

2022

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Recommended Citation

Joshua Perry, *The Messy History of Michigan's "Purity Clause"*, 120 MICH. L. REV. ONLINE 22 (2022).
Available at: https://repository.law.umich.edu/mlr_online/vol120/iss1/2

<https://doi.org/10.36644/mlr.online.120.24.messy>

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THE MESSY HISTORY OF MICHIGAN’S “PURITY CLAUSE”

*Joshua Perry**

INTRODUCTION

Texas Republicans were rightly pilloried in the summer of 2021 for declaring an intent to protect “the purity of the ballot box” in draft legislation that would disproportionately disenfranchise voters of color.¹ The phrase, rooted in Texas’s 1876 constitution,² evoked ugly memories of the Jim Crow South—a past which, as the substance of the bill reminded, is not even past.

But a state constitutional grant of legislative authority to protect election “purity” isn’t unique to Texas or the South.³ It’s a feature of Michigan’s constitution, too, first appearing in the constitution of 1850, which (in addition to limiting the vote to white men and some “civilized . . . Indian[s]”) provided that “[l]aws may be passed to preserve the purity of elections and guard against abuses of the elective franchise.”⁴

That “Purity Clause,” reenacted in Michigan’s two subsequent constitutions,⁵ still resonates today. Recently—for instance, in a 2007 decision upholding Michigan’s first voter ID law⁶ and in a 2020 decision barring election officials from counting timely-mailed absentee ballots received after polls close on Election Day⁷—Michigan courts have invoked the constitutionalized

* Of Counsel, Perry Guha, LLP. I’m grateful to Norm Eisen, Samidh Guha, Katherine Reisner, Anna VanCleave, and Sophia Weinstock for their research, guidance, and comments. All errors are of course my own.

1. Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History.*, WASH. POST (May 9, 2021, 3:02 PM), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black> [perma.cc/WY46-J4SN].

2. TEX. CONST. art. VI, § 4 (“[T]he Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box.”).

3. See, e.g., COLO. CONST. art. VII, § 11 (“The general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise.”); MD. CONST. art. I, § 7 (“The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.”).

4. MICH. CONST. of 1850, art. VII, §§ 1, 6.

5. MICH. CONST. of 1908, art. III, § 8; MICH. CONST. art. II, § 4 (amended 2018).

6. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444* (Mich. 2007).

7. *League of Women Voters of Mich. v. Sec’y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich.), and *reconsideration denied*, 948 N.W.2d 70 (Mich. 2020).

interest in election purity to justify restricting the fundamental right to vote. And the Clause will doubtless be cited in the inevitable litigation if any of the state's post-2020 wave of voter suppression legislation becomes law.⁸ That seems increasingly likely, as the state's ongoing "Secure MI" initiative—aimed at constricting both in-person and absentee voting through a voter-initiated, veto-proof legislative instrument—collects votes.⁹

So it's worth asking: What does the Purity Clause actually mean? Can contemporary courts properly invoke it to justify restrictions purportedly aimed at controlling "voter fraud"? Should they?

Part I diagnoses the problem: Recently, Michigan courts have invoked the Purity Clause to legitimize voting rights restrictions without applying their usual tools of constitutional interpretation or scrutinizing the Clause's complex history. As a result, voting restrictions have been justified by reference to a badly underexamined constitutional provision.

Part II examines the Clause with the tools that Michigan courts use to interpret the state constitution. This Part argues that neither the original public meaning nor the framers' intent justifies a narrow reading of the Clause as entirely about laws restricting "voter fraud" in the contemporary, politicized sense of the term. In fact, the Clause seems to have been intended to bar voting not by facially unqualified people but by otherwise qualified voters who were ostensibly infected by the "wrong" motives—and it was likely originally understood as a racial restriction.

Part III looks at the Clause's evolution since 1850—in its 1908 and 1963 reenactments and as applied by the courts—and argues that, to the extent the Clause is still relevant, it demands a broader understanding than recent court decisions have allowed. I conclude that the Purity Clause should no longer be applied to counterbalance or outweigh the federal and state constitutions' guarantee of the right to vote.

8. In the spring after Joe Biden's 2020 victory, Michigan's Republican state legislators introduced thirty-nine voter suppression bills. Dave Boucher & Clara Hendrickson, *Michigan GOP Senators File 39 Election Reform Bills Democrats Call Racist, Based on Lies*, DETROIT FREE PRESS (Mar. 24, 2021, 6:31 PM), <https://www.freep.com/story/news/politics/elections/2021/03/24/michigan-senate-gop-election-reform-laws/6963314002> [perma.cc/DW4R-FSCL]. Michigan echoed a national trend here. One analysis found that, in 2021, "at least 19 states passed 34 laws restricting access to voting." *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (emphasis omitted), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [perma.cc/5JPK-U7W4] (last updated Jan. 12, 2022) ("These numbers are extraordinary: state legislatures enacted far more restrictive voting laws in 2021 than in any year since the Brennan Center began tracking voting legislation in 2011.").

