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Property and Suffrage in the Early American Republic

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I. INTRODUCTION

In 1792, the state of New Hampshire amended its constitution to exclude "paupers" from the suffrage.[1] Later, South Carolina (1810), Maine (1819), Massachusetts (1821), Virginia (1829), Delaware (1831), Rhode Island (1842), and New Jersey (1844) all followed suit. By the end of the nineteenth century, fourteen states had excluded either "paupers" generally or inmates of poorhouses from the suffrage.[2] As late as 1934, all of these states continued to do so.[3] The term "pauper" in these clauses ordinarily referred to persons in receipt of poor relief.

Typically, states adopted "pauper" exclusions as they moved to eliminate formal property qualifications for the vote. Most commonly, pauper exclusions were adopted as states replaced property qualifications with taxpaying qualifications. But in South Carolina (1810), Maine (1819), New Jersey (1844), and Massachusetts (1853),[4] and in Rhode Island's 1842 "People's Constitution," pauper exclusions were

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1. N.H. CONST. of 1784, pt. II, art. 28 (1792) (reprint ed., Concord 1850). Recipients of alms had been excluded from the Parliamentary franchise in some English boroughs all along. *See* A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 11 (1905); *see also* Thomas, *The Levellers and the Franchise*, in THE INTERREGNUM: THE QUEST FOR SETTLEMENT, 1646-1660, at 62-65 (G. Aylmer ed. 1972).

2. During the nineteenth century, Louisiana, Texas, West Virginia, Missouri, and Oklahoma also enacted provisions to exclude either "paupers" or inmates of poorhouses, from the suffrage. In 1877, the Pennsylvania Supreme Court interpreted a provision of Pennsylvania's 1873 Constitution to achieve a similar result. The court ruled that inmates of poorhouses were not entitled to vote in the districts in which their poorhouses were located. Because inmates were generally not permitted to return home to vote, this ruling effectively "deprived [them], for the time," as the court put it, "of their political privilege of voting." Murray's Petition, 5 Weekly Notes of Cases 9, 9 (Pa. 1877) (interpreting PA. CONST. of 1873, art. 8, § 13).

3. *Further Poor Law Notes*, 8 SOC. SERV. REV. 43 (1934).

4. The 1853 Massachusetts Constitution was ultimately rejected at a ratification election. *See* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 5 (W. Swindler ed. 1975) [hereinafter STATE CONSTITUTIONS]; *see also* STATE CONSTITUTIONAL CONVENTIONS 99 (C. Browne ed. 1973).

incorporated into constitutions which otherwise established white "manhood" suffrage.[5]

A. *A Whig Interpretation of Pauper Exclusions*

Why should Americans have been moved in the decades after the Revolution to deprive recipients of poor relief of the vote? And why should they have done so just at the time they were otherwise broadening the suffrage? One way of developing an explanation for these pauper clauses is to treat them as if they were merely anachronisms.

If we adopted this approach, we might say that the American Revolution introduced a fundamentally new set of principles for organizing political life, but that these had not yet had time completely to displace older views. We might say that after the Revolution the property qualifications of the colonial period began to give way to the notion that all men were entitled to the vote. But, we might add, these new ideas faced a long struggle against older ways of thinking and only gradually prevailed over many decades. We might show that first, tax-paying qualifications began to replace property qualifications. Then white manhood suffrage was introduced. After the Civil War black men were enfranchised. In the twentieth century, the slow march of progress finally brought women the vote, and, by the 1960s, had eliminated the last vestige of earlier restrictions on the franchise, the poll tax. With the passage of the Voting Rights Act of 1965, the long struggle to establish the principle of universal adult suffrage had finally achieved complete success.

If we accepted this all-too-familiar account of the history of the suffrage,[6] we would have a relatively straightforward answer to the question, why pauper exclusions? They were simply institutional expressions of traditional ways of thinking which the Revolution had failed to eliminate. Like other "anachronistic" suffrage practices which survived into the new era, these too would eventually be eliminated by the gradual spread of enlightened attitudes. Needless to say, such an account would not be entirely wrong. As a nation, we have indeed moved in a general way over the last century and a half from "property to democracy," as one prominent historian has put it.[7] And viewed in isolation, pauper exclusions do in some sense represent the survival of older ways of thinking. Paupers, after all, had been among those ex-

5. Historians of the suffrage sometimes mischaracterize the franchise in these states as "universal manhood suffrage." *See, e.g.*, C. WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 190 (1960).

6. Chilton Williamson's classic work, *American Suffrage: From Property To Democracy*, is one example of this kind of whig history. *See id.* But many constitutional law casebooks offer implicit accounts which are very similar. Materials are arranged to suggest the gradual, progressive elimination of antiquated, feudal suffrage restrictions.

7. *See id.*

cluded from the colonial franchise all along under the general property qualifications of that era.

If we adopted this whig history of the suffrage, however, we would be radically simplifying a vastly more complex process, and would be engaging in the worst kind of ahistorical thinking. For in the decades after the Revolution practically no one argued that the principles of the Revolution demanded the introduction of universal suffrage. Pauper exclusions were themselves an innovation. If we are to grasp how Americans of this period regarded these exclusions, we must see that for them, pauper exclusions were part of a fundamentally new set of conceptions about who should exercise the franchise and who should not. Far from being anachronisms, pauper exclusions were integral to a new, nineteenth century way of defining full membership in a republican polity. This new set of conceptions was much more than a temporary weigh station on the road to universal suffrage. It was a self-contained scheme of understandings about the proper order of the polity which developed at a particular moment in American history, in response to the deepest dilemmas facing American political culture in the decades after the Revolution. And it was a set of basic conceptions which endured in rough form for more than a century.

B. *The Contradictory Legacy of the American Revolution*

We can better understand this point by reexamining the process by which the general property qualifications of the colonial era were gradually replaced with taxpaying qualifications and with provisions for manhood suffrage. In many cases, these changes were accompanied by the introduction of pauper exclusions.

By the middle of the eighteenth century, all the American colonies save one had adopted property qualifications for the suffrage.[8] Colonists explained the disfranchisement of the propertyless in their midst in part by observing that such people "had no wills of their own."[9] Under colonial restrictions all the propertyless, regardless of whether they were wage earners or recipients of poor relief, occupied the same political status. After the Revolution, as many states began to enfranchise some of those who owned no property, mainly wage earners and leaseholders, under taxpaying or manhood suffrage provisions, they began simultaneously to disfranchise others such as paupers. In such states, the undifferentiated propertyless of the colonial era were being separated into two distinct categories.

Some of the propertyless would henceforth be qualified to vote, some would not. Of those who would not, it was no longer sufficient merely to say that they could not vote because, being propertyless, they "had no wills of their own." Something more had to distinguish them

8. *See* notes 12-15 *infra* and accompanying text.
9. *See* notes 16-25 *infra* and accompanying text.

from the others who were being enfranchised. In other words, as some of the propertyless were enfranchised and others were explicitly disfranchised, it became necessary to redefine not only the former but also the latter. Much more was involved than the simple persistence of traditional attitudes in the new era.

As the traditional undifferentiated propertyless were divided into two groups, the new political-cultural categories of independent wage earner and dependent pauper emerged together, defining each other by mutual contrast. Whatever qualities now seemed to define paupers as dependent, it was the absence of those qualities which made it seem possible to view propertyless wage earners as independent.

It was no accident that this division of the traditional world of the propertyless began to occur at this particular moment in American history. The movement toward distinguishing among the traditional propertyless developed as one response to the contradictory legacy of the American Revolution. That legacy had left American political culture embracing fundamentally inconsistent premises. To state the dilemma in its simplest terms: On the one hand, Americans continued to adhere to the classical republican notion that only property ownership conferred independence on a man. On the other hand, they had also come to believe that "*all men* were by nature *equally free and independent* and had certain inherent and unalienable rights."[10] One view pointed toward a world in which all men, whether or not they owned property, were assumed by nature to be free and independent, and capable of political discretion. The other assumed that the polity was divided at bottom into two groups, those who owned property and those who did not. According to this view, the propertyless should never exercise political authority precisely because they were not free and independent agents.

These two views led to contradictory visions of political order. What we must understand, however, is that at bottom most Americans simultaneously believed some version of both. New York City and Philadelphia artisans of the era may have agitated for a broadening of the suffrage on the ground that all men were by nature equally free and independent,[11] but there can be little question that most of them also believed that only property ownership conferred real independence on a man.

As Americans struggled over the question of broadening the suffrage in the decades after the Revolution, they simultaneously struggled with these deeply inconsistent premises. The division of the

10. *See* note 63 *infra* and accompanying text.

11. *See* note 56 *infra* and accompanying text; *see also* E. FONER, TOM PAINE AND REVOLUTIONARY AMERICA 142-44 (1976); S. WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850, at 65-66, 70-71 (1984); H. ROCK, ARTISANS OF THE NEW REPUBLIC: THE TRADESMEN OF NEW YORK CITY IN THE AGE OF JEFFERSON 49-51 (1979).

traditionally undifferentiated propertyless into two new categories defined as binary opposites of one another represented an accommodation of these fundamental, yet inconsistent, premises of American life.

To fully understand the genesis of these developments, however, we must go back to an earlier point in time. We must begin by considering the position of the propertyless in early modern Anglo-American society. We must also develop an understanding of the complex connections which existed in that society between property ownership and self-government. Only then can we grasp the problem which confronted Americans as they struggled over the question of broadening the franchise. And only then can we understand the kind of answer which pauper exclusions represented.

II. THE DISFRANCHISEMENT OF THE PROPERTYLESS IN THE AMERICAN COLONIES

By the middle of the eighteenth century all American colonies save one had adopted election laws which denied the colony franchise to those who owned no property.[12] This development had taken more than a century to complete, for in the seventeenth century, property qualifications had by no means been the norm.[13] But by the time of the

12. *See* A. MCKINLEY, *supra* note 1, at 478, 481. In a number of colonies which adopted property qualifications, exceptions were made for inhabitants of certain towns. In New York State, for example, those who had been "admitted to the freedom" of Albany and New York City were entitled to vote without more. W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA app. at 298 (1980). In Virginia, "housekeepers" in Williamsburg and Norfolk could vote if they had served to any trade for five years. *Id.* at 303. In New Jersey, inhabitants of the towns of Perth Amboy and Burlington could vote if they were "householders." *Id.* at 299. For a summary of these provisions, see *id.* at 293-307. These exceptions harken back to a borough basis for the franchise common in the seventeenth century. *See* note 13 *infra*.

13. Following English practice, in the seventeenth century the American colonies adopted a number of different voting qualification schemes. In England, the 40-shilling freehold qualification only applied to the county Parliamentary franchise. The borough Parliamentary franchise was much more diverse. In some boroughs property ownership was not required at all. "At the outset," Albert McKinley says of the colonial franchise,

> the suffrage in most of the colonies conformed to the voter's qualifications in the English towns rather than to the freehold requisite of the English county. Thus in New England . . . the freeman principle of the English boroughs became the basis of the suffrage. [In the southern colonies] . . . the early suffrage . . . [was] similar to the franchise in those English towns where all adult male housekeepers participated in elections.

A. MCKINLEY, *supra* note 1, at 484-85.

But over the course of the seventeenth century, the basis of the colonial franchise began to shift decisively in the direction of property qualifications. McKinley observes that in both New England and the Southern states,

> the holding of land came [after a time] to be the sole qualification, or an alternative one with the ownership of personal property. And in this process the borough basis of freemanship or inhabitancy gave place to the ownership of property; that is, a qualification akin to the county franchise in England.

Id. at 485.

By the eighteenth century, property qualifications had been adopted almost everywhere in the American colonies. But some of the colonies retained exceptions based on the earlier borough franchise for inhabitants of certain towns. *See* note 12 *supra*.

Revolution only South Carolina retained a taxpaying qualification for the vote.[14] In all other colonies, election laws excluded the propertyless from the suffrage without distinction.[15]

As mentioned earlier, writers in this period frequently explained the disfranchisement of the propertyless by observing that those without property were not free agents.[16] Those who owned no property were powerless and dependent; they were nearly always subject to the will of those who commanded resources. Because they were not their own men, they lacked political capacity. The political community simply could not trust such men with the important task of selecting magistrates or legislative representatives because they could never exercise independent judgment. They would always be compelled to do the bidding of the wealthy.

These views prevailed all across the political spectrum in England and in the colonies in the eighteenth century. In a comment which Americans frequently cited,[17] Blackstone, for example, wrote of the franchise that

> [t]he true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.[18]

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14. A. McKINLEY, *supra* note 1, at 481.

15. The right to elect representatives did not play the central role in the eighteenth century which it subsequently assumed in the nineteenth century. In the colonies, it began to take on increasing importance as the American Revolution progressed. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 134-35, 163 n.2 (1969).

16. Contemporaries offered other explanations as well for restricting the suffrage to those who owned property. "Implicit also in English suffrage theory was the belief, as old as the emergence of the House of Commons itself, that so long as the landowners directly paid the bulk of public taxes it was not inequitable or unjust to confine Commons' elections to them." C. WILLIAMSON, *supra* note 5, at 5-6. Similar notions (which sometimes acknowledged the financial contributions of owners of personal property) also played roles in shaping the practice of American colonial suffrage. *See id.* at 6-7.

