

ARTICLE

THE CONSTITUTIONAL UNDERPINNINGS OF HOMELESSNESS

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TABLE OF CONTENTS

I. THE COLONIAL ERA 217

II. AFTER THE REVOLUTION 239

III. THE MODERN CONTEXT 267

IV. CONCLUSION..... 279

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

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1. 405 U.S. 56 (1972).

2. *Id.* at 58–59, 74 (holding that Oregon’s Forcible Entry and Wrongful Detainer statute did not violate the Equal Protection Clause of the Fourteenth Amendment).

3. *Id.* at 74.

4. *See, e.g.,* Perry v. Hous. Auth., 664 F.2d 1210, 1217 (4th Cir. 1981) (noting that the district court cited *Lindsey* for the proposition that there is no constitutional right to housing); Hurt v. Phila. Hous. Auth., 806 F. Supp. 515, 522–23 (E.D. Pa. 1992) (citing

Because housing has been denied fundamental right status with its attendant strict scrutiny standard of review,⁵ federal and state courts routinely have rejected attempts by the poor to obtain adequate shelter despite the extremely hard facts that these cases often present.⁶

Lindsey as basis, in part, for dismissal of plaintiffs' claims for "decent, safe, and sanitary housing").

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

6. *Lindsey* is one such case. Donald and Edna Lindsey lived in a rented house in Portland with their children, aged nine, ten, and fourteen. Record from the United States District Court for the District of Oregon at 42. Mr. Lindsey was frequently confined to a wheelchair. Brief for Appellants at 10, *Lindsey* (No. 70-5045). The Bureau of Buildings declared the house to be unfit for habitation and gave notice that the house would have to be vacated in thirty days unless the owner could show cause. *Lindsey*, 405 U.S. at 58 & n.2. The defects in the house's physical condition included, but were not limited to: (1) broken windows; (2) the first floor bathroom had only a toilet that did not work because the top half of it was missing; (3) the first floor "bathroom" apparently had been a closet before the toilet was installed; (4) the plaster was crumbling off the bathroom walls; (5) the back steps were missing; (6) the porch supports were tearing loose from the house; (7) the gutters and eaves were riddled with holes; (8) the only light fixture in a child's bedroom had exposed wires; (9) half the plaster in the kitchen ceiling was gone; (10) only two ceiling light fixtures worked; (11) the bedrooms did not have heat vents; (12) a hall heat vent did not have a cover, which created the risk of a child falling into it; and, (13) the front door could only be locked from the inside and, when unlocked, could be pushed open by a cat. Record from the United States District Court for the District of Oregon at 58–61. An expert witness testified that the house was "one of the worst [she had] seen that people are still living in." Brief for Appellants at 10, *Lindsey* (No. 70-5045). The Lindseys requested that the landlord repair the house, but she did nothing other than to nail a piece of plywood over one of the broken windows. See Record from the United States District Court for the District of Oregon at 58. The Lindseys had been looking for another rental unit for about two years, but had been unsuccessful due to an exceedingly low vacancy rate in the area, Mr. Lindsey's physical disability, and a lack of transportation. Brief for Appellants at 10, *Lindsey* (No. 70-5045).

In another case, relief was denied to tenants of a public housing project who were attempting to enforce the housing authority's contractual obligation to maintain the housing "in good repair, order and condition." *Perry v. Hous. Auth.*, 486 F. Supp. 498, 499–503 (D.S.C. 1980), *aff'd*, 664 F.2d 1210 (4th Cir. 1981). The court noted:

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

Id. at 500.

In *McCain v. Koch*, 502 N.Y.S.2d 720, 724 (N.Y. App. Div. 1986), *rev'd*, 511 N.E.2d 62 (N.Y. 1987), fourteen homeless families with children brought suit against the City of New York, alleging arbitrary denial of adequate emergency housing. The city placed one mother and her three children in "two rodent and bug-infested rooms,

The absence of an express constitutional right is unsurprising in light of the political and social conditions during the colonial and Revolutionary eras. In varying degrees, women, African Americans, Native Americans,⁷ Catholics, Jews, Baptists, Quakers, the unpropertied, and a variety of other groups were unable to vote or to hold office.⁸ Although both estimates and percentages vary among colonies, generally less than ten percent of the population could vote at the end of the colonial era, and the percentage of eligible voters was often much lower.⁹

The disenfranchised also were barred from participating in the drafting and ratification of the U.S. Constitution.¹⁰ As a result, the Constitution reflects the “naked preferences” of those in power.¹¹ It includes benefits for the propertied and for creditors, such as the Takings, Due Process, and Contract Clauses, but does not provide for the most basic necessities of life.¹² Moreover, those who were politically excluded before the Revolution largely remained so afterward.¹³

The poor were subject to particularly harsh treatment. The Articles of Confederation expressly excluded them from the

containing minimal furniture and four beds with dirty linen.” *Id.* Further, “[t]he windows ha[d] no guardrails and there [was] an open electrical box in the hallway within easy reach of her children.” *Id.* Another plaintiff slept on the beach at night with “her asthmatic six-year-old son” after she was denied emergency shelter. *Id.*; see also *Hurt*, 806 F. Supp. at 519 (dismissing several claims of tenants injured by exposure to lead-based paint in public housing units); *Cobos v. Dona Ana County Hous. Auth.*, 908 P.2d 250, 251–52 (N.M. Ct. App. 1995) (involving a tenant and her two children who died in a fire because no smoke alarm had been installed, even though the alarm was legally required and a Housing Authority inspector had approved the home), *modified*, 970 P.2d 1143 (N.M. 1998).

7. This Article employs the terms “African Americans” and “Native Americans” for the people who lived during the earlier historical eras about which this Article is concerned, rather than the appellations of those eras.

8. See ALBERT EDWARD MCKINLEY, *THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA* 473–84 (reprint 1969) (1905) (outlining colonial restrictions on voting based on sex, age, race, religion, property ownership, and other qualifications).

9. See *id.* at 487 (surveying the size of the potential voting class in various colonies and noting that in Massachusetts only one person in fifty took part in elections).

10. Refer to text accompanying notes 272–79, 345–51 *infra* (noting that the drafters of the Constitution were primarily upper-class citizens who possessed the right to vote).

11. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (defining a “naked preference” as “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”).

12. See *id.* at 1689–90. Refer to Part II *infra* (highlighting provisions of the Constitution that substantially benefited the propertied and denied protection to the poor).

13. Refer to text accompanying notes 422–27 *infra* (noting that several states amended their constitutions to contain voting limitations directed at the poor).

privileges and immunities of citizenship.¹⁴ Poor persons could be whipped and jailed for being poor, and the poor of all ages, including the young and the old, could be sold into indentured servitude.¹⁵

Legislators and judges justified their inhumane treatment of the poor as they did for the slaves; the poor and slaves were regarded as being not fully human, as people who could not think in a rational or independent manner.¹⁶ In 1776, John Adams wrote:

[V]ery few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.¹⁷

As a result, the poor had legal and social statuses far more akin to slavery than to free society.¹⁸ Against this backdrop, the absence of a constitutional provision for housing or other essentials is unsurprising, as is the inclusion of provisions addressing the concerns of the propertied and creditor classes. However, the absence of a constitutional right to housing is in marked contrast to the constitutions of a great number of countries that do provide such a right.¹⁹

14. Article Four of the Articles of Confederation begins:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all privileges and immunities of free citizens in the several states

ARTICLES OF CONFEDERATION art. IV (U.S. 1777) (emphasis added).

15. See William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 55 (1996) [hereinafter Quigley, *Colonial America*].

16. See *id.* at 70.

17. *Id.* (first and third alterations in original) (quotation marks omitted) (quoting Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS 376–77 (C. Adams ed., 1864)).

18. See *id.* at 77–78 (discussing slavery and its intersection with poverty).

19. Approximately forty percent of the world's constitutions include a right to housing; more than fifty countries have included housing as either an individual right or an obligation of the state. CENTRE ON HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR HOUSING RIGHTS: INTERNATIONAL AND NATIONAL STANDARDS 45–59 (2000) (listing constitutional provisions of various countries that recognize housing rights, including: Argentina, Armenia, Bahrain, People's Republic of Bangladesh, Belgium, Bolivia, Brazil, Burkina Faso, Cambodia, Colombia, Congo, Costa Rica, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Fiji, Finland, Greece, Guatemala, Guyana, Haiti, Honduras, India, Iran, Italy, Kenya, Republic of Korea, Democratic People's Republic of Korea, Mali, Mexico, Nepal, Netherlands, Nicaragua, Nigeria, Norway, Islamic Republic of Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Russian Federation, Sao Tome and Principe, Seychelles, Slovenia, South Africa, Spain, Democratic Socialist Republic of Sri Lanka, Suriname, Switzerland, Turkey,

Just as courts have been leaders in creating greater justice for African Americans and other minority groups, they have an important role to play in providing for the general welfare of the poor. The reason is the same for the poor as it has been for other groups accorded enhanced judicial protection. The poor have been largely disenfranchised and have been the subject of invidious discrimination.²⁰ The poll tax was not finally eliminated until 1966,²¹ almost two hundred years after the republic was created, and de jure discrimination against the poor still exists. For example, some states condition voter registration on having a permanent address.²² Even in those states that do not impose

Socialist Republic of Viet Nam), available at <http://www.cohre.org/downloads/SOU4.pdf> (last visited Mar. 29, 2003).

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

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

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

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

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

22. Refer to notes 569–70 *infra* and accompanying text (citing to statutes in Louisiana and Virginia that condition voter registration on having a permanent residence).

legal obstacles to the franchise, the unstable living situations of the homeless create substantial de facto obstacles to voting.²³ As a result, legislators do not serve the needs of the homeless or those of their more well-to-do constituents. This is the type of situation in which courts can provide the necessary check and balance.

In some states, judicial action has resulted in the recognition of a legally protected right to shelter.²⁴ In each of these jurisdictions, shelter opportunities for the poor increased.²⁵ Particularly with the rapidly increasing number of homeless people in this country,²⁶ the great majority of whom are incapable of working or are members of the "working poor,"²⁷ courts justifiably can hold that the general welfare includes protection from the crime, disease, and the other conditions that are the traveling companions of poverty.

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

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

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

25. For example, after consent decrees in two New York cases required the provision of shelter in New York City, the number of beds available for homeless men more than doubled, and the number for women increased by more than eight times. Kim Hopper & L. Stuart Cox, *Litigation in Advocacy for the Homeless*, in HOUSING THE HOMELESS 303, 305 (Jon Erickson & Charles Wilhelm eds., 1986). Similarly, three years after a consent decree obligated Philadelphia to shelter its homeless, the number of available beds increased from 250 to 5400. See Dennis P. Culhane, *The Quandaries of Shelter Reform: An Appraisal of Efforts to "Manage" Homelessness*, 62 SOC. SERV. REV. 428, 429 (1992).

26. See Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 257 & n.3 (1994) (observing that some estimates indicate the number of homeless increased ten-fold from 1984 to 1990).

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

I. THE COLONIAL ERA

The federal Constitution's treatment of property and of the right to shelter can be understood more fully by examining the society that produced it. Colonial America was largely a society of haves and have-nots.²⁸ Though a middle class came into being, wealth was disproportionately and increasingly concentrated in the hands of the few, while poverty gripped many.²⁹

The differences in economic status are attributable in large part to the methods by which the great majority of immigrants came to the colonies. Although some immigrants were motivated by religious persecution, many others came because of famine and economic problems in their home countries.³⁰ Many shippers lured prospective immigrants by often-false representations concerning the beneficial living conditions and economic opportunities in the New World.³¹ Shippers also resorted to kidnapping and other coercive measures to bring Europeans and Africans to the colonies.³² "From the complex pattern of forces producing emigration to the American colonies one stands out clearly as most powerful in causing the movement of servants. This was the pecuniary profit to be made by shipping them."³³

Like the shippers, England found forced relocation to be profitable. For example, England used the colonies as a dumping ground for its most economically burdensome residents—criminals and the poor.³⁴ Deportation to the colonies was the leading criminal punishment in England until the Revolution and was available for a wide variety of crimes.³⁵ Some English courts sentenced more than half of their convicts to the colonies.³⁶ The convicts were sent in such large numbers that they constituted approximately one-quarter of the British immigrant population in colonial America.³⁷

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

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

30. ABBOT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607–1776*, at 3 (1947).

31. *Id.* at 9.

32. *Id.* at 3–5.

33. *Id.* at 4; see also A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775*, at 131–32 (1987).

34. EKIRCH, *supra* note 33, at 17–19; Quigley, *Colonial America*, *supra* note 15, at 74–75.

35. See Quigley, *Colonial America*, *supra* note 15, at 74–75.

36. *Id.* at 74.

37. *Id.* at 75.

The crimes punishable by deportation included those associated with poverty, such as begging and vagrancy.³⁸ Pursuant to the English Poor Laws, many able-bodied poor persons were shipped to America in lieu of imprisonment in England.³⁹ The English government defined the “able-bodied” to include children.⁴⁰ It sent orphaned children and other poor children to the colonies to serve as “apprentices.”⁴¹ From 1619 to 1620 alone, when living conditions in the colonies were particularly harsh, England sent two hundred orphans and other poor children to work in Virginia.⁴² The children remained apprenticed until the age of twenty-one or, in some colonies, until the age of eighteen or upon marriage for girls.⁴³ Although some apprentices were taught a trade, many others worked as mere laborers.⁴⁴

A large impetus for bringing immigrants to the colonies was the need for cheap labor.⁴⁵ The Crown had granted huge estates in the colonies to a favored few.⁴⁶ Operation of these estates required large amounts of cheap labor.⁴⁷ Smaller farmers and plantation owners also needed workers, as did a variety of other commercial activities.⁴⁸ In Virginia, approximately 75% of the white immigrants in the mid-1600s were indentured.⁴⁹ In the

38. *Id.* at 74–75.

39. William P. Quigley, *Five Hundred Years of English Poor Laws, 1349–1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 108 & n.210 (1996) [hereinafter Quigley, *English Poor Laws*].

40. *See id.* at 95 (noting that the legislative framework differentiated between those who were unable to work and those who were considered able-bodied); Quigley, *Colonial America*, *supra* note 15, at 59 (noting that children over twelve were usually not exempted from work).

41. SMITH, *supra* note 30, at 12.

42. *Id.*; Quigley, *Colonial America*, *supra* note 15, at 59.

43. Quigley, *Colonial America*, *supra* note 15, at 59 & n.178; *see also* DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN AMERICAN ANALYSIS* 11–12 (1981) (noting that some of the children were sold as wives).

44. *See* SMITH, *supra* note 30, at 16–17 (noting that “[a] child’s indenture might specify that he be given the rudiments of an education or taught a trade”).

45. *See* Quigley, *Colonial America*, *supra* note 15, at 71–72 (“Indentured servants were the principal labor supply for the colonies until they were superseded by slaves in the eighteenth century.”).

46. *See* HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 83–84 (1980) (noting that “[t]he huge landholdings of the Loyalists had been one of the great incentives to Revolution”).