9. See Samuel J. Robinson, *Conservative Group Begins Collecting Signatures for Petition to Tighten Michigan Voting Laws*, MLIVE (Oct. 8, 2021, 7:20 PM), <https://www.mlive.com/public-interest/2021/10/conservative-group-begins-collecting-signatures-for-petition-to-tighten-michigan-voting-laws.html> [perma.cc/M69W-7X6H] (detailing the process of gathering signatures).

I. THE UNEXAMINED MEANING OF PURITY

In 1996, the Michigan legislature passed the state's first voter identification law, requiring in-person voters to show photo ID or else sign an affidavit of identity.¹⁰ But the law wasn't enforced for a decade, after a state attorney general opinion suggested that it was unconstitutional.¹¹ Then, in 2005, the legislature passed another voter ID law,¹² this time seeking an advisory opinion on constitutionality from the Michigan Supreme Court.

In a 5–2 decision, the court allowed the photo ID law to take effect.¹³ The court conceded that the ID law burdened the constitutional right to vote. But that wasn't the only constitutional interest at stake:

Balanced against a citizen's "right to vote" are the constitutional commands given by the people of Michigan to the Legislature in Const. 1963, art. 2, § 4, which states in relevant part:

... "The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."¹⁴

And, to the court, the state constitutional command to "preserve the purity of elections and to prevent abuses of the electoral franchise" had a clear purpose: "preventing lawful voters from having their votes diluted by those cast by fraudulent voters."¹⁵

The Purity Clause did a lot of work for the *Advisory Opinion* court, purportedly constitutionalizing a "competing interest" weighty enough to counterbalance, and to justify restricting, the fundamental right to vote.¹⁶ But there was surprisingly little analysis behind the court's holding. It correctly summarized the history of the Clause: enactment in 1850 and subsequent reenactments in 1908 and 1963.¹⁷ But the court looked to neither of the state courts' polestars of constitutional interpretation—original public meaning and indicia of the framers' intent.¹⁸ Instead, in glossing over the history of the Clause's adoption, reenactment, and meaning, the court assumed what it set out to prove: that the Purity Clause was intended to authorize voting restrictions Michigan never enacted until 146 years after the Clause was put to paper. "The

10. Act approved January 16, 1997, No. 583, sec. 168.523, § 6.523, 1996 Mich. Pub. Acts 2555, 2564–65.

11. *Advisory Op.*, 740 N.W.2d at 448 (citing Mich. Att'y Gen. Op. No. 6930, at 1 (Jan. 29, 1997)).

12. Act effective July 14, 2005, No. 71, § 168.523, 2005 Mich. Pub. Acts 205, 214–15.

13. *Advisory Op.*, 740 N.W.2d at 447–48.

14. *Id.* at 453 (quoting MICH. CONST. art. II, § 4 (amended 2018)).

15. *Id.* at 448. For a longer discussion of the 2007 decision, see Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 112–13 (2014), and Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 17 (2016).

16. *Advisory Op.*, 740 N.W.2d at 452–53.

17. *Id.* at 453 n.33.

18. See generally *Makowski v. Governor*, 852 N.W.2d 61 (Mich. 2014), as amended on *reh'g* (Sept. 17, 2014) (explaining interpretive methodology).

constitutional authority to prevent fraudulent voting,” the court tendentiously noted, “was first given to the Legislature in the 1850 Michigan Constitution.”¹⁹ In fact, though, the 1850 constitution never mentioned fraudulent voting—either verbatim (what records we have don’t actually use the word “fraud”) or by describing what the 2007 court would have recognized, if the mythical creature were ever to be seen in the wild, as voter fraud.

A 2020 Michigan Court of Appeals decision highlights the contrast between the state courts’ usual interpretive methodology and the ahistorical meaning sometimes ascribed to the Purity Clause.²⁰ That year, with COVID posing an ongoing threat, a presidential election imminent, and the U.S. Postal Service publicly warning that ballots might not be delivered timely, the League of Women Voters sued Michigan Secretary of State Jocelyn Benson. The plaintiffs argued that under the circumstances, with mail delays compounded by an anticipated crush of new mailed ballots, the statutory deadline for absentee ballot receipt—8 pm on Election Day—violated the right to vote by mail.²¹ In Michigan, that right is explicit in article II, section 4(g) of the state constitution, which was amended by referendum in 2018 to guarantee “[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.”²²

So what did the 2018 amendment mean? Figuring that out, a divided panel of the Michigan Court of Appeals recognized, required an application of the state courts’ traditional interpretive methodology. First, courts look to “the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it.”²³ Second, courts examine the framers’ intent, considering “the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished.”²⁴

Here, the court did not need to dig too deeply into the dictionary definition of the words themselves—presumably, that hadn’t changed much in the two years between enactment and interpretation—but it did insist on a meaning limited to the plain language of the ballot measure, which presumably informed the “common understanding” shared by “the great mass of people themselves.” And in the absence of an explicit provision overruling the statu-

19. *Advisory Op.*, 740 N.W.2d at 453 n.33.

