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Morris D. Forkosch

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THE INABILITY OF CONGRESS TO IMPINGE ON STATE POWER TO SET ELECTORAL AGE QUALIFICATIONS

MORRIS D. FORKOSCH*

Has Congress today power simply by statute to require the states to permit 18-year olds and over to vote in all federal, state, and local elections (assuming other permissible qualifications are met)? Or is an amendment to the Constitution necessary to enable Congress to fix, or itself to fix, such a minimum age? If the latter, then the former is unconstitutional.

The initial approach to these questions begins with article I, § 2, cl. 1 of the Constitution which empowers the States to set the qualifications of the voters although subject to the overriding power of Congress under § 4, cl. 1 to fix the time, place, and manner of holding the elections, as well as the power of the judiciary to examine the state's qualifications in the light of other constitutional limitations and prohibitions. Insofar as a voter's qualifications include all aspects other than time, etc., there is no definition or description found, so that interpretation of this constitutional term is required. The content historically and judicially to be given the term may be examined without reference to amendments or conditions subsequent to 1789 (the ratification of the Constitution), and then looked at in the light of these changes.

The conclusion reached is that Congress does not have power, simply by statute, to lower the voting age to 18. The analysis by which this view is reached treats these aspects: first, the Constitution's sections and clauses are set forth and examined, with a tentative conclusion arrived at which is to be subjected to a more rigorous analysis; then we proceed to the English background, the colonial background, and, finally, the Constitutional Convention of 1787, with the initial negative conclusion now so fortified.

* A.B., M.A., J.S.D., New York University; L.L.B., L.L.M., St. John's University; M.S.Sc., Ph.D., New School for Social Research. Dr. Forkosch is presently a Professor of Law at the Brooklyn Law School.

1 See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), and also M. Forkosch, Constitutional Law 252 (2d ed. 1969). For illustrations of the court's exercise of this power see discussion and cases below.
THE CONSTITUTIONAL CLAUSES INVOLVED

The 1970 Senate Amendment No. 545 to the extension of the Voting Rights Act of 1965\(^2\) proposed to reduce the voting age of electors otherwise qualified to 18; it was keyed to the fourteenth amendment’s § 5 and the fifteenth amendment’s § 2, both enforcement sections for their respective first sections.\(^3\) However, what of article I, § 2, cl. 1, as well as § 4, cl. 1? These three sections and several clauses, as well as others,\(^4\) require a preliminary examination of their language in order to understand the problems confronting the present statutory efforts to reduce the voting age by national, uniform legislation.

Article I, § 2, cl. 1 states that Representatives shall be chosen “by the People of the several States,” and that “the electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature.”\(^5\) Section 4, cl. 1 states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed” by the state legislatures, “but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” It would appear, from a juxtaposition of these two clauses, that three observations may be immediately made. First, that when the Preamble opens with “We the People of the United States,” and now refers to the election of repre-

\(^2\) P.L. 89-110, 79 Stat. 437, adopted by the Congress pursuant to its powers under § 5 of the fourteenth amendment and § 2 of the fifteenth amendment (see, e.g., § 9[b] of the Act), the enforcement sections; the Act came before the 91st Congress for extension (it was to expire August 6, 1970). In the Senate an amendment (No. 545), sponsored primarily by Senator Edward Kennedy, sought to reduce the voting age for all federal, state, and local elections to 18 as of January 1, 1971, and by a vote of 64-17 this was adopted (with other amendments) in March, 1970. In the House the Rules Committee voted to send to the floor a package including a rider (to the extension bill) lowering the voting age to 18, and by a vote of 272-132 the lower body adopted this. The President thereafter, on June 22, 1970, signed the bill thereby increasing the possible electorate by about 11 million. Will they vote, and even if they do, will they significantly alter the elections (e.g., the women’s votes after the nineteenth amendment)? For example, were the English elections of 1970 “influenced” when a Conservative was elected? What of those in Germany that same year?

\(^3\) See, e.g., M. Forkosch, Constitutional Law § 364 (2d ed. 1969). The second section of the fourteenth amendment is discussed below, see note 25 et seq., with the third and fourth being ignored as inapplicable here.

\(^4\) See, e.g., Gray v. Sanders, 372 U.S. 368, 381 (1963), holding the Georgia county unit system violated the Equal Protection Clause of the fourteenth amendment, but concluding (majority opinion): “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the fifteenth, seventeenth, and nineteenth amendments can mean only one thing—one person, one vote.” See also note 22, infra.

\(^5\) Senators, originally chosen by the state legislatures, are, of course, by virtue of the seventeenth amendment, elected “by the people” of the States, and these electors are qualified in the identical language as that quoted in the text.
sentatives "by the People of the several States," it is the same people who are involved but in two different capacities, i.e., as people having two sovereigns to whom they owe allegiances and duties, from whom they derive certain privileges, and against whom they may assert certain rights. It therefore follows that the people act in two election capacities, but that the federal sovereignty has chosen to adopt as the qualifications to be placed upon its voting people those which the state sovereign has (constitutionally) chosen to adopt for its most numerous legislative branch. The "federal people" therefore have a right to vote separate from that of the "state people," even though the former's qualifications are adopted by those of the latter. But does this reasoning not lead to the conclusion that the federal sovereignty therefore possesses the power at any time to nullify or alter these adopted qualifications? If these adoptions or qualifications were by statute there would be no problem; but the Constitution requires amendments pursuant to article V.

While the adoption approach of §2 is thus frozen, it does not mean that some amendment cannot, expressly or impliedly, negate a state's ability to formulate and apply one or more of the qualifications which it would otherwise have the power to impose.

The second observation concerning the two clauses quoted above is that the Founding Fathers used careful language to indicate the affirmative powers expressly granted to the Congress in the §4 clause (even as to the express exception) and, by refraining from so granting any or explicit powers, or making exceptions, in the declaratory §2 clause, impliedly (and even expressly) rejected any Congressional power in this respect. (Even the tenth amendment specifically reserves to the States or the People any "powers not delegated to the United States . . . ") Thirdly, that "Qualifications" of the electors is expressly

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6 See, e.g., Ex parte Yarbrough, 110 U.S. 651, 662-64 (1884), and Wiley v. Sinkler, 179 U.S. 58, 62-4 (1900).
7 See, e.g., the analogous dilemma, and the answer so given, in Opinion of the Justices, 247 Mass. 583, 143 N.E. 142 (1924). On whether or not the so-far usual Congressional method of proposing an amendment should be used, or the never-used one of a Constitutional Convention, both under article V of the Constitution, see, e.g., Forkosch, The Alternative Amending Clause in Article V: Reflections and Suggestions, 51 Minn. L. Rev. 1053 (1967).
7a This declaratory and hortatory amendment’s reservation of powers becomes jejune without the addition of judicial interpretation. For the present analysis, the argument may be urged that without some express or definite and unequivocally implied delegation to the federal government, the control over the voting age was so reserved. See Forkosch, Who are the “People” in the Preamble to the Constitution?, 19 Case West. L. Rev. 644, 706-7 (1968).
differentiated from the "Times, Places and Manner of holding Elections," and that the former may be said to allude to the substantive qualifications of electors while the latter has to do with the procedures whereby the qualified electors will cast their votes;\(^8\) further, that the Constitution gives to Congress only a reserved power to alter these express procedures, and even then excepts therefrom one aspect, but that as to the substantive qualifications does not permit Congress thereafter to interfere, i.e., Congress has no power to enact a law having to do with these substantive qualifications.

These comments on the use of "careful language" by the Founding Fathers are not limited to the cited provisions of the Constitution. For example, article I, § 2, cl. 2 sets forth the requirements to "be" a Representative and, as to age, makes 25 the minimum; article 2, § 3, cl. 3 makes the minimum age for one to "be" a Senator; and article II, § 1, cl. 4 makes 35 the minimum to "be eligible" for President. (In effect, therefore, one can be elected to Congress before reaching those ages provided he waits to be sworn in, e.g., former Senator Rush D. Holt, of West Virginia, who waited for six months, but not so for the Presidency). What of the Vice-President? What of Justices of the Supreme Court? Are statutes able to provide for their minimum ages? Statutes did not and do not. However, a constitutional amendment took care of the Vice-President, i.e., the twelfth amendment's last sentence provides, "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." Quaere: does this mean that a statute requiring Supreme Court Justices to be at least 35 would be unconstitutional? All of which again permits the conclusion that Congress has no power to reduce the voting age requirements.

These several conclusions appear to be fortified by reference to article I, § 8, cl. 18, which grants to Congress power to make all necessary and proper laws to execute "the foregoing [seventeen] Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ." But, what power is vested in the Congress by art. I, §§ 2 and 4, as above quoted? And if none as to the substantive

\(^8\) In *Ex parte Yarbrough*, 110 U.S. 651, 660 et seq. (1884), Justice Miller gives an extensive account of the power of Congress under this provision and illustrates by reference to various statutes, e.g., that of 1842 requiring representatives to be elected from districts, of 1872 requiring elections on one day in the year. These illustrations indicate the procedural nature of the Congressional power.
qualifications, then the Necessary & Proper Clause does not apply. Nor do other constitutional clauses or amendments suffice to change this conclusion, as it may be urged that Congress and the States have, many times since 1789, been offered the opportunity to alter this division of substantive and procedural powers and, impliedly, have rejected it. To illustrate, the twelfth amendment, while referring to the national "electors" in the Electoral College, might still have been a vehicle for change in the voting electors here examined; so, too, could later amendments, e.g., the fourteenth, fifteenth, seventeenth, nineteenth, twentieth, twenty-second, twenty-third, twenty-fourth, and twenty-fifth, all dealing with the political and voting aspects of the federal or state governments and yet all by-passing the question.  

What of the fourteenth and fifteenth amendments' enforcement sections, to which Senate No. 545 is keyed? The fifteenth (plus nineteenth) amendment prevents federal or state abridgment of the right of federal citizens to vote "on account of race, color, or previous condition of servitude" (or of "sex"), and it is these substantive qualifications on the right to vote, and no others, which are removed from state power. As later disclosed, every one of the original thirteen states had substantive qualifications on the right to vote which not only included, e.g., religion or property, but also, whether by constitution, statute, or custom, the above-quoted items. All these and others were not touched by the ratification of the Constitution and its art. I clauses, and not even the fifteenth and nineteenth amendments sufficed to remove all substantive state disqualifications; the twenty-fourth amendment, ratified in 1964, was required in order to remove the poll-tax. Which, in effect, supports the conclusion that from the mass of state disqualifications, or substantive requirements, on the right to vote, specific and limited constitutional amendments utilized a piecemeal approach, not a wholesale condemnation or withdrawal into the federal power, so that any federal rejection of or reduction in age as a requirement also requires a specific constitutional amendment.  

9 However, § 2 of the fourteenth amendment may have changed all that is implied in these general observations. To date there is no Congressional or judicial indication of the possibility of such a change. Inaction may therefore give rise to interpretation that such a possibility is not present. For a discussion of § 2 see text keyed to note 25 et seq., infra.  

10 From applying as to federal elections, but as to state ones see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), utilizing the Equal Protection Clause of the fourteenth amendment to strike these down.
The fourteenth amendment's § 5 must be read in conjunction with not only § 1 but also with the other intermediate sections. However, these intermediate sections have generally been ignored and especially so with respect to age. It is the first section, which contains the Privileges & Immunities Clause, the Due Process Clause, and the Equal Protection Clause, which has received the court's primary attention, especially with respect to equal protection in voting. For example, one argument used to support Senate No. 545 was that recent decisions had "provide[d] a solid constitutional basis for legislation by Congress in this area," e.g., Katzenbach v. Morgan, upholding § 4(e) of the 1965 Voting Rights Act. That Act was passed for the primary purpose of preventing any state from denying a federal citizen his right "to vote on account of race or color," today's already classic equal protection violation, although literacy and the poll tax were also included within its prohibitions. Other cases relied on by the proponents of No. 545 prevented a state from withholding the franchise from residents merely because they were servicemen, or in school district elections merely because they were bachelors, owned no property, or had no children attending within the district, or by imposing a poll tax. In all these cases the fourteenth amendment's Equal Protection Clause was held to apply. In Carrington the majority felt the state's prohibition "imposes an invidious discrimination," as they also did in Kramer, and in

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12 384 U.S. 641 (1966). Sec. 4(e) prevented a state from denying one's right to vote because of inability to pass a literacy test in English where he had completed the sixth primary grade in, e.g., Puerto Rico. On whether or not the English language is a requirement for voting, i.e., "read and speak the English language," see Jimenez v. Nuff, — U.S. —, 90 S. Ct. 1245 (1970), granting certiorari to determine this question where the Washington Constitution so required and the 1965 Voting Rights Act outlaws "any test of the ability to read, write, understand or interpret any matter" unless the test is uniformly administered.
13 Sec. 2, repeated in the sections and subdivisions following save for § 4(e) of the 1965 Voting Rights Act.
14 Respectively § 4(e), supra note 11, and § 10 (on the poll tax), the former being keyed to the fourteenth amendment, in its subd. (1), and the latter, in its subd. (b), to the enforcement sections of the fourteenth and fifteenth amendments.
18 380 U.S. at 96, the court also quoting from Lassiter v. Northampton Election Board, 360 U.S. 45, 50 (1959) that "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."
19 395 U.S. at 625, that "Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot," citing Carrington, supra note 15, and Pope v. Williams, 193 U.S. 621 (1904).
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Harper they felt that a state violated the clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard.”

