POLITICAL RIGHTS AS POLITICAL QUESTIONS: THE PARADOX OF *LUTHER V. BORDEN*

A paradox lies at the heart of our conception of republican government.[1] Republicanism posits that subjects of a dominion become free by participating in the political processes of collective deliberation that govern them.[2] In this conception of freedom as self-government, those who are excluded from the political franchise are, by definition, dominated by others. Domination resulting from exclusion from the franchise can be justified from a republican standpoint, but only according to a principled standard: competency to participate in political activity. That is, the exclusion from the franchise of people who are capable of attaining freedom through political participation

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[1] Much has been written lately about the republican tradition of political thought. *See, e.g.*, J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790'S (1984); B. BAILYN, THE IDEOLOGY OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY (1973); P. WIEBE, THE OPENING OF AMERICAN SOCIETY (1984); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1766–1787 (1969); Kramnick, *Republican Revisionism Revisited*, 88 AM. HIST. REV. 629 (1982); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982); Tushnet, Book Review, 100 HARV. L. REV. 423 (1986) (reviewing R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985)); Note, *The Origins and the Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

Much of this literature analyzes differences, or points of opposition, between republican and liberal conceptions of politics, focusing especially on the scope and mode of popular participation in politics. Professor Frank Michelman associates the republican tradition with the idea of "self-government," in which citizens participate directly and "immediately" in political activity. Michelman, *supra*, at 38, 40, 42, 74. Republicanism as self-government thus differs from classical liberal or pluralist conceptions of government, in which duly elected officials "represent" the will of the governed through a process of mediation. *See* H. ARENDT, ON REVOLUTION 139–40 (1963) (arguing that the act of electing representatives does not amount to republican participation); J. ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT, in THE SOCIAL CONTRACT AND DISCOURSES bk. III, ch. XV (G. Cole trans., J. Brumfitt & J. Hall, eds. 1973) (distinguishing representation from popular sovereignty); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (distinguishing representative from "synechdochal" participation); Michelman, *supra*, at 21, 42, 52–54. Recently, Professor Michelman has advanced the discussion of direct participation and mediated representative government by locating both in the republican tradition. The former he denominates the "deep" republican tradition, the latter the "proximate" tradition. Michelman, *supra*, at 36. This characterization of the differences between representative and direct participatory government as a tension contained within one tradition, rather than as an opposition between two wholly unrelated traditions, advances our understanding of what is at stake in both — individual freedom — without obscuring the differences.

[2] *See* H. ARENDT, THE HUMAN CONDITION 12–13, 22–27, 30–31 (1958); J.G.A. POCOCK, VIRTUE, COMMERCE AND HISTORY 43 (1985); J. ROUSSEAU, *supra* note 1, bk. I, ch. VI, at 174–75, ch. VII, at 177, ch. VIII, at 178; Michelman, *supra* note 1, at 19, 27; Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 345, 347, 349 (1981).

amounts to an unjustifiable deprivation of their freedom precisely because they are capable of attaining it. Conversely, the exclusion and resulting domination of those among the unfranchised who are incorrigibly incapable of political activity are justified according to the standard of political competency.[3] The paradox underlying the prescript of participation in public deliberation by the politically competent is one that besets all variants of republican thought: who should make the decision about who is competent to participate in collective decisionmaking?

The question of defining the standard of political competency reasserts itself in every age.[4] The particular criteria at issue may vary — wealth, gender, race, literacy, intelligence, mental fitness, age, or residence have all been debated at various times — but there is no known democratic polity, including our own state and federal governments, in which competency requirements have been altogether rejected.[5] Today, minimum age and residency requirements attest to

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[3] In the classical formulations of republicanism, the idea of a competency prerequisite to participation in the *polis* was expressed by the word "virtue," which "could signify the practice, *or the preconditions* of the practice" of equal citizen participation in politics. J.G.A. POCOCK, *supra* note 2, at 41 (emphasis added). The preconditions of republican political practice were conceived at various times to consist of material foundations (for example, land and arms) and/or moral qualities. *See id.* at 66–68. Although modern reformulations of republicanism jettisoned the classical conception of "virtue," *see* J. ROUSSEAU, *supra* note 1, bk. III, ch. IV, at 217, they retained the general idea that certain personal capacities are necessary to participate in political activity and that the fact that some persons lack these essential capacities justifies their exclusion and, thus, a departure from an ideal democracy, *see id.* bk. III, ch. V, at 219–20, bk. IV, ch. III, at 252.

[4] The most radical challenge to the definition of competency standards calls into question the objectivity and fairness of standards of competency per se and not just the content of particular standards. For an example of this radical critique of competency standards, see Minow, *When Difference Has Its Home: Group Homes For The Mentally Retarded and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (forthcoming 1987). Minow's critique of competency standards is based on the view that attributions of difference are constructed by the powerful to justify excluding and isolating the powerless, thus "cast[ing] suspicion on the very claim to knowledge manifested by the labeling of any group as different, because that claim disguises the act of power by which the namers simultaneously assign names and deny their relationships with, and power over, the named." *Id.* at 128. Minow suggests that this view "makes problematic the very use of judicial power to declare some attributions of difference unacceptable, for that declaration constructs and strengthens the power differential between the court and those subjected to its decisions." *Id.* at 183–84. This radical democratic critique of the competency of the judiciary, or of any privileged group, to define competency, suggests that the only democratic solution to the conundrum of determining who should determine competency is to let "the people" determine their competency themselves. But this simply begs the question, because who should decide who is "the people"?

[5] It is commonly stated that the "universal franchise" obtains in contemporary Western democracies. *See, e.g.*, C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 23 (1977). This description is accurate only if we assume that minors, felons, and aliens are "not full members of society," an assumption that MacPherson tells us formerly justified the exclusion of women and slaves from the franchise. *Id.* at 19.

the persistence of a republican conception of political participation as a universal right,[6] subject to a principled competency requirement. So the question, restated, reasserts itself: by what process are political rights distributed? Conversely, by what process are determinations of political incompetency made?

