   The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states . . . .
   ARTICLES OF CONFEDERATION art. IV (U.S. 1777) (emphasis added).
16. See id. at 70.
17. Id. (first and third alterations in original) (quotation marks omitted) (quoting Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS 376–77 (C. Adams ed., 1864)).
18. See id. at 77–78 (discussing slavery and its intersection with poverty).
19. Approximately forty percent of the world’s constitutions include a right to housing; more than fifty countries have included housing as either an individual right or an obligation of the state. CENTRE ON HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR HOUSING RIGHTS: INTERNATIONAL AND NATIONAL STANDARDS 45–59 (2000) (listing constitutional provisions of various countries that recognize housing rights, including: Argentina, Armenia, Bahrain, People’s Republic of Bangladesh, Belgium, Bolivia, Brazil, Burkina Faso, Cambodia, Colombia, Congo, Costa Rica, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Fiji, Finland, Greece, Guatemala, Guyana, Haiti, Honduras, India, Iran, Italy, Kenya, Republic of Korea, Democratic People’s Republic of Korea, Mali, Mexico, Nepal, Netherlands, Nicaragua, Nigeria, Norway, Islamic Republic of Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Russian Federation, Sao Tome and Principe, Seychelles, Slovenia, South Africa, Spain, Democratic Socialist Republic of Sri Lanka, Suriname, Switzerland, Turkey,
Just as courts have been leaders in creating greater justice for African Americans and other minority groups, they have an important role to play in providing for the general welfare of the poor. The reason is the same for the poor as it has been for other groups accorded enhanced judicial protection. The poor have been largely disenfranchised and have been the subject of invidious discrimination. The poll tax was not finally eliminated until 1966, almost two hundred years after the republic was created, and de jure discrimination against the poor still exists. For example, some states condition voter registration on having a permanent address. Even in those states that do not impose


In addition, 139 countries have ratified the United Nations' International Covenant on Economic, Social and Cultural Rights (CESCR), including Article 11(1), which recognizes a right to housing by stating:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Id. at 14 (quotation marks omitted) (quoting CESCR, Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 7 (entered into force Jan. 3, 1976)). Nations ratifying the CESCR include Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, Honduras, Hungary, Iceland, India, Iran (Islamic Republic of Iran), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Korea (Republic of), Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Mongolia, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, St. Vincent & the Grenadines, San Marino, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tanzania (United Republic of), Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Kingdom, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia (Serbia and Montenegro), Zambia, and Zimbabwe. Id. Although legal rights to housing have not ended homelessness in these countries, they provide a legal foundation for asserting such a right. Id. at 45.

20. Refer to notes 324-44 infra and accompanying text (illustrating the many historical limitations on the poor's inability to participate politically).

21. Refer to note 466 infra and accompanying text (citing the Twenty-Fourth Amendment's prohibition of poll taxes).

22. Refer to notes 569-70 infra and accompanying text (citing to statutes in Louisiana and Virginia that condition voter registration on having a permanent residence).
legal obstacles to the franchise, the unstable living situations of
the homeless create substantial de facto obstacles to voting. As
a result, legislators do not serve the needs of the homeless or
those of their more well-to-do constituents. This is the type of
situation in which courts can provide the necessary check and
balance.

In some states, judicial action has resulted in the recognition
of a legally protected right to shelter. In each of these
jurisdictions, shelter opportunities for the poor increased. Particu-
larly with the rapidly increasing number of homeless
people in this country, the great majority of whom are incapable
of working or are members of the "working poor," courts
justifiably can hold that the general welfare includes protection
from the crime, disease, and the other conditions that are the
traveling companions of poverty.

To demonstrate why courts should recognize a right to
shelter, Part I of this Article examines the political and social
conditions during the colonial era. To assess whether the
Constitution and the newly established American government
improved the legal and social conditions for the poor, Part II
examines conditions during and after the Revolutionary era. As
will be seen, both eras are marked by legislative hostility to and
political exclusion of the poor. Part III demonstrates that this
legacy of political powerlessness continues to disadvantage the
homeless today.

23. Refer to text accompanying notes 533-46 infra (discussing the variety of risks
that the homeless face).

24. See Dennis D. Hirsch, Note, Making Shelter Work: Placing Conditions on an
Employable Person's Right to Shelter, 100 YALE L.J. 491, 507 (1990) (noting the cities
affected by right-to-shelter litigation brought on behalf of the homeless).

25. For example, after consent decrees in two New York cases required the
provision of shelter in New York City, the number of beds available for homeless men
more than doubled, and the number for women increased by more than eight times. Kim
Hopper & L. Stuart Cox, Litigation in Advocacy for the Homeless, in HOUSING
THE HOMELESS 303, 305 (Jon Erickson & Charles Wilhelm eds., 1986). Similarly, three
years after a consent decree obligated Philadelphia to shelter its homeless, the number
of available beds increased from 250 to 5400. See Dennis P. Culhane, The Quandaries of
Shelter Reform: An Appraisal of Efforts to "Manage" Homelessness, 62 SOC. SERV. REV.

26. See Nancy A. Millich, Compassion Fatigue and the First Amendment: Are the
(observing that some estimates indicate the number of homeless increased ten-fold from

27. Id. at 261-65; see also David M. Smith, Note, A Theoretical and Legal Challenge
to Homeless Criminalization as Public Policy, 12 YALE L. & POLY REV. 487, 489 & n.15
(1994) (exposing the myth that all homeless are jobless).
I. THE COLONIAL ERA

The federal Constitution's treatment of property and of the right to shelter can be understood more fully by examining the society that produced it. Colonial America was largely a society of haves and have-nots. Though a middle class came into being, wealth was disproportionately and increasingly concentrated in the hands of the few, while poverty gripped many.

The differences in economic status are attributable in large part to the methods by which the great majority of immigrants came to the colonies. Although some immigrants were motivated by religious persecution, many others came because of famine and economic problems in their home countries. Many shippers lured prospective immigrants by often-false representations concerning the beneficial living conditions and economic opportunities in the New World. Shippers also resorted to kidnapping and other coercive measures to bring Europeans and Africans to the colonies. "From the complex pattern of forces producing emigration to the American colonies one stands out clearly as most powerful in causing the movement of servants. This was the pecuniary profit to be made by shipping them."

Like the shippers, England found forced relocation to be profitable. For example, England used the colonies as a dumping ground for its most economically burdensome residents—criminals and the poor. Deportation to the colonies was the leading criminal punishment in England until the Revolution and was available for a wide variety of crimes. Some English courts sentenced more than half of their convicts to the colonies. The convicts were sent in such large numbers that they constituted approximately one-quarter of the British immigrant population in colonial America.

28. See Quigley, Colonial America, supra note 15, at 42 ("Poverty in the colonies stood side by side with wealth.").

29. See id. (noting that "[b]y the eve of the Revolution, one-fifth of all households were faced with poverty").

31. Id. at 9.
32. Id. at 3–5.
33. Id. at 4; see also A. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775, at 131–32 (1987).
34. EKIRCH, supra note 33, at 17–19; Quigley, Colonial America, supra note 15, at 74–75.
35. See Quigley note 33, at 17–19; Quigley, Colonial America, supra note 15, at 74–75.
36. Id. at 74.
37. Id. at 75.
The crimes punishable by deportation included those associated with poverty, such as begging and vagrancy. Pursuant to the English Poor Laws, many able-bodied poor persons were shipped to America in lieu of imprisonment in England. The English government defined the “able-bodied” to include children. It sent orphaned children and other poor children to the colonies to serve as “apprentices.” From 1619 to 1620 alone, when living conditions in the colonies were particularly harsh, England sent two hundred orphans and other poor children to work in Virginia. The children remained apprenticed until the age of twenty-one or, in some colonies, until the age of eighteen or upon marriage for girls. Although some apprentices were taught a trade, many others worked as mere laborers.

A large impetus for bringing immigrants to the colonies was the need for cheap labor. The Crown had granted huge estates in the colonies to a favored few. Operation of these estates required large amounts of cheap labor. Smaller farmers and plantation owners also needed workers, as did a variety of other commercial activities. In Virginia, approximately 75% of the white immigrants in the mid-1600s were indentured. In the

38. Id. at 74–75.
40. See id. at 95 (noting that the legislative framework differentiated between those who were unable to work and those who were considered able-bodied); Quigley, Colonial America, supra note 15, at 59 (noting that children over twelve were usually not exempted from work).
41. SMITH, supra note 30, at 12.
42. Id.; Quigley, Colonial America, supra note 15, at 59.
43. Quigley, Colonial America, supra note 15, at 59 & n.178; see also DAVID W. GALENSON, WHITE SERVITUDE IN COLONIAL AMERICA: AN AMERICAN ANALYSIS 11-12 (1981) (noting that some of the children were sold as wives).
44. See SMITH, supra note 30, at 16–17 (noting that “[a] child’s indenture might specify that he be given the rudiments of an education or taught a trade”).
45. See Quigley, Colonial America, supra note 15, at 71–72 (“Indentured servants were the principal labor supply for the colonies until they were superseded by slaves in the eighteenth century.”).
46. See HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 83–84 (1980) (noting that “[t]he huge landholdings of the Loyalists had been one of the great incentives to Revolution”).
47. SMITH, supra note 30, at 4–5.
48. Id.
49. See Quigley, Colonial America, supra note 15, at 71–72. Another commentator sets forth the terms of the earliest extant indenture document, which was signed in 1619:

That the said Robert doth hereby covenant faithfully to serve the said S’ Willm, Richard George and John for three years from daye of his landinge in the land of Virginia, there to be employed in the lawfull and reasonable workes and labors of
other colonies, one-half to two-thirds of the white immigrants were indentured. An ongoing stream of immigrants was essential because the death rate in the colonies rivaled England's death rate during the plague. During certain periods, 80% of the immigrant workers in the colonies died of disease and malnutrition.

If a prospective immigrant was unable or unwilling to pay for passage to the colonies, the immigrant could be indentured as a servant. A typical indenture required the servant to serve a master for a period of years, usually two to seven years. As noted previously, children could be indentured for many more years, depending on their age. In exchange, the servant's new master agreed to pay for the servant's transportation to America and to feed, clothe, and shelter the servant during the period of indenture. If the immigrant had not been indentured to a colonist before setting sail, the shipper auctioned off the servant upon arrival in the colonies.

On board, shippers demonstrated greater concern for profits than for passengers. Immigrants were overloaded into ships for the weeks-long journey. If the journey lasted longer than expected, passengers died of starvation.

Smith, supra note 30, at 14–15 (alterations in original) (quoting Virginia Company Records, III, 210–11). By 1636, preprinted indenture forms were used. Id. at 17.

50. Quigley, Colonial America, supra note 15, at 71, 72 & n.269; Zinn, supra note 46, at 46, 47.


52. See id. (noting that "a combination of malnutrition with malaria and typhoid fever" probably contributed to the high death rate); Zinn, supra note 46, at 44.

53. See Smith, supra note 30, at 20–21 (reporting that "[d]uring all of the seventeenth century indentured servitude was practically the only method by which a poor person could get to the colonies").


55. Smith, supra note 30, at 17.

56. Id. at 16–17.

57. Id. at 19; see also Ekirch, supra note 33, at 122–24.

58. Ekirch, supra note 33, at 97–103.

59. Zinn, supra note 46, at 43 ("[s]ervants were packed into ships with the same fanatic concern for profits that marked slave ships.").

60. Id.
ship of indentured servants arrived in Boston from Belfast in 1741, almost half of the passengers had starved to death, and the survivors had eaten six corpses.\textsuperscript{61} Thirty-two apprenticed children died on another ship, and a pregnant immigrant who was having difficulty delivering her baby while in transit was pushed overboard.\textsuperscript{62}

Upon reaching the colonies, the immigrants experienced equally miserable conditions.\textsuperscript{63} Indentured servants were the chattel of their masters.\textsuperscript{64} Married couples and their children each could be sold to a different master.\textsuperscript{65} Women were auctioned off as wives.\textsuperscript{66} Servants could not marry without the master's consent,\textsuperscript{67} and voluntary sexual intercourse between a free person and a servant was illegal.\textsuperscript{68} Indentured servants could be re-sold, taken by the sheriff to satisfy the master's debts, bequeathed by will, and even lost in a card game.\textsuperscript{69} Masters could beat and whip their servants, a right that some colonial legislatures codified.\textsuperscript{70} Courts and juries turned an unimaginably blind eye to other forms of violence against servants. A jury acquitted a woman of murdering her servant though he died because she cut off his toes.\textsuperscript{71} Another master was convicted and then cleared of raping two women servants "despite overwhelming evidence."\textsuperscript{72}

Despite the inhumane treatment of indentured servants, colonial statutes and courts routinely enforced indenture contracts against those who attempted to escape from their masters.\textsuperscript{73} Colonial legislatures provided rewards for the return of runaway servants\textsuperscript{74} and codified terms for the indenture relationship.\textsuperscript{75} Servants that married, had children, or engaged in a trade without their master's consent were punished by an

\begin{footnotes}
\item[61] Id.
\item[62] Id.
\item[63] EKIRCH, supra note 33, at 147–50.
\item[64] SMITH, supra note 30, at 233.
\item[65] RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 321–22 (First Northeastern ed. 1981).
\item[66] SMITH, supra note 30, at 12.
\item[67] See ZINN, supra note 46, at 44; Quigley, Colonial America, supra note 15, at 73.
\item[68] Quigley, Colonial America, supra note 15, at 40 n.19.
\item[69] SMITH, supra note 30, at 233.
\item[70] Id.
\item[71] ZINN, supra note 46, at 44.
\item[72] Id.
\item[73] E. Merrick Dodd, From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts, 43 COLUM. L. REV. 643, 661 (1943); Quigley, Colonial America, supra note 15, at 74.
\item[74] Quigley, Colonial America, supra note 15, at 74.
\item[75] SMITH, supra note 30, at 19.
\end{footnotes}
increase in the period of their indenture. Perhaps the legislatures' and courts' harsh treatment of the indentured is less surprising because servants could not vote or serve on juries.

When the African slave trade began in the colonies in 1619, an indentured servant initially was more economically desirable to a master than an African slave. Buying a servant for seven years cost less than buying a slave for life. Because most servants and slaves did not survive more than seven years in the earlier years of colonization, the servant was a better economic investment. Over time, slaves increasingly replaced indentured servants, suffering unimaginable privations and other abuses during a lifetime of bondage. But, like slavery, the institution of indenture extended well into the nineteenth century.

For those servants who survived indenture, eighty percent remained poor despite the strong demand for labor. Colonial legislatures, controlled by the wealthy, enacted maximum wage laws for free workers to prevent them from charging what the seemingly insatiable labor market would bear. Unable to support themselves on these artificially suppressed wages, many newly freed servants continued laboring for their former masters, now as a tenant rather than as a servant.

Although the substantial majority of the colonies' poor were women, children, the elderly, and the physically or mentally disabled, other laws governing them were even more brutish. Colonial poor laws were based on the English Poor Laws, which provided imprisonment for paupers, beggars, and vagabonds. The colonial poor laws also were molded by the religious belief that economic status was a reflection of moral worth. The Puritans, among others, believed that "[p]overty, like wealth,

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76. Dodd, supra note 73, at 661 (noting that the punishment was generally "five extra days for each day lost"; Quigley, Colonial America, supra note 15, at 74.
77. ZINN, supra note 46, at 44.
78. Id. at 43.
79. BLUM ET AL., supra note 51, at 50.
80. Id.
81. See Quigley, Colonial America, supra note 15, at 77 ("If the evil system of indenture or temporary slavery was one of the major scandals of the colonial period, the system of permanent enslavement was exponentially worse." (quotation marks omitted)).
82. See id. at 74.
83. ZINN, supra note 46, at 46–47.
84. MORRIS, supra note 65, at 56–64 (discussing maximum wage legislation in the colonies).
85. ZINN, supra note 46, at 47.
86. Quigley, Colonial America, supra note 15, at 40–41.
87. See id. at 42–44; see also Quigley, English Poor Laws, supra note 39, at 74.
88. Quigley, Colonial America, supra note 15, at 44.
demonstrated God’s hand, and while riches were proof of goodness and selection, insufficiency was evidence of evil and rejection.”

As an alternative to imprisonment, colonial governments were statutorily authorized to indenture the poor against their will. A town could auction off poor women as household servants and the government could take poor children from their families without their parents’ consent. The children would be apprenticed, placed with another family, or sent to the “House of Employment”—a workhouse. Colonial Rhode Island went a step further. It statutorily authorized towns to apprentice not only poor children, but also children “who were thought likely to need assistance in the future.” In a misguided attempt to shame people out of poverty, the poor in several colonies were required to wear badges, such as a large, red letter “P.” Failure to do so was punished by whipping and hard labor.

As the number of poor increased, the colonies began constructing poorhouses and workhouses. Although poorhouses were intended for those who were unable to work and workhouses for those who could, the distinction often was ignored. “Children, vagrants, drunkards, the sick, and the mentally ill were housed in the same place, often in the same sleeping quarters.” If a workhouse resident did not work as directed, punishments included reduced food rations, whippings, and shackling. For the dubious benefit of living in these conditions, able-bodied inmates were required to pay for their stay.