47. SMITH, *supra* note 30, at 4–5.

48. *Id.*

49. *See* Quigley, *Colonial America*, *supra* note 15, at 71–72. Another commentator sets forth the terms of the earliest extant indenture document, which was signed in 1619:

That the said Robert doth hereby covenant faythfully to serve the said S^r Willm, Richard George and John for three years from daye of his landinge in the land of Virginia, there to be employed in the lawfull and reasonable workes and labors of

other colonies, one-half to two-thirds of the white immigrants were indentured.⁵⁰ An ongoing stream of immigrants was essential because the death rate in the colonies rivaled England's death rate during the plague.⁵¹ During certain periods, 80% of the immigrant workers in the colonies died of disease and malnutrition.⁵²

If a prospective immigrant was unable or unwilling to pay for passage to the colonies, the immigrant could be indentured as a servant.⁵³ A typical indenture required the servant to serve a master for a period of years, usually two to seven years.⁵⁴ As noted previously, children could be indentured for many more years, depending on their age.⁵⁵ In exchange, the servant's new master agreed to pay for the servant's transportation to America and to feed, clothe, and shelter the servant during the period of indenture.⁵⁶ If the immigrant had not been indentured to a colonist before setting sail, the shipper auctioned off the servant upon arrival in the colonies.⁵⁷

On board, shippers demonstrated greater concern for profits than for passengers.⁵⁸ Immigrants were overloaded into ships for the weeks-long journey.⁵⁹ If the journey lasted longer than expected, passengers died of starvation.⁶⁰ For example, when one

them . . . and to be obedient to such governors his and their assistants and counsell as they . . . shall from tyme to tyme appoynt and set over him. In consideracon whereof, the said S' Willm Richard George and John do covenant with the said Robert to transport him (with gods assistance) with all convenient speed into the said land of Virginia at their costs and charges in all things, and there to maintayne him with convenient diet and apparell meet for such a servant, And in thend of the said terme to make him a free man of the said Cuntry theirby to enjoy all the liberties freedomes and priviledges of a freeman there, And to grant to the said Robert thirty acres of land within their Territory or hundred of Barkley

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

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

51. JOHN M. BLUM ET AL., *THE NATIONAL EXPERIENCE* 50 (3d ed. 1973).

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

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

54. Quigley, *Colonial America*, *supra* note 15, at 74.

55. SMITH, *supra* note 30, at 17.

56. *Id.* at 16–17.

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

58. EKIRCH, *supra* note 33, at 97–103.

59. ZINN, *supra* note 46, at 43 (“[S]ervants were packed into ships with the same fanatic concern for profits that marked slave ships.”).

60. *Id.*

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

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

Despite the inhumane treatment of indentured servants, colonial statutes and courts routinely enforced indenture contracts against those who attempted to escape from their masters.⁷³ Colonial legislatures provided rewards for the return of runaway servants⁷⁴ and codified terms for the indenture relationship.⁷⁵ Servants that married, had children, or engaged in a trade without their master's consent were punished by an

61. *Id.*

62. *Id.*

63. EKIRCH, *supra* note 33, at 147-50.

64. SMITH, *supra* note 30, at 233.

65. RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 321-22 (First Northeastern ed. 1981).

66. SMITH, *supra* note 30, at 12.

67. *See* ZINN, *supra* note 46, at 44; Quigley, *Colonial America*, *supra* note 15, at 73.

68. Quigley, *Colonial America*, *supra* note 15, at 40 n.19.

69. SMITH, *supra* note 30, at 233.

70. *Id.*

71. ZINN, *supra* note 46, at 44.

72. *Id.*

73. E. Merrick Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 661 (1943); Quigley, *Colonial America*, *supra* note 15, at 74.

74. Quigley, *Colonial America*, *supra* note 15, at 74.

75. SMITH, *supra* note 30, at 19.

increase in the period of their indenture.⁷⁶ Perhaps the legislatures' and courts' harsh treatment of the indentured is less surprising because servants could not vote or serve on juries.⁷⁷

When the African slave trade began in the colonies in 1619,⁷⁸ an indentured servant initially was more economically desirable to a master than an African slave. Buying a servant for seven years cost less than buying a slave for life.⁷⁹ Because most servants and slaves did not survive more than seven years in the earlier years of colonization, the servant was a better economic investment.⁸⁰ Over time, slaves increasingly replaced indentured servants, suffering unimaginable privations and other abuses during a lifetime of bondage.⁸¹ But, like slavery, the institution of indenture extended well into the nineteenth century.⁸²

For those servants who survived indenture, eighty percent remained poor⁸³ despite the strong demand for labor. Colonial legislatures, controlled by the wealthy, enacted *maximum* wage laws for free workers to prevent them from charging what the seemingly insatiable labor market would bear.⁸⁴ Unable to support themselves on these artificially suppressed wages, many newly freed servants continued laboring for their former masters, now as a tenant rather than as a servant.⁸⁵

Although the substantial majority of the colonies' poor were women, children, the elderly, and the physically or mentally disabled,⁸⁶ other laws governing them were even more brutish. Colonial poor laws were based on the English Poor Laws, which provided imprisonment for paupers, beggars, and vagabonds.⁸⁷ The colonial poor laws also were molded by the religious belief that economic status was a reflection of moral worth.⁸⁸ The Puritans, among others, believed that "[p]overty, like wealth,

76. Dodd, *supra* note 73, at 661 (noting that the punishment was generally "five extra days for each day lost"); Quigley, *Colonial America*, *supra* note 15, at 74.

77. ZINN, *supra* note 46, at 44.

78. *Id.* at 43.

79. BLUM ET AL., *supra* note 51, at 50.

80. *Id.*

81. See Quigley, *Colonial America*, *supra* note 15, at 77 ("If the evil system of indenture or temporary slavery was one of the major scandals of the colonial period, the system of permanent enslavement was exponentially worse." (quotation marks omitted)).

82. See *id.* at 74.

83. ZINN, *supra* note 46, at 46–47.

84. MORRIS, *supra* note 65, at 56–64 (discussing maximum wage legislation in the colonies).

85. ZINN, *supra* note 46, at 47.

86. Quigley, *Colonial America*, *supra* note 15, at 40–41.

87. See *id.* at 42–44; see also Quigley, *English Poor Laws*, *supra* note 39, at 74.

88. Quigley, *Colonial America*, *supra* note 15, at 44.

demonstrated God's hand, and while riches were proof of goodness and selection, insufficiency was evidence of evil and rejection."⁸⁹

As an alternative to imprisonment, colonial governments were statutorily authorized to indenture the poor against their will.⁹⁰ A town could auction off poor women as household servants,⁹¹ and the government could take poor children from their families without their parents' consent.⁹² The children would be apprenticed, placed with another family, or sent to the "House of Employment"—a workhouse.⁹³ Colonial Rhode Island went a step further. It statutorily authorized towns to apprentice not only poor children, but also children "who were thought likely to need assistance in the future."⁹⁴ In a misguided attempt to shame people out of poverty, the poor in several colonies were required to wear badges, such as a large, red letter "P."⁹⁵ Failure to do so was punished by whipping and hard labor.⁹⁶

As the number of poor increased, the colonies began constructing poorhouses and workhouses.⁹⁷ Although poorhouses were intended for those who were unable to work and workhouses for those who could, the distinction often was ignored.⁹⁸ "Children, vagrants, drunkards, the sick, and the mentally ill were housed in the same place, often in the same sleeping quarters."⁹⁹ If a workhouse resident did not work as directed, punishments included reduced food rations, whippings, and shackling.¹⁰⁰ For the dubious benefit of living in these conditions, able-bodied inmates were required to pay for their stay.¹⁰¹

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

89. SAMUEL MENCHER, POOR LAW TO POVERTY PROGRAM: ECONOMIC SECURITY POLICY IN BRITAIN AND THE UNITED STATES 43 (1967); GARY B. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION 187 (1979).

90. Quigley, *Colonial America*, *supra* note 15, at 76.

91. *Id.* at 59; *see also* MORRIS, *supra* note 65, at 15.

92. Quigley, *Colonial America*, *supra* note 15, at 59–60.

93. *Id.* at 60.

94. *Id.*; *see also* NASH, *supra* note 89, at 184–85.

95. Quigley, *Colonial America*, *supra* note 15, at 63–64.

96. *Id.* at 64.

97. *Id.* at 61.

98. *Id.* at 62.

99. William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 156 (1977) [hereinafter Quigley, *Reluctant Charity*].

100. Quigley, *Colonial America*, *supra* note 15, at 63.

101. *Id.* (noting also that "[t]he housing costs for stubborn children or servants were to be paid by their parents or masters" (quotation marks omitted)).

debtor prison—“a crowded, vermin-infested, disease-breeding jail”—even if the debt was for a small amount.¹⁰² While in jail, the debtor was not entitled to publicly-provided food or fuel.¹⁰³ Instead, the debtor had to rely on family or charity.¹⁰⁴ Rather than have a debtor imprisoned, a creditor could force the debtor to work for him or could auction off the debtor to pay the debt.¹⁰⁵ Even a debtor’s children could be sold to pay the creditor.¹⁰⁶ In the Pennsylvania statute authorizing the creation of debtor prisons, the colonial legislature unbelievably states that it was providing this remedy out of “compassion” for debtors.¹⁰⁷ As an indication of the widespread use of debtor prisons, five debtors were jailed for each jailed criminal until well into the nineteenth century.¹⁰⁸

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

102. Quigley, *Reluctant Charity*, *supra* note 99, at 161–62 (noting the high numbers of people in jail for small debts led New York in 1789 to limit “imprison[ment] for debt to no more than thirty days for those owing less than ten pounds”).

103. *Id.* at 161.

104. *Id.*

105. *Id.* at 160–61.

106. See Quigley, *Colonial America*, *supra* note 15, at 76 (noting that “if a child of eight, ten or twelve years of age is given for [debt], said child must serve until twenty-one years old” (quotation marks omitted)).

107. *Id.* The Pennsylvania legislature declared:

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

Id. at 76 & n.313 (quotation marks omitted) (quoting Acts of the General Assembly of Pennsylvania, 1729–1730, ch. 315).

108. Quigley, *Reluctant Charity*, *supra* note 99, at 162.

109. See Quigley, *Colonial America*, *supra* note 15, at 56 (“English poor laws, dating back to 1388, differentiated between beggars who were ‘impotent,’ or unable to work, and those who were able-bodied.”).

110. *Id.* at 48.

111. See *id.* at 57.

to charge the least for this responsibility.¹¹² Moreover, the obligation to provide even this minimal form of support was limited to that local jurisdiction.¹¹³ If the poor person went to another area, no such duty was owed.¹¹⁴ Reported cases concerning the obligation to provide support normally involved disputes between jurisdictions as to which one was economically responsible for a particular pauper.¹¹⁵ Even if a jurisdiction undertook to provide support, a minimum period of residency often was required before relief would be provided,¹¹⁶ a requirement that clearly is unconstitutional today.¹¹⁷

To eliminate any issue concerning the obligation to provide support, some colonies prevented a disabled poor person from moving to that colony unless the current town of residence indemnified it for any support that it might provide.¹¹⁸ Other towns were even less receptive to new poor residents. If nonresident poor refused to leave when ordered, they could be jailed, whipped, and forcibly removed.¹¹⁹ Boston “warned out of the city hundreds of sick, weary, and hungry souls who tramped the roads into the city in the eighteenth century.”¹²⁰ Even

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

113. See PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 17 (1989).

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

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

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

117. See *Saenz v. Roe*, 526 U.S. 489, 506 (1999) (holding that the Citizenship Clause of the Fourteenth Amendment expressly disallows for “degrees of citizenship based on length of residence” (quoting *Zobel v. Williams*, 457 U.S. 55, 69 (1982))).

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

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

120. *Id.* at 66 (quoting GARY B. NASH, *RACE, CLASS, AND POLITICS: ESSAYS ON AMERICAN COLONIAL & REVOLUTIONARY SOCIETY* 185 (1986)); see also ROSSI, *supra* note 113, at 17 (noting that widows, children, the disabled, and the elderly were especially vulnerable to being “warned” to leave due to a town’s concerns over additional tax burdens). One historian states that “warning out” did not mean eviction but was a method to eliminate the city’s obligation to provide the poor relief. NASH, *supra* note 89, at 185.

mentally ill strangers were driven off with whips.¹²¹ If a poor male returned to New York after having been removed, he could be whipped thirty-nine times; poor women could be whipped twenty-five times.¹²²

Not content with rebuffing the poor who wished to become residents, some colonial legislatures also restricted those who merely wished to visit. A nonresident could not stay in a Bostonian's home for more than two weeks without government authorization.¹²³ In Rhode Island, a guest could not stay with a resident for more than a week without giving written notice to the local governing body; a resident who intentionally allowed a poor person into the colony could be fined \$100.¹²⁴

The colonies' treatment of the poor is unimaginably harsh to modern sensibilities. But, to many colonists, poverty, even among the elderly, was viewed as being the result of laziness and profligacy.¹²⁵ Even Benjamin Franklin, one of our most respected forebears, thought that the poor laws of the time were too lenient:

[I]f we provide arrangement for laziness, and support for folly, may we not be found fighting against the order of God and nature, which perhaps has appointed want and misery as the proper punishments for, and cautions against, as well as natural consequences of, idleness and extravagance?¹²⁶

In stark contrast to the harsh living conditions for the poor in colonial America, the upper class led lives of privilege and power. Many colonies existed in a state of virtual feudalism. In New York, fewer than twelve people owned three-quarters of the land.¹²⁷ These landowners dominated every aspect of their tenants' lives.¹²⁸ In Virginia, fifty wealthy families controlled the

121. Quigley, *Colonial America*, *supra* note 15, at 58.

122. Quigley, *Reluctant Charity*, *supra* note 99, at 148.

123. Quigley, *Colonial America*, *supra* note 15, at 65.

124. Quigley, *Reluctant Charity*, *supra* note 99, at 145.

125. *See, e.g.*, NASH, *supra* note 89, at 329.

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

127. Michael Parenti, *The Constitution as an Elitist Document*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 39, 40 (Robert A. Goldwin & William A. Schambra eds., 1980).

128. ZINN, *supra* note 46, at 206.

[The Anti-Renter Movement of 1839] was a protest against the patroonship system, which went back to the 1600s when the Dutch ruled New York, a system where . . . "a few families, intricately intermarried, controlled the destinies of

plantations, which were worked by slaves and indentured servants.¹²⁹ Seven people owned approximately 1.73 million acres.¹³⁰ In Maryland, the Crown granted individual proprietors unlimited power to govern.¹³¹

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

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

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

three hundred thousand people and ruled in almost kingly splendor near two million acres of land.”

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

Id.

129. *Id.* at 47.

130. Parenti, *supra* note 127, at 40.

131. ZINN, *supra* note 46, at 47.

132. *Id.* at 47–48.

133. NASH, *supra* note 89, at 257–58, 262–63; ZINN, *supra* note 46, at 48.

134. See THOMAS L. PURVIS, COLONIAL AMERICA TO 1763, at 194 (1999) (noting, for example, in New Jersey “53% of all colonial assemblymen elected since 1703 were either the sons, sons-in-law, or grandsons of men who had sat in either house of the legislature”).