The question of how to decide who has political rights came before the Supreme Court in 1848 in *Luther v. Borden*.[7] That case challenged the franchise provisions under the Rhode Island constitution whose property requirements excluded more than half the state population from the franchise. The challenge was brought under article IV, section 4 of the federal Constitution, which guarantees a "republican form of government" to every state in the union.[8] The Supreme Court denied jurisdiction in *Luther* on the ground that questions pertaining to the content of "republican form" are "political questions" for the "Political Department" to decide.[9] In the nearly 140 years since *Luther*, the Court has continued to apply the doctrine of political questions to the republican guaranty clause, frustrating all subsequent attempts to litigate legislative reapportionment or voting qualification cases under article IV, section 4.[10]

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[6] J.G.A. Pocock argues emphatically that the legal idea of a right is not the same as the republican idea of political participation and, moreover, that the discourse of rights is not reducible to the discourse of republicanism. *See* J. POCOCK, *supra* note 2. Yet Pocock recognizes that the basic constitutional requirements of a republic, and the material foundations of citizenship, must be expressed in terms of legal rights. Thus, Pocock acknowledges a position, albeit a problematic one, for legal rights in the republican vision. *See* Michelman, Republican Property (paper delivered at the Symposium on Law and Rhetoric at Northwestern University on June 2, 1986) (on file at the *Harvard Law Review*). Compare Pocock's view of the relationship between legal rights and politics with Hannah Arendt's view that matters of distributive justice should be excluded from politics. *See* H. ARENDT, *supra* note 2. *But see* Pitkin, *supra* note 2, at 327, 331–36, 342 (1981) (analyzing and criticizing Arendt's exclusion of justice from politics as rendering incomprehensible and vacuous the very idea of politics). This Note does not address the question whether rights discourse is fundamentally incompatible with the classical understanding of republicanism. Rather, it uses the term "right" according to its common usage.

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

[8] U.S. CONST. art. IV, § 4, cl. 1.

[9] *Luther*, 48 U.S. at 39. The political question doctrine was first enunciated by the Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[10] The political question doctrine has been invoked to render legislative apportionment schemes, and the appropriateness of the use of a referendum, nonjusticiable. In 1912, the Supreme Court held that the use of referenda in lieu of "usual" legislative procedures is a nonjusticiable political question under the guaranty clause. *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912). But challenges to the use of referenda and to legislative reapportionment have been held to be justiciable under other clauses of the Constitution. *See, e.g.*, Eastlake v. Forest City Enter., Inc., 426 U.S. 668 (1976) (striking down a city charter provision requiring proposed land use changes to be ratified by 55% of the votes under the due process clause); Hunter v. Erikson, 393 U.S. 385 (1969) (striking down under the equal protection clause the required use of a referendum with respect to laws against housing discrimination based on race, color, religion, or national ancestry); Baker v. Carr, 369 U.S. 186, 209 (1962) (holding that state legislative reapportionment is not justiciable under the guaranty clause, although it is

This Note argues that, despite its claim that it was abstaining from adjudicating the substantive issues, the *Luther* Court decisively repudiated the idea of a principled competency standard upon which the republican conception of a right to political participation depends. The first Part of this Note examines the context in which this issue was raised and the form in which it reached the Supreme Court. Through examining the parties' arguments, Part I reveals how the republican conception of a universal right to participate in politics depends upon a principle of political competency. This Part shows that the parties presented the Supreme Court with a choice between this republican conception and a fundamentally antagonistic view that there is no such principled standard and, therefore, no defensible right to participation to be claimed by the unfranchised.

Part II of this Note analyzes the implications of the *Luther* Court's holding for the republican conception of full participation in politics by the competent. The first Section of Part II examines *Luther*'s stated holding. The second Section endorses the thesis, advanced by historians, that the Supreme Court effectively eviscerated the notion of a natural *right* to political participation by deferring to the franchise prescriptions of established government. The third Section argues that in reaching this "positivist" position antithetical to the republican idea of political rights, the Court was animated by a formalist, as opposed to a substantive, conception of law, of politics, and of the relationship between the two. Part II concludes that in rejecting the republican tenet of a right to participate in politics, the Court contradicted its own claim to be abstaining from substantive adjudication.

I. THE PARADOX OF POLITICAL RIGHTS

A. The Dorr Rebellion

The question ultimately raised in *Luther v. Borden* — of whether the determination of political competency is susceptible to principled resolution — emerged in Rhode Island in the context of a revolutionary attack on the constitutional foundations of the State. It is a common belief that "the Declaration of Independence [was] followed by a spontaneous outbreak of constitution-making in all thirteen colonies."[11] In Rhode Island, however, "constitution-making" consisted at first in no more than the incorporation of the fact of independence from Britain into the original colonial charter that Charles II had

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justiciable under the equal protection clause). For the argument that cases like *Baker v. Carr* and *Pacific States Telephone* should be justiciable under the "republican form" clause, based on a liberal, formalist understanding of "republican form" as the "rule of law," see Note, *The Rule of Law and the States: A New Interpretation of The Guarantee Clause*, 93 YALE L.J. 561 (1984).

[11] H. ARENDT, *supra* note 1, at 139.

granted to the colony of Rhode Island and Providence Plantation in 1663.[12] By keeping its colonial charter, Rhode Island perpetuated a political system based on property qualifications, which, by the mid-nineteenth century, excluded from the franchise all but forty percent of the adult white male population.[13]

Opponents of the property qualifications repeatedly appealed, with no success, to the General Assembly of the charter government to extend the franchise to all adult white male residents.[14] Finally, frustrated by continuing resistance from the General Assembly, a "Suffragist" movement, led by Thomas Wilson Dorr,[15] attempted to extend suffrage to all adult white male residents by extragovernmental means. The Suffragists organized a "People's Constitutional Convention," which drafted a new "People's Constitution" explicitly extending the rights to vote and to hold political office to all adult white male residents of Rhode Island. They then submitted the proposed Constitution for ratification by the adult white male residents of Rhode Island, and on January 13, 1842, they announced its alleged ratification by a majority of that constituency.[16] On May 3, the Suffragists inaugurated a People's Government headed by Dorr and requested the transfer of all "muniments of power" from the now putatively obsolete charter government.[17]

Despite the Suffragists' claim that the people had withdrawn their consent, the charter government did not surrender, and the two gov-

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[12] *See* A. MOWRY, THE DORR WAR OR THE CONSTITUTIONAL STRUGGLE IN RHODE ISLAND 8, 13–15, 26–27 (1901).

[13] *See* G. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831–1861, at 13–14 (1976). Under the charter, the power to define voting qualifications lay with the General Assembly, which since the 1790s had extended the vote to white male adults who owned real property valued above $133 or who paid over $7 annual rent in tenancy. *See id.*; A. MOWRY, *supra* note 12, at 19–20. The influx of immigrants into Rhode Island in the mid-nineteenth century swelled the ranks of wage laborers whose low earnings placed them well below these minimum property qualifications. *See* G. DENNISON *supra*, at 27, 40, 76–77.

[14] *See* A. MOWRY, *supra* note 12, at 66.

[15] Thomas Wilson Dorr was a reformist lawyer and politician who came from a well-established Providence commercial family. *See* G. DENNISON, *supra* note 13, at 14–21.

[16] *See* A. MOWRY, *supra* note 12, at 110. Whether the Suffragists in fact gained a majority, even according to their own suffrage qualifications, is a matter of considerable debate. *See* G. DENNISON, *supra* note 13, at 76; A. MOWRY, *supra* note 12, at 112–17.