20. *League of Women Voters of Mich. v. Sec’y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich.), and *reconsideration denied*, 948 N.W.2d 70 (Mich. 2020).

21. *Id.* at 6.

22. MICH. CONST. art II, § 4(g).

23. *League of Women Voters*, 959 N.W.2d at 9 (quoting *Makowski v. Governor*, 852 N.W.2d 61, 66 (Mich. 2014)).

24. *Id.*

tory ballot receipt deadline, the court was satisfied that the right to vote absentee did not necessarily include the right to have that vote counted. “[W]hile the language of the amendment would not necessarily disabuse a voter of a belief that an absent-voter ballot mailed on election day but received thereafter would be counted, the language also does not lead to a belief that such a ballot would be counted.”²⁵

But the plaintiffs did not stop at the newly enacted absentee voting right. They also claimed that an arbitrary deadline on the receipt of mailed ballots violated the Purity Clause.²⁶ Was the Purity Clause susceptible to the interpretation the plaintiffs sought to give it—that is, would elections be less “pure” if a voter could have her ballot thrown out, through no fault of her own, merely because the postal service dragged its feet? One would think, with 170 years of interpretation and constitutional history for reference, this might have been a prolonged—and interesting—inquiry.

It was not. The court of appeals recited its own determination, from a 2014 case, that the Purity Clause has no “single precise meaning”²⁷ and proceeded to the questionable conclusion that “the Purity of Elections Clause grants the Legislature the authority to provide for a system of absentee voting.”²⁸ But that, of course, is not what the Purity Clause says, and the court made no showing that the framers or the people would have understood anything like that when ratifying the Clause. The court never even asked the question.

II. THE FRAMERS’ INTENT AND ORIGINAL PUBLIC MEANING OF THE PURITY CLAUSE

The *League of Women Voters* court got at least one thing right: It may actually be true that the Purity Clause has no “single precise meaning.” That doesn’t mean the inverse, which *League of Women Voters* implies, is also true: The Clause has multiple meanings that are so vague that judges can implement or defeat the policy agenda of their choosing under the guise of protecting “purity.” Surely the people of Michigan, and the framers of its constitutions, intended *something* by the Clause, and surely that *something* is different than the general grant of authority to the legislature to regulate the

25. *Id.* at 11.

26. *Id.* at 14.

27. *Id.* (quoting *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. 2014)). The “single precise meaning” language traces to *Wells v. Kent Cnty. Bd. of Election Comm’rs*, 168 N.W.2d 222, 227 (Mich. 1969) (“The phrase, ‘purity of elections,’ is one of large dimensions. It has no single, precise meaning. The above cases demonstrate, however, that one of the primary goals of election procedures is to achieve equality of treatment for all candidates whose names appear upon the ballot.”).

28. *League of Women Voters*, 959 N.W.2d at 15.

time and manner of elections—which would be redundant, since article II, section 4(2) of the Michigan Constitution provides that separately.²⁹

Instead, I submit that the Clause, at its inception and thereafter, was given and has developed no fewer than four interconnected meanings. The first two—which were probably top of mind for the 1850 framers and most readily understood by the voters who ratified the 1850 constitution—are largely foreign to the contemporary perspective and morally indefensible. But that doesn't mean those meanings should be ignored. To the contrary, because they were never confronted in subsequent reenactments, and because they manifest themselves in contemporary efforts to stop "voter fraud," they continue to taint and infect the Clause. They are powerful reasons for today's courts to disfavor, and look with deep skepticism at, the Purity Clause.

Michigan's first constitution, ratified in 1835, made no mention of election "purity" and vested the state legislature with no power to set election qualifications.³⁰ It limited the franchise to white men above the age of twenty-one.³¹

Admitted to the union as a free state in 1837, Michigan convened delegates for a constitutional convention in the summer of 1850. The convention debated whether to exclude Black residents from the franchise,³² but it wasn't an even contest, and ultimately a motion to give Black men the vote failed 13–46.³³ The 1850 constitution, as tendered for ratification, limited the franchise to "every white male citizen above the age of twenty-one years" and to some "civilized male inhabitant[s] of Indian descent."³⁴ Apparently as a compromise, this segregationist constitution was offered to the voters simultaneously with a freestanding proposition that would have extended to "[e]very colored

29. MICH. CONST. art. II, § 4(2) ("Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, [and] to guard against abuses of the elective franchise.").

30. See MICH. CONST. of 1835, art. II; *id.* art. IV.

31. *Id.* art. II, § 1 ("In all elections, every white male citizen above the age of twenty-one years, having resided in the state six months next preceding any election, shall be entitled to vote at such election.").

32. Compare MICH. CONST. CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 1850, at 142, 242 (1850) (recording debate, with repeated motions to approve language limiting the franchise to "every white male citizen") with *id.* at 144 (describing a competing motion "to strike out 'white'").