135. Parenti, *supra* note 127, at 40.

136. ALICE HANSON JONES, WEALTH OF A NATION TO BE 272 (1980); NASH, *supra* note 89, at 257, 262.

137. JONES, *supra* note 136, at 191 tbl.6.15.

138. *Id.*

139. ZINN, *supra* note 46, at 49.

140. *Id.*

wealthiest 1% owned 44% of the property, and the wealthiest 10% owned 66%.¹⁴¹ In contrast, the proportion of poor adult men in Boston increased from 14% to 29% during that period.¹⁴² Overall, during the eighteenth century, the wealthiest city residents in the colonies increased their share of the colonies' wealth from 33% to 55%.¹⁴³ In contrast, by the time of the American Revolution, 20% of the colonies' white families lived in poverty,¹⁴⁴ and slaves constituted an additional 20% of the population.¹⁴⁵

Confronted with such disparities in wealth and power and lacking the vote, the lower classes engaged in organized rebellion from at least the mid-seventeenth century and committed individual acts of violence against their masters.¹⁴⁶ A large early rebellion, Bacon's Rebellion, erupted in Virginia in 1676.¹⁴⁷ Hundreds of backsettlers, slaves, and white servants banded together to rebel against economic and social inequalities.¹⁴⁸ A large military force was required to suppress the movement.¹⁴⁹

Workers in colonial cities also began rebelling at least as early as the mid-seventeenth century.¹⁵⁰ Food riots, tenant riots, farmer riots, and worker strikes continued throughout the eighteenth century,¹⁵¹ despite the enactment of laws to punish rebels and the stationing of militia to prevent uprisings.¹⁵² "[B]y 1760, there had been eighteen uprisings aimed at overthrowing colonial governments. There had also been six black rebellions, from South Carolina to New York, and forty riots of various origins."¹⁵³ Fearful that the African Americans and Native Americans would join forces against the outnumbered white

141. *Id.* at 49, 65.

142. *Id.*

143. Quigley, *Colonial America*, *supra* note 15, at 42.

144. *Id.*

145. *See* ZINN, *supra* note 46, at 49 ("Black slaves were pouring in; they were 8 percent of the population in 1690; 21 percent in 1770."); *see also* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1168 (1975).

146. ZINN, *supra* note 46, at 44–45.

147. *Id.* at 39.

148. *Id.* (noting that the rebellion "began with conflict over how to deal with the Indians").

149. *Id.* at 41.

150. *Id.* at 50 (listing strikes of coopers, butchers, and bakers, which occurred in protest of "government control of fees they charged").

151. *Id.* at 78–84.

152. *Id.* at 45 (noting that "[t]wo companies of English soldiers remained in Virginia to guard against future trouble").

153. *Id.* at 59.

landowners, the Carolinas enacted legislation that prohibited free blacks from entering Indian territory.¹⁵⁴

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

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

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

154. *Id.* at 54.

155. *See, e.g.*, NASH, *supra* note 89, at 296–98, 301–02.

156. ZINN, *supra* note 46, at 63.

157. *Id.*

158. *Id.* at 64–65.

159. *Id.* at 64.

160. *Id.* at 63–64.

161. *Id.* at 79, 81.

162. *Id.* at 84–85.

163. *Id.* at 81; *see also* Parenti, *supra* note 127, at 43 (“During the 1780s, the jails were crowded with debtors. Among the people, there grew the feeling that the revolution against England had been fought for naught.”). One historian describes the Revolution as a movement to challenge upper-class control of government. NASH, *supra* note 89, at 382.

164. Refer to text accompanying notes 89, 126 *supra* (discussing Puritan views of the poor and Benjamin Franklin’s view of poor laws).

hierarchical countries. "Most persons in the provincial period believed in a hierarchical ordering of the population and had no concept of the modern democratic theory of equality of men. They took for granted a stratified society in which deference to one's betters was the accepted norm."¹⁶⁵ Both the government and the churches reinforced this view. For example, in the 1630s, the governor of Massachusetts Bay Colony stated that "in all times some must be rich, some poore, some highe and eminent in power and dignitie; others meane and in subjeccion."¹⁶⁶ This outlook continued throughout the colonial period as evidenced by a sermon given over one hundred years later: "[T]is no ways fitting that men cloathed with honor and power should be brought down to a level with vulgar people."¹⁶⁷

Another clear impetus for the colonies' treatment of the poor was the punitive English Poor Laws.¹⁶⁸ Some colonies' laws expressly incorporated or otherwise referred to the English Poor Laws.¹⁶⁹ However, as harsh as the English Poor Laws were, the colonies' laws became progressively harsher during the colonial era.

Substantial if not dominant reasons for this legal evolution were the increasing restrictions throughout the colonial era on suffrage and the ability to hold office. Colonial laws limited these political powers to the wealthiest few percent of the population.¹⁷⁰ These powers also were limited by a variety of other factors, including race, gender, and religion.¹⁷¹ Although the king was a strong force behind the adoption of these restrictions, the groups benefited by them also were strong proponents.¹⁷²

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

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

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

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

169. Quigley, *Colonial America*, *supra* note 15, at 43-44.

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

171. *Id.* at 473.

172. See *id.* at 485.

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

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

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

173. See *id.* at 33, 484.

174. *Id.* at 33–34 (quoting 2 WILLIAM WALLER HENING, STATUTES AT LARGE OF VIRGINIA 424–25 (1823)).

175. *Id.* at 253–54.

176. *Id.* at 30–31 (quoting 2 HENING, *supra* note 174, at 280); see also NASH, *supra* note 89, at 273, 297; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 27 (1992).

177. MCKINLEY, *supra* note 8, at 253–54.

178. *Id.* (quotation marks omitted).

to prevent taxation without representation¹⁷⁹—and, in later years, disproportionate taxation of the lower classes was a substantial trigger for a great deal of civil unrest.¹⁸⁰

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

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

179. See, e.g., *id.* at 31–32 (noting the Virginia colonists' strong concern with the right of representation).

180. See, e.g., Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 *BUFF. L. REV.* 819, 844 (2002) (commenting that "taxes were frequently a major precipitating factor of protest").

181. MCKINLEY, *supra* note 8, at 61.

182. *Id.*

183. See generally PURVIS, *supra* note 134, at 193 ("In most colonies, the only election in which voters could participate was for a candidate to sit in the legislature's lower house.").

184. MCKINLEY, *supra* note 8, at 61 (quoting ARCHIVES OF MARYLAND, Proceedings and Acts of Assembly, 1666–1676, at 47 (1883)).

185. *Id.* at 62.

186. *Id.* at 62–63.

187. *Id.* at 35 (noting that freeholders could serve on juries if they "possessed one hundred pounds sterling real and personal estate").

188. PURVIS, *supra* note 134, at 193 ("In most colonies, any voter could run for office, but five of the thirteen colonies required their assemblymen to possess a significant amount of wealth.").

189. *Id.*; WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 307 (Rita Kimber & Robert Kimber trans., 1980).

New Hampshire's election law limited the vote to those who owned land worth at least £50 but required political candidates to own land worth at least £300.¹⁹⁰ North Carolina's 1760 election law required ownership of fifty acres to vote and one hundred acres to be a candidate.¹⁹¹ New Jersey's 1709 election law required ownership of either one hundred acres of land or real and personal property worth £50 to vote, whereas candidacy required one thousand acres of land or a total estate worth £500.¹⁹² Moreover, in all but two colonies, members of the legislature's upper house were not even elected; instead, they were appointed.¹⁹³

In addition to the property requirements, a variety of other factors effectively prevented the lower classes from holding legislative office. Legislators were not paid and often did not even receive complete reimbursement for expenses incurred to attend legislative sessions.¹⁹⁴ Legislative sessions could last for as long as three months.¹⁹⁵ Only the well-to-do could afford to be away from their plantation or other source of income for such an extended period of time.¹⁹⁶ As a result, the wealthiest two percent of the colonists comprised the majority in many colonial legislatures, and the wealthiest ten percent held all but a handful of the legislative seats.¹⁹⁷

The exclusionary effects of the colonial election laws' property requirements were compounded by the poll tax that existed in some colonies.¹⁹⁸ But ownership requirements and poll taxes were only two of the exclusionary devices that limited political participation. As was true for the ownership requirement, some additional criteria were based on self-serving stereotypes. Women, of course, were denied the vote in every

190. ADAMS, *supra* note 189, at 293.

191. *Id.* at 304.

192. *Id.* at 299.

193. *See* PURVIS, *supra* note 134, at 193.

194. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 64.

195. PURVIS, *supra* note 134, at 193.

196. *See id.* ("A man of average means would have found it virtually impossible to afford the personal sacrifice of time and money, especially if called to the assembly at planting time or harvest time . . .").

197. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 60 ("Most of the persons elected were large landowners, though about one-third were lawyers, merchants, or members of other professions."); PURVIS, *supra* note 134, at 194 tbl.8.7 (listing background characteristics of legislators from South Carolina, Maryland, and New York circa 1763).

198. *See, e.g.*, MCKINLEY, *supra* note 8, at 327; *ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA* 412 (John Mack Faragher ed., 1990) (discussing "Suffrage").

colony with rare exception.¹⁹⁹ John Adams stated a prevalent attitude about women's political participation:

Their delicacy . . . renders them unfit for practice and experience in the great businesses of life, and the hardy enterprises of war, as well as the arduous cares of state. Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares.²⁰⁰

This perception was so common among legislators that election laws in only four colonies expressly excluded women.²⁰¹ When a woman did vote or attempt to vote, the government took decisive action. For example, a South Carolina election was declared void in 1733 because a woman tried to vote.²⁰²

African Americans and Native Americans were generally, but not universally, denied the right to vote.²⁰³ Some recorded instances exist of free blacks and Indians voting during the colonial era.²⁰⁴ However, even when not legislatively denied the vote, local custom may have accomplished the same end. In explaining why blacks were disenfranchised in Virginia, the governor said that, until blacks were "educated and reformed," a "decent Distinction" had to be maintained "between them and their Betters."²⁰⁵ In any event, slaves would have been unable to satisfy the property ownership requirements.

Like the slaves, white servants could not vote in most colonies. A servant could vote in Connecticut only after meeting a variety of requirements, such as being a man of "Honest Conversation."²⁰⁶ The poor were disenfranchised because, as described earlier, they were deemed to have no "judgment of their own" and to be as dependent "as women are upon their husbands, or children on their parents."²⁰⁷

199. See MCKINLEY, *supra* note 8, at 473 ("Lady Moody on Long Island and Mrs. Margaret Brent in Maryland remain the only women who are shown by the records to possess even a desire for political privileges.").

200. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 29–30 (quotation marks omitted) (quoting Letter from John Adams to James Sullivan, *supra* note 17, at 377).

201. MCKINLEY, *supra* note 8, at 35. Virginia, South Carolina, Georgia, and Delaware specifically limited voting to males. See *id.* at 473.

202. MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 151 & n.39 (1943).

203. See DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 32.

204. See *id.* at 32–33 (noting that twenty-nine Indians had voted in a 1763 Stockbridge, Massachusetts election and that until 1723 free blacks were permitted to vote in Virginia).

205. *Id.* at 33 (quoting Governor William Gooch).

206. MORRIS, *supra* note 65, at 505.

207. Refer to text accompanying note 17 *supra* (quoting John Adams).

The final class that could not vote because of concerns about character and judgment was the young.²⁰⁸ In two colonies, voters had to be at least twenty-four years old.²⁰⁹ In the other colonies, twenty-one was the minimum age to vote.²¹⁰ The stated justifications for the age restrictions were the same as those for excluding women, African Americans, Native Americans, and servants.²¹¹ John Adams explained that: “Children . . . have not judgment or will of their own.”²¹² The age limit was intended to “fix upon some period in life, when the understanding and will of men in general, is fit to be trusted by the public.”²¹³ Unlike the other disenfranchised groups, however, this characterization of the young generally is based on fact, rather than on stereotype. But the similar justifications advanced for disenfranchising these groups strongly reflects the caricatures that underlay their legal treatment in many ways beyond the election laws.

Although the gender, race, and wealth restrictions were based on false assumptions about the abilities of members of those classes, every colony’s voting laws disenfranchised a variety of other groups precisely because they exercised independent judgment.²¹⁴ Although many colonists left England because of religious and political persecution, these same colonists denied the right to vote to people who had different religious beliefs or who might have different ideas concerning government.²¹⁵

Religious restrictions on the franchise existed throughout the colonies to varying degrees.²¹⁶ People who did not belong to the locally dominant church “were often considered to be a threat

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

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

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

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

212. *Id.*

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

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

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

216. See *id.* at 31–32 (discussing the various voting restrictions imposed on members of different religious groups).

to the existing government as well as to the dominant faith.”²¹⁷ Ironically, the Puritans were the most restrictive.²¹⁸ During the seventeenth century, only Puritans could vote in Massachusetts in order to maintain the “Puritan theocracy.”²¹⁹ The restrictions on religious practices in Massachusetts were stricter than those the Puritans had fled in England.²²⁰

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

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

217. *Id.* at 31.

218. *See id.*

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

220. *See* MCKINLEY, *supra* note 8, at 337.

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

222. *Id.* at 322.

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

224. *Id.* at 324–25.

225. *Id.* at 326.

religious restriction on the franchise was eliminated in Massachusetts.²²⁶ However, religious restrictions continued in other colonies.²²⁷ Catholics were the most politically disenfranchised.²²⁸ They were barred from voting in many colonies.²²⁹ For example, Maryland, which had the largest Catholic population, disenfranchised them to prevent “the Discouragement and Disturbance of his Lordship’s Protestant Government.”²³⁰ After 1740, Parliament prohibited Catholic aliens from becoming citizens in any colony.²³¹

The political rights of the Jews were almost as restricted as those of Catholics.²³² Seven colonies denied Jews the vote, and Rhode Island, which had a history of religious toleration, prevented Jews from even becoming naturalized citizens after 1762.²³³ A probable reason for this extreme measure was the competing political factions’ fear that the Jews would side with the opposition.²³⁴ Like the restrictions imposed on Catholics, the restrictions placed on Jews also were designed to protect the Protestant faith.²³⁵ And like the restrictions imposed on Catholics, the political restrictions for Jews continued through the Revolution.²³⁶

Catholics and Jews had long histories of persecution even before the colonies were established. But several colonies, in addition to Massachusetts, demonstrated hostility or fear for even less established religions. Many colonies disenfranchised Quakers and Baptists.²³⁷ Some colonies disenfranchised Presbyterians.²³⁸ In 1680, New Hampshire disenfranchised everyone except Protestants.²³⁹

226. *See id.* at 337 (describing the change from suffrage based on religion to suffrage based on “the ownership of wealth”).

227. *Id.* at 475–76 (surveying the restrictions imposed on members of different faiths in the various colonies after 1691).

228. *Id.* at 476 (claiming that “the sect which received the most liberal share of political persecution was the Roman Catholic”).

229. *Id.*

230. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 32 (quotation marks omitted).

231. MCKINLEY, *supra* note 8, at 475.

232. *Id.* at 476.

233. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 32.

234. *Id.*

235. *Id.*

236. MCKINLEY, *supra* note 8, at 215. However, it is likely that the enforcement of statutes restricting suffrage was left to the discretion of local officials, so it is difficult to determine the actual extent to which Jews were denied the right to vote. *Id.*

237. *Id.* at 475–76.

238. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 31 (noting that Presbyterians were frequently barred from voting in the Anglican colonies).

239. MCKINLEY, *supra* note 8, at 379.

Disenfranchising religious groups was only one means by which the English colonists attempted to cement their control of political power. Despite their status as immigrants or descendants of immigrants, the English colonists also disenfranchised or attempted to disenfranchise immigrants from countries other than England, often in response to their political activities.²⁴⁰ With limited exception, only people born or naturalized in England or naturalized in a colony could vote or hold office in that colony.²⁴¹ English colonists in South Carolina protested political activities by French Huguenots who settled in South Carolina at the end of the seventeenth century.²⁴² Although German immigrants constituted one-third of Pennsylvania's population,²⁴³ English colonists attempted to revoke their franchise when they supported the Quakers.²⁴⁴ A Pennsylvania minister justified the disenfranchisement movement on the ground that the Germans were "ignorant, proud, stubborn Clowns."²⁴⁵ Pennsylvanians also attempted to deprive Scotch-Irish immigrants of political power because they were considered "lawless and shiftless."²⁴⁶ New York subjected Dutch immigrants to similar treatment because they were characterized as people of "[i]gnorance & mean spirit."²⁴⁷

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

240. See DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 33–34 (surveying voting restrictions imposed by the various colonies on immigrants from countries other than England).

