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**\*749 THE CENTRAL MEANING OF REPUBLICAN GOVERNMENT: POPULAR SOVEREIGNTY,  
MAJORITY RULE, AND THE DENOMINATOR PROBLEM**

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Like the apostle Paul, Republican Government has been "made all things to all men." [\[FN1\]](#) The concept is indeed a spacious one, and many particular ideas can comfortably nestle under its big tent. Surprisingly, however, few modern scholars seem even aware of the central meaning of Republican Government--of the main pole that keeps the big top up, as it were. Today, I shall describe this central pillar as understood and acted upon in the Founding, Antebellum, and Civil War eras.

The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule. They do not necessarily rule directly, day-to-day. Republican Government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, [\[FN2\]](#) but neither does it require ordinary lawmaking via these direct populist mechanisms. What it does require is that the structure of day- to-day government--the Constitution--be derived from "the People" and be legally alterable by a "majority" of them. These corollaries of popular sovereignty--the people's right to alter or abolish, and popular majority rule in making and changing constitutions--were bedrock principles in the Founding, Antebellum, and Civil War eras. [\[FN3\]](#) And I shall show that these principles were understood and accepted as the central \*750 meaning of Republican Government by many of the major participants in constitutional debates from 1780 to 1870. [\[FN4\]](#)

Of course, participants in these constitutional debates disagreed about a good deal--fiercely enough, at times, to wage civil wars [\[FN5\]](#)--but these disagreements only prove my point, for different sides argued within the central meaning, not against it. And without more, the central meaning of Republican Government left some big issues unresolved and up for grabs. Exactly who were "the People," a

"majority" of whom could lawfully alter or abolish constitutions? I shall call this deep and recurring question "the denominator problem."

The denominator problem arose in many contexts, along many axes. Were adult women part of the Republican People--the polity? What about unpropertied adult males? How about free black men? Should "the People" be understood as the people of each state, or of the United States as a whole? And what did the "majority rule" concept require if a group constituting a "majority" of those who did vote, but only a minority of those eligible to vote, authorized a new constitution? Now these issues, I shall argue, are exactly the ones that organized American constitutional discourse about, and implementation of, Republican Government between 1780 and 1870.

At the Founding, the very act of constitution itself--of ordainment and establishment--embodied the first principles of Republican Government: the right of the sovereign people, via a special convention, to alter their existing constitution by simple majority vote. The problem of the denominator generated explicit theoretical discussion, and the very act of ratification further clarified some of the Founding era's denominator problems. Because each state was sovereign and independent prior to ratification, popular sovereignty took place within each state, per Article VII of the new Constitution. The rule of decision followed by each state was simple majority rule within a specially called ratifying convention of "the People." Even in states \*751 where they could not vote for ordinary legislatures, unpropertied militiamen who had fought for their freedom in the Revolution were, it seems, part of "the People" eligible to participate in constitutional change by electing delegates to the specially called ratifying conventions. [\[FN6\]](#)

In the Antebellum era, the central meaning of Republican Government was alive and well, with new state constitutions in many states born via majority rule popular sovereignty. But in the early 1840's the denominator problem triggered a brief intrastate civil war in Rhode Island. Pointing to two different state constitutions, two different groups each claimed to be the lawful government of Rhode Island. Backers of each constitution claimed that it, and not the other, enjoyed the support of the relevant popular majority; but which majority was entitled to rule? This was the key issue underlying "Dorr's Rebellion" and generating the first major Supreme Court case to address the Republican Government Clause, *Luther v. Borden*. [\[FN7\]](#) In the 1850's, the denominator problem resurfaced with a vengeance in the western territories. Who, precisely, were "the People" entitled to exercise "popular sovereignty" in Kansas? Should votes of "border ruffians"--Missouri residents who had no intention of living in Kansas--count? If one side boycotted an election called by the other, could a simple majority of those actually voting suffice to bind the rest? These were the issues over which Kansas bled. [\[FN8\]](#)

The civil wars in Rhode Island and Kansas were, in retrospect, mere preludes. In 1860 and 1861, various southern states called special conventions in which simple majorities claimed the right to alter their governments by seceding from the Union. President Lincoln, of course, denied the legality of these attempted secessions. He agreed that majority rule popular sovereignty was a central pillar of Republican Government, but argued that, under the U.S. Constitution, ultimate popular sovereignty resided in the collective people of the United States, not the people of each state. Secessionist majoritarians insisted that the lawful denominator was the state, not the Union--"\*752 and the war came." [\[FN9\]](#) When it ended, Southern state governments needed to be re-constituted for re-entry into

the Union, and the denominator problem arose yet again. Were southern black men--now freed by the Emancipation Proclamation-- part of the state peoples, and thus eligible to participate in the new state constitution-making process? If Southern states that refused to include blacks were to be excluded from Congress as "un-Republican," what about Northern states that denied blacks the suffrage? The most momentous issues of the Reconstruction era explicitly pivoted on the Republican Government Clause; and once again, debate and action swirled within what I am calling its central meaning. [\[FN10\]](#)

In Parts II, III and IV of what follows, I shall sketch how the central meaning of Republican Government organized constitutional words and deeds in the Founding, Antebellum, and Civil War eras respectively. Before turning to those sketches, I shall in Part I canvass other possible approaches to the central meaning of Republican Government.

## I. SIDE SHOWS

The concept of Republican Government has spawned a considerable number of modern interpretations. Indeed, several of these interpretations are the explicit foundations of, or targets of attack from, the other main essays in today's symposium. Let us briefly catalogue these contending theories before we consider what I claim to be the concept's central meaning.

### A. Indeterminacy

The Indeterminacy Thesis might deny that any such central meaning exists. The concept of Republican Government, Indeterminists would argue, is utterly vacuous. In 1807, John Adams complained to Mercy Otis Warren that he had "never understood" what a republic was and "no other man ever did or ever will." [\[FN11\]](#) But as the \*753 great historian Gordon Wood has observed, Adams' "memory was playing him badly" representing "the bewilderment of a man whom ideas had passed by." [\[FN12\]](#) As we shall see, Republican Government had a rather precise signification to those who participated in the framing and ratification of the Constitution in the late 1780's. Adams, alas, was off in Europe when these momentous words and deeds unfolded; and in this very real way, the intellectual and practical culmination of the American Revolution did indeed pass him by.

### B. Nonjusticiability

Consider next the Nonjusticiability Thesis. [\[FN13\]](#) According to this view, the key thing to understand about the Republican Government Clause of Article IV is that it is not ordinarily justiciable in Article III courts. But why not? Because it is wholly devoid of analytic content, and cannot be made more specific through judicially manageable standards? This is simply the Indeterminacy Thesis in different garb, and is no more persuasive in its new clothing. Indeed, it is hard to see how other big clauses--from Section One of the Fourteenth Amendment, for example--are so different from the Republican Government Clause in their potential breadth, and their need for judicial mediating principles.

If instead, the Nonjusticiability Thesis is justified by appeal to precedent, the thesis runs into other problems. As we shall see, the hoary case said to establish the general nonjusticiability of the Clause, *Luther v. Borden*, [\[FN14\]](#) in fact establishes no such thing; and the events giving rise to *Luther* show that the concept of Republican Government does have a central meaning, intimately connected with popular sovereignty and majority rule. [\[FN15\]](#) And if we look at more modern case law, we see that this vision is indeed justiciable--though the Court in the landmark case of *Reynolds v. Sims* [\[FN16\]](#) repackaged these Republican Government issues as "equal protection" issues.

**\*754** The majoritarian rhetoric of *Reynolds* [\[FN17\]](#) harmonizes nicely with the spirit of Republican Government, but much less well with the text and history of the Equal Protection Clause itself, which was written to protect the civil rights of minorities and nonvoting "persons"--aliens, for example--rather than the political (voting) rights of majorities. [\[FN18\]](#) The Nonjusticiability Thesis cannot explain why this mismatching of clauses came to pass in U.S. Reports; the account I shall offer, by contrast, does help to explain this anomaly.

### C. State Autonomy

Next, consider the State Autonomy Thesis. [\[FN19\]](#) On this view, a core meaning of the Article IV Republican Government Clause is that the federal government is limited in its ability to restructure state government at will. The Clause guarantees a measure of state governmental autonomy from the federal government. Congress could not, for example, demand that Colorado locate its state capital in Boulder rather than Denver, or switch to a unicameral legislature, even if these changes might improve interstate commerce. There is much that is right--textually, historically, and structurally--about this thesis, but without more it is incomplete. At most, it is an account of a particular clause in Article IV, not a global account of Republican Government generally, a concept that of course applies in many other contexts--in federal territories that have not yet become states, and in thinking about the Republican character of the federal Constitution itself, for example.

Even as an account of Article IV, the State Autonomy Thesis is only one side of the coin, as its most sophisticated proponent, Deborah Jones Merritt, has explicitly noted. [\[FN20\]](#) Sometimes, the federal government may (or perhaps must) intervene and restructure state government under the invitation (or mandate) of the Article IV Republican **\*755** Government Clause itself. For if the de facto government of a state is not, indeed, "Republican" in form, the Clause calls for federal governmental intervention, not state governmental autonomy. But to decide when this intervention is called for, we need a richer account of Republican Government itself, and its central meaning.