Although the proponents of No. 545 did not cite Gray v. Sanders, that case rejected a state’s county unit system as a basis for counting votes also because of the Equal Protection Clause.

What comes through from these and other cases is the feeling that whatever the Constitution may have permitted in 1789, amendments and changes have produced different results today; and that when these amendments and changes do apply, then the federal government (through congressional, executive, or judicial action) has an obligation so to determine and effectuate.

Thus sex was ousted by the nineteenth amendment, and the imposition of a poll-tax on the right to vote was negated by the 1868 (fourteenth) and subsequent amendments; color, too, was unable to be so used. Residence, however, is still upheld as a requirement, even though not able to be unreasonably formulated and applied. Where does age fit in? As disclosed later, twenty-one is the universally applied age at the time of the Constitution’s ratification, and even the fourteenth amendment twice mentions this figure in its § 2. An examination of this section gives weight to the conclusion that Congress has no statutory power to lower the voting age.

Section 2 of the fourteenth amendment sought to safeguard the right of the newly-freed Blacks to their privileges and immunities as federal citizens; included in these was the right to vote which he

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20 383 U.S. at 666. At 668 the opinion also stated: “But we must remember that the interest [i.e., constitutional power] of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”


22 See also note 4, supra, on this case. At 380 the majority opinion also contained this language: “Yet when Senators are chosen, the seventeenth amendment states the choice must be made ‘by the people.’ Minors, felons, and other classes may be excluded.”

23 See, e.g., Forkosch, Who Are the “People” in the Preamble to the Constitution?, 19 Case West. L. Rev. 644, 711 (1968), querying, concerning the effect of judicial decisions and amendments on “People,” “While never directly amended, was not the Preamble indirectly so changed? Is not the earlier interpretation by the Supreme Court now to be altered? These indirect judicial amendments to the Constitution, so as to follow the intent of the people, have precedent and even necessity behind them . . . .”

24 See, e.g., the writer’s opinion that the language of the Preamble mandates judicial action “to secure the Blessings of Liberty” therein contained, in Forkosch, Does “Secure the Blessings of Liberty” In the Preamble Mandate Judicial Action?, 1970 Law and the Social Order —.

25 See, e.g., M. Forkosch, Constitutional Law Chap. XVII (2d ed. 1969). Briefly, article IV of the Constitution safeguards the privileges and immunities of state citizens when going into other states where these other states grant them to their own citizens; but if not so
could now have and seek to enforce against recalcitrant states.\(^{27}\) As Thaddeus Stevens assured the House just before the proposed amendment was voted upon, “The second section ... worked the enfranchisement of the colored man,”\(^{28}\) although Senator Jacob Howard, of Michigan, who presented the House’s proposal to the Senate on behalf of the Joint Committee on Reconstruction and so made the major expository address on the unamended section,\(^{29}\) “acknowledge[d] ... that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage in the colored race.”\(^{30}\) The finally ratified § 2 contains two sentences. The first sentence makes the flat declaratory statement that Representatives are to be apportioned among the states “according to their respective [whole]...
numbers" of persons, excluding Indians not taxed. The second sentence qualifies this for those elections where a federal President, Vice-President, or Representatives are to be chosen, as well as where any state's Executive or Judicial officers, or members of the Legislature are to be elected, i.e., generally, for all federal and state elections; in these elections, "when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . ., 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."  

There are several observations which may be made concerning this language. The term "abridged" refers to "the right to vote," and does not apply to the qualifications of those persons seeking the franchise; thus it is to be limited to situations where, e.g., a state official falsely registers one, or permits illegal voting to occur, or takes a bribe, or makes a false return, or neglects any duty required by federal or state law.  

The references to "male" and "twenty-one" do come within the substantive qualifications which, in art. I, § 2, cl. 1, have been previously examined. But, as noted and later to be further discussed, these substantive qualifications included and today partially still include items such as property, religion, color, sex, tax, literacy, residence and age. It may be queried why only sex and age were included in § 2's enumeration. The answer is that only these two were uniformly found in not only the original states but also those admitted to the 1860's;  

further, that as to the others, there was not only a variety of treatment but also definite national and local efforts then being made to erase one or more of them. In addition, these "male" and "twenty-one" requirements were present in the earlier federal government's own Northwest Ordinance of 1787, i.e., when "five thousand free male inhabitants, of full

31 Of course "male" has been superseded by the nineteenth amendment, and "at least" should be inserted before "twenty-one" (or else "or over" after it). As to citizenship see, e.g., M. Forkosch, Constitutional Law § 259 (2d ed. 1969).

32 This language, here illustrative only, is found in the Reconstruction legislation, e.g., 16 Stat. 140, 144, 254 (1870), and for additional references see M. Forkosch, Constitutional Law 171 n.9, and 371 et seq. (2d ed. 1969).

33 See, e.g., F. Thorpe, A Constitutional History of the American People 1776-1850 (2 vols. 1898) (hereafter Thorpe, Constitutional), in which he gives a four-page table of the qualifications found during that period (at II, 476-79), and refers to the "Agitation for woman suffrage [which] began about 1845 in New York . . . ." At 481. The table at I, 93-96, shows that between 1776 and 1800 the qualifications of all the states were 21 and male.
age,” were present in the district they could elect their own representatives. It is therefore understandable that such inclusions would occur when all governments agreed that these were requirements coming within the constitutional “qualifications” within the power of the states to control.

This last is important, i.e., “within the power of the states to control.” The implication is that the federal government has no ability to determine sex or age but must leave this to the states, in their discretion. However, where the states voluntarily surrender all or a portion of their discretion, there can be no objection. The nineteenth amendment so did, i.e., “male” was removed when three-fourths of the state legislatures voluntarily ratified that amendment. Pari passu, if one of these two qualifications required a constitutional amendment to change it, then does not the other so require?

Another thought intrudes. Section 2’s built-in qualification in its second sentence on the apportionment stated in the first sentence has a penalty clause where a denial of the right to vote occurs today when anyone is (at least) twenty-one. While a state may therefore lower its age requirement to eighteen, does it have power so to increase it to twenty-two? The language of § 2 must be construed to permit this, with the state thereby voluntarily agreeing to a reduction in the basis of its representation. In other words, § 2 does not prevent a state from increasing or decreasing the age required for voting. But if Congress has the power to decrease, then why not the coin-face power to increase? Which, if permitted, willy-nilly gives Congress power automatically to decrease one or more of the states’ representation!

This examination of the applicable Constitutional clauses supports the view expressed at the outset, that Congress has no present statutory power to mandate a lowering of the voting age to 18. However, what of the historic background of these clauses? Does history shed any light

34 There were also required a freehold in 50 acres of land, citizenship in one of the states, and two years’ residence. Sec. 9 of the Ordinance.

35 The 39th Congress, which proposed the fourteenth amendment, of course did not have all this in mind. They desired to penalize those states preventing one from voting on account of color or race and “Such a [penalty] provision would be in its nature gentle and persuasive . . . .” Joint Committee Report, supra note 30. See also the statement of Senator Oliver H. P. T. Morton, of Indiana, in 1868, that this penalty was “an obvious justice that no reasonable man for a moment could deny . . . .” Avins, Reconstruction, supra note 27, at 288.
upon the subject? We turn first to the English, and then to the American, backgrounds.

THE ENGLISH BACKGROUND

To what extent, if any, does age play a part in the popular branch of the government during early and late England, so that sixteenth and seventeenth century emigrants would take with them a background of requirements and limitations which included this as a factor? There are several historical aspects other than age which may be profitably examined, with this latter occupying a minor role in each such other aspect, i.e., it seems to be the accepted norm for 21 to be the minimum age for an elector. All these aspects tie in to disclose that 21 is a line of demarcation for many purposes, and that undoubtedly it was that age which the American colonists brought with them to the New World.

THE ANGLO-SAXON PERIOD

To start with, the expulsion of all Roman functionaries from Britain, created a vacuum which was filled by invading hosts, internal feuds, and the necessitous militarization of all tribes and races. There were “military colonies,” as Dr. Gneist terms them, which arose and eventually formed the Anglo-Saxon mold for the future nation. In this new nation the military system “was founded on the duty of all to bear arms,” and the concomitant acquisition of land by the victors. Parliam ent’s origins may conceivably be found in the Anglo-Saxon town-moot, the next higher burgh-moot, etc., the local ones being participatory (comprised of freemen and cultivators of the folk-land) while the superior ones generally become representative (these were usually appointed). The highest such body was the witenagemot which “made laws, imposed taxes, concluded treaties, ... and even assumed to elect and depose the king himself.” Taylor states that “The Supreme powers . . . were vested in the king and the witan . . . . In every act of legisla-

36 The House of Lords, and its predecessors, are not “elected” as is the House of Commons, and while the minimum age for membership in both Houses is 21, Ency. Brit. XVII, 380 (14th ed. 1969), it is the age of the electors for the members of the lower House which is of present interest.
38 The original “assemblies of the whole people” which were “found grouped” around the king were changed as “there comes into being a more restricted measure of participation” so that ultimately “the general assemblies of the people cease, in the main.” Id. at 13-14.
39 Ency. Brit. XX, 838 (13th ed. 1926); these highest and lowest (representative) moots may conceivably be analogized respectively to the present Houses of Commons and of Lords.
tion the right of the witan to advise and consent was invariably recognized.\textsuperscript{40}

To the extent that the crown appointees and the others were direct advisers, etc., it does not make sense to have callow youths chosen for such a purpose; the smaller assemblies, however, probably aped the procedure described by Tacitus; the eldest opened, and “then each one speaks according as distinguished by age, family, renown in war, or eloquence,”\textsuperscript{41} although this circle kept narrowing by virtue of required land-ownership, status, birth, etc., and age and war service were among the casualties. There thus seems to be, at first, no requirement that a minimum age of 21 be attained before one could enter the local councils, although the weight accorded youthful opinion varied; if a man could fight, and perhaps obtain spoils (e.g., land) and so become established, he undoubtedly could participate in these general local assemblies. Historically, therefore, the pre-Norman era probably had at least local universal suffrage, albeit limited to (fighting) males possessing other qualifications.

\textbf{THE NORMAN CONQUEST—HENRY III’S SEVERAL “AGES”}

The conquest of Britain in 1066 eventually led to feudalism, status, and the ultimate, albeit not initial, demise of any form of assembly of the general population.\textsuperscript{42} In the first years of his reign, William consulted with and used the witan, e.g., “to accomplish a complete severance of ecclesiastical from temporal business by the creation of distinct courts and councils, in which the church could judge and legislate upon its own affairs without secular interference.”\textsuperscript{43} William’s absolutism, despite baronial dissension, later rejected the witenagemot in favor of his own personal council of officials, although some forms of national council were maintained. The new council was later continued and became known as the curia (concilium) regis, although its jurisdiction was eventually limited to advice of a judicial\textsuperscript{44} nature (To what

\textsuperscript{40} H. Taylor, The Origin and Growth of the English Constitution I, 186 (2 vols. 1904) (hereafter Taylor).

\textsuperscript{41} Quoted in Gneist, supra note 37, at 26.

\textsuperscript{42} Although William the Conqueror did, at first, continue the witan, Taylor, supra note 40, at I, 239 and 260, and he also had “a very deep speech with” them.

\textsuperscript{43} Taylor, supra note 40, at I, 260.