[17] For a detailed description of the course of action pursued by the Suffragists, and the response of the charter government, see A. MOWRY, cited in note 12 above, at 30–80. Before turning to extra-constitutional means, the Suffragists appealed to the charter government to make the desired changes in qualifications for freemanship; even after the Suffragists began to organize their alternative constitutional convention, they continued to petition the General Assembly to initiate the desired reforms. The General Assembly responded by calling an official constitutional convention of freemen, which failed to alter the existing regime of suffrage qualifications. *See id.* at 58–71, 100–01, 106. The freeholder electorate defeated the freemen's Constitution in March 1842, *see id.* at 282, leaving the original charter in place. The General Assembly subsequently defeated a motion to resubmit the People's Constitution to ratification by freemen under the auspices of the charter government. *See id.* at 133.

ernments arrayed themselves for armed confrontation. Dorr led his followers in an abortive attack, the so-called "Dorr's Rebellion."[18] The charter government imposed martial law throughout the state[19] and ordered out the state militia.[20] Hundreds of men were detained and arrested by charter officials,[21] while many others, including Dorr himself, fled the state.[22]

B. The Case of Luther v. Borden

Defeated by martial law and rapidly losing the support of their followers,[23] the Suffragists turned to the judicial system in a last-ditch effort to vindicate their claim to governmental authority.[24] The Suffragists found their vehicle in the case of *Luther v. Borden*.[25] Martin Luther, a rank-and-file Suffragist, and his mother sued Luther Borden, a military official sent to arrest Martin Luther at his home, in trespass for breaking and entering without a warrant.[26] Under the supervision of the Suffragist leaders,[27] the plaintiffs' strategy was to argue that the government purporting to authorize the militiaman's entry into the Luther house had been nullified by the ratification of the People's Constitution. They justified the legitimacy of that process of ratification by interpreting article IV's guarantee of a "republican form of government"[28] to imply that the form of government must reflect the will of the majority and, therefore, that majorities can change the form of government at their will. With the issue put this way, the determination of which of the competing governments was the legitimate one depended on the question of whether a majority of "qualified" voters had indeed ratified the new constitution. The resolution of that question in turn required a prior answer to the question of what makes voters qualified. The lower court refused to admit

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[18] *See* G. DENNISON, *supra* note 13, at 84–109.

[19] *See* A. MOWRY, *supra* note 12, at 223–27. This was the first time in United States history that martial law was imposed on an entire state. *See id.* at 151–52.

[20] *See* G. DENNISON, *supra* note 13, at 93.

[21] *See id.* at 97.

[22] Dorr was eventually tried and convicted of treason in a Rhode Island state court. *See* REPORT OF THE TRIAL OF THOMAS WILSON DORR FOR TREASON (1844).

[23] *See* G. DENNISON, *supra* note 13, at 93–94.

[24] Prior to the Suffragists' defeat under martial law, factions among the Suffragists debated the merits of seeking to vindicate their claims through the court system under the republican guaranty clause. Until the defeat, and his conviction for treason, *see supra* note 22, Dorr opposed the prolegalist faction arguing, first, that reliance on judicial authority would subvert the principle of popular sovereignty, *see* G. DENNISON, *supra* note 13, at 27, and second, that the charter government would satisfy the formal requirements of the republican guaranty clause, *see id.* at 51.

[25] 48 U.S. (7 How.) 1 (1849).

[26] *See id.* at 2.

[27] *See* G. DENNISON, *supra* note 13, at 154–55.

[28] *Id.* at 18, 25–26.

evidence relating to the factual question of whether a majority of "qualified" voters had indeed ratified the new constitution.[29] On appeal, the Supreme Court thus faced the underlying question of whether what makes voters qualified is subject to adjudication.[30]

The Suffragists based the legitimacy of their new government on its electoral mandate from a constituency whose right to vote derived from a constitution that had been ratified by this same constituency. Because the Suffragists based the legitimacy of this new constitution on its ratification by adult white males, it would have been circular to defend the limitation of political competency to this particular constituency simply as the result of the legitimating process of ratification. Rather, the attribution of the right to vote to adult white males needed an independent justification.

The circularity involved in having a constituency determine its own competency to act as a political constituency was reflected in the plaintiffs' two justifications of the white male's right to vote. First, the plaintiffs justified the competency of adult white males to vote as a natural right.[31] From this standpoint, the "natural right" of all white male adults to participate in the framing and ratification of a new constitution justified the Suffragist constitution and the people's government. The defendants countered by arguing that suffrage qualifications are inherently arbitrary and therefore not natural. The defendants criticized "universal" white male suffrage as a necessarily partial and artificial conception. Thus, they challenged the claim that the Suffragists' definition of "the people" constituted a better, or more "natural," realization of the principle of inclusion than the charter's property qualifications.

In essence, the defendants were asserting that there is no natural definition of "the people." To support this position, they argued that

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[29] *See Luther*, 48 U.S. at 18 (quoting the opinion of Story, J.).

[30] The Supreme Court did not hear the case until January, 1848, by which time the General Assembly, reacting to Suffragist agitation, had already supervised the adoption of a new constitution to replace the charter. *See* A. MOWRY, *supra* note 12, at 283. All native males of three years' residence were permitted to elect the delegates who drafted it, and everyone who would be made eligible to vote by the new constitution was permitted to vote on its ratification. *See id.* This constitution of 1843 — which continues to serve as Rhode Island's fundamental law to this day — extended the franchise to all male residents, black and white. *See* G. DENNISON, *supra* note 13, at 98; A. MOWRY, *supra* note 12, at 287–88.

[31] The plaintiffs referred to *Burke's Report* (published in 1844) for a definition of "the people" as "includ[ing] *all free white male persons* of the age of twenty-one years, who are *citizens* of the state, are of sound mind, and have not forfeited their right by some crime against the society against which they are members." Luther v. Borden, 48 U.S. (7 How.) 1, 22 (1849). (*Burke's Report*, a report on suffrage prepared for the General Assembly, is discussed in A. MOWRY, cited in note 12 above, at 274–80). Whether to include blacks in the franchise had been hotly debated between factions pro- and anti-abolitionist within the Suffragist movement. In the end, the Suffragists decided that blacks would continue to be excluded until "qualified" (white male) members voted otherwise. *See* G. DENNISON, *supra* note 13, at 44; A. MOWRY, *supra* note 12, at 80, 98. The Suffragists did not question the exclusion of women from political participation.

a natural right is one that adheres to all individuals, regardless of race, sex, or age. Participatory rights, they argued, differed from "natural" rights in that they required special qualifications:

> The right to vote, and the right to be voted for . . . are obligations and duties to be performed for the seven-eighths of society, composed of women, children and others, who are otherwise disqualified from performing these duties. . . . It is something worse than absurdity and nonsense to say that one man has a *natural* right to act for others, who from a principle of sound policy and expediency are excluded from acting for themselves.[32]

Thus, the defendants reasoned that any theory of membership, no matter how *relatively* extensive, that restricts the political franchise to less than universal human participation lacks the transcendant authority of natural law. From this, they concluded that the authority for any theory of political membership could be derived only from positive prescription.