In addition, many also believed that the ownership of a freehold (some would have added "a visible personal estate") tied a man to the interests of the community. As Governor William Markham of Pennsylvania told the new members of his council in 1696: "You are all men that are fastened to the country by visible estates . . . and that's a great security you will study the interest of the country." W. ADAMS, *supra* note 12, at 211 n.84. For a summary of the major justifications advanced for linking rights of suffrage to property ownership, see *id.* at 207-17.

17. *See* C. WILLIAMSON, *supra* note 5, at 12. Alexander Hamilton, for example, paraphrased Blackstone in A. HAMILTON, THE FARMER REFUTED (New York 1775), *reprinted in* 1 A. HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 81, 106 (H. Syrett & J. Cooke eds. 1961).

18. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *171 (1765) [hereinafter COMMENTARIES].

> If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But,

Blackstone emphasized that those without property lacked autonomy and would inevitably fall under the sway of others.[19] Since, in his view, only "free agents" could be allowed to vote,[20] the propertyless could not be enfranchised.

In the colonies, John Adams expressed a nearly identical view. "Such is the frailty of the human heart," he wrote,

> that very 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, who has attached their minds to his interest . . . . [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.[21]

But such views were also held at the other end of the eighteenth century political spectrum. Even many *radical* English whigs firmly believed that the propertyless were not fit to exercise political authority. Joseph Priestley, for example, wrote that "those who are extremely dependent should not be allowed to have votes . . . because this might . . . be only throwing more votes into the hands of those persons on whom they depend."[22]

As we now know, eighteenth century whig thought played a critical role in American political culture during the Revolutionary period. American whigs, like their English counterparts, continued to regard the politically relevant "people as a unitary, property-holding, homogeneous body—not 'the vile populace or rabble of the country . . . .' "[23] To eighteenth century whigs, in fact, property represented much more than material possessions. It represented "the attributes of a man's personality that gave him a political character."[24]

These views on the political significance of property were common throughout the colonies. In 1775, one Pennsylvanian, for example, declared that, "[a] Civil Society or State is a number of proprietors of land within certain limits, united by a compact or mutual agreement, for making laws and appointing persons to execute these laws for their

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since that can hardly be expected *in persons of indigent fortunes, or such as are under the immediate dominion of others*, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected *to have no will of their own*, are excluded from voting, in order to set other individuals, *whose wills may be supposed independent*, more thoroughly upon a level with each other.

Id. (emphasis added).

19. *Id.*; *see* note 18 *supra*.

20. He stated that "[o]nly such are entirely excluded, as can have no will of their own: there is hardly *a free agent* to be found, but what is entitled to a vote in some place or other in the kingdom." *Id.* at *172 (emphasis added).

21. 9 J. ADAMS, THE WORKS OF JOHN ADAMS 376-77 (C. Adams ed. 1864) (letter from John Adams to James Sullivan, May 26, 1776).

22. J. PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT 13 (2d ed. 1771). For other writers who held similar views, see G. WOOD, *supra* note 15, at 168-69.

23. G. WOOD, *supra* note 15, at 62.

24. *Id.* at 219.

common benefit."[25] In the decades after the Revolution, hardly anyone disputed the proposition that property ownership was necessary for personal independence. And if independence was a prerequisite for political participation, as many Americans thought it should be, then those who owned no property could not reasonably expect to participate in political life.

III. PROPERTY AND SELF-GOVERNMENT: RELATIONSHIPS OF DEPENDENCE IN THE EARLY MODERN PERIOD

A. *Economic/Social Relationships of Dependence and Governance*

When eighteenth century writers of practically all political hues insisted that the propertyless should not vote because they were governed by other men, we must understand that their views were based squarely on their experience of life in their world. Today, we view the power over persons which property ownership confers as an embarrassment.[26] While we are frequently forced to acknowledge it, we also go to great lengths to conceal it. Before the nineteenth century, little need was seen for such concealment. The inhabitants of that world frankly acknowledged and openly exercised the power over others which property ownership conferred.

In the early modern period, a wide range of adult relationships of dependence were considered normal. Hardly anyone questioned the right of persons who controlled resources to use those resources to create relationships of dependence. Such relationships were grounded in the notion that those who controlled resources might extend their protection and care to those who did not. The latter, in return, would owe loyalty and obedience. They were expected to serve their protectors and do their bidding. Those who controlled no resources had little choice about the matter. They frequently had to enter one of these relationships and submit to the government of others, simply in order to survive.

Explicit relationships of dependence were a common feature of social life at all levels, both in Europe[27] and America. In late colonial

25. C. WILLIAMSON, *supra* note 5, at 6.

26. For modern discussions of the power over persons which property ownership confers, see Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), and Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923).

27. In a vivid essay on literary life under the French *ancien regime*, Robert Darnton draws on the files of a police inspector charged with keeping literary figures under surveillance to reconstruct the "common subjectivity, [the] social construction of reality," shared by the French of the eighteenth century. The inspector's files reveal a literary culture based on a system of clientage, protection, and dependence.

> Just as Mme de Pompadour got Bernis an abbey, Bernis got Duclos a sinecure. That was how the system worked. The police did not question the principle of influence peddling. They assumed it: it went without saying, in the republic of letters as in society at large.

R. DARNTON, *A Police Inspector Sorts His Files*, in THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY 165 (1984).

New York City, for example, a system of personal loyalty and "economic clientage" was well established.[28] "[Numerous artisans] were beholden to merchants, lawyers, and urban landholders who controlled their rents, job opportunities, credit, and even personal affairs . . . ."[29] Such dependence frequently translated into political loyalty. "Even with secret balloting many artisans cast their votes as their patron desired, for it was not easy to hide one's political preferences."[30]

In this world, social deference and material necessity converged to place some men explicitly under the control of other men. Even versions of the European aristocratic form were to be found in the colonies. In the Mohawk District of New York State, for example, a 1773 election for five constables has been described this way:

> There was no shortage of qualified electors; at least four hundred men in the district possessed the franchise. But only fourteen turned out for the election, and all of them voted for the same five candidates. Every one of the fourteen voters has been shown to have been closely tied to Sir William [the chief land owner in the area], whether by interest, patronage, or economic dependency. This was local democracy in a county where the jail, the courthouse, and the Anglican church were all the personal property of one man and where that man received letters headed "May it Please Your Lordship."[31]

Stephen Innes has recently shown that in seventeenth century Springfield, Massachusetts, John Pynchon, the leading landowner, established relationships of dependence with nearly fifty percent of the town's adult male inhabitants.[32] "As patron, John Pynchon exchanged the fruits of his status, power, influence, and authority for the loyalty and political support of the client . . . . Those tenants whose rent was in arrears, men chronically indebted to Pynchon, or wage laborers dependent on him for long-term or seasonal employment were not likely to oppose his wishes in town meeting, on the muster green, or anywhere else."[33] "[N]either patron nor client," Innes goes on to add, "found this kind of asymmetrical relationship unusual or demeaning. [A client] knew that he was joined by roughly half the town's men in dependency

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> The constant unremitting quest for protection stands out everywhere in [the inspector's] accounts of literary careers . . . .
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> Such were the facts of literary life. [The inspector] recorded them unblinkingly, without any moralizing about toadyism among the writers or the vanity of protectors. On the contrary, he sounded shocked when a protegé deviated from the unswerving loyalty he owed his patron.

Id. at 167-68.

28. G. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION 366 (1979).

29. *Id.*

30. *Id.*

31. E. COUNTRYMAN, A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790, at 33 (1981) (citations omitted).

32. S. INNES, LABOR IN A NEW LAND: ECONOMY AND SOCIETY IN SEVENTEENTH-CENTURY SPRINGFIELD 38, 42, 208-27 (1983).

33. *Id.* at 40.

on Pynchon."[34]

The obsessive preoccupation of eighteenth century Anglo-American whigs with dependence reflects the social reality of the era.[35] In England and the colonies property ownership conferred a power over others which was freely acknowledged and openly exercised in a wide variety of relationships of dependence.

B. *Legal Relationships of Dependence and Governance*

For the very poor in this period (and for women and children), the situation was even worse. They frequently found themselves in a form of dependence relationship that was even more rigorous. For if social convention dictated that property owners were entitled to command the loyalty of those to whom they extended care and protection, it was a matter of legal doctrine that heads of household were entitled to command the loyalty and services of those for whom *they* provided. Household dependents not only included wives and children, but also propertyless wage earners who lived with the master. Before the nineteenth century in the colonies,

> most propertyless people were dependents in a propertied household—wives, children, slaves, servants, apprentices, journeyman, hired laborers. Apart from these groups, a smaller number of tenant farmers, common seamen and casual laborers set up independent households without a property owner as the head. But for the most part, inequality between the property owners and the propertyless was a domestic affair.[36]

In the legal relationships of dependence (master and servant, husband and wife, parent and child) of this period, the head of household was responsible for the maintenance, care and protection of all his dependents. They could bring a variety of legal actions to enforce the duty of support which he owed them.[37] But in return, he was given, in

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34. *Id.* at 42.

35. G. WOOD, *supra* note 15, at 143-58.

36. A. DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN 61 (1976).

37. In eighteenth century England, for example,

> [t]he contract [between master and servant for an indefinite period] implicitly bound the servant to serve the master for the year, and to obey his reasonable commands, and it bound the master to maintain the servant for the year and to pay the wages agreed upon, whether or not there was daily work for the servant, and whether or not the servant remained fit to work. As Burn advised Justices of the Peace, "if a servant retained for the year falls sick, or is hurt or disabled, by act of God or the master's business, he is not to be put away nor his wages to be abated.' " The large number of Quarter Sessions' order to take back sick and injured servants and to maintain them to the end of the term attests both to the enforceable nature of the contract and to the frequency with which it was broken.

A. KUSSMAUL, SERVANTS IN HUSBANDRY IN EARLY MODERN ENGLAND 32 (1981) (quoting R. BURN, THE JUSTICE OF PEACE (London 1775)) (citations omitted).

Similarly, in the seventeenth century Plymouth colony, "[t]he master's basic responsibilities continued unaltered even if his servant experienced some serious . . . misfortune. . . . He was bound to protect his servant's welfare to the full extent of his ability, until the end of the

varying degrees, legal jurisdiction or control over them. This jurisdiction included rights to their services, and even, in certain cases, rights to chastise or confine them. The structure of these legal household relationships of dependence closely resembled the structure of other relationships of dependence common in this period. On the one hand, the law imposed on heads of household duties to support and protect their dependents. On the other hand, it extended to them varying degrees of control over their persons and energies.[38]

This reciprocal set of duties was at the heart of all versions of these legal relations of dependence. Persons unable to fulfill their duty of support often lost the right to govern their dependents. Early English master/servant law, for example, declared that "[i]f a Man who is not able nor sufficient to keep a Servant, shall retain a Servant, such Retainer is void."[39] A similar kind of rule applied to parents. Parents who could not support their children were liable to have them removed by overseers of the poor and placed into service. As one nineteenth century court declared in a custody dispute between a father and overseers of the poor:

> It seems very clear to us, that the father could not come forward and claim to exercise the rights of a parent and natural guardian, and control and direct as to the custody and disposition of the boy, until he was also prepared to assume the obligations and liabilities of the same relation, and furnish the means of support.[40]

One of the crucial points to understand about the propertyless who became recipients of poor relief in this period is that when they accepted assistance, they too entered this kind of legal relationship of dependence. The relationship of towns to their "paupers," was structured in exactly the same way as the relationship of heads of household to their dependents. Both were reciprocal relationships in which one party owed a duty of support and the other owed a duty of loyalty and service in return.

Towns are bound by law to support all such of their inhabitants as may

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contracted terms; there was no shortening of this term except by mutual agreement." J. DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 109-10 (1970) (citations omitted). But see S. INNES, *supra* note 32, at 111, for an example of a servant in seventeenth century Springfield, Massachusetts who paid for his own "diet."

For a discussion of similar arrangements in the colonies during the eighteenth century, see Salinger, *Artisans, Journeymen, and the Transformation of Labor in Late Eighteenth-Century Philadelphia*, 40 WM. & MARY Q. 62, 76 (1983). *See also* G. NASH, *supra* note 29, at 259; R. Moss, Master Builders: A History of the Colonial Philadelphia Building Trades 143-46 (Ph.D. diss., Univ. of Delaware, 1972).

38. For a summary of the law governing these household relationships during this period, see 1 COMMENTARIES, *supra* note 18, at *423. For an extended discussion and analysis of the law governing master/servant relationships, see R. Steinfeld, The Disappearance of Indentured Servitude and the Invention of Free Labor in the United States (1986) (unpublished manuscript) (on file with the *Stanford Law Review*).

39. M. DALTON, THE COUNTREY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 127 (London 1682).

40. Houston v. Kimball, 22 Vt. 575, 580 (1850).

> from time to time fall into distress and stand in need of relief, and to continue such support so long as it may be needed; and during its continuance they are entitled to the reasonable services of those supported by them .... *The rights and duties of towns and paupers are correlative. While the town supports the pauper, the pauper is bound to labor for the town.* But when the support becomes unnecessary, the right to control the labor ceases.[41]

In the contract by which the caretakers in this case "took *the care and custody* of the poor of the town," they vowed, in words which evoke a husband's vow, that they would "*support comfortably and decently, in sickness and in health*, all the paupers who shall be chargeable upon the town . . . ."[42] And like a head of household, they were also "to have the reasonable service and labor of the paupers."[43]

It is no accident that the relationship of dependence between towns and paupers paralleled the relationship of dependence between heads of household and dependents. Today, we might classify these two kinds of relationships very differently, characterizing one as private and

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41. Wilson v. Brooks, 31 Mass. (14 Pick.) 341, 343 (1833) (emphasis added).