241. See *id.* (noting that the election laws of New Hampshire, Pennsylvania, North Carolina, and Delaware explicitly restricted voting rights to persons born in Great Britain or "naturalized in England or in [a] particular colony," whereas "[e]lsewhere in America, the barring of non-British subjects was merely customary").

242. *Id.* at 34.

243. *Id.* at 52.

244. *Id.* at 34.

245. *Id.* (quoting WILLIAM SMITH, *A BRIEF STATE OF THE PROVINCE OF PENNSYLVANIA* 40 (1755)).

246. *Id.* at 52; WILLIAM S. HANNA, *BENJAMIN FRANKLIN AND PENNSYLVANIA POLITICS* 3 (1964).

247. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 53.

248. See MCKINLEY, *supra* note 8, at 477 (noting that "[b]y the Revolutionary days a residence within the county was required" in order to vote in Maryland, North Carolina, South Carolina, Georgia, Pennsylvania, Delaware, and New Jersey).

249. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 35.

Carolina required a one-year residency.²⁵⁰ Georgia and North Carolina required a six-month residency.²⁵¹

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

As a result, only a small portion of the population could vote. Although the paucity and incompleteness of records from the colonial era render precision and comprehensiveness unobtainable goals, the extant records reveal that a uniformly small portion of the population was qualified to vote. For example, in 1662, only about 7% of the population of Connecticut could vote.²⁵⁸ In Massachusetts, approximately 5% of the population could vote in 1670, 6.7% in 1679, and perhaps only 3% in 1687.²⁵⁹ In New Hampshire, approximately 5% of the population could vote in 1679.²⁶⁰ In Pennsylvania, about 8% of the

250. MCKINLEY, *supra* note 8, at 477.

251. DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 35.

252. In contrast, Virginia disenfranchised anyone who was shipped to the colonies as a convict, MCKINLEY, *supra* note 8, at 447, and South Carolina disenfranchised sailors. *Id.* at 148.

253. *Id.* at 387.

254. *Id.* at 324, 374.

255. *Id.* at 341–42, 346–47.

256. *Id.* at 448, 459.

257. See DINKIN, *PROVINCIAL AMERICA*, *supra* note 165, at 47 (asserting that “on some occasions the number of people permitted to poll depended less on the provisions of the election laws than on the discretion of the officials present”); see also MCKINLEY, *supra* note 8, at 482 (noting that certain voting requirements “virtually left the control of the freemanship with the body of existing freeman in each town”).

258. See MCKINLEY, *supra* note 8, at 418 (“In other words, only one person in thirteen of the new population was admitted to the freemanship.”).

259. See *id.* at 327–28, 334–35 (basing these numbers on various writers’ estimates and existing tax lists from the era).

260. *Id.* at 373.

rural population could vote, but only 2% of the residents of Philadelphia held that right.²⁶¹ In Rhode Island, the percentage ranged from around 9% to about 14% in 1708, which was a “remarkably high proportion.”²⁶²

As small as these numbers are, the percentage of people who actually voted generally was far smaller. For example, in the years immediately before the Revolution, only 2% of Connecticut’s population voted and only 3–4% of the residents of Boston did so.²⁶³ In 1692, only 1.7% of the Massachusetts population voted.²⁶⁴ In other Massachusetts elections, 2% of the population voted,²⁶⁵ and from 1780–1786, less than 3% voted.²⁶⁶ Against this backdrop, the nation was formed.

II. AFTER THE REVOLUTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed²⁶⁷

“Democracy” is “the worst . . . of all political evils.”²⁶⁸

Despite the inclusionary language of the Declaration of Independence, the second statement, by Constitutional Convention delegate Elbridge Gerry, is more reflective of the Revolutionary era because most people remained unable to vote.²⁶⁹ Every state, except South Carolina, limited the franchise to property owners.²⁷⁰ Even without the ownership requirement,

261. *Id.* at 487.

262. *Id.* at 453, 487.

263. *Id.* at 356, 487.

264. *Id.* at 355.

265. *Id.* at 487.

266. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 243 (3d ed. 1986).

267. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

268. Elbridge Gerry (delegate to the Constitutional Convention), *quoted in* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 23 (2000).

269. *See* KEYSSAR, *supra* note 268, at 24 (claiming that the American Revolution produced “only modest” increases in the democratic process, with restrictions on suffrage remaining in force in more than one-third of the states).

270. *See id.* at 5 (“On the eve of the American Revolution, in seven colonies men had to own land of specified acreage or monetary value in order to participate in elections; elsewhere, the ownership of personal property of a designated value (or in South Carolina, the payment of taxes) could substitute for real estate.”).

South Carolina precluded its poorest citizens from voting by limiting the franchise to taxpayers.²⁷¹

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

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

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

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

271. *Id.*

272. See ARTICLES OF CONFEDERATION art. IV (U.S. 1777) (entitling the free person's privileges to those given by the states).

273. *Id.* (providing that "the free inhabitants of each of these states, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all privileges and immunities of free citizens in the several states" (emphasis added)).

274. Parenti, *supra* note 127, at 41.

275. BEARD, *supra* note 266, at 239; see also John F. Manley, *Class and Pluralism in America*, in THE CASE AGAINST THE CONSTITUTION 107 (John F. Manley & Kenneth M. Dolbeare eds., 1987).

276. See Parenti, *supra* note 127, at 41.

277. See U.S. CONST. art. I, § 9, cl. 2 (providing that the writ of habeas corpus may not be suspended except in case of rebellion); *id.* § 10, cl. 1 (prohibiting the states from making any legal tender except gold and silver coin); see also Mark V. Tushnet, *The Constitution as an Economic Document: Beard Revisited*, 56 GEO. WASH. L. REV. 106, 107-08 (1987) (noting that the Constitution "disabl[ed] state governments from adopting debtor relief legislation"). At least two delegates, Luther Martin and John Francis Mercer, opposed ratification of the Constitution based in large part on its treatment of the poor. BEARD, *supra* note 266, at 127, 131-32 (noting that Martin "was always more or less in sympathy with poor debtors," and thus bitterly opposed the adoption of the Constitution because he was "unwilling to preclude altogether the issue of paper money," while Mercer's sympathies rested "with the popular party in Maryland" in spite of his apparent wealth).

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other.²⁷⁸

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

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

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

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

278. THE FEDERALIST NO. 10, at 56 (James Madison) (Random House ed., 1961).

279. See Parenti, *supra* note 127, at 46–47 (discussing Madison’s argument that the “propertyless majority” should not be allowed to unite to overthrow the “established economic order”).

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

281. BEARD, *supra* note 266, at 58–59 (quotation marks omitted).

282. See Tushnet, *supra* note 277, at 107 (noting that the Rebellion was eventually “put down by state efforts”).

283. See Parenti, *supra* note 127, at 46 (“The framers believed the states acted with

who were delegates, wanted a strong national military to suppress slave uprisings.²⁸⁴ As a result, Article I, Section 8 of the Constitution authorizes Congress to create a national militia and to use that militia to suppress insurrections.²⁸⁵

To increase certainty and stability for creditors, the Framers also wanted to prevent states from enacting debtor relief legislation.²⁸⁶ In response to an economic depression following the Revolution, some states had adopted laws designed to prevent or to delay farm foreclosures, debt imprisonment, and other actions against debtors.²⁸⁷ For example, the laws extended the time for repaying a debt or authorized payment with paper money or with goods, rather than with specie.²⁸⁸

Although the great majority of the lower class lived at a subsistence level during this time,²⁸⁹ Madison denounced these laws as being “improper” and “wicked.”²⁹⁰ Other leaders demonstrated similar contempt or even fear. Chief Justice Marshall described the debtor relief laws as being “indulgent.”²⁹¹ General Knox anxiously declared that the debtor relief proponents were “determined to annihilate all debts public and private.”²⁹² Therefore, to prevent states from continuing to intervene on behalf of debtors, Article I, Section 10 of the Constitution provides: “No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts,” including debt contracts.²⁹³

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

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

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

285. U.S. CONST. art. I, § 8, cl. 15.

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

287. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 41 (1989).

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

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

290. THE FEDERALIST NO. 10, at 62 (James Madison) (Random House ed., 1961).

291. BEARD, *supra* note 266, at 298.

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

293. U.S. CONST. art. I, § 10, cls. 1–2.

One benefit was for the holders of public securities.²⁹⁴ The national government had issued securities to finance the war and its other operations.²⁹⁵ The great majority of Framers held large amounts of the securities.²⁹⁶ Although some had purchased the securities to support the war, many others were speculators who bought them at substantially depreciated prices when the government was unable to pay them on schedule.²⁹⁷ Many speculators also purchased from soldiers who had been paid in scrip, rather than money, and had been forced by necessity to sell them at deeply discounted rates.²⁹⁸ A provision in the Constitution guaranteed that the new national government would pay the full face value to the holders, which provided an obvious and substantial benefit.²⁹⁹ Article VI provides that all national debts contracted before the Constitution's enactment would be enforceable against the new government,³⁰⁰ and Congress was given the power to tax to meet those obligations.³⁰¹

A second benefit that the Constitution provided was for western land speculators, including George Washington, Benjamin Franklin, Alexander Hamilton, Robert Morris, and several other framers.³⁰² The speculators had acquired the lands at significantly depressed prices because of the weak central government, an inadequate military, and ambiguity as to the scope of their property rights.³⁰³ Again reflecting possibly unconscious self-interest, one framer argued that a strong central government would significantly enhance the value of those lands: "For myself, I conceive that my opinions are not biassed by private Interests, but having claims to a considerable Quantity of Land in the Western Country, I am fully persuaded that the Value of those Lands must be increased by an efficient federal

294. See BEARD, *supra* note 266, at 35 (estimating that "at least \$40,000,000 gain came to the holders of securities through the adoption of the Constitution").

295. See *id.* at 33 (reporting projected foreign debt of nearly \$12 million as of December 1789, and domestic debt of over \$40 million).

296. See *id.* at 149–50 ("Of the fifty-five members who attended [the Constitutional Convention] no less than forty appear on the Records of the Treasury Department for sums varying from a few dollars up to more than one hundred thousand dollars.").

297. See *id.* at 35.

298. See *id.* at 38.

299. See Parenti, *supra* note 127, at 44–45.

300. U.S. CONST. art. VI ("All debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").

301. *Id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

302. See BEARD, *supra* note 266, at 151.

303. *Id.* at 49.

Government.”³⁰⁴ A majority of the delegates agreed. Therefore, the Constitution gave Congress the power to regulate and to sell all U.S. territories.³⁰⁵

The Constitution also provided benefits to a third class of the propertied, the merchants. The clearest benefit was the constitutional authorization to impose duties on imports.³⁰⁶ This power enabled Congress to protect American products from foreign competition.³⁰⁷ Other benefits were more indirect but also were designed to facilitate commerce. For example, to maintain a stable national currency,³⁰⁸ thereby lowering interest rates, the Constitution authorized Congress to borrow against the country’s credit.³⁰⁹ The Constitution also authorizes Congress to regulate commerce among the states and with other nations, to establish uniform bankruptcy laws, to coin money, and to standardize weights and measures.³¹⁰ The constitutional prohibition of state debtor relief laws also was designed to enhance commerce.³¹¹ Unlike the other commerce-enhancing provisions, the poor bear the entire burden of this prohibition, and the propertied enjoy the entire benefits.

However, the Framers had a far larger concern about the poor than rebellions and state debtor relief legislation. While a few states had enacted debtor relief laws, the formation of a national government presented the specter of nationwide laws benefiting the poor if they could form an electoral majority.³¹² In particular, the delegates feared that the poor would legislate for property redistributions.³¹³ That concern was expressed frequently and vigorously throughout the Constitutional

304. *Id.* at 50 (quoting Letter from Hugh Williamson to James Madison (June 2, 1788)).

305. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”)

306. *See id.* art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises”).

307. *See Parenti, supra* note 127, at 44–45.

308. *See id.* at 45.

309. U.S. CONST. art. I, § 8, cl. 2.

310. *Id.* art. I, § 8, cls. 3–5.

311. *See Tushnet, supra* note 277, at 107–08 (“Restoring the stability of the international and national credit systems thus required that there be a government strong enough to suppress local agitation for debtor relief.”).

312. *Id.* at 109 (arguing that the Framers “were concerned about local debtor relief laws, particularly because, as they saw it, there would inevitably be more debtors than creditors”).

313. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 145 (1990) (“The rich want to maintain their power, privilege, and property; the poor want to take at least some of these for themselves.”).

Convention, during the state ratification conventions, and in the speeches and writings leading up to them.³¹⁴ At the federal Constitutional Convention, Madison warned of the possibility of redistribution:

Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.³¹⁵

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

Their creed is "That the property of the United States has been protected from the confiscations of Britain by the joint exertions of all, and therefore ought to be the common property of all. And he that attempts opposition to this creed is an enemy to equity and justice, and ought to be swept from off the face of the earth."³¹⁶

To avoid the possibility of redistribution from becoming a reality, the Framers employed two different means. First, they incorporated substantive protections for property ownership into the Constitution, including the Takings and Due Process Clauses.³¹⁷ Both provisions protect private property owners from government action.³¹⁸ The frequency with which litigation continues to address the scope of protection these clauses provide demonstrates their continued importance.

The Framers' second means, however, is antithetical to modern democratic ideals. The Framers substantially curtailed the lower classes' ability to participate in government.³¹⁹ Some delegates demonstrated undisguised scorn at the concept of

314. BEARD, *supra* note 266, at 294.

315. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203-04 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS].

316. BEARD, *supra* note 266, at 58-59.

317. See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

318. *Id.*

319. See Tushnet, *supra* note 277, at 109 (discussing the steps the Framers took to "reduce the risk that the powerful national government [created by the Constitution] would come under democratic control," which included "staggering the terms of office of Representatives, Senators, and the President").

political participation by the poor. One framer, Robert Morris, was particularly contemptuous of the lower classes' participation in politics.³²⁰ He described a public gathering that was prompted by a port closing in 1774:

I stood in the balcony and on my right hand were ranged all the people of property, with some few poor dependents, and on the other all the tradesmen, etc., who thought it worth their while to leave their daily labor for the good of the country The mob begin to think and reason. Poor reptiles! It is with them a vernal morning, they are struggling to cast off their winter's slough, they bask in the sunshine and before noon they will bite, depend upon it. The gentry begin to fear this. Their committee will be appointed, and they will deceive the people, and again forfeit a share of their confidence. And if these instances of what with one side is policy, and the other perfidy, shall continue to increase, and become more frequent, *farewell aristocracy*.³²¹

The Framers acted to block participation by the poor at each stage in the political process. The Framers' first target was the franchise. Some delegates proposed that the state legislatures, rather than the electorate, should choose the members of Congress, because "[t]he people . . . should have as little to do as may be about the government."³²² Another delegate advocated a property qualification to vote "as a necessary defence agst. the dangerous influence of those multitudes without property & without principle, with which our Country like all others, will in time abound."³²³ However, recognizing the political difficulty of imposing uniform federal franchise requirements on the states, the delegates deferred to the state requirements.³²⁴ Of course, the state requirements prevented the poor from voting.

