

A Constitutionally Protected Right to Vote

PHILLIP M. KANNAN*

I. INTRODUCTION.....	748
II. THE USE OF AMBIGUITY AND INFERENCE IN THE CONSTITUTION.....	751
III. APPLYING THE CALCULUS OF INFERENCE DEVELOPED BY THE SUPREME COURT IN <i>GRISWOLD V. CONNECTICUT</i> TO FIND UNENUMERATED CONSTITUTIONALLY PROTECTED RIGHTS	756
IV. TEXTUAL EVIDENCE SUPPORTING A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE	760
<i>A. Evidence of a Constitutionally Protected Right to Vote Based on the Constitution as Originally Ratified.....</i>	<i>761</i>
<i>B. Evidence of a Constitutionally Protected Right to Vote Based on the Bill of Rights</i>	<i>763</i>
<i>C. Evidence of a Constitutionally Protected Right to Vote Based on the Fourteenth Amendment.....</i>	<i>764</i>
<i>D. Evidence of a Constitutionally Protected Right to Vote Based on the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.....</i>	<i>765</i>
1. History of the Struggles Leading to and Implementing the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty- Sixth Amendments.....	766
2. Language Used in the Fifteenth, Nineteenth, Twenty- Fourth, and Twenty-Sixth Amendments Implies a Constitutionally Protected Right to Vote	770
V. SUMMARIZING THE EVIDENCE: THERE IS A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE—THE RIGHT TO VOTE IS A FUNDAMENTAL RIGHT	774
VI. CONCLUSION	775

“[T]he nation, shall have a new birth of freedom, and . . . government of the people by the people for the people, shall not perish from the earth.”¹

I. INTRODUCTION

In the quotation given above, President Abraham Lincoln eloquently stated the objective of the United States Constitution (“Constitution”), namely, the creation of a government of the people, by the people, for the people.² Surprisingly, the Constitution does not *expressly* protect or recognize the *means* for achieving this goal—the right of citizens to vote. The thesis of this Article is that the Constitution *implicitly* recognizes and protects that right; in a landmark case, *Griswold v. Connecticut*, the Supreme Court developed the methodology for drawing that inference.³

Rights that are recognized and protected by the Constitution are called fundamental rights by the Supreme Court.⁴ When reviewing laws that impinge on fundamental rights, the Court applies the standard of strict scrutiny, which requires “that the [law or] regulation be narrowly tailored to advance a compelling state interest”⁵

* Distinguished Lecturer and Legal-Scholar-in-Residence, Colorado College.

1. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), <http://www.ourdocuments.gov/doc.php?flash=false&doc=36&page=transcript>.

2. *See id.*

3. *See* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (showing that the Supreme Court had to develop the methodology to draw inferences that the Constitution implicitly recognizes and protects particular rights).

4. *See* *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (“These decisions make it clear that only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.” (internal quotation marks and citations omitted)); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.”); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“Freedom of speech and of the press are fundamental rights . . .”).

5. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

The Supreme Court concluded in *Griswold v. Connecticut*: “[There are rights of people] not mentioned in the Constitution or in the Bill of Rights.”⁶ This is an express affirmation of what is implicit in the Ninth Amendment to the Constitution, which states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparate others retained by the people.”⁷ The Court in *Griswold* held that other rights peripheral to, and in the penumbras of, enumerated rights were also protected by the Constitution because without them, “the specific rights would be less secure.”⁸ Applying the general principle that the Constitution protected peripheral and penumbral rights, the Court then analyzed the First, Third, Fourth, and Fifth Amendments, holding that peripheral to them, and emanating from their penumbras, was a constitutionally protected right of privacy: “[T]he right of privacy which presses for recognition here is a legitimate one.”⁹

A constitutionally protected right to vote, which like a right to privacy, is not mentioned in the Constitution and also presses for recognition. There are Supreme Court opinions that assume the existence of, and even recognize, a constitutionally protected right to vote;¹⁰ however, in other cases, the Court implies and even states the

Thus, as we have recognized when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); see *Roe*, 410 U.S. at 155 (“Where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” (internal quotation marks and citations omitted)).

6. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

7. U.S. CONST. amend. IX.

8. *Griswold*, 381 U.S. at 482–83.

9. *Id.* at 485.

10. *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (reviewing and upholding a Tennessee statute that limited activity within 100 feet of the entrance to a polling place). The Court applied the strict scrutiny standard and stated, “As a facially content-based restriction on political speech in a public forum, [the Tennessee statute] must be subjected to exacting scrutiny: The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” *Id.* (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

opposite position.¹¹ This dichotomy by the Court has been analyzed in the literature, and principles for unifying the two lines of cases have been proposed.¹² However, the Supreme Court has not adopted or clearly stated a unifying principle, so the dichotomy persists.¹³

In this article, I go back to the Constitution itself to find proof that the citizens of the United States do have a constitutionally protected right to vote. I argue that there are enumerated rights protected by the Constitution, the Bill of Rights, and later amendments that have penumbras which, when considered jointly in the manner the Supreme Court has applied in the past, recognize this constitutionally protected right.

The argument that a right to vote is an unenumerated right protected by the Constitution is developed in Parts II through IV. In Part II, I discuss important issues, debated by the drafters of the Constitution but left unresolved by the *express* language of the Constitution resulting in ambiguities, and show how inference was used by the drafters of the Constitution to resolve them. Part III analyzes *Griswold* and dissects the logic by which the Court concluded that a right of privacy is an unenumerated right protected by the Constitution. Part IV identifies the specific provisions in the Constitution and its amendments from whose penumbras I argue that the protection for

11. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (refusing to apply strict scrutiny and stating, “[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

12. See, e.g., Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 145–46 (2008) (analyzing Supreme Court cases on both sides of this issue and proposing a solution based on whether the Court was considering a state law that directly affected the right to vote or one that only indirectly affected the right to vote). The proposal is for the Court to apply strict scrutiny to laws that directly affect the right but not to laws that only indirectly affect the right. John M. Greabe, *A Federal Baseline for the Right to Vote*, 112 COLUM. L. REV. SIDEBAR 62, 67 (2012) (“The text of the Constitution does not by its own terms confer on United States citizens a right to vote.”).

13. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (“In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by *relevant and legitimate state interests* ‘sufficiently *weighty* to justify the limitation.’”) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (emphasis added)).

a right to vote emanates. Part IV applies the Court's logic from *Griswold* to these provisions to conclude that there is a constitutionally protected right to vote. I explore some of the implications that arise from this right in Part V.

II. THE USE OF AMBIGUITY AND INFERENCE IN THE CONSTITUTION

The Constitution accomplished the following three objectives: (1) it created a state, the United States of America, which became an actor in international dynamics from then forward;¹⁴ (2) it created, structured, and inaugurated the government of that state;¹⁵ and (3) it formed "the people" of that state.¹⁶ However, ambiguity is a hallmark of each of these accomplishments.

There was uncertainty concerning the territorial extent of the United States.¹⁷ Did its territory include only the areas populated by European settlers in 1789?¹⁸ Did its territory extend from the Atlantic Ocean to the Appalachian Mountains as some of the former colonies claimed?¹⁹ Or did its territory extend to the Mississippi River and beyond as others claimed?²⁰ These were lingering questions inherited from the Articles of Confederation.²¹ The extent of the uncertainty is captured in the following summary:

Some of the bitterest controversies in post-Revolutionary America involved western land. Connecticut, Georgia, Massachusetts, New York, North and South Carolina, and Virginia insisted that their colonial charters extended their boundaries to the Mississippi River or beyond. Maryland, which had no western land

14. U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish the Constitution for the United States of America.").

15. U.S. CONST. arts. I–III.

16. See U.S. CONST. pmbl.

17. U.S. DEP'T OF STATE, BUREAU INT'L INFO. PROGRAMS, OUTLINE OF U.S. HISTORY 70–71 (2011), http://photos.state.gov/libraries/amgov/30145/publications-english/history_outline.pdf.

18. See *id.* (discussing the problems with expansion).

19. See *id.*

20. See *id.*

21. *Id.* ("With the end of the Revolution, the United States again had to face the old unsolved Western question, the problem of expansion, with its complications of land, fur trade, Indians, settlement, and local government.").

claims, refused to approve the Articles of Confederation unless it received assurance that the other states agreed to yield their claims to the federal government. Between 1781 and 1785, the “landed” states ceded their western land claims to Congress. Virginia ceded the single largest area to the national government. Known as the Northwest Territories, it comprised the present-day states of Illinois, Indiana, Michigan, Ohio, and Wisconsin, as well as part of Minnesota.²²

The Constitution created a government with three branches: the legislative (Congress), the executive (the President and Vice President), and the judicial (the Supreme Court).²³ It specified interconnections of the three branches only to a limited extent. The legislature was given “all legislative Powers”²⁴ and the executive was assigned the obligations to “preserve, protect and defend the Constitution of the United States”²⁵ and to “take Care that the Laws be faithfully executed.”²⁶ The authority of the Supreme Court and all lower courts established by Congress²⁷ was specified as follows: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties.”²⁸ In brief, Congress was to make laws, the President was to execute the laws made by Congress pursuant to the Constitution, and the federal courts were to adjudicate cases that arose under these laws.

Nothing was said in the Constitution about how these three sets of power were to resolve disagreements that arose among them

22. Steven Mintz & Sara McNeil, Annotation, *Northwest Ordinance*, DIGITAL HIST. (2016), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=255.

23. See U.S. CONST. arts. I–III.

24. U.S. CONST. art. I, § 1.

25. U.S. CONST. art. II, § 1, cl. 7.

26. U.S. CONST. art. II, § 3, cl. 3.

27. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). In this grant of authority, the power of Congress to create inferior courts is an *implied* power, not an expressed power. See *infra* Part IV.C. It is implied from an unarticulated premise. *Id.* This is typical of the way the Constitution creates authority. *Id.*

28. U.S. CONST. art. III, § 2, cl. 1.

or conflicts between the people and actions by the three branches. Authority over the system formed by the interaction of three branches of government among themselves and with the people was *assumed* by the Supreme Court. In *Marbury v. Madison*, the Supreme Court claimed and exercised the power to examine a law enacted by Congress and to declare it void because it was inconsistent with the Constitution.²⁹ This power was stated by Chief Justice John Marshall in one of the most well-known principles in U.S. judicial history: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”³⁰

The ambiguity in the Constitution regarding the creating of “a People”³¹ is illustrated by its treatment of Native Americans and African Americans. Except in special cases, the Court held in 1884 that Native Americans were not included in “the People.”³² It was not until 1924 that this decision was reversed by an Act of Congress.³³ Regarding African Americans, the Court held that they were not citizens and could not be citizens even if they were freed, and thus, African Americans were not included in “the People.”³⁴ This ruling was not reversed until 1868 when the Fourteenth Amendment was ratified.³⁵

29. *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

30. *Id.* at 177.

31. *See* *Minor v. Happersett*, 88 U.S. 162, 165 (1874) (discussing the drafters of the Constitution and those who ratified it intended to be included in “we the People”).

32. *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (“The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect . . .”).

33. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. 1401(b) (2012)) (“Indians born within the territorial limits of the United States [are] declared to be citizens of the United States . . .”).

34. *See* *Dred Scott v. Sandford*, 60 U.S. 393 (1856). The Court stated the issue as follows: “Can a negro, whose ancestors were imported into this country,

Not only did the Constitution create uncertainty by failing to define critical terms, such as the three discussed above, it shrouded the resolutions of many contentious issues in layers of inferences. Consider slavery, for example. There is no explicit statement in the Constitution that recognized the slave trade in the United States or property rights in humans; nor is there one that recognizes or asserts a right of individuals to own slaves. Both of these failures to protect rights that predate the Constitution are bridged by drawing inferences from explicit provisions in the Constitution. First, the following provision is found in Article IV:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.³⁶

This clause implied that slaves were the property of their owners. Thus, property in humans and ownership of property in humans were protected by the Constitution. Consider next the following, which is part of Article V: “Provided that no Amendment [to this Constitution] which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the . . . first Clause[] in the Ninth Section of the first Article”³⁷ The first clause of the ninth section states:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax

and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States . . . ?” *Id.* at 403. The court answered the issue: “Clearly they were not regarded as portion of the people” *Id.* at 411.