During the seventeenth and eighteenth centuries, selectmen or overseers of the poor placed paupers with individual families, generally for a year at a time. These families would receive some cash for the care of the pauper and not infrequently rights to his or her labor. "Richard Dodge, Jr., for example, a Wenham farmer, contracted with selectmen 'to keep Elisabeth Senie and her youngest Child . . . for the Consideration of twenty shillings and what Labour She can do During the Sd Term.' " Jones, *The Transformation of the Law of Poverty in Eighteenth-Century Massachussetts*, in LAW IN COLONIAL MASSACHUSSETTS, 1630-1800, at 153, 159 (1984). Similarly, in 1693, George Keetch agreed with the town council of Providence, Rhode Island, that he would "take Edward London into his Care & Keepeing [and would] find the said Ed: London sufficiently with meat, drinke washing & Lodgeing . . . ." In return, he was granted "fifty shillings in Currant pay at monie price" and "said Londons Labour in what he may Comfortably doe." M. CREECH, THREE CENTURIES OF POOR LAW ADMINISTRATION: A STUDY OF LEGISLATION IN RHODE ISLAND 306 (reprint ed. 1969).

By the beginning of the nineteenth century, however, many towns began to adopt a harsher version of this long standing practice. They began to auction off the poor of the town in lots. The lowest bidders would receive cash compensation and rights to the paupers' labor. *See id.* at 164-94; *see also* J. PRUDE, THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSSETTS, 1810-1860, at 28 (1983).

In the eigtheenth century, a number of locales had established almshouses. Paupers who were maintained in these, needless to say, were also obligated to work. Jones, *supra*, at 164-71.

Recipients of temporary outdoor relief might not be under the kind of control custodial paupers were, but in many jurisdictions they too owed labor to the town.

> A person is to be considered 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; 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 consideration of his services for a year, or any less period. We are of this opinion, because in each of the situations above described, the pauper is dependent upon the town, and under the care and protection, if not the personal control, of the overseers .... Nor do we consider that it is material whether the pauper makes compensation by his labor to the person to whom he has been consigned, or to the overseers of the poor when they directly support him ....

7 Me. 497, 499 (1831) (advisory opinion).

42. 31 Mass. (14 Pick.) at 341 (emphasis added).

43. *Id.*

domestic, the other as public and political. But at an earlier time, that distinction was not made so sharply.

In this period, relationships of dependence, whether formalized in law or only a matter of social convention, were essentially based on a similar idea. Persons who controlled resources might extend their protection and care to others. In return, these others would incur obligations to serve and obey their protectors and providers. But in the legal relationships of dependence, these obligations of service and obedience assumed a more stringent form. The power over persons stemming from control over resources took the form of legal jurisdiction. We might almost say that in these relationships the power of property was "established."

C. *Political Relationships of Dependence and Governance*

There were a number of reasons why those living in this period so frankly acknowledged and openly exercised the power over persons conferred by property. Governance had not yet been restricted exclusively to governments. Though some contemporaries were growing increasingly uncomfortable with the idea that some individuals were entitled to the personal government of other individuals, such a notion was still common. But there was perhaps an even more basic reason. Government itself, in this period, was frequently viewed as a relationship of dependence between a ruler and his subjects.[44]

And this relationship of rulers to subjects was not thought to be fundamentally different from other relationships involving dependence and governance. Like these other relationships, that of ruler and subject was also understood to be based on a set of reciprocal obligations: a duty of protection on one side, a duty of allegiance and loyalty on the other. It too was understood to be a relationship which mixed government with care and protection. "[F]or as the subject oweth to the king his true and faithful ligeance and obedience," Lord Coke observed, "so the sovereign is to govern and protect his subjects."[45] "[P]ower and protection," he went on, "draweth ligeance."[46] Political relationships thus bore a striking structural resemblance to other relationships of dependence.[47] On the very eve of the Revolution, Americans still thought about their relationship to the King in this way. When, for example, American polemicists sought to justify the separation of the

44. *See* E. MORGAN, THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND 19-20 (rev. ed. 1966); *see also* G. WOOD, *supra* note 15, at 269-71, 282.

45. J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 18 (1978) (quoting Calvin's Case, 7 Coke's Reporter 1a, 4b (1608)).

46. *Id.* (quoting Calvin's Case, 7 Coke's Reporter at 9b).

47. "The natural community of allegiance," James Kettner has noted, "was the aggregation of all those reciprocal relationships of allegiance and protection between individual subjects and the king. It resembled the natural family, where a common paternity made sons and daughters into brothers and sisters . . . ." *Id.* at 23.

colonies from England, they argued that "by withdrawing his protection and levying war upon us, [the King] has discharged us of our allegiance, and of all obligations to obedience: For protection and subjection are mutual, and cannot subsist a part [sic]."[48]

In the decades following the Revolution, some Americans argued that the propertyless should not have the vote because they were dependent on others and had no wills of their own. But we must remember that they were still very close to a world in which property owners were thought to be entitled to establish open relationships of dependence, and to command, in these relationships, those to whom they had granted access to their resources. These Americans were still very close to a universe in which those without property had virtually no choice about entering such relationships of dependence. Only when the idea that all men were entitled to govern themselves began to call into question the legitimacy of the links between property, dependence, and governance—only then did the power of government conferred by property begin to create a political dilemma of the first order. And only then did this power begin to require concealment.

IV. The Problem of Political Rights and Property Ownership in a Republican Polity

A. *The Rise of the Norm of Self-Government in English Republicanism and Liberal Individualism*

In the Anglo-American world of the seventeenth century, the relationships of ruler and subject, master and servant, husband and wife, parent and child, defined the very essence of social and political order. Seventeenth century New England Puritans, for example, believed that social and political life was a matter of

> the superiority of husband over wife, parents over children, and master over servants in the family, ministers and elders over congregation in the church, rulers over subjects in the state . . . . In each relationship God had ordained that one party be superior, the other inferior; for when he said, "Honor thy father and thy mother," he meant spiritual and political as well as natural fathers and mothers.[49]

In the world they inhabited, these relationships paralleled one another in the different realms of life. All were viewed as the same basic kind of mixed public/private relationship of dependence and governance. And in all of these relationships, property and government sat easily beside one another.

A speech delivered by John Winthrop to the Massachusetts General Court illustrates just how natural it seemed to seventeenth century New Englanders to associate relationships of dependence in one area of life

48. G. Wood, *supra* note 15, at 270 & n.19 (quoting *Letters from a Farmer* in Writings of Dickinson 310 (Ford ed. 1970)).

49. E. Morgan, *supra* note 44, at 19.

with those in another. Winthrop observed that a good subject resembled a good wife. Subjects elected magistrates to rule them. Wives selected husbands. Once each had chosen, both were in the same position. "[T]he woman's own choice makes such a man her husband; yet being so chosen, he is her lord, and she is to be subject to him, yet in a way of liberty, not of bondage; and a true wife accounts her subjection her honor and freedom . . . ."[50]

But during the seventeenth century another set of basic conceptions began to develop and to penetrate Anglo-American culture. Self-government came to be celebrated as a fundamental value which social and political order ought to protect and advance. This new norm played a basic role in two of the most important ideological movements to emerge in the seventeenth century: English republicanism and liberal individualism.[51]

In both of these early modern movements, however, there was considerable tension between the abstract norm of self-government and its elaboration in the detailed arrangements of social life. English republicanism, for example, celebrated personal independence as the virtue which made genuinely human community possible and vilified dependence as a source of corruption. Yet at the same time, it took for granted that self-government could not be the lot of all mankind. It relegated the propertyless to the degraded status of permanent dependence.

And unlike traditional hierarchy, which considered dependence the *natural* lot of much of mankind, republicanism considered dependence a corruption of the best qualities of human personality. It should come as no surprise, then, that the republicanism of this period pointed in different directions. It served to reinforce traditional hierarchical relationships of dependence even as it spread values which progressively undermined them. Even the propertyless would find it hard to accept dependence as a corrupt rather than a natural condition.

Liberal individualism celebrated the norm of self-government in a different way. The liberal universe was composed of equal, separate, and autonomous individuals. In this universe, all men by nature were assumed to be equally free and independent. Liberalism conceived of organized social and political life as a fundamental compact among all these individuals. Like the republicanism of the early modern era, however, liberal individualism also pointed in different directions. On the one hand, some individuals, such as women and children, were thought

50. K. LOCKRIDGE, A NEW ENGLAND TOWN, THE FIRST HUNDRED YEARS: DEDHAM, MASSACHUSETTS, 1636-1736, at 53 (1970) (quoting Winthrop).

51. On Anglo-American republicanism during this period, see J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975). For liberal individualism, see I. SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY (1986). *See also* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM, HOBBES TO LOCKE (1962).

to lack the basic capacity to govern themselves. Others, such as servants and hirelings, had contracted their autonomy away. On the other hand, the ultimate objective remained to design social and political institutions which would promote, to the maximum extent possible, the natural autonomy of all individuals regardless of their social or economic status.

B. *The Decline of Traditional Relationships of Dependence: The Invention of the Self-Governing People and the Independent Wage Earner*

Despite the basic tensions in each of these movements, the gradual spread of the norm of self-government did begin to have a significant impact on American life. The new values played a role in the complex processes which, by the nineteenth century, led to a basic reconceptualization of two of the principal traditional relationships of dependence: ruler and subject, and master and servant.

The traditional political concept of ruler and subject did not survive the American Revolution. In its place, Americans began to conceive their polity in a fundamentally new way, in terms of a Lockean social compact. Gordon Wood has written of this transformation that, as the Revolution unfolded, "[t]he mutual contract between rulers and ruled began to seem inoperable once the character and obligations of the two parties overlapped and combined and became indistinguishable."[52] These developments culminated in the first principle of post-Revolutionary political culture: popular sovereignty. In place of the traditional relationship of ruler and subject, Americans had established the self-governing people as the ultimate source of political order.

At the same time, the Revolution advanced the transformation of another one of the traditional relationships of dependence. Though

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52. G. WOOD, *supra* note 15, at 283. Wood explains:

> There was, however, another contractual analogy that ran through the Whig mind of the eighteenth century. This was the idea of the social compact, the conception John Locke had developed in his *Second Treatise on Civil Government*, not a governmental contract between magistrates and people, rulers and ruled, but an agreement among isolated individuals in a state of nature to combine in a society—a social compact which by its very character was anterior to the formation of government . . . . Under the changing exigencies of their polemics and politics, Americans needed some new contractual analogy to explain their evolving relationships among themselves and with the state. Only a social agreement among the people, only such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.

Id. (citations omitted). As Wood describes the transition:

> [T]he constitution could no longer be intelligibly regarded as a contract, like Magna Carta, between rulers and people. All authority in all parts of the government was equivalently derived from the people, "through the medium of that constitutional compact, which binds them together in one body." The constitution was not a bargain between two parties but had become the very basis of the society, and because "established by the people, it is stronger than any law the assembly can make, it being the foundation whereon they stand."

Id. at 290 (quoting Adams, *Sermon Preached*, May 29, 1782, at 21).

the process would not be complete until sometime in the nineteenth century, the master/servant relationship also underwent reconceptualization. In the place of a hierarchical relationship of dependence and governance, employment would become a purely contractual engagement between juridical equals. Employees would be understood to retain the legal right to govern themselves under all circumstances.[53] As one Massachusetts man of the mid-nineteenth century explained:

> In a free government like ours, employment is simply a contract between parties having equal rights. The operative agrees to perform a certain amount of work in consideration of receiving a certain amount of money . . . . The employed is under no greater obligation to the employer than the employer is to the employed; and the one has no more right to dictate [outside of work] than the other. In the eye of the law, they are both freemen—citizens having equal rights, and brethren having one common destiny.[54]

As the American Revolution proceeded, the abstract proposition that by nature all men were entitled to govern themselves became a central tenet of American political culture. Americans, however, could not completely foresee how difficult it would prove to square this proposition with the generally accepted truth that only those who owned property could ever expect to be genuinely independent.

C. *The Framework of the Suffrage Debate*

In the decades after the Revolution, most Americans accepted the idea that only people who governed themselves were entitled to claim membership in the "self governing people." People controlled and dominated by others simply could not be trusted with the important task of selecting magistrates and legislative representatives. As Gordon

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53. For an extended version of this argument see generally R. Steinfeld, *supra* note 38. For an account of transformations wrought in the relationship between masters and their journeymen in the decades after the Revolution, see S. WILENTZ, *supra* note 11, at 23-103.