The second prong of the plaintiffs' argument accomodated the defendants' positivist position. The plaintiffs asserted that the specification of who is competent to participate in constitution-making is part and parcel of the positive lawmaking power of the people. For support, they pointed to the United States Constitution, and the procedures by which it was formed, as the exemplar of the proposition that the mode by which a constitution becomes — and is recognized as — paramount law is determined "by the constitution itself."[33] By locating the decision about competency in the positive lawmaking power of the people rather than in external criteria, the plaintiffs presented a rationale that was immune to the defendants' critique of natural rights theory.

In their definition of self-government, the plaintiffs elevated the positive prescriptions of extragovernmental conventions over those of

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[32] ARGUMENTS OF MESSRS. WHIPPLE AND WEBSTER IN THE CASE OF MARTIN LUTHER, PLAINTIFF IN ERROR, VERSUS LUTHER M. BORDEN AND OTHERS 20–21 (C. Burnett ed. 1848) [hereinafter ARGUMENTS]. John Whipple actually distinguished two categories of justiciable rights, "natural" and "civil," differentiating both of them from "political" rights. Whipple included life, liberty, and the pursuit of happiness in the category of "natural" rights and property in the category of "civil" rights, asserting that "[u]nder our government, and under all free governments, both the natural and civil rights of all ages and sexes are equally protected" and, moreover, that natural rights are equally protected for "all ages, sexes and colors." *Id.* at 20. The fallacy behind this assertion is, of course, that such rights *were* subject to qualifications often based precisely on sex, *see* J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 410–11 (1973); W. PAGE, THE LAW OF CONTRACTS §§ 1658–1687 (2d. ed. 1920); T. REEVE, THE LAW OF BARON AND FEMME 182–93 (1867), and color, *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 95–97 (1973); M. GROSSBERG, GOVERNING THE HEARTH 130 (1985). This fallacy renders meaningless the criterion of universality used by the defendants to distinguish natural and civil from political rights. *See* p. 1137.

[33] *Luther*, 48 U.S. at 24.

the state.[34] The plaintiffs thus emphasized the conceptual and normative distinction between "the people" and their ruling institutions, and argued for the sovereignty of the former over the latter.[35] From the normative priority of the will of the people over a "subsisting constitution,"[36] they derived the right of the people "to abolish, to reform, and to alter any existing form of government"[37] without the assent of that government, and without regard to the existing constitution. In addition to the right to form new constitutions and destroy old ones, the plaintiffs attributed to "the people" the authority to determine the mode of expressing their will.[38] Thus, the plaintiffs portrayed the process of extragovernmental positive lawmaking as self-justifying and self-authorizing.

The defendants presented both practical and moral objections to the plaintiffs' contention that a principled justification for the delimitation of the franchise is located in the positive law of self-government. As a practical matter, the defendants argued that self-government, in the sense of daily direct participation by the mass of people in legislative and executive affairs, is impossible.[39] As a result, they argued, "[t]he right to choose representatives," rather than a direct voice in lawmaking and political decisions, must be the extent of "every man's part in the exercise of sovereign power."[40] Perhaps recognizing that the assertion that *daily* mass mobilization is impracticable does not adequately counter the authority of an alleged *instance* of mobilization, they went on to extol the mediation of the popular will by elected representatives as a necessary foil against encroachment by the "tumultuous mob" upon the rights of the "moral, prudent, industrious, and well disposed" minority.[41] In this fashion, the defendants suggested that even the practical achievement of majoritarian constitution-making would lack justificatory authority under the federal Constitution.

From this supposed imperative of mediated government, the defendants drew a chain of inferences. First, portraying the natural right to vote as a fallacy, and self-government as "mob" government at loggerheads with right and reason,[42] they concluded that no prin-

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[34] The plaintiffs characterized the view "that legislative action or sanction is necessary, as the mode of effecting a change in state government" as an "anti-republican doctrine." *Id.* at 23.

[35] *See id.* at 21–22.

[36] *Id.* at 24.

[37] *Id.* at 20.

[38] *See id.* at 24.

[39] *See* ARGUMENTS, *supra* note 32, at 38–40 (Webster).

[40] *Id.* at 40.

[41] *Id.* at 22 (Whipple).

[42] The view that "law" is the antithesis of majoritarian "mob rule" was also expressed by contemporary observers. *See, e.g.*, D. RANDALL, DEMOCRACY VINDICATED AND DORRISM UNVEILED (1846). Alexander Mowry also relies on this understanding of law as opposed to the unmediated will of the people in his historical analysis. *See* A. MOWRY, *supra* note 12, at 91.

cipled source existed for defining franchise qualifications. Second, from the absence of principle, the defendants reasoned that any determination of political rights and qualifications is necessarily partial and positive. Third, given the absence of impartial, natural grounds for assessment, the defendants concluded that the Court must defer jurisdiction over suffrage qualifications to the extant government.[43]

II. THE POLITICS OF JURISDICTION[44]

A. The Holding

The Supreme Court in *Luther* affirmed the lower court's holding that the defendants were not liable for trespass; it denied jurisdiction over questions arising under the "republican form" clause of article IV on the ground that questions about the meaning of "republican form" are political and, hence, not suitable for resolution by the judiciary.[45] In so doing, the Court affirmed both the defendants' assertion that political rights are inherently subjective and the defendants' conclusion that the supposed subjectivity of political rights commands judicial deference to the prescriptions of "the political department."[46] Alone in dissent, Justice Woodbury held that the imposition of martial law by the charter government was illegal regardless of the underlying legitimacy of the government and therefore could not serve as a defense to the trespass.[47] Justice Woodbury had been a vocal supporter of the Suffragists prior to assuming a seat on the bench.[48] But, with the other members of the Court, he found it to be "obvious, on a little reflection,"[49] that the validity of the charter,

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[43] *See* ARGUMENTS, *supra* note 32, at 50–53 (Webster).