33. *Id.* at 344.

34. *Id.* at app. 6, at 4–5.

male inhabitant . . . the rights and privileges of an elector.”³⁵ The constitution was ratified by the (white) electorate; the proposition was not.³⁶

This history suggests at least two relevant takeaways. First, the Purity Clause came out of the same racist convention that excluded Black residents (and most other residents of color) from the franchise. And, as we will see, while there is no record of the delegates themselves explicitly using “purity” to denote unmixed European ancestry, the common understanding in 1850 certainly did extend to racial purity of blood.

Second, contemporary voter fraud mania purports to be largely about excluding people who are categorically ineligible, like noncitizens and nonresidents. But the 1850 constitution’s categorical qualifications, as we just saw, were contained in article VII, section 1. The Purity Clause seemed to be talking about something else.

A. *The Framers’ Intent: Spiritual Purity*

On the 1850 convention’s thirty-fourth day, the delegates debated exclusions from the rule established by article VII, section 1. They struggled with whether to expressly authorize the legislature to bar some otherwise qualified white male citizens from voting, enumerating categories of undesirables: people who “wager[ed]” on elections,³⁷ people who were “intoxicated,”³⁸ people who were themselves candidates for office,³⁹ people who lacked “a sound mind” or had “a disordered understanding,”⁴⁰ and people who had been convicted of crimes.⁴¹

In this context—and, more specifically, in the context of people who bet on election results—the delegates first deployed and then enacted the “purity of elections” language. Delegate Addison Comstock explained the point of authorizing the legislature to bar bettors from voting: “It was well known that those who bet on elections became pecuniarily interested therein, and used all their influence to make their friends interested in them too. It was also well

35. *Id.* at app. 6, at 6. Even the compromise of submitting Black voting rights to a popular referendum (of white voters) was not universally embraced. One opponent called it a “chimerical proposition” that “could never obtain in this State. Seven-eighths of the legal voters, or more, would be against trying the experiment.” MICH. CONST. CONVENTION, REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 1850, at 483 (1850) [hereinafter MICH. CONST. CONVENTION, REPORT].

36. *See* *People v. Dean*, 14 Mich. 406, 414 (1866) (“At the time when the present constitution was submitted to a popular vote, a separate proposition was submitted with it, whereby, if adopted, ‘every colored male inhabitant’ would have been put upon precisely the same footing, as an elector, as if he were white. This proposition was rejected, and the constitution, therefore, admitted none to be electors who were not ‘white.’”).

37. MICH. CONST. CONVENTION, REPORT, *supra* note 35, at 467–68.

38. *Id.*

39. *Id.* at 473.

40. *Id.* at 474.

41. *Id.* at 475–76.

known that this practice went to impair the purity intended to be guaranteed and guarded in our elections."⁴²

The proposition here, maybe puzzling to the contemporary observer, is that otherwise eligible people who are directly financially interested in election outcomes shouldn't be able to vote because they might vote for the wrong reasons or use their influence to make their friends vote for the wrong reasons. The delegates presumably knew how to criminalize vote buying. But this was not that. The proposal was aimed at preventing voters from even developing the motive, as opposed to committing the criminal act.⁴³

Throughout the debate, voters' motives and reasoning preoccupied the delegates. That was made clear when the delegates turned to another category of proposed pariahs—the intoxicated, whose participation also purportedly threatened “the purity of the elective franchise.”⁴⁴ “When a man came to the polls in a state of intoxication,” warned Macomb County delegate A.S. Robertson, “he had lost all that principle which ought to govern him in casting his vote at an election.”⁴⁵ Again, the concern here is not about unqualified voters sneaking in. It is about the right people voting but for the wrong reasons. Drunk voters and gamblers might be motivated by the wrong “principle[s]”—or, like the “insane,” another contemplated carveout, by no principle at all that was intelligible or acceptable to the framers.⁴⁶

After a morning of debate about which white male citizens were nevertheless not pure enough to vote, the delegates still could not come to a consensus on how, and to what extent, to police the electorate's motives and capacity for reasoning. So, immediately after the conventioners returned from lunch, delegate J.G. Cornell proposed a compromise. Instead of enumerating categories of the impure, the constitution would delegate the task to the legislature through the Purity Clause: “Laws may be passed to preserve the purity of elections and guard against abuses of the elective franchise.”⁴⁷ The official report of the proceedings does not record any debate on that proposal—only a prompt vote that carried 54–27 and apparently settled the issue

42. *Id.* at 469.

43. As described *infra*, the convention ultimately declined to expressly authorize the legislature to bar bettors from voting. But when the legislature did criminalize betting on elections in 1861, it named the new law “An Act to Preserve the Purity of Elections.” No. 172, 1861 Mich. Pub. Acts 277.

44. MICH. CONST. CONVENTION, REPORT, *supra* note 35, at 469–70.

45. *Id.* at 470.