The account of changes in the master-servant relationship offered here represents a considerable simplification. In another place, I argue that the early modern English and American master-servant relationship was actually composed of a number of distinct legal statuses: apprentice, household servant, day laborer, and artificer. Each of these statuses had its own legal incidents. The legal power of masters was considerably greater in some than in others. What all these statuses shared, however, was that at the time the American colonies were settled, all of them required workmen not to depart before they had performed their agreements. While wage-earners were engaged, therefore, none retained complete legal control over their own persons. Over time these statuses changed at different rates, so that by the eighteenth century in the American colonies, day laborers and artisans seem no longer to have operated under the legal injunction not to depart. But some kinds of servants continued to operate under that injunction much longer. It was not until sometime in the nineteenth century that all these statuses were reduced to a single, homogeneous legal category of employment. It was only then that the employment relationship became a relationship in which wage earners generally (except for minor apprentices) retained complete legal autonomy during their employment. *See generally* R. Steinfeld, *supra* note 38.

54. 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, at 550 (Boston 1853) [hereinafter DEBATES AND PROCEEDINGS, MASSACHUSETTS CONVENTION OF 1853] (address delivered by Henry Williams).

Wood has noted, "most of the constitution-makers in the early years of the Revolution assumed, although with increasing defensiveness, that 'sufficient discretion,' making a man '*a free agent* in a *political view*,' was a prerequisite to the right to vote."[55]

If most Americans believed that only the free and independent should participate in self-government, they also continued to believe that only property ownership conferred genuine independence on a man. What is difficult to justify is separating political rights from economic status when both of these propositions are taken seriously. Together, these propositions point directly to the conclusion that political rights must be based on property ownership. The propertyless, because they remain dependent on and subject to the government of men who control resources, cannot be included among the truly self-governing. They will continue to be dependent on and subject to the government of the wealthy.

But the Revolution had also spawned ideas and generated movements which began to make the close identification of political rights with property ownership deeply problematic. Almost as soon as the Revolution broke out, groups of artisans and mechanics began to agitate for suffrage reform.[56] They claimed the maxim "[t]hat all men are by nature *equally free and independent*, and have certain inherent rights" for themselves. And under the banner of equality of right, they began to insist that property owning qualifications betrayed the fundamental precepts of the Revolution. But as they pressed for the separation of political rights from property ownership, claiming that all men regardless of their status were entitled to these rights, not very many of them would have denied that it was only property ownership which made a man genuinely independent. How then could men who owned no property legitimately claim the political privileges of the self-governing?

The debate over suffrage which was initiated during these years con-

55. G. WOOD, *supra* note 15, at 169.

56. For accounts of this artisan agitation for suffrage reform during and following the Revolution see E. FONER, *supra* note 11, at 123-28, 142-44; S. WILENTZ, *supra* note 11, at 66; H. ROCK, *supra* note 11, at 49-51. *See also* G. WOOD, *supra* note 15, at 169. Needless to say, support for suffrage reform came not only from the laboring sections of the population. By 1820,

> *The Niles' Register*, a national spokesman for the manufacturing interest, [took the position] that property tests themselves led to an aristocracy while a personal-property test or universal suffrage led to election frauds. Only a taxpaying qualification was free of these undesirable accompaniments. A proper and just handling of the suffrage, it maintained, was the bulwark against social instability and radicalism.

C. WILLIAMSON, *supra* note 5, at 187. And at least one large New York landowner supported broadened suffrage on the ground that reform was a guarantee to governments of stability and fidelity. *See id.* at 197.

On the other hand, the most insistent critics of extended suffrage were whigs: "In the *North American Review*, the *American Review*, the *American Quarterly Review*, and other journals of whig opinion, writers contemplated with regret the decline of virtue and principle in American political life since the eighteenth century." *Id.* at 287.

tinued for decades. Its structure was relatively simple. Those who sought to maintain property qualifications appealed to the traditional view that property ownership was necessary for personal independence, and hence a prerequisite for political participation. Those who wished to replace formal property owning qualifications with taxpaying qualifications or manhood suffrage appealed to the proposition "that all men are by nature equally free and independent and have certain inherent rights."[57]

But the suffrage reformers' task was not as straightforward as this simple contrast of positions might at first suggest. They vigorously asserted that "by nature all men are equally free and independent." But most of them did not dispute that only property ownership conferred real independence on a man. And most also agreed that the dependent should not be permitted to participate in the self-governing people, even under a broadened suffrage. As a result, when they argued for a broadened suffrage, reformers were faced with the task of reconciling underlying beliefs which appeared flatly contradictory. In order to do so, they had to offer a way of thinking about independence which did not turn on property ownership, but which recognized the indisputable fact that property ownership did bring power, and did confer a degree of personal independence. The process of accommodating these contradictory basic beliefs is the story of how the struggle to extend the suffrage produced a distinctively nineteenth century, hybrid republican-liberal regime of political rights.

D. *The Suffrage Debate in Virginia and Massachusetts*

The struggle over the suffrage which began during the Revolution continued into the 1820s, '30s, '40s, and beyond. During these decades, numerous state constitutional conventions were called to consider and reconsider qualifications for the vote.[58] During this span of time, the overwhelming majority of states replaced their property owning qualifications either with taxpaying qualifications (with or without pauper exclusions), or with provisions for white manhood suffrage (with pauper exclusions). Outside the new Western states, very few departed from these norms by establishing white manhood suffrage without a pauper exclusion.[59]

57. On the use of arguments drawn from natural rights philosophy to justify franchise extensions, see C. WILLIAMSON, *supra* note 5, at 168, 198.

58. Reports on these suffrage debates are available for many of the conventions held during these decades, including those held in Virginia, Massachusetts, New Jersey, Delaware, and New York. Of the latter, only New York did not explicitly adopt a pauper exclusion when it broadened the franchise. In developing an account of the struggle over the suffrage, I rely primarily here on the debates which took place in the Virginia (1829-1830) and Massachusetts (1820) conventions, but also draw on debates from the Delaware (1831) and New Jersey (1844) conventions. In all four of these states the disfranchisement of paupers was integral to the process which broadened the suffrage.

59. State suffrage requirements in the first half of the nineteenth century can be divided

The real issue driving the suffrage debates in this period was whether propertyless wage earners and tenants of land would be permitted to vote. As one Massachusetts reformer observed during that state's 1820 convention, "Who are [the men excluded by the property qualification]? [T]he laboring parts of society? How long have they been fettered? Forty years. Who achieved our independence? This class of men. And shall we then disfranchise them? I hope not."[60]

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into four separate categories. A number of state constitutions both imposed taxpaying requirements for the vote, and explicitly excluded paupers from the franchise. States adopting such provisions (and the dates of their adoption) included: New Hampshire, taxpaying qualification initially adopted by statute in 1775, pauper exclusion added to constitution in 1792, *see* N.H. CONST. of 1784, pt. II, art. 28 (1792) (reprint ed., Concord 1850); Delaware, taxpaying qualification effective 1792, DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 4, at 210, pauper exclusion effective 1831, DEL. CONST. of 1831, art. IV, § 1, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 4, at 222; Massachusetts, taxpaying qualification and pauper exclusion ratified simultaneously in 1822, MASS. CONST. of 1780, amend. art. III (1822), *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 4, at 109; Rhode Island, taxpaying qualification for native-born citizens, freehold qualification for naturalized citizens, and pauper exclusion ratified simultaneously, R.I. CONST. of 1842, art. II, §§ 2, 4 *reprinted in* 8 STATE CONSTITUTIONS, *supra* note 4, at 388-89.

Other states adopted taxpaying qualifications but did not explicitly exclude paupers from the suffrage. These states included: Pennsylvania, taxpaying qualification effective 1776, PENN. CONST. of 1776, "Plan or Frame of Government," § 6, *reprinted in* 8 STATE CONSTITUTIONS, *supra* note 4, at 279, poorhouse exclusion adopted by judicial interpretation in 1877, *see* note 2 *supra*; Georgia, taxpaying qualification effective 1789, GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 4, at 454; Ohio, taxpaying qualification effective 1803, OHIO CONST. of 1802, art. IV, § 1, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 4, at 551; Connecticut, taxpaying qualification ratified 1818, CONN. CONST. of 1818, art. VI, § 2, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 4, at 149; New York, taxpaying qualification ratified 1822, N.Y. CONST. of 1822, art. II, § 1, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 4, at 183, manhood suffrage ratified 1826, residency exclusion for almshouse inmates ratified 1846, N.Y. CONST. of 1846, art II, § 3, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 4, at 194; North Carolina, taxpaying qualification ratified 1854, N.C. CONST. of 1776, art. I, § 3, cl. 2, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 4, at 411.

Still other states adopted white male suffrage along with pauper exclusions. These states included: South Carolina, ratified 1810, S.C. CONST. of 1790, art. I, § 4 (1810), *reprinted in* 8 STATE CONSTITUTIONS, *supra* note 4, at 483; Maine, ratified 1819, ME. CONST. of 1819, art. II, § 1, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 4, at 316; Rhode Island's "People's Constitution," ratified 1841, R.I. "PEOPLE'S CONSTITUTION" of 1841, art. II, cls. 1, 2, *reprinted in* 8 STATE CONSTITUTIONS, *supra* note 4, at 373; New Jersey, ratified 1844, N.J. CONST. of 1844, art. II, § 1, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 4, at 454; Virginia, white male suffrage ratified 1851, VA. CONST. of 1851, art. III, § 1, *reprinted in* 10 STATE CONSTITUTIONS, *supra* note 4, at 71-72, pauper exclusion ratified 1830, VA. CONST. of 1830, art. III, § 14, *reprinted in* 10 STATE CONSTITUTIONS, *supra* note 4, at 64.

Finally, a number of states adopted white male suffrage with no pauper exclusions. These included: Vermont, affirmed by the legislature in 1779, VT. CONST. of 1777, ch. II, § 6, *reprinted in* 9 STATE CONSTITUTIONS, *supra* note 4, at 491; Kentucky, effective 1792, KY. CONST. of 1792, art. III, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 4, at 146; Tennessee, effective 1796, TENN. CONST. of 1796, art. III, § 1, *reprinted in* 9 STATE CONSTITUTIONS, *supra* note 4, at 144-45; Maryland, ratified 1810, MD. CONST. of 1776, amend. art. XIV (1810), *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 4, at 387; Indiana, effective 1816, IND. CONST. of 1816, art. VI, § 1, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 4, at 372; Illinois, effective 1818, ILL. CONST. of 1818, art. II, § 27, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 4, at 240; Michigan, ratified 1837, MICH. CONST. of 1835, art. II, § 1, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 4, at 205.

60. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS, BEGUN AND HOLDEN AT BOSTON, NOVEMBER 15, 1820, AND CONTINUED BY ADJOURNMENT TO JANUARY 9, 1821, at 252 (Boston 1853) [herein-

In 1829, Virginia still required that voters own freehold land. Persons had to own twenty-five acres with a twelve-foot by twelve-foot house, or unsettled land of fifty acres, to be qualified to vote.[61] As was the case with so many of the constitutional conventions called during these post-Revolutionary decades, the suffrage quickly emerged as one of the principal issues in the 1829-30 Virginia convention.

In October, suffrage reformers presented to the convention "The Memorial of the Non-Freeholders of the City of Richmond."[62] The memorialists urged the adoption of a broader franchise. They began their argument from the first principles of post-Revolutionary political theory, including the idea that all power derived from the people, that no man deserved special privileges, and that under the great compact by which their polity was ordered, government and taxation required popular consent. Foremost among these principles, they contended, was the idea "[t]hat all men are by nature equally free and independent, and have certain inherent rights . . . ."[63] But the actual "regulation of suffrage," they argued, in no way accorded with these principles:

> A regulation, which, instead of the equality nature ordains, creates an odious distinction between members of the same community; robs of all share, in the enactment of the laws, a large portion of the citizens, bound by them, and whose blood and treasure are pledged to maintain them, and vests in a favoured class, not in consideration of their public services, but of their *private possessions*, the highest of all privileges; one which . . . is held practically to confer, absolute sovereignty.[64]

But the Virginia reformers' appeals to abstract principles of natural

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after DEBATES AND PROCEEDINGS, MASSACHUSETTS CONVENTION OF 1820] (remarks of Mr. Slocum of Dartmouth); *see also id.* at 251-52 (remarks of Josiah Quincy).

61. "Housekeepers" in Williamsburg and Norfolk could also vote "if they had served to any trade for five years." *See* note 12 *supra*.

62. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, TO WHICH ARE SUBJOINED, THE NEW CONSTITUTION OF VIRGINIA AND THE VOTES OF THE PEOPLE 25 (Richmond 1830) [hereinafter PROCEEDINGS AND DEBATES, VIRGINIA CONVENTION].

63. *Id.* at 26. The memorialists contended:

> Among the doctrines inculcated in the great charter handed down to us, as a declaration of the rights pertaining to the good people of Virginia and their posterity, "as the basis and foundation of Government," we are taught,
>
> "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity . . . .
>
> "That all power is vested in, and consequently derived from, the people.
>
> . . . .
>
> "That no man, nor set of men, are entitled to exclusive or separate emoluments or privileges, but in consideration of public services.
>
> "That all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have a right of suffrage, and cannot be taxed, or deprived of their property, without their consent, or that of their representative, nor bound by any law, to which they have not, in like manner, assented, for the public good."

Id. (from the Memorial of the Non-Freeholders of the City of Richmond, quoting the Virginia Declaration of Rights of 1776).