### D. The Bill of Rights

Now let us turn to the Bill of Rights Thesis. On this account, any state that violates any of its citizens' fundamental rights is not a "Republican" state; and the federal Bill of Rights constitutes a presumptive, if nonexclusive, catalogue of these fundamental rights. This thesis was prominently voiced in the 39th Congress in 1866 by Senator James Nye and Representative Roswell Hart, [\[FN21\]](#) and has been

discussed in some modern scholarship. [\[FN22\]](#) If taken seriously, the Thesis requires repudiating the Supreme Court's 1833 landmark case *Barron v. Baltimore*, [\[FN23\]](#) which held that the original Bill of Rights regulates only federal officials. Overruling *Barron* indeed was the intent of the 39th Congress, and as I have argued else-where, [\[FN24\]](#) Congress embedded that intent in the plain meaning of the words of Section One of the Fourteenth Amendment. As an account of the meaning of the federal Constitution prior to the Fourteenth Amendment, however, the Nye/Hart Bill of Rights Thesis is highly problematic.

Certain rights and freedoms proclaimed in the Bill of Rights might indeed be unbridgeable by any state that was truly "Republican." Without broad protection for antigovernmental discourse, petitions, and assemblies, for example, popular sovereignty and the right of the people to alter or abolish their existing government might be meaningless. [\[FN25\]](#) But not all provisions of the original \*756 Bill of Rights clearly connect to the central meaning of Republican Government. A state that obliged criminal defendants to take the witness stand--just as civil defendants and witnesses generally are often obliged to testify against their wishes--might be called unfair, or even illiberal; but it would hardly be un-Republican.

#### E. Anti-Direct Democracy

Consider next the Anti-Direct Democracy Thesis--the widely held view that various forms of direct democracy such as initiatives and referenda are inconsistent with Republican Government, and forbidden by the Republican Government Clause of Article IV. [\[FN26\]](#) The foundation of this claim is remarkably slender, consisting of "law office history" based on a brief passage in Madison's *Federalist* Number 10 and a cross reference back to this passage in his Number 14, which served as a sequel. [\[FN27\]](#) Though Number 10 is now canonical, its role at the Founding and for the next century was far more modest. In a most careful study, the brilliant historian Douglass Adair noted that:

\*757 It was not until 1913, 125 years [after its initial publication], that Charles A. Beard made this particular essay [Number 10] famous for students of the United States Constitution. Before [1913], practically no commentator on *The Federalist* or the Constitution, none of the biographers of Madison, had emphasized *Federalist* 10 as of special importance for understanding our "more perfect union". . . . [\[FN28\]](#)

When we examine the key scrap of language from *Federalist* Number 10, further doubts crowd the mind:

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy. . . .

[A] great point[] of difference between a democracy and a republic [is] the delegation of the government in the latter, to a small number of citizens elected by the rest. [\[FN29\]](#)

Note that Madison here does not purport to be discussing "Republican Government" within the meaning of the Republican Government Clause of Article IV. And when he and Hamilton do discuss this clause in Numbers 21 and 43, they nowhere refer back to this scrap from Number 10. Note also that Madison

seems a bit selfconscious, aware that he is using the word "republic" in a nonobvious-- perhaps even idiosyncratic--way: "A republic, by which I mean . . . ." as opposed to "A republic, by which is generally meant . . . ."

By contrast, only three paragraphs before the key scrap, Madison refers nonchalantly and unselfconsciously to majority rule as "the republican principle." [\[FN30\]](#) And as we shall see, this linkage between Republicanism and majority rule runs throughout The Federalist Papers, and Founding era discourse more generally. Proponents of the Anti-Democracy Thesis have yet to identify a similar pattern linking Republicanism with a rejection of all forms of direct democracy, and what little evidence there is seems to cut the other way. To be sure, Madison does clearly refer back to Number 10 in his sequel, \*758 Number 14, where Madison repeats his claim that republics rely on representation in contrast to democracies. [\[FN31\]](#) But other leading Framers seemed explicitly to say that Republican Government could be either directly or indirectly democratic.

In the South Carolina ratifying convention, Charles Pinckney described a Republican Government as one where "the people at large, either collectively or by representation, form the legislature." [\[FN32\]](#) And in the Pennsylvania ratifying convention, the great James Wilson pointedly equated a "republic" with a "democracy"; in both (and in explicit contrast to "monarchy" and "aristocracy") "the people at large retain the supreme power, and act either collectively or by representation." [\[FN33\]](#) As Wilson put the point later in the convention, under the Constitution "all authority, of every kind, is derived by representation from the people, and the democratic principle is carried into every part of the government." [\[FN34\]](#) In debates over the Constitution, republican government was regularly contradistinguished from monarchy and aristocracy, but rarely from democracy. [\[FN35\]](#) Indeed, Madison himself, who in Number 10 offered what he labeled a "republican remedy for the disease most incident to republican government" had earlier described this very same scheme at Philadelphia as "the only defence agst. the inconveniences of democracy consistent with the democratic form of Govt." [\[FN36\]](#) Let us also note that in the 1790's, various political groups sprang up, some labeling themselves "Republican Societies," some "Democratic Societies" and some "Democratic-Republican Societies" [\[FN37\]](#) --and the political party Madison co-founded in that decade began as the "Republican" party but later became known as the "Democratic" party.

\*759 Until its proponents offer more evidence than scraps from Number 10 and its sequel Number 14, [\[FN38\]](#) we are entitled to say, with the Scotch, that the Anti-Direct Democracy reading of the Republican Government Clause of Article IV is "not proven."

## F. Common Good

Consider finally the Common Good Thesis that the essence of a Republican Government is that virtuous citizens be willing to make sacrifices for the greater common good. [\[FN39\]](#) On this view, a Republic's spirit and aim was the res publica, the public affairs, or the public good. As Gordon Wood has observed, under this definition, it would even be possible for a hereditary monarchy to be a republic, if its citizens possessed the proper self- sacrificing, virtuous spirit. [\[FN40\]](#) And prior to 1776, it was indeed conceivable that a benign though nonelective monarchy could be considered republican in

America. But by 1787, Americans clearly understood that monarchy was incompatible with the deepest spirit of republicanism, which required democratic self-rule. Thus, when Madison in Federalist Number 43 did turn to expounding the Republican Government Clause of Article IV, these were his first words: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations." [\[FN41\]](#)

So too, in Federalist Number 39, Madison explicitly contradistinguished republicanism from "aristocracy" and "monarchy" [\[FN42\]](#) --a contradistinction \*760 prominent in many other discussions of the Republican Government Clause in 1787-88. [\[FN43\]](#)

But what, for Madison, was a republic? In Number 39, Madison linked it with "the capacity of mankind of self-government," where government derives "all its powers" from "the great body of the people"; [\[FN44\]](#) and in the above-quoted passage from Number 43, he reminded his audience that the Constitution itself was to be "founded on republican principles." [\[FN45\]](#) As we shall see, these principles were rooted in majority rule popular sovereignty. Virtue and a willingness to sacrifice for the common good were indeed part of republicanism because they were presupposed by the project of democratic self-government. As Madison put the point in Number 55: "Republican government presupposes the existence of [virtuous] qualities in a higher degree than any other form. . . . [Republicanism requires] sufficient virtue among men for self- government." [\[FN46\]](#)

Thus, perhaps a better rendering of the *res publica* would be that in a republican government, government must be the people's thing. Like *poplicus*, *publica* ultimately is rooted in a reference to "the People"--consider also the Latin *pubes*, in the sense of "adult men." [\[FN47\]](#) Roger Sherman captured this etymological truth well in a 1789 letter to John Adams noting that "what especially denominates [a government] a republic is its dependence on the public or people at large." [\[FN48\]](#) Like the Constitution's more explicit references to "the People" in the Preamble, and the First, Ninth, and Tenth Amendments, Article IV's indirect reference to the people tapped into first principles of popular sovereignty and self-rule by the people. [\[FN49\]](#)

To understand this last point most clearly, we must return to the Founding, and see it with fresh eyes.

## \*761 II. THE FOUNDING ERA

We have been taught to look at the Constitution through the wrong end of the telescope. We have been told that the Bill of Rights was designed to inhibit majority tyranny and limit popular passion; and so we have missed the many ways in which it was also structured to enhance majority rule and promote popular sovereignty. We have been taught to dwell on the most indirect and filtered parts of our Constitution such as Article III; and so we have all but ignored the most directly democratic majoritarian parts of our Constitution, the Preamble and Article VII, which set out how our Constitution came to be ordained and established, and which have grand implications for how it might be altered or abolished. We have been told that Article V specifies the exclusive mechanism of lawful constitutional change

when instead it may specify only the exclusive mechanism by which ordinary government may alter the Constitution without recurring to the people themselves. We have been told that the Preamble's reference to "the People" is essentially meaningless; that the Ninth Amendment's reference to "the People" implicates only individual rights like privacy; and that the Tenth Amendment's reference to "the People" involves only states' rights. What we miss is how all these references to "the People" are embodiments of the Constitution's unitary structure and overarching spirit of popular sovereignty--of the people's right to "ordain" and "establish," and their "reserved" and "retained" rights to alter or abolish, their Constitution. And when we look at the "Constitution" as an act and not a text--as a physical, embodied, real-life doing of ordaining and establishing--we have been taught, by Charles Beard and his disciples, to treat this constituting act as an antipopulist Thermidorian conspiratorial coup. In fact, it was the most participatory, majoritarian (within each state) and populist event that the planet Earth had ever seen.

I have argued all of these things elsewhere, at great length, and I shall not here try to cover this ground again, or present all my evidence and arguments. [\[FN50\]](#) Instead, I shall ask a simple question: how does the concept of Republican Government fit with my earlier claims about the Preamble, and the Ninth and Tenth Amendments, \*762 and the Bill of Rights more generally, and the Constitution's overall structure and spirit?