\textsuperscript{44} “Under the Norman kings the [“legislative and judicial functions and the voting of taxation or supply”] were undifferentiated. At a sitting of the curia regis (king’s court or council), petitions might be considered and disposed of by what would be called a judicial
extent is the present House of Lords [through its committee] effectively so limited today?); and especially in the exercising of such a function can it be said that age was a most important factor.

The curia's dependence upon the king's will is also shown by the aftermath of Magna Carta's security council of twenty-five nobles\(^4\) which further disclosed the immediate disregard of any grouping which was independent of the king. It may be noted, however, that the need of Henry III for money to wage war eventually required him, in 1254, to ask his barons to designate and send up two knights from each shire to consult with him, \textit{i.e.}, representatives (of the people) meeting in a central assembly, with these representatives undoubtedly being of "full age." And it may be further noted that in 1275 Edward I utilized the same method, with the knights now chosen by the freeholders (who, by definition, usually\(^4\), had to be 21), and including two burgesses from every leading population center, which seemingly begins the parliamentary form of government.\(^4\)

The Great Charter of 1215 is itself of present interest, as is the accession of Henry III to the throne. The Charter uses terms such as "full age" (Art. 2, referring to the inheritance upon the death of an earl and others, and if "at his death his heir be of full age") and "under age" (Arts. 3, 4), and also refers to "when he becomes of age" (Art. 5). One year after its acceptance King John died; his eldest son, Henry, born October 1, 1207, was then but nine years old,\(^4\) and so the barons chose a regent to rule for him. In 1223 the Pope declared Henry, although only sixteen, of age and competent to govern;\(^4\) certain authorities speak of the latter attaining his "majority"\(^5\) or coming "of determination, or by an order to a sheriff to see that right was done, or by a general order which partook of the nature of legislation." Ency. Brit. XVII, 376 (14th ed. 1969).

\(^{4}\) See list in J. Holt, Magna Carta 338 (1965). The next sentence is supported by Ency. Brit. XX, 839, n.1 (15th ed. 1926).

\(^{4}\) This is the general approach adopted here although minors could hold land in freehold, as in Calvin's Case, 7 Co. Rep. 1a, 77 E.R. 377 (1608), suing, if need be, by his prochain ami. And a freeholder did not per se satisfy all qualifications for voting, e.g., it might be less than the required amount.

\(^{4}\) Ency. Brit. XX, 840, n.1, and see also Id. XVII, 383 (14th ed. 1969), that in the Norman French period of the Middle Ages individual writs summoned two persons from each shire and borough. Additionally, by definition a "freeholder" had to be 21.


age\textsuperscript{51} in 1225, when Henry was only eighteen; but it seems to be uniformly agreed that at the beginning of 1227, when he was not yet twenty, "he complete[d] his emancipation,"\textsuperscript{52} attained "his majority,"\textsuperscript{53} "declared himself of age,"\textsuperscript{54} and was also "again proclaimed of age,"\textsuperscript{55} and, while not dismissing his advisers, began to assume increasing degrees of personal control;\textsuperscript{56} five years later, in 1232, when Henry was twenty-five, his "personal rule" begins.\textsuperscript{57} Regardless of the accuracy of the various dates in Henry's life, there is no confusion about the fact that at least for him the terms "of age," "full age," "majority," and "emancipation" refer to different periods in his life beginning with sixteen and continuing into twenty-five.\textsuperscript{58}

THE COMMON LAW

The term "full age" is thus of historical ambiguity. Henry III did not initiate this vagueness and uncertainty; he did, however, continue it. Nevertheless, by the dawn of the common law, as disclosed by Coke's Littleton, some degree of definitiveness became the norm, at least as applied to land: "For when such tenant dyeth, the lord shall have the land holden of him until the age of the heire of 21 yeares; the which is called full age, because such heire by intendment of the law is not able to doe such knight's service before his age of 21 years..."\textsuperscript{59} The comments then state of the French "Pleine age," that "Full age regularly is one and twenty yeares," and disclose further that "A woman hath

\textsuperscript{51} E.g., T. Plucknett, A Concise History of the Common Law 23 (5th ed. 1956).
\textsuperscript{52} Taylor, supra note 40, at 396, 397.
\textsuperscript{53} Stubbs, supra note 48, at 39.
\textsuperscript{54} Gneist, supra note 37, at 90.
\textsuperscript{55} Ency. Brit. XIII, 282 (13th ed. 1926); see also F. Pollock and F. Maitland, The History of English Law I, 198, 523 (2d ed., repr. 1959), who speak of his "full age" when referring to a "permanent, center tribunal" held by Henry, and to an action for land in which it is alleged that the king is plaintiff's warrantor, whereupon "the action must remain in suspense until the king is of full age."
\textsuperscript{56} Taylor, supra note 40, at 396, mentions "personal direction."
\textsuperscript{57} Gneist, supra note 37, at 90; Lyon, supra note 50, at 339; Ency. Brit., supra note 55, using the term for 1227, and Taylor, supra note 40, at 397, using "personal government" for 1234, and just prior thereto speaking of "actually attempted to govern alone."
\textsuperscript{58} Writing of the Dublin and Waterford craft gilds in the 16th century, Prof. Lipson states that a citizen was responsible for his apprentice's wrongdoing "as he would for his son if he were of age, that is to say, if he can count twelve pence, as is the law of citizens and burgesses." E. Lipson, The Economic History of England I, 311 (3 vols. 1949). His footnote includes: "At Ipswich proof of age was determined by the ability to measure cloth and count money: Bacon, Annals of Ipswich, 70."
\textsuperscript{59} Coke's Commentary upon Littleton, Lib. 2, Chap. 4, § 103, 74b (London 1775) concerning "Knight's Service;" the only change made here is to replace the original initial "f" by "s."
ELECTORAL AGE QUALIFICATIONS

seven ages for several purposes appointed to her by law” and that “A man also by the law for several purposes hath divers ages assigned unto him . . . .” While the first quotation is given to disclose one type of “full age,” i.e., that concerning land, the first comment refers to the term as being “regularly” 21; which means, pari passu, that the other comments, while disclosing various ages for women and for men, do not contradict the fact that 21 is “regularly” the “full age” and so to be considered unless the contrary appears.

Pollock and Maitland, in writing their famous work, agree at the outset that “There is more than one ‘full age,’” but then feel that “Gradually however the knightly majority is becoming the majority of the common law,” and that “by this time,” i.e., in Bracton’s text, what is “regarded as the normal full age . . . [is] one and twenty years.” They then opine that “the only line of general importance is drawn at the age of one and twenty; and infant—the one technical word that we have as a contrast for the person of full age—stands equally well for the new-born babe and the youth who is in his twenty-first year.” One other common law aspect is pertinent. The two authors, after stating that “the knightly majority is becoming” the common law one, later discuss the pleading and proof at a trial; now they write that the sheriff chooses four knights, who in turn choose twelve others, and that a “grand assize is composed of [such] twelve lawful knights,” with a “petty assize or an ordinary jury, [being composed of] twelve free and lawful men of the neighbourhood . . . .” Since the former (knights) are twenty-one or over, and the sheriff chooses the petty assizes, it would be presumptuous for this latter to choose younger men, i.e., infants, to decide what the older had charged; and since it is “free and lawful” men who are here mentioned, the presumption must attach that 21 was also a minimum so to serve. It is not much of a jump from this age re-

60 Id. at 78b. For the man this is given: “twelve yeares to take the oath of allegheance in the torne or leet, fourteene yeares to consent to mariage, fourteene yeares for the heire in socage to choose his gardian, and fourteene yeares is also accounted his age of discretion, fifteene yeares for the lord to have aid pur faire fitz chivaler, under one and twenty to be in ward to the lord by knights service, under fourteene to be in ward to gardian in socage, fourteene to be out of ward of gardian in socage, and one and twenty to be out of ward of gardian in chivalrie and to alien his lands goods and chattells.”


62 Id. at 439, citing for the first quotation Bracton, n.275b, and for the second citing and quoting the seven ages of women, supra note 60, where the ages of man are given. The authors use the term full age at various other places, e.g., II, 443, 639, 640, and so the reader must assume a continuation of their earlier opinion.

63 Id. at 621. See also Id. at 645.
requirement to serve and vote on a petty jury, to that of serving and voting as an elector; the two have much in common.

Parliament And Its Electors

Self-government by those so able (in years and otherwise), which had somewhat existed in differing modes prior to William the Conqueror, e.g., by assent, re-appeared in various and effective forms in the nation and in the localities even before the statute of Henry IV in 1406. For example, by Arts. 12 and 14 of Magna Carta not only did John agree not to levy scutage or aid “except by the common counsel of our realm,” but to summon his greater barons “individually by our letters,” and separately to “summon generally through our sheriffs and bailiffs all those who hold of us in chief for a fixed date . . . [and] state the reason for the summons.” In the Parliaments held later that century the writs summoning the various lords, bishops, and others were highly restricted and changed with the decades.\(^6\) Eventually, however, elections replaced designations, and it is then that the composition of the electors' ages becomes relevant.

On the local scene a major problem of electoral qualification arises because of the unavailability of early local records and, more importantly, the domination and application of local usage and custom, the latter “render[ing] anything like a perfect generalization, even upon sufficient data, almost impossible.”\(^6\(^5\) However, some background, even though involving national requirements, illustrates and, perhaps, may give a clue as to the age qualification locally and nationally. For example, in 1372 a parliamentary ordinance forbade “the election of lawyers and exclu[d] the sheriffs from candidature,”\(^6\(^6\) while in 1376 a petition was dismissed by the King which requested “that the knights may be chosen by common election from the better folk of the shire, and not merely nominated by the sheriff without due election . . . .”\(^6\(^7\) Because of a variety of evils resulting from the system then in force, the Act of 1406\(^6\(^8\) now required, \textit{inter alia}, “that the election shall be

\(^{64}\) See, \textit{e.g.}, discussion by Stubbs, \textit{supra} note 48, III, Chap. XX.

\(^{65}\) Taylor, \textit{supra} note 40, at 473, then quoting from Stubbs, \textit{supra} note 48, III, 419-20.

\(^{66}\) Stubbs, \textit{supra} note 48, III, 413. See also \textit{Id.} II, 445. At III, 263, the author writes that “Edward's ordinance against the choice of lawyers had remained a dead letter . . . .”

\(^{67}\) \textit{Id.} III, 414.

\(^{68}\) 7 Hen. IV, c. 15, Statutes, ii, 156. For background reasons for the statute see, \textit{e.g.}, Stubbs, \textit{supra} note 48, III, 264, 420-21, and also 423.
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made in full county court by [all] the persons present,” who included not only those called for the election but also those separately and independently summoned for the judicial work of the court, e.g., suitors, jurors, and anyone else then in the courtroom, and these, too, “shall attend to the election.”

Regardless, the succeeding monarch restricted the electors and their choices to residents within their county, city, or borough, and in 1430, because of the “great attendance by people of small substance and no value, whereof every of them pretended a voice equivalent, as to such elections, with the most worthy knights and squires resident,” the short-lived democracy was limited by a property requirement, i.e., 40s. This aped the requirement which limited the class of those qualified to serve on juries but, even when “in theory the right of election was so free that every person who attended the county court might vote, in practice the privilege was not valued . . . .” The exercise of the franchise locally thus became a matter for local regulation, although general legislation sought to remove demonstrated evils; but the local records are not available. There appears to be overlapping, and it is custom more than statute which is followed. While the elections are eventually “becoming direct and primary . . . it is improbable that any completely new system of franchise was introduced in the sixteenth century . . . .” Which, in effect, rejects any less than “full age” or 21 as one electoral qualification.