46. *Id.* at 477. Similarly, at another point during the convention, “guarding the purity of elections” was also offered to explain a prohibition against state legislators holding other public offices. Proponents of the prohibition were concerned, *inter alia*, that candidates “who occupy official positions” would “use the influence of their positions to forward their object in obtaining seats in the legislature.” *Id.* at 131. This, again, was not a concern about unqualified people voting, but about improper motives.

47. *Id.*

for the rest of the convention, entrenching the Clause in the constitution to the present day.⁴⁸

So it seems as though the primary meaning for the 1850 delegates was one captured by Noah Webster's 1828 dictionary, which explained that purity meant—among other things—"[f]reedom from any sinister or improper views, as the purity of motives or designs."⁴⁹ For the delegates, the purity of elections was primarily about *why* people voted the way they did, not the separate question of *who* voted.⁵⁰ There were some otherwise qualified voters whose mere participation could corrupt the entire enterprise. Voting—like civic participation in general—was about a kind of moral virtue. Voters who were thought to be beyond reason, or motivated by the wrong reasons, injected a spiritual taint, an infection, into the body politic. And, as we'll see in the next Section, the voters who ratified the constitution might well have understood *body* much more literally.

B. Original Public Meaning: Racial Purity

While they never discussed anything like today's "voter fraud," there is some evidence suggesting that 1850 delegates would have understood election purity to comprehend at least some form of challenge to voters' identification. But the same evidence—an 1847 Michigan Supreme Court case and a related law—suggests "purity" also meant something much more transparently troubling.

That case, *Gordon v. Farrar*, was brought by a mixed-race plaintiff to exact damages from the election inspectors who turned him away at the polls.⁵¹ Gordon was, as the decision carefully taxonomizes and scrutinizes him,

partly of Saxon and partly of African descent, but the Saxon blood in him greatly predominates over the African. He is of a complexion as white as, or

48. *Id.* at 478. By contrast, Wisconsin, framing its constitution just two years earlier, went a different route. It explicitly prohibited people who are "non compos mentis, or insane" from voting entirely. WIS. CONST. of 1848, art. III, § 2. It also spelled out categories of otherwise eligible white male citizens whom the legislature could, at its discretion, exclude from the franchise:

Laws may be passed excluding from the right of suffrage all persons who have been, or may be convicted of bribery, or larceny, or of any infamous crime, and depriving every person who shall make or become directly interested in any bet or wager depending upon the result of any election, from the right to vote at such election.

Id. § 6.

49. *Purity*, WEBSTER'S DICTIONARY 1828, <http://www.webstersdictionary1828.com/Dictionary/purity> [perma.cc/8RY3-BBDL].

50. In neighboring Wisconsin and nearby Iowa, laws were enacted around the same time of Michigan's 1850 constitution "to preserve the purity of elections" by protecting voters from threats aimed at compelling them to vote for particular candidates. An Act to Preserve the Purity of Elections, ch. 105, § 5, 1849 Iowa Acts 132, 133; An Act to Preserve the Purity of Elections, ch. 85, § 11, 1857 Wis. Sess. Laws 102, 105.

51. 2 Doug. 411 (Mich. 1847).

whiter than many persons descended from European nations; but there is a mixture of African blood in his composition, though he has less than one-half.⁵²

The case went up to the state supreme court, but not on the question of whether a Black man could vote (under the 1835 constitution, he could not) or on the question of whether Gordon was Black (a jury had found that he was white). Instead, the court was asked whether election inspectors performed an essentially judicial function when they decided voters' qualifications.⁵³ If so, they were immune from civil suit.⁵⁴ If not—if the task of determining whiteness at the polls was nondiscretionary and merely ministerial—they were liable for damages.⁵⁵ Where to look for authority? The statute defining the duties and authority of election inspectors was 1841's "An Act to Preserve the Purity of Elections."⁵⁶

That Act instituted a bevy of election regulations, including section 4, which criminalized interrupting or deterring voters, key tactics of today's voter intimidation and suppression campaigns.⁵⁷ It also, in sections 1 and 2, instituted a system for checking voter qualifications that somewhat resembles Michigan's status quo prior to the photo ID law's implementation. If any voter raised a challenge about another voter's qualifications, the 1841 statute required inspectors to examine the challenged voter's age, citizenship, and residency.⁵⁸ Ultimately, though, if the voter swore out an oath attesting that he was qualified, the inspectors were bound to receive his vote.⁵⁹

The statute said nothing about challenging a voter's racial qualifications, but it was inconceivable to the court that any voter could simply claim the rights of a white man. Instead, the court ruled, inspectors were implicitly empowered to determine race—without any standards.⁶⁰ While the legislature's silence did not deprive inspectors of the authority to exclude on race, it did deprive would-be voters of the right to overcome challenges by swearing out an oath that the inspectors were bound to respect. In the end, the adjudication of whiteness—unlike the adjudication of, say, citizenship—was a core act of discretion, so Gordon could have no recourse.

52. *Id.* at 412.