35. U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

36. U.S. CONST. art. IV, § 1, cl. 3.

37. U.S. CONST. art. V.

or duty may be imposed on such Importation, not exceeding ten dollars for each Person.³⁸

These last two clauses guarantee that slave trade is constitutional in the United States.

From the conclusion that the slave trade was protected by the Constitution, three inferences can be drawn: (1) slaves were property under state laws, (2) slaves could be owned, bought, and sold like any other chattel, and (3) slavery as an institution was protected by the Constitution.

There is one last subtle inference created by the three clauses quoted above in light of the foreign commerce clause.³⁹ The inference is that, without these articles, the power of Congress to regulate foreign commerce included the authority to tax *slave trade* heavily, impose limits and other restrictions on *slave trade*, and even to end *slave trade*. Because there is no analogous express authority giving Congress the authority to tax, regulate, or prohibit *slave ownership*, one may infer that Congress lacked those powers.⁴⁰

As demonstrated by the above analysis of the issue of the constitutionality of slavery, the drafters of the Constitution utilized inference and unarticulated objectives to produce a constitution that was more than met the eye.

Regarding many issues, including the question of a right to vote, the Constitution was a paper lamb. The calculus of inference, operating on clauses included in the Constitution and on the absence of other provisions in it, can be used to prove that the Constitution protects unenumerated rights.

38. U.S. CONST. art. I, § 9, cl. 1.

39. U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations . . .”).

40. This argument is based on the logic used by Hamilton to support the position that no Bill of Rights was needed in the proposed Constitution. THE FEDERALIST NO. 84 (Alexander Hamilton); *see infra* notes 62–63 and accompanying text.

III. APPLYING THE CALCULUS OF INFERENCE DEVELOPED BY THE
SUPREME COURT IN *GRISWOLD V. CONNECTICUT* TO FIND
UNENUMERATED CONSTITUTIONALLY PROTECTED RIGHTS

Understanding the Court's analysis in *Griswold v. Connecticut*,⁴¹ where the Court recognized a constitutionally protected right of privacy,⁴² is essential to the argument developed in this Article.⁴³

In *Griswold*, a Connecticut law made it a crime for married couples to use contraceptive devices and for a physician to advise couples about contraceptive devices.⁴⁴ The Court found that the Connecticut law did not violate any *enumerated* constitutional provision. It held, consistent with the Ninth Amendment,⁴⁵ that there were other rights, *unenumerated*, but still protected by the Constitution. The Court's logic in arriving at this holding begins with the premise that each enumerated right created peripheral rights. For example, in the First Amendment:

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.⁴⁶

41. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

42. *Id.* at 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”). It is interesting to note that a right to privacy is included in the European Convention for the Protection of Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222. This right was recognized as creating obligations on the part of the government to protect members of the public, that is, as a positive right, by the European Court of Human Rights. *Lopez Ostra v. Spain*, 303-C Eur. Ct. H.R. (ser. A) (1994).

43. The second and third paragraphs in this Part are taken from my previous article, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*. Phillip M. Kannan, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*, 46 U. MEM. L. REV. 637 (2016).

44. *Griswold*, 381 U.S. at 480.

45. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparate others retained by the people.”).

46. *Griswold*, 381 U.S. at 482 (citations omitted).

Regarding the First Amendment, the Court held that it created a right of association that included “more than the right to attend a meeting [and that] it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.”⁴⁷ The Court then gave its logic for declaring the existence of, and protecting, these peripheral constitutional rights: “Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment *its existence is necessary in making the express guarantees fully meaningful*.”⁴⁸ It is important to understand that the *Griswold* Court developed a logical process that recognized unenumerated rights called peripheral rights and that the Court found them enforceable.⁴⁹

In the reasoning in the preceding paragraph, the Court discussed the First Amendment; however, that was merely a particular example of its overall logic. It was in no way meant to suggest that the logic only applies to the First Amendment. In fact, in *Griswold*, the Court combined peripheral rights from the First, Third, Fourth, Fifth, and Ninth Amendments to find the constitutionally recognized and protected right of privacy.⁵⁰

The contributions of the First Amendment to the right of privacy are numerous. By prohibiting Congress from making laws establishing religion,⁵¹ this amendment recognizes personal zones of religion into which the government may not intrude. This is the beginning of the right to privacy. The next provision, which denies Congress the power to make laws prohibiting the free exercise of re-

47. *Id.* at 483.

48. *Id.* (emphasis added).

49. In an earlier article, I argued that any means requisite to the existence of a constitutionally protected end or right is itself an unenumerated right protected by the Constitution. Kannan, *supra* note 43, at 658 (“Thus, each complex, multidimensional, constitutionally protected right includes (1) inherent rights, (2) peripheral-penumbral rights, and (3) necessary means for achieving constitutionally protected rights.”).

50. *Griswold*, 381 U.S. at 484. Finding a peripheral right protected by the Constitution by implication from several enumerated rights is an indication that the Bill of Rights is as much a system of rights as a “bill,” that is, a list of unrelated rights. When interpreting the Bill of Rights, one should take into account the systems’ dynamics of the document as a whole and the multidimensional nature of each of the enumerated rights.

51. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

ligion, recognizes that, in these zones, individuals have the autonomy to make all decisions regarding their exercise of religion.⁵² These two clauses together protect a right of *religious* privacy. The next clause prohibits Congress from making laws abridging the freedom of speech,⁵³ this extends the zone of autonomy from religion to “freedom of inquiry, freedom of thought, and freedom to teach.”⁵⁴ The next provision, which prohibits Congress from limiting the freedom of the press,⁵⁵ extends the zone of autonomy to protect the freedom of individuals to receive information as well as the freedom of the press to publish.⁵⁶ Finally, the last clause, which prohibits Congress from enacting laws abridging the right of the people peaceably to assemble,⁵⁷ extends the zone of autonomy to protect individuals’ rights to decide for themselves with whom they will associate.