In every colony, if a poor person fell a step deeper into poverty by incurring a debt, that person could be locked in a

90. Quigley, Colonial America, supra note 15, at 76.
91. Id. at 59; see also MORRIS, supra note 65, at 15.
93. Id. at 60.
94. Id.; see also NASH, supra note 89, at 184–85.
95. Quigley, Colonial America, supra note 15, at 63–64.
96. Id. at 64.
97. Id. at 61.
98. Id. at 62.
100. Quigley, Colonial America, supra note 15, at 63.
101. Id. (noting also that “[t]he housing costs for stubborn children or servants were to be paid by their parents or masters” (quotation marks omitted)).
debtor prison—"a crowded, vermin-infested, disease-breeding jail"—even if the debt was for a small amount.102 While in jail, the debtor was not entitled to publicly-provided food or fuel.103 Instead, the debtor had to rely on family or charity.104 Rather than have a debtor imprisoned, a creditor could force the debtor to work for him or could auction off the debtor to pay the debt.105 Even a debtor's children could be sold to pay the creditor.106 In the Pennsylvania statute authorizing the creation of debtor prisons, the colonial legislature unbelievably states that it was providing this remedy out of "compassion" for debtors.107 As an indication of the widespread use of debtor prisons, five debtors were jailed for each jailed criminal until well into the nineteenth century.108

While debtors and the "able-bodied" poor were treated in such inhumane manners, the colonial poor laws did provide some relief for those who were incapable of working.109 However, the relief was circumscribed in ways that are unconstitutional under modern law. If a person was destitute and family members were unable to provide support, in some colonies the local town, county, or church parish was obligated to do so.110 Often the poor or disabled would be placed in a private home where the owners were paid to feed and shelter them.111 In a Dickensian system, homeowners would bid for the right to shelter the poor, with hapless individuals placed in the home of the person who offered

102. Quigley, Reluctant Charity, supra note 99, at 161–62 (noting the high numbers of people in jail for small debts led New York in 1789 to limit "imprison[ment] for debt to no more than thirty days for those owning less than ten pounds").
103. Id. at 161.
104. Id.
105. Id. at 160–61.
106. See Quigley, Colonial America, supra note 15, at 76 (noting that "if a child of eight, ten or twelve years of age is given for [debt], said child must serve until twenty-one years old" (quotation marks omitted)).
107. Id. The Pennsylvania legislature declared:

Whereas, in compassion to such unhappy persons, as, by losses and other misfortunes, have been rendered incapable to pay their debts, it is provided by an act of assembly of this government, that if any person be imprisoned for debt, or fines, within this province, and have no sufficient estate to satisfy the same, the debtor shall make satisfaction by servitude, according to judgment of the court . . . .

108. Quigley, Reluctant Charity, supra note 99, at 162.
109. See Quigley, Colonial America, supra note 15, at 56 ("English poor laws, dating back to 1388, differentiated between beggars who were 'impotent,' or unable to work, and those who were able-bodied.").
110. Id. at 48.
111. See id. at 57.
to charge the least for this responsibility. Moreover, the obligation to provide even this minimal form of support was limited to that local jurisdiction. If the poor person went to another area, no such duty was owed. Reported cases concerning the obligation to provide support normally involved disputes between jurisdictions as to which one was economically responsible for a particular pauper. Even if a jurisdiction undertook to provide support, a minimum period of residency often was required before relief would be provided, a requirement that clearly is unconstitutional today.

To eliminate any issue concerning the obligation to provide support, some colonies prevented a disabled poor person from moving to that colony unless the current town of residence indemnified it for any support that it might provide. Other towns were even less receptive to new poor residents. If nonresident poor refused to leave when ordered, they could be jailed, whipped, and forcibly removed. Boston "warned out of the city hundreds of sick, weary, and hungry souls who tramped the roads into the city in the eighteenth century." Even

112. See id. at 60-61 (noting that "[t]he first method of assistance was always to look to the family").


114. See id. ("There thus arose a kind of transient poor, shunted from community to community because in place after place they were denied settlement rights.").

115. See, e.g., Town of New Hartford v. Town of Canaan, 52 Conn. 158, 159 (1884) ("This is a suit to recover for supplies furnished one LaFayette Parrott and his wife and minor children, alleged paupers of the defendant town."); Town of Sandlake v. Town of Berlin, 2 Cow. 485, 493 (N.Y. Sup. Ct. 1824) ("We grant the rule that a mandamus issue, requiring [the two towns] to make the apportionment of the expense of these paupers, as they should have done in 1813, but without giving any directions beyond this.").

116. See Rossi, supra note 113, at 18 (noting the length of residence required was "usually one or more years of uninterrupted time").


118. Stefan A. Riesenfeld, The Formative Era of American Public Assistance Law, 43 Cal. L. Rev. 175, 229 (1955) ("The most important innovations were the introduction of the certificate system for persons having their settlement in another town in the province and of the right of a town, compelled to relieve an unsettled pauper too sick for removal, to obtain reimbursement from the town of his settlement.").

119. See Quigley, Colonial America, supra note 15, at 55 ("The able-bodied unemployed were either bound out as indentured servants, whipped and run out of town, or jailed.").

120. Id. at 66 (quoting Gary B. Nash, Race, Class, and Politics: Essays on American Colonial & Revolutionary Society 185 (1986)); see also Rossi, supra note 113, at 17 (noting that widows, children, the disabled, and the elderly were especially vulnerable to being "warned" to leave due to a town's concerns over additional tax burdens). One historian states that "warning out" did not mean eviction but was a method to eliminate the city's obligation to provide the poor relief. Nash, supra note 89, at 185.
mentally ill strangers were driven off with whips. If a poor male returned to New York after having been removed, he could be whipped thirty-nine times; poor women could be whipped twenty-five times.

Not content with rebuffing the poor who wished to become residents, some colonial legislatures also restricted those who merely wished to visit. A nonresident could not stay in a Bostonian's home for more than two weeks without government authorization. In Rhode Island, a guest could not stay with a resident for more than a week without giving written notice to the local governing body; a resident who intentionally allowed a poor person into the colony could be fined $100.

The colonies' treatment of the poor is unimaginably harsh to modern sensibilities. But, to many colonists, poverty, even among the elderly, was viewed as being the result of laziness and profligacy. Even Benjamin Franklin, one of our most respected forebears, thought that the poor laws of the time were too lenient:

[If we provide arrangement for laziness, and support for folly, may we not be found fighting against the order of God and nature, which perhaps has appointed want and misery as the proper punishments for, and cautions against, as well as natural consequences of, idleness and extravagance?]

In stark contrast to the harsh living conditions for the poor in colonial America, the upper class led lives of privilege and power. Many colonies existed in a state of virtual feudalism. In New York, fewer than twelve people owned three-quarters of the land. These landowners dominated every aspect of their tenants' lives. In Virginia, fifty wealthy families controlled the

121. Quigley, Colonial America, supra note 15, at 58.
123. Quigley, Colonial America, supra note 15, at 65.
125. See, e.g., NASH, supra note 89, at 329.
126. Quigley, Colonial America, supra note 15, at 55 n.144 (quotation marks omitted) (quoting Howell V. Williams, Benjamin Franklin and the Poor Laws, 18 SOC. SERV. REV. 77, 78 (1944)); see also NASH, supra note 89, at 328 ("[T]he more public provisions were made for the poor, the less they provided for themselves, and of course became poorer." (quoting Benjamin Franklin)).
128. ZINN, supra note 46, at 206.

[The Anti-Renter Movement of 1839] was a protest against the patroonship system, which went back to the 1600s when the Dutch ruled New York, a system where . . . "a few families, intricately intermarried, controlled the destinies of
plantations, which were worked by slaves and indentured servants.\footnote{129} Seven people owned approximately 1.73 million acres.\footnote{130} In Maryland, the Crown granted individual proprietors unlimited power to govern.\footnote{131}

But the gap between rich and poor was not confined to rural areas. In the cities, the wealthy used their control of trade and politics to create a colonial aristocracy during the seventeenth and eighteenth centuries.\footnote{132} They lived in mansions, wore jewels and fine clothes, and otherwise conspicuously displayed their wealth.\footnote{133} Wealthy families intermarried, creating mercantile and political dynasties.\footnote{134} "By 1760, fewer than 500 men in five colonial cities controlled most of the commerce, banking, mining, and manufacturing on the eastern seaboard and owned much of the land."\footnote{135}

The disparities between rich and poor widened throughout the colonial period as wealth became increasingly concentrated.\footnote{136} By 1774, the wealthiest 10% of men owned 56.4% of the colonies' physical wealth.\footnote{137} In contrast, the poorest 20% owned nothing, and the poorest half owned 2.8%.\footnote{138}

The wealth disparities were particularly pronounced in the cities. For example, in 1687, one thousand Bostonians owned property; five thousand owned none.\footnote{139} The wealthiest 1% of the population owned 25% of the city's property.\footnote{140} By 1770, the

\textit{three hundred thousand people and ruled in almost kingly splendor near two million acres of land."

The tenants paid taxes and rents. The largest manor was owned by the Rensselaer family, which ruled over about eighty thousand tenants and had accumulated a fortune of $41 million. The landowner, as one sympathizer of the tenants put it, could "swill his wine, loll on his cushions, fill his life with society, food, and culture, and ride his barouche and five saddle horses along the beautiful river valley and up to the backdrop of the mountain."

\textit{Id.}

\footnote{129} \textit{Id.} at 47.
\footnote{130} Parenti, \textit{supra} note 127, at 40.
\footnote{131} ZINN, \textit{supra} note 46, at 47.
\footnote{132} \textit{Id.} at 47–48.
\footnote{133} NASH, \textit{supra} note 89, at 257–58, 262–63; ZINN, \textit{supra} note 46, at 48.
\footnote{134} See THOMAS L. PURVIS, COLONIAL AMERICA TO 1763, at 194 (1999) (noting, for example, in New Jersey "53% of all colonial assemblymen elected since 1703 were either the sons, sons-in-law, or grandsons of men who had sat in either house of the legislature").
\footnote{135} Parenti, \textit{supra} note 127, at 40.
\footnote{136} ALICE HANSON JONES, WEALTH OF A NATION TO BE 272 (1980); NASH, \textit{supra} note 89, at 257, 262.
\footnote{137} JONES, \textit{supra} note 136, at 191 tbl.6.15.
\footnote{138} \textit{Id.}
\footnote{139} ZINN, \textit{supra} note 46, at 49.
\footnote{140} \textit{Id.}
wealthiest 1% owned 44% of the property, and the wealthiest 10% owned 66%. In contrast, the proportion of poor adult men in Boston increased from 14% to 29% during that period. Overall, during the eighteenth century, the wealthiest city residents in the colonies increased their share of the colonies’ wealth from 33% to 55%. In contrast, by the time of the American Revolution, 20% of the colonies’ white families lived in poverty, and slaves constituted an additional 20% of the population.

Confronted with such disparities in wealth and power and lacking the vote, the lower classes engaged in organized rebellion from at least the mid-seventeenth century and committed individual acts of violence against their masters. A large early rebellion, Bacon’s Rebellion, erupted in Virginia in 1676. Hundreds of backsettlers, slaves, and white servants banded together to rebel against economic and social inequalities. A large military force was required to suppress the movement.

Workers in colonial cities also began rebelling at least as early as the mid-seventeenth century. Food riots, tenant riots, farmer riots, and worker strikes continued throughout the eighteenth century, despite the enactment of laws to punish rebels and the stationing of militia to prevent uprisings. By 1760, there had been eighteen uprisings aimed at overthrowing colonial governments. There had also been six black rebellions, from South Carolina to New York, and forty riots of various origins. Fearful that the African Americans and Native Americans would join forces against the outnumbered white...
landowners, the Carolinas enacted legislation that prohibited free blacks from entering Indian territory.154

As the American Revolution approached, rebellion by the lower classes against the governing elite continued on a massive scale.155 One particularly powerful rebellion, the Regulator movement in North Carolina, lasted from 1766 to 1771.156 It united thousands of white farmers against the ruling elite.157 In three counties alone, between six thousand and seven thousand white farmers from a population of eight thousand supported the movement.158 In just one of many such instances, seven hundred supporters forcibly freed two Regulator leaders from jail.159 The protesters were rebelling against political oppression, including disproportionately high taxes on the poor.160

Not even the Revolution stopped the rebellions. The lower classes continued fighting the upper classes over high prices and their hoarding of food and other necessities.161 In response to inequalities in the distribution of confiscated Loyalist properties and in military pay, many tenants stopped paying rent.162 One rebel even argued that the lower classes would have been better off if the Revolution had failed: "[I]t was better for the people to lay down their arms and pay the duties and taxes laid upon them by King and Parliament than to be brought into slavery and to be commanded and ordered about as they were."163

Why would colonial governments treat the lower classes so harshly that they would resort to armed rebellion? Although the reasons differed among the colonies, the differences were largely only a matter of degree. As described above, one important reason was that many civic and religious leaders believed poverty was a sign of a defective character and even a form of divine judgment.164 Others believed that a class-based hierarchy was inevitable, presumably because they had emigrated from rigidly

154. Id. at 54.
155. See, e.g., Nash, supra note 89, at 296–98, 301–02.
156. Zinn, supra note 46, at 63.
157. Id.
158. Id. at 64–65.
159. Id. at 64.
160. Id. at 63–64.
161. Id. at 79, 81.
162. Id. at 84–85.
163. Id. at 81; see also Parenti, supra note 127, at 43 ("During the 1780s, the jails were crowded with debtors. Among the people, there grew the feeling that the revolution against England had been fought for naught."). One historian describes the Revolution as a movement to challenge upper-class control of government. Nash, supra note 89, at 382.
164. Refer to text accompanying notes 89, 126 supra (discussing Puritan views of the poor and Benjamin Franklin’s view of poor laws).
hierarchical countries. "Most persons in the provincial period believed in a hierarchical ordering of the population and had no concept of the modern democratic theory of equality of men. They took for granted a stratified society in which deference to one's betters was the accepted norm." Both the government and the churches reinforced this view. For example, in the 1630s, the governor of Massachusetts Bay Colony stated that "in all times some must be rich, some poore, some highe and eminent in power and dignitie; others meane and in subjeccion." This outlook continued throughout the colonial period as evidenced by a sermon given over one hundred years later: "[T]is no ways fitting that men cloathed with honor and power should be brought down to a level with vulgar people."

Another clear impetus for the colonies' treatment of the poor was the punitive English Poor Laws. Some colonies' laws expressly incorporated or otherwise referred to the English Poor Laws. However, as harsh as the English Poor Laws were, the colonies' laws became progressively harsher during the colonial era.

Substantial if not dominant reasons for this legal evolution were the increasing restrictions throughout the colonial era on suffrage and the ability to hold office. Colonial laws limited these political powers to the wealthiest few percent of the population. These powers also were limited by a variety of other factors, including race, gender, and religion. Although the king was a strong force behind the adoption of these restrictions, the groups benefited by them also were strong proponents.

165. ROBERT J. DINKIN, VOTING IN PROVINCIAL AMERICA: A STUDY OF ELECTIONS IN THE THIRTEEN COLONIES, 1689-1776, at 55 (1977) [hereinafter DINKIN, PROVINCIAL AMERICA]; see also NASH, supra note 89, at 8.

166. DINKIN, PROVINCIAL AMERICA, supra note 165, at 55; PURITAN POLITICAL IDEAS 1558-1794, at xvi–xvii (Edmund S. Morgan ed., 1965); NASH, supra note 89, at 7.

167. DINKIN, PROVINCIAL AMERICA, supra note 165, at 55 (quoting CHARLES CRAUNCY, CIVIL MAGISTRATES 30-31 (1747)).

168. "English Poor Laws were the single most important source for the development of early American legislation addressing poverty. While individual economic and social circumstances shaped each colony's response to its poor, the English Poor Laws were usually the frame of reference for local action." Quigley, Colonial America, supra note 15, at 42–43 (footnote omitted); see also MADELEINE R. STONER, THE CIVIL RIGHTS OF HOMELESS PEOPLE: LAW, SOCIAL POLICY, AND SOCIAL WORK PRACTICE 4 (1995) (noting that in Colonial America, sanctions imposed on "involuntary servants" followed the British model).


170. See MCKINLEY, supra note 8, at 484–85 (noting that "in the south and in New England the holding of land came to be the sole qualification" for the right to vote).

171. Id. at 473.

172. See id. at 485.
The restrictions varied among the colonies, but one universal prerequisite was property ownership—virtually always land and often in a substantial amount.\(^{173}\) The king directed the colonial governors to condition suffrage on land ownership because it was "more agreeable to the custome of England."\(^{174}\) But colonial landowners also favored the restriction and propounded two justifications for limiting political rights in this way.