64. *Id.* (emphasis added).

equality and freedom did not mean they were arguing for universal suffrage. They were not. And that left them open to the gibes of their opponents. "[W]hy," defenders of the status quo taunted reformers, "exclude any from the right of suffrage? . . . Why are not women, and children, and paupers, admitted to the polls?"[65] Some reformers had difficulty answering this question, suggesting only that "we are all agreed" that women, children, paupers, and slaves were not entitled to vote, and that it was inappropriate to test the principle of equality by such "extreme cases."[66]

Other reformers, however, offered what they considered substantial reasons for these exclusions. They argued that the abstract proposition that "all men were by nature equally free and independent" did not mean that all people were, in fact, independent. And in good republican fashion, they affirmed that they only wished to extend the privilege of self-government to those who were independent. But their definition of independence was now quite different from the classic republican one. "[I]t is said," Mr. Cooke of Frederick declared,

> that if it be true that "all men are by nature equally free," then all men, all women, and all children, are . . . entitled to the right of suffrage . . . .
>
> Sir, no such absurdity can be inferred from the language of the Declaration of Rights. The framers of that instrument . . . did not express the self-evident truth that the Creator of the Universe, to render woman more fit for the sphere in which He intended her to act, had made her weak and timid, in comparison with man, and had thus placed her under his *control*, as well as under his protection. That children, also, from the immaturity of their bodies and their minds, were under a like control. They did not say . . . that the exercise of political power, that is to say, of the right of suffrage, necessarily implies *free-agency* and *intelligence*; free-agency because it consists in *election* or *choice* between different men and different measures; and *intelligence*, because on a *judicious* choice depends the very safety and existence of the community. That nature herself had therefore pronounced, on women and children, a sentence of incapacity to exercise political power. They did not say all this; and why? Because to the universal sense of all mankind, these were self-evident truths. They meant, therefore, this, and no more: that all members of a community, of mature reason, and free agents by situation, are originally and by nature, *equally* entitled to the exercise of

65. *Id.* at 68.

66. *Id.* at 414. One reformer argued:

> Mr. Chairman, it has been said . . . that we derive a rule from the law of nature and the Bill of Rights, in relation to suffrage, that is in its terms universal, and that we ourselves abandon it, and thereby prove its fallacy: the females, including one half of the population, are disfranchised at one fell swoop; minors, convicts, paupers, slaves, &c., which together, compose a large majority of every community . . . . For this argument, I have a short answer; it will not do to test any rule by extreme cases. I presume it cannot be necessary for me to assign a reason for the exceptions . . . [because, after all,] [i]n the foregoing exceptions we are all agreed.

Id.

political power, or a voice in the Government.[67]

This answer was particularly good because it reconciled several of the most basic premises of the reformist position. On the one hand, reformers said that the right to the suffrage "has its origin in every human being . . . it is inherent, and appertains to him in right of his existence; his person is the title deed . . . ."[68] On the other hand, they proposed to continue excluding many from the suffrage. But they were not free to argue, as the defenders of the property qualification were, that social status or economic position disqualified these kinds of persons. It was, after all, the reformers' contention that the suffrage right inhered "in every human being," that personhood "is the title deed."

A crucial part of their attack on the status quo had been that property ownership was a purely private matter, holding no significance for legal and political rights.

The suffrage reformers instead justified the continued exclusion of so many from the franchise on the basis of *natural* or *individual* incapacity. This preserved the idea that only the self-governing were entitled to participate in politics, but it added a new twist. Dependence was no longer associated with propertylessness, but dictated by nature and character and embodied in *legal relationships of dependence*, like husband and wife, parent and child, and pauper and town. The law of nature guaranteed the suffrage to all, reformers urged, "unless it be those on whom the same natural law has pronounced judgment of disability [i.e., women and children], or those who have forfeited it by crime or profligacy . . . ."[69] It was precisely because of their perceived natural and individual disabilities that women, children, and paupers continued to be placed under the legal control of those who protected and provided for them.

Those who defended property qualifications began their argument from different premises. The "plain exposition of the origin and formation of society," they contended,

> incontestibly shows that *both Representation and Suffrage are social institutions*. It proves that it is a solecism to insist, that it is proper to refer back to a state of nature, for principles to regulate rights which never existed in it—which could only exist after mankind abandoned it . . . . [I]n deciding upon suffrage, we are deciding *a question of expediency and policy*, and . . . we ought so to regulate it, as will best promote the happiness and prosperity of society.[70]

And only freeholders passed the policy test for reliable republican citizenship. Only the ownership of real property guaranteed that a person had a sufficiently "permanent common interest" with the community to

67. *Id.* at 55-56.
68. *Id.* at 412.
69. *Id.*
70. *Id.* at 364 (emphasis added).

be trusted with the right of election.[71]

But according to defenders of the status quo, something equally important lay behind the freehold qualification. It kept those without "wills of their own" from voting. In Virginia, defenders of the freehold qualification argued, its elimination would mean the enfranchisement of leaseholders and wage earners, men who by virtue of their economic dependence were not their own rulers. "[T]emporary [leasehold] interests [in the soil] give a control to others, over the votes of the holder, just as certainly, as that 'a control over a man's subsistence, is always a control over his will.' "[72]

Proponents of property qualifications repeatedly made this kind of argument in the conventions of the early nineteenth century. In the 1820 Massachusetts convention, for example, Josiah Quincy made an eloquent plea for retention of property qualifications[73] in nearly identical terms. He was concerned that if wage earners were enfranchised, they would become a dangerous source of corruption in a republican polity. "The theory of our constitution," he declared, "is, that extreme poverty—that is, pauperism—is inconsistent with independence. It therefore assumes a qualification of a very low amount, which, according to its theory, is the lowest consistent with independence."[74] "At the present day," Quincy went on to add, the property qualification is

> probably worth very little. . . . But prospectively, it [is] of great consequence. . . . Everything indicates that the destinies of the country will eventuate in the establishment of a great manufacturing interest in the Commonwealth. There is nothing in the condition of our country, to prevent manufacturers from being absolutely dependent upon their employers, here as they are everywhere else. The whole body of every manufacturing establishment, therefore, are dead votes, counted by the

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71. *Id.* As a defender of the property qualification argued:

> [S]ufficient evidence of common, permanent interest, is only to be found in a lasting ownership of the soil of the country.
>
> This kind of property is durable, it is indestructible; and the man who acquires, or is the proprietor of it, connects his fate by the strongest of all ties, with the destiny of the country. No other species of property has the same qualities, or affords the same evidence. Personal property is fluctuating—it is frequently invisible, as well as intangible—it can be removed, and can be enjoyed as well in one society as another. What evidence of permanent interest and attachment, is afforded by the ownership of horses, cattle, or slaves? Can it retard or impede the removal from the State, in times of difficulty or danger impending over it? What security is the ownership of Bank or other stocks, or in the funded debt? None. A man may transfer this kind of property in a few moments, take his seat in the stage, or embark in the steamboat, and be out of the State in one day, carrying with him all he possesses.

Id.

72. *Id.* at 364-65.

73. In Massachusetts, unlike Virginia, ownership of *personal* as well as *real* property qualified men to vote in the period before the state adopted a taxpaying qualification. *See* MASS. CONST. of 1780, pt. II, ch. I, §§ 2 (art. II) and 3 (art. IV), *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 4, at 98, 100.

74. DEBATES AND PROCEEDINGS, MASSACHUSETTS CONVENTION OF 1820, *supra* note 60, at 251. Notice that Quincy does *not* use the term "pauper" here to refer to those in receipt of public assistance, but to the very poor, those without either real or personal property.

> head, by their employer. Let the gentlemen from the country consider, how it may affect their rights, liberties and properties, if in every county of the Commonwealth there should arise, as in time there probably will, one, two, or three manufacturing establishments, each sending, as the case may be, from one to eight hundred votes to the polls depending on the will of one employer, one great capitalist.[75]

Suffrage reformers offered several responses to the arguments made by the defenders of property qualifications. The first drew on ideas introduced by the Scottish Common Sense school. The reformers argued that one did not have to own land to feel deep attachment to the community. "Virtue [and] intelligence," the non-freeholders of Richmond insisted, "are not among the products of the soil."

> Attachment to property, often a sordid sentiment, is not to be confounded with the sacred flame of patriotism. The love of country, like that of parents and offspring, is engrafted in our nature. It exists in all climates, among all classes, under every possible form of Government. Riches oftener impair it than poverty. Who has it not is a monster.[76]

The second argument was a sophisticated challenge to the basic premises behind the identification of property ownership with personal independence. If the true measure of individual autonomy was economic independence, the reformers pointed out, in a commercial society one would have to look to something more than property ownership to determine whether people were truly independent. Rather, one would have to examine their balance sheets. It was the very essence of commercial society, after all, that all kinds of people exercised economic leverage over other people, even over people who owned property. If political rights depended on economic independence, then many people, including freeholders, would have to be disfranchised. "[T]he gentleman . . . yesterday," one reformer argued,

> objected to tenants being voters, because, said he, the landlord held them by their very heart-strings; could distrain upon them, sell their last cow, and even the cradle on which their infants reposed. If the gentleman's argument be a good one, I think it will prove too much . . . .
>
> [W]ill not the reasons assigned . . . for the exclusion of tenants, operate in equal degree to exclude his own favorite freeholders? [W]ill it not furnish a good reason for excluding every man that is indebted, and for putting the Government in the hands of the creditor class of the community? And if this be the rule of exclusion, how many of the freeholders, think you, will be excluded? I venture to affirm at least one half or three-fourths: is there not that proportion indebted to their neighbours, their merchants, to the Banks, &c., by account, by bond, and by trust deed, or otherwise; and will not a debt have the same influ-

75. *Id.* at 251-52. Similar concerns were expressed in Virginia. *See* PROCEEDINGS AND DEBATES, VIRGINIA CONVENTION, *supra* note 62, at 28, 158-59.

76. PROCEEDINGS AND DEBATES, VIRGINIA CONVENTION, *supra* note 62, at 27 (Memorial of the Non-Freeholders of the City of Richmond).

> ence upon a freeholder, as upon a tenant or other non-freeholders? Indebtedness is, in substance, the reason assigned for excluding the tenant; and can it be a matter of any importance what sort of debt it be, whether it be for rent or any other consideration; whether it be collectable by distress-warrant, or by fieri facias, whether the cow or the cradle be sold by the constable, the sheriff, or a trustee or marshal, or whether the person indebted be turned out of possession by notice, to quit if a tenant, or by a *habere facias possessionem*, or *sesinam* if a mortgaged freeholder?[77]

Thus, the reformers noted that in a commercial society, no clear boundary between economic dependence and independence could be drawn at the property line. Very few men were completely independent, and the economic position of most was neither absolute dependence nor independence, but some relative level of economic vulnerability. In such a society, the reformers argued, the true measure of independence should be whether a man "manage[d] . . . his private affairs."[78] In other words, the real question in separating the self-governing from the dependent should be whether a man had the *legal right* to dispose of himself or whether that right of control lay in another.[79]

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77. *Id.* at 415-16.

78. *Id.* at 27. In 1829, this was not a new idea. Radicals had been arguing for decades that he "who *has a will and understanding of his own* capable to manage his affairs" should be entitled to vote. G. WOOD, *supra* note 15, at 231 (emphasis in original). The idea, of course, goes back further still. During the English Revolution of the seventeenth century, the levellers had employed a similar distinction in arguing for their version of suffrage reform. *See* C. B. MACPHERSON, *supra* note 51, at 142-54; *see generally* THE LEVELLER TRACTS, 1647-1653 (W. Haller & G. Davies eds., reprint. ed. 1964).

79. *See* PROCEEDINGS AND DEBATES, VIRGINIA CONVENTION, *supra* note 62, at 55-56. This was actually only one form of the test proposed by suffrage reformers. The other distinguished those who would be entitled to vote from those who would not by asking whether they had fulfilled their personal duties to the polity like taxpaying or militia service. One Virginia reformer explained:

> What I mean by General Suffrage, is the extension of that inestimable right of voting . . . to all white freemen of the age of twenty-one years and upwards, who are citizens by birth or residence for a certain time, *and who have discharged all the burthens personal, including militia duties, and pecuniary, such as taxes, imposed upon them by the laws of the land* . . . . In other words, I wish to establish a qualification that is personal, and respects age and residence, and to abolish forever the freehold qualification, which to me has always appeared an invidious and anti-republican test.

Id. at 410 (emphasis added).

If the legal right of self-government stood as the direct rationale for pauper exclusions, the fulfillment of personal political duties stood directly behind tax paying qualifications. We might almost call the first kind of test a possessive individualist test and the second a republican test for wage earners. The deep connection between them in the minds of contemporaries, however, seems to have been that political capacity demanded that individuals command resources at least sufficient for them to fulfill their various duties of support. Full members of the polity should, on the one hand, fulfill their duty to maintain themselves and their dependents, their families. On the other hand, as members of the self-governing people, they should fulfill their political duty to contribute to the maintenance of their government. Full members of the polity should be sharing in the burdens of supporting it. Though the rationales differed, both tests generally functioned to enfranchise wage earners and to disfranchise the destitute. This effect was intended. For what was critical to contemporaries in distinguishing between those with political capacity and those without was that the gainfully em-

V. Redefining Independence by Disfranchising Paupers

A. *The Creation of a New Test for Independence: Legal Self-Government*

This new way of thinking about personal independence was plausible to many Americans in this period precisely because of the implicit and familiar contrast between people who controlled themselves and the many adults who still did not enjoy that right. In the relationships of "legal dependence" still common in the early nineteenth century, not only wives and children, but also paupers, lacked the right of legal disposal of their own persons. They were not self-governing, in that they were *legally* obligated to obey the reasonable commands of their providers. In particular, they could not dispose of their energies according to their own desires; their labor was the property of their providers.