53. *Id.* at 415.

54. *Id.*

55. *Id.*

56. No. 84, 1841 Mich. Pub. Acts 185.

57. *Id.* at 187; Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html> [perma.cc/ZH3V-D8GK].

58. No. 84, § 1, 1841 Mich. Pub. Acts at 185–86.

59. *Id.* § 2.

60. *Gordon*, 2 Doug. at 415.

Four takeaways are relevant here. First, inferentially, one meaning of “purity” in 1841—even though it was a meaning that the constitutional convention never invoked—did involve checking voters’ qualifications. Second, in 1841, a statute aimed at protecting election “purity” forbade not just what today’s right-wing partisans decry as the (largely nonexistent) crime of “voter fraud”⁶¹ but also what today’s voting rights activists decry as the (far more prevalent) phenomenon of voter intimidation.⁶² So whatever else it meant back then, the 1841 statute suggests that election purity comprehended a set of protections that cannot easily be politically pigeonholed. Third, in 1841, the Michigan legislature never assumed that protecting the purity of elections could extend to turning aside voters who lacked official identification paperwork. Every white voter challenged under the statute was entitled to swear out an oath and vote.

Fourth, and finally, as far as the state supreme court was concerned, three years before the 1850 constitution was enacted, a statute that was about “purity” didn’t even need to mention race in order to encode it. It was simply taken for granted that that election “purity” necessarily and always, at bottom, meant the exclusion of Black voters.

For the delegates and electorate in 1850, disenfranchising the state’s tiny Black population was in part about preserving the state’s white character. As one historian explained, “[a] primary reason for denying [B]lack the right to vote was the fear that it would encourage [B]lack migration to Michigan.”⁶³ The state itself must be kept racially pure, and that instinct for purity extended, as it so often did, to fears about miscegenation. As the editor of the *Detroit Free Press* sickeningly put it in 1850, if Black people were allowed to vote, and migrated to the state, Michigan would be “peopled by these dark bypeds—a species not equal to ourselves. . . . What man would like to see his daughter encircled by one of these sable gentlemen, breathing in her ear the soft accents of love?”⁶⁴

Against this backdrop, it seems likely that the white, male Michiganders who turned out to ratify the 1850 constitution—and to resoundingly defeat

61. *Compare Heritage Explains: Voter Fraud*, HERITAGE FOUND., <https://www.heritage.org/election-integrity/heritage-explains/voter-fraud> [perma.cc/9W8G-7K65] (marshalling a tiny handful of voter fraud cases in an attempt to prove the existence of a widespread phenomenon), with *The Myth of Voter Fraud*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud> [perma.cc/6JK8-UJYG] (“[E]xtensive research reveals that fraud is very rare, voter impersonation is virtually nonexistent, and many instances of alleged fraud are, in fact, mistakes by voters or administrators.”).

62. See, e.g., THURGOOD MARSHALL INST., NAACP LEGAL DEF. FUND, *DEMOCRACY DEFENDED* 21 (2021), https://www.naacpldf.org/wp-content/uploads/LDF_2020_Democracy-Defended-1-3.pdf [perma.cc/77DK-Z2N4] (describing “an alarming surge in voter intimidation tactics—both passive and aggressive” in the runup to the 2020 elections).

63. Edward J. Littlejohn, *The Michigan Supreme Court and Black Rights 1850-1870*, 18 J.L. SOC’Y 59, 60 (2018).

64. *Id.* at 61 (quoting Ronald Formisano, *The Edge of Caste: Colored Suffrage in Michigan, 1827-1861*, MICH. HIST. MAG., LVI/1 Spring 1972, at 28–29).

the freestanding Black suffrage referendum⁶⁵—would hear in the term “purity”—among any other meanings—the constitution’s desire to protect the electorate from “foreign admixture” or, in a more figurative sense, “defilement.”⁶⁶ Those too are definitions of purity in its physical and spiritual sense, according to Noah Webster’s 1828 dictionary.⁶⁷ Voters in Michigan in 1850 might well have understood “purity” to mean exactly what it meant to legislators in neighboring Ohio nine years later when they passed a law disenfranchising residents with a “distinct and visible admixture of African blood.”⁶⁸ Their purpose? To “preserve the purity of elections.”⁶⁹

This deeply racist implication of “purity” also resonated in the Michigan Supreme Court’s 1866 decision in *People v. Dean*.⁷⁰ Dean had a Black great-great-grandparent. When he was convicted of illegal voting, he appealed to the Michigan Supreme Court. The question: Under the Michigan Constitution of 1850, which limited the franchise to white male citizens, what did “white” mean?⁷¹ The state attorney general, in briefing, had the answer, submitting that “[i]n the debates of the convention of 1850, the words ‘white’ and ‘colored’ were invariably used by the honorable members of that body, in contradistinction to each other; the former, in its use, having reference to the pure European race, distinguished from the Asiatic, Malay, American and African races”⁷²

The Michigan Supreme Court, though—writing the year after the Civil War ended, the same year that Congress passed the Fourteenth Amendment—was less hung up on absolute purity of European blood. It ultimately held that anyone with “less than one-fourth of African blood” could vote, so Dean won a new trial.⁷³ But the court was still ready to deploy the “purity of elections” trope to describe the need to exclude Black voters. “The constitution,” wrote Justice Campbell for the majority, “does not impose any restriction of color, except upon electors.”⁷⁴ What made elections different? “The aim of all election laws is to preserve the purity of elections by prevention of illegal voting as far as possible, so as to insure [sic] a legal election as nearly

65. *Id.* at 62 (“71.3% of 44,914 votes were against [B]lack suffrage.”).