The first justification focused on personal qualities and reflected the upper class's mistrust and negative stereotyping of persons in the lower classes. For example, when England proposed expanding the suffrage to owners of smaller parcels of land in West Jersey in 1705, the large landowners objected that expanding the suffrage would "put the election of Representatives into the meanest of the people who being impatient of any Superiors, will never fail to choose such from amongst themselves as may oppose us, and destroy our Rights."\(^{175}\) Similarly, when Virginia shifted from universal suffrage to a landownership requirement in 1670, a stated purpose was to prevent the lower classes from causing disorder at the polls. "[T]he usuall way of chuseing burgesses by the votes of all persons ... who haveing little interest in the country doe ofner make tumults at the election to the disturbance of his majesties peace...."\(^{176}\)

In addition to reflecting negative stereotypes of the lower classes, the previous quotation also illustrates the second justification for excluding them from the vote and from elected office. Landowners argued that a person who did not own land was less tied to the community and, therefore, would not act in its best interests.\(^{177}\) The large landowners in West Jersey also argued in 1705 that reducing the requirements for suffrage would cause the assembly to "be packed of strangers and beggars, who will have little regard to the good of the country, from whence they can remove at pleasure, and may oppress the landed men with heavy taxes."\(^{178}\) Of course, this statement ignores a principal reason for universal suffrage in earlier colonial times—

\begin{enumerate}
\item See id. at 33, 484.
\item Id. at 33–34 (quoting 2 WILLIAM WALLER HENING, STATUTES AT LARGE OF VIRGINIA 424–25 (1823)).
\item Id. at 253–54.
\item Id. at 30–31 (quoting 2 HENING, supra note 174, at 280); see also NASH, supra note 89, at 273, 297; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 27 (1992).
\item MCKINLEY, supra note 8, at 253–54.
\item Id. (quotation marks omitted).
\end{enumerate}
to prevent taxation without representation—\textsuperscript{179} and, in later years, disproportionate taxation of the lower classes was a substantial trigger for a great deal of civil unrest.\textsuperscript{180}

Beyond these theoretical justifications for restricting the suffrage, practical considerations undoubtedly influenced legislators as well. For instance, in 1666, the tri-colony council for Maryland, North Carolina, and Virginia proposed reducing tobacco production because tobacco prices had fallen.\textsuperscript{181} The lower house of the Maryland legislature, which consisted of elected members, objected because unpropertied free workers would have to leave Maryland to find work.\textsuperscript{182} The tri-colony council and the upper house, whose members were appointed by the colonial proprietor,\textsuperscript{183} responded that the landowners' welfare was more important, because the landowners "are the Strength & only Strength of this Province, not the Freemen."\textsuperscript{184} The lower house relented.\textsuperscript{185} Despite its capitulation, the colonial government revoked unpropertied freemen's suffrage rights four years later and, four years after that, prohibited them from serving on grand juries.\textsuperscript{186} Another member of the tri-colony council, Virginia, also prohibited unpropertied freemen from serving on juries.\textsuperscript{187}

The property requirements for seeking office often further concentrated political power in the upper class. Several colonial legislatures required greater property holdings to run for office than to vote.\textsuperscript{188} For example, Georgia's 1761 election law limited the vote to owners of at least fifty acres, whereas ownership of at least five hundred acres was required to run for office.\textsuperscript{189} In 1727,

\begin{itemize}
  \item \textsuperscript{179} See, e.g., id. at 31–32 (noting the Virginia colonists' strong concern with the right of representation).
  \item \textsuperscript{180} See, e.g., Marjorie E. Kornhauser, Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America, 50 Buff. L. Rev. 819, 844 (2002) (commenting that "taxes were frequently a major precipitating factor of protest").
  \item \textsuperscript{181} Mckinley, supra note 8, at 61.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} See generally Purvis, supra note 134, at 193 ("In most colonies, the only election in which voters could participate was for a candidate to sit in the legislature's lower house.").
  \item \textsuperscript{184} Mckinley, supra note 8, at 61 (quoting Archives of Maryland, Proceedings and Acts of Assembly, 1666–1676, at 47 (1883)).
  \item \textsuperscript{185} Id. at 62.
  \item \textsuperscript{186} Id. at 62–63.
  \item \textsuperscript{187} Id. at 35 (noting that freeholders could serve on juries if they "possessed one hundred pounds sterling real and personal estate").
  \item \textsuperscript{188} Purvis, supra note 134, at 193 ("In most colonies, any voter could run for office, but five of the thirteen colonies required their assemblymen to possess a significant amount of wealth.").
  \item \textsuperscript{189} Id.; Willi Paul Adams, The First American Constitutions 307 (Rita Kimber & Robert Kimber trans., 1980).
\end{itemize}
New Hampshire's election law limited the vote to those who owned land worth at least £50 but required political candidates to own land worth at least £300. North Carolina's 1760 election law required ownership of fifty acres to vote and one hundred acres to be a candidate. New Jersey's 1709 election law required ownership of either one hundred acres of land or real and personal property worth £50 to vote, whereas candidacy required one thousand acres of land or a total estate worth £500. Moreover, in all but two colonies, members of the legislature's upper house were not even elected; instead, they were appointed.

In addition to the property requirements, a variety of other factors effectively prevented the lower classes from holding legislative office. Legislators were not paid and often did not even receive complete reimbursement for expenses incurred to attend legislative sessions. Legislative sessions could last for as long as three months. Only the well-to-do could afford to be away from their plantation or other source of income for such an extended period of time. As a result, the wealthiest two percent of the colonists comprised the majority in many colonial legislatures, and the wealthiest ten percent held all but a handful of the legislative seats.

The exclusionary effects of the colonial election laws' property requirements were compounded by the poll tax that existed in some colonies. But ownership requirements and poll taxes were only two of the exclusionary devices that limited political participation. As was true for the ownership requirement, some additional criteria were based on self-serving stereotypes. Women, of course, were denied the vote in every

190. Adams, supra note 189, at 293.
191. Id. at 304.
192. Id. at 299.
193. See Purvis, supra note 134, at 193.
194. Dinkin, Provincial America, supra note 165, at 64.
196. See id. ("A man of average means would have found it virtually impossible to afford the personal sacrifice of time and money, especially if called to the assembly at planting time or harvest time . . . .").
197. Dinkin, Provincial America, supra note 165, at 60 ("Most of the persons elected were large landowners, though about one-third were lawyers, merchants, or members of other professions."); Purvis, supra note 134, at 194 tbl.8.7 (listing background characteristics of legislators from South Carolina, Maryland, and New York circa 1763).
198. See, e.g., McKinley, supra note 8, at 327; Encyclopedia of Colonial and Revolutionary America 412 (John Mack Faragher ed., 1990) (discussing "Suffrage").
colony with rare exception. John Adams stated a prevalent attitude about women's political participation:

Their delicacy...renders them unfit for practice and experience in the great businesses of life, and the hardy enterprises of war, as well as the arduous cares of state. Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares.

This perception was so common among legislators that election laws in only four colonies expressly excluded women. When a woman did vote or attempt to vote, the government took decisive action. For example, a South Carolina election was declared void in 1733 because a woman tried to vote.

African Americans and Native Americans were generally, but not universally, denied the right to vote. Some recorded instances exist of free blacks and Indians voting during the colonial era. However, even when not legislatively denied the vote, local custom may have accomplished the same end. In explaining why blacks were disenfranchised in Virginia, the governor said that, until blacks were "educated and reformed," a "decent Distinction" had to be maintained "between them and their Betters." In any event, slaves would have been unable to satisfy the property ownership requirements.

Like the slaves, white servants could not vote in most colonies. A servant could vote in Connecticut only after meeting a variety of requirements, such as being a man of "Honest Conversation." The poor were disenfranchised because, as described earlier, they were deemed to have no "judgment of their own" and to be as dependent "as women are upon their husbands, or children on their parents.

199. See McKinley, supra note 8, at 473 ("Lady Moody on Long Island and Mrs. Margaret Brent in Maryland remain the only women who are shown by the records to possess even a desire for political privileges.").
201. McKinley, supra note 8, at 35. Virginia, South Carolina, Georgia, and Delaware specifically limited voting to males. See id. at 473.
202. Mary Patterson Clarke, Parliamentary Privilege in the American Colonies 151 & n.39 (1943).
203. See Dinkin, Provincial America, supra note 165, at 32.
204. See id. at 32–33 (noting that twenty-nine Indians had voted in a 1763 Stockbridge, Massachusetts election and that until 1723 free blacks were permitted to vote in Virginia).
205. Id. at 33 (quoting Governor William Gooch).
206. Morris, supra note 65, at 505.
207. Refer to text accompanying note 17 supra (quoting John Adams).
The final class that could not vote because of concerns about character and judgment was the young. In two colonies, voters had to be at least twenty-four years old. In the other colonies, twenty-one was the minimum age to vote. The stated justifications for the age restrictions were the same as those for excluding women, African Americans, Native Americans, and servants. John Adams explained that: “Children . . . have not judgment or will of their own.” The age limit was intended to “fix upon some period in life, when the understanding and will of men in general, is fit to be trusted by the public.”

Unlike the other disenfranchised groups, however, this characterization of the young generally is based on fact, rather than on stereotype. But the similar justifications advanced for disenfranchising these groups strongly reflects the caricatures that underlay their legal treatment in many ways beyond the election laws.

Although the gender, race, and wealth restrictions were based on false assumptions about the abilities of members of those classes, every colony’s voting laws disenfranchised a variety of other groups precisely because they exercised independent judgment. Although many colonists left England because of religious and political persecution, these same colonists denied the right to vote to people who had different religious beliefs or who might have different ideas concerning government.

Religious restrictions on the franchise existed throughout the colonies to varying degrees. People who did not belong to the locally dominant church “were often considered to be a threat

208. See DINKIN, PROVINCIAL AMERICA, supra note 165, at 29–30 (noting that age was one factor used “to determine a voter’s capacity to take an intelligent interest in public matters”).

209. Id. at 30 (observing that in the late seventeenth century, both Massachusetts and New Hampshire briefly raised the voting age to twenty-four).

210. See MCKINLEY, supra note 8, at 474 (claiming the twenty-one-year age requirement was nearly “universal” in the colonies); see also DINKIN, PROVINCIAL AMERICA, supra note 165, at 30 (speculating that even if each colony did not “establish a minimum age in its election laws,” it was probably “customary” to restrict the right to vote to males over the age of twenty-one).

211. See DINKIN, PROVINCIAL AMERICA, supra note 165, at 30 ("The rationale for barring young men [from voting] was similar to that employed in rejecting women.").

212. Id.

213. Id. (quotation marks omitted) (quoting Letter from John Adams to James Sullivan, supra note 17, at 377).

214. See id. at 29 (asserting that some groups were excluded from the right to vote because they “could not be counted upon” to benefit the public interest).

215. See id. at 31 (observing, for example, that Anglican colonies frequently prohibited Quakers, Baptists, and Presbyterians from voting).

216. See id. at 31–32 (discussing the various voting restrictions imposed on members of different religious groups).
to the existing government as well as to the dominant faith.\textsuperscript{217} Ironically, the Puritans were the most restrictive.\textsuperscript{218} During the seventeenth century, only Puritans could vote in Massachusetts in order to maintain the "Puritan theocracy."\textsuperscript{219} The restrictions on religious practices in Massachusetts were stricter than those the Puritans had fled in England.\textsuperscript{220}

Decades of royal pressure were required to eliminate the religious voting restriction. The Crown was disturbed that an English colony denied political rights to Church of England members and that restrictions on religious practices were more stringent in Massachusetts than in England.\textsuperscript{221} In 1662, King Charles II ordered the Puritans to eliminate the religious restriction on the vote.\textsuperscript{222} After two years of royal pressure, the Puritans purported to eliminate the restriction but, in reality, did not do so.\textsuperscript{223} In lieu of an express religious requirement, the vote was limited to men who were (1) at least twenty-four years old, (2) admitted as an inhabitant by a town in the colony, (3) a householder, (4) a freeholder, (5) a property taxpayer, (6) religiously orthodox, (7) "not vicious," (8) in possession of "a certificate from all the ministers of his town proving his religious and moral qualifications" and of a certificate from a majority of the local government officials confirming his status as a freeholder and taxpayer, and (9) accepted by a majority vote of the general court.\textsuperscript{224} Understandably, the King and his commissioners were not amused. The commissioners were particularly appalled that "those who came to America to establish liberty of conscience... later denied it to others, in order that their own enjoyments might not be disturbed."\textsuperscript{225}

In 1691, after sixty years of the Puritans' monopolistic control of government and decades of royal pressure, the

\textsuperscript{217} Id. at 31.

\textsuperscript{218} See id.

\textsuperscript{219} See MCKINLEY, supra note 8, at 322–23 (explaining that the king's order to abolish "the religious qualification upon the suffrage" in Massachusetts met with great resistance from the colonists); see also DINKIN, PROVINCIAL AMERICA, supra note 165, at 31 (noting that only "bona fide" members of the Puritan faith were allowed to vote).

\textsuperscript{220} See MCKINLEY, supra note 8, at 337.

\textsuperscript{221} See id. at 322–23 ("The king deemed it 'very scandalous' that any man should be debarred from the practice of religion according to English laws by those who had been given liberty to adopt what profession they pleased in religion... ").

\textsuperscript{222} Id. at 322.

\textsuperscript{223} See id. at 322–25 (contrasting King Charles II's order to abolish the religious requirements for suffrage with the colony's implementation of that order, which was "so famous for its formal compliance with the king's letter, and for its practical disobedience of his commands").

\textsuperscript{224} Id. at 324–25.

\textsuperscript{225} Id. at 326.
religious restriction on the franchise was eliminated in Massachusetts. However, religious restrictions continued in other colonies. Catholics were the most politically disenfranchised. They were barred from voting in many colonies. For example, Maryland, which had the largest Catholic population, disenfranchised them to prevent "the Discouragement and Disturbance of his Lordship's Protestant Government." After 1740, Parliament prohibited Catholic aliens from becoming citizens in any colony.

The political rights of the Jews were almost as restricted as those of Catholics. Seven colonies denied Jews the vote, and Rhode Island, which had a history of religious toleration, prevented Jews from even becoming naturalized citizens after 1762. A probable reason for this extreme measure was the competing political factions' fear that the Jews would side with the opposition. Like the restrictions imposed on Catholics, the restrictions placed on Jews also were designed to protect the Protestant faith. And like the restrictions imposed on Catholics, the political restrictions for Jews continued through the Revolution.

Catholics and Jews had long histories of persecution even before the colonies were established. But several colonies, in addition to Massachusetts, demonstrated hostility or fear for even less established religions. Many colonies disenfranchised Quakers and Baptists. Some colonies disenfranchised Presbyterians. In 1680, New Hampshire disenfranchised everyone except Protestants.

226. See id. at 337 (describing the change from suffrage based on religion to suffrage based on "the ownership of wealth").
227. Id. at 475-76 (surveying the restrictions imposed on members of different faiths in the various colonies after 1691).
228. Id. at 476 (claiming that "the sect which received the most liberal share of political persecution was the Roman Catholic").
229. Id.
230. DINKIN, PROVINCIAL AMERICA, supra note 165, at 32 (quotation marks omitted).
231. MCKINLEY, supra note 8, at 475.
232. Id. at 476.
233. DINKIN, PROVINCIAL AMERICA, supra note 165, at 32.
234. Id.
235. Id.
236. MCKINLEY, supra note 8, at 215. However, it is likely that the enforcement of statutes restricting suffrage was left to the discretion of local officials, so it is difficult to determine the actual extent to which Jews were denied the right to vote. Id.
237. Id. at 475-76.
238. DINKIN, PROVINCIAL AMERICA, supra note 165, at 31 (noting that Presbyterians were frequently barred from voting in the Anglican colonies).
239. MCKINLEY, supra note 8, at 379.
Disenfranchising religious groups was only one means by which the English colonists attempted to cement their control of political power. Despite their status as immigrants or descendants of immigrants, the English colonists also disenfranchised or attempted to disenfranchise immigrants from countries other than England, often in response to their political activities.\textsuperscript{240} With limited exception, only people born or naturalized in England or naturalized in a colony could vote or hold office in that colony.\textsuperscript{241} English colonists in South Carolina protested political activities by French Huguenots who settled in South Carolina at the end of the seventeenth century.\textsuperscript{242} Although German immigrants constituted one-third of Pennsylvania's population,\textsuperscript{243} English colonists attempted to revoke their franchise when they supported the Quakers.\textsuperscript{244} A Pennsylvania minister justified the disenfranchisement movement on the ground that the Germans were "ignorant, proud, stubborn Clowns."\textsuperscript{245} Pennsylvanians also attempted to deprive Scotch-Irish immigrants of political power because they were considered "lawless and shiftless."\textsuperscript{246} New York subjected Dutch immigrants to similar treatment because they were characterized as people of "[i]gnorance & mean spirit."\textsuperscript{247}

Residence requirements strongly reinforced the exclusionary effects of the citizenship and religion requirements. By the end of the colonial period, at least seven colonies had residence requirements to vote.\textsuperscript{248} Delaware and Pennsylvania required two years of residence as a condition to vote.\textsuperscript{249} New Jersey and South