In 1833, the Massachusetts Supreme Judicial Court described the legal relationship between towns and paupers this way:

> Towns are bound by law to support, comfortably, all such of their inhabitants as may from time to time fall into distress and stand in need of relief, and to continue such support so long as it may be needed; and during its continuance they are entitled to the reasonable services of those supported by them . . . . The rights and duties of towns and paupers are correlative. While the town supports the pauper, the pauper is bound to labor for the town. But when the support becomes unnecessary, the right to control the labor ceases.[80]

As late as the 1880s, in some locales, paupers continued to be legally bound to serve the town which was supporting them. In 1884, for example, Connecticut towns were still farming out their paupers and still assigning the rights to their labor. In Groton, Connecticut, "the keeper of the town poor" still operated "under a written contract, [by which he] receiv[ed] an annual compensation for three years of $2,300, and for an additional term of three years the annual sum of $2,800, *and the services of the paupers during both periods*."[81]

In contrast to these legally dependent persons, those who had the legal right to control themselves, though they were otherwise propertyless, began to appear autonomous in a way which also made them appear qualified to participate in government. By this time, as we have seen, wage earners were included among the legally autonomous.[82] They entered employment through "contracts," and were understood to retain the legal control and disposal of their own persons under all circumstances.[83] The employment relationship no longer took the

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ployed among the propertyless had the capacity to fulfill their political and domestic duties of support; paupers and the destitute did not.

80. Wilson v. Brooks, 31 Mass. (14 Pick.) 341, 343 (1833).

81. Fish v. Perkins, 52 Conn. 200, 201 (1884) (emphasis added).

82. *See* notes 53-54 *supra* and accompanying text.

83. *Id.*

form of a legal relationship of dependence. Wage earners were no longer legally analogous to wives, children, and paupers, but stood as their binary opposites: wage earners legally autonomous; wives, children, and paupers legally dependent and bound.

In many of the states which broadened their suffrage in these years, the legal right to self-government became a primary test for separating those who were entitled to the franchise from those who would continue to be disfranchised.[84] In Delaware, the 1831 convention added a pauper exclusion to the taxpaying qualification which had been in effect since 1792. The committee which introduced the pauper clause explained to the convention that "[p]aupers who live on the public funds, and *who were under the direction of others, who might control their wills*, ought not to be permitted to vote."[85]

But this test of legal self-government was also applied in Delaware to disfranchise members of the United States armed forces stationed there, on the ground that "such persons were under the influence of others, that they were bound to obey orders, that they were in a special sense the servants of the U[nited] States, and as such disposed to gratify the wishes of the Executive of the United States."[86] Indeed, one member of the convention wanted to carry the principle further. He moved to add "servants" to the disfranchised category, arguing that "[t]here were servants known to the laws, as persons convicted of crimes and sold to discharge jail fees . . . [who] were still citizens, and as such might be taxed, and might vote, though under the control of others."[87] But the convention ultimately rejected this proposal because, as one member observed, "it might exclude those who *voluntarily* contracted to serve others,"[88] and who were now commonly considered to be legally autonomous.

When New Jersey introduced white manhood suffrage in 1844, it excluded paupers, idiots, and the insane from the franchise. In the convention debates, members pointed to the absence of the legal right to self-possession as the reason for excluding paupers. The drafters of the pauper exclusion thought:

84. The other primary test required that voters fulfill their personal political duties toward the republic. *See* note 79 *supra*. For a comparison of the tests proposed in Germany at the abortive constitutional convention of 1849, see Rose, *The Issue of Parliamentary Suffrage at the Frankfurt National Assembly*, 5 CENT. EUR. HIST. 127 (1972). Both the range of tests and the ultimate outcome were remarkably similar to the earlier American experience. In the German convention, liberals apparently opened by proposing an "independence" test defined to exclude "minors, bankrupts, servants, factory workers and journeymen, farmhands, [and] poor-relief recipients." *Id.* at 132. Ultimately, however, the convention adopted a test which allowed all males who were twenty-five or older to vote except for "bankrupts, poor-relief recipients, and persons in the guardianship of others." *Id.* at 143.

85. DEBATES OF THE DELAWARE CONVENTION, FOR REVISING THE CONSTITUTION OF THE STATE OR ADOPTING A NEW ONE; HELD AT DOVER, NOVEMBER, 1831, at 23 (1881) (emphasis added).

86. *Id.* at 24.

87. *Id.* at 163.

88. *Id.* at 164 (emphasis added).

> [W]hen a man is so bowed down with misfortune, as to become an inmate of a poor house, . . . he voluntarily surrenders his rights. . . . [I]t is so considered in law. He parts with his liberty—he loses his control of his children and he labors for others. . . .
>
> . . . Can we regard [paupers] as free agents? [A]s qualified to vote? No, sir! No, sir![89]

When the Maine Supreme Court was asked by Maine's House of Representatives to render an opinion on the precise scope of that state's pauper exclusion, the court provided a similar rationale. Noting that disfranchisement was appropriate for those lacking "understanding, discretion or power of self-government," the court explained that "paupers are excepted because they are dependent upon and under the care and protection of others, and necessarily feel that they cannot exercise their judgment or express their opinions with any independence."[90]

This understanding of independence played an important role not only in states which adopted pauper exclusions, but also in states which were adopting taxpaying qualifications. In these states, contemporaries well understood, the practical result of taxpaying qualifications was to enfranchise the self-supporting wage earner and to disfranchise the destitute. "When a government extends the right of suffrage to all persons . . . who have paid . . . a [poll] tax," one Massachusetts man wrote, "it practically gives the right to everybody not a pauper; for, among the able-bodied poor, and among all who maintain themselves by labor of all descriptions, there are very few persons indeed who cannot pay . . . seventy-five cents in a year . . . ."[91]

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89. NEW JERSEY WRITERS' PROJECT OF THE WORKS PROGRESS ADMINISTRATION, PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 88-89 (1942) [hereinafter PROCEEDINGS, NEW JERSEY CONVENTION OF 1844]. In words reminiscent of those Josiah Quincy had used twenty years before in Massachusetts to explain why employees in large factories should not be permitted to vote, *see* text accompanying note 75 *supra*, one delegate drew a vivid picture of the dangers involved in permitting paupers to vote. "How humiliating a sight would it be, sir," he argued, "to see a band of these paupers led up to the ballot box, and deposit their votes by the tricks of their master!" PROCEEDINGS, NEW JERSEY CONVENTION OF 1844, *supra*, at 88. Others at the convention did try to argue that the proposed pauper exclusion was inconsistent with the principle that there should be no pecuniary qualifications for the vote. *Id.* at 89-90, 429-32. But this argument failed to carry the convention. *Id.* at 584.

90. 7 Me. 497, 498 (1831) (advisory opinion).

91. DISCUSSIONS ON THE CONSTITUTION PROPOSED TO THE PEOPLE OF MASSACHUSETTS BY THE CONVENTION OF 1853, at 54-55 (Boston 1854) [hereinafter DISCUSSIONS ON THE PROPOSED MASSACHUSETTS CONVENTION] (letter by G.T. Curtis). The view that only those who shared in the burdens of maintaining the republic should be entitled to vote, that taxation and representation should go hand in hand, *see* note 79 *supra*, was repeated over and over again in the conventions which adopted taxpaying qualifications. The new conception of independence nevertheless played an important role in their adoption, even where they were not accompanied by formal pauper exclusions. The general effect of taxpaying qualifications in states which had a poll tax, as contemporaries well understood, was to enfranchise the self-supporting wage earner while disfranchising the destitute, as pauper exclusions also tended to do.

B. *Wage Earning as a Standard of Independence*

As reformers won in more and more states, expanding the suffrage and bringing more working men into the political process, the idea of legal self-government as a way of understanding independence and dependence, and of allocating political rights, began to supplant the very different classical republican understanding of personal independence. In this new Jacksonian world of the nineteenth century, the crucial distinction between the independent and the dependent began to turn on whether a man legally disposed of his own labor, and supported himself and his dependents, or whether he was forced into dependence on poor relief. As one reformer in the 1820 Massachusetts convention said of "laboring men": "[T]hey have no freehold—no property to the amount of two hundred dollars, but they support their families reputably with their daily earnings."[92]

Increasingly, in American political and legal culture, the test for separating the self-governing from the dependent was becoming whether a person supported himself by earning wages or was dependent on poor relief. And it was applied to draw a bright line between the independent and the dependent even under highly ambiguous circumstances. In 1877, for instance, the Pennsylvania Supreme Court employed just this kind of test to decide who might legitimately be omitted from voting lists under the new Constitution of 1873.[93] Employees of almshouses, the court explained, were not paupers (and thus were entitled to vote), even if they once had been paupers, because they "are now in good faith employed at wages, even though small, and . . . clothe themselves, and are at liberty to leave their places at their

Though the formal rationales for the two kinds of clauses differed, both expressed a changed attitude toward the political capacity of wage earners.

Most states which adopted taxpaying qualifications had some form of poll or capitation tax. Hence, in such states "[w]ith taxation of adult males almost universal, a taxpaying suffrage was almost universal suffrage." C. WILLIAMSON, *supra* note 5, at 136. For a list of states which had some form of capitation tax during this period, see H. ADAMS, TAXATION IN THE UNITED STATES, 1789-1816, at 314 (1884). For those where capitation taxes were combined with a taxpaying qualification, see C. WILLIAMSON, *supra* note 5, at 136, 181, 194. In states which did not have a poll tax, on the other hand, where only personal or real property was taxed, the taxpaying qualification could amount to a property test. *Id.* at 271.

Nevertheless, some states did add pauper exclusions to taxpaying qualifications. One reason may simply have been that the two kinds of exclusions rested on separate rationales. See, for example, the discussion of the two kinds of exclusions by the Massachusetts Supreme Judicial Court, 28 Mass. (11 Pick.) 538 (1832) (advisory opinion). But there were probably practical considerations as well. The coverage of the two exclusions could be different. Taxpaying clauses were both narrower and broader. Many stated that one could vote if one had paid a tax within the prior one or two years. Under these clauses, it was possible for someone to be eligible to vote even if they were currently receiving poor relief, if they had paid a tax within the requisite period. But tax clauses could also have broader coverage. They tended to disfranchise people who would not have been disfranchised under pauper clauses. Not only most recipients of poor relief, but the destitute generally, those who were excused from paying taxes, were frequently disfranchised under the tax clauses.

92. DEBATES AND PROCEEDINGS, MASSACHUSETTS CONVENTION OF 1820, *supra* note 60, at 252 (remarks of Mr. Austin of Boston).

93. Murray's Petition, 5 Weekly Notes of Cases 9 (Pa. 1878).

own free will . . . ."[94] In contrast, the court excluded from the suffrage former paupers who received no wages, but who worked in an almshouse for room and board: "We think it is more in accordance with the language and spirit of the Constitution to treat such persons as still in the class of paupers. They are not free and self-supporting citizens, and are therefore deprived, for the time, of their political privilege of voting."[95]

As early as 1833, the Massachusetts Supreme Judicial Court had similarly made the ability to maintain oneself by selling one's labor for wages the test for determining whether a person was legally independent. In deciding the case of one individual, a man of "small mental capacity," the court stated:

> [H]e had bodily health and strength; could perform many kinds of labor on a farm; and was able to earn more than enough to support himself. He was willing to labor for the defendant, and the defendant was willing to employ and to pay him wages . . . . Can such a person be considered a pauper? We think not.[96]

By mid-century, it seemed, this identification of political capacity with the ability to sell one's labor had become even more firmly established. Increasingly, contemporaries answered the question why paupers should be excluded from voting by explaining that "a man who cannot maintain himself by his labor . . . has not the mental and moral qualifications which make him a fit depositary of political power."[97]

In this new world, independent wage earner and dependent pauper emerged together and created one another. The dependence of the pauper defined by contrast what made the wage earner self-governing even though he owned no property. At the same time, the contrast between "independent wage earner" and "dependent pauper" began to play a role in shaping the way working men experienced their own lives. By the 1840s, activists in the labor movement were concerned

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94. *Id.* at 9.

95. *Id.*

96. Wilson v. Brooks, 31 Mass. (14 Pick.) 341, 343-44 (1833).

97. DISCUSSIONS ON THE PROPOSED MASSACHUSETTS CONVENTION, *supra* note 92, at 56 (letter by G.T. Curtis). A similar process occurred in England. Gertrude Himmelfarb writes that the English Poor Law of 1832 was part of a new cultural universe structured very differently from the old. "The [old] Elizabethan laws were, in fact, genuinely and unambiguously 'poor' laws precisely because they did not make any sharp distinction between poor and pauper." G. HIMMELFARB, THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE 160 (1984). By the 1830s, in contrast,

> the marketplace recognized . . . only . . . "contracts"—contracts freely entered into by free men, by "independent laborers" and (it went without saying) independent employers. In that contractual world the pauper had no part. He might be taken care of, indeed the New Poor Law made elaborate arrangements to take care of him, but it did so outside the framework of the market. Since that framework defined the boundaries of society, the pauper was, by definition so to speak, an outcast—an outcast not so much by virtue of his character, actions, or misfortunes, but by the mere fact of his dependency, his reliance on relief rather than his own labor for his subsistence.