My answer is that Republican Government fits into this structure quite snugly. Like the explicit invocations of the people in the Preamble and the Ninth and Tenth Amendments, the subtle invocation of the people in the Republican Government Clause of Article IV reaffirms basic principles of popular sovereignty--of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule, in these exercises of ultimate popular sovereignty.

#### A. Popular Sovereignty, The Right To Alter or Abolish, and Majority Rule

Let me begin in the most unlikely place imaginable--the canonical Federalist Number 78, the home field of those who would have us focus first on the Constitution's most filtered, least majoritarian, least populist place, Article III. The author is none other than Alexander Hamilton, Exhibit A of Charles Beard and his disciples, a man who, in his heart of hearts, had little faith in the people (unlike, say, James Wilson). And yet here is what even this man, in even this place, publicly says about Republican Government: "I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness . . . ."  
" [\[FN51\]](#)

Clearly, then, even Hamilton understood--and accepted--the linkages between Republican Government, popular sovereignty, and the people's right to alter or abolish. Though he does not explicitly specify in Number 78 the legal mechanism by which this right may be exercised, he does appear to imply that this process is majoritarian. A "majority" of the voters, Hamilton says in the remainder of this passage, cannot simply disregard the written Constitution whenever they please, or

pressure their representatives to do so; rather they--"the people," says Hamilton--must alter or abolish \*763 through the proper legal channels in some "solemn and authoritative act" such as the calling of a new constitutional convention. [\[FN52\]](#)

To see the central role of popular majority rule in altering or abolishing, however, we need not strain to read between the lines of Number 78; we need only read the plain words of Hamilton's earlier Number 21, in a passage where Hamilton is explicitly discussing the Republican Government Clause of Article IV: "[The clause] could be no impediment to reforms of State constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence." [\[FN53\]](#)

Indeed, in the very next Number we find Hamilton, echoing and elaborating Madison's nonchalant and unselfconscious dictum in Number 10: "[A] fundamental maxim of republican government . . . requires that the sense of the majority should prevail." [\[FN54\]](#)

Now turn to James Madison, today viewed as the great champion of minority rights. In a letter to Thomas Jefferson written only weeks before the publication of Number 10, Madison invoked "the republican principle which refers the ultimate decision to the will of the majority." [\[FN55\]](#) This point he reformulated almost fifty years later as follows: "the vital principle of republican government is the *lex majoris partis*, the will of the majority." [\[FN56\]](#) And Madison's observations in *The Federalist* consistently linked Republican Government with popular self-rule, the people's right to alter or abolish, and the role of popular majority rule in moments of constitutional founding and change.

As we have already seen, Madison begins his famous Number 39 by linking Republican Government with "the capacity of mankind for self government." [\[FN57\]](#) He then asks, "What, then, are the distinctive characters of the republican form?" [\[FN58\]](#) He notes that under some loose definitions, even aristocratic or monarchical regimes might \*764 claim to be republics, but in post Revolutionary America, these definitions will not do. Republicanism must be defined as against aristocracy and monarchy--as "a government which derives all its powers . . . from the great body of the people" [\[FN59\]](#) --echoing his line in Number 37 that the "genius of republican liberty . . . demand[s] that all power should be derived from the people." [\[FN60\]](#)

But how, exactly, would the federal Constitution establish a truly republican government "deriv[ing] all its powers" from the people? In part through the practice of elections for officers, but even more fundamentally, through the act of popular ordainment and establishment of the Constitution itself. As Madison reminds his readers when he turns to expound the Republican Government Clause of Article IV in Number 43, the federal Constitution will itself be "founded on republican principles" [\[FN61\]](#) --"founded," as he puts the same point in Number 39, "on the assent and ratification of the people of America, given by deputies elected for the special purpose." [\[FN62\]](#) These special conventions of the people, Madison explicitly notes in Number 40, would act by simple majorities; [\[FN63\]](#) and in Number 39 he observes that in a nonfederal republican regime, at least, "majority of the people" would be "competent at all times . . . to alter or abolish its established government." [\[FN64\]](#)

Publius was not alone in linking Republican Government to popular sovereignty and majority rule.

Samuel Johnson's 1786 dictionary defined "Republican" as "Placing the government in the people"; [FN65] and various ratification era pamphlets and speeches defined republican government as one in which "the people are sovereign," [FN66] "the people are consequently the fountain of all power," [FN67] "laws are derived from the consent of the people," [FN68] and power resides in "the hands of the people at large." [FN69] In his most famous Supreme Court \*765 opinion, in the 1793 case of *Chisholm v. Georgia*, the great Justice James Wilson--signer of both the Declaration of Independence and the Constitution, one of the Constitution's two most important Framers, and the leading lawyer in America--offered a "short definition" of Republican Government as "one constructed on the principle, that the Supreme Power resides in the body of the people." [FN70] Two years later, Justice James Iredell delivered an opinion noting that in "a Republic" the "sovereignty resides in the great body of the people." [FN71] Likewise, in a 1792 newspaper essay, James Madison described a "republican government" as one rooted in the ideas that "mankind are capable of governing themselves" and that "the Government be administered in the spirit and form approved by the great body of the people." [FN72] In his First Inaugural Address, Thomas Jefferson described majority rule as "the vital principle of republics" [FN73] --a point he later formulated as follows: "the first principle of Republicanism is, that the *lex majoris partis* is the fundamental law of every society of equal rights. To consider the will of the society announced by the majority of a single vote as sacred as if unanimous is the first of all lessons of importance." [FN74] In a similar vein, former Philadelphia Convention delegate Caleb Strong noted that "in republics, the opinion of the majority must prevail." [FN75]

It is tempting for modern readers to dismiss all this talk of popular sovereignty, altering or abolishing, and majority rule as mere theoretical speculation, unimportant window dressing or, more darkly, dishonest posturing. Yet this temptation only reflects the tremendous distortions created by looking at the Constitution through the wrong end of the telescope. Ordinary, day-to-day government under the Constitution might be both highly filtered and supermajoritarian; but if these rules themselves had been approved by popular majorities, and could be changed by them, the essence of the Constitution Publius was far more Republican than modern cynics acknowledge. The words of *The Federalist* were indeed "rhetoric" \*766 designed to "persuade" and "justify"--but they were trying to persuade majorities in each state to ratify the Constitution. These words were written to justify the exercise of majority rule popular sovereignty, which provided the foundation of the Constitution itself. Majority rule popular sovereignty was not mere theory but embodied practice: in assembled conventions, the people of each state were exercising their rights to alter their existing state constitution and to help ordain and establish a new continental constitution. And they--"We, the People"--were doing all this, state by state, by simple majority rule--30-27 in New York; 187-168 in Massachusetts; 57-47 in New Hampshire; 89-79 in Virginia; and so on. [FN76] These conventions sprang to life via special elections in which a greater "mass of the people" was eligible to vote than ever before. [FN77] Until we see all this--and begin to take it seriously--we simply cannot understand the American Constitution in word, deed, or spirit.

## B. The Denominator Problem

Nor can we begin to understand and grapple with the big and difficult issues raised by the Constitution's words, deeds, and spirit--what I am calling here "the denominator problem." As we shall see, from 1780 to 1870, much of American constitutional history--state, federal, and territorial--can be

seen as variations on this denominator problem.

## 1. The Geography Problem

The first question to ask is, which majority should ultimately rule--a majority of each state people, or a majority of the continental people? Prior to the ordainment and establishment of the U.S. Constitution, the answer was clear in both the Constitution and *The Federalist*: the people of each state. Under Article VII, the Constitution would go into effect only in those states whose peoples had ratified it; no state could be bound without the consent of its own people, as expressed by a majority of a special popular convention within that state. As Madison observed in Number 39:

**\*767** Were the people regarded in this transaction as [already] forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority. . . . [Instead, however, e]ach State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. [\[FN78\]](#)

These rules for ratification made good common sense and legal sense. Each of the thirteen states had been founded at a different time, with a unique colonial history and charter. Each had its own constitution after 1776. The states had indeed leagued together in the Articles of Confederation, but the Articles were a mere treaty among thirteen separate nations, each of which expressly retained its sovereignty. Under standard principles of international law, the notorious and widespread violations of that treaty in the 1780's freed each contracting party--each state--to withdraw (secede, if you will) from the treaty in 1787-88 by ratifying the federal Constitution. Until a new nation had been formed, no state could speak for any other; in 1787, a national ratification convention would have been pure bootstrap. [\[FN79\]](#)

But once Americans had ratified the new U.S. Constitution and formed "a more perfect union" would each state people continue to be sovereign and independent? Under the Constitution, which majority should ultimately rule--a majority of the people of the United States, or a majority of the people of each state? Here was the momentous question that led to civil war. Jefferson Davis insisted that the people of each state continued to be sovereign; and that just as a simple majority of a specially called South Carolina convention had seceded from the Articles to join the Union in 1788, so too a simple majority of a specially called South Carolina convention could secede from the Union to join the Confederacy in 1860. Abraham Lincoln was no less committed to ultimate majority rule and Republican Government--indeed, his First Inaugural Address brilliantly defended majority rule [\[FN80\]](#) --but Lincoln believed that the denominator was national, not statewide. The United States was a nation, and ultimately **\*768** sovereignty lay in the national people, acting in accordance with the fundamental principle of Republics, majority rule.

In *The Federalist* Number 39, Madison tried to straddle the momentous issue of the geographic denominator. The new Constitution, he argued, was neither

wholly national nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all

times, like that of a majority of every national society to alter or abolish its established government.