\textsuperscript{240} See DINKIN, PROVINCIAL AMERICA, supra note 165, at 33–34 (surveying voting restrictions imposed by the various colonies on immigrants from countries other than England).
\textsuperscript{241} See id. (noting that the election laws of New Hampshire, Pennsylvania, North Carolina, and Delaware explicitly restricted voting rights to persons born in Great Britain or "naturalized in England or in [a] particular colony," whereas "[e]lsewhere in America, the barring of non-British subjects was merely customary").
\textsuperscript{242} Id. at 34.
\textsuperscript{243} Id. at 52.
\textsuperscript{244} Id. at 34.
\textsuperscript{245} Id. (quoting WILLIAM SMITH, A BRIEF STATE OF THE PROVINCE OF PENNSYLVANIA 40 (1755)).
\textsuperscript{246} Id. at 52; WILLIAM S. HANNA, BENJAMIN FRANKLIN AND PENNSYLVANIA POLITICS 3 (1964).
\textsuperscript{247} DINKIN, PROVINCIAL AMERICA, supra note 165, at 53.
\textsuperscript{248} See MCKINLEY, supra note 8, at 477 (noting that "bly the Revolutionary days a residence within the county was required" in order to vote in Maryland, North Carolina, South Carolina, Georgia, Pennsylvania, Delaware, and New Jersey).
\textsuperscript{249} DINKIN, PROVINCIAL AMERICA, supra note 165, at 35.
Carolina required a one-year residency.\textsuperscript{250} Georgia and North Carolina required a six-month residency.\textsuperscript{251}

Even if a potential voter satisfied all the objectively stated requirements concerning wealth, gender, race, age, religion, citizenship, and residency, he still could be denied the vote based on \textit{subjective standards} in several colonies.\textsuperscript{252} Connecticut conditioned citizenship on "peaceable and honest conversation."\textsuperscript{253} Unless affiliated with a church, a person could become a citizen of Massachusetts only if he was "not vicious in life," as was also the case in New Hampshire.\textsuperscript{254} Plymouth denied the vote to "lyers," "drunkards," "swearers," and those refusing to take an oath of "fidelity to the government."\textsuperscript{255} Rhode Island required "civil conversation," "obedience to the civil magistrate," and a compulsory oath by each citizen that he would not bribe or use other unethical tactics in elections.\textsuperscript{256} With such ambiguous standards, election officials had a great deal of discretion in determining who could vote—and they were not reluctant to use it.\textsuperscript{257}

As a result, only a small portion of the population could vote. Although the paucity and incompleteness of records from the colonial era render precision and comprehensiveness unobtainable goals, the extant records reveal that a uniformly small portion of the population was qualified to vote. For example, in 1662, only about 7% of the population of Connecticut could vote.\textsuperscript{258} In Massachusetts, approximately 5% of the population could vote in 1670, 6.7% in 1679, and perhaps only 3% in 1687.\textsuperscript{259} In New Hampshire, approximately 5% of the population could vote in 1679.\textsuperscript{260} In Pennsylvania, about 8% of the

\textsuperscript{250} MCKINLEY, supra note 8, at 477.
\textsuperscript{251} DINKIN, PROVINCIAL AMERICA, supra note 165, at 35.
\textsuperscript{252} In contrast, Virginia disenfranchised anyone who was shipped to the colonies as a convict, MCKINLEY, supra note 8, at 447, and South Carolina disenfranchised sailors. \textit{Id.} at 148.
\textsuperscript{253} \textit{Id.} at 387.
\textsuperscript{254} \textit{Id.} at 324, 374.
\textsuperscript{255} \textit{Id.} at 341-42, 346-47.
\textsuperscript{256} \textit{Id.} at 448, 459.
\textsuperscript{257} See DINKIN, PROVINCIAL AMERICA, supra note 165, at 47 (asserting that "on some occasions the number of people permitted to poll depended less on the provisions of the election laws than on the discretion of the officials present"); see also MCKINLEY, supra note 8, at 482 (noting that certain voting requirements "virtually left the control of the freemanship with the body of existing freeman in each town").
\textsuperscript{258} See MCKINLEY, supra note 8, at 418 ("In other words, only one person in thirteen of the new population was admitted to the freemanship.").
\textsuperscript{259} See \textit{id.} at 327-28, 334-35 (basing these numbers on various writers' estimates and existing tax lists from the era).
\textsuperscript{260} \textit{Id.} at 373.
rural population could vote, but only 2% of the residents of Philadelphia held that right. In Rhode Island, the percentage ranged from around 9% to about 14% in 1708, which was a "remarkably high proportion."

As small as these numbers are, the percentage of people who actually voted generally was far smaller. For example, in the years immediately before the Revolution, only 2% of Connecticut's population voted and only 3–4% of the residents of Boston did so. In 1692, only 1.7% of the Massachusetts population voted. In other Massachusetts elections, 2% of the population voted, and from 1780–1786, less than 3% voted. Against this backdrop, the nation was formed.

II. AFTER THE REVOLUTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ... "Democracy" is "the worst . . . of all political evils."

Despite the inclusionary language of the Declaration of Independence, the second statement, by Constitutional Convention delegate Elbridge Gerry, is more reflective of the Revolutionary era because most people remained unable to vote. Every state, except South Carolina, limited the franchise to property owners. Even without the ownership requirement,
South Carolina precluded its poorest citizens from voting by limiting the franchise to taxpayers.271

Like the states, the national government demonstrated from its inception an intent to exclude the poor from exercising political rights. The Articles of Confederation deferred to the states' restrictive franchise laws.272 But the Articles went even further and expressly excluded paupers from the privileges and immunities of citizenship.273

When the constitutional Framers convened in Philadelphia in 1787, their stated purpose was merely to amend the Articles of Confederation.274 The question whether to hold the convention had not been put to a popular vote, and the delegates were not chosen by the electorate, but by the state legislatures.275 Unsurprisingly, therefore, the constitutional delegates were virtually all members of the upper classes, and many had been born into their station in life.276

The uniformity of the Framers' economic status had a predictable impact on the Constitution. It provides protections for property rights and limits the political powers of the poor. In contrast, it does not provide for the needs of the lower classes. Instead, those provisions focused on the poor are designed to suppress insurrections, to prohibit state debtor relief laws, and to prevent property redistributions.277

Ironically, in The Federalist No. 10, James Madison recognized that legislators cannot escape acting in their self-interest:

271. Id.
272. See ARTICLES OF CONFEDERATION art. IV (U.S. 1777) (entitling the free person's privileges to those given by the states).
273. Id. (providing that "the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states" (emphasis added)).
274. Parenti, supra note 127, at 41.
275. BEARD, supra note 266, at 239; see also John F. Manley, Class and Pluralism in America, in THE CASE AGAINST THE CONSTITUTION 107 (John F. Manley & Kenneth M. Dolbeare eds., 1987).
276. See Parenti, supra note 127, at 41.
277. See U.S. CONST. art. I, § 9, cl. 2 (providing that the writ of habeas corpus may not be suspended except in case of rebellion); id. § 10, cl. 1 (prohibiting the states from making any legal tender except gold and silver coin); see also Mark V. Tushnet, The Constitution as an Economic Document: Beard Revisited, 56 GEO. WASH. L. REV. 106, 107–08 (1987) (noting that the Constitution "disab[led] state governments from adopting debtor relief legislation"). At least two delegates, Luther Martin and John Francis Mercer, opposed ratification of the Constitution based in large part on its treatment of the poor. BEARD, supra note 266, at 127, 131–32 (noting that Martin "was always more or less in sympathy with poor debtors," and thus bitterly opposed the adoption of the Constitution because he was "unwilling to preclude altogether the issue of paper money," while Mercer's sympathies rested "with the popular party in Maryland" in spite of his apparent wealth).
No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other.\textsuperscript{278}

However, Madison made this statement when arguing against granting political power to the poor.\textsuperscript{279} Apparently, he failed to perceive that the Framers had acted in their own self-interest, whether consciously or unconsciously.

A key concern for the Framers was physical safety from insurrections of the poor. The convention began three months after the Massachusetts militia suppressed the most recent rebellion of "desperate debtors," known as Shays' Rebellion.\textsuperscript{280} General Henry Knox, a veteran of George Washington's army and founder of The Order of the Cincinnati, wrote to Washington concerning Shays' Rebellion:

This dreadful situation has alarmed every man of principle and property in New England. They start as from a dream, and ask what has been the cause of our delusion? what is to afford us security against the violence of lawless men? Our government must be braced, changed, or altered to secure our lives and property.\textsuperscript{281}

The state militia had suppressed the Rebellion, but only after many months.\textsuperscript{282} Therefore, many constitutional delegates believed that a national military was necessary to provide greater security.\textsuperscript{283} Additionally, the slaveholders, including those


\textsuperscript{279} See Parenti, supra note 127, at 46–47 (discussing Madison's argument that the "propertyless majority" should not be allowed to unite to overthrow the "established economic order").

\textsuperscript{280} BEARD, supra note 266, at 30; Parenti, supra note 127, at 43 (observing that Shays' Rebellion "confirm[ed] [the constitutional delegates'] worst fears about the populace"); Tushnet, supra note 277, at 107–08 (discussing the influence of Shays' Rebellion on the development of the Constitution).

\textsuperscript{281} BEARD, supra note 266, at 58–59 (quotation marks omitted).

\textsuperscript{282} See Tushnet, supra note 277, at 107 (noting that the Rebellion was eventually "put down by state efforts").

\textsuperscript{283} See Parenti, supra note 127, at 46 ("The framers believed the states acted with
who were delegates, wanted a strong national military to suppress slave uprisings. As a result, Article I, Section 8 of the Constitution authorizes Congress to create a national militia and to use that militia to suppress insurrections.

To increase certainty and stability for creditors, the Framers also wanted to prevent states from enacting debtor relief legislation. In response to an economic depression following the Revolution, some states had adopted laws designed to prevent or to delay farm foreclosures, debt imprisonment, and other actions against debtors. For example, the laws extended the time for repaying a debt or authorized payment with paper money or with goods, rather than with specie.

Although the great majority of the lower class lived at a subsistence level during this time, Madison denounced these laws as being “improper” and “wicked.” Other leaders demonstrated similar contempt or even fear. Chief Justice Marshall described the debtor relief laws as being “indulgent.” General Knox anxiously declared that the debtor relief proponents were “determined to annihilate all debts public and private.” Therefore, to prevent states from continuing to intervene on behalf of debtors, Article I, Section 10 of the Constitution provides: “No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts,” including debt contracts.

In contrast to these denials of protection for the poor, the Constitution provided substantial benefits for the propertied.

insufficient force against popular uprisings, so Congress was given the task of ‘organizing, arming, and disciplining the Militia’ and calling it forth, among other reasons, to ‘suppress Insurrections.’

284. See Beard, supra note 266, at 30 (“The southern planter was also as much concerned in maintaining order against slave revolts as the creditor in Massachusetts was concerned in putting down Shays’ ‘desperate debtors.’”).


286. See Tushnet, supra note 277, at 107–08 (noting that Article I, Section 10 of the Constitution “disabl[ed] state governments from adopting debtor relief legislation” by preventing the states from coining money or from making laws which impair contractual obligations).


288. See Tushnet, supra note 277, at 107.

289. See Parenti, supra note 127, at 42–43 (discussing the economic plight of the common people).


291. Beard, supra note 266, at 298.

292. Id. at 58–59 (quotation marks omitted).

One benefit was for the holders of public securities. The national government had issued securities to finance the war and its other operations. The great majority of Framers held large amounts of the securities. Although some had purchased the securities to support the war, many others were speculators who bought them at substantially depreciated prices when the government was unable to pay them on schedule. Many speculators also purchased from soldiers who had been paid in scrip, rather than money, and had been forced by necessity to sell them at deeply discounted rates. A provision in the Constitution guaranteed that the new national government would pay the full face value to the holders, which provided an obvious and substantial benefit. Article VI provides that all national debts contracted before the Constitution's enactment would be enforceable against the new government, and Congress was given the power to tax to meet those obligations.

A second benefit that the Constitution provided was for western land speculators, including George Washington, Benjamin Franklin, Alexander Hamilton, Robert Morris, and several other framers. The speculators had acquired the lands at significantly depressed prices because of the weak central government, an inadequate military, and ambiguity as to the scope of their property rights. Again reflecting possibly unconscious self-interest, one framer argued that a strong central government would significantly enhance the value of those lands: "For myself, I conceive that my opinions are not biased by private interests, but having claims to a considerable quantity of land in the Western Country, I am fully persuaded that the value of those lands must be increased by an efficient federal

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294. See Beard, supra note 266, at 35 (estimating that "at least $40,000,000 gain came to the holders of securities through the adoption of the Constitution").
295. See id. at 33 (reporting projected foreign debt of nearly $12 million as of December 1789, and domestic debt of over $40 million).
296. See id. at 149–50 ("Of the fifty-five members who attended [the Constitutional Convention] no less than forty appear on the Records of the Treasury Department for sums varying from a few dollars up to more than one hundred thousand dollars.").
297. See id. at 35.
298. See id. at 38.
299. See Parenti, supra note 127, at 44–45.
300. U.S. Const. art. VI ("All debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").
301. Id. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ").
302. See Beard, supra note 266, at 151.
303. Id. at 49.
Government. A majority of the delegates agreed. Therefore, the Constitution gave Congress the power to regulate and to sell all U.S. territories. The Constitution also provided benefits to a third class of the propertied, the merchants. The clearest benefit was the constitutional authorization to impose duties on imports. This power enabled Congress to protect American products from foreign competition. Other benefits were more indirect but also were designed to facilitate commerce. For example, to maintain a stable national currency, thereby lowering interest rates, the Constitution authorized Congress to borrow against the country's credit. The Constitution also authorizes Congress to regulate commerce among the states and with other nations, to establish uniform bankruptcy laws, to coin money, and to standardize weights and measures. The constitutional prohibition of state debtor relief laws also was designed to enhance commerce. Unlike the other commerce-enhancing provisions, the poor bear the entire burden of this prohibition, and the propertied enjoy the entire benefits.

However, the Framers had a far larger concern about the poor than rebellions and state debtor relief legislation. While a few states had enacted debtor relief laws, the formation of a national government presented the specter of nationwide laws benefiting the poor if they could form an electoral majority. In particular, the delegates feared that the poor would legislate for property redistributions. That concern was expressed frequently and vigorously throughout the Constitutional

304. Id. at 50 (quoting Letter from Hugh Williamson to James Madison (June 2, 1788)).
305. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .")
306. See id. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").
307. See Parenti, supra note 127, at 44–45.
308. See id. at 45.
310. Id. art. I, § 8, cls. 3–5.
311. See Tushnet, supra note 277, at 107–08 ("Restoring the stability of the international and national credit systems thus required that there be a government strong enough to suppress local agitation for debtor relief.").
312. Id. at 109 (arguing that the Framers "were concerned about local debtor relief laws, particularly because, as they saw it, there would inevitably be more debtors than creditors").
313. See JENNIFER NEDELSKEY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 145 (1990) ("The rich want to maintain their power, privilege, and property; the poor want to take at least some of these for themselves.").
Convention, during the state ratification conventions, and in the speeches and writings leading up to them. At the federal Constitutional Convention, Madison warned of the possibility of redistribution:

Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.

General Knox enunciated a similar fear when describing the lower class:

Their creed is “That the property of the United States has been protected from the confiscations of Britain by the joint exertions of all, and therefore ought to be the common property of all. And he that attempts opposition to this creed is an enemy to equity and justice, and ought to be swept from off the face of the earth.”

To avoid the possibility of redistribution from becoming a reality, the Framers employed two different means. First, they incorporated substantive protections for property ownership into the Constitution, including the Takings and Due Process Clauses. Both provisions protect private property owners from government action. The frequency with which litigation continues to address the scope of protection these clauses provide demonstrates their continued importance.

The Framers’ second means, however, is antithetical to modern democratic ideals. The Framers substantially curtailed the lower classes’ ability to participate in government. Some delegates demonstrated undisguised scorn at the concept of

314. BEARD, supra note 266, at 294.
315. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203–04 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS].
316. BEARD, supra note 266, at 58–59.
317. See U.S. CONST. amend. V (“No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).
318. Id.
319. See Tushnet, supra note 277, at 109 (discussing the steps the Framers took to "reduce the risk that the powerful national government [created by the Constitution] would come under democratic control," which included "staggering the terms of office of Representatives, Senators, and the President").
political participation by the poor. One framer, Robert Morris, was particularly contemptuous of the lower classes' participation in politics. He described a public gathering that was prompted by a port closing in 1774:

I stood in the balcony and on my right hand were ranged all the people of property, with some few poor dependents, and on the other all the tradesmen, etc., who thought it worth their while to leave their daily labor for the good of the country. The mob begin to think and reason. Poor reptiles! It is with them a vernal morning, they are struggling to cast off their winter's slough, they bask in the sunshine and before noon they will bite, depend upon it. The gentry begin to fear this. Their committee will be appointed, and they will deceive the people, and again forfeit a share of their confidence. And if these instances of what with one side is policy, and the other perfidy, shall continue to increase, and become more frequent, farewell aristocracy.

The Framers acted to block participation by the poor at each stage in the political process. The Framers' first target was the franchise. Some delegates proposed that the state legislatures, rather than the electorate, should choose the members of Congress, because "[t]he people... should have as little to do as may be about the government." Another delegate advocated a property qualification to vote "as a necessary defence agst. the dangerous influence of those multitudes without property & without principle, with which our Country like all others, will in time abound." However, recognizing the political difficulty of imposing uniform federal franchise requirements on the states, the delegates deferred to the state requirements. Of course, the state requirements prevented the poor from voting.