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

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

320. See NEDELSKY, *supra* note 313, at 77.

321. *Id.* (emphasis added) (alteration in original) (quotation marks omitted) (quoting 1 THE LIFE AND CORRESPONDENCE OF GOVERNOR MORRIS 23–25 (Jared Sparks ed., 1832)).

322. BEARD, *supra* note 266, at 214 (quotation marks omitted) (quoting Roger Sherman).

323. *Id.* at 195 (using Madison's notes to explain John Dickinson's views).

324. See U.S. CONST. art. I, § 4 (granting authority to each state's legislature to determine a manner of electing that state's senators and representatives).

mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. . . . It is admitted that you cannot have a good executive upon a democratic plan.³²⁵

To prevent the lower classes from serving in government, some delegates argued for property qualifications for all three branches. For example, Charles Pinckney proposed that the President must have at least \$100,000 and that judges and legislators must have at least \$50,000.³²⁶ Other delegates proposed accomplishing the same end by not compensating senators.³²⁷ Pinckney supported this proposal by arguing that, because the Senate “was meant to represent the wealth of the Country, it ought to be composed of persons of wealth; and if no allowance was to be made the wealthy alone would undertake the service.”³²⁸ Benjamin Franklin seconded the proposal, and it was defeated by a one-state majority.³²⁹ Nevertheless, members of Congress did not receive a salary until 1815.³³⁰

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

325. 1 CONVENTION RECORDS, *supra* note 315, at 294, 299.

326. BEARD, *supra* note 266, at 210–11.

327. 1 CONVENTION RECORDS, *supra* note 315, at 426–27 (discussing Charles Pinckney’s suggestion that Senators not be compensated because the Senate represented the elite).

328. *Id.*

329. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 142 (1990) (discussing Pinckney’s proposal of not paying senators).

330. Congressional Pay Rates (indicating that between 1789 and 1815, members of Congress only received a \$6.00 per diem), available at <http://www.congresslink.org/sources/salaries.html> (last visited Apr. 7, 2003).

331. U.S. CONST. art. I, § 2 (granting the authority of electing the House of Representatives to state voters).

legislatures would choose Senators,³³² state electors would elect the President,³³³ and the President would nominate and appoint U.S. Supreme Court Justices.³³⁴ Additionally, the President was given the power to veto legislation that Congress did enact.³³⁵

Scholars and others vigorously have debated whether the Constitution's Framers were motivated by economic self-interest, an altruistic commitment to the public good, or both.³³⁶ And certainly there were different motivations among the Framers. But the bottom line is that they blocked political participation by the lower classes and did not address their needs, though they provided so much for the upper classes. In fact, some delegates criticized the constitutional structure as being aristocratic.³³⁷ Moreover, in dealing with the most downtrodden, the slaves and indentured servants, the Constitution respected ownership rights to them,³³⁸ required that those who escaped to another state be returned,³³⁹ and permitted the slave trade to continue³⁴⁰ despite the nation's stated commitment to "liberty for all."³⁴¹

Although the constitutional delegates had not been elected and certainly were not representative of society as a whole,³⁴² the electorate did not have the opportunity to vote on ratification of the Constitution.³⁴³ Rather, it was ratified by state conventions consisting of elected delegates.³⁴⁴ In every state but New York, property and other prerequisites to voting for delegates disenfranchised substantial portions of the population.³⁴⁵

332. *Id.* art. I, § 3 (authorizing state legislatures to select two Senators each).

333. *Id.* art. II, § 1 (granting each state one elector for each member of Congress from that state).

334. *Id.* art. II, § 2.

335. *Id.* art. I, § 7.

336. *See, e.g.,* Parenti, *supra* note 127, at 50–51 (examining both sides of the issue of what motivated the Constitution's Framers).

337. 2 CONVENTION RECORDS, *supra* note 315, at 286, 632, 640 (highlighting the reservations that several delegates to the convention had concerning the proposed Constitution).

338. U.S. CONST. art. I, § 2 (allowing indentured servants and slaves to be at least partially counted for purposes of determining the number of a state's representatives and for direct taxes).

339. *Id.* art. IV, § 2 (requiring escaped indentured servants and slaves to be returned to their owners).

340. *Id.* art. I, § 9 (forbidding Congress from prohibiting slavery until 1808).

341. Parenti, *supra* note 127, at 51 (noting that the nation's founders felt no conflict between the principle of "liberty for all" and simultaneous slave ownership).

342. *Id.* at 55 (noting that "the rich monopolize[d] the Philadelphia Convention").

343. *Id.*

344. *Id.*

345. BEARD, *supra* note 266, at 240–41, 251 (claiming the masses of people were disenfranchised through property qualifications); Parenti, *supra* note 127, at 55 (alleging that even if the poor were enfranchised, they were exposed to liabilities that kept them

Although estimates vary, only about one-fifth of the adult males voted.³⁴⁶ Unsurprisingly, the economic standing of the state convention delegates generally mirrored those of the Constitution's Framers.³⁴⁷ Also unsurprisingly, a major concern of state delegates was the potential for property redistributions.³⁴⁸

Madison spoke to this concern in *The Federalist No. 10*. He described the protection of unequal property distributions as being "the first object of government"³⁴⁹ and argued that a large national government would make property redistributions and debtor relief laws less likely:

A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.³⁵⁰

Although the Constitution was ratified, its antidemocratic character caused ratification to be vigorously contested.³⁵¹ Some state convention votes were very close and turned on the superior political skills of the Constitution's supporters, rather than on its merits.³⁵² Chief Justice Marshall said: "[I]t is scarcely to be doubted that in some of the adopting states a majority of the people were in the opposition."³⁵³

underrepresented).

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

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

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

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

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

349. THE FEDERALIST NO. 10, at 55 (James Madison) (Random House ed., 1961).

350. *Id.* at 62.

351. Tushnet, *supra* note 277, at 110.

352. See *id.*

353. 4 JOHN MARSHALL, LIFE OF GEORGE WASHINGTON 242 (Citizens' Guild 1926).

After ratification, the antidemocratic bias of the new federal government was soon manifested in the suffrage provisions of the Northwest Ordinance of 1787, which Congress ratified in 1789.³⁵⁴ Rather than being elected, the Territory's governor was appointed by Congress.³⁵⁵ To be appointed, the governor had to own at least one thousand acres in the Territory.³⁵⁶ Congress also appointed the Territory's secretary and judges.³⁵⁷ These appointees had to own at least five hundred acres.³⁵⁸ The franchise and the ability to serve as a representative to the general assembly were restricted by landownership, citizenship, and residency requirements.³⁵⁹ A representative had to own two hundred acres and had to have been a U.S. citizen for three years and a current resident of the Territory, or a resident of the Territory for three years.³⁶⁰ To vote, a man had to own fifty acres and had to be a U.S. citizen and a resident of his district for two years.³⁶¹

Like the federal government, the states generally resisted increased political participation by their poorer citizens after the Revolution. Although battles to broaden the suffrage were waged in state constitutional conventions, reform was limited at best.³⁶² A Massachusetts constitutional convention actually increased the

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

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

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

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

356. *Id.* (noting that Congress will appoint the governor, who, to qualify for the position, must maintain 1000 acres of land).

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

358. *Id.*

359. *Id.* § 9.

360. *Id.*

361. *Id.*

362. KEYSSAR, *supra* note 268, at 18–19 (surveying some of the states' voting requirements after the Revolution).

requirements for the franchise.³⁶³ Pursuant to Massachusetts's 1691 charter, a man could vote if he owned a freehold estate that produced an annual income of forty shillings or a personal estate worth £40.³⁶⁴ Pursuant to Massachusetts's 1780 constitution, he had to own a freehold that produced an annual income of at least £3 or a personal estate worth £60.³⁶⁵ When considering the franchise issue, convention delegates expressed contempt for and fear of the unpropertied. In his outstanding book, *The Right to Vote*, legal historian Alexander Keyssar quotes a Massachusetts convention delegate who argued against enfranchising the unpropertied:

Your Delegates considered that Persons who are Twenty-one Years of age, and have no Property, are either those who live upon a part of a Paternal estate, expecting the Fee thereof, who are but just entering into business, or those whose Idleness of Life and profligacy of manners will forever bar them from acquiring and possessing Property. And we will submit it to the former class, whether they would not think it safer for them to have their right of Voting for a Representative suspended for [a] small space of Time, than forever hereafter to have their Privileges liable to the control of Men who will pay less regard to the Rights of Property because they have nothing to lose.³⁶⁶

The increased requirements sparked an armed rebellion by hundreds of men who had been disenfranchised.³⁶⁷

Although Connecticut, Delaware, Rhode Island, and Virginia did not further restrict the franchise, they also did not expand it.³⁶⁸ Their suffrage requirements were unchanged by their constitutional conventions.³⁶⁹ Similarly, South Carolina did not change the suffrage requirements in its 1776 constitution, though it minimally eased them in 1778.³⁷⁰ Maryland retained its requirement of

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

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

365. *Id.*

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

367. ZINN, *supra* note 46, at 90-94 (discussing the events leading to Shays' Rebellion).

368. DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 35-36.

369. *Id.*

370. ADAMS, *supra* note 189, at 305 (presenting South Carolina's pre- and post-constitution suffrage requirements); DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363,

ownership of fifty acres of land but lowered its alternate method of qualification from property worth £40 to property worth £30.³⁷¹

In large part to appease militia members who were fighting the war with England, eight states' constitutional conventions expanded the franchise.³⁷² Georgia replaced its fifty-acre freehold requirement with alternative qualification methods; to vote, a man had to own £10, be liable to pay state tax, or be a member of "any mechanic trade."³⁷³ New Hampshire granted the franchise to taxpayers.³⁷⁴ New Jersey eliminated the landownership requirement and granted the vote to a person worth £50 of proclamation money.³⁷⁵ Although New York decreased its franchise requirement for the lower legislative chamber from land worth £40 to land worth £20 or a tenancy with an annual value of forty shillings, it imposed a new requirement to vote for the upper legislative chamber and for the governorship; voters now had to own land worth £100 to vote for these offices.³⁷⁶ North Carolina granted the franchise to taxpayers for the House of Commons but continued its fifty-acre landownership requirement to vote for the Senate.³⁷⁷ In Pennsylvania, the franchise was expanded to include any adult male taxpayer and landowners' sons even if they were not taxpayers.³⁷⁸

at 35 ("The liberal suffrage provisions in the South Carolina constitution (1778) were practically the same as those in the provincial period."); KEYSSAR, *supra* note 268, at 18 (noting that despite calls for change, only nominal revision occurred to South Carolina's property requirements).

371. ADAMS, *supra* note 189, at 302 (comparing Maryland's voting requirement before and after its 1776 constitution); DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 33–34 (explaining that "lessen[ing] the forty-pound-sterling property alternative to thirty pounds current money . . . actually cut the amount needed for eligibility in half").

372. KEYSSAR, *supra* note 268, at 16–18 (examining the expansion of the franchise in Pennsylvania, Maryland, New Jersey, Georgia, New Hampshire, New York, North Carolina, and Vermont).

373. ADAMS, *supra* note 189, at 307; KEYSSAR, *supra* note 268, at 17 (listing Georgia's voting requirements in 1777).

374. ADAMS, *supra* note 189, at 293; DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 33 (discussing the ultimately successful attempts to lower voting eligibility requirements); KEYSSAR, *supra* note 268, at 17 (indicating that New Hampshire struggled for years with the text of its constitution before adopting its voting requirement in 1782).

375. ADAMS, *supra* note 189, at 299 (illustrating New Jersey's 1776 voting eligibility requirements); DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 37 (noting that the elimination of the landownership requirement expanded suffrage "probably close to 90 percent"); KEYSSAR, *supra* note 268, at 17.

376. ADAMS, *supra* note 189, at 298 (comparing New York's 1701 election law with its 1777 constitution); KEYSSAR, *supra* note 268, at 17 (discussing the similarities between New York and North Carolina calls for change).

377. ADAMS, *supra* note 189, at 304 (showing the change in North Carolina's voting rules); DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 32; KEYSSAR, *supra* note 268, at 17.

378. ADAMS, *supra* note 189, at 300 (indicating the changes in Pennsylvania's voting requirements); DINKIN, *REVOLUTIONARY AMERICA*, *supra* note 363, at 32 (expressing that

However, even the states that expanded the franchise often undercut the salutary effects of these expansions by increasing the prerequisites for holding office. In its 1784 constitution, New Hampshire first imposed the requirements that candidates for the state senate own land worth £200 and that candidates for governor own a £500 personal estate, including land worth £250.³⁷⁹ New Hampshire also provided in 1784 that the state legislature, rather than the electorate, would select the members of the executive council.³⁸⁰ Similarly, in its 1776 constitution, New Jersey first required candidates for the senate to own an estate worth £1,000 and provided that the legislature, rather than the voters, would elect the governor.³⁸¹

In its 1776 constitution, North Carolina re-enacted its existing requirement that candidates for the lower legislative chamber own one hundred acres but imposed new requirements for voting and for election to the senate, governorship, and executive council.³⁸² The vote for the senate was limited to owners of fifty acres of land; candidates had to own three hundred acres.³⁸³ The governor had to own one thousand acres and was elected by the legislature, as was the executive council.³⁸⁴

Although Georgia's 1777 constitution required legislative candidates to own 250 acres of land or other property worth £250, while its former election law had required ownership of 500 acres, the new requirement still severely curtailed the number of potential candidates.³⁸⁵ The new Georgia constitution also removed the choice of governor from the electorate.³⁸⁶ Pursuant to the new constitution, the legislature elected the governor and the executive council from among its members.³⁸⁷ As can be seen, even in the states that expanded the franchise, elections were far from democratic. Although more men could vote after the

Pennsylvania was the first state to remove property ownership voting requirements); KEYSSAR, *supra* note 268, at 16 (referring to Pennsylvania's constitution as the most dramatic of the thirteen states).

379. ADAMS, *supra* note 189, at 293; DINKIN, REVOLUTIONARY AMERICA, *supra* note 363, at 46.

380. ADAMS, *supra* note 189, at 293.

381. *Id.* at 299 (illustrating New Jersey's 1776 election law and constitution).

382. *Id.* at 304 (listing North Carolina's elector and candidate requirements under its 1776 constitution); DINKIN, REVOLUTIONARY AMERICA, *supra* note 363, at 46 (stating that North Carolina saw no need to change its lower house requirement for candidacy, but raised its requirement for the upper house).

383. ADAMS, *supra* note 189, at 304.

384. *Id.*

385. *Id.* at 307 (comparing the property ownership requirements for legislative candidates in Georgia under its 1761 election law and its constitution adopted in 1777).

386. *Id.* (noting that the governor of Georgia is elected by the legislature).

387. *Id.*

Revolution than before, the increase was “modest.”³⁸⁸ And, in some areas, the proportion of men who could vote decreased.³⁸⁹

The ability to perceive the anachronistic quality of the Revolutionary-era election laws does not require the perspective provided by the passage of over two hundred years. A delegate to a state constitutional convention in the 1820s stated that the authors of the first state constitution had “retained a small relic of ancient prejudices” concerning the franchise.³⁹⁰ Another delegate stated that the property requirements in the original state constitution reflected “circumstances . . . which no longer ought to have weight.”³⁹¹ In fact, those “circumstances” are directly traceable to England in 1429.³⁹²

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

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

389. DINKIN, REVOLUTIONARY AMERICA, *supra* note 363, at 39–40.

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

Id. (footnote omitted).