[44] The idea that a denial of jurisdiction implies a commitment to a particular political regime is inspired by Professor Robert Cover's analysis of the political implications of jurisdictional doctrines in Cover, *The Supreme Court — 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 53–60 (1983). In Cover's analysis, jurisdictional holdings are disguised acts of judicial commitment to "the employment of force" through which the state imposes its interpretation of substantive principles over other, unofficial interpretations. This Part is intended to illustrate Cover's thesis that a jurisdictional doctrine, such as the political question doctrine, functions simultaneously as a commitment to a particular political regime and as a concealment of that commitment. In particular, this section aspires to pursue Cover's provocative suggestion that despite the view that jurisdictional principles of deference are justified by "the general Thayerite principle of deference to the 'majoritarian' branches," these principles do not guarantee the degree to which the so-called majoritarian branches are in fact representative of popular politics. *Id.* at 56–57.

[45] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 35–36 (1849); *id.* at 51 (Woodbury, J., dissenting).

[46] *Luther*, 48 U.S. at 39.

[47] *See id.* at 51 (Woodbury, J., dissenting).

[48] *See* G. DENNISON, *supra* note 13, at 129, 170.

[49] *Luther*, 48 U.S. at 51 (Woodbury, J., dissenting).

and the "subordinate question[ ]" of "whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and none others,"[50] are "mere" political questions.[51] Thus, the Court was unanimous in rendering the so-called "republican guaranty clause" of article IV political and nonjusticiable.

The identity of the political department to which the Court deferred was, however, extremely vague. Both the majority and the dissent nominally affirmed the broad principle, advocated by the plaintiffs, of popular sovereignty.[52] But whereas the plaintiffs took popular sovereignty to imply the subordination of official government prescriptions to extragovernmental majority determinations of the franchise, the Justices took it to imply the subordination of judicial authority to that of elected officials.

Chief Justice Taney, who wrote the opinion of the Court, and Justice Woodbury both equated the power of "the people" with the power of the supposedly majoritarian branches of government, even though the question of whether these branches in fact represented a majority of the politically competent was precisely the issue at stake. But they did so in different ways. Chief Justice Taney equated the "political power" with the legislative power to recognize legitimate constitutional change.[53] By contrast, Justice Woodbury defined the political power as that belonging to "the people, independent of the legislature,"[54] differentiating it from the merely legislative power. Nevertheless, Justice Woodbury joined the Court in concluding that "[t]he adjustment of these questions belongs to the people *and their political representatives*, either in the State or general government."[55] How popular sovereignty paradoxically implied the sovereignty of the legislature over the popular franchise remained to be explained.

B. The Positivist Thesis

The *Luther* Court's deference to those branches of government that mediate the popular will has been analyzed as an affirmation of the positivist statist position that "might makes right."[56] As one historian summed up the majority opinion, "[m]ajorities could change govern-

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[50] *Id.* at 53.

[51] *Id.* at 51.

[52] *See Luther*, 48 U.S. at 47; *id.* at 51 (Woodbury, J., dissenting).

[53] *See Luther*, 48 U.S. at 35.

[54] *Id.* at 51 (Woodbury, J., dissenting).

[55] *Id.* (emphasis added).

[56] For the most developed statement of this thesis, see G. DENNISON, *supra* note 13, at 175, 191–92, 198–200, 203, 205. Contemporaneous commentators also analyzed the battle in Rhode Island in terms of the principles of might and right. *See, e.g.*, FRANCES HARRIET WHIPPLE GREENE, MIGHT AND RIGHT (1844).

ment, but only if they had the physical power to prevail."[57] Indeed, Chief Justice Taney assigned the task of deciding whether a state constitution has a "republican form" to four different political entities: the legislative and executive branches of the extant state government, the Congress, and the President — the implication being that all four branches would recognize the extant state government.[58] In so doing, Chief Justice Taney linked the question of the legitimacy of a government to its success in establishing itself.[59]

The positivist stance that the Chief Justice implied was expressly stated by Justice Woodbury. Even as Justice Woodbury rhetorically elevated the authority of the people, "independent of the legislature," he conceded that "mere naked power, rather than intrinsic right"[60] might control the outcome. Justice Woodbury forthrightly acknowledged that deference to the extant institutions amounts to the positivist criterion of success in gaining a monopoly of power — that the official recognition and protection of a constitution depends on "put[ting] and ke[eping] it in successful operation,"[61] which in turn requires "a union of physical with moral strength."[62]

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[57] G. DENNISON, *supra* note 13, at 175.

[58] Chief Justice Taney combined jurisdictional principles of federalism and the doctrine of political questions to conclude that the federal courts must follow the state courts in presuming the legitimacy of the extant state constitution. *See Luther*, 48 U.S. at 40, 46. In assigning the role of defining the right to vote to the states, the Court's reasoning comported with other pre-Civil War Supreme Court decisions that left the definition of most individual rights to the states and limited the scope of federal constitutional rights to a narrow category of natural rights. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); *cf.* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

Chief Justice Taney also argued that deference was owed to the political branches of the federal government, based on a reading (proposed by the defendants, *see* ARGUMENTS, *supra* note 32, at 50–53 (Webster)) of the "republican form" clause of the Constitution in conjunction with the second clause of article IV, section 4, the domestic rebellion clause, which states that the United States "shall protect . . . each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." *See* U.S. CONST. art. IV, § 4. Reading the domestic rebellion clause to confer authority on Congress and the president to recognize legitimate state governments, the Chief Justice stated that the Court lacked the jurisdiction to adjudicate the "republican form" of contending state regimes. *Luther*, 48 U.S. at 29–31.

[59] Chief Justice Taney alluded to the sweeping practical importance of a state government's being actually "able to exercise any authority in the State," cautioning that if the charter government was found to have been annulled by the passage of the People's Constitution, then:

> the laws passed by its legislature during that time were nullities; its taxes wrongfully collected, its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

Luther, 48 U.S. at 38–39.

[60] *Id.* at 51 (Woodbury, J., dissenting).

[61] *Id.* at 54.

[62] *Id.* at 55.

C. The Formalist Analysis

The positivist approach described above perceives that legislative and executive determinations are guided by political power rather than by justiciable principle. What remains obscure in this account is why only participatory political rights, as opposed to other rights, should be relegated to the political departments for resolution. Chief Justice Taney did not explain in *Luther* why only rights that are political in the sense that they relate to participation in public affairs should be entrusted to the elected branches of government. Hence it is necessary to examine the explicit attempts to distinguish political rights from justiciable rights offered by the defendants, on whom Chief Justice Taney relied, and by Justice Woodbury, who agreed with the Court on this matter.