The next hurdle to political participation concerned the prerequisites to holding office. In a famous speech, Alexander Hamilton vigorously denounced the abilities of the poor to serve as legislators:

All communities divide themselves into the few and the many. The first are the rich and well born, the other the

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320. See NEDELSKY, supra note 313, at 77.
321. Id. (emphasis added) (alteration in original) (quotation marks omitted) (quoting 1 THE LIFE AND CORRESPONDENCE OF GOVERNOR MORRIS 23–25 (Jared Sparks ed., 1832)).
322. BEARD, supra note 266, at 214 (quotation marks omitted) (quoting Roger Sherman).
323. Id. at 195 (using Madison's notes to explain John Dickinson's views).
324. See U.S. CONST. art. I, § 4 (granting authority to each state's legislature to determine a manner of electing that state's senators and representatives).
mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. . . . It is admitted that you cannot have a good executive upon a democratic plan. 325

To prevent the lower classes from serving in government, some delegates argued for property qualifications for all three branches. For example, Charles Pinckney proposed that the President must have at least $100,000 and that judges and legislators must have at least $50,000. 326 Other delegates proposed accomplishing the same end by not compensating senators. 327 Pinckney supported this proposal by arguing that, because the Senate “was meant to represent the wealth of the Country, it ought to be composed of persons of wealth; and if no allowance was to be made the wealthy alone would undertake the service.” 328 Benjamin Franklin seconded the proposal, and it was defeated by a one-state majority. 329 Nevertheless, members of Congress did not receive a salary until 1815. 330

Although neither the property qualifications nor the noncompensation provision were enacted, the ratified version of the Constitution successfully insulated the federal government from public participation at virtually every level. As in the colonial era, the Constitution authorized the voters to elect only the members of the lower legislative chamber, the House of Representatives. 331 The Constitution provided that state

325. 1 CONVENTION RECORDS, supra note 315, at 294, 299.
326. BEARD, supra note 266, at 210–11.
327. 1 CONVENTION RECORDS, supra note 315, at 426–27 (discussing Charles Pinckney’s suggestion that Senators not be compensated because the Senate represented the elite).
328. Id.
331. U.S. CONST. art. I, § 2 (granting the authority of electing the House of Representatives to state voters).
legislatures would choose Senators, state electors would elect the President, and the President would nominate and appoint U.S. Supreme Court Justices. Additionally, the President was given the power to veto legislation that Congress did enact.

Scholars and others vigorously have debated whether the Constitution's Framers were motivated by economic self-interest, an altruistic commitment to the public good, or both. And certainly there were different motivations among the Framers. But the bottom line is that they blocked political participation by the lower classes and did not address their needs, though they provided so much for the upper classes. In fact, some delegates criticized the constitutional structure as being aristocratic. Moreover, in dealing with the most downtrodden, the slaves and indentured servants, the Constitution respected ownership rights to them, required that those who escaped to another state be returned, and permitted the slave trade to continue despite the nation's stated commitment to "liberty for all."

Although the constitutional delegates had not been elected and certainly were not representative of society as a whole, the electorate did not have the opportunity to vote on ratification of the Constitution. Rather, it was ratified by state conventions consisting of elected delegates. In every state but New York, property and other prerequisites to voting for delegates disenfranchised substantial portions of the population.

332. Id. art. I, § 3 (authorizing state legislatures to select two Senators each).
333. Id. art. II, § 1 (granting each state one elector for each member of Congress from that state).
334. Id. art. II, § 2.
335. Id. art. I, § 7.
336. See, e.g., Parenti, supra note 127, at 50–51 (examining both sides of the issue of what motivated the Constitution's Framers).
337. 2 CONVENTION RECORDS, supra note 315, at 286, 632, 640 (highlighting the reservations that several delegates to the convention had concerning the proposed Constitution).
338. U.S. CONST. art. I, § 2 (allowing indentured servants and slaves to be at least partially counted for purposes of determining the number of a state's representatives and for direct taxes).
339. Id. art. IV, § 2 (requiring escaped indentured servants and slaves to be returned to their owners).
340. Id. art. I, § 9 (forbidding Congress from prohibiting slavery until 1808).
341. Parenti, supra note 127, at 51 (noting that the nation's founders felt no conflict between the principle of "liberty for all" and simultaneous slave ownership).
342. Id. at 55 (noting that "the rich monopolize[d] the Philadelphia Convention").
343. Id.
344. Id.
345. BEARD, supra note 266, at 240–41, 251 (claiming the masses of people were disenfranchised through property qualifications); Parenti, supra note 127, at 55 (alleging that even if the poor were enfranchised, they were exposed to liabilities that kept them
Although estimates vary, only about one-fifth of the adult males voted. Unsurprisingly, the economic standing of the state convention delegates generally mirrored those of the Constitution's Framers. Also unsurprisingly, a major concern of state delegates was the potential for property redistributions. Madison spoke to this concern in The Federalist No. 10. He described the protection of unequal property distributions as being "the first object of government" and argued that a large national government would make property redistributions and debtor relief laws less likely:

A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

Although the Constitution was ratified, its antidemocratic character caused ratification to be vigorously contested. Some state convention votes were very close and turned on the superior political skills of the Constitution's supporters, rather than on its merits. Chief Justice Marshall said: "[I]t is scarcely to be doubted that in some of the adopting states a majority of the people were in the opposition."

underrepresented).

346. BEARD, supra note 266, at 250–51; Parenti, supra note 127, at 55 ("Even if two-thirds or more of the adult white males could vote for delegates, as might have been the case in most states, probably not more than 20 percent actually did.").

347. BEARD, supra note 266, at 325; Parenti, supra note 127, at 55.

348. See BEARD, supra note 266, at 303. A leading supporter of the Constitution in Massachusetts forcefully articulated the delegates' concern:

The people of the interior parts of these states [New England] have by far too much political knowledge and too strong a relish for unrestrained freedom, to be governed by our feeble system, and too little acquaintance with real sound policy or rational freedom and too little virtue to govern themselves. They have become too well acquainted with their own weight in the political scale under such governments as ours and have too high a taste for luxury and dissipation to sit down contented in their proper line, when they see others possessed of much more property than themselves. With these feelings and sentiments they will not be quiet while such distinctions exist as to rank and property; and sensible of their own force, they will not rest easy till they possess the reins of Government and have divided property with their betters, or they shall be compelled by force to submit to their proper stations and mode of living.

Id. (alteration in original) (quoting Stephen Higginson) (quotation marks omitted).


350. Id. at 62.

351. Tushnet, supra note 277, at 110.

352. See id.

After ratification, the antidemocratic bias of the new federal government was soon manifested in the suffrage provisions of the Northwest Ordinance of 1787, which Congress ratified in 1789. To rather than being elected, the Territory's governor was appointed by Congress. To be appointed, the governor had to own at least one thousand acres in the Territory. Congress also appointed the Territory's secretary and judges. These appointees had to own at least five hundred acres. The franchise and the ability to serve as a representative to the general assembly were restricted by landownership, citizenship, and residency requirements. A representative had to own two hundred acres and had to have been a U.S. citizen for three years and a current resident of the Territory, or a resident of the Territory for three years. To vote, a man had to own fifty acres and had to be a U.S. citizen and a resident of his district for two years.

Like the federal government, the states generally resisted increased political participation by their poorer citizens after the Revolution. Although battles to broaden the suffrage were waged in state constitutional conventions, reform was limited at best. A Massachusetts constitutional convention actually increased the

So balanced were parties in some of [the states], that, even after the subject had been discussed for a considerable time, the fate of the constitution could scarcely be conjectured; and so small, in many instances, was the majority in its favour, as to afford strong ground for the opinion that, had the influence of character been removed, the intrinsic merits of the instrument would not have secured its adoption. In all of them, the numerous amendments which were proposed, demonstrate the reluctance with which the new government was accepted; and that a dread of dismemberment, not an approbation of the particular system under consideration, had induced an acquiescence in it.

Id. "North Carolina and Rhode Island did not at first accept the constitution, and New York was apparently dragged into it by a repugnance to being excluded from the confederacy." Id. at 243

354. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT §§ 3–4 (U.S. 1787) (authorizing Congress to appoint governors, secretaries, and judges, but not providing for election of these officials by the public).

355. Id. § 3 (authorizing Congress to appoint a governor for a three-year term, unless sooner revoked by Congress).

356. Id. § 3 (authorizing Congress to appoint a governor for a three-year term, unless sooner revoked by Congress).

357. Id. § 4 (authorizing Congress to appoint a secretary for a four-year term, unless revoked earlier by Congress, and three judges for life commissions).

358. Id.

359. Id. § 9.

360. Id.

361. Id.

362. KEYSSAR, supra note 268, at 18–19 (surveying some of the states' voting requirements after the Revolution).
requirements for the franchise. 863 Pursuant to Massachusetts’s 1691 charter, a man could vote if he owned a freehold estate that produced an annual income of forty shillings or a personal estate worth £40.864 Pursuant to Massachusetts’s 1780 constitution, he had to own a freehold that produced an annual income of at least £3 or a personal estate worth £60.865 When considering the franchise issue, convention delegates expressed contempt for and fear of the unpropertied. In his outstanding book, The Right to Vote, legal historian Alexander Keyssar quotes a Massachusetts convention delegate who argued against enfranchising the unpropertied:

Your Delegates considered that Persons who are Twenty-one Years of age, and have no Property, are either those who live upon a part of a Paternal estate, expecting the Fee thereof, who are but just entering into business, or those whose Idleness of Life and profligacy of manners will forever bar them from acquiring and possessing Property. And we will submit it to the former class, whether they would not think it safer for them to have their right of Voting for a Representative suspended for [a] small space of Time, than forever hereafter to have their Privileges liable to the control of Men who will pay less regard to the Rights of Property because they have nothing to lose.866

The increased requirements sparked an armed rebellion by hundreds of men who had been disenfranchised.867

Although Connecticut, Delaware, Rhode Island, and Virginia did not further restrict the franchise, they also did not expand it.868 Their suffrage requirements were unchanged by their constitutional conventions.869 Similarly, South Carolina did not change the suffrage requirements in its 1776 constitution, though it minimally eased them in 1778.870 Maryland retained its requirement of

863. ROBERT J. DINKIN, VOTING IN REVOLUTIONARY AMERICA: A STUDY OF ELECTIONS IN THE ORIGINAL THIRTEEN STATES, 1776–1789, at 34–35 (1982) [hereinafter, DINKIN, REVOLUTIONARY AMERICA] (indicating that the initial draft of the Massachusetts constitution lowered voting qualifications, but that the adopted version raised them); KEYSSAR, supra note 268, at 18–19.

864. ADAMS, supra note 189, at 295 (comparing voting requirements between the Massachusetts 1691 charter and its 1780 constitution).

865. Id.

866. KEYSSAR, supra note 268, at 19 (alteration in original) (quotation marks omitted).

867. ZINN, supra note 46, at 90–94 (discussing the events leading to Shays’ Rebellion).

868. DINKIN, REVOLUTIONARY AMERICA, supra note 363, at 35–36.

869. Id.

870. ADAMS, supra note 189, at 305 (presenting South Carolina’s pre- and post-constitution suffrage requirements); DINKIN, REVOLUTIONARY AMERICA, supra note 363,
ownership of fifty acres of land but lowered its alternate method of qualification from property worth £40 to property worth £30.\textsuperscript{371}

In large part to appease militia members who were fighting the war with England, eight states' constitutional conventions expanded the franchise.\textsuperscript{372} Georgia replaced its fifty-acre freehold requirement with alternative qualification methods; to vote, a man had to own £10, be liable to pay state tax, or be a member of "any mechanic trade."\textsuperscript{373} New Hampshire granted the franchise to taxpayers.\textsuperscript{374} New Jersey eliminated the landownership requirement and granted the vote to a person worth £50 of proclamation money.\textsuperscript{375} Although New York decreased its franchise requirement for the lower legislative chamber from land worth £40 to land worth £20 or a tenancy with an annual value of forty shillings, it imposed a new requirement to vote for the upper legislative chamber and for the governorship; voters now had to own land worth £100 to vote for these offices.\textsuperscript{376} North Carolina granted the franchise to taxpayers for the House of Commons but continued its fifty-acre landownership requirement to vote for the Senate.\textsuperscript{377} In Pennsylvania, the franchise was expanded to include any adult male taxpayer and landowners' sons even if they were not taxpayers.\textsuperscript{378}
However, even the states that expanded the franchise often undercut the salutary effects of these expansions by increasing the prerequisites for holding office. In its 1784 constitution, New Hampshire first imposed the requirements that candidates for the state senate own land worth £200 and that candidates for governor own a £500 personal estate, including land worth £250. New Hampshire also provided in 1784 that the state legislature, rather than the electorate, would select the members of the executive council. Similarly, in its 1776 constitution, New Jersey first required candidates for the senate to own an estate worth £1,000 and provided that the legislature, rather than the voters, would elect the governor.

In its 1776 constitution, North Carolina re-enacted its existing requirement that candidates for the lower legislative chamber own one hundred acres but imposed new requirements for voting and for election to the senate, governorship, and executive council. The vote for the senate was limited to owners of fifty acres of land; candidates had to own three hundred acres. The governor had to own one thousand acres and was elected by the legislature, as was the executive council.

Although Georgia's 1777 constitution required legislative candidates to own 250 acres of land or other property worth £250, while its former election law had required ownership of 500 acres, the new requirement still severely curtailed the number of potential candidates. The new Georgia constitution also removed the choice of governor from the electorate. Pursuant to the new constitution, the legislature elected the governor and the executive council from among its members. As can be seen, even in the states that expanded the franchise, elections were far from democratic. Although more men could vote after the

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379. ADAMS, supra note 189, at 293; DINKIN, REVOLUTIONARY AMERICA, supra note 363, at 46.
380. ADAMS, supra note 189, at 293.
381. Id. at 299 (illustrating New Jersey's 1776 election law and constitution).
382. Id. at 304 (listing North Carolina's elector and candidate requirements under its 1776 constitution); DINKIN, REVOLUTIONARY AMERICA, supra note 363, at 46 (stating that North Carolina saw no need to change its lower house requirement for candidacy, but raised its requirement for the upper house).
383. ADAMS, supra note 189, at 304.
384. Id.
385. Id. at 307 (comparing the property ownership requirements for legislative candidates in Georgia under its 1761 election law and its constitution adopted in 1777).
386. Id. (noting that the governor of Georgia is elected by the legislature).
387. Id.
Revolution than before, the increase was "modest."\textsuperscript{388} And, in some areas, the proportion of men who could vote decreased.\textsuperscript{389}

The ability to perceive the anachronistic quality of the Revolutionary-era election laws does not require the perspective provided by the passage of over two hundred years. A delegate to a state constitutional convention in the 1820s stated that the authors of the first state constitution had "retained a small relic of ancient prejudices" concerning the franchise.\textsuperscript{390} Another delegate stated that the property requirements in the original state constitution reflected "circumstances...which no longer ought to have weight."\textsuperscript{391} In fact, those "circumstances" are directly traceable to England in 1429.\textsuperscript{392}

Because of these recognized deficiencies, states began amending their constitutions, including their suffrage requirements, as early as 1790. A major thrust of the reforms was to eliminate the property prerequisites to the franchise.\textsuperscript{393} In 1790, ten of the thirteen states had a property requirement.\textsuperscript{394} The number of states with this type of requirement continuously declined until 1855, by which time all but three of the thirty-one

\textsuperscript{388} Keyssar, supra note 268, at 24 ("Overall, the proportion of adult men who could vote in 1787 was surely higher than it had been in 1767, yet the shift was hardly dramatic, in part because changes in the laws were partially offset by socioeconomic shifts that increased the number of propertyless men.").

\textsuperscript{389} Dinkin, Revolutionary America, supra note 363, at 39–40.

As land in parts of New England was being subdivided into smaller tracts, proportionately fewer men achieved eligibility with each ensuing generation. Charles Grant's study of the town of Kent, Connecticut, shows that whereas 79 percent of the resident adult males could qualify for the freemanship in 1777, only 63 percent could do so in 1796. Kenneth Lockridge in his work on landholding patterns in eastern Massachusetts estimates that in certain older settlements the group of men satisfying the minimum suffrage standard in 1790 may have diminished by as much as 30 percent compared to the pre-Revolutionary era.

Id. (footnote omitted).

\textsuperscript{390} Keyssar, supra note 268, at 43 (characterizing delegates who advocated eliminating property requirements as aggressive and confident).

\textsuperscript{391} Id. (quotation marks omitted).

\textsuperscript{392} Adams, supra note 189, at 196.

These [franchise] qualifications were an extension of an unbroken tradition of English election laws dating back to 1429. The right to vote for county representatives to Parliament as knights of the shires was first limited to landholders under Henry VI. For over three hundred years, the figure of forty shillings as the minimum annual rent recurs like a mystic number in English and American suffrage laws.

Id. at 196–97 (footnote omitted).

\textsuperscript{393} Keyssar, supra note 268, at 330 tbls.A.2–3 (illustrating the state trend of lowering and eliminating property requirements for voting).