390. KEYSSAR, *supra* note 268, at 43 (characterizing delegates who advocated eliminating property requirements as aggressive and confident).

391. *Id.* (quotation marks omitted).

392. ADAMS, *supra* note 189, at 196.

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

Id. at 196–97 (footnote omitted).

393. KEYSSAR, *supra* note 268, at 330 tbls.A.2–3 (illustrating the state trend of lowering and eliminating property requirements for voting).

394. *Id.* at 336 tbl.A.3.

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

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

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

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

395. *Id.*

396. *Id.*

397. *Id.* at 330 tbls.A.2–3.

398. Refer to notes 372–78 *supra* and accompanying text (discussing states that lowered or eliminated property requirements for voting but instituted taxing requirements for voting).

399. KEYSSAR, *supra* note 268, at 44 (noting that many proponents of expanded suffrage viewed voting as a right that could be earned "by paying taxes, serving in the militia, or even laboring on the public roads").

400. *Id.* at 37 (explaining why those already enfranchised wanted to broaden suffrage, particularly for the purposes of self-protection).

401. *Id.* at 35 (quoting historian J.R. Pole).

402. *Id.*

403. *Id.*

404. *Id.* at 37.

405. *Id.* at 37–38.

406. *Id.* at 38.

and to farm, thereby increasing land values and tax revenues.⁴⁰⁷
A delegate to Illinois's 1847 constitutional convention argued:

Should we not . . . hold out to the world the greatest inducement for men to come amongst us, to till our prairies, to work in our mines, and to develop the vast and inexhaustible resources of our state? . . . We cannot obtain this class of population without holding out to them inducements equal to those of other states; and as we are burthened with a debt, we should have those inducements greater than elsewhere.⁴⁰⁸

In contrast, states did not want to attract those who did not pay taxes and who might require government assistance.⁴⁰⁹ As states were expanding the franchise to include taxpayers, they began amending their constitutions to exclude paupers.⁴¹⁰ The first pauper exclusion was enacted in 1792.⁴¹¹ Into the twentieth century, states continued amending their constitutions to exclude paupers.⁴¹² Virginia amended its constitution in 1902 to exclude them, and Oklahoma excluded poorhouse residents in its 1907 constitution.⁴¹³ In all, fourteen states constitutionally disenfranchised paupers.⁴¹⁴ All these restrictions remained in effect well into the twentieth century.⁴¹⁵

Although the meaning of the word "pauper" was the subject of debate and litigation, the suffrage exclusion generally was directed at people receiving public assistance, including shelter.⁴¹⁶

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

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

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

410. *Id.*

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

412. *Id.*

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

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

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

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

A person is to be considered as a pauper while he receives supplies, as such, from the town where he is resident or found, whether for a year, or a portion of a year;

The stated reason for denying paupers the vote was that they were insufficiently independent because they received government assistance and could be forced to work in exchange for that assistance.⁴¹⁷ More realistically, however, the Constitution's Framers feared the possibility of an electorate that would favor property redistributions to lessen the gap between rich and poor.⁴¹⁸

Therefore, after the Revolution, states enacted a variety of additional franchise limitations directed at the poor. Throughout the nineteenth century and well into the twentieth century, states enacted residency requirements and frequently amended their constitutions to lengthen the required period of residency.⁴¹⁹ For example, Alabama's 1867 constitution required six months' residence.⁴²⁰ In 1875, it amended its constitution to require residence of one year and amended its constitution again in 1901 to extend the requirement to two years.⁴²¹ Similarly, in 1898, Louisiana amended the one year residency requirement in its 1868 and 1879 constitutions to two years and provided that residency would be lost if a person remained outside the state for more than ninety days.⁴²² In 1895, South Carolina amended its original constitution to extend the residency requirement from one to two years, as did Virginia in 1902.⁴²³ By 1923, all forty-eight states had enacted residency requirements, with the most common time periods being six months or one year.⁴²⁴

whether in an alms house, or at his own dwelling; and whether furnished directly by the overseers of the poor, or indirectly by the person to whom he has been disposed of and consigned by such overseers for support

In re Opinion of the Justices, 7 Me. 497, 499 (1831).

417. See KEYSSAR, *supra* note 268, at 61 ("Advocates of these laws frequently invoked a vivid, if implausible, image of the trustees or masters of poorhouses marching paupers to the polls and instructing them how to vote."); see also Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 358 (1989) (noting that advocates of laws excluding paupers argued that these laws "kept those without 'wills of their own' from voting"). Both authors quote Josiah Quincy, a delegate to Massachusetts's 1820 constitutional convention: "The theory of our constitution is, that extreme poverty—that is, pauperism—is inconsistent with independence." KEYSSAR, *supra* note 268, at 61; Steinfeld, *supra*, at 358.

418. See KEYSSAR, *supra* note 268, at 9–11 (contrasting the position that the poor should not vote because they were not thought to be independent with the argument that they should not vote because they would be influenced by self-interest).

419. *Id.* at 63–65, 368 tbl.A.14 (examining the reasoning behind residency requirements and outlining the lengths of such requirements in various states).

420. *Id.* at 368 tbl.A.14.

421. *Id.*

422. *Id.* at 64, 370–71 tbl.A.14.

423. *Id.* at 375–76 tbl.A.14.

424. *Id.* at 368 tbl.A.14 (indicating that North Dakota was the final state to enact a residency requirement for suffrage).

Although residency requirements were enacted in part to ensure that the electorate was knowledgeable about local conditions, they also were designed to prevent many of the working poor from voting.⁴²⁵ Recent immigrants, who were almost uniformly poor, were a particular target of these restrictions.⁴²⁶ States also wanted to disenfranchise manual laborers, who often had to move in search of work.⁴²⁷ Delegates to Wisconsin's constitutional convention wanted to disenfranchise miners migrating from Illinois.⁴²⁸ In Ohio, concern was expressed that transient canal boat hands were deciding elections along canal routes.⁴²⁹ In other states, railroad and farm workers were the targets of increased residency requirements.⁴³⁰

As a further method of disenfranchising immigrants and the rapidly increasing population of urban laborers, states began enacting voter registration laws during the first half of the nineteenth century.⁴³¹ The laws often applied only to urban areas, which had the largest populations of both groups.⁴³² "Voter registration was intended to discourage voting in big cities, and by the poor and less educated."⁴³³ New York enacted a voter registration law that applied only to New York City, which was designed to disenfranchise the large number of resident Irish immigrants.⁴³⁴ Similarly, Pennsylvania enacted a registration law in 1836 that applied only to Philadelphia, and South Carolina enacted a law in 1819 that applied only to Columbia.⁴³⁵

As if the pauper exclusions, residency requirements, and registration laws were insufficient to prevent the poor from voting, twenty states enacted literacy laws, including English language literacy laws, during the last half of the nineteenth century and into the twentieth century.⁴³⁶ Typically, these laws

425. See *id.* at 63–64 (suggesting that the lack of property or taxpaying qualifications promoted residency requirements in order to prevent the poor from voting).

426. See *id.* at 64 (observing that "antagonistic popular attitudes toward the mobile foreign-born" resulted in some states increasing their residency requirements).

427. See *id.* at 63 (noting that proponents of lengthy residency requirements believed that manual laborers were "ignorant of local conditions and a source of electoral fraud").

428. *Id.* at 63–64.

429. *Id.* at 64.

430. *Id.* (discussing the fear that railroad workers could be influenced by the railroad corporations, and that farmhands could simply be shipped to various locations to vote).

431. See *id.* at 65.

432. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 120 (1988).

433. *Id.*

434. See KEYSSAR, *supra* note 268, at 65.

435. *Id.*

436. *Id.* at 362 tbl.A.13 (cataloguing each state's approach to literacy requirements).

conditioned the franchise on the ability to read and write, often in English.⁴³⁷ Particularly because education was generally unavailable to the poor, these laws were very effective in achieving their goal.⁴³⁸ Half of the black male population and fifteen percent of the white population could not read at this time.⁴³⁹ The tenuous relationship between literacy and effective political participation is well illustrated by the difficulty Andrew Jackson reputedly experienced in spelling his name.⁴⁴⁰

The passage of the Fifteenth Amendment, which outlawed racial franchise restrictions, prompted another wave of disenfranchising laws.⁴⁴¹ Because the states no longer could target African Americans expressly, they turned to class-based requirements to achieve the same goal.⁴⁴² Several states enacted increased residency requirements and literacy tests with that intent.⁴⁴³ Additionally, some states now disenfranchised people who had been convicted of crimes, including those associated with poverty.⁴⁴⁴ For example, in 1901, Alabama disenfranchised “any person convicted as a vagrant or tramp.”⁴⁴⁵

Although the primary motivation for these laws was to disenfranchise African Americans, many legislators seized this opportunity to disenfranchise poor whites.⁴⁴⁶ The rhetoric often paralleled the dehumanizing rhetoric of the Revolutionary era. At the end of the nineteenth century, proponents of disenfranchising poor white men argued that they were “ignorant, incompetent, and vicious.”⁴⁴⁷ To counter the argument

437. *See id.*

438. *See* PIVEN & CLOWARD, *supra* note 432, at 120 (“Literary tests . . . were not so likely to bar the rich as they were the poor, or the well educated as they were the uneducated.”).

439. KEYSSAR, *supra* note 268, at 112.

440. *Id.* at 66 (noting that detractors of literacy requirements pointed to “many fine, upstanding citizens who happened to be illiterate or barely literate . . . but were perfectly capable of responsibly exercising the franchise”).

441. *See id.* at 111 (discussing various methods employed to exclude African American voters even after the passage of the Fifteenth Amendment, including “poll taxes, . . . literacy tests, secret ballot laws, lengthy residency requirements, elaborate registration systems, confusing multiple choice voting-box arrangements, and eventually, Democratic primaries restricted to whites only”).

442. *Id.* (noting that “Democrats chose to solidify their hold on the South by modifying the voting laws in ways that would exclude African Americans without overly violating the Fifteenth Amendment”).

443. *Id.* at 111–12.

444. *Id.*

445. *Id.* at 378 tbl.A.15.

446. *Id.* at 112–13 (suggesting that “many advocates of so-called electoral reform were quite comfortable with the prospect of shunting poor whites aside along with African Americans”).

447. *Id.* at 113.

that all male citizens should be entitled to vote, Alabama amended its constitution in 1901 to recharacterize the franchise as a “privilege”; the previous constitution had described it as a “right.”⁴⁴⁸

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

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

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

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

448. *Id.* (quotation marks omitted).

449. Refer to notes 269–71 *supra* and accompanying text (describing how states added taxpaying requirements in place of property requirements).

450. See KEYSSAR, *supra* note 268, at 51 fig.2.1 (illustrating that fewer than ten states maintained tax qualifications in 1855).

451. *Id.* at 67–70 (claiming that an increase in the working class led to the abandonment of tax provisions).

452. *Id.* (arguing that the enfranchisement of the working class was unintentional).

453. *Id.*

454. *Id.* at 356 tbls.A.10–11 (surveying taxpaying requirements imposed on suffrage in the various states).

455. *Id.*

456. *Id.* at 358 tbl.A.11 (noting that Alabama, Georgia, Louisiana, Rhode Island, South Carolina, and Virginia all enacted exemptions from literacy or registration requirements for property owners).

457. *Id.* (noting that various states allowed only property owners to vote on matters such as bond issues, special assessments, and school elections).

years immediately preceding and those following its enactment, twenty-three states enacted new tax requirements.⁴⁵⁸ Some states enacted new income and property tax requirements, while many others now directly taxed the right to vote by imposing a poll tax.⁴⁵⁹ These laws were not limited to southern states; legislatures from New Hampshire to Florida and to Arizona and Nevada enacted them.⁴⁶⁰

Although a precise determination of the cumulative effects of these restrictive franchise laws is impossible, Professor Keyssar states that the number of people who registered to vote and who actually voted after these laws were enacted “dropped precipitously.”⁴⁶¹ Many of these restrictions continued until the 1960s and 1970s, aided by U.S. Supreme Court decisions upholding their legality.⁴⁶² Tax requirements, including the poll tax, were not eliminated until the enactment of the Twenty-Fourth Amendment⁴⁶³ in 1964 and the U.S. Supreme Court’s decision in *Harper v. Virginia State Board of Electors* in 1966.⁴⁶⁴ Lengthy state residency requirements were not completely prohibited until 1972, after the Voting Rights Act limited residency requirements to thirty days for presidential and vice-presidential elections,⁴⁶⁵ and the U.S. Supreme Court invalidated state residency requirements of one year in the state and three months in the county.⁴⁶⁶ Literacy tests were not permanently eliminated until 1975.⁴⁶⁷ Today, the homeless still are

458. *Id.* at 356 tbl.A.10.

459. *Id.*

460. *Id.*

461. *Id.* at 114–15.

462. *See, e.g.,* *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (enforcing a North Carolina English language literacy test); *Breedlove v. Suttles*, 302 U.S. 277, 282–84 (1937) (validating a Georgia poll tax), *overruled by Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Giles v. Harris*, 189 U.S. 475 (1903) (refusing to invalidate Alabama’s literacy requirements); *Williams v. Mississippi*, 170 U.S. 213, 219–23 (1898) (upholding the poll tax and literacy test because the Fourteenth Amendment does not apply to election officials).

463. U.S. CONST. amend. XXIV. The Amendment provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Id. § 1.

464. 383 U.S. 663, 665–67 (1966) (holding that a poll tax has no relation to voter qualifications and therefore violates the Fourteenth Amendment).

465. 42 U.S.C. § 1973aa-1(d) (1994).

466. *Dunn v. Blumstein*, 405 U.S. 330, 331–32 (1972) (holding that Tennessee’s residency requirements violate the Fourteenth Amendment). *But see Marston v. Lewis*, 410 U.S. 679, 679–80 (1973) (upholding a fifty-day state residency requirement).

467. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, tit. 1, § 102, 89 Stat.

disenfranchised in two states that require a permanent address to register to vote.⁴⁶⁸

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

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

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

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

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

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

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

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

471. Quigley, *Reluctant Charity*, *supra* note 99, at 170 n.385.

472. *Id.* at 139–40 (quotation marks omitted).

473. *Id.* at 152–53; see also Steinfeld, *supra* note 417, at 346 n.41 (discussing the practice of placing paupers with a family while giving the family money and rights to the pauper's labor).

474. Quigley, *Reluctant Charity*, *supra* note 99, at 154 (quotation marks omitted) (quoting Gardner Town Records, at 100 (Jan. 5, 1789)).