The defendants explicitly distinguished the right to participate in political activity from other justiciable rights. In their critique of a "natural right" to participate in political activity, the defendants interpreted the Suffragists' disqualification of "seven-eighths of society" as demonstrating the partial, as opposed to impartial and principled, nature of franchise qualifications. The defendants asserted that it was the partial, exclusionary character of the right to vote that differentiated it from justiciable rights. But exclusions of various kinds occur in rights other than voting, and do not indict the universality of those rights the defendants took to be natural and, therefore, justiciable.[63] Property and other rights, such as the right to make contracts, the right to stand trial, and the right to make a will and testament, are all subject to certain competency requirements. As long as such disqualifications are perceived to be based on a principled standard of competency, and everyone is subjected to the same standard, such rights are considered to be justiciable.[64] Thus, contrary to the defendants' reasoning, the simple fact that an exclusionary competency requirement adheres to the right to vote does not distinguish this right from any of these other "natural," or "justiciable," rights.

The defendants also rejected the plaintiffs' argument that justiciable standards of inclusion in the franchise emerged out of the process of self-government itself. Accepting arguendo the defendants' proposition that the standard of political competency must be determined

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[63] *See supra* note 32.

[64] In the context of criminal law, a defendant's lack of competency to assist in her own defense is grounds for not permitting her to stand trial. *See, e.g.*, Dusky v. United States, 362 U.S. 402 (1960) (per curiam). In the context of the law of wills, testamentary capacity is required. *See, e.g.*, Safe Deposit & Trust Co. v. Berry, 93 Md. 560, 49 A. 401 (1901); Guarantee Trust & Safe Deposit Co. v. Heidenreich, 290 Pa. 249, 138 A. 764 (1977). In the context of contract law, mental firmity is required. *See* E. FARNSWORTH, CONTRACTS § 4.6 (1982); Alexander & Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAW. 537, 557–59 (1973). For a discussion of all of these examples, see Minow, cited in note 4 above.

by mediated rather than direct politics does not by itself lead to the conclusion that the judicial branch is unsuited to evaluate that standard. Indeed, in the context of other rights, the consistency of competency standards with particular characteristics is considered to be a matter of law, suggesting that the evaluation of the conformity of particular characteristics with a competency standard is preeminently a judicial function.

The conclusion that participatory rights, unlike the other rights enumerated above, are nonjusticiable is not logically supported by either the existence of qualifications or the necessity that such qualifications be defined by the mediating structures of government. To get from the characterization of political rights as positive and exclusionary to the conclusion that they are nonjusticiable requires further assumptions — that the judicial process *is* principled, that the process by which political institutions arrive at the prescription of qualifications is not, and that principled rules do not exist "unless there [i]s some previous law of the State to guide [the court]."[65] Only reliance on these assumptions accounts for the *Luther* Court's conclusion that "the qualification of voters upon the adoption or rejection of the proposed constitution," unlike qualifications attached to bearers of other rights, *cannot* be governed by principled rules that the judiciary can apply.[66]

The Court's equation of principle as such with "previous law" reveals that its holding of nonjusticiability was motivated by a formalist conception of the judicial role. The crux of the formalist view is "the insistence on a rigid separation between law and morality."[67] From the standpoint of this dichotomy between legal principle and value, the process of interpreting law, qua principled process, must be kept institutionally distinct from the lawmaking process, which is rooted in collective debate over values and policy. Such a formalist conception of the judicial role is reflected in Chief Justice Taney's declaration that "[i]t is the province of a court to expound the law, not to make it . . . not to prescribe the qualifications of voters in a state, nor to determine what political privileges the citizens of a state are entitled to."[68] In the same spirit, Justice Woodbury stated that "we speak what the law is, jus dicere, we speak or construe what is the constitution, after both are made, but we make, or revise, or control neither."[69]

The formalist separation between value-laden lawmaking and value-neutral interpretation requires that the application of legal principle be an impersonal, mechanical process; it proceeds inexorably

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[65] *Luther*, 48 U.S. at 41.

[66] *Id.*

[67] M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 256 (1977).

[68] *Luther*, 48 U.S. at 41.

[69] *Id.* at 52 (Woodbury, J., dissenting).

from the "crystal clear" logic of the principle itself without the intervention of personal choice, or considerations of "conscience, natural right, or justice."[70] To fulfill this conception of neutrality, principled standards must be abstract in form and divorced from the processes of collective debate. Legal principles in the formalist conception then have two characteristics, both of which are depicted in *Luther*: (1) they are *unambiguous* or, in Justice Woodbury's words, "strict," "fixed," and "manifestly ordained,"[71] and (2) they *preexist* the occasion of adjudication. Thus, Chief Justice Taney explained that the state courts are bound to presume the legitimacy of an extant constitution because "[j]udicial power *presupposes* an established government capable of enacting laws and enforcing their execution."[72] In this view, adjudication consists in identifying encroachments upon clearly established "boundary line[s]"[73] and "determining whether [the acts of the states and the federal legislative and executive branches] are beyond the limits of power marked out for them respectively by the constitution of the United States."[74]

The formalist insistence upon the univocal and preexisting nature of a legal principle compels two related conclusions: that there is no principled standard of political competency and that, therefore, the positive prescriptions of elected officials must prevail. If legal principles are uncontroversial abstractions, mechanically applied, then the fact that the Suffragists asserted the rule of white male suffrage prior to the adjudication did not suffice; to be justiciable, from the formalist standpoint, the rule had moreover to be "strongly evinced."[75] To be strongly evinced, in turn, meant being "clearly acknowledged by the existing political tribunals."[76] And to be clearly acknowledged by the existing political tribunals meant having won the seat of power.

Relying explicitly on the distinction between making law and applying it, Justice Woodbury's criteria for distinguishing political from other justiciable rights clearly reveal the operation of the formalist

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[70] R. COVER, JUSTICE ACCUSED 233 (1975).

[71] *Luther*, 48 U.S. at 51–54 (Woodbury, J., dissenting).

[72] *Luther*, 48 U.S. at 40 (emphasis added). The plaintiffs conceded that those state courts that were creatures of the state constitution were bound to assume its authority and, therefore, to defer to the legitimacy of the "political branches" of government constituted by the same source. *See* G. DENNISON, *supra* note 13, at 156–57. But they argued that it was within the jurisdiction of the Supreme Court to measure the conformity of a state's form of government with the criterion of "republican form" because, as a federal court, the Supreme Court derives its authority from the federal Constitution. which transcends the authority of the state. *See id.* The Supreme Court implictly rejected this argument by relying on the holding deferring to the extant political branches of a Rhode Island state court that claimed its authority under the Constitution of 1843. *See Luther*, 48 U.S. at 40.

[73] *Luther*, 48 U.S. at 54 (Woodbury, J., dissenting).

[74] *Luther*, 48 U.S. at 47; *cf. id.* at 52–53 (Woodbury, J., dissenting) (likening the task of judicial review to identifying boundary transgressions).

[75] *Luther*, 48 U.S. at 41.