\textsuperscript{394} Id. at 336 tbl.A.3.
states had eliminated it.\textsuperscript{395} Even in those three states, the property requirement had been significantly circumscribed. Rhode Island's property requirement applied only to citizens who had been born in another country.\textsuperscript{396} New York's law applied only to African Americans, and South Carolina's requirement did not apply to a potential voter who had lived in the state for six months.\textsuperscript{397}

When states eliminated property requirements, they often substituted a tax payment requirement.\textsuperscript{398} A substantial justification for this requirement was the belief that a person should not be taxed without representation.\textsuperscript{399} However, the self-interest of those who already had the franchise provided other substantial motivations for expanding it.\textsuperscript{400}

Perhaps the most significant motivation was the need to maintain an effective military. One historian has stated that the War of 1812 was "the greatest single stimulus to the movement for suffrage extension."\textsuperscript{401} Large proportions of the militia could not vote.\textsuperscript{402} In one case, 83\% of a muster could not vote.\textsuperscript{403} The military musters provided an organizing point for those who rightly argued that they should not have to risk injury or death for a government that barred them from participation.\textsuperscript{404} Military leaders believed that denial of the franchise hurt recruitment efforts and battlefield performance.\textsuperscript{405} The southern states had an additional reason for wanting a strong militia—to prevent and to defeat slave uprisings.\textsuperscript{406}

The propertied also were motivated to enfranchise taxpaying males as a means of encouraging settlement. Particularly the newer states wanted to lure workers to exploit natural resources

\begin{thebibliography}{9}
\bibitem{395} Id.
\bibitem{396} Id.
\bibitem{397} Id. at 330 tbls.A.2–3.
\bibitem{398} Refer to notes 372–78 supra and accompanying text (discussing states that lowered or eliminated property requirements for voting but instituted taxing requirements for voting).
\bibitem{399} KEYSSAR, supra note 268, at 44 (noting that many proponents of expanded suffrage viewed voting as a right that could be earned "by paying taxes, serving in the militia, or even laboring on the public roads").
\bibitem{400} Id. at 37 (explaining why those already enfranchised wanted to broaden suffrage, particularly for the purposes of self-protection).
\bibitem{401} Id. at 35 (quoting historian J.R. Pole).
\bibitem{402} Id.
\bibitem{403} Id.
\bibitem{404} Id. at 37.
\bibitem{405} Id. at 37–38.
\bibitem{406} Id. at 38.
\end{thebibliography}
and to farm, thereby increasing land values and tax revenues. A delegate to Illinois's 1847 constitutional convention argued:

Should we not . . . hold out to the world the greatest inducement for men to come amongst us, to till our prairies, to work in our mines, and to develop the vast and inexhaustible resources of our state? . . . We cannot obtain this class of population without holding out to them inducements equal to those of other states; and as we are burthened with a debt, we should have those inducements greater than elsewhere.

In contrast, states did not want to attract those who did not pay taxes and who might require government assistance. As states were expanding the franchise to include taxpayers, they began amending their constitutions to exclude paupers. The first pauper exclusion was enacted in 1792. Into the twentieth century, states continued amending their constitutions to exclude paupers. Virginia amended its constitution in 1902 to exclude them, and Oklahoma excluded poorhouse residents in its 1907 constitution. In all, fourteen states constitutionally disenfranchised paupers. All these restrictions remained in effect well into the twentieth century.

Although the meaning of the word "pauper" was the subject of debate and litigation, the suffrage exclusion generally was directed at people receiving public assistance, including shelter.

407. Id. ("As territories began to organize themselves into states, inhabitants of sparsely populated regions embraced white manhood suffrage, in part because they believed that a broad franchise would encourage settlement and in doing so raise land values, stimulate economic development, and generate tax revenues.").

408. Id. (first alteration in original) (quotation marks omitted).

409. See id. at 61 (noting that various states amended their constitutions to disenfranchise paupers, thus "making [it] clear that individuals had to maintain a minimum level of economic self-sufficiency in order to possess political rights").

410. Id.

411. Id. at 61, 343 tbl.A.6 (noting that New Hampshire was the first state to disenfranchise paupers).

412. Id.

413. Id. at 344 tbl.A.6.

414. Id. at 343 tbl.A.6 (listing Arkansas, Delaware, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, Oklahoma, Rhode Island, South Carolina, Texas, Virginia, and West Virginia as the states that disenfranchised paupers).

415. Id. (highlighting several states that constitutionally excluded paupers into the twentieth century).

416. Id. at 61 (noting that "these laws clearly were aimed at . . . men who received public relief from their communities or from the state: those who lived in almshouses or were given 'outdoor relief' (generally in the form of food, fuel, or small amounts of cash) while residing at home").

A person is to be considered as a pauper while he receives supplies, as such, from the town where he is resident or found, whether for a year, or a portion of a year;
The stated reason for denying paupers the vote was that they were insufficiently independent because they received government assistance and could be forced to work in exchange for that assistance. More realistically, however, the Constitution’s Framers feared the possibility of an electorate that would favor property redistributions to lessen the gap between rich and poor.

Therefore, after the Revolution, states enacted a variety of additional franchise limitations directed at the poor. Throughout the nineteenth century and well into the twentieth century, states enacted residency requirements and frequently amended their constitutions to lengthen the required period of residency. For example, Alabama’s 1867 constitution required six months’ residence. In 1875, it amended its constitution to require residence of one year and amended its constitution again in 1901 to extend the requirement to two years. Similarly, in 1898, Louisiana amended the one year residency requirement in its 1868 and 1879 constitutions to two years and provided that residency would be lost if a person remained outside the state for more than ninety days. In 1895, South Carolina amended its original constitution to extend the residency requirement from one to two years, as did Virginia in 1902. By 1923, all forty-eight states had enacted residency requirements, with the most common time periods being six months or one year.
Although residency requirements were enacted in part to ensure that the electorate was knowledgeable about local conditions, they also were designed to prevent many of the working poor from voting. Recent immigrants, who were almost uniformly poor, were a particular target of these restrictions. States also wanted to disenfranchise manual laborers, who often had to move in search of work. Delegates to Wisconsin’s constitutional convention wanted to disenfranchise miners migrating from Illinois. In Ohio, concern was expressed that transient canal boat hands were deciding elections along canal routes. In other states, railroad and farm workers were the targets of increased residency requirements.

As a further method of disenfranchising immigrants and the rapidly increasing population of urban laborers, states began enacting voter registration laws during the first half of the nineteenth century. The laws often applied only to urban areas, which had the largest populations of both groups. “Voter registration was intended to discourage voting in big cities, and by the poor and less educated.” New York enacted a voter registration law that applied only to New York City, which was designed to disenfranchise the large number of resident Irish immigrants. Similarly, Pennsylvania enacted a registration law in 1836 that applied only to Philadelphia, and South Carolina enacted a law in 1819 that applied only to Columbia.

As if the pauper exclusions, residency requirements, and registration laws were insufficient to prevent the poor from voting, twenty states enacted literacy laws, including English language literacy laws, during the last half of the nineteenth century and into the twentieth century. Typically, these laws

425. See id. at 63–64 (suggesting that the lack of property or taxpaying qualifications promoted residency requirements in order to prevent the poor from voting).
426. See id. at 64 (observing that “antagonistic popular attitudes toward the mobile foreign-born” resulted in some states increasing their residency requirements).
427. See id. at 63 (noting that proponents of lengthy residency requirements believed that manual laborers were "ignorant of local conditions and a source of electoral fraud").
428. Id. at 63–64.
429. Id. at 64.
430. Id. (discussing the fear that railroad workers could be influenced by the railroad corporations, and that farmhands could simply be shipped to various locations to vote).
431. See id. at 65.
432. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON’T VOTE 120 (1988).
433. Id.
434. See KEYSSAR, supra note 268, at 65.
435. Id.
436. Id. at 362 tbl.A.13 (cataloguing each state’s approach to literacy requirements).
conditioned the franchise on the ability to read and write, often in English. Particularly because education was generally unavailable to the poor, these laws were very effective in achieving their goal. Half of the black male population and fifteen percent of the white population could not read at this time. The tenuous relationship between literacy and effective political participation is well illustrated by the difficulty Andrew Jackson reputedly experienced in spelling his name.

The passage of the Fifteenth Amendment, which outlawed racial franchise restrictions, prompted another wave of disenfranchising laws. Because the states no longer could target African Americans expressly, they turned to class-based requirements to achieve the same goal. Several states enacted increased residency requirements and literacy tests with that intent. Additionally, some states now disenfranchised people who had been convicted of crimes, including those associated with poverty. For example, in 1901, Alabama disenfranchised "any person convicted as a vagrant or tramp."

Although the primary motivation for these laws was to disenfranchise African Americans, many legislators seized this opportunity to disenfranchise poor whites. The rhetoric often paralleled the dehumanizing rhetoric of the Revolutionary era. At the end of the nineteenth century, proponents of disenfranchising poor white men argued that they were "ignorant, incompetent, and vicious." To counter the argument

437. See id.
438. See PIVEN & CLOWARD, supra note 432, at 120 ("Literary tests . . . were not so likely to bar the rich as they were the poor, or the well educated as they were the uneducated.").
439. KEYSSAR, supra note 268, at 112.
440. Id. at 66 (noting that detractors of literacy requirements pointed to "many fine, upstanding citizens who happened to be illiterate or barely literate . . . but were perfectly capable of responsibly exercising the franchise").
441. See id. at 111 (discussing various methods employed to exclude African American voters even after the passage of the Fifteenth Amendment, including "poll taxes, . . . literacy tests, secret ballot laws, lengthy residency requirements, elaborate registration systems, confusing multiple choice voting-box arrangements, and eventually, Democratic primaries restricted to whites only").
442. Id. (noting that "Democrats chose to solidify their hold on the South by modifying the voting laws in ways that would exclude African Americans without overly violating the Fifteenth Amendment").
443. Id. at 111–12.
444. Id.
445. Id. at 378 tbl.A.15.
446. Id. at 112–13 (suggesting that "many advocates of so-called electoral reform were quite comfortable with the prospect of shunting poor whites aside along with African Americans").
447. Id. at 113.
that all male citizens should be entitled to vote, Alabama amended its constitution in 1901 to recharacterize the franchise as a "privilege"; the previous constitution had described it as a "right." 448

The most blatantly class-based approach to disenfranchisement was the re-introduction of property ownership requirements. As described earlier, during the first half of the nineteenth century, property requirements were virtually eliminated and often were replaced by taxpaying requirements. 449 However, beginning in about 1840, so many states repealed the tax qualification that only a handful still had such a requirement by 1855.450

Professor Keyssar concludes that the widespread repeal of these original tax provisions was a response to the tremendous changes in the nation's population since their enactment. 451 The industrial revolution created a large body of workers who could not have satisfied the earlier franchise requirements but who nevertheless paid taxes. 452 Rapidly expanding numbers of industrial workers constituted a large portion of those who had been enfranchised by the tax qualification. 453

In response, several states enacted new property requirements. 454 Some did so indirectly by limiting the franchise to those who paid property taxes. 455 In a clear demonstration that states had enacted literacy and registration requirements to disenfranchise the poor, some states exempted landowners from those requirements. 456 Other states restricted the types of issues on which the unpropertied could vote. 457

The enactment of the Fifteenth Amendment in 1870 also prompted a new round of taxpaying restrictions. During the

448. Id. (quotation marks omitted).
449. Refer to notes 269–71 supra and accompanying text (describing how states added taxpaying requirements in place of property requirements).
450. See KEYSSAR, supra note 268, at 51 fig.2.1 (illustrating that fewer than ten states maintained tax qualifications in 1855).
451. Id. at 67–70 (claiming that an increase in the working class led to the abandonment of tax provisions).
452. Id. (arguing that the enfranchisement of the working class was unintentional).
453. Id.
454. Id. at 356 tbls.A.10–11 (surveying taxpaying requirements imposed on suffrage in the various states).
455. Id.
456. Id. at 358 tbl.A.11 (noting that Alabama, Georgia, Louisiana, Rhode Island, South Carolina, and Virginia all enacted exemptions from literacy or registration requirements for property owners).
457. Id. (noting that various states allowed only property owners to vote on matters such as bond issues, special assessments, and school elections).
years immediately preceding and those following its enactment, twenty-three states enacted new tax requirements. Some states enacted new income and property tax requirements, while many others now directly taxed the right to vote by imposing a poll tax. These laws were not limited to southern states; legislatures from New Hampshire to Florida and to Arizona and Nevada enacted them.

Although a precise determination of the cumulative effects of these restrictive franchise laws is impossible, Professor Keyssar states that the number of people who registered to vote and who actually voted after these laws were enacted “dropped precipitously.” Many of these restrictions continued until the 1960s and 1970s, aided by U.S. Supreme Court decisions upholding their legality. Tax requirements, including the poll tax, were not eliminated until the enactment of the Twenty-Fourth Amendment in 1964 and the U.S. Supreme Court’s decision in Harper v. Virginia State Board of Electors in 1966. Lengthy state residency requirements were not completely prohibited until 1972, after the Voting Rights Act limited residency requirements to thirty days for presidential and vice-presidential elections, and the U.S. Supreme Court invalidated state residency requirements of one year in the state and three months in the county. Literacy tests were not permanently eliminated until 1975. Today, the homeless still are

458. Id. at 356 tbl.A.10.
459. Id.
460. Id.
461. Id. at 114–15.
463. U.S. CONST. amend. XXIV. The Amendment provides:
   The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
   Id. § 1.
464. 383 U.S. 663, 665–67 (1966) (holding that a poll tax has no relation to voter qualifications and therefore violates the Fourteenth Amendment).
disenfranchised in two states that require a permanent address to register to vote.\textsuperscript{468}

The harsh legal treatment of the poor after the Revolution was a clear reflection of their political powerlessness. The federal and state legislatures and courts treated the poor in extraordinarily punitive manners. Apparently believing that their prior treatment of the poor had been too lenient, legislatures enacted harsher poor laws during the last part of the eighteenth century, and courts routinely upheld them.\textsuperscript{469}

Despite the motivation provided by public whippings, incarceration, and branding, the number of poor continued to expand after the Revolution, as did the number of indentured servants.\textsuperscript{470} One-half to two-thirds of the white immigrants were indentured.\textsuperscript{471} Moreover, governments swelled the ranks of the indentured with citizens. In 1780, Virginia amended its poor laws to require that half of the state's male orphans "be bound to the sea."\textsuperscript{472} Towns held annual poor auctions at which the poor were sold as indentured servants individually or in a lot.\textsuperscript{473} For example, at a 1789 town meeting in Massachusetts, a family was auctioned to different buyers:

The condition of sale of Oliver Upton and wife are such, that the lowest bidder have them until March meeting . . . the children to be let out to the lowest bidder until the selectmen can provide better for them . . .

Oliver Upton & his wife bid off by Simon Gates, at one shilling per week. Oldest child bid off by Simon Gates, at one shilling per week. Second child bid off by John Haywood at ten pence per week. Third child bid off by Andrew [B]eard, at one shilling, two pence per week. Fourth child bid off by Ebeneezer Bolton, at one shilling, nine pence per week.\textsuperscript{474}

\textsuperscript{400} (codified as amended at 42 U.S.C. § 1973aa(b) (2000)).

\textsuperscript{468} Refer to notes 566–67 infra and accompanying text (noting that Louisiana and Virginia both require a permanent residence).

\textsuperscript{469} Quigley, Reluctant Charity, supra note 99, at 160 (noting that during this time "[p]oor people, even those who were not thought to be able to work, were subject to treatments that can only be described as punitive").

\textsuperscript{470} Id.; see also ZINN, supra note 46, at 84 (claiming that the Revolution "did nothing to end and little to ameliorate white bondage").

\textsuperscript{471} Id., Reluctant Charity, supra note 99, at 170 n.385.

\textsuperscript{472} Id. at 139–40 (quotation marks omitted).

\textsuperscript{473} Id. at 132–53; see also Steinfeld, supra note 417, at 346 n.41 (discussing the practice of placing paupers with a family while giving the family money and rights to the pauper's labor).

\textsuperscript{474} Id., Reluctant Charity, supra note 99, at 154 (quotation marks omitted) (quoting Gardner Town Records, at 100 (Jan. 5, 1789)).
Involuntary indenturing, including of children, continued throughout the nineteenth century. In 1871, the Massachusetts Supreme Court considered a dispute between two farmers concerning the services of a boy who had been involuntarily indentured as a laborer at the age of eight; the indenture was to last until the boy was twenty-one. Over a quarter of a century later, the Connecticut Supreme Court heard a case concerning a man who had served as an indentured farm hand while a minor. The case concerned the habeas corpus petition he filed after being involuntarily committed to an almshouse.

Paupers who were not indentured to private individuals could essentially become indentured to the government. For example, in 1798, Rhode Island established a workhouse for “idle, indigent persons” who “are likely to become a town charge,” “straggling persons” who “cannot give a good account of themselves,” “Indians, who are tippling and idling their time away about the town,” transients, and criminals. A statutory rule directed the workhouse keeper to “constantly” employ the inmates in the manner he deemed “most profitable.” To ensure the keeper’s enthusiastic enforcement of this rule, his compensation was room, board, and half of the inmates’ earnings. Any inmate who refused to obey the keeper was placed in solitary confinement and received reduced food rations.