Involuntary indenturing, including of children, continued throughout the nineteenth century. In 1871, the Massachusetts Supreme Court considered a dispute between two farmers concerning the services of a boy who had been involuntarily indentured as a laborer at the age of eight; the indenture was to last until the boy was twenty-one.⁴⁷⁵ Over a quarter of a century later, the Connecticut Supreme Court heard a case concerning a man who had served as an indentured farm hand while a minor.⁴⁷⁶ The case concerned the habeas corpus petition he filed after being involuntarily committed to an almshouse.⁴⁷⁷

Paupers who were not indentured to private individuals could essentially become indentured to the government. For example, in 1798, Rhode Island established a workhouse for “idle, indigent persons” who “are *likely* to become a town charge,” “straggling persons” who “cannot give a good account of themselves,” “Indians, who are tippling and idling their time away about the town,” transients, and criminals.⁴⁷⁸ A statutory rule directed the workhouse keeper to “constantly” employ the inmates in the manner he deemed “most profitable.”⁴⁷⁹ To ensure the keeper’s enthusiastic enforcement of this rule, his compensation was room, board, and half of the inmates’ earnings.⁴⁸⁰ Any inmate who refused to obey the keeper was placed in solitary confinement and received reduced food rations.⁴⁸¹

In a particularly Dickensian case, the overseers of the poor took custody of an allegedly insane man for thirty years and auctioned him off at town meetings as a laborer for eighteen years.⁴⁸² During the other twelve years, the overseers contracted out his work.⁴⁸³ Apparently upon discovering that her brother might be a source of income, the pauper’s sister brought an action to recover the surplus though she had not “assisted or offered to assist him” during his thirty-year institutionalization.⁴⁸⁴ In 1857, the New Hampshire Supreme

475. *Bardwell v. Purrington*, 107 Mass. 419, 425–26 (1871) (ruling that such indenture for the whole of the boy’s minority was reasonable).

476. *Harrison v. Gilbert*, 43 A. 190, 190 (Conn. 1899).

477. *Id.*

478. Quigley, *Reluctant Charity*, *supra* note 99, at 156 & n.301 (emphasis added) (quotation marks omitted).

479. *Id.* at 157.

480. *Id.*

481. *Id.*

482. *Abbot v. Town of Fremont*, 34 N.H. 432 (1857).

483. *Id.*

484. *See id.*

Court held that the town did not have to reimburse the pauper for his excess earnings.⁴⁸⁵ As a warning to enterprising towns, the Court stated in dictum that a town could not profit from the work of an insane person who was institutionalized as a pauper when he was not one.⁴⁸⁶ Based on the facts, that dictum could have been the controlling rule of law in the case before the court.

Even while profiting from the labors of the poor, local governments exempted themselves from many employment laws. In 1940, the Massachusetts Supreme Court upheld the denial of workers' compensation to the family of a man who died from injuries suffered while working on a city ash truck.⁴⁸⁷ The deceased had been compelled to work on the truck in exchange for \$8.20 per week in welfare.⁴⁸⁸ Three years earlier, a plaintiff in the same court described such forced labor as "rehabilitation" and stated that the city's right to recover its aid is "not subject to qualification on principles of fairness or of implied contract."⁴⁸⁹

As with indentured servitude, debtor prisons became more widely used after the Revolution. In 1788, more than one thousand debtors were imprisoned in just one New York county, and many of those owed less than twenty shillings.⁴⁹⁰ By 1830, five debtors were imprisoned for every criminal in the Northeast.⁴⁹¹ Unlike criminals, debtors could remain in prison indefinitely.⁴⁹² Some states would free a debtor from prison in exchange for a period of indentured servitude.⁴⁹³

Like private creditors, the state and federal governments employed the full coercive power of debtor prisons. In the 1820s, New York imprisoned a lawyer for failing to pay fees to the clerk of court.⁴⁹⁴ In 1840, a federal court upheld the defendant's imprisonment for a judgment owed to the federal government.⁴⁹⁵ In 1867, the federal government imprisoned a judgment debtor in a civil action for selling sixteen packages of matches without tax

485. *Id.* at 436–37.

486. *Id.* at 437–38 (claiming that this would constitute an injury to the plaintiff).

487. *Scordis's Case*, 25 N.E.2d 226, 227 (Mass. 1940).

488. *Id.*

489. *City of Marlborough v. City of Lowell*, 10 N.E.2d 104, 105 (Mass. 1937) (ruling in favor of the plaintiff).

490. *Quigley, Reluctant Charity*, *supra* note 99, at 161–62 (noting, however, that imprisonment was limited in 1789 to thirty days for those who owed less than ten pounds).

491. *Id.* at 162.

492. *Id.* at 161.

493. *Id.* (citing Connecticut as an example).

494. *People v. Rossiter*, 4 Cow. 143 (N.Y. Sup. Ct. 1825) (upholding the imprisonment).

495. *United States v. Hewes*, 26 F. Cas. 297, 298, 303 (E.D. Pa. 1840) (No. 15,359).

stamps.⁴⁹⁶ A federal court upheld the imprisonment despite the abolition of debt imprisonment in the state where the debtor was imprisoned and despite a federal law that provided, “no person shall be imprisoned for debt on process issuing out of the courts of the United States, in any state where by the laws of such state imprisonment for debt has been abolished.”⁴⁹⁷ The court held that the national government was not subject to the state and federal laws prohibiting imprisonment.⁴⁹⁸

Debtor prisons and the other inhumane treatments of the poor, including slavery, clearly show that the federal and state governments did not act in a representative manner. In light of human nature, perhaps a desire to further one’s self-interest, even at great expense to others, is unsurprising. And the upper class proved to be remarkably adept at serving its self-interest. The large gap in wealth between rich and poor at the time of the Revolution continuously widened during this period.⁴⁹⁹ But with the industrial revolution, living conditions for many of the poor dangerously deteriorated and demonstrate a shocking disregard for human life.

From 1800 to 1890, the country’s population increased 1200%,⁵⁰⁰ and the urban population exploded by more than seven times that amount.⁵⁰¹ Immigrants constituted the great majority of the urban population growth. From 1820 to approximately 1920, thirty-three million people immigrated to this country.⁵⁰² Most lived in the industrial cities of the northeast and labored in factories and in related industries, such as transportation.⁵⁰³

The industrial workers labored in conditions that seem impossibly harsh. “In New York City, girls sewed umbrellas from six in the morning to midnight, earning \$3 a week, from which employers deducted the cost of needles and thread.”⁵⁰⁴ In 1835, the workers at twenty mills went on strike to decrease the work day from thirteen and one-half hours to eleven hours, to be paid in cash and not company scrip, and to eliminate cash penalties

496. United States v. Walsh, 28 F. Cas. 391, 394 (D. Or. 1867) (No. 16,635).

497. *Id.* at 393.

498. *Id.*

499. JONES, *supra* note 136, at 272–73.

500. BLUM ET AL., *supra* note 51, at 441.

501. *Id.* (noting that twenty-six cities had populations of over 100,000 in 1890, compared to only six cities with more than eight thousand people in 1800).

502. RICHARD E. FOGLESONG, PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S, at 60–61 (1986) (highlighting the period from 1880 to 1920 as the time of greatest immigration, with six million immigrants arriving in the United States each decade).

503. *Id.* at 61.

504. ZINN, *supra* note 46, at 229.

for arriving late to work.⁵⁰⁵ Unbelievably, another mill strike was begun by the children who worked there.⁵⁰⁶

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

It is worthy of particular remark that in general, women and children are rendered more useful, and the latter more early useful, by manufacturing establishments, than they would otherwise be. Of the number of persons employed in the cotton manufactories of Great Britain, it is computed that four-sevenths, nearly, are women and children; of whom the greatest proportion are children, and many of them a tender age.⁵⁰⁷

A case decided approximately one hundred years later involved a pauper whose minor child “was seriously injured in September, 1879, while working in a factory, and soon became entirely helpless and idiotic, and so remained for about eighteen months, and until he died.”⁵⁰⁸

The horrendous working conditions were matched by the workers’ housing. By 1890, one-half of New York City’s population lived in tenements that were “human pigsties.”⁵⁰⁹ Other American cities had the same type of housing for their workers.⁵¹⁰ Working class families often lived in one room and sometimes with boarders.⁵¹¹ An 1856 New York legislative report on the tenements “described filth, dilapidation, overcrowding, degradation, dark rooms, offensive privies, lack of water, high

505. *Id.* at 224.

506. *Id.* at 225 (discussing a strike begun by children in Patterson, New Jersey, when their employer changed the lunch hour from noon to 1:00 p.m.).

507. Quigley, *Reluctant Charity*, *supra* note 99, at 169 n.379 (quotation marks omitted); see also NASH, *supra* note 89, at 189–93 (discussing efforts by Boston leaders to put women and children to work during the 1740s and 1750s).

508. *Town of New Hartford v. Town of Canaan*, 52 Conn. 158, 160 (1884) (quotation marks omitted).

509. See BLUM ET AL., *supra* note 51, at 446 (describing the tenements as the “foulest product of the haphazard laissez-faire growth” of the cities).

510. See ZINN, *supra* note 46, at 235. The conditions in various cities were described as follows:

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

Id.

511. FOGLESONG, *supra* note 502, at 66; see also ZINN, *supra* note 46, at 213 (describing the housing of working class families in Philadelphia).

rents, and exorbitant profits that were nearly unbelievable by present standards.”⁵¹² Epidemics of typhoid, typhus, cholera, and other diseases raged through the tenements, killing thousands of residents.⁵¹³ Of course, most of the tenement residents and factory workers could not vote.⁵¹⁴ In an ironic twist, the poor today generally have the right to vote, but many have no housing, substandard or otherwise.

III. THE MODERN CONTEXT

Despite the modern stereotype of the Skid Row bum, today’s homeless population is demographically as diverse as it was during the colonial and Revolutionary eras. Forty percent of the homeless are families with children, 4% are unaccompanied minors, 14% are single women, and 40% are single men.⁵¹⁵ Twenty percent are the working poor, 11% are military veterans, and 22% are mentally ill.⁵¹⁶ A large rural homeless population also exists. In fact, the poverty rate of the rural population is greater than that of the urban population.⁵¹⁷

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

512. FOGLESONG, *supra* note 502, at 56.

513. *Id.* at 67. The deplorable conditions were described as follows:

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

ZINN, *supra* note 46, at 213.

514. Refer to notes 409–68 *supra* and accompanying text (describing the voting limitations placed on the poor).

515. THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES 54 (2001), available at <http://www.usmayors.org/uscm/hungersurvey/2001/hungersurvey2001.pdf> (last visited Apr. 13, 2003) [hereinafter U.S. CONFERENCE OF MAYORS].

516. *Id.*

517. National Coalition for the Homeless, *Rural Homelessness* (Mar. 1999) (noting that in 1997 the “nonmetropolitan” poverty rate was 15.9% and the metropolitan poverty rate was 12.6%), available at <http://www.nationalhomeless.org/rural.html> (last visited Apr. 13, 2003).

518. See U.S. CONFERENCE OF MAYORS, *supra* note 517, at 69 (reporting that “an average of 37 percent of shelter requests by homeless people are estimated to have gone unmet during the last year across the survey cities”).

519. *Id.* (summarizing unmet requests for housing in different cities across the United States).

of the requests for emergency shelter by homeless families.⁵²⁰ The failure to provide adequate shelter space is perhaps unsurprising in light of the increasing number of people who live in poverty.⁵²¹ During 2001, the number of emergency shelter requests increased by 13%.⁵²² The 2000 Census states that 33,899,812 people live in poverty, which is 12.4% of the population.⁵²³

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

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

520. *Id.*

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

522. *Id.* at ii.

523. U.S. CENSUS BUREAU, U.S. CENSUS 2000, POVERTY STATUS IN 1999 OF INDIVIDUALS: 2000, available at <http://www.census.gov/main/www/cen2000.html> (last modified Mar. 17, 2003).

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

525. *Id.*

526. JAMES D. WRIGHT ET AL., *BESIDE THE GOLDEN DOOR: POLICY, POLITICS, AND THE HOMELESS* 20 (1998).

527. *See id.* (estimating that the “number of Americans destined to be homeless at least once in an average year is between 1.5 million and 3.75 million”).

528. *Id.* at 23.

529. *Id.* (analyzing data through the early 1980s).

530. National Coalition for the Homeless, *Homelessness Among Elderly Persons* (June 1999), available at <http://www.nationalhomeless.org/elderly.html> (last visited Apr. 25, 2003).

531. WRIGHT ET AL., *supra* note 528, at 28.

532. *Id.* at 16 (“These include widespread lack of immunization, development and

average life span for homeless men is approximately fifty-three years.⁵³³

Obviously, given a choice, most homeless people would not choose to be homeless. Although alcohol and drug abuse are significant causes of homelessness, many of the leading causes are structural to our society, rather than personal to the individual.⁵³⁴ The U.S. Conference of Mayors identified a lack of affordable housing as the leading cause of homelessness.⁵³⁵ Decades of urban renewal, gentrification, condominium conversions, and elimination of single room occupancy (SRO) hotels and flophouses have sometimes caused dramatic declines in the housing units available to the poorest people.⁵³⁶ For example, New York City lost 60% of its SRO units in one six-year period.⁵³⁷ Some cities have no SRO units, shelter beds, or transitional housing units.⁵³⁸ Approximately two million low-income housing units are torn down each year and frequently are replaced with more expensive housing.⁵³⁹

Governments have attempted to alleviate the affordable housing shortage by creating incentives for real estate developers, such as density bonuses, but such programs have been largely inadequate.⁵⁴⁰ The economics of real estate development make more expensive developments desirable for developers.⁵⁴¹ Many local jurisdictions also refuse to permit low-income housing for a variety of reasons, including lower tax revenues, increased demand on public services, aesthetics, and

learning disorders of varying severity, anger, depression, anxiety, and uncertainty about life.”).

533. *Id.* at 28.

534. U.S. CONFERENCE OF MAYORS, *supra* note 517, at 74.

535. *Id.* The U.S. Conference of Mayors Report lists the following causes of homelessness from most to least frequent: (1) lack of affordable housing, (2) low paying jobs, (3) substance abuse and the absence of necessary services, (4) mental illness and the absence of needed services, (5) domestic violence, (6) unemployment, (7) poverty, (8) prison release, and (9) changes and cuts in public assistance. *Id.* at 74–75.

536. *See* WRIGHT ET AL., *supra* note 528, at 85 (citing an estimate by Hartman and Zigas).

537. *Id.* (discussing the loss of SRO units in New York City, mainly by conversions to condominiums).

538. *See* U.S. CONFERENCE OF MAYORS, *supra* note 517, at 92 (indicating that Charlotte and Providence have no SRO units, shelter beds, or transitional housing units).

539. WRIGHT ET AL., *supra* note 528, at 89 (commenting that when new replacement units are built, the rent is often “well beyond the reach of low-income families and hopelessly beyond the reach of the homeless poor”).

540. *See, e.g.*, ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 115–16 (1984) (describing the different requirements for some New Jersey real estate developers to qualify for an increase in density).

541. *See* WRIGHT ET AL., *supra* note 528, at 87–91 (discussing why developers would prefer expensive developments over low income housing developments).

class and race discrimination.⁵⁴² Local jurisdictions also define the scope of their police power as extending only to residents who, by definition, normally have found housing that they could afford in the jurisdiction.⁵⁴³

In marked contrast, Congress continues to afford specialized treatment for the propertied.⁵⁴⁴ For example, it provides a wide variety of subsidies for property owners, including tax benefits.⁵⁴⁵ Without even taking into account the tax benefits for owners of commercial properties, such as depreciation deductions, the tax subsidies enjoyed by homeowners far exceed federal benefits for the homeless.⁵⁴⁶ The following chart shows the amount of tax revenue that will be lost as a result of the homeownership deductions for mortgage interest, residential real estate taxes, and capital gains exclusions for the sale of a principal residence.⁵⁴⁷

(IN BILLIONS)

	2001	2002	2003	2004	2005
Mortgage Interest	\$62.7	\$66.0	\$69.1	\$72.4	\$76.1
Property Taxes	\$21.0	\$21.6	\$22.3	\$23.0	\$23.5
Capital Gains	\$13.3	\$13.4	\$13.5	\$13.6	\$13.8
Total	\$97.0	\$101.0	\$104.9	\$109.0	\$113.4

In contrast, the federal government budgeted the following amounts for homelessness assistance:⁵⁴⁸

542. Barbara S. Rolleston, *Determinants of Restrictive Suburban Zoning: An Empirical Analysis*, 21 J. URB. ECON. 1, 18–20 (1987) (explaining that “communities with fiscal superiority over their neighbors appear to use zoning to preserve their relative fiscal advantage”).