The contribution of the Third Amendment to the protection of a right of privacy is clear. It recognizes that the right of privacy has physical dimensions, private residences,⁵⁸ as well as the mental and intellectual dimensions protected by the First Amendment.

The Fourth Amendment extends the physical dimension to the protection of “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁵⁹

The Fifth Amendment returns to the mental dimension of the right of privacy. Because of this amendment, the government cannot force open and get inside of the mind of individuals in criminal proceedings against them.⁶⁰

52. *See id.*

53. *Id.* (“Congress shall make no law . . . abridging the freedom of speech . . .”).

54. *Griswold*, 381 U.S. at 482.

55. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press . . .”).

56. *See Griswold*, 381 U.S. at 482.

57. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”).

58. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner to be prescribed by law.”).

59. U.S. CONST. amend. IV.

60. U.S. CONST. amend. V. (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”).

In the penumbra of each of these amendments falls a common theme—protecting the autonomy of individuals. The cumulative force of these fragments of evidence and the multidimensional nature of the types of autonomy protected by the individual amendments led the Supreme Court to conclude that there is a constitutionally protected right of privacy: “[T]he right of privacy which presses for recognition here is a legitimate one.”⁶¹

Further, the Court could have supported the protection of a right to privacy with the argument made by Alexander Hamilton in *The Federalist Papers* in support of the position that no Bill of Rights in the proposed Constitution was necessary.⁶² It can be understood, in its general form, from a particular example given by Hamilton: “For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”⁶³ The Court in *Griswold* could have pointed to the absence from the Constitution of any power of the government to restrict personal autonomy. While this evidence alone is probably not conclusive, it adds strength to the evidence based on the First, Third, Fourth, and Fifth Amendments discussed above.

The significance of *Griswold* is twofold. First, it establishes that the allusion to unenumerated, constitutionally protected rights in the Ninth Amendment is not a vacuous, merely theoretical possibility. The Court recognized a constitutionally protected right of privacy, which has proven to be a powerful individual right that is implicated in socially sensitive areas, such as abortion⁶⁴ and individual decisions concerning medical treatment and death.⁶⁵ Second, the

61. *Griswold*, 381 U.S. at 485.

62. THE FEDERALIST NO. 84 (Alexander Hamilton).

63. *Id.*

64. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[F]or the period of pregnancy prior to this ‘compelling’ point [viability of the fetus], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.”).

65. *See, e.g., Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990) (“The choice between life and death is a *deeply personal decision* of obvious

Griswold Court developed and applied the methodology the Court would use when called upon to recognize unenumerated, constitutionally protected rights. In brief, that methodology is a careful analysis of the 1789 Constitution, the Bill of Rights, and all later amendments to understand their penumbras and determine whether these penumbras, when considered cumulatively, protect the asserted right.

In the following Part, I apply these principles from *Griswold* to the question of the existence of a constitutionally protected right to vote.⁶⁶ The first step in this process is a close examination of the Constitution to see the extent to which its text integrates voting.

IV. TEXTUAL EVIDENCE SUPPORTING A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE

To see how the calculus of inference can be applied to the question of the existence of a constitutionally protected right to vote, I start by considering clauses concerning voting that are included in the Constitution as ratified. I then expand this inquiry to its amendments.

and overwhelming finality.” (emphasis added)). The right to make this choice was held to be a liberty interest protected by the Fourteenth Amendment. *Id.* at 278.

66. It must be noted that, even if there is a constitutionally protected right to vote, it is not unlimited and absolute. For example, the Supreme Court has upheld North Carolina’s literacy test. *Lassiter v. Northhampton Cty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (“The present requirement, applicable to members of all races, is that the prospective voter be able to read and write any section of the Constitution of North Carolina in the English language. That seems to us to be one fair way of determining whether a person is literate” (internal quotation marks and citations omitted)); *see also* *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (stating that “evenhanded restrictions” which protect the “integrity and reliability of the electoral process itself” are constitutional). It is not surprising that a right to vote would not be unlimited and absolute. Even the constitutionally protected right of freedom of speech is not absolute. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . .”).

A. Evidence of a Constitutionally Protected Right to Vote Based on the Constitution as Originally Ratified

In the Constitution as ratified in 1789, the word “vote” is not expressly associated with “the People.” Voting is expressly established as an official act of the States⁶⁷ or of appointed⁶⁸ electors,⁶⁹ or of Senators,⁷⁰ or of the Vice President.⁷¹ The closest association of the People and voting is given in Article I, Section 2, which states: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁷² The phrases “chosen . . . by the People” and “the Electors in each State” clearly envision voting by qualified persons.⁷³ If there actually are “Electors of the most numerous Branch of the State Legislature,”⁷⁴ then Article II, Section 2 is the first piece of evidence on which a constitutionally protected right to vote can be based.⁷⁵

The Constitution provides evidence that these electors do in fact exist: that is, that there are some citizens of each state who are electors of the state legislature. Article IV states: “The United States

67. U.S. CONST. art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII (“But in choosing the President, the Votes shall be taken by States, the Representatives from each State having one Vote . . .”).

68. U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

69. U.S. CONST. art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII (“The Electors shall meet in their respective States, and vote by Ballot for two Persons . . .”).

70. U.S. CONST. art. I, § 3, cl. 1 (“[E]ach Senator shall have one Vote.”).

71. U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

72. U.S. CONST. art. I, § 2, cl. 1.

73. *Id.*

74. *Id.*

75. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned.” (citing *United States v. Classic*, 313 U.S. 299, 314–15 (1941))). The Court’s conclusion is valid, however, only if there were “Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1. The Court did not demonstrate that this prerequisite is satisfied. See *supra* notes 64–66 and accompanying text.

shall guarantee to every State in this Union a Republican Form of Government”⁷⁶ A republican form of government can be understood best by contrasting it to a pure democracy. James Madison provided a succinct comparison of these forms of government as follows:

[A] pure democracy . . . [is] a society consisting of a small number of citizens, who assemble and administer the government in person A republic . . . [is] a government in which the scheme of representation takes place The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.⁷⁷

Thus, elections are a necessary prerequisite to a republican form of government.