[\[FN81\]](#)

Yet in denying that the Constitution did ultimately empower a majority of the people of the Union--as his fellow Federalist James Wilson apparently believed--Madison left us with a huge puzzle: if the people of neither South Carolina nor America could abolish the Constitution by majority action, because the Constitution was neither wholly federal nor national, what happened to Madison's fundamental principle of Republican Government? [\[FN82\]](#)

## 2. The Demography Problem

The Founding raised another momentous denominator question that also foreshadowed the Civil War debate. Within any given state, which persons constituted the relevant people, a majority of whom should ultimately rule under the Republican principle? On what occasions might those persons exercise their ultimate sovereignty? In elaborating on the Republican Government Clause of Article IV, Madison tiptoed up to these demographic denominator and procedural questions, and gave us some key clues and prescient predictions:

At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently that the federal interposition can never be required but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes \*769 of violence, be formed as well by a majority of a State . . . ?

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? . . . May it not happen, in fine, that the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the state has not admitted to the rights of suffrage? [\[FN83\]](#)

Madison's analysis, building on earlier notes to himself in his now-famous "Vices of the Political System of the United States," [\[FN84\]](#) begins by reminding us that in a Republican Government, not everything a majority does is lawful. A majority must act through the proper, peaceful legal channels--such as conventions--rather than through appeals to brute force, or (as Hamilton will remind his readers in Number 78) [\[FN85\]](#) unprincipled pressure on officials to ignore extant, unpealed constitutional provisions. This concern about majority compliance with formal niceties would prove remarkably prescient, for as we shall see, the Rhode Island Civil War in the 1840's would hinge on technical issues of legal formality: even if the People's Party, led by Thomas Dorr, constituted the clear majority party in Rhode Island, had they properly jumped through the requisite procedural hoops in ratifying their "People's Constitution"?

Madison's next point is in some respects the flip side of all this. Even if a lawful majority of the duly constituted, legally relevant "people" authorizes a regime through strict compliance with all formal niceties, that lawful majority may lack the muscle to make its will and judgment stick. De jure authority

does not guarantee de facto power; right does not always make might. A voting minority, Madison reminds his audience, might have a majority of the guns, or the wealth. It might also have the backing of outsiders--"foreign powers," "alien residents" or "a casual concourse of adventurers." Here too, Madison proved a prophet, as we shall see in the 1850's \*770 controversy over majority rule "popular sovereignty" in Kansas, in which the role of outsider "border ruffians" loomed large.

Most intriguing of all, Madison reminds his audience that a minority of the lawful voters might be backed by the outsiders within--those permanent residents of a Republic "whom the Constitution has not admitted to the rights of suffrage." In Number 52, Madison returns to this point, reminding his readers that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government." [FN86] In focusing on the disenfranchised in Number 43, Madison does not appear to be thinking primarily of women--alas, almost no major participant in Founding era deliberations appeared to be thinking primarily of women. Who, then, is on his mind first and foremost? In his very next sentence, he describes them:

an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves. [FN87]

In a word: slaves. And here again we see the seeds of future discord within the tradition of Republican Government. How could slaves simply be excluded from "the People" by definitional fiat?

As Madison recognized in Number 39, the "essence[]" of Republican Government was "that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it." [FN88] How was a favored caste of race any more Republican than a favored caste of noblemen, especially in any state where blacks constituted a majority or near majority of the population? Could a Republic truly exist half slave and half free? Here was the other great denominator question, long repressed, bursting open with the Civil War. And once slaves were freed in the South, did not Republican Government principles require that the large mass of now-free black men in the South be allowed to participate in electing constitutional conventions? This was the burning question of Reconstruction--and \*771 one that, as we shall see, was explicitly debated in terms of the Republican Government Clause of Article IV.

Before we leave Madison's remarkable ruminations, let us, finally, note his initial description of "Republican Theory" in his 1787 notes to himself: "According to Republican Theory, Right and power [are] both vested in the majority." [FN89] Though we have seen how, descriptively, this tight linkage of right and might fails, Republican theory did indeed try to bring right and might into rough alignment. In a stable and healthy Republic, economic and military power should be distributed in ways that broadly corresponded with the distribution of formal political power. Voters would not possess mathematically identical wealth shares, even as they possessed exactly equal votes; but wild extremes of both wealth and poverty were un-Republican, and should be discouraged. [FN90] Roughly speaking, those who voted equally should be equally armed, and those who bore arms militarily should vote.

Over and over, and across the centuries, we can see this Republican Theory inscribed in the text of our

Constitution. The Second Amendment's two clauses equated the "well regulated militia" with "the People" [FN91] --the same people who in the Preamble "ordain[ed] and establish[ed] this Constitution," [FN92] who enjoyed a First Amendment right to "assemble" in conventions (and elsewhere), [FN93] and who "retain[ed]" and "reserv[ed] their "rights" and "powers" to alter or abolish (and other rights and powers) in the Ninth and Tenth Amendments. [FN94] Indeed, an early draft of the Second Amendment, later shortened for purely stylistic reasons, pointedly defined the \*772 "militia" as "composed of the body of the People." [FN95] Section Two of the Fourteenth Amendment defined a state's presumptive electorate as "male inhabitants of [a] State, being twenty-one years of age, and citizens"--roughly speaking, the same group that constituted the state's general militia. [FN96] The Fifteenth Amendment entitled black men to vote long before women of all races became eligible, in part because black men had borne arms for their country and provided the Union the margin of victory. [FN97] When it became clear that wars had ceased to be highly structured, ritualized competitions between armies of men, but instead pitted entire societies and economies against each other, women won the vote under the Nineteenth Amendment. Indeed, Woodrow Wilson and other politicians explicitly endorsed women's suffrage in recognition of women's role as economic soldiers in the war effort against Germany. [FN98] And more recently, the Twenty-Sixth Amendment extended the vote to young adults on the theory that if they were old enough to bear arms in Vietnam, they were old enough to vote on the wisdom of that war, and on all else. [FN99]

The same Republican linkage emerges if we focus on the Constitution as an act--as an embodied ordaining and establishing--rather than as a mere text. In various states, it appears that militiamen who had borne arms for the Revolution were part of "the People" who elected delegates to specially-called ratifying conventions, regardless of whether these militiamen met the property qualifications for voting for ordinary state legislatures. [FN100]

These, then, were the words and deeds of the Founding era, reflecting both the central meaning of Republican Government, and the problems raised by that central meaning. And let us not say that all this is irrelevant today--that the Founding has nothing to say to us, or that all the wrinkles were ironed out by later struggles with happy endings (e.g., the Fifteenth and Nineteenth Amendments). \*773 Are the extremes of wealth and poverty today--among equal citizens, equal voters--truly compatible with the spirit of Republican Government? Are our campaign finance rules, or First Amendment cases that seem to privilege capitalism over democracy, and inequality over equality? Is our system of financing education, or teaching our young, compatible with the goal of producing Republican citizens, capable of individual and collective self-government? If women are truly equal Republican citizens after the Nineteenth Amendment, how can we tolerate discrimination in our Armed Forces on the basis of sex? (Of course, as Republican theory might predict, this discrimination is then used by men to silence women in key political debates: "You never saw combat, so how can you know . . . ?") Most generally: does the citizenry today really understand its awesome rights and responsibilities in a Republican Government rooted in the "capacity of mankind for self-government"?

### III. THE ANTEBELLUM ERA

In the seventy years between the Founding and the Civil War, the central meaning of Republican Government was carried forth and acted out on the state and territorial stage. In state after state "the People" adopted new state constitutions via specially called conventions acting under majority rule. In many states, these conventions were not explicitly provided for by the pre-existing state constitution; and in some states, a special amendment clause of the old state constitution, looking rather like the U.S. Constitution's Article V, seemed at first to specify the exclusive mechanism of constitutional change and to impliedly prohibit these specially called conventions; but no matter. Over and over, Americans proved--by their deeds as well as their words--that these Article V analogues were not exclusive; that the people were sovereign; and that in a Republican Government the people might always assemble in properly called conventions to alter or abolish existing constitutions by majority rule. And as Americans pushed relentlessly westward, they poured into new territories, organized them into new states, and founded state constitutions (subject to ultimate congressional approval) on the Republican Government principle of majority rule popular sovereignty.

I shall not here try to document this extraordinary implementation of the Republican Government, state by state, territory by territory, year by year, for a proper telling of this tale would be a book (at **\*774** least). And at least one excellent book already provides much of the documentation and theoretical elaboration: Roger Sherman Hoar's *Constitutional Conventions*, [\[FN101\]](#) a must read for all who seek to learn what Republican Government meant on the ground, for those who followed the Founders, and were, in their own way, Founders, too.

Most remarkable is what was not said in antebellum debates. Almost no one denied that the people are sovereign; that they may alter or abolish their governments lawfully and peacefully through properly called conventions; or that the proper voting rule for popular sovereignty in making or changing constitutions is simple majority rule. Almost no one, for example, argued that conventions or popular ratification must be supermajoritarian.

Rather, debate swirled within majority rule popular sovereignty. Was a convention properly called? Who were the relevant legal people, who could act by simple majority rule in constitutional moments? These were the questions on which men broke, and over which they at times came to blows. Thus the central meaning of Republican Government explains not only the many success stories of antebellum popular sovereignty, but also some of its spectacular failures. Here, we shall briefly consider the two most dramatic, from Rhode Island and Kansas. What is most noteworthy about those two episodes is how key participants tried to frame their words and deeds within the ideology of majority rule popular sovereignty, exploiting some of the ambiguities within that ideology--the problem of the denominator.