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

544. STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2001–2005, at 18 tbl.1 (Comm. Print 2001) [hereinafter JOINT COMMITTEE ON TAXATION] (listing tax expenditure estimates for housing).

545. *Id.*

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

547. JOINT COMMITTEE ON TAXATION, *supra* note 544, at 18 tbl.1.

548. BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2003 HISTORICAL TABLES, at 267 tbl.12.3, available at <http://www.access.gpo.gov/usbudget/fy2003/pdf.hist.pdf> (last visited Apr. 14, 2003).

(IN BILLIONS)

	2001	2002	2003	2004	2005
Homelessness Assistance	\$1.0	\$1.1	\$1.2	\$1.3	\$1.4

These amounts are budgeted to be decreased beginning in 2006,⁵⁴⁹ although they only equal approximately 1% of the amounts for the homeownership subsidies. Beyond substantially benefiting homeowners in comparison to the homeless, these deductions disproportionately benefit upper income homeowners. The following charts, which are based on the 2000 tax year, show the number of tax returns for each income bracket that included a deduction for mortgage interest or for real estate taxes, the percentage of total returns claiming a deduction, the average value of the deduction, and the percentage of the overall benefit enjoyed by each income group.⁵⁵⁰ The percentages are rounded, and therefore do not total 100%. As can be seen, households with incomes of \$100,000 or more receive 59% of the benefit of this deduction.⁵⁵¹ Households with incomes of \$50,000 or more receive 92% of the benefit.⁵⁵²

MORTGAGE INTEREST DEDUCTION

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

549. *Id.*

550. JOINT COMMITTEE ON TAXATION, *supra* note 544, at 29 tbl.3. The Joint Committee's report did not include comparable information with respect to the capital gains exclusion.

551. *Id.*

552. *Id.*

The results for the residential real estate tax deduction are virtually identical.⁵⁵³ Again, households with incomes of \$100,000 or more receive 60% of the benefit of this deduction.⁵⁵⁴ Households with incomes of \$50,000 or more receive 92% of the benefit.⁵⁵⁵ Clearly, both deductions are regressive.

REAL ESTATE TAXES

Income Total (Thousands)	# Returns		Amount	
	(Thousands)	% Total	(Millions)	% Total
< \$10	21	.06	\$1	.004
\$10 to < \$20	298	.90	\$40	.200
\$20 to < \$30	930	3.00	\$152	.800
\$30 to < \$40	2,109	6.00	\$426	2.000
\$40 to < \$50	3,107	9.00	\$819	4.000
\$50 to < \$75	8,229	25.00	\$2,683	13.000
\$75 to < \$100	7,332	22.00	\$3,833	19.000
\$100 to < \$200	8,522	26.00	\$6,980	34.000
≥ \$200	2,396	7.00	\$5,303	26.000

The homeownership deductions also adversely affect the poor by transferring large amounts of money from the central cities, where poverty generally is concentrated, to the more affluent suburbs.⁵⁵⁶ A Brookings Institution Report concluded that in 1990, these deductions caused a transfer of over \$18 billion from the central cities to the suburbs.⁵⁵⁷ In some metropolitan areas, the proportionate transfer greatly exceeded the national average.⁵⁵⁸ For example, in 1989, the City of Philadelphia received \$400 million as a result of the deductions, whereas the Philadelphia suburbs received \$2.3 billion.⁵⁵⁹

553. *Id.* at 25 tbl.3.

554. *Id.*

555. *Id.*

556. Joseph Gyourko & Todd Sinai, *The Spatial Distribution of Housing-Related Tax Benefits in the United States* 3 (Mar. 2001) (unpublished working paper, on file with the National Bureau of Economic Research), *available at* <http://www.nber.org/papers/w8165.pdf> (last visited Apr. 26, 2003).

557. *Id.* at 19.

558. *Id.* at 3 (stating that “[t]his aggregate result is driven by a relatively few states, including California, New Jersey, New York, Massachusetts, and Connecticut, where the suburbs reap much greater tax benefits than the state’s cities”)

559. *Id.* at 4, 24 & app.B.

Like lower income homeowners and central city residents, tenants are also disadvantaged by the tax code.⁵⁶⁰ Tenants suffer in two ways. First, their tax liability is greater because of the tax revenue loss attributable to homeownership deductions.⁵⁶¹ The Brookings Institution Report stated that, on average, each rental household paid an additional \$1,815 in taxes in 1990 to compensate for the homeownership deductions.⁵⁶²

Second, tenants cannot deduct their rent payments on their tax returns.⁵⁶³ In contrast, homeowners who do not have mortgage debt liability for their homes are not subject to tax on the imputed rental value of their homes.⁵⁶⁴ This difference generally disproportionately benefits the well-to-do at the expense of lower income renters and is an additional example of the ways in which Congress favors the upper classes over the lower classes.

This differential treatment is attributable in large part to the poor's relative political powerlessness. As described in the last section, many legal barriers to voting by the poor continued until thirty or forty years ago.⁵⁶⁵ Some legal obstacles remain. For example, Louisiana⁵⁶⁶ and Virginia⁵⁶⁷ prohibit people who live on the streets from registering to vote. Until 1995, Pennsylvania law also prohibited the homeless from voting.⁵⁶⁸ Although Pennsylvania repealed that statutory prohibition in 1995, it now authorizes each county elections clerk to refuse to register

560. WRIGHT ET AL., *supra* note 528, at 90 (discussing the tax benefits received by the middle and upper-middle classes).

561. MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS 186-88 (9th ed. 2002).

562. Gyourko & Sinai, *supra* note 556, at 15.

563. CHIRELSTEIN, *supra* note 561, at 188.

564. *Id.*

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

566. Pursuant to LA. REV. STAT. ANN. § 18:101(A)(1) (West Supp. 2003), a person must be "an actual bona fide resident" of the state to register to vote. The Louisiana attorney general has interpreted this provision to mean that a homeless person "can only use the address of a shelter to register to vote if he actually resides at said shelter." La. Op. Att'y Gen. 95-431 (1996). Therefore, a person who lives on the streets cannot register. *Accord* La. Op. Att'y Gen. No. 99-113 (1999).

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

568. PA. STAT. ANN. tit. 25, § 623-1 (West 1994 & Supp. 2002) (repealed 1995).

anyone who lives in a shelter or lives on the street.⁵⁶⁹

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

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

569. See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR: THE AUTHORITATIVE ACLU GUIDE TO POOR PEOPLE'S RIGHTS* 349 tbl.8-1 n.3 (1997).

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

571. *PENN KIMBALL, THE DISCONNECTED 4* (1972) (advancing that "voter registration operates as an effective system of political control").

572. *Id.*; *PIVEN & CLOWARD, supra* note 432, at 120-21 (noting that "voter registration was intended to discourage voting in big cities, and by the poor and less educated").

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

KIMBALL, supra note 571, at 4.

573. *Id.* at 4-5 (observing that inconveniences such as location and hours have been used as obstacles to prevent the poor from voting); *PIVEN & CLOWARD, supra* note 432, at 120-21 (stating that urbanization, income, and education are used as obstacles to discourage voting).

574. *PIVEN & CLOWARD, supra* note 432, at 119; David Callahan, *Ballot Blocks: What Gets the Poor to the Polls?*, *AM. PROSPECT*, July-Aug. 1998, at 68.

other inconvenience of the registration time or place.⁵⁷⁵ Second, only nine states' election laws expressly enfranchise the homeless.⁵⁷⁶ In those jurisdictions that do not, registration officials often refuse a homeless person the right to register.⁵⁷⁷ In some cases, election registrars prevent homeless persons from voting even if they have registered.⁵⁷⁸ Finally, many states check on the continued residency of registered voters by mailed notice, and any addressee who does not respond to the notice is purged from the registration list.⁵⁷⁹ This practice obviously presents greater difficulties for the homeless than for those with a home.

The cumulative impact of these obstacles is as impossible to determine as determining the exact number of homeless persons. However, U.S. Census Bureau data strongly demonstrate the enormous differences in voter turnout between the upper and lower classes.⁵⁸⁰ In the 2000 election, adult members of families with an income of at least \$50,000 were twice as likely to vote as those with a family income of less than \$5,000.⁵⁸¹ In the 1994, 1996, and 1998 elections, the differences were similar.⁵⁸²

575. See KIMBALL, *supra* note 571, at 5 (advancing that "registration lists have continued to be manipulated indirectly by administrative inconveniences").

576. See HERSHKOFF & LOFFREDO, *supra* note 569, at 345 (noting that Arizona, Colorado, Illinois, Indiana, Iowa, Maine, Nebraska, Oregon, and West Virginia have enacted homeless registration statutes).

577. Patricia M. Hanrahan, *No Home? No Vote: Homeless Are Often Denied that Most Basic Element of Democracy*, 21 HUM. RTS. Q. 8 (1994).

[H]omeless people often believe that the right to vote is predicated on having a home. Even more discouraging are reports that registrars also believe this. Around the country, homeless citizens are turned away from registration sites because their address is a post office box, a shelter, or open-air site . . . instead of a street name and house number.

Id.; see also HERSHKOFF & LOFFREDO, *supra* note 569, at 345; Tara Gruzen, *Homeless Lack Roof, but They Have Vote*, CHI. TRIB., Oct. 7, 1996, at 1 (metro).

578. Cf. HERSHKOFF & LOFFREDO, *supra* note 569, at 345 (instructing the homeless to contact local election agencies if they are denied the right to vote).

579. National Law Center on Homelessness & Poverty, *Voter Registration for Homeless People: Legal Rights*, available at http://www.nlchp.org/FA_CivilRights/ (last visited Mar. 1, 2003).

580. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, tbl.9, available at <http://www.census.gov/population/socdemo/voting/p20-542/tab09.pdf> (last visited Apr. 25, 2003).

581. *Id.*

582.

Annual Family Income	Percentage Reported Voted			
	2000	1998	1996	1994
Under \$5,000	28.2	21.1	32.8	20.0
\$5,000 - \$9,999	34.7	23.9	32.8	23.5
\$10,000 - \$14,999	37.7	30.4	39.5	33.0
\$15,000 - \$24,999	43.4	34.6	45.9	40.4
\$25,000 - \$34,999	50.0	40.2	52.0	44.9

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

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

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

\$35,000 – \$49,999	57.7	44.0	59.4	50.1
\$50,000 – \$74,999	65.2	49.9	66.8	58.3
\$75,000 and over	71.5	57.3	73.6	63.7

Id.; U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1998, tbl.9, available at <http://landview.census.gov/population/socdemo/voting/cps1998/tab09.txt> (last visited Apr. 25, 2003); U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF 1996, at 56 tbl.13, available at <http://www.census.gov/prod/3/98pubs/p20-504u.pdf> (last visited Apr. 25, 2003); U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF 1994, tbl.13, available at <http://www.census.gov/population/socdemo/voting/work/tab13.txt> (last visited Apr. 25, 2003).

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

584. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, at 1 (2002) (stating that the voting data was acquired by asking respondents whether they were registered and whether they voted), available at <http://landview.census.gov/prod/2002pubs/p20-542.pdf> (last visited Apr. 26, 2003).

585. David Stout, *Study Finds Ballot Problems Are More Likely for Poor*, N.Y. TIMES, July 9, 2001, at A9.

586. *Id.*

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

588. See PIVEN & CLOWARD, *supra* note 432, at 119 (reporting that the poor are marginalized from electoral politics).

2003] *UNDERPINNINGS OF HOMELESSNESS* 277

comprehensive prescription drug benefits for senior citizens.⁵⁸⁹ Similarly, Vice President Cheney stated that he had to vote against funding for Head Start in order to support then-President Reagan's tax cuts for corporations and wealthy individuals.⁵⁹⁰ Despite representations concerning the "trickle-down" effect of these tax cut programs, the poor have continued getting poorer and the rich have become much richer.

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

A 1999 report on concentration of wealth in the United States⁵⁹³ that was based on Census Bureau figures sets forth a variety of facts demonstrating the increasing gulf between the rich and the poor, including:

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

589. Citizens for Tax Justice, *Proposed Tax Giveaways for Wealthiest 1% Would Pay for Medicare Prescription Coverage for Seniors*, at <http://www.ctj.org/html/usaction.htm> (Feb. 15, 2001).

590. *Id.*

591. U.S. CENSUS BUREAU, *MONEY INCOME IN THE UNITED STATES: 2000*, at 8 tbl.c (2001).

592. *Id.*

593. See George Draper, *Facts on the Concentration of Wealth*, available at <http://www.endgame.org/primer-wealth.html> (last visited Jan. 24, 2003).

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

Moreover, in 1999, the three middle income quintiles of Americans earned less than they did in 1977.⁵⁹⁵ In marked contrast, the net worth of the 400 wealthiest Americans increased by over 500% in constant dollars.⁵⁹⁶

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

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

594. *Id.*

595. *Id.* (noting that “[s]ince 1973, every group in society except the top 20 percent has seen its share of the national income decline”).

596. Molly Ivins, Editorial, *Memo to the Right Wing: It's Class Warfare Out There*, CHI. TRIB., Aug. 15, 2002, at 19 (commentary).

597. See Federal Election Commission, *FEC Reports on Congressional Financial Activity for 2000* (May 15, 2001) (summarizing the money raised and spent in Congressional Campaigns from 1981–2000), available at <http://www.fed.gov/press/051501congfinact/051501congfinact.html>.

598. See *id.* (noting that PACs gave \$193.4 million to House candidates and \$52 million to Senate candidates).

599. *Id.*

600. David S. Broder, Editorial, *A Senate of Millionaires*, WASH. POST, Jan. 17, 1996, at A17 (stating that “[t]he combination of rising campaign costs and foolishly frozen limits on individual contributions has increased the advantage of self-financed candidates”).

601. The Center for Responsive Politics, *Election Overview: 2002 Cycle: Who's Spent the Most* (listing Elizabeth Dole as spending the most in 2000), available at <http://www.opensecrets.org/overview/topspend.asp?cycle2002> (last visited Feb. 14, 2003).

602. Kevin Diaz & Shira Kantor, *Congress Bares Its Pocketbooks*, STAR TRIB. (Minneapolis), June 15, 2002, at 18A.

members of Congress are known to be millionaires, and some are multi-millionaires.⁶⁰³ “Electoral politics is largely a rich man’s game and the property qualifications—as translated into campaign costs—are far steeper today than in 1787.”⁶⁰⁴

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

IV. CONCLUSION

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

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

604. Parenti, *supra* note 127, at 57.

605. Sen. Edward M. Kennedy, Address to the Democratic National Convention (Aug. 12, 1980) (“The poor may be out of political fashion, but they are not without human needs.”), available at <http://www.cs.umb.edu/jfklibraryle081289.htm> (last visited Mar. 4, 2003).

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