With the creation of the Tudor Dynasty by Henry VII (1485-1509) the age factor as an electoral requirement is still greatly clouded, even though a greater degree of self-government appears. This latter is illustrated by local and financial administration, highway regulation,

69 Stubbs, supra note 48, III, 417 and 419. Bishop Stubbs also refers to the diminishing importance of these county courts since the thirteenth century; see also 418, n.2.
70 1 Hen. V., c. 1, Statutes ii, 170.
71 8 Hen. VI., c. 7, Statutes ii, 243. This was that only residents possessed of a freehold worth 40s. a year could vote for these two knights (see note 67 and text, supra), with the additional requirement that a majority thereof decided the election. See also Ency. Brit. XVII, 384 (14th ed. 1969), that this 40s. requirement was the sole one until 1832, until which year “the franchise was regulated by local custom.” For the American like fears of the lower class dominating the government, see discussion infra, notes 182-3.
72 Stubbs, supra note 48, III, 265. On the election of members by twelve electors “forming a jury,” see 432, and giving references to other localities so doing.
73 Id. at 421.
74 Id. at 433, who then proceeds to “briefly indicate the several theories or customs which are found in working [sic] when our knowledge of the subject begins.”
and the care of the poor.\textsuperscript{75} It is, however, the need of Henry VIII (1509-1547) for financial and local support in his aborted war with France and then the continuing fight with the Pope, that led to Parliamentary power and authority, even though shortly after his death, with Mary (1553-1558) succeeding Edward VI (1547-1553), the Catholic Restoration occurred. Now the "Reconciliation," Parliament’s retrogressive conduct in "humbly acknowledging their sin of spiritual defection, and receiving absolution from the hands of Cardinal Pole . . . led the way back to the Papacy, but the esteem and confidence of the nation in them was uprooted."\textsuperscript{76} With Elizabeth’s (1558-1603) succession to the throne of Mary, the Anglican State-Church replaced that of Rome, and the kingship re-asserted power theretofore relinquished. This is somewhat shown by the Queen’s rebuke to Commons in 1571 to "meddle with no matters of state but such as should be propounded to them," and in 1593 informing them that their only privilege was in voting yes or no and not "to speak every man what he listeth or what cometh unto his brain to utter,"\textsuperscript{77} although such language resulted from problems connected with the raising of funds through monopolistic grants. But Parliament’s importance is not to be denigrated, for "at important crises the Crown now seeks to exercise an influence over elections."\textsuperscript{78}

The Crown’s desire to control the members of Parliament seeps down to their base, \textit{i.e.}, those whom they represent. The narrower this base the easier to influence. Until 1832 who were the electors from the inception of and during the reign of the Tudors? Parliamentary representation, which at first was by royal designation later was accorded geographical entities, \textit{e.g.}, towns, counties, shires, boroughs, and institutions (\textit{e.g.}, universities), did not become truly elective until the last century. As already seen, the limitations placed upon the right of a person to vote were numerous, and the land and financial requirements were so onerous as to narrow the base considerably, \textit{e.g.}, as late as 1831 reform bills were introduced which, by the time of final passage the following year, increased the eligible voters from slightly over 400,000 to nearly double; and yet this was still but a small proportion of the

\textsuperscript{75} See Gneist, supra note 37, at 181-4.
\textsuperscript{76} Id. at 189. On the rise of the Privy Council, see 192-4.
\textsuperscript{77} Quoted in M. Forkosch, Antitrust and the Consumer 363, n.24 (1956).
\textsuperscript{78} Gneist, supra note 37, at 196. See also Ency. Brit. XVII, 378 (14th ed. 1969) : "The fact that the Lords’ journals began in 1509 and the Commons’ journals in 1547 is significant. It shows the increasing importance of Parliament under the Tudors, and especially under Henry VIII."
total population of over ten million,\textsuperscript{79} so that by 1852 England and Wales had electors numbering 322,619 freeholders, 23,097 copyholders, 21,104 leaseholders, 99,019 tenants, and 488,920 as borough electors.\textsuperscript{80} It is only by 1858 that the qualifications of £600 and £300 ground-rent for Parliamentary members of counties and boroughs, introduced a century earlier, are abolished,\textsuperscript{81} and the succeeding reforms free the citizen-voter from all civil duties to the point where Dr. Gneist sorrowfully concludes that “From this time forward there is no principle which could be placed in opposition to any right of vote, not even the suffrage in the case of women and minors.”\textsuperscript{82} He was, of course, incorrect then as to age,\textsuperscript{83} although since the 1969 Representation of the People Act, the voting age is 18. And this legislation in effect supports the ultimate conclusion of Congressional impotency, for if the United States, as England, did not have a written and limiting constitution, then Congress, without more, could likewise so do.

\textbf{Conclusions}

The Examination of the pre-Norman era has permitted the probable conclusion that age, \textit{i.e.}, 21, did not necessarily count as a limiting factor in the make-up of the local councils. Nevertheless, the formulation and application of the common law from William the Conqueror on indicates strongly that 21, as a serious dividing line for

\textsuperscript{79} Ency. Brit. XVII, 378 (14th ed. 1969), Table II, showing this to be 4.4\% of the electorate as a percentage of the population aged 20 and over, but increasing steadily so that by 1931 it becomes 96.9\%, and by 1964 is 96.2\%. \textit{See also} note 82, \textit{infra}, on footnote to table.

\textsuperscript{80} Gneist, \textit{infra} note 37, at 355-9. \textit{See also} \textit{Id. at} 352 on “the Reform Bill in favour of parliamentary franchise [which] summoned only £10 householders.” At 361-2 Dr. Gneist gives other financial limitations, at 363 gives a footnote for page 362 concerning the dropping of the £10 qualification, and at 365 gives the figures for the electorate down to the third reform bill of 1884-5.

\textsuperscript{81} \textit{Id. at} 341.

\textsuperscript{82} \textit{Id. at} 371, speaking of the consequences he attributes to the law of 1869 for assessing the poor-rate, \textit{i.e.}, that the occupier of a house “is to have the right of vote, whether he pay the tax himself or through his landlord, provided that somebody pay” (at 370). This language is continued in the second edition (1887) at 434, which is re-written by A. Keane. \textit{See also} note 83, \textit{infra}.

\textsuperscript{83} \textit{See} Ency. Brit. XVII 384 (14th ed. 1969), that “In 1918 only two qualifications were recognized, residence and the occupation of business premises of £10 a year,” but also giving a table of electorate growth between 1831 and 1964 (see note 79, \textit{ supra}) which states, in a footnote, that “Persons under 21 have no vote . . . .” This, of course, is indicative of the continuing fact of this qualification, to the point where it is so much a matter of common understanding and acceptance that it is deemed known to all without the necessity of qualifying language (on which see also the colonial and other situation understood by the Constitutional Convention of 1787, \textit{infra} note 135, \textit{et seq.}).
major purposes, must be applied to those selected and later elected as representatives, and, analogous to the jurors, their electors must also have been of that age. This last conclusion is strengthened when note is taken of the successive eliminations of voting qualifications into the present, without any imposition of an age requirement save continuation by recognition, so that universal suffrage is the rule otherwise. It is this background of Anglo-Saxon, Norman and Elizabethan views of the electoral age requirement that the emigrants to the New World took with them, applied until the Revolution of 1776, and continued into the Constitution of 1787. We turn to the American colonies and their use of 21 as the minimum voting age.

THE COLONIAL BACKGROUND

The English use of particular and even peculiar terms is continued by the colonists who, after all, deemed themselves transplanted Englishmen. Insofar as voting age is concerned, the same general connotations given to “freeman” and “freeholder” are found transported across the ocean so that, for example, Samuel Eliot Morison equates the former with “voters,” i.e., they have attained their majority. As we shall see, the early documents and charters of the sixteenth and following centuries, while generally vague as to age, in effect follow the language used in the English statutes and common law until the period of the Revolution is reached. Then, probably for the first time, the specific age of 21, for purposes of voting, comes to the fore. Until then, however, the tenor and implication of the charters and records discloses that freemen, freeholders, officials, and others occupying appointed or elected positions of authority or influence were adults, i.e., 21, and that voters partook of this qualification through reference to e.g., freemen, as being those able to vote, and freeholders (who, by English definition, usually had to be 21), as being those able to be elected.

THE EARLY CHARTERS

There seems to be little of historical detail concerning age, that is, of “full” or “voting” age, in the available records of the early settlers of the 1580’s and 90’s. We do know that the first settlers were “men of the rough-and-ready, adventurous type,” and that later these

84 See note 92, infra, where he so does, at least for the Mayflower Compact.
ELECTORAL AGE QUALIFICATIONS

The first three Charters of Virginia, beginning with 1606, provided for councils and assemblies, but these were in effect appointed by or subservient to the royal will, as was that later created in the 1620 Patent of the Council for New England. In none of these councils, assemblies, or other bodies were qualifications set forth explicitly, but insofar as age was concerned it can be seen from the lists of named appointees, or the general descriptions of the offices, that all who sat were followed by “men, women, and children, seemingly of the more domestic, peace-loving sort.” It was these latter who created permanent settlements but who, nevertheless, continued to be governed from England, e.g., as in the case of Lord Baltimore, who ruled Maryland from afar “as absolute lord and proprietor.” Nevertheless, each colony utilized the English common law, as later modified because of experience, and followed the mother country in its own land and descent laws, its ecclesiastical organizations, and in the procedure and practice of its assemblies.

85 C. Andrews, Our Earliest Colonial Settlements 16 (1933, repr. 1959) (hereafter Andrews, Our Earliest), and see 41-2, discussing Virginia. Prof. Andrews’ little volume studies the settlements begun in Virginia, Massachusetts, Rhode Island, Connecticut, and Maryland, but nowhere discusses voting age. However, there does come through the “adult” qualification.

86 Id. at 151, and see 68. The proprietorship did not end, technically, until the last Lord Baltimore, in 1770, bequeathed his entire estates to two illegitimate children who, in turn, were later dispossessed in 1781 by the new powers, the State later paying the sum of $50,000 as recompense. At 164. Besides chartered companies and proprietary patents there were also Crown colonies (see note 94, infra). On the “absoluteness” of Lord Baltimore’s powers see the 1632 Charter of Maryland which, in par. VII, grants him “free, full, and absolute power . . . to Ordain, Make, and Enact LAWS . . . of and with the Advice, Assent, and Approbation of the Free-Men of the same Province . . . .” This preliminary and superficial veto power is, however, constricted and removed shortly by other language. W. MacDonald, Select Charters 56 (1899) (hereafter MacDonald, Select); see also note 98, infra.

87 See, e.g., the 1774 Declaration and Resolves of the First Continental Congress, Resolve 6, “That they [the inhabitants] are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.” MacDonald, Select, at 359; see also Forkosch, The Doctrine of Criminal Conspiracy and Its Modern Application to Labor, 40 Texas L. Rev. 304, 473 (1962) (hereafter Forkosch, Doctrine).

88 See, esp., the Fundamental Constitutions of Carolina of 1669, MacDonald, Select, at 149-54, which refers, inter alia, to landgraves, cassiques, leet-men and women, and other purely English terms.

89 See, e.g., Forkosch, Doctrine, and Andrews, Our Earliest, at 27, and also 142-3; as to Maryland see 153-4.

90 Andrews, Our Earliest, at 5-6, 13-14, 18-19, the Charters being at 1606, 1609, and 1611-12.

91 Id. at 26, where the King named forty of his cousins and others as “the first . . . Councill” with these individuals having the right to fill vacancies, i.e., self-perpetuating.
were adults. The first somewhat truly representative legislature in America was constituted in Virginia in 1619. It consisted of twenty-two burgesses, elected by eleven towns, plantations, and (taken from England) hundreds, who sat with the council and so formed the assembly. Unfortunately, these legislative assemblies accomplished little until the collapse of the Virginia Company in 1624 created a Crown colony, the first in America, whereupon the planters petitioned the King to allow, *inter alia*, their local council to continue as a restraint upon the Crown’s governor; thus self-government began its birth-pangs in these decades, even though it “was hardly democratic . . . .”

It was not until 1638 that the three Connecticut settlements at Windsor, Wethersfield, and Hartford assumed the control of their own affairs and that “the first written constitution known to history that created a government” was drafted; however, it was barren of any age requirements, for its two legislative bodies and officials were chosen “by all that are admitted freemen and have taken the Oath of Fidelity . . . .” While the 1641 Massachusetts Body of Liberties does spe-

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92 Id. at 35, where the 1621 Ordinance for Virginia gives the names of those in the Council of State, and at 35-6 gives the composition of the General Assembly; see also note 93, infra. The first Charter of Massachusetts of March 4/14, 1628/9, also provided for assemblies (at 40-41), but age does not enter. Samuel Eliot Morison’s comments on the Mayflower Compact of 1620 include these: “The forty-one signers . . . included every head of a family, every adult bachelor . . . and most of the hired menservants. The only males who did not sign were those under age, and two sailors . . . .” “The twenty signers who survived the first six months ashore acted as ‘freemen’ (voters) . . . [and] admitted to the franchise, individually and sparingly, boys as they grew up” etc. D. Boorstin, ed., *An American Primer* I, 2, 4 (1966).