[76] *Id.*

conception. According to Justice Woodbury, only the law of "private rights," as opposed to political rights, can be applied by the judiciary. He distinguished private from political rights according to the nature of the person to which they attach and their subject matter. Private rights are held by persons in their role as individual subjects rather than as makers of law; political rights belong to "the people" in its collective capacity as lawmaker rather than to a person qua individual.[77] Furthermore, private rights relate to "what is meum and tuum,"[78] whereas political rights are "public liberties"[79] — that is, shares in the public power of making law.

Justice Woodbury expressly distinguished this political power of constitution-making, which belongs to the people, from the merely legislative power.[80] He conceived private rights, matters of "meum and tuum," to be governed by "already made" law.[81] Precisely because they are "already" defined to belong to each individual, private rights (of which property is the paradigm) can be judicially applied; their prior defintion supposedly removing the possibility of any controversy through which the arbitrary lawmaking power of a judge might intervene. By contrast, participatory rights are the very vehicle through which the positive lawmaking power of the people is exercised, and as such they ought to be left to "policy, inclination, popular resolves, and popular will" — in short, "politics."[82] It is because political rights are the subject of the sovereign political power of "the people," rather than the legislative power, that questions "extend[ing] to the power of the people, independent of the legislature, to make constitutions — to the right of suffrage among different classes"[83] are nonjusticiable. Thus, the explicit rationale for deference is that the judiciary, rather than controlling the people (as it does individual subjects and the legislature), is constrained by "the people themselves in their primary capacity as makers and amenders of constitutions"[84] from usurping the political lawmaking function of the people.[85]

Justice Woodbury's statement that the judiciary is "a check on the legislature [rather] than on the people themselves in their primary capacity as makers and amenders of constitutions"[86] seems to echo

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[77] *See id.* at 53 (Woodbury, J., dissenting).

[78] *Id.* at 52.

[79] *Id.*

[80] *See id.* at 51–53.

[81] *Id.* at 52.

[82] *Id.*

[83] *Id.* at 51.

[84] *Id.* at 53.

[85] Thus, Justice Woodbury argued that the people should not "intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary" and further asserted that the people could overturn judicial determinations only through revolution. *Id.* at 52.

[86] *Id.* at 51.

the plaintiffs' justification of extragovernmental power. But in an ironic twist on the plaintiffs' argument, Justice Woodbury used the distinction between the *political* constitution-making power of the people and the merely *legislative* power of the extant government to subvert the principle of protecting the exercise of extragovernmental political power. Ultimately, he too deferred to the elected branches whose representation of "the people" (that is, the politically competent) was being contested.

This paradoxical outcome — enforcing, in the name of the people, the power of elected officials over the people whom they may not represent — demonstrates the ambiguous position occupied by political rights in this multifaceted dichotomy between natural, individual property rights on one hand, and positive, public or collective rights of participation in politics on the other. As the *subject* of the people's prior and sovereign political power of lawmaking, the allocation of political rights should not be subject to judicial review. But political rights are simultaneously the *vehicle* of the popular lawmaking process, allocated to individuals. As such, like other individual rights, they are vulnerable to encroachment by a political body that does not in fact represent them. Hence they may require judicial protection.

The refusal to extend such protection to political rights leaves their determination to, in Justice Woodbury's frank statement, "inclination — or prejudice or compromise," or "even [to] public policy alone or mere naked power."[87] Justice Woodbury expressly acknowledged that a conception of a legal principle as being *clearly fixed prior* to its application requires a popular movement to "be so strong" as to be able to avoid the "arming of the militia or successful appeals to the general government to suppress [the movement] by force."[88] The formalist conception of law as literal pre-scription thus compels the Court to endorse a positivist, statist position that disregards whether a population is unjustifiably excluded from the franchise.

D. The Paradox of the Formalist Conception

According to legal historians, alternatives to the formalist jurisprudence were available to the Supreme Court — "[a]lternative articulations . . . that gave the formal structure more down-to-earth, instrumental justifications, that stressed the inevitable and desirable role of the judge and of policy input in decision making, and that gave the judiciary a more explicit role as conjoint legislator."[89] Because

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[87] *Id.*

[88] *Id.* at 54.

[89] R. COVER, *supra* note 70, at 237; *see* M. HORWITZ, *supra* note 67, at 160–61, 180–84 (describing an instrumental and substantive jurisprudence). Similarly, in his Constitutional Law course at Harvard Law School, Professor Richard D. Parker traces two distinct models of pre-

the Supreme Court has, on different occasions, alternately availed itself of both the formalist and the instrumentalist models of judicial reasoning,[90] its reliance on a formalist conception of law in *Luther* must itself be regarded as the product of a substantive choice. And because the merits of the parties' competing claims, for and against a justiciable right to political participation, depended upon these two competing models of jurisprudence respectively, its adoption of only one model, the formalist one, contradicts its jurisdictional posture of not reaching the substantive claims.

The alternative to formalist jurisprudence has been denominated a "substantive,"[91] "instrumental,"[92] or "unmediated"[93] conception of law and legal reasoning. This alternative conception of the judicial role, which softens the distinction between making and applying law, contains an alternative conception of the form of legal principle. Whereas from the formalist standpoint values are subjective, from the substantive standpoint legal objectivity is rooted in values.[94] These alternative conceptualizations of legal principle have different implications for the conceptualization of the political process. The formalist equation of legal principles with "crystal clear" formulations that tran-

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Civil War judicial reasoning: a "transcendalist," — that is, formalist — paradigm of reasoning, which he associates with liberal political theory, and a substantive paradigm, in which the Court explicitly articulates and assesses values and standards, which he associates with republican political theory.

[90] Professor Morton Horwitz associates formalist and substantive jurisprudences with different time periods. *See* M. HORWITZ, *supra* note 67. Cover differs with Horwitz, arguing that

> appeals to formalism . . . may be not only the product of an "age" or a "jurisprudence," but of various external and internal pressures on the judge of which moral beliefs is one. I would suggest here that any fully descriptive jurisprudence must have complementary components for noting both the generative and the restraining elements of a formal legal system. Which of the components is stressed will be more issue-related than time-bound.

R. COVER, *supra* note 70, at 200. Although Cover specifically directed this comment toward explaining the apparent anomaly of formalist adjudication in slavery cases in an era (the mid-nineteenth century) when the substantive style is thought to have prevailed, his observation is of general relevance. Professor Parker identifies Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as examples of the formalist "transcendental liberal" model of judicial reasoning; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), as an example of the substantive style; and Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), as an example of both styles represented sequentially.

[91] *See, e.g.*, M. HORWITZ, *supra* note 67, at 160; *cf.* Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 236–39 (1981) (discussing the relationship between process and substance in constitutional interpretation).