In a particularly Dickensian case, the overseers of the poor took custody of an allegedly insane man for thirty years and auctioned him off at town meetings as a laborer for eighteen years. During the other twelve years, the overseers contracted out his work. Apparently upon discovering that her brother might be a source of income, the pauper’s sister brought an action to recover the surplus though she had not “assisted or offered to assist him” during his thirty-year institutionalization. In 1857, the New Hampshire Supreme Court

475. Bardwell v. Purrington, 107 Mass. 419, 425–26 (1871) (ruling that such indenture for the whole of the boy’s minority was reasonable).
476. Harrison v. Gilbert, 43 A. 190, 190 (Conn. 1899).
477. Id.
478. Quigley, Reluctant Charity, supra note 99, at 156 & n.301 (emphasis added) (quotation marks omitted).
479. Id. at 157.
480. Id.
481. Id.
483. Id.
484. See id.
Court held that the town did not have to reimburse the pauper for his excess earnings. As a warning to enterprising towns, the Court stated in dictum that a town could not profit from the work of an insane person who was institutionalized as a pauper when he was not one. Based on the facts, that dictum could have been the controlling rule of law in the case before the court.

Even while profiting from the labors of the poor, local governments exempted themselves from many employment laws. In 1940, the Massachusetts Supreme Court upheld the denial of workers' compensation to the family of a man who died from injuries suffered while working on a city ash truck. The deceased had been compelled to work on the truck in exchange for $8.20 per week in welfare. Three years earlier, a plaintiff in the same court described such forced labor as "rehabilitation" and stated that the city's right to recover its aid is "not subject to qualification on principles of fairness or of implied contract."

As with indentured servitude, debtor prisons became more widely used after the Revolution. In 1788, more than one thousand debtors were imprisoned in just one New York county, and many of those owed less than twenty shillings. By 1830, five debtors were imprisoned for every criminal in the Northeast. Unlike criminals, debtors could remain in prison indefinitely. Some states would free a debtor from prison in exchange for a period of indentured servitude.

Like private creditors, the state and federal governments employed the full coercive power of debtor prisons. In the 1820s, New York imprisoned a lawyer for failing to pay fees to the clerk of court. In 1840, a federal court upheld the defendant's imprisonment for a judgment owed to the federal government. In 1867, the federal government imprisoned a judgment debtor in a civil action for selling sixteen packages of matches without tax

485. Id. at 436–37.
486. Id. at 437–38 (claiming that this would constitute an injury to the plaintiff).
488. Id.
490. Quigley, Reluctant Charity, supra note 99, at 161–62 (noting, however, that imprisonment was limited in 1789 to thirty days for those who owed less than ten pounds).
491. Id. at 162.
492. Id. at 161.
493. Id. (citing Connecticut as an example).
494. People v. Rossiter, 4 Cow. 143 (N.Y. Sup. Ct. 1825) (upholding the imprisonment).
A federal court upheld the imprisonment despite the abolition of debt imprisonment in the state where the debtor was imprisoned and despite a federal law that provided, "no person shall be imprisoned for debt on process issuing out of the courts of the United States, in any state where by the laws of such state imprisonment for debt has been abolished." The court held that the national government was not subject to the state and federal laws prohibiting imprisonment.

Debtor prisons and the other inhumane treatments of the poor, including slavery, clearly show that the federal and state governments did not act in a representative manner. In light of human nature, perhaps a desire to further one's self-interest, even at great expense to others, is unsurprising. And the upper class proved to be remarkably adept at serving its self-interest. The large gap in wealth between rich and poor at the time of the Revolution continuously widened during this period. But with the industrial revolution, living conditions for many of the poor dangerously deteriorated and demonstrate a shocking disregard for human life.

From 1800 to 1890, the country’s population increased 1200%, and the urban population exploded by more than seven times that amount. Immigrants constituted the great majority of the urban population growth. From 1820 to approximately 1920, thirty-three million people immigrated to this country. Most lived in the industrial cities of the northeast and labored in factories and in related industries, such as transportation.

The industrial workers labored in conditions that seem impossibly harsh. "In New York City, girls sewed umbrellas from six in the morning to midnight, earning $3 a week, from which employers deducted the cost of needles and thread." In 1835, the workers at twenty mills went on strike to decrease the work day from thirteen and one-half hours to eleven hours, to be paid in cash and not company scrip, and to eliminate cash penalties

496. United States v. Walsh, 28 F. Cas. 391, 394 (D. Or. 1867) (No. 16,635).
497. Id. at 393.
498. Id.
499. JONES, supra note 136, at 272–73.
500. BLUM ET AL., supra note 51, at 441.
501. Id. (noting that twenty-six cities had populations of over 100,000 in 1890, compared to only six cities with more than eight thousand people in 1800).
502. RICHARD E. FOGLESONG, PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S, at 60–61 (1986) (highlighting the period from 1880 to 1920 as the time of greatest immigration, with six million immigrants arriving in the United States each decade).
503. Id. at 61.
504. ZINN, supra note 46, at 229.
for arriving late to work. Unbelievably, another mill strike was begun by the children who worked there.

Far from recoiling at such inhumane treatment, Alexander Hamilton extolled the virtues of having women and children work in factories. In 1790, he reported to Congress:

It is worthy of particular remark that in general, women and children are rendered more useful, and the latter more early useful, by manufacturing establishments, than they would otherwise be. Of the number of persons employed in the cotton manufactories of Great Britain, it is computed that four-sevenths, nearly, are women and children; of whom the greatest proportion are children, and many of them a tender age.

A case decided approximately one hundred years later involved a pauper whose minor child “was seriously injured in September, 1879, while working in a factory, and soon became entirely helpless and idiotic, and so remained for about eighteen months, and until he died.”

The horrendous working conditions were matched by the workers’ housing. By 1890, one-half of New York City’s population lived in tenements that were “human pigsties.” Other American cities had the same type of housing for their workers. Working class families often lived in one room and sometimes with boarders. An 1856 New York legislative report on the tenements “described filth, dilapidation, overcrowding, degradation, dark rooms, offensive privies, lack of water, high

505. Id. at 224.
506. Id. at 225 (discussing a strike begun by children in Patterson, New Jersey, when their employer changed the lunch hour from noon to 1:00 p.m.).
507. Quigley, Reluctant Charity, supra note 99, at 169 n.379 (quotation marks omitted); see also NASH, supra note 89, at 189–93 (discussing efforts by Boston leaders to put women and children to work during the 1740s and 1750s).
508. Town of New Hartford v. Town of Canaan, 52 Conn. 158, 160 (1884) (quotation marks omitted).
509. See BLUM ET AL., supra note 51, at 446 (describing the tenements as the “foulest product of the haphazard laissez-faire growth” of the cities).
510. See ZINN, supra note 46, at 235. The conditions in various cities were described as follows:

In New York, 100,000 people lived in the cellars of the slums; 12,000 women worked in houses of prostitution to keep from starving; the garbage, lying 2 feet deep in the streets, was alive with rats. In Philadelphia, while the rich got fresh water from the Schuylkill River, everyone else drank from the Delaware, into which 13 million gallons of sewage were dumped every day. In the Great Chicago Fire in 1871, the tenements fell so fast, one after another, that people said it sounded like an earthquake.

Id.
511. FOGLESONG, supra note 502, at 66; see also ZINN, supra note 46, at 213 (describing the housing of working class families in Philadelphia).
rents, and exorbitant profits that were nearly unbelievable by present standards.\textsuperscript{512} Epidemics of typhoid, typhus, cholera, and other diseases raged through the tenements, killing thousands of residents.\textsuperscript{613} Of course, most of the tenement residents and factory workers could not vote.\textsuperscript{614} In an ironic twist, the poor today generally have the right to vote, but many have no housing, substandard or otherwise.

III. THE MODERN CONTEXT

Despite the modern stereotype of the Skid Row bum, today's homeless population is demographically as diverse as it was during the colonial and Revolutionary eras. Forty percent of the homeless are families with children, 4\% are unaccompanied minors, 14\% are single women, and 40\% are single men.\textsuperscript{615} Twenty percent are the working poor, 11\% are military veterans, and 22\% are mentally ill.\textsuperscript{516} A large rural homeless population also exists. In fact, the poverty rate of the rural population is greater than that of the urban population.\textsuperscript{517}

Unlike the earlier eras, however, local communities no longer house all of their poor residents.\textsuperscript{518} In its 2001 \textit{Status Report on Hunger and Homelessness in America's Cities}, the U.S. Conference of Mayors reported a widespread inability to provide even the most basic form of housing.\textsuperscript{519} In 2001, cities denied 52\%

512. Foglesong, supra note 502, at 56.
513. \textit{Id.} at 67. The deplorable conditions were described as follows:

In New York you could see the poor lying in the streets with the garbage. There were no sewers in the slums, and filthy water drained into yards and alleys, into the cellars where the poorest of the poor lived, bringing with it a typhoid epidemic in 1837, typhus in 1842. In the cholera epidemic of 1832, the rich fled the city; the poor stayed and died.

Zinn, supra note 46, at 213.
514. Refer to notes 409–68 supra and accompanying text (describing the voting limitations placed on the poor).
516. \textit{Id.}
517. National Coalition for the Homeless, \textit{Rural Homelessness} (Mar. 1999) (noting that in 1997 the "nonmetropolitan" poverty rate was 15.9\% and the metropolitan poverty rate was 12.6\%), \textit{available at} http://www.nationalhomeless.org/rural.html (last visited Apr. 13, 2003).
518. See U.S. CONFERENCE OF MAYORS, supra note 517, at 69 (reporting that "an average of 37 percent of shelter requests by homeless people are estimated to have gone unmet during the last year across the survey cities").
519. \textit{Id.} (summarizing unmet requests for housing in different cities across the United States).
of the requests for emergency shelter by homeless families.\(^{520}\) The failure to provide adequate shelter space is perhaps unsurprising in light of the increasing number of people who live in poverty.\(^{521}\) During 2001, the number of emergency shelter requests increased by 13%.\(^{522}\) The 2000 Census states that 33,899,812 people live in poverty, which is 12.4% of the population.\(^{523}\)

Determining the number of homeless people has proven to be an impossible task.\(^{524}\) Believing that its count of the homeless is unreliable, the Census Bureau did not include them in the 2000 Census.\(^{525}\) Although estimates vary widely, the best estimate is that 500,000 to 750,000 people are homeless on any given day.\(^{526}\) Because homelessness generally is not chronic, usually lasting at most six months, the total number of people who are homeless during a given year is estimated to be three to five times those numbers.\(^{527}\) And the number increases each year.\(^{528}\) The General Accounting Office reported that the number of homeless increases by 10% to 38% each year.\(^{529}\)

Without shelter, the homeless suffer from a variety of greatly increased risks in addition to the obvious hazards of living on the streets, especially in harsh weather. During a one-year period in Detroit, half of the older homeless population were robbed and one-fourth were physically assaulted.\(^{530}\) Homeless women are twenty times more likely to be sexually assaulted than other women, and the homeless are one hundred times more likely to contract tuberculosis.\(^{531}\) Homeless children are "dramatically" more subject to physical disorders,\(^{532}\) and the

\(^{520}\) Id.

\(^{521}\) Cf. id. at i–ii (identifying the increase in requests for food and shelter due to an increase in persons living in poverty).

\(^{522}\) Id. at ii.


\(^{524}\) Steven A. Holmes, Bureau Won't Distribute Census Data on Homeless, N.Y. TIMES, June 28, 2001, at A16 (recognizing that the homeless are not a static population, so any count would be misleading).

\(^{525}\) Id.


\(^{527}\) See id. (estimating that the "number of Americans destined to be homeless at least once in an average year is between 1.5 million and 3.75 million").

\(^{528}\) Id. at 23.

\(^{529}\) Id. (analyzing data through the early 1980s).


\(^{531}\) WRIGHT ET AL., supra note 528, at 28.

\(^{532}\) Id. at 16 ("These include widespread lack of immunization, development and
average life span for homeless men is approximately fifty-three years.\footnote{533}{} Obviously, given a choice, most homeless people would not choose to be homeless. Although alcohol and drug abuse are significant causes of homelessness, many of the leading causes are structural to our society, rather than personal to the individual.\footnote{534}{ U.S. CONFERENCE OF MAYORS, supra note 517, at 74.} The U.S. Conference of Mayors identified a lack of affordable housing as the leading cause of homelessness.\footnote{535}{ Id.} Decades of urban renewal, gentrification, condominium conversions, and elimination of single room occupancy (SRO) hotels and flophouses have sometimes caused dramatic declines in the housing units available to the poorest people.\footnote{536}{ For example, New York City lost 60\% of its SRO units in one six-year period. Id.} Some cities have no SRO units, shelter beds, or transitional housing units.\footnote{537}{ Id. at 74–75.} Approximately two million low-income housing units are torn down each year and frequently are replaced with more expensive housing.\footnote{538}{ Id. at 85 (citing an estimate by Hartman and Zigas).}

Governments have attempted to alleviate the affordable housing shortage by creating incentives for real estate developers, such as density bonuses, but such programs have been largely inadequate.\footnote{539}{ See WRIGHT ET AL., supra note 528, at 87–91 (discussing why developers would prefer expensive developments over low income housing developments).} The economics of real estate development make more expensive developments desirable for developers.\footnote{540}{ See, e.g., ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 115–16 (1984) (describing the different requirements for some New Jersey real estate developers to qualify for an increase in density).} Many local jurisdictions also refuse to permit low-income housing for a variety of reasons, including lower tax revenues, increased demand on public services, aesthetics, and
class and race discrimination. Local jurisdictions also define the scope of their police power as extending only to residents who, by definition, normally have found housing that they could afford in the jurisdiction.  

In marked contrast, Congress continues to afford specialized treatment for the propertied. For example, it provides a wide variety of subsidies for property owners, including tax benefits. Without even taking into account the tax benefits for owners of commercial properties, such as depreciation deductions, the tax subsidies enjoyed by homeowners far exceed federal benefits for the homeless. The following chart shows the amount of tax revenue that will be lost as a result of the homeownership deductions for mortgage interest, residential real estate taxes, and capital gains exclusions for the sale of a principal residence.

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage Interest</td>
<td>$62.7</td>
<td>$66.0</td>
<td>$69.1</td>
<td>$72.4</td>
<td>$76.1</td>
</tr>
<tr>
<td>Property Taxes</td>
<td>$21.0</td>
<td>$21.6</td>
<td>$22.3</td>
<td>$23.0</td>
<td>$23.5</td>
</tr>
<tr>
<td>Capital Gains</td>
<td>$13.3</td>
<td>$13.4</td>
<td>$13.5</td>
<td>$13.6</td>
<td>$13.8</td>
</tr>
<tr>
<td>Total</td>
<td>$97.0</td>
<td>$101.0</td>
<td>$104.9</td>
<td>$109.0</td>
<td>$113.4</td>
</tr>
</tbody>
</table>

In contrast, the federal government budgeted the following amounts for homelessness assistance.


543. See id. at 2, 18–19 (recognizing that local jurisdictions zone for the benefit of their residents).


545. Id.

546. Wright et al., supra note 528, at 90 (noting that “federal subsidies for middle- and upper-middle-class housing actually dwarf the federal low-income housing subsidy”).

547. Joint Committee on Taxation, supra note 544, at 18 tbl.1.

These amounts are budgeted to be decreased beginning in 2006, although they only equal approximately 1% of the amounts for the homeownership subsidies. Beyond substantially benefiting homeowners in comparison to the homeless, these deductions disproportionately benefit upper income homeowners. The following charts, which are based on the 2000 tax year, show the number of tax returns for each income bracket that included a deduction for mortgage interest or for real estate taxes, the percentage of total returns claiming a deduction, the average value of the deduction, and the percentage of the overall benefit enjoyed by each income group. The percentages are rounded, and therefore do not total 100%. As can be seen, households with incomes of $100,000 or more receive 59% of the benefit of this deduction. Households with incomes of $50,000 or more receive 92% of the benefit.

### Mortgage Interest Deduction

<table>
<thead>
<tr>
<th>Income Total (Thousands)</th>
<th># Returns (Thousands)</th>
<th>% Total</th>
<th>Amount (Millions)</th>
<th>% Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $10</td>
<td>12</td>
<td>.04</td>
<td>$1</td>
<td>.002</td>
</tr>
<tr>
<td>$10 to &lt; $20</td>
<td>272</td>
<td>.90</td>
<td>$105</td>
<td>.200</td>
</tr>
<tr>
<td>$20 to &lt; $30</td>
<td>906</td>
<td>3.00</td>
<td>$386</td>
<td>.600</td>
</tr>
<tr>
<td>$30 to &lt; $40</td>
<td>2,141</td>
<td>7.00</td>
<td>$1,194</td>
<td>2.000</td>
</tr>
<tr>
<td>$40 to &lt; $50</td>
<td>3,016</td>
<td>9.00</td>
<td>$2,591</td>
<td>4.000</td>
</tr>
<tr>
<td>$50 to &lt; $75</td>
<td>8,071</td>
<td>25.00</td>
<td>$8,165</td>
<td>13.000</td>
</tr>
<tr>
<td>$75 to &lt; $100</td>
<td>7,130</td>
<td>22.00</td>
<td>$12,423</td>
<td>20.000</td>
</tr>
<tr>
<td>$100 to &lt; $200</td>
<td>8,097</td>
<td>25.00</td>
<td>$22,131</td>
<td>37.000</td>
</tr>
<tr>
<td>≥ $200</td>
<td>2,164</td>
<td>7.00</td>
<td>$13,619</td>
<td>22.000</td>
</tr>
</tbody>
</table>

549. Id.
550. JOINT COMMITTEE ON TAXATION, supra note 544, at 29 tbl.3. The Joint Committee’s report did not include comparable information with respect to the capital gains exclusion.
551. Id.
552. Id.
The results for the residential real estate tax deduction are virtually identical. Again, households with incomes of $100,000 or more receive 60% of the benefit of this deduction. Households with incomes of $50,000 or more receive 92% of the benefit. Clearly, both deductions are regressive.

