

M-READ MEMORANDUM

To: Articles Committee
From: Aidan Calvelli
Date: February 21, 2023
Re: S-18229: Becoming Fundamental

I. Recommendation: Semi-soft yes to M-Read.¹

II. Synopsis

(Please see Ariella's [Rotopool](#) for a comprehensive summary. It's worth reading, because she didn't love the piece).

Prof. Ross's article argues that the right to vote is a fundamental right even under a *Dobbs*-like methodology because state constitutional change after the founding era liquidated the idea that a "republican form of government" meant a universal franchise for the polity.

This is an incredibly timely article. It identifies an underappreciated threat that *Dobbs* created—the protection of the right to vote. And it identifies a new grounding of the right—based in how history has given meaning to an underappreciated constitutional clause—that plausibly responds to originalist worry. In so doing, the article teaches us about the meaning of democracy in our history, and what it has meant to expand that concept.

This is also not a perfect article. The history is rich and well-developed – but often to the detriment of drawing conclusions from that history. The section on the English interregnum drags on, while brief sections for bold claims about the justiciability of the Guarantee Clause or whether state intent was needed for liquidation get short shrift. Interesting discussions in the conclusion about what it means to have a fully inclusive democracy are dropped in without full connection to the article's history.

All that said, I think the article is strongly worth considering. Unlike Ariella, I thought the lingering questions I had were addressable; in other words, the history is there to back up the points, and what I think is missing is the author being more explicit weaving the threads together and making pointier conclusions. I don't think this is me reading in my views to the piece; I think it's lifting up ideas from the introduction that aren't as explicitly called-back to later on, but that you can tell the author is thinking about. With this in mind, I'm confident Prof. Ross will have more depth to add to the liquidation and Republican Form sections of the article,

¹ Harder than Brie, softer than 5-year Cheddar.

because that doesn't require new research – just creative summary. Given the fundamentality of the right to vote, the threat facing it, and the status of the author as a prominent Black progressive scholar fairly engaging with the Court on its own originalist terms, I think we should give this article a generous look.

III. Preliminary Literature Review

This is a very brief literature review because I am not worried that this article is preempted. At its core, the article is using a methodology only fully developed in *Dobbs* in 2022, so the framework Prof. Ross uses to analyze what makes a right fundamental is different than what's in past scholarship. In its presentation of history, the article is not necessarily surfacing brand new insights (or claiming to), but, like any good work of history, situates existing historical developments into a theoretical framework adds support for the article's argument. Moreover (and this will be a small criticism later on), the article's defense of the Guarantee Clause as justiciable in this context is novel – because most people had given up on it!

Below I track a few articles on similar topics, but they seem sufficiently different to me at this stage.

Jason Mazzone argues that the Fourteenth Amendment incorporates the Guarantee Clause and thus gave states responsibility to enforce things like equal protection as part of republican government.² But this interpretation does not affect the meaning of the clause in the preceding years where Prof. Ross focuses.

In 1994, Erwin Chemerinsky argued that the Guarantee Clause should be justiciable, especially when it is protecting individual rights, not general political structural ones.³ This seems to overlap with Prof. Ross's focus on the protection of individual voting rights, but Prof. Chemerinsky is explicit in not being specific about which rights his framework would protect.

Francesca Procaccini⁴ argues that there were both aristocratic and republican conceptions of government.⁵ This resembles Prof. Ross's divide between conservatives and radicals, but Prof. Procaccini's argument is about federal power to enforce the clause, rather than judicial power to define it.

One Note from Stanford focuses on state constitutions as giving meaning to the Guarantee Clause.⁶ But I'd say this is more helpful as support than preemptive.

² Jason Mazzone, *The Incorporation of the Republican Guarantee Clause*, 97 NOTRE DAME L. REV. 1435 (2022).

³ See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 UNIV. COL. L. REV. 849 (1994).

⁴ Section 7's recent Climenko! Sorry that you were in 7B though, Farris!

⁵ Francesca Procaccini, *Reconstructing State Republics*, 89 FORDHAM L. REV. 2157 (2021).

⁶ Note, Jacob M. Heller, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711 (2010).

And as we all know from reading the State of The Review emails this year, nobody really cites student writing anyway.⁷

James Gardner argues for a more robust constitutional understanding of the right to vote, but he explicitly rejects that the Guarantee Clause has much to say about that.⁸

IV. Analysis

A. Positives

Incredibly Timely and Important: The Article responds to an urgent and underappreciated crisis: the threat the *Dobbs* methodology created to constitutional protection for the right to vote. The Article's careful exposition of how existing doctrine justifying the right to vote as fundamental is in tension with the *Dobbs* approach convinced me that I should be worried! The Article's engagement with originalism on its own terms also might support its impact, as it's at least plausible that some originalist judges buy into the account the process of constitutional liquidation has trended towards increased protection for voting rights.

Historically Informative: This piece is more than just a response to the threat *Dobbs* poses. Its history offers important insight into how the Founding generation and subsequent generations thought about the meaning of democracy. I found the juxtaposition between the conservative and radical conceptions of democracy to be a useful lens with which to view the debates in England, at the convention, and in state constitutional efforts going forward.