#### A. Dorr's Rebellion

To do justice to the words and deeds underlying the Rhode Island Civil War-- a.k.a. Dorr's Rebellion--would, once again, require a book. Let me ruthlessly compress by quoting at length from Roger Sherman Hoar, and invite you to observe the centrality of majority rule and procedural denominator problems in the Dorr Affair:

[A]lthough the people are supreme, they have no method of expression except through their

representatives, the voters; and they in turn can only speak by means of elections regularly called and held.

**\*775** It was this little technical point alone which justified the prosecution of Thomas W. Dorr for supporting the "People's Constitution" of 1841 in Rhode Island. Under his leadership the people of that State attempted to overthrow the tyrannous rule of the landholding classes who were still entrenched behind the King's charter. Caucuses of the adult male citizens throughout the State sent delegates to a convention which submitted a fair and democratic constitution to a special election called by it. At this election a clear majority of all the adult males voted for the new frame of government. Not only this, but among those voting in favor was a clear majority of those duly registered as voters under the charter. Dorr was subsequently elected Governor. He attempted to assume office, but John Tyler, Whig President of the United States, interfered at the request of the Whig charter government, and forced Dorr and many of his followers into exile, by threatening to send Federal troops into the State. This partisan action, by the way, is chiefly what drove the Whigs from power in the succeeding national election. Equally partisan was the Democratic congressional report on Tyler's action . . . .

On Dorr's return, a few years later, he was tried and convicted of high treason. In the meantime, the Charterists themselves had submitted a constitution, which had received the votes of less than one third of the adult males, less than half of the registered vote.

Yet technically this became the constitution of the State, and the People's Constitution did not. Neither method of procedure was authorized by the charter. The valid one received seven thousand votes; the invalid one nearly fourteen thousand. Yet the difference in validity lay in this: the seven thousand voted at a duly called election, and hence had authority to speak for the whole people; whereas the fourteen thousand voted at an irregular election, and hence spoke only for themselves. [\[FN102\]](#)

In contrast to Hoar's Dorr-leaning account, consider the language of an 1842 letter from a leader of the charter faction to President Tyler, challenging the Dorrites' majoritarian bona fides:

[The issue is w]hether their constitution shall be carried out by force of arms, without a majority; or the present government **\*776** be supported until a constitution can be agreed upon that will command a majority . . . . Nearly all the leaders, who are professional men, have abandoned them, on the ground that a majority is not in favor of their constitution. [\[FN103\]](#)

Dorr's Rebellion generated the famous case of *Luther v. Borden*, [\[FN104\]](#) which gave the U.S. Supreme Court its first big chance to opine on the Republican Government Clause of Article IV. Borden, an officer of the Charter government had, under orders, forcibly entered Luther's house, and Luther sued in trespass. In defense, Borden pled his orders. If the Charter government was indeed the lawful government of Rhode Island, Borden's defense would hold; but if the Dorrite regime was the lawful government, then Borden stood as a mere private citizen, a naked tortfeasor stripped of all governmental immunity.

The U.S. Supreme Court declined to decide for itself which of the two contending regimes was the lawful government of Rhode Island; and its ruling has today come to stand for the broad proposition that the Republican Government Clause of Article IV is not justiciable. But a narrower reading of Luther's holding makes much more sense. The key issue in the case was not whether the charter regime was Republican, but whether it was a Government. Perhaps both the charter and the Dorrite regimes met minimal conditions of democratic legitimacy--even if one denominator was better than the other, both

were plausible, and so both regimes were arguably Republican "enough," even if one was "more" Republican. However, only one regime could be the actual Government of Rhode Island. Thus, the real question in Luther was akin to the international question of "recognition"--a question committed to the federal political branches under our Constitution. Indeed, especially strong reasons counseled deference to the judgments of the federal political branches in an intrastate civil war, for well before any definitive federal court action, the President would typically have committed himself to support one of the regimes as the lawful government, and the House and Senate might have seated representatives of that regime. A later federal court decision backing the other regime could lead to chaos, undoing all governmental action--marriages, land transfers, criminal convictions and the like--that had taken place in the interim.

**\*777** Yet none of this would follow from a typical Republican Government case today, deciding whether a particular action or regime was Republican rather than whether it came from a Government. (It is of course sophistic to argue that if, say, Tennessee's malapportionment scheme in *Baker v. Carr* [FN105] had been deemed un-Republican by the Supreme Court, Tennessee would somehow have ceased to be a "Government"; under that logic, a state that violates equal protection would likewise not be a "state," yet no one thinks that.)

In any event, putting justiciability issues to one side, let us recall what the Luther Court said on the merits, about the principles underlying the Republican Government Clause, and the Constitution generally: "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure." [FN106]

Consider also the oral argument of Luther's dazzling lawyer, Benjamin Franklin Hallett:

[T]he great body of people may change their form of government at any time, in any peaceful way, and by any mode of operations that they themselves determine to be expedient.

. . . and the mode they do adopt, when adopted, ratified, or acquiesced in by a majority of all the people, is binding upon all. [FN107]

Again and again, in countless passages, Hallett hammered home the linkages between simple majority rule, popular sovereignty, the people's right to alter or abolish, and the concept of Republican Government. [FN108] The Federalist Number 43, not Number 10, was Hallett's canonical text on Republican Government, and it, Hallett argued, affirmed "the rights of majorities." [FN109]

#### **\*778 B. Bleeding Kansas**

If the issues underlying Dorr's Rebellion--or even the fact that a brief and unbloody civil war took place in Rhode Island in the 1840's--are known today only to a handful of scholars, the story of "bleeding Kansas" is a stock part of high school American history. Rather than recounting this well-known episode at length, I shall simply remind you of how snugly the most basic facts of the affair fit into our account of the central meaning of Republic Government: "Popular sovereignty" was the watchword of Stephen Douglas and his allies-- indeed, he hoped to ride to the Presidency astride this powerful slogan for deciding the fate of the Kansas Territory. But which people were sovereign? (The

ubiquitous denominator problem.) Squatters? "Border ruffians" who poured over from neighboring Missouri to intervene in Kansas affairs, yet had little intention of living in Kansas? Which (if either) of two competing constitutions--each claiming to have the support of a popular majority of Kansans--was the lawful constitution of Kansas? What happened when one side called an election and the other side boycotted? Could a simple majority of those actually voting--as opposed to those eligible to vote--suffice to ratify a constitution? Here too, only once we rediscover the central meaning of Republican Government, and the problems raised within that meaning, can we understand the most basic issues and events in American history.

#### IV. THE CIVIL WAR ERA

The line from the Kansas civil war to the American civil war is easy to trace--through the birth of the Republican Party in Kansas' wake; the brutal caning of Charles Sumner on the floor of the Senate in retaliation for his 1856 "Crime Against Kansas" speech; the 1857 bombshell of Dred Scott, [\[FN110\]](#) and the difficulties it posed for a "popular sovereignty" solution to slavery in Kansas and other territories; the showdown between Stephen Douglas and James Buchanan over Kansas, foreshadowing the eventual splintering of the Democratic Party; the Lincoln-Douglas debates of 1858, and their strong emphasis on Kansas and popular sovereignty; the polarizing armed raid on Harper's Ferry in 1859, led by John Brown, freshly returned from his armed struggles in Kansas; Sumner's June 1860 \*779 "Barbarism of Slavery" speech on the proposed admission of Kansas as a free state; the November 1860 election of Lincoln; and the quick secessions that followed.

Equally easy to trace--though more surprising to some--are the remarkable similarities between Jefferson Davis' and Abraham Lincoln's constitutional theories. Both had been shaped by the American Republican Government tradition, emphasizing majority rule popular sovereignty. Jefferson Davis, after all, insisted that even the slimmest majority in a secession convention strictly bound the minority, however passionate, to lawful obedience. The people had spoken, through the proper procedures, claimed Davis, and their majority verdict was Supreme Law in a Republic whose geographic boundaries had already been defined by pre-existing laws. Lincoln was no less passionate about majority rule and popular sovereignty [\[FN111\]](#) --government "of the people, by the people, and for the people" [\[FN112\]](#) --but disagreed about the geographic and demographic denominator. The people of the United States, and not of each state, were sovereign; and in a stable Republic, slavery had no place in the long run. Blacks could not simply be excluded by a definitional fiat. Either they had to be physically excluded--through colonization--or, if they continued to stay, they eventually had to become Republican citizens and voters. Early in his administration, Lincoln strongly pushed the first option; but before his death he gave signs that he was growing towards the second, largely in recognition that black men had borne arms nobly and well for the Union flag--their flag. [\[FN113\]](#)

Lincoln did not live long enough to resolve the denominator problem raised by black Americans, and the great task fell to the Reconstruction Congress. The issue arose in a variety of contexts, most prominently: (1) Congress's decision not to automatically readmit Southern states that continued to exclude now-free black men from state constitutional conventions called to repudiate ordinances of

secession and restore their states to their proper role within the Union; (2) congressional support for Section 2 of the Fourteenth Amendment, reducing a state's congressional representation in proportion to its disenfranchisement of blacks in ordinary elections; and (3) \*780 Congress's ultimate decision to propose the Fifteenth Amendment, barring racial discrimination in voting.