From Article IV, Section 4, we can infer that each state has a republican form of government, which requires that state legislatures be elected by voters.⁷⁸ Thus, Article II, Section 2 is the first piece of evidence on which the existence of a constitutionally protected right to vote can be based.

76. U.S. CONST. art. IV, § 4.

77. THE FEDERALIST NO. 10, at 70–71 (James Madison) (Floating Press 2011). See also Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule. They do not necessarily rule directly, day-to-day. Republican Government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms. What it does require is that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them.” (internal cross-reference omitted)).

78. U.S. CONST. art. IV, § 4. A modern view of a democracy implies that democratic governments and republican governments are functionally equivalent. See, e.g., *Democracy*, OXFORD ENGLISH DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/democracy (last visited Mar. 28, 2017) (“A system of government by the whole population or all the eligible members of a state, typically through elected representatives.”).

Other evidence will be found in the amendments to the Constitution. Both the Bill of Rights and later amendments provide such evidence. The arguments supporting this conclusion follow.

B. Evidence of a Constitutionally Protected Right to Vote Based on the Bill of Rights

As discussed above, the First Amendment uses language that implies the existence of rights.⁷⁹ For example, in the provision “Congress shall make no law . . . abridging the freedom of speech, or of the press,” these rights are presumed to exist.⁸⁰ The structure of the language implies the pre-constitutional existence of these rights; the purpose of this language in the First Amendment is to recognize and protect the preexisting freedom of speech and freedom of the press. Likewise, the last phrase in the First Amendment, namely, “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”⁸¹ also exists and predates the Constitution; these rights are protected by the Constitution. The *structure of the language* and *the use of the phrase* “the right of the people” *imply* that conclusion.⁸²

The Fourth Amendment uses this same combination of language and structure to recognize and protect a preexisting right. The specific phrase is: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁸³ As discussed below, the Supreme Court has held that this provision recognizes and protects a preexisting right of persons to be free from unreasonable searches and seizures.⁸⁴ As with the First Amendment, the *structure of the language*

79. See *supra* notes 46–54 and accompanying text.

80. U.S. CONST. amend. I.

81. *Id.*

82. See *id.* The First Amendment provides further proof that the Constitution recognizes and protects a right to vote. See *id.* It can be argued that voting is a form of political expression, and thus, protected by the First Amendment. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment We do not stop to canvass the relation between voting and political expression.”).

83. U.S. CONST. amend. IV.

84. See *infra* Part IV.D.

and the use of the phrase “the right of the people” in the Fourth Amendment *imply* this conclusion.

Thus, as discussed below,⁸⁵ when later amendments to the Constitution use the same language and the same structure of language regarding the right to vote, the First and Fourth Amendments provide evidence that these later amendments recognize and protect a pre-constitutional right to vote.

C. Evidence of a Constitutionally Protected Right to Vote Based on the Fourteenth Amendment

The Fourteenth Amendment appears to recognize a right to vote as it actually uses the term “right to vote.” It states:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and a citizen of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁸⁶

This language implies that male citizens who are at least twenty-one years of age have the right to vote. If this group did not have a right to vote, there would be no need to punish a state for preventing members of that group from voting. There is an additional level of implication hidden in Section 2 of the Fourteenth Amendment. Because voting for officials in the federal government is linked to state qualifications, a right to vote based on state constitutions or laws implies a constitutionally protected right to vote. However, Section 2 of the Fourteenth Amendment is not an explicit recognition of that right. Like the slavery issues and privacy right discussed above, the right to vote is hidden by layers of implications.

85. *See infra* Part IV.D.

86. U.S. CONST. amend. XIV, § 2.

Even if the provision from the Fourteenth Amendment quoted above recognizes a constitutionally protected right to vote, the right is not absolute. It can be curtailed by the states; however, the cost of doing so is steep. For example, assume that State A qualifies to elect twelve members of the House of Representatives, based on its population. Assume further that State A has denied African Americans their right to vote, and assume that African American males twenty-one years of age constitute one-third of the number of males twenty-one years of age in State A. Then, State A would forfeit one-third of the number of members it would be allowed to elect to the House of Representatives. Losing the authority to elect four members of the House of Representatives is a price few, if any, states would be willing to pay. However, a state's willingness to bear this cost was a loophole that allowed states to deny African American males of age twenty-one years their right to vote.

The loophole that allows states to deny citizens a right to vote threatens any unpopular group, not just former slaves. For example, it could be applied to an ethnic population. If the ethnic population in the state is small, reducing "the basis of representation therein"⁸⁷ might not result in the state's losing a representative to the House or any other penalty.

The Fifteenth Amendment closed the loophole in Section 2 of the Fourteenth Amendment if denial of the right to vote was based on "race, color, or previous condition of servitude."⁸⁸ It states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."⁸⁹

D. Evidence of a Constitutionally Protected Right to Vote Based on the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments

Each of these four constitutional amendments is intended to prevent governments from excluding categories of citizens from voting. The Fifteenth Amendment forbids exclusion "on account of

87. U.S. CONST. amend. XIV, § 2.

88. U.S. CONST. amend. XV, § 1.

89. *Id.*

race, color, or previous condition of servitude”;⁹⁰ the Nineteenth forbids exclusion “on account of sex”;⁹¹ the Twenty-Fourth forbids exclusion “by reason of failure to pay any poll tax or other tax”;⁹² and the Twenty-Sixth forbids exclusion of “[citizens] 18 years of age or older, [from voting] on account of age.”⁹³ By *preventing the exclusion* in each of these amendments, Congress *required the inclusion* of these categories of citizens in the class of those with voting rights.

Both the proponents and opponents of each of these four amendments fought hard and long for their positions because they understood the social and political significance of extending the vote. The privileges of the white, male, propertied, adult citizens to control the government of the United States, and with it the social and economic dimensions of the United States, were ultimately at stake in this sequence of amendments. The following Subpart reviews briefly the histories of these struggles to demonstrate their intensities and thus the importance of what was at stake.