94 Andrews, Our Earliest, *supra* note 85, at 58. On the contents of the petition see 54. See also 119, esp. 131-3, on Connecticut.


96 Although in par. 7 there seemingly is a change to “all that are admitted inhabitants . . . provided that non [sic] be chosen a Deputy . . . which is not a Freeman . . . .” MacDonald, Select, respectively at 60, note 61, and 63. On the “freeman” aspect also see the Fundamental Articles of New Haven of 1639 which opened by referring to “all the free planters [who had now] assembled . . . .” At 67. The 1643 united effort of New Haven, Guilford, and Milford in forming a representative government permitted only “free burgesses” to “have power . . . to chuse fitt and able men” as judges, or to “vote in the election of all” other officials. At 101, *et seq.* The 1662 Royal Charter of Connecticut set up a Governor, Deputy Governor, plus twelve Assistants, “to bee from tyme to tyme Constituted, Elected and Chosen out of the Freemen of the said Company.” At 117-18.
cifically mention age, i.e., 21, twice, the first time with respect to the
ability to make wills and alienate property, and the second time “for
giveing of votes, verdicts or Sentence in any Civill Courts or causes,”
it otherwise refers merely to “freemen,” e.g., they have power “to make
such [customs or prescriptions] by laws and constitutions,” “to choose
yearly... all the Generall officers,” “to choose such deputies for the
Generall Court,” etc. The first 1662 charter of South Carolina also
refers to “Freemen” (and also “freeholders”), as does that of 1663 for
Rhode Island and Providence, as well as the 1664 New Jersey conces-
sion and agreement (referring also to freeholders), whereas the 1669
Fundamental Constitutions of Carolina mentions “freemen” passingly
but throughout refers to “freeholders” who choose those for office,
and eventually speaks of seventeen as a dividing line for proscribing
those above it from “any benefit or protection of the law” who are not
church members or of some profession of God, and requiring all be-
tween 17 and 60 to bear arms.

Since effective English legislative supremacy does not occur until
1689, it is understandable that the colonial assemblies were at first
innocuous, so that general or universal suffrage was not of much con-
sequence and could be and was highly restricted. Thus colonial elec-

97 MacDonald, Select, at 75 and 81 (see also the 1691 Second Charter, at 205, and the
Explanatory Charter of 1725, at 233), although in the Fundamental Constitutions of
Carolina, supra note 88, at 154, “the younger sons of proprietors” may become members of
a court (quaere: does “younger” require or permit minors). See also R. Taylor, Massa-
chusetts, Colony to Commonwealth (1961) (hereafter Taylor, Massachusetts), stating of the
1691 Charter that “According to law every town with forty or more freeholders had to send a
representative to the General Court [i.e., the legislature],” but since each town was required
to pay for travel and maintenance, many refrained from so doing because of the expense (at
4-5).
98 MacDonald, Select, at 82-3. See also the 1680 Charter of Pennsylvania, at 186 and
187, where William Penn is given power to make laws “by and with the advice, assent and
approbacion of the freemen” although in emergencies their consent is not required (see
also note 86, supra). See the 1682 Frame of Government of Pennsylvania at 192 et seq., mention-
ing “freemen” continually and as voting for the Provincial Council (par. Second, at
193), but nowhere defining the term (see also the 1683, 1696, and 1701 documents at 200,
217, and 224).
99 There is no definition of this term but par. CXVII, at 168, states that “Nor shall
any person... above seventeen years old, have any estate or possession in Carolina, or protec-
tion or benefit of the law there, who hath not, before a precinct register, subscribed these
Fundamental Constitutions in this form,” thereupon setting forth an oath of allegiance.
100 1669 Fundamental Constitutions of Carolina, respectively at 122, 123, 129, 142, 143,
145, and 156 and 159 et seq. (esp. pars. LXXI-II, and cf. XCII).
101 Id. at 166 and 168 (at 153 the age of 21 is mentioned in referring to the alienation of
lands). See also the 1676 Concessions of West New Jersey, at 175 et seq., esp. at 181, Chap.
XXXV, that “the said Proprietors and freeholders at their choice of persons to serve them in
the General and Free Assembly of the Province...”
102 See Forkosch, Who Are the “People” in the Preamble to the Constitution?, 19 Case
tors generally had to be landowners or taxpayers, even though the governments were to be "democratical,"103 and in Connecticut, for example, where "the source of civil and religious authority . . . [was] such of the people as were deemed worthy to exercise it,"104 an oath of religious fidelity was also required.105

The lengthy upheaval in England gave rise to the Long Parliament and, finally, the Glorious Revolution of 1688 which settled the question of supremacy between the King and the Parliament. A spin-off appeared and continued to be the insistence of the home government in London upon popularly elected assemblies in the provinces whenever and wherever possible.106 The subsequent efforts of George III and his ministers to centralize and also to control colonial affairs107 must be cast against this portion of the total scene, for by the time of the 1776 rebellion all of the colonies had some form of a representative assembly. This is indicated by the 1774 Declaration and Resolves of the First Continental Congress which referred to the grievances of "the people of America" who now, "justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet . . .” and these deputies now declared "That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council . . ."108

West. Res. L. Rev. 644, 661-2 (1968) (hereafter Forkosch, People). See also the Charter, supra note 95, and from the tenor of the other paragraphs the Patroons who ruled were all adults. See also MacDonald, Select, at 44.

103 Andrews, Our Earliest, supra note 85, at 101-4.

104 Andrews, Our Earliest, at 139.

105 See, e.g., A Hart, Formation of the Union 14 (1893) (hereafter Hart, Formation), who also writes that "the number of voters at that time [1750] was not more than a fifth to an eighth as large in proportion to the population as at present.” As of 1970 it would be even smaller. See also Andrews, Our Earliest, at 121, that “It is an interesting and suggestive fact that Connecticut and Rhode Island were the last of the original thirteen colonies to throw off a money or property qualification upon the right to vote . . .”

106 See, e.g., J. Miller, Origins of the American Revolution 30-1 (1943), excepting from this home policy “the brief interlude of the Dominion of New England (1686-1689) in which the assemblies were abolished and rule by an appointed government and council initiated . . .” See also Fisher, Colonial, supra note 93, Chap. XII on “The Effects on the Colonies of the Revolution of 1688.”

107 See, e.g., the English 1774 Massachusetts Government Act which sought “for the better regulating [of] the government of the province” and which therefore rejected the annual elections of counsellors or assistants and henceforth had them appointed by the Crown, although qualifications for service on juries included a minimum of 21 years of age (maximum 70). MacDonald, Select, respectively at 343, 345, 348.

108 MacDonald, Select, respectively at 357, 358, and 359, and on the two Continental Congresses see the next few paragraphs. “The people,” of course, was a highly restricted group, supra note 102.
ELECTORAL AGE QUALIFICATIONS

THE REVOLUTIONARY SITUATION

During the pre-Revolution period there is little of aid to our inquiry; all is either darkness or cloudy. For example, the Stamp Act of 1765 spawned a host of colonial resolutions in opposition, with that of Virginia being the first. It contained the statement "That the Taxation of the People themselves, or by Persons chosen by themselves to represent them," was the only permissible method, i.e., it was the people who chose their representatives, but no further description or qualification of these electors was given. Pennsylvania (and, with slight language variations, Connecticut, South Carolina, and New Jersey) claimed "That the only legal Representatives of the Inhabitants of this Province are the Persons they annually elect . . .," although the Maryland language referred to "the Representatives of the Freemen of this Province . . ."; Massachusetts stated negatively only "That the Inhabitants of this Province are not, and never have been represented in the Parliament . . .". The Stamp Act Congress that fall, to which "delegates" from nine of the colonies traveled, in its Declaration aped the Pennsylvania language and contended "That the only Representatives of the People of these Colonies, are Persons chosen thereby by themselves . . .". In other words, general references to the "People," or "Persons," or "Inhabitants," were insufficient to particularize their age, although, as already seen, "freeman" was undoubtedly specific.

By the following decade the differences between the mother country and the colonies came to a head. Thus on September 5, 1774, on the eve of the Revolution, delegates from all the colonies save Georgia gathered at Philadelphia as the First Continental Congress. They adopted a Declaration of Colonial Rights which, 

\[109\] E. Morgan, ed., Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766 (1959) (hereafter Morgan, Prologue), at 48 and 50, with the quotations respectively at: 51 (55, 57, 60); 53. New York's Resolve was unique, merely referring to the claim that historically applications, etc. "have always been made to the Representatives of the People of this Colony . . ." At 61.

\[111\] Id. at 57. The Instructions of the Town of Braintree (to Ebenezer Thayer), drafted by John Adams, referred to the "grand and fundamental principle of the constitution, that no freeman should be subject to any tax to which he has not given his own consent, in person or by proxy." Commager, Documents, supra note 95, at 57.

\[112\] Id., supra note 109, at 63; see also MacDonald, Select, at 314.

\[110\] Hart, Formation, supra note 105, at 61, writes that this "First Continental Congress . . . was, therefore, a body without any legal status."
constituted, and appointed deputies” who were now assembled, but nowhere mentioned the qualifications of these “good people.” They also recommended that each colony “establish a modified charter government as a temporary expedient pending reconciliation with Great Britain,” which recommendation was not only repeated by the Second Continental Congress in November of the following year, but on May 10, 1776 was supplemented by advice to the colonies to form permanent governments. The Second Continental Congress also adopted their own Declaration “setting forth the causes and necessity of their taking up arms” which, inter alia, charged that “Not a single man” of the English Parliament, which assumed the right to make laws binding the colonists “in all cases whatsoever . . . is chosen by us or is subject to our control or influence . . . .” In all this nothing expressly appears with respect to the voting age of those who chose or even served.

Who, therefore, chose representatives up to this time, and who, thereafter, were so to choose? To 1776, as we have seen, the choosers (electors) were not clearly limited to those 21 or over. But there now occurs a series of events which bears importantly on this subject. As already noted, the two Continental Congresses had advised the colonies to form new governments, and on July 4, 1776 the Second Congress’s Declaration of Independence proclaimed that it emanated from “the Thirteen United States of America,” not colonies. The thirteen colonies therefore rushed their transformation into states, and it is their constitutional activities during this period which must now be examined.

The First State Constitutions

The first constitution to be adopted was that of New Hampshire, promulgated on January 5, 1776, and the last was that of Massachusetts in 1780. By 1777 there were ten in effect, but of the eventual thirteen only that of Massachusetts, drafted by a convention called for that sole

113 People, supra note 93, I, 158.
114 Taylor, Massachusetts, supra note 97, at 13.
115 Hart, Formation, supra note 105, at 81.
116 People, supra note 93, I, 161, 162, “in all cases whatsoever” being capitalized. This Declaration of July 6, 1775 was followed a year later by the Declaration of Independence of July 4, 1776 (at 201). Prof. Hart states that this Second Continental Congress now “constituted a government exercising great sovereign powers. It began with no such authority; it never received such authority until 1781.” Hart, Formation at 76.
117 The Second Congress's Declaration opened by stating that it was “A declaration by the representatives of the United Colonies of North America . . . .” People, I, 161.
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purpose, was thereafter submitted for ratification by popular vote, the first such procedure in the United States. The backgrounds of the New Hampshire, Massachusetts, and Virginia provisions are of some interest. The New Hampshire Constitution of 1776 was expressly a stop-gap one, and consisted of but a few paragraphs and resolutions which did not mention elections, electors, or ages. However, the eventually-ratified full-length Constitution of 1784 did specify age. It provided that senators "be annually elected by freeholders and other inhabitants of this state, qualified as in this constitution is provided," and one of the qualifications shortly enumerated was, "of twenty-one years of age and upwards . . . ."

Massachusetts had a background of age ambiguity, e.g., the Resolves of the Stockbridge Convention of December 15, 1776 contained a recommendation "to the Freeholders, and other inhabitants qualified," to vote for various officers. Now, however, on October 22, 1776, "the Inhabitents of the Town of Concord being free & twenty one years of age and upward," met and resolved that a constitutional convention be called to frame a charter of government. The other town petitions and resolves are not specific as to the age of those joining in the call or being eligible to vote; nevertheless, a constitution was eventually framed. This document of 1778 was rejected because of the lack of a Bill of Rights, but its article V spoke unequivocally as to age: "Every male inhabitant of any town in this State, being free, and twenty-one years of age, . . . shall be intitled to vote . . . ." Even the objectors to the proposed Constitution did not cavil at 21, and one town expressly upheld .