I shall consider only the first context here, because of the particular prominence in this context of the Republican Government Clause of Article IV in congressional deliberations. As we have seen, *Luther v. Borden* [FN114] had stressed the special role of the nonjudicial branches of the federal government in implementing this clause, especially in deciding whether to seat representatives from a given regime in the House and Senate. In refusing to seat Southern representatives, leading members of Congress explicitly defended their actions by pointing to Luther and the Republican Government Clause. Congress did not speak with one voice in these matters-- important variations existed among and within the different wings of the Republican party--and congressional action came under intense attack, especially from Andrew Johnson. Congress's eventual response was to use all the arrows in its quiver--including impeachment and jurisdiction stripping--to prevail. A Supreme Court that saw what happened to a President who challenged Congress's theory of the Republican Government Clause took pains to avert a showdown of its own with Congress [FN115] --and even years later, would reflexively jerk away from any case implicating this dangerous clause. [FN116] (Thus, it was the Reconstruction experience, and not just the dicta in Luther, that made the Clause a nonjusticiable hot potato for the Court at the turn of the century.) [FN117]

Congress's arguments on behalf of excluding Southern states have not been treated with particular respect by some modern lawyers. My colleague Bruce Ackerman, for example, has implied that \*781 the exclusion was unprincipled and illegal--a naked power grab hard to square with the Constitution's text and structure, or with the theory of union championed by Lincoln during the war. [FN118] The issue is, I think, considerably more intricate and interesting than Ackerman implies--and once again takes us to the key linkage between Republican Government and majority rule.

Piecing together arguments made at various times in the Reconstruction Congress, we could understand Congress's argument to go something like this: "Prior to the Civil War, slave states could exclude slaves from their denominator and yet still be considered Republican. Just as aliens were no part of the People, so too with slaves. But once the Emancipation Proclamation forever freed Southern slaves, the situation changed radically. Free black men were part of the People, and had been from the Founding, as Justice Curtis proved conclusively in his Dred Scott dissent. Free black men must therefore be allowed to participate in state conventions; if not, these states would not be Republican. The fact that most Northern states have excluded blacks from political participation is beside the point, and does not make these states similarly un-Republican. In the North, free blacks make up only a tiny proportion of the free male population, so any exclusion is de minimis. In the South, the situation is radically different. Blacks constitute a majority in three states; over forty percent in five; and over twenty-five percent in the remaining three. To exclude black men in these states would be to exclude a large mass of the free male citizenry--and that would be un-Republican under Madison's definition in *The Federalist* Number 39. Women and children, of course may be, and always have been, excluded from the political people--just as they can be excluded from military arms bearing--but a sizable proportion of the adult free male population may not be." [FN119]

Within the general contours of this congressional argument lay important ambiguities and variations. Did the majority rule principle allow excluding a forty-nine percent minority at the convention threshold; or must all important segments of the population be included at the outset, perhaps only to lose within a convention? Did **\*782** Republican Government require only inclusivity at the convention stage, or must blacks also be given a role in electing ordinary government officials? (Recall that the Rhode Island and Kansas experiences had dramatized the ways in which even the people's right to alter or abolish outside government could, as a practical matter, be impaired by the actions and inactions of ordinary government officials hostile to popular sovereignty.) A definitive assessment of the ultimate correctness or plausibility of Congress's argument would require attending to these and other questions, but my task here is more modest--to show how the arguments of leading Congressmen fit snugly within the framework of the central meaning of Republican Government.

As early as 1837, we find leading abolitionist literature presaging the argument that would find voice in Congress thirty years later. Here is an important tract from James Birney, whose theories on many topics literally become the party line of the Republican Party: "[The Constitution] guarantees to every state in the union a republican form of government, Art. IV sec. 4th. A majority of the people of South Carolina were slaves; can she be said properly to have a republican form of government?" [\[FN120\]](#)

Though Birney used the Republican Government Clause to attack slavery itself--at least in South Carolina--Reconstruction Republicans had the historically easier task of deploying the Clause to include free black men in the polity. In June 1864, Senator Charles Sumner rose to oppose admitting William Fishback from Arkansas into the Senate on the grounds that the alleged government that sent Fishback to Washington represented only "a minority" of the "people" of Arkansas. [\[FN121\]](#) "Unquestionably, it is according to the genius of our Government that a majority should rule. A majority is the natural base of a republic. To found a republic on a minority is scarcely less impracticable than to stand a pyramid on its apex." [\[FN122\]](#) Sumner went on to quote Luther v. Borden's explicit language affirming Congress's power to decline to seat representatives of regimes that were not republican governments, and urged his colleagues not to "forget the principles of republican institutions, which are offended by the rule of a minority." [\[FN123\]](#)

**\*783** Early in the 39th Congress, Democratic Congressman Boyer responded to Sumner with a demographic denominator taunt of his own: "[If the idea of republican government requires black suffrage,] then women should vote, for the same reason; and the New England States themselves are only pretended republics because their women who, are in a considerable majority, are denied the right of suffrage." [\[FN124\]](#)

Speaking two weeks later, the New England Republican Thomas Eliot did not respond directly to Boyer's taunt, but did say that a state had no right "to disenfranchise large masses of its citizens." [\[FN125\]](#) Considerably more elaboration on the topic came from Higby of California and John Bingham of Ohio. Higby went first:

[M]y friend here from Ohio, [Mr. Bingham,] to whom I intend to yield a portion of my time, will attempt to explain how it is that a Government can be republican in form, and yet exclude, if need be, one half of the population from the elective franchise.

There was not one of the slave States where a large proportion of the population was not black.

....

[Any state that excludes] one half of its population from the right of suffrage . . . will not be republican in form. [\[FN126\]](#)

So far so good. But Higby then went on to broaden his claim, arguing that any racial exclusion in the franchise would be unconstitutional. A colleague pounced immediately, forcing Higby to concede under questioning that under this broader test, almost all states, including Higby's own California, flunked. [\[FN127\]](#)

Bingham was far more careful and took pains to state his denominator with some precision:

[U]nder the Confederation the majority of male free citizens of full age held the right to the elective franchise in every State then in the Union . . . .

**\*784** . . . .

. . . [We must secure] equal rights [and] the declared intention of the Constitution of your fathers. . . . [W]hen all are free, a minority of the citizens of a State may [not] disenfranchise a majority of the citizens of full age. . . .

....

. . . There is a further guarantee in the Constitution, of a republican form of government to every State, which I take to mean the majority of the free male citizens in every State shall have the political power. [\[FN128\]](#)

Bingham also observed that in South Carolina and Mississippi, (free) blacks outnumbered whites. [\[FN129\]](#)

Later in the session, Ralph Buckland noted in passing that control of government by a "mere fraction of the people" is "contrary to the fundamental principles of republican government"; [\[FN130\]](#) and in an extremely important speech on behalf of the Select Committee on Reconstruction in which he explained the proposed Fourteenth Amendment to his colleagues, Senator Jacob Howard provided more elaboration. He began by quoting Madison on the "essence of republican government"--not the Madison of Number 10, distinguishing between republics and pure democracies, but the Madison of Number 39, who, in the text Howard quoted, had insisted that in a Republic the "mass of citizens" must have a "voice in making the laws." [\[FN131\]](#) What about women? asked his challengers. By natural law, retorted Howard, "women and children were not regarded as the equals of men. . . . [M]ature manhood is the representative type of the human race." [\[FN132\]](#) Still later in this session, the radical George Boutwell challenged Tennessee's readmission to Congress by invoking the Republican Government Clause. He denied that republican government demanded that "every man should vote" but claimed that "the great majority" must be enfranchised. [\[FN133\]](#) Yet moments later, he appeared **\*785** to slip into a more sweeping claim that all racial exclusions in suffrage were un-Republican. [\[FN134\]](#)

Several months later, John Broomall asked how the government of South Carolina can:

be considered republican in form when four out of every seven adult males are denied the right of suffrage . . . .

If it be said that this argument applies with equal force to my own State, I admit it, and with some sense of humiliation. Possibly, as but one in sixty is there excluded from participation in the

government, the maxim de minimus non curat lex might reconcile easy consciences. [\[FN135\]](#)

And what about women? "I am ready to advocate this extension [of suffrage] whenever the women of America shall believe themselves unfairly treated" by virtual representation via men. [\[FN136\]](#)

Similar themes would resound through later Congresses. In the 40th Congress, for example, we find Senator Richard Yates defining "republican government" as one in which no "portion[] of the people" are disenfranchised on racial grounds; [\[FN137\]](#) and claims that Republican Government means "that the majority ought to rule, subject to the equal right of the minority to the same rights with themselves, without regard to color" [\[FN138\]](#) --i.e., equal protection for the minority.

Once again, John Bingham of Ohio provided the most careful analysis, in a speech on the admission of Kansas's twin sister, Nebraska. Here is how he summed up a century-old tradition of American discourse on Republican Government:

Now sir, what is a republican form of government? If there is anything settled under the American Constitution by the traditions of our people and by the express laws of this land, it is the absolute, unquestioned, unchallenged right of a majority of American male citizens, of full age, resident within an organized constitutional State of this Union, to control its entire political power . . . in the mode prescribed by the Constitution of the United States . . . .

**\*786** The right of the majority of the male citizens of the United States of full age to control its political powers is of the essence of the rights . . . reaffirmed by that . . . provision of the Constitution of the United States which declares "that the United States shall guaranty to every State in this Union a republican form of government." [\[FN139\]](#)

## V. CONCLUSION

Amidst all the quotes, we must not lose sight of the main point. Republican Government did have a central meaning at the Founding and for a century thereafter. Many current theories of Republican Government sidestep this central meaning; and one theory--a strong form of the Anti-Direct Democracy Thesis--comes close, at least rhetorically, to betraying the central meaning. The central meaning of Republican Government revolved tightly around popular sovereignty, majority rule, and the people's right to alter or abolish. Until we see this central meaning, we will miss much of the essence of American Constitutions--state and federal--and much of our history as a People.