**REAL ESTATE TAXES**

<table>
<thead>
<tr>
<th>Income Total (Thousands)</th>
<th># Returns</th>
<th>Amount (Millions)</th>
<th>% Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $10</td>
<td>21</td>
<td>.06</td>
<td>1</td>
</tr>
<tr>
<td>$10 to &lt; $20</td>
<td>298</td>
<td>.90</td>
<td>40</td>
</tr>
<tr>
<td>$20 to &lt; $30</td>
<td>930</td>
<td>3.00</td>
<td>152</td>
</tr>
<tr>
<td>$30 to &lt; $40</td>
<td>2,109</td>
<td>6.00</td>
<td>426</td>
</tr>
<tr>
<td>$40 to &lt; $50</td>
<td>3,107</td>
<td>9.00</td>
<td>819</td>
</tr>
<tr>
<td>$50 to &lt; $75</td>
<td>8,229</td>
<td>25.00</td>
<td>2,683</td>
</tr>
<tr>
<td>$75 to &lt; $100</td>
<td>7,332</td>
<td>22.00</td>
<td>3,833</td>
</tr>
<tr>
<td>$100 to &lt; $200</td>
<td>8,522</td>
<td>26.00</td>
<td>6,980</td>
</tr>
<tr>
<td>≥ $200</td>
<td>2,396</td>
<td>7.00</td>
<td>5,303</td>
</tr>
</tbody>
</table>

The homeownership deductions also adversely affect the poor by transferring large amounts of money from the central cities, where poverty generally is concentrated, to the more affluent suburbs. A Brookings Institution Report concluded that in 1990, these deductions caused a transfer of over $18 billion from the central cities to the suburbs. In some metropolitan areas, the proportionate transfer greatly exceeded the national average. For example, in 1989, the City of Philadelphia received $400 million as a result of the deductions, whereas the Philadelphia suburbs received $2.3 billion.

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553. Id. at 25 tbl.3.
554. Id.
555. Id.
557. Id. at 19.
558. Id. at 3 (stating that “this aggregate result is driven by a relatively few states, including California, New Jersey, New York, Massachusetts, and Connecticut, where the suburbs reap much greater tax benefits than the state’s cities”)
559. Id. at 4, 24 & app.B.
Like lower income homeowners and central city residents, tenants are also disadvantaged by the tax code. Tenants suffer in two ways. First, their tax liability is greater because of the tax revenue loss attributable to homeownership deductions. The Brookings Institution Report stated that, on average, each rental household paid an additional $1,815 in taxes in 1990 to compensate for the homeownership deductions.

Second, tenants cannot deduct their rent payments on their tax returns. In contrast, homeowners who do not have mortgage debt liability for their homes are not subject to tax on the imputed rental value of their homes. This difference generally disproportionately benefits the well-to-do at the expense of lower income renters and is an additional example of the ways in which Congress favors the upper classes over the lower classes.

This differential treatment is attributable in large part to the poor's relative political powerlessness. As described in the last section, many legal barriers to voting by the poor continued until thirty or forty years ago. Some legal obstacles remain. For example, Louisiana and Virginia prohibit people who live on the streets from registering to vote. Until 1995, Pennsylvania law also prohibited the homeless from voting. Although Pennsylvania repealed that statutory prohibition in 1995, it now authorizes each county elections clerk to refuse to register.

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560. Wright et al., supra note 528, at 90 (discussing the tax benefits received by the middle and upper-middle classes).


563. Chirelstein, supra note 561, at 188.

564. Id.

565. Refer to text accompanying notes 446–67 supra (discussing the poor's powerlessness by disenfranchisement).


567. Virginia's statutory requirements to register to vote include a "residence in the precinct." Va. Code Ann. § 24.2-418 (Michie 2002). A "residence" is both a "domicile and a place of abode." Id. § 24.2-101. The Virginia State Board of Elections has interpreted this definition to exclude "[p]roperty on which there is no dwelling." Virginia State Board of Elections, Registering to Vote, available at http://www.sbe.state.va.us/VotRegServ/To_reg2vote.htm (last visited Apr. 26, 2003). Therefore, as in Louisiana, a person who lives on the street is unable to register.

Anyone who lives in a shelter or lives on the street.\textsuperscript{569}

Although a handful of courts and elections boards have overturned such restrictions,\textsuperscript{570} a number of additional obstacles exist. Voter registration has been a particularly potent obstacle.\textsuperscript{571} Although the stated purpose for implementing registration was to eliminate fraud, the unstated purpose was to prevent immigrants, southern blacks, and other poor groups from voting.\textsuperscript{572} This obstacle has been effective in accomplishing this latter goal, because it disproportionately prevents the poor from voting.\textsuperscript{573}

Registration requirements disproportionately affect the homeless in at least three ways. First, the cost and effort to register generally are greater for the poor than for those who are more affluent,\textsuperscript{574} whether due to the necessity for a bus ride or

\textsuperscript{569} See Helen Hershkoff & Stephen Looffredo, The Rights of the Poor: The Authoritative ACLU Guide to Poor People's Rights 349 tbl.8-1 n.3 (1997).

\textsuperscript{570} Pitts v. Black, 608 F. Supp. 696, 708 (S.D.N.Y. 1984) (holding that the New York Election Law violated the Equal Protection Clause of the Fourteenth Amendment because it disenfranchised homeless individuals); Fischer v. Stout, 741 P.2d 217, 221 (Alaska 1987) (recognizing that a shelter or even a park bench will be a sufficient residence for voter registration purposes); Collier v. Menzel, 176 Cal. App. 3d 24, 31 (1985) (stating that a park is a "physical area where a person can sleep and otherwise use as a dwelling place"); Bd. of Election Comm'rs v. Chicago/Gary Area Union of the Homeless (Cook County Circ. Ct. Misc. No. 86-24) (1986); In re Application for Voter Registration of Willie R. Jenkins, D.C. Board of Elections and Ethics (June 7, 1984); see also Comm. for Dignity & Fairness for the Homeless v. Tartaglione, No. 84-3447, 1984 U.S. Dist. LEXIS 23612, at *1 (E.D. Pa. Sept. 4, 1984) (stating "that for purposes of voter registration... any applicant who is homeless shall be deemed to have satisfied the residency requirements... by declaring on the Voter Registration Application the address of a shelter").

\textsuperscript{571} Pen\nKIMBALL, supra note 571, at 4.

\textsuperscript{572} Id.; Piven & Cloward, supra note 432, at 120–21 (noting that "voter registration was intended to discourage voting in big cities, and by the poor and less educated").

The requirement for an individual to register in order to vote was not introduced into the American political system until late in the nineteenth century. Its emergence coincided with the mass immigration of foreign-born newcomers into American cities and the move to disenfranchise Blacks in the South. Although the rationale included the elimination of fraud by big-city political machines or county courthouse gangs, the Anglo-Saxon majority in a rapidly growing America was also seeking bulwarks against unpalatable change. Mixed in with a Puritanical zeal for civic reform were a whole set of WASPish prejudices about who should be permitted to vote.

KIMBALL, supra note 571, at 4.

\textsuperscript{573} Id. at 4–5 (observing that inconveniences such as location and hours have been used as obstacles to prevent the poor from voting); Piven & Cloward, supra note 432, at 120–21 (stating that urbanization, income, and education are used as obstacles to discourage voting).

\textsuperscript{574} Piven & Cloward, supra note 432, at 119; David Callahan, Ballot Blocks: What Gets the Poor to the Polls?, Am. Prospect, July-Aug. 1998, at 68.
other inconvenience of the registration time or place.\footnote{575} Second, only nine states' election laws expressly enfranchise the homeless.\footnote{576} In those jurisdictions that do not, registration officials often refuse a homeless person the right to register.\footnote{577} In some cases, election registrars prevent homeless persons from voting even if they have registered.\footnote{578} Finally, many states check on the continued residency of registered voters by mailed notice, and any addressee who does not respond to the notice is purged from the registration list.\footnote{579} This practice obviously presents greater difficulties for the homeless than for those with a home.

The cumulative impact of these obstacles is as impossible to determine as determining the exact number of homeless persons. However, U.S. Census Bureau data strongly demonstrate the enormous differences in voter turnout between the upper and lower classes.\footnote{580} In the 2000 election, adult members of families with an income of at least $50,000 were twice as likely to vote as those with a family income of less than $5,000.\footnote{581} In the 1994, 1996, and 1998 elections, the differences were similar.\footnote{582}

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\hline
Under $5,000 & 28.2 & 21.1 & 32.8 & 20.0 \\
\hline
$5,000 - $9,999 & 34.7 & 23.9 & 32.8 & 23.5 \\
\hline
$10,000 - $14,999 & 37.7 & 30.4 & 39.5 & 33.0 \\
\hline
$15,000 - $24,999 & 43.4 & 34.6 & 45.9 & 40.4 \\
\hline
$25,000 - $34,999 & 50.0 & 40.2 & 52.0 & 44.9 \\
\hline
\end{tabular}
\caption{Percentage Reported Voted}
\end{table}

\footnote{575} See Kimball, supra note 571, at 5 (advancing that "registration lists have continued to be manipulated indirectly by administrative inconveniences").

\footnote{576} See Hershkoff & Loffredo, supra note 569, at 345 (noting that Arizona, Colorado, Illinois, Indiana, Iowa, Maine, Nebraska, Oregon, and West Virginia have enacted homeless registration statutes).


\footnote{578} Cf. Hershkoff & Loffredo, supra note 569, at 345 (instructing the homeless to contact local election agencies if they are denied the right to vote).


\footnote{581} Id.

\footnote{582}
Presumably, the difference would be even more pronounced if the comparisons were with only the homeless. Obviously, in Louisiana and Virginia, the percentage of homeless who voted would be approximately zero.\textsuperscript{583}

The U.S. Census Bureau voting figures are based on people who reported that they voted.\textsuperscript{584} Because of another structural difference in voting by the upper and lower classes, the actual difference in the number of voters counted is even greater than shown in the Census Bureau figures. A congressional study of the 2000 election showed that the votes of the poor were three times more likely to be disqualified than the votes of the more well-to-do.\textsuperscript{585} The reason is that older, faultier voting machines are used in poorer election districts.\textsuperscript{586}

Aside from voter registration and other structural obstacles to voting is the lower class’s sense of political powerlessness.\textsuperscript{587} In part, this sense of powerlessness and perhaps apathy results from the political agendas of the two leading political parties and from the apparent priorities of Congress and the state legislatures.\textsuperscript{588} A legion of examples exists in which legislators and members of the executive branch place far greater priority on the needs of big business and of our wealthiest citizens. For example, Citizens for Tax Justice has reported that President Bush’s tax reforms will provide more tax benefits for the wealthiest 1% of Americans than would be required to fund

\begin{tabular}{|c|c|c|c|c|}
\hline
Income Range & $35,000 - $49,999 & $50,000 - $74,999 & $75,000 and over \\
\hline
Percentage & 57.7 & 44.0 & 59.4 & 50.1 \\
\hline
\end{tabular}


583. Refer to notes 571–72 \textsuperscript{supra} and accompanying text (discussing Louisiana and Virginia voter registration laws).


586. \textit{Id.}

587. \textit{PIVEN & CLOWARD, supra note 432,} at 113, 119 (declaring that the poor feel isolated by the U.S. political system); Callahan, \textit{supra} note 579, at 68.

588. \textit{See PIVEN & CLOWARD, supra note 432,} at 119 (reporting that the poor are marginalized from electoral politics).
comprehensive prescription drug benefits for senior citizens. 589 Similarly, Vice President Cheney stated that he had to vote against funding for Head Start in order to support then-President Reagan's tax cuts for corporations and wealthy individuals. 590 Despite representations concerning the "trickle-down" effect of these tax cut programs, the poor have continued getting poorer and the rich have become much richer.

The U.S. Census Bureau has reported that, in 2000, the bottom quintile of households in this country had 3.6% of the income. 591 The top quintile of households had 49.7% of the income, and the top two quintiles had almost three-quarters of the income. 592

A 1999 report on concentration of wealth in the United States 593 that was based on Census Bureau figures sets forth a variety of facts demonstrating the increasing gulf between the rich and the poor, including:

1. In the late 1970s, the top 1% of families in America owned 13% of the wealth. In 1995, the top 1% owned 38%;
2. The wealthiest 2% of the population own 54% of all net financial assets. Over half of all families own no financial assets or own less than they owe;
3. The wealthiest 10% of the population owns 81.8% of the country's privately-held real estate, 81.2% of the stocks, and 88% of the bonds;
4. In 1960, CEO compensation was 40 times greater than the average salary for a worker. In 1992, CEO compensation was 157 times greater;
5. From the late 1970s to the mid-1990s, the income for the poorest families with children decreased by more than 20%, whereas it increased by almost 30% for the wealthiest families; and
6. Ninety-eight percent of the companies in America generate 25% of the country's business, whereas 0.1% of

590. Id.
592. Id.
the companies hold two-thirds of the business resources, employ two-thirds of industrial workers, make 60% of the sales, and generate 70% of the profits. 594

Moreover, in 1999, the three middle income quintiles of Americans earned less than they did in 1977. 596 In marked contrast, the net worth of the 400 wealthiest Americans increased by over 500% in constant dollars. 596

Why does the government so generously favor the wealthiest members of society, rather than providing necessary help for those who do not have shelter, food, and other essentials? Undoubtedly, the enormous cost of political campaigns constitutes a large part of the problem. During the 1999–2000 election cycle, candidates for Congress raised over $1 billion to fund their campaigns. 597 The special interest groups represented by political action committees (PACs) contributed almost one-quarter of this amount. 598 The candidates themselves contributed or lent an additional $175.9 million to their own campaigns. 599 Unsurprisingly, wealthy people have become party nominees in large part because they can help fund their own campaigns. 600 With individual congressional elections costing as much as $14 million, 601 the attractiveness of a wealthy candidate and of wealthy donors is obvious. The attractiveness of a homeless person is certainly questionable when campaign funding looms as such a large concern for candidates and for political parties.

Determining the exact net worth of members of Congress is virtually impossible because federal law requires only that they report their financial assets in wide dollar ranges. 602 But many

594. Id.
595. Id. (noting that "[s]ince 1973, every group in society except the top 20 percent has seen its share of the national income decline").
598. See id. (noting that PACs gave $193.4 million to House candidates and $52 million to Senate candidates).
599. Id.
600. David S. Broder, Editorial, A Senate of Millionaires, WASH. POST, Jan. 17, 1996, at A17 (stating that "[t]he combination of rising campaign costs and foolishly frozen limits on individual contributions has increased the advantage of self-financed candidates").
602. Kevin Diaz & Shira Kantor, Congress Bares Its Pocketbooks, STAR TRIB. (Minneapolis), June 15, 2002, at 18A.
members of Congress are known to be millionaires, and some are multi-millionaires. 603 "Electoral politics is largely a rich man's game and the property qualifications—as translated into campaign costs—are far steeper today than in 1787. 604

Obviously, personal wealth does not always correlate with a legislator's politics. Some of the wealthiest members of Congress, such as Edward Kennedy, have fought to provide legal rights for the poor. 605 But the inability of the poor to make significant campaign contributions or to fund PACs and their lower rates of political participation have left them generally unprotected in the political process. 606 With accelerating campaign costs and the increasing divide in the assets of the rich and the poor, the gap in legal rights between the two classes inevitably will increase. For this reason, the courts have an essential role to play in balancing the political power of one class over another.

IV. CONCLUSION

Since England colonized this country, the poor have been politically powerless. For much of our history, the poor have been unable to vote or to hold office. Unsurprisingly, as a result, legislatures have dealt particularly harshly with the poor. Debtor prisons, sales of children to satisfy debts, whippings, and brandings were among the devices that the government used to punish the poor. That governments would enact and enforce such laws is a clear demonstration of the perils of powerlessness. Although many of the cruelest laws directed at the poor no longer exist, the cruelty of homelessness continues. As in earlier times, Congress favors the upper classes, while providing only a very small fraction of its resources for the poor. As the gap between the rich and the poor continues to widen, the courts are best situated to protect those who have been the subjects of an ongoing history of discrimination.

603.  Id. (reporting that Democratic Sen. Mark Dayton and Rep. Jim Oberstar are both worth at least $10 million).

604.  Parenti, supra note 127, at 57.


606.  Refer to notes 572–87 supra and accompanying text (discussing the low rate of political participation among the poor and their inability to protect themselves in the political process).