118 It stated, inter alia, that "We, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, . . . conceive ourselves reduced to the necessity of establish A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain . . . ." F. Thorpe, ed., The Federal and State Constitutions IV, 2451, 2452 (7 vols. 1909) (hereafter Thorpe, Federal).

119 However, the Congress turned itself into an assembly which was "then [to] proceed to choose twelve persons, being reputable freeholders and inhabitants" to act as a Council. Id. at 2452.

120 Id. at 2459. "All persons qualified to vote in the election of senators shall be intitled to vote . . . [for] representatives." At 2461.

121 Taylor, Massachusetts, supra note 97, at 16, where the Constitutionalists' objections give this language. See also the Town of Pittsfeld's Petition that same month to the General Assembly that "the good people of this province" vote (at 19), again so generalizing, as did the General Court's (Assembly's) Proclamation of January 23, 1776, referring to "the good people of this Colony [who] have chosen representatives (at 21).

122 Commager, Documents, supra note 95, at 105. This convention was the first such suggestion in Massachusetts by any locality, but not utilized until 1779.

123 Taylor, Massachusetts, at 53.

124 Id. at 59, 62, 64-5, 69, 70.
The eventual and ratified constitution of 1780 also required that "every male inhabitant . . . [be] twenty-one years of age and upwards" before being eligible to vote.\textsuperscript{126}

The 1776 Virginia Declaration of Rights at first stated generally that "all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage,"\textsuperscript{127} but later again generalized by having this right "remain as exercised at present,"\textsuperscript{128} thus giving no express age or other qualification. Even Thomas Jefferson's \textit{Notes on the State of Virginia}, written in 1781-82, mentioned only that legislators were "chosen annually by the citizens" possessing some portion of land.\textsuperscript{129} However, the colonial statutory background which required that an elector be "a freeman having 500 acres," etc., \textit{i.e.}, also a freeholder, indicates conclusively that these terms and references mandate a qualification of 21 as to age.\textsuperscript{130} That this is not an erroneous conclusion is shown by the Virginia Constitution of 1864 which set forth, as one of the voter qualifications, "the age of twenty-one years."\textsuperscript{131}

As with these constitutions and statutes of New Hampshire, Massachusetts, and Virginia, so was 21 found in the 1776 Constitutions of Maryland, New Jersey, New York, North Carolina, and Pennsylvania, as well as those later ones of Georgia (1777), South Carolina (1778), and Delaware (1792),\textsuperscript{132} while Connecticut's (1715) and Rhode Is-

\textsuperscript{125} Id. at 65.

\textsuperscript{126} Id. at 133, giving Chap. I, Sec. II, Art. II, including other qualifications on voters for senators, while Sec. III, Art. IV, dealing with representatives, omits "and upwards;" see also that Address to the Convention which referred to the two legislative bodies which "are to be chosen by the Male Inhabitants who are Twenty one Years of age . . ." (at 125). See also Thorpe, Federal, supra note 118, III, 1895, 1898, for this language.

\textsuperscript{127} Thorpe, Federal, VII, 3813.

\textsuperscript{128} Id. at 3816. Its Ordinance of 1621, granted by James I, permitted part of its popular Council "to be respectively chosen by the Inhabitants . . . ." At 3811. Its subsequent Constitutions of 1830 and 1850 do not refer to age (see, however, note 130, infra).

\textsuperscript{129} People, supra note 93, at 214.

\textsuperscript{130} Prof. Thorpe's table of statutory qualifications discloses that Virginia's "Law of 1762-69" required that an elector be "a freeman having 500 acres," etc. Thorpe, Constitutional, supra note 33 at 96.

\textsuperscript{131} Thorpe, Federal, supra note 118, VII, 3854, also repeated in its Constitutions of 1870 (at 3875) and 1902 (at 3906).

\textsuperscript{132} See Thorpe, Constitutional, supra note 33, giving a table of the "Qualifications of Electors Prescribed by the Constitutions 1776-1800" at I, 93-95. The Delaware and South Carolina earlier constitutions of 1776 had respectively stated that the voters' qualifications were to be those "as exercised by law" and "as required by law." Thorpe, Federal, supra note 118, respectively at I, 563, and VI, 3245. The 1701 Charter of Delaware granted by William Penn "unto all the Freemen, Planters and Adventurers therein," stated that "For the well governing of this Province and Territories, there shall be an Assembly yearly chosen, by the Freemen thereof . . . ." Id. I, 557, 559.
ELECTORAL AGE QUALIFICATIONS

land's (1762) earlier laws, specifying 21, were thereafter repeated in their constitutions; Vermont, while vacillating between possession and statehood, did have two constitutions which specified 21; and those of Kentucky (1792) and Tennessee (1796) did likewise. By the turn of the nineteenth century, therefore, whether by constitution, statute, or custom, every state in the Union, original or admitted, required 21 as the minimum age for voting; but, of importance for the Constitutional Convention of 1787 which promulgated the federal Constitution under which we live, by that year every one of the thirteen Colonies-turned-States so required.

THE CONSTITUTIONAL CONVENTION OF 1787

From Revolution to ratification the United States was a confederacy, with the Articles of Confederation specifying throughout that it was the states which sent delegates and which wielded the power. Nevertheless, the Congress under these Articles did formulate a bit of federal policy which bears upon voting age. This legislation was known to the Founding Fathers, for a good many of them were in or had close connections with that interim national government. When the Northwest Ordinance of 1787 was adopted on July 13th of that year, the delegates to the Constitutional Convention had been laboring since May 25th and would continue until September 17th. Additionally, that Ordinance had been preceded by Congressional action in 1783 when it appointed a committee to report on the lands ceded by the states to the federal government; Thomas Jefferson, as chairman, had, on March 1, 1784, submitted a plan for the government of the western territory which was adopted three weeks later. Jefferson's Ordinance was not satisfactory (even

133 Prof. Thorpe's table of constitutional qualifications (Thorpe, Constitutional, supra note 33) is followed at 96, by one entitled "The Qualifications of Electors as Prescribed by Law," and includes, besides the references to Connecticut and Rhode Island, others to New Jersey's of 1797 and Pennsylvania's of 1799, although the last two statutes are preceded by their Constitutions of 1776. The Connecticut (1818) and Rhode Island (1842) Constitutions, respectively given in Thorpe, Federal, supra note 118, I, 544, and VI, 3224, disclose 21 as the specified voting age.

134 When New York finally withdrew its objections, Vermont was formally admitted into the Union in 1790, but its two Constitutions of 1777 and 1786 referred to 21, as did its Constitution of 1793. Thorpe, Federal, supra note 118, VI, 3742, 3755 (3757), 3765 (3768).

135 The first day on which deputies gathered at Philadelphia was May 14th, but as a majority of the states were not represented, those present adjourned daily till the 25th, when such a majority was found. M. Farrand, The Records of the Federal Convention of 1787 (4 vols. 1937), at I, 3 (hereafter Farrand, Records). As is known, there are several versions of the Convention's proceedings, from the official Journal to those of the delegates attending, kept privately (see Farrand's Introduction, I, xi-xxv, for discussions and analyses). That referred to is Madison's Notes, save where otherwise stated.
he was bitterly disappointed in that his anti-slavery clause had been stricken), and three different ordinances were thereafter reported to Congress before it finally adopted the famous one of 1787. Among its provisions was one that eventually permitted five thousand free male inhabitants of the district, "of full age," to elect their own representatives.¹³⁸

With the English and colonial background as sources from which to draw, and with their own experiences fresh in their minds, the delegates to the Convention had laid before them, four days after they opened officially, two plans of government, one by Edmund Randolph of Virginia, and the other by Charles Pinckney of South Carolina. The Virginia Plan's first Resolution urged "that the articles of Confederation ought to be so corrected & enlarged as to" create a new form of government, and the fourth Resolution opened by having the lower branch of the national legislature "elected by the people of the several States . . . ." The Pinckney proposal was that it "be chosen . . . by the people of the several States & the qualifications of the electors shall be the same as those of the Electors in the several States for their legislatures . . . ."¹³⁸

During the next two days the first inklings of the fundamental¹³⁹

¹³⁶ The preceding is found in M. Farrand, The Legislation of Congress For the Government of the Organized Territories of the United States, 1789-1895, 6-10 (1896).

The ratification of the Constitution occurred in 1789, and among the first acts of the new Congress was one to permit the territory south of the Ohio River, ceded by North Carolina, to organize in a fashion and on conditions similar to that of the Northwest Territory. So, too, in 1798, was organized the territory ceded by South Carolina and Georgia. At 19-20. Other similar federal legislation was thereafter enacted from time to time as required, e.g., the Indiana territory was organized in 1800 on the same representative basis as that in the 1787 act, i.e., "free males of age" (at 57, from App. B's listing of the statutes), and the government of Michigan was changed in 1823 with representatives again to be chosen by "free white males of age" (at 65); and Congress did even refer specifically to 21 as the voting age in its 1893 statute with respect to the Oklahoma territory (at 92).

¹³⁷ This fourth Resolution later was reported out by the Committee of the Whole as its third recommendation (Farrand, Records, supra note 135, at 235, and see note 145, infra), and is so discussed below (note 158, infra).

¹³⁸ Farrand, Records, supra note 135, respectively at I, 20, and III, 596 (see explanation as to authenticity of details in latter document at 595, 601 et seq., with Farrand's reconstruction giving Pinckney's proposal this language: "The House of Delegates [i.e., Representatives] to be elected by the State Legislatures . . . ." At 605). The Pinckney proposals do not loom importantly hereafter in the debates.

¹³⁹ The greatest difference was the small-versus-large state voting, and the Great Compromise is found in having the members of the lower house elected on the basis of numbers of population, while the upper house is based on equality of numerical representation. During the debates references to the qualifications on suffrage appear, e.g., Farrand, Records, supra note 135, I, 465 et seq., but while property, etc. are mentioned, age is absent (understood?).
differences in the Convention appeared; on May 31st the above-quoted fourth Virginia Resolution was brought before the delegates sitting as a Committee of the Whole. Extended debate now occurred, the opponents feeling that the state legislatures, and not the people directly, should elect the lower Representatives. The vote finally taken was in favor of the people, although close, viz., six states supporting the clause, two opposed, and two divided, whereupon the remainder of the Resolution was postponed “as entering too much into detail for general propositions.”

This division resulted in a 6-5 vote the following week for reconsideration, with Pinckney now reversing himself and moving “that the first branch of the national Legislature be elected by the State Legislatures, and not by the people . . . .” After extended and somewhat sharp debate the motion was defeated by a vote of 8-3, and the subsequent report and recommendation of the Committee to the Convention (merely changing the paragraph number from “4.” to “3.”) was “that the members of the first branch of the National Legislature ought to be elected by the people of the several States . . . .”

140 The first Virginia Resolution became the subject of delicate maneuvering on May 30th, in the Committee of the Whole, the statists fighting the nationalists (see Id., I, 33-35); the latter finally won, by a vote of 6-1, with an eighth state (New York) being divided, and the language agreed upon was “that a national Governt. ought to be established . . .” (at 35). However, New Jersey was not yet present through its delegates, so that its own later Plan could be voted upon by eleven, not eight, states. See notes 149 et seq., infra, on this new plan, and also the Virginia-New Jersey split differences. See notes 145 and 156, infra, on the final showdown between the statists and the nationalists.

141 Farrand, Records, supra note 135, I, 47-51, the vote being at 50, and the quotation being at 51. The Virginia Plan’s remaining language in the fourth Resolution went into explicit details concerning the qualifications of the representatives themselves, but nothing was said concerning the qualifications of the “people,” i.e., the voters.

142 Id. at 124, by a vote of 6-5 on the motion of Pinckney and John Rutledge, also of South Carolina. The South Carolina delegation also included Pierce Butler and Charles Cotesworth Pinckney. The former expressed himself, during the earlier debate, against “election by the people [as] an impractical mode” (I, 50), whereas the latter was generally (see, however, note 143, infra) silent (see character sketch by William Pierce [of Georgia, who attended beginning on May 31st and was absent after July 1st (III, 589)] concerning the four South Carolina delegates, stating of this second Pinckney that “he is generally considered an indifferent Orator.” III, 96. Pierce gives their ages as 24 for Charles, and about 40 for Charles Cotesworth Pinckney.