1. History of the Struggles Leading to and Implementing the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments

Ending the exclusion from voting of each of these four categories of citizens has a history of struggle. The intensity of the struggle that ended in the adoption of each of these amendments is proportional to importance the contestants assign to the outcome. Regarding voting, the intensity of struggle for each amendment adds weight to the conclusion that there is a constitutionally protected right to vote.

To protect the exclusion from the right to vote based on race, violence was pervasive⁹⁴ and continued even after the ratification of

90. U.S. CONST. amend. XV, § 1.

91. U.S. CONST. amend. XIX, § 1.

92. U.S. CONST. amend. XXIV, § 1.

93. U.S. CONST. amend. XXVI, § 1.

94. For a history of that struggle, see SUSAN CIANCI SALVATORE ET AL., NAT'L PARK SERV., U.S. DEPT. OF INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 4–8 (2007, rev. 2009), http://www.nps.gov/nhl/learn/themes/CivilRights_VotingRights.pdf. See also *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (last updated

the Fifteenth Amendment. This continuing violence led Congress to enact a criminal statute aimed at punishing conspiracies to interfere, based on race, with a person's exercising his right to vote.⁹⁵ However, in *United States v. Reese* the Supreme Court interpreted the Fifteenth Amendment narrowly.⁹⁶ Here, the Court stated: "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servi-

Aug. 6, 2015) ("The extension of the franchise to black citizens was strongly resisted. Among others, the Ku Klux Klan, the Knights of the White Camellia, and other terrorist organizations attempted to prevent the 15th Amendment from being enforced by violence and intimidation.").

95. Civil Rights Act of 1871 (Third Ku Klux Klan Act), ch. 22, 17 Stat. 13 ("If two or more persons within any State or Territory of the United States shall conspire together . . . by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine."); *see also* U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, CONSTITUTIONAL AMENDMENTS AND MAJOR CIVIL RIGHTS ACTS OF CONGRESS REFERENCED IN BLACK AMERICANS IN CONGRESS, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> (last visited Mar. 31, 2017) (describing the First Ku Klux Klan Act and Second Ku Klux Klan Act).

96. *United States v. Reese*, 92 U.S. 214, 217–18 (1875).

tude.”⁹⁷ Following this decision and the end of reconstruction, African Americans were once again stripped of their right to vote.⁹⁸

The intensity of the struggle that ended in the adoption of the Nineteenth Amendment lasted approximately seventy years and was ardently pressed by millions of people. It was also zealously opposed by millions of people.⁹⁹ Surely, such a historic struggle would not have been waged if the objective had been a mere theoretical possibility of voting. Both sides exerted their efforts because the objective was a constitutionally protected right to vote for women.

This struggle included unsuccessful court battles based on the Fourteenth Amendment’s Privileges and Immunities of Citizens clause. In 1875 the Supreme Court held: “[The Fifteenth Amendment] did not add to the privileges and immunities of citizens. It simply furnished an additional guaranty for the protections of such as he already had.”¹⁰⁰ Part of the logic on which this conclusion is based is an *inference*: If the Privileges and Immunities Clause had been intended to create a constitutionally protected right to vote, there would have been no need for the Fifteenth Amendment. Thus, the existence of the Fifteenth Amendment *implicitly* undercuts the ar-

97. *Id.* at 217. This interpretation is not only narrow; it is also incorrect. Consider person A, who has all the qualifications to vote before the Fifteenth Amendment except that he is an African American. Then consider person B who lives in the same state as A, and who is white and has all the qualifications to vote before and after the Fifteenth Amendment. Because of the Fifteenth Amendment, A has a right to vote.

98. U.S. DEP’T OF JUSTICE, *supra* note 94 (“[*United States v. Reece and United States v. Cruikshank*] together with the end of Reconstruction marked by the removal of federal troops after the Hayes-Tilden Compromise of 1877, resulted in a climate in which violence could be used to depress black voter turnout and fraud could be used to undo the effect of lawfully cast votes.”).

99. *19th Amendment to the U.S. Constitution: Women’s Right to Vote (1920)*, NAT’L ARCHIVES, <http://www.ourdocuments.gov/doc.php?flash=false&doc=63> (last visited Mar. 31, 2017) (“The 19th amendment guarantees all American women the right to vote. Achieving this milestone required a lengthy and difficult struggle; victory took decades of agitation and protest. Beginning in the mid-19th century, several generations of woman suffrage supporters lectured, wrote, marched, lobbied, and practiced civil disobedience to achieve what many Americans considered a radical change of the Constitution. Few early supporters lived to see final victory in 1920.”).

100. *Minor v. Happersett*, 88 U.S. 162, 171 (1875) (“[T]he Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted.”).

gument of those *pressing* for a right to vote under the Fourteenth Amendment. If inference can be used by the Court to deny the existence of a constitutionally protected right to vote, it can also be used, as is being done in the present Article, to prove the existence of that right.

The Twenty-Fourth Amendment states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.¹⁰¹

The Twenty-Fourth Amendment was specifically designed to apply only to federal elections.¹⁰² Congress apparently considered a poll tax as falling within the category of conditions, such as a literacy test, that states could constitutionally impose on the right to vote.¹⁰³ This assumption by Congress proved to be incorrect. In 1966, the Supreme Court held in *Harper v. Virginia State Board of Elections* that poll taxes in state elections violated the equal protection clause of the Fourteenth Amendment.¹⁰⁴

The Supreme Court's decision in *Harper* that the small poll tax of \$1.50 was unconstitutional is an indication of just how intolerant the Court is of conditions imposed on voting and, conversely, how important the Court considers voting. In striking down Virgin-

101. U.S. CONST. amend. XXIV, § 1.

102. Jamin B. Raskin, *Is There a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 697 (1999) ("In 1964 the Constitution was amended by the Twenty-fourth Amendment to ban poll taxes in federal elections. There is very explicit debate on the floor of the Senate as to whether this amendment should apply to poll taxes in just federal elections or state elections as well. Those who championed states' rights at that point won. They said poll taxes have a long, honorable tradition in state elections and should not be banned. So there was the explicit statement that state poll taxes would not be prohibited as part of the Twenty-fourth Amendment. But just two years later, in *Harper v. Virginia Board of Elections*, the Supreme Court found that under the Equal Protection Clause, state poll taxes are unconstitutional." (internal cross-references and citations omitted)).