Novel Justification for Voting Rights: I love voting rights and consider myself somewhat informed about the academic literature there. This attempt to ground the right in the Guarantee Clause was new to me. One common critique in the jurisprudence is that the Court just fashions democratic theory principles out of nowhere; this article provides a solid counterargument – namely that the right to vote comes not from polisci treatises, but from the lived practice of how states have built our constitutional republic.

Author Diversity: Prof. Ross is a progressive Black scholar – a description not applicable to many people who are engaged in this deep an originalist project. I will also note that at the time of this writing, 80% of the authors we have published in Vol. 137 are white.

⁷ ESPECIALLY when it's in SLS...

⁸ See James A. Gardner, *LIBERTY, COMMUNITY AND THE CONSTITUTIONAL STRUCTURE OF POLITICAL INFLUENCE: A RECONSIDERATION OF THE RIGHT TO VOTE*, 145 U. PENN. L. REV. 893 (1997).

B. Negatives

Underdeveloped Liquidation + Justiciability Arguments: The core of the argument is that states liquidated the meaning of the Guarantee Clause as protecting a right to vote for all in the polity. But that only has teeth if the constitutional meaning is enforceable. I found compelling Prof. Ross's attempt to distinguish these kinds of voting claims from the reasons that the Guarantee Clause has never been seen as justiciable. But proposing this much change to a well-established doctrine probably needs more than just 2-ish pages. The same problem goes for liquidation: it seems to me like all the state constitutional evidence shows liquidation, but the article should've included more on how these discrete acts by states were defining a federal constitutional guarantee, rather than just doing what they thought was best for their states.

Multi-Pronged Abstract: Minor quibble. I thought the abstract was too long! And made a few claims that got short shrift in the article – like how the suffrage has expanded after the initial liquidation against property qualifications by the states.

Support Lacking: As Ariella notes, there are some times where a paragraph or two goes by without a footnote. The piece is so meticulously sourced otherwise that I can't imagine the claims are just being made up. But to the extent people want to continue our reputation as being a journal of footnotes that also includes some text, we'd need to get Prof. Ross to throw in a few more sources.

Some parts are TOO LONG / Losing the Forest for the Trees: I glossed over when the article discussing the history of whatever some generals in England thought about some conflict that seemed very distant to me. (I'd go back and check how many pages that discussion was, but I can't risk falling asleep before finishing this M-Read). I also thought the presentation of so much history without as much narrative or opinion contextualizing that history made the piece hard to follow at times. On my read, some of the historical discussions can be cut or trimmed without changing the meaning of the piece (but that seems like the easiest kind of P-read suggestion to take).

You might just not buy it! There are a few leaps you have to take to fully buy this argument. You need to think what state constitutions were doing was giving content to a constitutional clause they were not talking about. You need to be a little purposivist reading Federalist 37 and 43 together. You need to think the British history was relevant to how the colonists were thinking about republicanism. And maybe biggest of all, you need to buy that this kind of history – which relies on purposivist-adjacent claims via liquidation – can live up to the article's promise to be persuasive to an originalist judiciary.

C. Neutrals / Questions

Lotsssss of History: It seems like our committee is not troubled by articles with lots of history.⁹ But I will note that after Part I, the balance between argumentation and historical description tended mostly towards the latter. Since the article positioned itself with a presentist lens, that might be problematic, or it might just be a reasonable response to a “history and tradition” judiciary.

Structural / Organizational Challenges: Ariella mentioned structural flaws in the article, so I’m putting this here. I don’t totally agree. I maintain the criticism that the focus on history can obscure the theoretical takeaways. But I do think the general structure, if relevant parts were fleshed out more, makes sense: *Dobbs* created a threat that existing jurisprudence doesn’t address; the meaning of Republican Form was indeterminate at the Founding and left to the states; state action after the founding showed a trend towards seeing republicanism as including a universal right to vote (for the existing polity); and this trend demonstrates liquidation of a fundamental right in the Guarantee Clause, in ways distinct from others that the Court found nonjusticiable.

Audience Uncertainty? At times, this Article seems caught between audiences – one the one hand the originalist court, and on the other hand more voting-sympathetic scholars. One might see this as leading the Article to lose its punch, because it doesn’t lean fully into the style that might best convince either of those groups.

Expansive Originalism? I think it’s kinda nifty that Prof. Ross is trying to put an originalist spin on the evolving meaning of American democracy! I also could see critique from both sides: from the right, in that he’s reading a lot of meaning into the intent of state legislatures; and from the left, in that he’s accepting the premise that we should debate fundamental rights like the franchise on the Court’s historical terms.

Conclusion Raises New Claims: I have no idea what the point of a “Conclusion” section is for a law review article. This one is slightly atypical, in that it brings in sort of new claims about how our conception of the polity has expanded since the relevant history in the article, namely that now we see the right to vote as expanding to people of color, women, 18-year olds, etc., and not just white men. I think this should’ve been woven in more to address a counterargument that what was liquidated was only a limited right to vote, not a robust fundamental one we’d care about today. But it seems like he’d be amenable to weaving that in, since this point was mentioned in the abstract as important.

⁹ Hi Kelly!