66. *Purity*, *supra* note 49.

67. *Id.*

68. Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 648 (2007) (quoting 1859 Ohio Laws 120, in STEVEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* 12 (1993)).

69. *Id.*

70. 14 Mich. 406 (1866).

71. *Id.* at 415.

72. *Id.* at 408.

73. *Id.* at 425.

74. *Id.* at 423.

as may be.”⁷⁵ The body politic must be kept pure, and that necessarily meant excluding Black bodies.

III. “PURITY” SINCE 1850: PREVENTING FRAUD, PROMOTING EQUITY

So, at its inception, the Purity Clause was likely intended and understood, in significant part, as a grant of authority to police spiritual and racial purity. But, as I acknowledged earlier, it does seem that one sense of election “purity”—in 1841 and inferentially also in 1850—extended to preventing categorically unqualified voters from voting, even if nothing suggests that nineteenth century Michiganders were quite as preoccupied with “voter fraud” as some contemporary partisans. That strand of meaning was not, at least until very recently, the sole or even the most prominent reading of the Purity Clause. Instead, for a long time, the Michigan courts applied the Clause to promote equity—or what they called “evenhandedness”⁷⁶—at the ballot box.

Those two strands of meaning—purity as preventing illegal voting and purity as guaranteeing equitable elections—are captured in the caselaw and in the very limited discussion around the Purity Clause at Michigan’s post-1850 constitutional conventions. Both conventions reenacted the Clause.⁷⁷ But neither convention seems to have “truly grappled”⁷⁸ with the Clause’s difficult history,⁷⁹ so the taint of the original enactment was never fully purged.

The 1908 constitution amended the Purity Clause by substituting “may” for “shall.” As the official convention report explained, this change “render[ed] it mandatory upon the legislature to pass laws to preserve the purity of elections.”⁸⁰ The change was enacted by a unanimous vote, without recorded debate or discussion, and it does not seem that the convention ever debated what “purity” actually means.⁸¹

And while the 1963 constitution made significant changes to the elections article of the constitution—including adding language authorizing the legislature to regulate the time, place, and manner of elections—it did not change the substance of the Purity Clause, discuss the Clause’s past meaning, or define

75. *Id.* (emphasis omitted).

76. *Socialist Workers Party v. Sec’y of State*, 317 N.W.2d 1, 11 (Mich. 1982).

77. MICH. CONST. of 1908, art. III, § 8 (“Laws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise.”); MICH. CONST., art. II, § 4 (amended 2018).

78. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (“[T]he States’ legislatures never truly grappled with the laws’ sordid history in reenacting them.”).

79. *Id.* (quoting *United States v. Fordice*, 505 U.S. 717, 729 (1992)) (“[P]olicies that are ‘traceable’ to a State’s *de jure* racial segregation and that still ‘have discriminatory effects’ offend the Equal Protection Clause.”).

80. COMMITTEE ON SUBMISSION, PROPOSED REVISION OF THE PRESENT CONSTITUTION OF MICHIGAN 13–14 (1908).

81. *See* 1 MICH. CONST. CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 560, 566 (1908).

with any clarity its present meaning.⁸² In reporting out the proposed changes to the elections section of the constitution to the full body of the convention, one delegate noted, “[t]his section accomplishes one of the major objectives of the committee. It vests in the legislature full authority over election administration, subject to other provisions of this constitution, and to the national constitution and laws. The legislature is specifically enjoined to enact corrupt practices legislation.”⁸³ Although “corrupt practices” was never defined—and surely extends as easily to voter intimidation as to voter fraud—this pronouncement could fairly be cited as evidence that at least some of the framers of the 1963 constitution understood that they were preserving language that, among other things, could be used as grounds for enacting at least some anti-“voter fraud” measures.