103. See *supra* note 66 and accompanying text.

104. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966); see *supra* notes 13, 66, 75 and accompanying text.

ia's \$1.50 poll tax, the Court was being precautionary by preempting the possibility that other state laws might impose significantly higher poll taxes.¹⁰⁵ Taking preemptive action to eliminate that possibility is strong evidence that the Court recognizes a constitutionally protected right to vote and places high value on it.

Before the Twenty-Sixth Amendment, many states had a minimum age of twenty-one as a prerequisite for voting. The impetus for the change was the fact that, although millions of citizens age eighteen to twenty-one had assumed the responsibilities of adulthood, including employment, marriage, and eligibility for the military draft, they did not have the political power that came with the right to vote.¹⁰⁶ The responsibilities that were being shouldered by these citizens age eighteen to twenty-one demonstrated that they had the capacity to vote. This argument was persuasive to the Senate:

A Senate Judiciary Committee report supported the amendment, noting that persons 18 through 21-years-old could be prosecuted in adult courts in 49 states, could create wills in 26 states, and could be drafted and die in the armed services; furthermore, three million of them were full-time employees and taxpayers, and half were married.¹⁰⁷

2. Language Used in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments Implies a Constitutionally Protected Right to Vote

Each of these four amendments uses the phrase “the right of citizens of the United States to vote.” The use of this phrase in all four amendments implies that citizenship carries with it a right to vote. It would have been clearer had these amendments started with the following sentence: “Every citizen of the United States has a right to vote.” By not including an express recognition of that right, the

105. See *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (striking down Maryland's tax of the Bank of the United States). Its conclusion “that the power to tax involves the power to destroy” evidences a preemptive approach. *Id.*

106. MICHAEL NELSON, *GUIDE TO THE PRESIDENCY* 207 (2015).

107. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 295–96 (2006).

drafters of the Constitution left it to inference to protect that right;¹⁰⁸ this is common throughout the Constitution. The Bill of Rights used such linguistic construction over and over. For example, there is no explicit statement in the First Amendment that a right to free speech or free press exists. From the phrase “Congress shall make no law . . . abridging the freedom of speech, or of the press,” it is implied that these rights exist and are given constitutional protection.¹⁰⁹ The Second Amendment provides another example of the Constitution protecting a right by inference. The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹¹⁰ The Supreme Court held that this language recognized and protected citizens’ right to bear arms and their right of self-defense in *District of Columbia v. Heller*.¹¹¹

The use of the phrase “the right of citizens of the United States to vote” in the Fifteenth,¹¹² Nineteenth,¹¹³ Twenty-Fourth,¹¹⁴ and

108. SALVATORE, *supra* note 94 (“However, something of a compromise, the [Fifteenth] amendment did not affirmatively grant universal suffrage to male adults, but only banned discrimination on the basis of race. Left out from coverage were supposedly non-racial qualifications such as literacy tests and poll tax payments. This omission would prove devastating to African American political freedom in the decades to come.”).

109. See *Griswold v. Connecticut*, 381 U.S. 479, 482, 485 (1965).

110. U.S. CONST. amend. II.

111. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (“The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.” (internal cross-references omitted)).

112. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

113. U.S. CONST. amend. XIX, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

114. U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”).

Twenty-Sixth¹¹⁵ Amendments is evidence that this right exists. One can argue that if the existence of this right were doubtful, the amendments would have started with the phrase: “*If citizens of the United States have a right to vote.*” The absence of this conditional clause implies that the citizens of the United States do have a right to vote.

The structure of these four amendments is strikingly similar to that of the Fourth Amendment, which states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹¹⁶ These amendments differ from the Fourth Amendment in that the Fourth Amendment protects the right of *the people* to be free from unreasonable searches, whereas the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments protect the right of citizens of the United States to vote no matter what their race, color, or previous condition of servitude, sex, wealth, age—if eighteen years of age or older.¹¹⁷ It is not surprising that the implied right to vote is limited to citizens, but the implied right to be free from unreasonable searches and seizures belongs to “the People” whether or not they are citizens. The important point is that the language “the right of the people to be secure” is accepted as recognizing and protecting a constitutional right to be free from unreasonable searches and seizures. However, constitutional recognition and protection are *implied*, not explicitly stated. The fact that these four amendments use this same language regarding the right to vote as the Fourth Amendment uses regarding searches is a clue for interpreting the Constitution under the interpretative theory called “intratextualism.”¹¹⁸ Under the theory of intratextual-

115. U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.”).

116. U.S. CONST. amend. IV.

117. Obviously, the amendments also differ in subject matter.

118. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (explaining the theory and application of intratextualism as follows: “[V]arious words and phrases recur in the [Constitution]. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism. In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”). The Supreme Court applied the principle (but not the name) of intratextualism to inter-

ism, the fact that the phrase “the right of citizens of the United States to vote” is used in all four of these amendments for the same purpose, namely, to expand the group of eligible voters, and the similarity of that phrase to the phrase “the right of the people to be secure,” which recognizes a constitutionally protected right to be free from unreasonable searches and seizures, implies that these four amendments recognize and protect a constitutional right to vote.¹¹⁹

In addition to the *intratextual* argument, there is an *intrastructural* argument. Paraphrasing Professor Amar’s explanation of intratextualism,¹²⁰ intrastructuralism can be understood as follows: in applying the technique of intrastructuralism, the interpreter tries to construct an argument that certain text, which appears in the Constitution, implies a certain conclusion in light of the fact that other text in the Constitution featuring the same (or a very similar) logical structure has been held to imply an analogous conclusion. The text to be interpreted has the same structure as other text in the document, and thus, the text to be interpreted supports a conclusion analogous to the conclusion supported by the other text. The structure of the logic, which supports the right of persons to be free from unreasonable searches and seizures, is as follows: (1) by means of an unarticulated premise, this right is recognized, and then (2) the Fourth Amendment expressly states that this right is protected. This same logical structure is present in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Thus, in each case the conclusion follows that the Constitution recognizes and protects a right to vote.