143 Id. at 132, with Rutledge seconding the motion Charles Cotesworth Pinckney spoke in favor of the motion (at 137), making the South Carolina delegation unanimous in their opposition to the Virginia proposal.

144 Id. at 137-8. Maryland’s delegates appeared June 2d (I, 76; III, 33, and see note 146, infra), making eleven states now attending. The original vote of 6-2-2 had Connecticut and Delaware divided; the former now voted in favor of the Pinckney motion, and the latter against, with Maryland joining in opposition, so that the original 6 became 8, and the original 2 became 3.

145 Id. at 235, the details and limitations (see note 141 supra) being omitted. On the changed number see note 137, supra, and 158, infra. See also 228 for the Journal’s language.
What next occurred must be placed in chronological and contextual perspective: the Virginia and Pinckney Plans had both been proposed on May 29th and referred to the Committee of the Whole for consideration; on May 31st the Virginia proposal to have the lower branch elected by the people was adopted by a vote of 6-2-2; on June 5th the Pinckney-Rutledge motion for reconsideration was passed, 6-5, but on June 6th defeated 8-3; apparently "the people" had won. But the victory was only in Committee, and another battle had to be fought. The delegates, still sitting in Committee, continued their deliberations to June 13th. On that day they rose and reconstituted themselves as a Convention, with Nathaniel Gorham, of Massachusetts, who had chaired the Committee, now reporting its recommendations. At this point Randolph, seconded by Luther Martin, of Maryland,46 moved "to postpone the farther consideration of the report till tomorrow," which passed.47 The reason was that during this period of Committee gestation and voting the "state" forces had been preparing their ammunition and gathering their cohorts.148 The following day, on June 14th, William Patterson, of New Jersey, "observed to the Convention that it was the wish of several deputations . . . that further time ought to be allowed them to contemplate the plan reported from the Committee . . . and to digest one purely federal . . ." and he thereupon successfully moved for a postponement to June 15th.49 On that day Patterson presented to the Convention the New Jersey plan "which he said several of the deputations wished to be submitted" for the Virginia one; this was referred to the Committee of the Whole and it was also felt "that in order to place the two plans in due comparison, the other [Virginia Plan] should [also] be recommitted."150

The New Jersey Plan was an outright rejection of a new form of government, and sought only to have the Articles of Confederation "so revised, corrected & enlarged, as to render the federal Constitution

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46 He appeared as a delegate on June 9th, Id. at 175, although see references in note 144, supra.
47 Farrand, Records I, 223, the Journal, with Madison writing that the report "was postponed till tomorrow, to give an opportunity for other plans to be proposed . . . ." At 234-5.
148 See, e.g., Madison's description of this background, Id. at I, 242.
149 Id. at 240, the quotation being Madison's, the motion being the Journal's. Randolph seconded the motion and also moved for adjournment, seconded by Martin.
150 Id. at 242.
adequate to the exigencies of Government, & the preservation of the Union." There was therefore no problem of voter qualifications, for the state legislatures would elect or appoint the delegates. But the issue so joined had to be resolved before the question of voter qualification could be determined. Beginning on June 16th the debates ranged widely and furiously, and it was on June 18th that Alexander Hamilton, of New York, who had thus far been silent in the deliberations of the Convention, rose and made a lengthy and impassioned address, culminating in his own proposals or plan. He was, of course, in favor of an independent national government, and he proposed that the lower branch of the national legislature "consist of persons elected by the people . . . ." However, Hamilton's language in proposing his plan was (as Madison reports it) that it was but a "paper he had sketched," and so he "read his sketch" to the delegates. Professor Farrand goes into some detail and, of concern to us is his reproduction of a document "which was not submitted to the Convention and has no further value than attaches to the personal opinions of Hamilton." Nevertheless, this was, at the very least, the later opinion of Hamilton with respect to the lower branch's qualifications:

The Assembly shall consist of persons to be called representatives, who shall be chosen, except in the first instance, by the free male citizens & inhabitants of the several States comprehended in the union, all of whom of the age of twenty one years & upwards shall be entitled to an equal vote.

The Hamilton speech and Plan were the last items of business that June 18th, and the following day the basic conflict between those advocating a new form of national government (the Virginia Plan) and those desiring merely to amend and continue the Articles (the New

151 Id. at 242, being the first of a series of resolutions. On June 18th John Dickinson, of Delaware, moved to substitute a different first resolution (at 281) which was defeated the following day (at 313), and the original New Jersey first proposition was then postponed (at 322).

152 Id. at 291, his speech occupying pp. 282-293. One of Prof. Farrand's references states the delivery took "between five and six hours, and was pronounced by a competent judge, (Gouverneur Morris), the most able and impressive he had ever heard." At 293, n.9.

153 Farrand, Records I, 291. In 1818 James Madison wrote to John Quincy Adams that Hamilton had never submitted a plan but had only "sketched an outline which he read as part of a speech . . . ." III, 426.

154 Id. III, 619. He gives the document as: "Copy of a paper Communicated to J. M. [James Madison] by Col. Hamilton, about the close of the Convention . . . which he said delineated the Constitution which he would have wished to be proposed by the Convention . . . ."

155 Id. at 619-20.
Jersey Plan) came to the fore. It may have been Madison’s rhetoric which carried the day for his state’s Plan, but there were others who agreed; the final result was, for all practical purposes, an emphatic rejection of every plan but the Virginia one.\textsuperscript{156} The delegates, in Convention, now undertook to examine, \textit{seriatim}, each recommended Committee Resolution,\textsuperscript{167} the third\textsuperscript{159} one’s first clause unsuccessfully being made the subject of a crippling amendment (to have the lower national branch appointed by the states legislatures), and then being adopted \textit{verbatim} as had been originally proposed by Virginia and then recommended by the Committee.\textsuperscript{159} Apparently the delegates’ energy had been expended on the debate concerning the amendment, for on the first clause of the third Resolution there appears only the putting of the question and the vote, and none of the official or unofficial records discloses any statement concerning the qualifications of these “people.”\textsuperscript{160}

Nothing more on the subject appears in the Convention Records until all the amended and adopted Resolutions were dumped into the lap of the Committee of Detail on July 26th, and the Convention adjourned till August 6th to give that body “time to prepare & report the Constitution.”\textsuperscript{161} However, during this last day’s discussion, George Mason, of Virginia, seconded by Pinckney, moved to instruct the Committee “to receive a clause requiring certain qualifications of landed property & citizenship . . . in members of the Legislature,” whereupon Gouverneur Morris, of Pennsylvania, retorted that “If qualifications are proper, he wd. prefer them in the electors than the elected.”\textsuperscript{162} Although speaking of the legislators, John Dickenson’s (of Maryland) words are pertinent; he “was agst. any recital of qualifications in the

\textsuperscript{156} \textit{Id. I, 322}, for the vote, which was 7-3, with Maryland divided, and pp. 314-322 for Madison’s speech. The first Virginia Resolution (see notes 137, and 145, \textit{supra}) for a national government was then taken up, with an adjournment to the following day closing the discussion (at 325). On June 20th, after a slight change in language was proposed by Oliver Ellsworth, of Connecticut (at 335), and agreed to by Randolph (at 336), the amendment was passed without objection (at 336), and the Committee passed on to the second Virginia Resolution, apparently feeling that this national-state problem had been resolved. This second Resolution, after discussion, was adopted by a vote of 7-3-1 on June 21st (at 353).

\textsuperscript{157} For the first two see note 156, \textit{supra}.

\textsuperscript{158} \textit{See} notes 137 and 145, \textit{supra}.

\textsuperscript{159} \textit{See}, for the language, text keyed to notes 138 and 145, \textit{supra}, the only difference being that “People” was not capitalized. The amendment lost by 6-4-1, and the resolution was adopted by 9-1-1, Maryland being the divided state in each instance. Farrand, Records I, 360.

\textsuperscript{160} \textit{See Id.} at 353-368, which comprise the total Farrand records for June 21st.

\textsuperscript{161} \textit{Id. II, 128}.

\textsuperscript{162} \textit{Id. II, 121}.
Constitution. It was impossible to make a compleat one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions. The best defence lay in the freeholders who were to elect the Legislature.\textsuperscript{163} Regardless, the Committee undertook to delve into the Convention’s jumbled proceedings and to report out one document. Professor Farrand has collated the “nearly complete series of [nine] documents representing the various stages of the work of the Committee,”\textsuperscript{164} and these bear significantly upon the question of voter qualifications.

Before examining this series of documents a preliminary observation may be made on the Committee’s work as here relevant: there will appear a delicious ambivalence among the members of the Committee, for there comes through either a disagreement which has to be, and yet cannot be, resolved, or else a resignation to let the collective perpetrators of this dilemma make the decision. Nevertheless, a tentative conclusion will be in order, and the varieties of clauses and language utilized will disclose the indecision of these members and the manner in which they sought to resolve the problem.

The first three documents are unimportant for us, but the fourth is in Randolph’s handwriting and in its pertinent section is as follows:

\begin{quote}
11. The qualification of electors shall be the same (throughout the states; viz.) \textit{with that in the particular states, unless the legislature shall hereafter direct some uniform qualification to prevail through the states.}

\begin{itemize}
  \item citizenship:
  \item manhood
  \item sanity of mind
  \item previous residence for one year, or possession of real property within the state for the whole of one year, or enrolment in the militia for the whole of a years.)\textsuperscript{165}
\end{itemize}
\end{quote}

The fifth document is in Wilson’s handwriting and refers to the biennial election of the lower house.

\textsuperscript{163} \textit{Id.} II, 123, abbreviation and punctuation so in Records. Does the reference to “freeholders” indicate a Convention knowledge that the electorate was a restricted and qualified one? The answer is yes, on which see Forkosch, \textit{People, supra} note 102.

\textsuperscript{164} Farrand, Records, \textit{supra} note 135, II, 129.

\textsuperscript{165} \textit{Id.} II, 139-40, and see also the corrected version of this document at IV, 40, where n.8 is added to this language with this comment: “Marginal note crossed out: ‘These qualifications are not justified by the resolutions.’” On Randolph’s handwriting see 137, n.6, also stating that parenthesized language is “crossed out in the original, italics represent changes made in Randolph’s handwriting . . . .”
by the People of the United States in the following Manner. Every Freeman of the Age of twenty one Years (having a freehold Estate within the United States) who has (having) resided in the United States for the Space of one whole Year immediately preceding the Day of Election, and has a Freehold Estate in at least fifty Acres of Land

Undoubtedly the Committee got bogged down in not only these details of qualification, as Dickinson had earlier warned concerning the legislators, but also in and with all of the other clauses, for the next (sixth) document, also in Wilson’s handwriting, presents a mishmash of suggestions and conflicting language and clauses; it undoubtedly represents a combination of all the suggestions grouped into their appropriate places. For our purposes, two paragraphs are important. The first states that the lower house is to be chosen

by the People of the several States comprehended within this Union (the Time and Place and the Manner of holding the Elections and the Rules) The Qualifications of the Electors shall be (appointed) prescribed by the Legislatures of the several States; but the ir provisions (which they shall make concerning them shall be subject to the Control of) concerning them may at any Time be altered and superseded by the Legislature of the United States.

However, shortly thereafter, appears the following in one of two parallel columns concerning the two houses of the national legislature:

The Times and Places and the Manner of holding the Elections (for) of the Members of each House shall be prescribed by the Legislatures of each State; but their Provisions concerning them may, at any Time, be altered and superseded by the Legislature of the United States.