One problem here for the proponents of voter fraud mythology⁸⁴ is that there’s no real evidence that the framers ever confronted, much less disavowed, the history and implications of the “purity” language. If they meant only to go after corrupt practices, why not just say so, rather than preserving the 1850 language? A second problem is that a number of delegates appear to have thought of the Purity Clause as fundamentally about something entirely different than “voter fraud.” For those delegates, election purity was about setting ground rules ensuring that all candidates were presented to the voters on equal footing. One delegate cited the need for “purity in the elective process” in arguing for language prohibiting ballot designations for incumbents, on the grounds that the designation gave incumbents an unfair advantage.⁸⁵ Another invoked “the purity of elections” in support of a constitutional rule requiring Boards of Canvassers to have a bipartisan membership.⁸⁶

These two strands of meaning are reflected in the caselaw and legislation dating back to the nineteenth century. In one 1865 decision, the Michigan Supreme Court explained that a provision “requiring voting to be in the township of the voter’s residence” was meant to “secur[e] the purity of elections” by ensuring that voters’ qualifications could readily be ascertained.⁸⁷ And in 1868, the court upheld a voter registration law explicitly aimed at “preserv[ing] the purity of elections” by “preventing fraud.”⁸⁸

But, alongside the prevention of “voter fraud,” Michigan’s courts preserved and enforced under the rubric of “purity” a requirement that the law treat voters and candidates equitably. Thus, for instance, in 1894, the court cited the Purity Clause in allowing voters with disabilities to receive assistance

82. See, e.g., COMM. ON DECLARATION OF RTS., SUFFRAGE AND ELECTIONS, ACTION JOURNAL NO. 40, at 1 (Mich. 1962) (recording committee approval of the language).

83. 2 MICH. CONST. CONVENTION, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961 OFFICIAL RECORD 2215 (Austin C. Knapp & Lynn M. Nethaway eds., 1964).

84. See *The Myth of Voter Fraud*, *supra* note 61.

85. MICH. CONST. CONVENTION, *supra* note 83, at 2238.

86. *Id.* at 2268.

87. *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 145 (1865).

88. *People ex rel. Foley v. Koppelkom*, 16 Mich. 342, 344 (1868).

in the ballot box.⁸⁹ In 1940, the court invoked the Clause in requiring election officials to rotate candidates' names on the ballot.⁹⁰ In 1969, it struck down on "purity" grounds a statute allowing judges to designate their incumbency on the ballot.⁹¹ And in 1982, it struck down, at the behest of the Socialist Workers Party, a law barring parties from appearing on the general election ballot unless they first cleared a minimum vote threshold in the primaries.⁹² "Although the 'purity of elections' concept has been applied in different factual settings," the court explained, "it unmistakably requires, as plaintiffs correctly argue, fairness and evenhandedness in the election laws of this state."⁹³

CONCLUSION

We are left with a Clause that has held four distinct primary meanings—two more antiquated, two more recently applied. To the extent the "Purity Clause" is about race—a meaning that has never been fully purged—it is beneath contempt and should be consigned to ignominy if it cannot be excised entirely from the constitution. And contemporary voter suppression laws that enforce the 1850 conception of racial purity by disproportionately disenfranchising voters of color should be viewed with greater skepticism, not imbued with greater legitimacy, in light of the Clause's origins.

Similarly, to the extent the Clause is about enforcing a kind of spiritual purity, it expresses an antiquated appreciation of how the electorate is composed and how the legislature may try to dictate a voter's state of mind and motive at the ballot box. But the original meaning behind the Clause does cast a new light on today's voter suppression laws, which—under the guise of preventing "fraud"—are too frequently intended to restrict the vote of people who think and feel the "wrong" way and who will vote accordingly. Procedural controls are spun up as a cover for excluding these political outgroups. Contemporary voter fraud laws, in this sense, do grow out of the original 1850 constitutional provision—but that is an ancestry that today's courts should reject, not embrace.

Beyond that, what we have is a Clause in tension, if not open conflict, with itself. Allowing election workers to assist disabled voters promotes equitable participation; it also, of course, could compromise secret ballots, which might lead to fraud. Broad participation of minor parties in general elections is equitable in the sense of helping to ensure that every voter and every party has a voice; but it threatens the impulse towards uniform and (notionally) virtuous voter intentions that undergirded the 1850 framers' understanding of purity. If absentee ballots are received late as a result of mail delays, excluding those

89. Att'y Gen. *ex rel.* Reynolds v. May, 58 N.W. 483, 485–86 (Mich. 1894).

90. Elliott v. Sec'y of State, 294 N.W. 171, 173 (Mich. 1940).

91. Wells v. Kent Cty. Bd. of Election Comm'rs, 168 N.W.2d 222, 227 (Mich. 1969).

92. Socialist Workers Party v. Sec'y of State, 317 N.W.2d 1, 12 (Mich. 1982).

93. *Id.* at 11.

ballots would threaten the "purity" principle that requires evenhanded treatment of equally situated voters and forbids throwing out votes absent fault or negligence; but, of course, some claim that mailed ballots are themselves an invitation to fraud and a threat to election purity.

If today's Michigan courts want to finally contend with the Purity Clause's troubled history, they can start by discarding any applications of the Clause that echo its origins in racism and thought policing. The Clause cannot be used any longer to validate racially discriminatory restrictions on the ballot. That would unacceptably perpetuate precisely the outcomes that the 1850s framers and ratifiers intended.