The right to vote implied by the Fifteenth, Nineteenth, and Twenty-Fourth Amendments is stronger than the version which is implicit in Section 2 of the Fourteenth Amendment¹²¹ because it pro-

pret the phrase “Right of the People” in the Second Amendment. *See* District of Columbia v. Heller, 554 U.S. 570, 579 (2008).

119. *See* Amar, *supra* note 118, at 748–49 (applying the theory of intratextualism as follows: “[T]he Independent Counsel must be an ‘inferior’ officer under the Appointments Clause of Article II, Section 2. But what exactly does ‘inferior’ mean here? To whom exactly is [the Independent Counsel] ‘inferior’? An intratextual analysis would look to two other clauses of the Constitution that use the word ‘inferior’—the Article I, Section 8 clause concerning ‘inferior’ tribunals, and the Article III, Section 1 clause concerning ‘inferior’ courts—for guidance in understanding the constitutional concept of ‘inferior.’”).

120. *See supra* notes 118–19.

121. *See supra* Part IV.D.

fects that right against abridgement by “*the United States* or by any State.”¹²² Explicitly prohibiting the United States from denying or abridging the right removes the necessity of *inferring* that the prohibition limits federal as well as state abridgement of the right to vote.

V. SUMMARIZING THE EVIDENCE: THERE IS A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE—THE RIGHT TO VOTE IS A FUNDAMENTAL RIGHT

The persistent implication in all four of the amendments analyzed above, namely, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth, of the “right to vote”¹²³ makes it clear that Congress and the public chose their words deliberately; they meant what they said. As demonstrated by this language and the evidence and arguments given above in Parts IV.A and IV.B of this Article, Congress and the people, by amending the Constitution, recognized the existence of a constitutionally protected right to vote and intended to extend it to an ever-expanding group of citizens who, by their social and economic commitments to the nation, deserved the right to participate *fully* in its government. The First Amendment protected their

[R]ight of freedom of speech and press [which] includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . [and] [t]he right of “association” [which] . . . includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.¹²⁴

This interpretation of the First Amendment secures the right of political expression, whose ultimate objective often is to influence the outcome of elections.¹²⁵ This Article demonstrates that the last step

122. U.S. CONST. amend. XV, § 1 (emphasis added).

123. See *supra* Part IV.D.

124. *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (citations omitted).

125. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (“For speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, this Court has recognized that the First Amendment has its fullest and

in the political process, voting, is also a constitutionally protected right. What would be the point of protecting the right of political expression if there were no right to take the final step in the political process—voting? Uncertainty exists among the People as well.¹²⁶ This Article demonstrates that the government and governance of the United States are not defined by such an illusory Constitution.

VI. CONCLUSION

As demonstrated in the introduction of this Article, there is uncertainty as to the existence of a constitutionally protected right to vote. This ambiguity is reflected in Supreme Court decisions and the legal literature.¹²⁷ Uncertainty exists among the People as well.¹²⁸ This Article has attempted to resolve the ambiguity by applying to the task of interpreting the Constitution the following modified version of the popular wisdom: if all else fails, *read the Constitution*.¹²⁹ A close reading of the Constitution and the application of the theories of intratextualism and intrastructuralism disclose strong evidence that the right to vote is indeed constitutionally recognized and protected, that is, evidence that the right to vote is a fundamental right. Applying to that evidence the calculus for finding unenumerated rights developed by the Supreme Court in *Griswold* leads to the conclusion that the right to vote is an unenumerated right protected by the Constitution.

The protection of the right to vote by the Constitution is a means for achieving President Abraham Lincoln's objectives for the

most urgent application to speech uttered during a campaign for political office.” (citations omitted) (quoting another source)).

126. Aliza Plener Cove, *Archetypes of Faith: How Americans See, and Believe in, Their Constitution*, 26 STAN. L. & POL'Y REV. 555, 573 (2015) (“[M]any Americans identified certain rights as being *explicitly* granted by the Constitution and its amendments when, in fact, they are not. For example, 78 percent of Americans believe that the right to vote is guaranteed by the Constitution.” (quoting Press Release, FindLaw.com, Are Americans Right About Their Constitutional Rights? (Sept. 18, 2006), <http://company.findlaw.com/pr/2006/091806.constitution.html>) (emphasis added)).

127. See *supra* Part I.

128. Cove, *supra* note 126, at 573.

129. This is a paraphrasing of the familiar Plan B for people who purchase items that come with the warning that assembly will be necessary: if all else fails, read the instructions.

government of the United States, namely, that the government of the United States be a “government of the people by the people for the people.”¹³⁰ Because government officials are elected from the people through those people’s votes, a constitutionally protected right to vote assures that the government is “of the people” and “by the people.”¹³¹ Furthermore, because an elected official, who acts contrary to the public interest or fails to accomplish his or her obligations to the public,¹³² can be replaced in the next election, a constitutionally protected right to vote assures that the government also will be “for the People.”

The United States Supreme Court must cut through the complexity of the indirect language and the necessity to draw inferences by which the Constitution secures a right to vote and give a direct, declaratory statement recognizing that right. An excellent model for such a holding is provided by Article 21(3) of the Universal Declaration of Human Rights which states, “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures.”¹³³ Such an articulation of a constitutionally protected right to vote would resolve the uncertainty created by the Court¹³⁴ and would fulfill the objectives laid out by President Abraham Lincoln for the government of the United States—a “government of the people by the people for the people.”¹³⁵

130. See *supra* note 1 and accompanying text.

131. See *id.*

132. President Abraham Lincoln described the duty of government as follows: “[T]o do for the people what needs to be done, but which they can not, by individual effort, do at all, or do so well, for themselves.” CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 72 (Edward C. Goodman ed., Sterling Publ’g Co. 2007) (1954).

133. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

134. See *supra* notes 10–13 and accompanying text.

135. See *supra* note 1.