Id. at 183.

that pauperism was on the increase,[98] and working men began to worry about winding up in the poorhouse. "To end one's years at the Alms House among paupers and criminals," Paul Faler writes, "was a fear that haunted many mechanics . . . ."[99] Through their efforts to bring about fundamental transformations in the terms of the franchise, and in the traditional conception of the employment relationship, working men themselves were partly responsible for the creation of this new distinction.[100] As these changes penetrated social life, the definition of freedom as self-ownership, and the contrast between "independent wage earner" and "dependent pauper," became more than an abstract proposition. White wage earners might find it difficult to imagine themselves in the position of black slaves,[101] but they had little difficulty imagining themselves falling into pauperism. As dependent paupers they could be institutionalized, let out to contractors of the poor for their labor, or compelled to perform labor for a town. With the spectre of the poorhouse hanging over them, the *legal* freedom to come and go as they wished, to sell their labor to whomever they desired, and to be *legally* obligated to obey no man's commands, could very well begin to feel like genuine freedom.[102]

C. *The Problem of Propertylessness and the Self-Governing Wage Earner*

These developments did not mean that wage earners had stopped

98. " 'Thirty years ago,' " one labor leader observed, " 'the number of paupers in the whole United States was estimated at 29,166, or one in three hundred. The pauperism of New York City now amounts to 51, 600, or one in every seven of the population.' " N. WARE, THE INDUSTRIAL WORKER, 1840-1860: THE REACTION OF AMERICAN INDUSTRIAL SOCIETY TO THE ADVANCE OF THE INDUSTRIAL REVOLUTION 27 (1924) (quoting G.H. Evans, in *The Working Man's Advocate*, July 6, 1844). On the constant and pervasive economic vulnerability even of skilled journeymen, see S. WILENTZ, *supra* note 11, at 50-51.

99. P. FALER, MECHANICS AND MANUFACTURERS IN THE EARLY INDUSTRIAL REVOLUTION: LYNN, MASSACHUSETTS, 1780-1860, at 173 (1981).

100. For a discussion of the impact which the Revolution had on the traditional master/servant relationship, see R. Steinfeld, *supra* note 38. *See also* S. WILENTZ, *supra* note 11, at 23-103 (discussion of the changes in the relationship between journeymen and their masters occurring in the decades following the Revolution).

101. Recently, certain historians of labor have portrayed pre-Civil War abolitionists as propagators of an emergent ideology of possessive individualism. They have accused abolitionists of pressing the novel view that freedom was a matter of self-ownership. Eric Foner, for example, has noted that "[William Lloyd] Garrison, defending capitalist labor relations, viewed the ability to contract for wages as a mark of liberty . . . ." E. FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 71 (1980).

Our account of suffrage reform in the early decades of the nineteenth century suggests, on the contrary, that this definition of freedom was not limited to a small band of abolitionists. Over a long period of time, it was being built into the very foundations of American legal and political culture.

102. Jonathan Prude has shown how the freedom to come and go was used by Massachusetts mill workers in the 1820s and 1830s to maintain a modicum of independence. "Indeed, among workers who rarely voted and whose other forms of resistance had only limited effect, mobility may well have emerged as the principal means of avoiding 'corrupt' dependency on their employers—of asserting independence." J. PRUDE, *supra* note 41, at 148. For a general discussion of this point, see *id.* at 144-57. On the bargaining power which mobility gave tenants and wage laborers, see S. INNES, *supra* note 32, at 39.

believing that only property ownership made men truly independent, or that property conferred power. On the contrary, increasingly they denounced their employment as wage slavery.[103] What these developments meant, rather, was that American culture and experience now embraced two contradictory versions of the independence/dependence distinction. One drew the line at property ownership, the other at self-ownership. In a sense, the two versions had long played roles in Anglo-American culture, but now their positions were reversed.[104] The one, based on property ownership, which had previously been "established," was being disestablished. The other, based on self-ownership, was being established in its place.

Increasingly, political rights were being linked, even if sometimes indirectly, to self-ownership rather than to property ownership. Property ownership, in turn, was relegated to the realm of the "private." Property might confer independence and give power, but that was only a matter of private relationships between individuals in civil society. The power of property to govern was being disestablished, and by virtue of disestablishment became more difficult to see and attack. In the official realm, the realm of legal and political rights, less and less turned on property ownership. Legal autonomy and the political right of self-government were beginning to be guaranteed to virtually all men who could support themselves by their own labor.

When working men began to press for the abolition of property qualifications for the vote on the ground that they were independent, self-governing individuals, even though they owned no property, their agitations contributed to splitting the traditional universe into distinct realms. In the new universe which their agitations helped to bring into being, property ownership would be formally divorced from governance. Governance was to occupy one realm, the public realm; property ownership was to be consigned to another, the realm of purely private relationships between juridical equals. Consigned to the realm of the private, the power over persons which property conferred lost its quality as "government" and became mere "private economic power."

In a world split apart in this way, the contradictory propositions that all men were entitled to govern themselves, but that propertylessness meant dependence and subjection, could both be accommodated. In the first instance, this accommodation was managed by consigning each version of the independence/dependence distinction to its own realm. The independent wage earner/dependent pauper distinction began to apply primarily to the public realm, the realm of legal and political rights. In this realm, all *capable* men were indeed beginning to exercise the rights of self-government. The truth that propertylessness meant

103. *See* D. MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872, at 30 (1967); *see also* N. WARE, *supra* note 98, at xv-xvi.

104. See note 78 *supra* for the historical roots of the view that the suffrage should be expanded to those who had the legal right of self-government.

dependence and subjection was beginning to be a truth limited to the realm of private relationships.

But the structure of mediation in this new universe was even more complex and multi-layered.[105] The independent wage earner/dependent pauper distinction itself played a direct role in mediating the contradictory premises of political culture. The new distinction radically narrowed the idea of dependence. Dependence became "legal dependence." Paupers, wives, and children were thus dependent, but wage earners, by this time, were not.

In this new world, propertylessness in itself made no one dependent. The propertyless who supported themselves by selling their labor were in all *legal* and *political* senses their own masters. They had merely contracted with their employers to perform labor, and were as free to leave as they had been to enter such relationships. The propertyless only became dependent by accepting poor relief and assuming the legal status of pauper. As the Maine Supreme Court observed in 1831:

> Property is not one of the necessary qualifications [for the vote in the state of Maine]. . . . Paupers, then, are not excepted merely on account of their poverty. There must have been some other reason for their exclusion from the class of qualified voters . . . . [P]aupers are excepted because they are dependent upon and under the care and protection of others . . . .[106]

Only dependent paupers were governed. But even they were not subject to the *personal government of other men.* By this time, paupers were considered wards of the "public."[107]

But while this conceptual universe divorced dependence from propertylessness, it simultaneously acknowledged the intimate connection between the two, as indeed it had to, if it was to serve as a plausible depiction of social and political life. It reaffirmed the unarguable truth that property and independence were connected. But it did so by projecting this truth through the prism of a narrowed legal understanding

105. In addition to the ones we discuss, several other mediating devices emerged to deal with this problem. Perhaps the earliest was the Jeffersonian image of a yeoman republic that resolved the dilemma mainly by ignoring the propertyless. This image characterized the nation as one composed overwhelmingly of small, independent freeholders. When propertyless wage earners became too important in the life of the nation to ignore, equality of opportunity began to gradually supplant the image of the yeoman republic. *See* D. MONTGOMERY, *supra* note 103, at 30-32. According to this view, capable men might begin their lives as propertyless apprentices or hirelings, but almost everyone had the opportunity to acquire property and ultimately to become his own master.

106. 7 Me. 497, 498 (1831) (advisory opinion).

107. During both the eighteenth and nineteenth centuries, paupers were primarily the responsibility of towns and parishes. But the basic status of towns changed in fundamental ways during that time. Where previously towns had been understood to be mixed public/private bodies, by the third decade of the nineteenth century they had been redefined as purely public and governmental. *See* Frug, *The City As a Legal Concept*, 93 HARV L. REV. 1057, 1099-1105 (1980); *see also* H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 191-204 (1983).

of dependence. The propertyless were dependent only insofar as they were so utterly destitute that they had to accept public assistance. Only paupers were *genuinely* propertyless; they had been deprived of even the property in their own labor. The rest of the propertyless were independent, self-supporting citizens precisely because they possessed valuable property in their own labor. In the contractual realm of civil society, wage earners dealt with the propertied as full juridical equals.

Recast in this way, the indisputable truth that property ownership was necessary for self-government began to appear compatible with the proposition that all men were entitled to govern themselves. The dangerous truth that propertylessness involved subjection to other men had been partially neutralized. The utterly destitute segment of the propertyless, the genuinely dependent, were, by definition, those who had failed even to enter into contractual relationships with the propertied. Their destitution placed them entirely outside the boundaries of civil society, as wards of the public. In this form, the politically charged connection between propertylessness and subjection could be carried forward more safely. There was no possibility, however, in a universe in which all capable men were thought to be entitled to govern themselves, that the problem of property ownership could be permanently laid to rest. It was and would remain one of the most basic and intractable problems in American political culture.[108]

As the nineteenth century wore on, wage earners vigorously insisted that the power of property made them slaves to their employers. They could appeal to deeply entrenched republican beliefs to support their claims, but their argument was now more difficult and more contradictory. For decades wage-earners had argued that they merited the vote precisely because they were among the self-governing, and that they were among the self-governing because they owned and disposed of themselves. Their propertylessness, they had contended, made no difference. Having prevailed in that contention, having won the franchise, and having gained *legal* autonomy in the employment relationship, it became paradoxically difficult for wage-earners to argue that their propertylessness subjected them to the rule of other men.[109]

108. For an excellent discussion of this problem during the Civil War era, see generally D. MONTGOMERY, *supra* note 103.

109. Needless to say, this universe was not created unilaterally by laboring men. Rather, it was the product of a complex process which had seen laboring people achieve some of their transformative political-legal and social objectives, but fail completely to achieve others. During the Revolution, for example, radical artisans in Pennsylania had agitated for the adoption of so-called agrarian laws. These laws would have limited the amount of property any one individual could legally accumulate. And such legislation did find support in aspects of classical whig thought. Had agrarian laws achieved wide acceptance after the Revolution, the universe of the nineteenth century might have looked quite different. In a more egalitarian republic, independence and property ownership might have continued to be linked. On the demand for agrarian laws in the period of the Revolution, see Nash, Smith & Hoerder, *Labor in the Era of the American Revolution: An Exchange*, 24 LABOR HIST. 414, 430-32 (1983). *See also* G. WOOD, *supra* note 15, at 89.

Throughout much of the nineteenth century, labor had to contend with this basic contradiction. Equally important, working men had to contend with a parallel, contradictory sense of freedom and unfreedom in their own lives. They celebrated their independence, and considered themselves free and self-governing men, even though they owned no property; and yet they also experienced their propertylessness as wage slavery. As a consequence of the "disestablishment" of property, labor found itself in the unenviable position of having to argue and live out these contradictory propositions. Together with the greater difficulty involved in "seeing" the disestablished power of property, labor's contradictory experience operated simultaneously to reinforce and bring into question the assumptions upon which the nineteenth-century social universe increasingly rested. The position of labor subtly legitimated the existing order even as it stood as testimony to its utter falsity.

VI. The Problem of Keeping Independent Wage Earners and Dependent Paupers Categorically Distinct

The new social and legal construction of the world required a very delicate balance between the most basic competing principles of American political culture. But the boundary on which this balance depended was not completely stable. The realities of cyclical and seasonal unemployment, and of poor relief, made it very difficult to keep the two categories of the propertyless—independent wage earners and dependent paupers—sealed tightly in separate compartments. The tendency of the bright line to blur posed the danger that a universe constructed by the opposition of independent wage earner and dependent pauper might collapse back into a world of the undifferentiated propertyless and the propertied.[110]

In 1831, Maine's House of Representatives asked the Maine Supreme Court to render an advisory opinion on the state's pauper disfranchisement clause. The Representatives wanted to know "what length of time after receiving [assistance under the poor law] is necessary to restore [a pauper] to the privileges of an elector?"[111] The Court answered without hesitation. "[A] man," it declared, "is to be considered a pauper so long as he receives supplies, as such, from the town where he resides, but no longer."[112]

A pair of Massachusetts Supreme Judicial Court opinions from this period reveal just why it was considered so important to restrict the

110. On this style of organizing the political-legal universe into vacuum-bounded binary opposites, see Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 Buffalo L. Rev. 383 (1979).

111. 7 Me. 497, 497 (1831) (advisory opinion).