[\[FN1\]](#). Southmayd Professor, Yale Law School. This symposium essay builds on my Southmayd Inaugural Lecture. See Akhil Reed Amar, [The Consent of the Governed: Constitutional Amendment Outside Article V](#), 94 COLUM. L. REV. 457 (1994). For more documentation and elaboration of my claims today, I urge the interested reader to consult that Lecture. For help on this symposium essay, I thank Bruce Ackerman, Vik Amar, Neal Katyal, and William Wiecek.

[FN1]. 1 Corinthians 9:22 (King James). In more modern translations, "all men" becomes "all [persons]." See, e.g., *id.* (Revised English). As we shall see, a similar trend towards gender inclusivity marks the evolution of the definition of "the People" underlying Republican Government.

[FN2]. See *infra* Part I.E.

[FN3]. See generally Akhil Reed Amar, [The Consent of the Governed: Constitutional Amendment Outside Article V](#), 94 COLUM. L. REV. 457 (1994).

[FN4]. Ninety years is, of course, a long time, and a great deal relevant to the meaning of Republican Government happened between 1780 and 1870. In keeping with the spirit of a symposium, I shall aim at presenting representative rather than exhaustive documentation. Much of what I shall summarize today builds on earlier work of mine. See, e.g., Amar, *supra* note 3.

[FN5]. Yes, wars. Like the American Civil War of the 1860's, the Rhode Island Civil War of the 1840's and the Kansas Civil War of the 1850's crystallized around constitutional debates within the central meaning of Republican Government. See *infra* parts III.A.-B.

[FN6]. The brief account of the Founding era offered in this paragraph is elaborated in Part II, *infra*.

[FN7]. [48 U.S. \(7 How.\) 1 \(1849\)](#).

[FN8]. The brief account of the Antebellum era offered in this paragraph is elaborated in Part III, *infra*.

[FN9]. Abraham Lincoln, Second Inaugural Address, in GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD 415, 416 (Richard Hofstadter ed., 1958) [[hereinafter GREAT ISSUES]].

[FN10]. The brief account of the Civil War era offered in this paragraph is elaborated in Part IV, *infra*.

[FN11]. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 48 (1969).

[FN12]. [Id.](#)

[FN13]. For more discussion of nonjusticiability, see Erwin Chemerinsky, [Cases Under the Guarantee Clause Should Be Justiciable](#), 65 U. COLO. L. REV. 849 (1994) (this issue).

[FN14]. [48 U.S. \(7 How.\) 1 \(1849\)](#).

[FN15]. See [infra](#) notes 102-09 and accompanying text.

[FN16]. [377 U.S. 533 \(1964\)](#).

[FN17]. See [id. at 565](#) ("in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators"). I do not here claim that this majoritarian rhetoric was Reynold's sole, or even dominant, theme.

[FN18]. See Akhil Reed Amar, [The Bill of Rights and the Fourteenth Amendment](#), 101 YALE L.J. 1193, 1224-26, 1234, 1261-62 & n.295 (1992).

[FN19]. For more discussion of state autonomy, see Deborah Jones Merritt, [Republican Governments and Autonomous States: A New Role for the Guarantee Clause](#), 65 U. COLO. L. REV. 815 (1994) (this issue).

[FN20]. See Deborah Jones Merritt, [The Guarantee Clause and State Autonomy: Federalism For a Third Century](#), 88 COLUM. L. REV. 1, 25-26 (1988).

[FN21]. See Amar, [supra](#) note 18, at 1242.

[FN22]. See, e.g., Arthur E. Bonfield, [The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude](#), 46 MINN. L. REV. 513, 568- 69 (1962).

[FN23]. [32 U.S. \(7 Pet.\) 243 \(1833\)](#).

[FN24]. Amar, *supra* note 18, at 1218-46.

[FN25]. This is the deep constitutional insight that James Madison explicated well in the eighteenth century, that the Abolitionists and Reconstruction Republicans nourished in the nineteenth century, and that the U.S. Supreme Court belatedly embraced in the twentieth century, to the delight of the great constitutional theorist Alexander Meiklejohn. On Madison, see *id.* at 1266-67 & n.314; on the Abolitionists and Reconstruction Republicans, see *id.* at 1214-17, 1272-84; on the modern Court and Meiklejohn, see Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 n.13, 141 (1992).

[FN26]. For more discussion of Direct Democracy, see Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (this issue). See also Hans A. Linde, *When Initiative Lawmaking is not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) [[hereinafter Linde, Initiative]. Judge Linde ultimately suggests that only certain forms of direct democracy offend Republican Government--for him, initiatives are more problematic than referenda, constitutional initiatives more problematic than statutory initiatives, affirmative-lawmaking initiatives more problematic than structural initiatives, and emotional, ideological initiatives more problematic than other initiatives. Though his proposal seems modest and attractive, it is rooted in a broader, Anti-Direct Democracy Thesis whose historical foundations I mean to question here.

[FN27]. Cf. Linde, Initiative, *supra* note 26, at 22 ("We need not go to great lengths to establish that the framers distinguished a republican form of government from direct democratic lawmaking."). With all due respect to Judge Linde, he and others do need to go to greater lengths than they have gone so far, at least to persuade me. Let me be clear. I do not challenge the advantages of representative government for most purposes; indeed, I have elsewhere extolled its virtues. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1303-05 (1984). I mean only to question whether the framers clearly understood that the Article IV Republican Government Clause would require representative government for all purposes; and I also want to highlight the role that the people themselves--in conventions, and at times even more directly--have played in making and amending American constitutions.

[FN28]. DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 75-76 (1974).

[FN29]. THE FEDERALIST NO. 10, at 81-82 (James Madison) (Clinton Rossiter ed., 1961).

[FN30]. *Id.* at 80 (emphasis added).

[FN31]. THE FEDERALIST NO. 14, at 100 (James Madison) (Clinton Rossiter ed., 1961).

[FN32]. 4 Debates on the Adoption of the Federal Constitution 328 (Jonathon Elliot ed., 2d ed. 1881) [hereinafter Elliot's Debates] (emphasis added).

[FN33]. 2 id. at 433 (emphasis altered).

[FN34]. Id. at 482 (emphasis altered); see also id. at 478.

[FN35]. See, e.g., Merritt, *supra* note 20, at 25 & n.135; William M. Wiecek, The Guarantee Clause of the U.S. Constitution 17, 62, 67, 73 (1972). But see id. at 18. See also Robert W. Shoemaker, "Democracy" and "Republic" as Understood in Late Eighteenth-Century America, 41 Am. Speeches 83 (1966). Though I do not concur in all of his analysis I found Shoemaker's pulling together of primary sources most helpful.

[FN36]. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added); 1 THE RECORDS OF THE FEDERAL CONVENTIONS OF 1787, at 135 (Max Farrand ed., 1937) (emphasis added) [hereinafter RECORDS].

[FN37]. Shoemaker, *supra* note 35, at 83.

[FN38]. See also 3 ELLIOT'S DEBATES, *supra* note 32, at 396 (Patrick Henry) (linking republican government with representation in passing, but not discussing Article IV); 2 id. at 257 (Alexander Hamilton) (similar).

[FN39]. This understanding of Republican Government might find support in Cass Sunstein's general efforts to revive republicanism. See, e.g., Cass R. Sunstein, [Beyond the Republican Revival](#), 97 YALE L.J. 1539 (1988); Cass R. Sunstein, [Interest Groups in American Public Law](#), 38 STAN. L. REV. 29 (1985); Cass R. Sunstein, [Naked Preferences and the Constitution](#), 84 COLUM. L. REV. 1689 (1984).

[FN40]. WOOD, *supra* note 11, at 49, 205-06.

[FN41]. THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[FN42]. THE FEDERALIST NO. 39, at 240-41 (James Madison) (Clinton Rossiter ed., 1961).

[FN43]. See, e.g., 1 RECORDS, supra note 36, at 206 (Edmund Randolph); 2 id. at 48 (Nathaniel Gorham); sources cited supra note 35.

[FN44]. THE FEDERALIST NO. 39, supra note 42, at 240-41.

[FN45]. THE FEDERALIST NO. 43, supra note 41, at 274.

[FN46]. THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[FN47]. Note the implicit denominator issues packed into this word. Note also how the sharp distinction posited by the Anti-Direct Democracy Thesis dissolves etymologically, with the res publica being a rough Latin equivalent of the Greek demos-kratia--rule by the demos, or people.

[FN48]. WIECEK, supra note 35, at 24 (emphasis added).

[FN49]. On the significance of these more explicit references, see generally Amar, supra note 3.

[FN50]. See generally Amar, supra note 3; Akhil Reed Amar, [The Bill of Rights as a Constitution](#), 100 YALE L.J. 1131 (1991); Akhil Reed Amar, [Of Sovereignty and Federalism](#), 96 YALE L.J. 1425, 1425-66 (1987).

[FN51]. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added) (footnote omitted).

[FN52]. Id. at 469-70 (emphasis added).

[FN53]. THE FEDERALIST NO. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN54]. THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 58, at 361 (James Madison) (Clinton Rossiter ed., 1961) (labeling majority rule "the fundamental principle of free government").

[FN55]. 10 THE PAPERS OF JAMES MADISON 206, 212 (Robert A. Rutland & Charles P. Hobson eds., 1977) (letter from James Madison to Thomas Jefferson (Oct. 24, 1787)).

[FN56]. RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 208 (1969).

[FN57]. See supra note 44 and accompanying text.