It may appear that somewhat of a confusion is indicated by this section paragraph, for it speaks of the Senate, as well as the House of Representatives (i.e., “each House”), and permits the procedure for “the Elections” of Senators to be set by the legislatures, subject to the overriding authority of the Congress, whereas to now the several plans have had the Senators chosen by the state legislatures. In effect this was the objection eventually urged by Madison and Gouverneur Morris, whose motion to have the reference apply only to the House of Repre-

166 Id. II, 151, parenthetical language crossed out in original.
167 See note 163, supra.
168 Farrand, Records, supra note 135, II, 153, parenthetical language crossed out, and italicized language later inserted in original.
169 Id. II, 155; see note 168, supra as to the parenthesized and italicized language.
170 This sixth document also stated that “The . . . Senate of the United States shall be chosen . . . by the Legislatures of the several States . . .” Id. II, 154.
sentatives was defeated. However, the numerous suggestions and resolutions had produced a variety of versions which, now incorporated by the Committee on Detail, did not do violence to the Convention's swaying mood. It may also be queried whether this Committee had the authority to make substantive policy determinations or recommendations, as will shortly be noted, but apparently this did not bother its members or the Convention delegates. It may also be remarked that the first paragraph deals with what we have originally termed the substantive portion of the present Constitution's art. I, § 2, cl. 1, and the second paragraph deals with the procedural details found in art. I, § 4, cl. 1; further, that while the first paragraph will ultimately be greatly changed in practically every aspect of policy and language, the policy of the second paragraph will be adopted in full and only the language will be changed to reflect style. While the implication of this comment is that the final policy determination of the Convention will be to reject any Congressional control over the substantive qualifications of the electors, this, as a conclusion, may wait until that body's entire proceedings have been examined.

For the present, the final (ninth) document of the Committee of Detail, also in Wilson's handwriting, represents the version which will be reported to the Convention, albeit to be divided and subdivided into articles and sections, and to be slightly changed in several details. It makes a drastic revision of the first substantive paragraph quoted above from the sixth document, and reflects a Committee determination which the Convention will later accept, although the second quoted paragraph is only slightly changed for style. The language now appears as follows:

The Qualifications of the Electors shall be (prescribed by the Legislatures of the several States; but these Provisions concerning them may, at any Time be altered and superseded by the Legislature of the United States) the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.

The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States.\textsuperscript{172}

\textsuperscript{171} Id. II, 239-40.

\textsuperscript{172} Id. II, 163-4, and 165, parenthetical language crossed out, italicized language added, in original. This ninth document also has Senators chosen by the legislatures, II, 165; see also note 170, supra.
On the reporting date of August 6th the Committee presented its lengthy and overly-detailed constitution. The two above-quoted paragraphs of the ninth document were repeated *verbatim*. The following day Gouverneur Morris moved to strike out the second sentence of the first section of the proposed article IV pertaining to the election of representatives, which is the first above-quoted paragraph in its amended form, and it was this motion which sparked the only Convention debate on the subject of the qualifications of the electors. Morris desired to substitute some other provision so as to “restrain the right of suffrage to freeholders,” fearing that the egalitarian mood of the country would result in giving the votes to the propertyless who would “sell them to the rich” and thereby create an “aristocracy [which] will grow out of the House of Representatives.” Wilson argued that “It was difficult to form any uniform rule of qualifications for all the States,” and Ellsworth urged that the “right of suffrage was a tender point, and most strongly guarded by most of the [State] Constitutions.” Mason said that eight or nine states had “extended the suffrage beyond the freeholders” and any national power to disfranchise was a “dangerous” one, also urging that ancient prejudices not be followed, i.e., since a freehold qualification was found in England “it is imagined to be the only proper one. The true idea in his opinion was that every man having evidence of attachment to & permanent common interest with the Society ought to share in all its rights & privileges.” Madison corrected Mason

173 Farrand, Records, *supra* note 135, II, 178, 179, changed, of course, as per the indicated deletions and additions, *supra* note 172, but with fewer capitals, and one “the” deleted (in second paragraph, before (now) “manner.”

174 *Id.*, II, 201.

175 *Id.* II, 202. John F. Mercer, of Maryland, supported the proposed restriction because “The people can not know & judge of the characters of Candidates . . . The people in Towns can unite their votes in favor of one favorite; & by that means always prevail over the people of the Country, who being dispersed will scatter their votes among a variety of candidates.” At 205. *Quaere:* did this presage the twentieth century population movement, and the eventual reapportionment cases?

176 *Id.* II, 201, also urging that having different federal and state qualifications might exclude voters for state officials from voting for federal ones, to which Morris replied that that occurred where some states had different qualifications for electors for Governor and state representatives, and that “as it [the clause] stands . . . it makes the qualifications of the Natl. Legislature depend on the will of the States, which he thought not proper.”

177 *Id.* II, 101. He also queried how the freehold was to be defined (at 202), and Morris responded that he “did not conceive the difficulty . . . to be insuperable” (at 203).

178 *Id.* II, 201-02. Butler echoed these fears, but Dickinson “had a different idea,” i.e., the freeholders were “the best guardians of liberty,” were a “defence agst. the dangerous influence of those multitudes without property and without principle,” and since “The great mass of our Citizens is composed at this time of freeholders, . . . [they] will be pleased with it” (at 202). For Madison’s views on liberty see note 181, *infra.*

as to the English voting system, and felt that "the freeholders ... would be the safest depositories of Republican liberty," also pointing up the possibility of an eventual class struggle between the propertied and the propertyless and thereby presaging his future and justly-famous No. 10 in *The Federalist*. At this moment the great conciliator, Benjamin Franklin, rose. He extolled the "virtue & public spirit of our common people," pointed to their sufferings and patriotism during the Revolution, and "was persuaded also that such a [freehold] restriction ... would give great uneasiness in the populous States."

The result of this debate (solely on the worth of a freehold qualification) was a vote of 7-1 against the proposal, and the Convention then adjourned. The next day, August 8th, there was practically no discussion when the entire first section of article IV was again brought up, and it was now adopted without opposition. That day and the following one the other sections and clauses were discussed and voted upon, until the first section of article VI (the second above-quoted paragraph reported out by the Committee of Detail) was reached. That paragraph is divided in two by a semi-colon (also found in the ratified document), and the first procedural part was agreed to without much opposition. The second "but" part, giving the Congress the power of alteration, now became the subject of a slight debate. Pinckney and Rutledge moved to strike the entire clause because the states "could & must be relied on in such cases;" Gorham responded it would be as improper to do this "as to Restrain the British Parliament;" Madison gave the lengthiest reasons for retaining the clause, giving first the impossibility of "foresee[ing] all the abuses that might be made of the discretionary power," and then giving others; Rufus King, of Massachusetts, felt that if the Congress did not have this power "their right of judging of the returns of their members may be frustrated;" Gouverneur Morris "observed that the States might make false returns and then make no provisions for new elections;" and Roger Sherman, of Connecticut, "did not know but it might be best to retain the clause, though he had himself sufficient con-

180 Id. II, 204.
181 Id. II, 202, thereby disagreeing with Dickenson, supra note 178.
182 Id. II, 204, and see n.17. Rutledge thought the proposed restriction "a very unadvised one. It would create division among the people & make enemies of all those who should be excluded" (at 205).
183 Id. II, 204-05.
184 Id. II, 206, with one state (Maryland) divided, and one state (Georgia) absent.
185 Id. II, 216, only Mercer and Gorham speaking briefly.
186 See note 171, supra, for motion to restrict it to the House of Representatives, which was defeated, whereupon it was now adopted. Id. II, 240.
fidence in the State Legislatures." The motion to strike "did not prevail." With but a few language changes, the entire paragraph was adopted without opposition.

The delegates now continued their examination of each recommended committee article and section, but found their pace too leisurely; they therefore appointed ad hoc committees, especially one of eleven to report back to them on postponed as well as other items not treated. The eventual frenetic haste of the delegates to complete their labors resulted in the entire balance of nineteen articles and numerous sections being discussed and voted upon by September 10th, just one month after the adoption of the "but" clause giving Congress power to make or alter the states' procedural regulations, and the entire body of accepted material was turned over to a Committee of Style and Arrangement to re-draft for language and style. This committee undoubtedly labored day and night, for on the second day (September 12th) it reported what the Journal stated was "the Constitution as revised and arranged," and what Madison wrote was "a digest of the plan . . . ." Regardless, the document, as made available by Professor Farrand, is now in the form and style of the eventual Constitution, with its art. I, § 2, cl. 1 containing the identical ratified language, and its art. I, § 4, cl. 1 being only slightly amended. This amendment, agreed to without opposition on September 14th, was to add the exception clause to the Committee on Style's version.

CONCLUSIONS

The examination of the language of art. I, § 2, cl. 1 and § 4, cl. 1, of the Constitution permitted the hypothesis, if not the definite conclu-
ELECTORAL AGE QUALIFICATIONS

sion, the Congress does not have power, simply by statute, to lower the voting age to 18. The further examination of the English and colonial backgrounds, as well as the proceedings in the Constitutional Convention of 1787, fleshed out and unequivocally supported such tentative view. The English experience discloses that while different ages may be found at the common law for different reasons and purposes, 21 was the one which dominated the consciousness of freeholders, freemen and others as the age of maturity, legal ability, and the "right" to vote, assuming other requirements were met; and, regardless of England's 1969 statutory reduction to 18 as the voting age, two hundred years ago the colonists had 21 before them, and England has never been limited by a written constitution. The colonists brought with them not only language and customs but, insofar as this age pertained to like conditions, the use of 21 as the age for voting; their charters and other documents are replete with this qualification.

Of great importance, however, is the situation with respect to the constitutions adopted by practically all the original and admitted states into the Convention period—they explicitly set forth 21 as a voting requirement, and 21 was the age followed by Virginia. So, too, did the Congress under the Articles of Confederation deal with its ceded territories by including "of full age" or "of age" in its statutes. So that in the 1787 Convention there was no need to mention this (and also sex) as a universal and normal qualification on the right to vote although other qualifications might or might not be found, e.g., religion. For several valid reasons the delegates hesitated to give Congress power over these substantive qualifications, but as to the procedural ones there were

193 The present constitutions of the fifty states are compiled by the Legislative Drafting Research Fund of Columbia University in two loose-leaf volumes, published in 1962 with supplements to December 31, 1967. The state constitutions are explicit with respect to qualifications and many do contain 21, e.g., Alabama, I, 34, §177 of its constitution. Four have, however, lowered the vote to 18, i.e., Georgia (in 1943), Kentucky, Alaska, and Hawaii; constitutional amendments in twenty others have been rejected, e.g., Ohio, New Jersey, Oregon; there are pending bills or resolutions for constitutional amendments in a few others, e.g., New York; in one legal case an effort is being made to compel a state to lower the age to 18 on fourteenth amendment Due Process and Equal Protection grounds (in New York, as reported in N.Y. Times, May 6, 1970, p. 37, col. 2); and in other nations there is, of course, great diversity, e.g., British Columbia has lowered it to 19, the first in Canada (N.Y. Times, April 17, 1970, p. 8, col. 7), Switzerland is in the throes of its own great debate. Which all adds up to a local ferment and hodge-podge which also existed in 1787 and has never been changed—save by constitutional amendment when sufficient desire and pressure came through.

Is age "germane to one's ability to participate intelligently in the electoral process" (note 20, supra)? May "Minors . . . be excluded" (note 22, supra)?
exceedingly good and sufficient reasons to include the "but" clause as well as the exception to it. And, as seen, during the proceedings the Hamilton suggestion, although concededly questionable, does include specific mention of 21 in this context.

Throughout the Convention proceedings there seeps through an undoubted division of state and federal ultimate responsibility, with the former bearing the burden of fixing the qualifications of the electors (subject, of course, to subsequent amendments and the judicial use of, e.g., the Equal Protection Clause), and the latter able to shoulder the burden, when and if desired, of fixing the procedural details (as Congress has already done in certain respects). This division is frozen, sans an amendment (as has occurred with respect to sex), and if permitted to be violated by Congress then the evils felt by the Convention delegates to result if that body did not have control over the procedural details are coin-face for the substantive ones.\textsuperscript{194}

Which, in effect, all boils down to the supported conclusion that Congress has no present Constitutional power\textsuperscript{195} to lower the voting age to 18.

\textsuperscript{194} Also, the concept of a federalism of two sovereigns with one people is weakened if the people are split into separate classes of voters, as feared by Madison. And the principle of checks and balances may well be analogously applied in this instance.

\textsuperscript{195} The emphasis throughout this article has been on power, not policy, so that one's personal desires do not enter, e.g., even though the English change of 1969 to 18 as the voting age was a policy decision of Parliament, able to be effectuated because there is no higher limiting authority, their historic background is what the Founding Fathers and their descendants lived and (at least in this respect) still live under; so that an English policy change cannot determine American constitutional limitations. The same may be said of the 1969-70 reductions to 18 by the German Laender, and the probable aping by the Federal Republic (and also of any other nation). See Griswold v. Connecticut, 381 U.S. 479 (1965) (opening sentences of Justice Black's dissent) and West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (opening paragraph of Justice Frankfurter's dissent).