112. *Id.* at 499. But, employing some questionable reasoning, the court went on to add that since one had to have resided in a town for at least three months prior to an election in order to qualify to vote, one could not have received assistance during the three-month period directly preceding an election. *Id.* at 499-500.

term "pauper" to "actual" recipients of poor relief, and why simultaneously it proved so difficult to do so. In the first opinion, rendered in 1832 to the State Senate, the court declared that persons who had been exempted from taxation under the tax statutes by reason of age, infirmity, or poverty were *not* "paupers" for purposes of the franchise.[113] Although admitting that in "a certain loose and indefinite sense, the persons in question may be called paupers," the court ruled that under the constitutional provisions dealing with suffrage, "the word *'paupers,'* had acquired a precise and technical meaning, and was understood to designate [only] persons receiving aid and assistance from the public, under the provisions made by law for the support and maintenance of the poor . . . ."[114]

The danger in reading the term "pauper" broadly was obvious to the court. A broader reading might result in the disfranchisement as paupers of other poor persons, perhaps even of self-supporting though propertyless wage earners. "[I]f [the term] were intended to be understood . . . as extending to all poor persons, it might go to exclude those from voting, whose poverty might be manifested in other modes than [that they have been excused from paying taxes] . . . ."[115] But twenty years later, in another context, the same court was forced to adopt virtually the same broad definition of "pauper"-as-poor-person which it had previously rejected. In *Hutchings v. Thompson*,[116] a grandparent refused to pay for the maintenance of his grandchildren, under a statute making kindred financially responsible for their "pauper" relatives. He argued that since the grandchildren had not actually received poor relief, they were not "paupers" within the scope of the statute.[117] The

113. 28 Mass. (11 Pick.) 538, 540 (1832) (advisory opinion).

114. *Id.* At the same time, the Massachusetts court did not seem nearly so concerned with reading the taxpaying clause narrowly. In a series of opinions, the court read that clause to exclude from the franchise many who arguably should have been included. In this period, tax statutes commonly permitted assessors to exempt from the tax lists those who "through age, infirmity or poverty, may be unable to contribute." *Id.* at 538. But the court concluded that those exempted by age, infirmity, or poverty did not fall within the constitution's "by law exempted" exception to the taxpaying requirement. *Id.* at 540-42. In an advisory opinion delivered in 1844, the court went even further. It noted that if the legislature repealed the poll tax, leaving only property taxes, then people would have to own property in order to qualify to vote. *See* 46 Mass. (5 Met.) 591, 595 (1844) (advisory opinion).

It's a little hard to understand why the pauper and tax-paying clauses should have received such different treatment. It may have been that taxpaying was a sufficiently definite test, and that there was little chance of the poll tax being repealed. As a result, the court could feel easy about insisting on the strict application of the republican principle that voters (with only a few exceptions) must always contribute to the maintenance of government, that taxation and representation should, to the maximum extent possible, go hand in hand. In any case, the practical effect of this strict reading was to reinforce the line between the destitute (those exempted from taxation) and the self-supporting wage earner (those whose polls were taken).

115. 28 Mass. (11 Pick.) at 540.

116. 64 Mass. (10 Cush.) 238, 239 (1852).

117.

> [R]espondent denies his liability on the alleged ground that the word "pauper" in [the statute], is used technically, and means only a person who has received relief and

court admitted that "[t]o construe the word 'pauper' in its narrow, technical sense, in these sections, would be manifestly absurd."[118] The realities of poverty and poor relief compelled the court in this case to read the term "pauper" broadly. Here "pauper" was to mean any "poor and indigent" person, not merely "recipients of poor relief."[119]

These technical, definitional controversies all raised a deeper problem. Could "paupers" and "propertyless poor persons" be maintained as clearly separate legal categories? In Massachusetts this deeper question rose to the surface and produced an important political controversy in the 1870s. In 1877, the Massachusetts legislature nearly enacted a statute, which would have disfranchised all those who had received poor relief during the prior year. At the last moment, questions about the bill's constitutionality forced it back into committee.[120]

In its very next session, however, the legislature was considering a similar bill when a prominent lawyer, Charles T. Russell, Jr., launched a campaign against it. He published a pamphlet in which he argued that the proposed legislation was unconstitutional. "[I]f the Legislature," he contended, "can say that the word 'pauper,' as used in the Constitution, shall mean 'a person who has within a year received public assistance,' it can say that the word shall mean 'a person worth less than $500 or $200,' and so in effect restore the abolished property qualification for voters!"[121] Citing, among others, the Massachusetts Supreme Judicial Court's 1832 advisory opinion to the state Senate, Russell maintained that the law of Massachusetts was already clear on the subject:

> If a person is receiving public assistance at the time he offers to vote, he is disqualified; if he is not receiving public assistance at that time, if otherwise qualified, he can vote; and no inquiry into his past poverty or dependence, no search among the records of the overseers of the poor, however authorized or required by statute, can deprive him of his constitutional right.[122]

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support from a town, under the provisions of the [poor law]. And he relies on the opinion of the court . . . that the amendment of the constitution, which prohibits paupers from voting in certain elections, does not apply to all poor persons who receive or need relief, but only to persons receiving aid and assistance from the public.

Id. at 239.

118. *Id.* at 240.

119. *Id.* at 241.

[T]he words "such pauper," when applied to a person whom a town has relieved, means a technical pauper . . . because, by being relieved by a town, he becomes a technical pauper. The same words, however, when applied to one whom his kindred have relieved, do not necessarily so mean. As has been already said, they mean one of the poor and indigent persons mentioned in [the poor law], whether he be a technical pauper or not.

Id.

120. For the legislative history of the bill, see C. RUSSELL, THE DISFRANCHISEMENT OF PAUPERS: EXAMINATION OF THE LAW OF MASSACHUSETTS 3-4 (1878).

121. *Id.* at 13.

122. *Id.* at 24.

Russell clearly understood what was at stake in this proposed legislation. If it went into effect it would blur the sharp legal boundary separating wage earners, who might have been unemployed at some point during the year, from paupers. "During the last few years," he began his pamphlet, "owing to the depression in business and 'hard times,' thousands of persons have been thrown out of employment, and become more or less dependent upon public and private charity."[123] Russell attacked what he saw as the "popular delusion" behind the proposal: namely, " 'once a pauper always a pauper.' "[124] Russell argued that a pauper's dependence, and with it the justification for his exclusion from the suffrage, ended immediately after he stopped receiving public assistance.[125] "Can it be pretended," Russell asked,

> that, after the [town's] support became unnecessary, the town could any more deprive [a former pauper] of his right to vote, than of his right to labor for whom he pleased? Did not his right of suffrage [along with his right to sell his labor to whom he pleased], suspended during his dependence upon the town, *immediately revive* and exist *when the dependence ceased*?[126]

Concerned by the questions raised about the bill's constitutionality, the Massachusetts House, in April 1878, submitted the issue to the Supreme Judicial Court. The court adopted Russell's interpretation of the clause and a good deal of his reasoning as well. Citing its own 1833 opinion in *Wilson v. Brooks*,[127] the court ruled: "[A] man who has been supported by his town as a pauper, but is able to earn more than enough to support himself and has found an employer, and is therefore not actually chargeable to the town and stands in no need of immediate relief, is no longer a pauper."[128] For the Massachusetts court that ended the inquiry; the constitution disfranchised paupers only so long as they were in actual receipt of assistance, and no longer.

Given the economic realities of the nineteenth century labor market, it was apparent that men regularly passed back and forth over the boundary separating the independent wage earner from the dependent pauper. But *in the public realm of rights*, it had become crucial by this time that the independent wage earner and the dependent pauper not be treated merely as two manifestations of a single group, the propertyless. A considerable intellectual effort was mounted in the face of pop-

123. *Id.* at 3.
124. *Id.* at 29.
125. *See id.* at 25.
126. *Id.* at 26. Russell further pointed out the case of the individual who:
> has been himself temporarily sick or out of work, and so required public aid for a time; and afterwards recovers his health, or receives employment, and becomes again self-supporting . . . . [C]an it be maintained that, after the dependence upon the public ceases, the disqualifications imposed by the Constitution on account of such dependence still continue?

Id. at 26-27.
127. 31 Mass. (14 Pick.) 341 (1833).
128. 124 Mass. 596, 597 (1878) (advisory opinion).

ular misconceptions to maintain the sharp *legal* boundary which defined the two as opposites of one another. The boundary, contemporaries now had to acknowledge, was readily crossed, but on each crossing the individual was transformed into his juridical opposite. On crossing the boundary in one direction, the individual's independence, his political and legal right of self-government, "immediately revived" and his "dependence ceased." In the other direction, he instantly became a ward of the state, with no legally or politically effective will of his own. This vacuum boundary had become critical in maintaining a world in which the propertied and propertyless—one governing, one governed—would not directly face each other. In Massachusetts, as elsewhere, this sharp legal boundary endured well into the twentieth century.

VII. CONCLUSION

> [I]f it should ever happen, even once, that any one of the ideas that motivate our life were taken seriously—uncompromisingly seriously, so that nothing were left of the counter-idea—our civilisation could scarcely continue to be the sort of civilisation it is!
>
> —Robert Musil, *The Man Without Qualities*[129]

The pauper exclusions of the nineteenth century have been, for the most part, invisible to historians. That they have been invisible is testimony to the prejudice among historians that historical periods function more or less as rational and coherent wholes and are primarily guided by one or a few consistent principles. This prejudice in itself is relatively new. It appeared in its modern form for the first time only in the eighteenth century, when

> Vico, Voltaire, Montesquieu, Millar, Schlozer . . . were able, each in his way, to observe that in a period supposedly governed by certain characteristics it was natural that certain social institutions, certain habits of thought and forms of art should exist in conformity with the dominant characteristics, and that they should fall and be replaced by others as the character of the period changed.[130]

Pauper exclusions have been overlooked because they seem inconsistent with the idea that "all men are by nature equally free and independent and have certain inherent rights," and because this idea is supposed to have guided the movement to broaden the suffrage in the decades following the American Revolution. This article has proceeded from a different set of premises. It has worked from the idea that pauper exclusions were as integral to the period as was a broadened suffrage, and has accepted that a period may be governed by deeply inconsistent principles. It has developed an account which reveals that

129. 2 R. MUSIL, THE MAN WITHOUT QUALITIES 269 (E. Wilkins & E. Kaiser trans. 1967).

130. J. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 248 (1957).

early nineteenth century suffrage reforms grew out of, and continued to rest on, a complex and contradictory set of motivating ideas.

As laboring men mounted their struggle to alter the traditional terms of political participation in the decades following the Revolution, they did appeal to the view that "all men are by nature equally free and independent." But most of them also continued to believe that only the self-governing should exercise the suffrage and that only property ownership conferred genuine independence. Out of the struggle over the suffrage which drew on these contradictory materials came an *ad hoc*, distinctively nineteenth century settlement. It incorporated versions of all these basic ideas but cast them into new relationships. It would be a simplification to call the result either purely liberal or republican.

On the one hand, republican principles continued to have an impact on the terms of the franchise, but only in modified form. The republican precept that only the self-governing should exercise political authority, for example, was not abandoned. Rather, it was recast to make use of the liberal idea that the self-governing were those who owned and disposed of themselves. The republican notion that propertylessness and lack of autonomy go hand in hand also continued to shape franchise qualifications. It persisted in the idea that property in one's labor distinguished the independent from the dependent.

On the other hand, this nineteenth century regime of political rights can hardly be called purely liberal. Voting rights were not completely separated from social or economic status. They *were* divorced from property ownership, but taxpaying qualifications continued the tradition of imposing pecuniary restrictions on the franchise. In another sense so did pauper disqualifications.[131] And women continued to be excluded from the franchise precisely because of their dependent social and legal status. The tale of suffrage reform in the early American republic thus is not a story of one coherent historical formation replacing another—republican giving way to liberal—but a story of the *ad hoc* way in which contradictory cultural materials were cobbled together under pressure to produce a new accommodation.

Treating pauper exclusions as integral to the period has permitted us to begin to understand the ways in which the new world of independent wage earners and dependent paupers rested on the flatly contradictory premises that all men by nature are entitled to govern themselves, but that if they own no property they are likely to be subject to the will of other men. The distinctiveness of this nineteenth century world did not lie in the coherence of its ideas, liberal or otherwise, but in the contradictions on which it was built, and on the way those contradictions were accommodated. At bottom this world was marked

131. See, for example, the arguments made in PROCEEDINGS, NEW JERSEY CONVENTION OF 1844, *supra* note 89, at 87-88, 429-30.

by an intense preoccupation with independence and dependence, but what uniquely defined its spirit was that it simultaneously incorporated two contradictory versions of that distinction. We might say that the very split in the modern world which consigns property ownership to one realm and governance to another took place as these contradictory motivating ideas were accommodated.

Because it had emerged from, and rested on, contradictory premises, the tensions in this nineteenth century settlement continued to subject it to revision in any number of directions. That all men were entitled to govern themselves, but that only property ownership allowed them actually to do so, was a potentially explosive combination of ideas. Despite the sophisticated ways in which the impact of those ideas was limited, they continued to provide a fertile source of demands for radical revision of the status quo.

It is by looking more closely at apparent anomalies like pauper exclusions that we gain access to worlds built on contradiction, whose appearance of solidity evaporates as we come to understand the *ad hoc* way in which they have been constructed out of materials which had been assembled in very different ways not long before. And we come to realize that these structures can be reassembled again. The human actors in these worlds continue to have in hand abundant materials with which to remake them, in any number of directions.