[FN58]. THE FEDERALIST NO. 39, supra note 42, at 240.

[FN59]. Id. at 240-41 (emphasis added).

[FN60]. THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961).

[FN61]. See THE FEDERALIST NO. 43, supra note 41.

[FN62]. THE FEDERALIST NO. 39, supra note 42, at 243.

[FN63]. THE FEDERALIST NO. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961).

[FN64]. THE FEDERALIST NO. 39, supra note 42, at 246.

[FN65]. Merritt, supra note 20, at 24 n.130 (citation omitted).

[FN66]. Id. (citation omitted).

[FN67]. 3 ELLIOT'S DEBATES, supra note 32, at 298 (Edmund Pendleton).

[FN68]. Merritt, *supra* note 20, at 24 n.130 (citation omitted).

[FN69]. *Id.* at 35 (citation omitted); see also *supra* notes 32-35 and accompanying text (quoting other ratification speeches linking Republican Government and rule by the people).

[FN70]. [Chisholm v. Georgia, 2 U.S. \(2 Dall.\) 419, 457 \(1793\).](#)

[FN71]. [Penhallow v. Doane's Adm'rs, 3 U.S. \(3 Dall.\) 54, 93 \(1795\).](#)

[FN72]. James Madison, A Candid Estate of Parties, Nat'l Gazette, Sept. 22, 1792, in 14 THE PAPERS OF JAMES MADISON 370, 371 (Robert A. Rutland et al. eds., 1983).

[FN73]. Thomas Jefferson, First Inaugural Address, in GREAT ISSUES, *supra* note 9, at 186, 189.

[FN74]. Letter from Thomas Jefferson to Baron F. H. Alexander Von Humboldt (June 13, 1817), in THE WRITINGS OF THOMAS JEFFERSON 89 (Paul L. Ford ed., 1899).

[FN75]. HOFSTADTER, *supra* note 56, at 143.

[FN76]. See Amar, *supra* note 3, at 486-87.

[FN77]. See *infra* text accompanying note 100.

[FN78]. THE FEDERALIST NO. 39, *supra* note 42, at 244 (emphasis added).

[FN79]. See generally Amar, *supra* note 3; Akhil Reed Amar, [Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1425-66 \(1987\).](#)

[FN80]. See *infra* note 111.

[FN81]. THE FEDERALIST NO. 39, *supra* note 42, at 246.

[FN82]. I explore this puzzle in Amar, *supra* note 3, at 506-08.

[FN83]. THE FEDERALIST NO. 43, *supra* note 41, at 276-77.

[FN84]. James Madison, Vices of the Political System of the United States, in THE MIND OF THE FOUNDER 57, 59 (Marvin Meyers ed., 1981).

[FN85]. See *supra* notes 51-52 and accompanying text.

[FN86]. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

[FN87]. THE FEDERALIST NO. 43, *supra* note 41, at 277.

[FN88]. THE FEDERALIST NO. 39, *supra* note 42, at 241 (emphasis in original).

[FN89]. Madison, *supra* note 84, at 59. As Professor Wiecek has noted, Madison had expressed the point even earlier in a February 1787 Congressional debate concerning Shay's Rebellion: "the principles of Republican Govts . . . as they rest on the sense of the majority, necessarily suppose power and right to be on the same side." WIECEK, *supra* note 35, at 40 (citation omitted). For an excellent analysis of the role of Shay's Rebellion in the genesis of the Republican Government Clause, see *id.* at 27-42. For Madison's statement at Philadelphia that "According to Republican theory" right and power are both vested "in the majority," see 1 RECORDS, *supra* note 36, at 318.

[FN90]. See WOOD, *supra* note 11, at 22, 64, 72, 89, 100, 402. See generally Akhil Reed Amar, Forty Acres and a Mule: A Republican Theory of Minimal Entitlements, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

[FN91]. [U.S. Const. amend. II](#).

[FN92]. U.S. CONST. pmb1.

[FN93]. [U.S. Const. amend. I](#).

[\[FN94\]. U.S. Const. amends. IX, X.](#)

[\[FN95\]. EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 214 \(1957\).](#)

[\[FN96\]. U.S. Const. amend. XIV, § 2.](#)

[\[FN97\]. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1164 n.152 \(1991\).](#)

[\[FN98\]. Id.](#)

[\[FN99\]. Id.](#)

[\[FN100\]. See, e.g., Samuel B. Harding, Party Struggles Over the First Pennsylvania Constitution, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1894, at 371, 371-75 \(1895\); WOOD, \*supra\* note 11, at 289.](#)

[\[FN101\]. ROGER S. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS \(1917\).](#)

[\[FN102\]. Id. at 21-22.](#)

[\[FN103\]. WIECEK, \*supra\* note 35, at 96 \(letter of John Whipple to President John Tyler, Apr. 9, 1842\) \(emphasis omitted\).](#)

[\[FN104\]. 48 U.S. \(7 How.\) 1 \(1849\).](#)

[\[FN105\]. 369 U.S. 186 \(1962\).](#)

[\[FN106\]. 48 U.S. \(7 How.\) at 47.](#)

[\[FN107\]](#). [Id. at 24.](#)

[\[FN108\]](#). Hallett's remarkable oral argument, published in 1848, is a must read for serious students of Republican Government. See BENJAMIN F. HALLETT, *THE RIGHT OF THE PEOPLE TO ESTABLISH FORMS OF GOVERNMENT* (1848).

[\[FN109\]](#). [Id. at 27.](#)

[\[FN110\]](#). [Scott v. Sandford, 60 U.S. \(19 How.\) 393 \(1857\).](#)

[\[FN111\]](#). See Abraham Lincoln, First Inaugural Address, in *GREAT ISSUES*, *supra* note 9, at 389, 393 ("A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.").

[\[FN112\]](#). Abraham Lincoln, Gettysburg Address, in *id.* at 414-15.

[\[FN113\]](#). See ERIC FONER, *RECONSTRUCTION* 6-11, 49, 74 (1988).

[\[FN114\]](#). [48 U.S. \(7 How.\) 1 \(1849\).](#)

[\[FN115\]](#). Judicial retreats include [Mississippi v. Johnson, 71 U.S. \(4 Wall.\) 475 \(1866\)](#); [Georgia v. Stanton, 73 U.S. \(6 Wall.\) 50 \(1867\)](#); and *Ex Parte* [McCardle, 74 U.S. \(7 Wall.\) 506 \(1868\)](#).

In *Stanton*, Georgia openly invited the Court to opine on the Republican Government Clause. [73 U.S. \(6 Wall.\) at 65](#) (oral argument). The Court declined the invitation. One year later, after some of the dust had settled, the Court did discuss the Clause, only to pointedly reaffirm Luther and broad power in the political branches of the federal government. [Texas v. White, 74 U.S. \(7 Wall.\) 700, 729-30 \(1869\)](#).

[\[FN116\]](#). See, e.g., [Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 \(1912\)](#).

[\[FN117\]](#). Also relevant was an ill-starred attempted intervention by a lower federal court in a Dorr-like crisis in Louisiana in 1872. For a nice discussion, see WIECEK, *supra* note 35, at 226-30. Nor should we forget the legitimacy crisis triggered by the Presidential election of 1876, and the critical and highly controversial role of Supreme Court Justice Bradley in throwing the uncertain election to Rutherford B.

Hays, who in turn promised to end Reconstruction.

[\[FN118\]](#). See Bruce Ackerman, *Discovering The Constitution* (1986) (unpublished draft, on file with author).

[\[FN119\]](#). For a similar reading of this strand of Republican thought, see WIECEK, *supra* note 35, at 191, 200-01. For the racial population statistics of the South, see FONER, *supra* note 113, at 294. On the historical status of free blacks, see [Scott v. Sandford, 60 U.S. \(19 How.\) 393, 571-88 \(1857\)](#) (Curtis, J., dissenting).

[\[FN120\]](#). HOWARD J. GRAHAM, *EVERYMAN'S CONSTITUTION* 231 (1968).

[\[FN121\]](#). CONG. GLOBE, 38th Cong., 1st Sess. 2897 (1864).

[\[FN122\]](#). *Id.*

[\[FN123\]](#). *Id.* at 2898-99.

[\[FN124\]](#). CONG. GLOBE, 39th Cong., 1st Sess. 177 (1866) (emphasis altered).

[\[FN125\]](#). *Id.* at 406.

[\[FN126\]](#). *Id.* at 427.

[\[FN127\]](#). *Id.*

[\[FN128\]](#). *Id.* at 430-31.

[\[FN129\]](#). *Id.* at 431.

[\[FN130\]](#). *Id.* at 1627.

[\[FN131\]](#). Id. at 2767.

[\[FN132\]](#). Id. For a similar denominatorial exchange over black suffrage, women's suffrage, and the meaning of Republican Government, see CONG. GLOBE, 40th Cong., 3d Sess. 557-58 (1869) (Remarks of Representatives Boutwell, Niblack, and Eldridge).

[\[FN133\]](#). CONG. GLOBE, 39th Cong., 1st Sess. 3976 (1866).

[\[FN134\]](#). Id.

[\[FN135\]](#). CONG. GLOBE, 39th Cong., 2d Sess. 351 (1867).

[\[FN136\]](#). Id.

[\[FN137\]](#). CONG. GLOBE, 40th Cong., 2d Sess. 351 app. (1868).

[\[FN138\]](#). CONG. GLOBE, 40th Cong., 1st Sess. 543 (1867) (remarks of John Bingham).

[\[FN139\]](#). CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867) (paragraphs inverted).

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