[92] *See* R. COVER, *supra* note 70, at 237; M. HORWITZ, *supra* note 67, at 30.

[93] For a subtle elaboration of the "unmediated" style associated with the republican tradition, see Michelman, cited in note 1 above, at 33–36, where he describes Justice O'Connor's reasoning in Goldman v. Weinberger, 106 S. Ct. 1310 (1986), and at 42, where he contrasts the liberal conception of the "empire of laws" as an objective, politically transcendant rule of law, with the republican conception of that empire as principles and standards emergent from political debate.

[94] *See* M. HORWITZ, *supra* note 67, at 161.

scend the realm of collective debate implies that the process of collective activity — that is, the political process — is itself unprincipled. The judicial process, in this view, is unlike the political process precisely in that it is principled by virtue of being divorced from value judgments. Conversely, in the substantive view, law emerges out of political activity[95] and political activity itself assumes the character of "reason in the debate of a commonwealth."[96] Thus, in this view, the judicial and political processes are similar in that both are based on principled determinations of "intrinsic value."[97]

The contrast between the substantive conception of justice and the formalist conception that guided the *Luther* Court sheds light on what was at stake in the parties' debate over the relative merits of direct participation and mediated politics. The plaintiffs invoked a substantive conception of justice in claiming that a principled definition of franchise qualifications emerged out of the processes of self-government.[98] Conversely, the defendants relied on formalist assumptions in portraying "self-government" as unprincipled mob rule, and mediated government as the source of valid, yet inherently arbitrary, rules.[99]

The strength of the defendants' argument lay in exposing the weaknesses in the plaintiffs' two justifications of the Suffragist constitution — the natural right justification and the theory of self-government. As the defendants pointed out, the plaintiffs failed to articulate reasons why adult white male residents of sound mind, as opposed to the other "seven-eighths of society," were "naturally" fit to participate in the activity of government. The plaintiffs failed not only to offer principled reasons why the rest of society, including blacks, women, and minors, did not possess the same "natural right," but also to articulate reasons why adult white men themselves *are* naturally competent to vote without regard to property.

In the alternative, the plaintiffs relied on the idea of a process of popular "self-government," in which principled reasons for including participants (and excluding nonparticipants) supposedly inhered.[100] But the advocacy of direct, participatory government over mediated, representative government simply does not address, let alone resolve, the issue of whether there exists a principled standard for distinguish-

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[95] *See* Michelman, *supra* note 1, at 27–38, 42, 58; Pitkin, *supra* note 2, at 339, 344, 347–49.

[96] J. HARRINGTON, *The Commonwealth of Oceana*, in THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J. Pocock ed. 1977), *quoted in* Michelman, *supra* note 1, at 4, 42.

[97] *Cf.* M. HORWITZ, *supra* note 67, at 161 (stating that in the substantive conception, judicial reasoning is based on judgments about the "intrinsic value" of a given case).

[98] *See supra* pp. 1132–33.

[99] *See supra* pp. 1133–34.

[100] *See supra* pp. 1132–33.

ing between those who are and those who are not entitled to the political franchise. Like the "natural rights" idea, the abstract concept of "self-government" does not in itself disclose a justification for limiting the constituents of that collective "self" to white adult male residents. The logical circle in which adult white males determined their competency to determine their competency could not be squared simply through faith in the direct activity of self-government, as opposed to the mediated and mediating activity of elected officials.

The defendants were correct in characterizing the plaintiffs' descriptions of nature and self-government as unprincipled. But this criticism of the plaintiffs' particular criteria does not support the conclusion that the distinction between those qualified to participate in politics and those not is *inherently* unprincipled. Observing that the plaintiffs' definition of the competency of adult white males was indefensible — that is, undefended, unreasoned — the defendants then made the unsupported extrapolation that *no* defensible standard of competency exists.

Had the Supreme Court analyzed the contest between the two parties from the standpoint of substantive justice, it could have evaluated the "intrinsic justice" of the property qualification in comparison with "universal" white male suffrage in terms of the conformity of both prescriptions to the criterion of the ability to participate in political activity. Instead, by defining the political process as an arena governed solely by force, and by consigning the determination of franchise qualifications to this unprincipled political process, the Supreme Court repudiated simultaneously the republican vision of politics as an arena of rational collective deliberation and the central republican tenet of an enforceable right to participate in the political arena.

III. Conclusion

In *Luther v. Borden*, the Supreme Court was faced with a choice. On the plaintiffs' side was the republican conception in which justice consists in rational debate about substantive values, and participation in that debate is a right subject only to principled exceptions on the basis of competency. On the defendants' side was a fundamentally antagonistic conception, in which debate is unprincipled by definition, and values are subjective — a conception rendering a determination of political competency, upon which the objectivity of political rights depends, inherently arbitrary. In characterizing political rights as nonjusticiable and subjecting them to the unrestrained determinations of the "political branches," the Court decisively sided with the latter viewpoint. In so choosing, it contradicted its own claim to neutrality.

Politicizing the republican conception of a universal right to political participation, subject only to a competency standard, as the Court

did in *Luther*, has been a double-edged sword. On the one hand, it deprives the politically competent — all those capable of achieving personal freedom through collective self-government — of judicial protection against governmental encroachment on their right to participate. On the other hand, the evisceration of the content of the republican conception of the political process by definition weakens the requirements of competency to participate in that process and, thus, narrows the definition of political incompetency according to which exclusion from the franchise is justified.[101]

Since the founding of the United States, our history has been characterized by the increasing democratization of suffrage accompanied by a decreasing degree of intensity or directness of political involvement.[102] The foregoing analysis of *Luther v. Borden* suggests that these two trends, the democratization and the dilution of political participation, are not unrelated; on the contrary, they both correspond to the weakening of the original republican conception of political participation premised on an objective standard of political competency. If this analysis is correct, then by rejecting the republican idea of a principled standard of political competency, the *Luther* Court simultaneously paved the way for the future enfranchisement of hitherto excluded populations and contributed to a decline in the level of political participation.[103]

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[101] *Cf.* Tushnet, *supra* note 1, at 430 (noting the danger associated with republicanism of providing "more concrete standards of moral worth," which "may be too stringent and, by leading those with lesser accomplishments to feel that they have lesser value, may lead to discrimination").

[102] For a sampling of some of the many writings criticizing contemporary American politics for distinguishing popular political participation, see B. BARBER, *The Compromised Republic: Public Purposelessness in America*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 32 (1978), and Parker, cited in note 91 above, at 242, 244, 253, 256.

[103] *Cf.* J. POCOCK, *supra* note 2, at 43 ("It begins to look . . . as if the characteristic tendency of jurisprudence [as opposed to republicanism] was to lower the level of participation and deny that man is by nature political.").