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The Missing Right?: The Explicit Right to Vote and the Constitution

An Inquiry Pack to Accompany [LegalTimelines.org](https://legaltimelines.org)

Inquiry Question: Should the Constitution be amended to guarantee an explicit right to vote?

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Introduction: Do Americans Have an Explicit Right to Vote?

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (emphasis added)

– *Universal Declaration of Human Rights, Article 21, Section 3*

The Universal Declaration of Human Rights is an international document adopted by the United Nations that serves as a guide for countries worldwide, including the United States. It contains 30 articles about the fundamental rights that all people should have, including the rights to free speech, to own property, to religious freedom, to an education, and many more. It also includes the right to “universal and equal suffrage.” This has been interpreted to mean that all people should have an equal right to vote.

The explicit right to vote (or a fully and clearly written right to vote) is in many constitutions worldwide, but it is not in the U.S. Constitution. The U.S. Constitution grants state governments the power to determine who is eligible to vote. Article 1, Section 2 says that states should use the same voter qualifications for U.S. House of Representatives elections as they do for elections in “the most numerous Branch of the State Legislature.” It also grants state governments the right to determine the “Time, Places, and Manner” for federal elections, but allows Congress to “by Law make or alter such Regulations.” In his opinion for the 2013 case of *Arizona v. InterTribal Council of Arizona Inc.*, Justice Antonin Scalia wrote that the Constitution “empowers Congress to regulate how federal elections are held, but not who may vote in them.” This leaves the decision about who holds the right to vote up to the states.

Soon after the United States won its independence from Great Britain, state constitutions determined who would be eligible to vote. Most state constitutions included an explicit right to vote only for white, property-holding men. Some states, like New Jersey and Pennsylvania, allowed some women and Black men to vote. By the 1840s, however, states amended their constitutions so that suffrage was exclusive to white men. Because the explicit right to vote is granted in state constitutions, state courts typically play a major role in deciding cases in which a person believes that their right to vote has been denied.

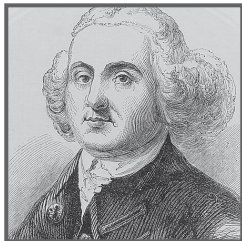
Over the years, access to the ballot has been granted and suppressed by state governments and the federal government. The 14th, 15th, 19th, and 26th Amendments, for example, expanded the right to vote to Black men, women, and citizens 18 and older. For about 50 years after their passage, the federal government did not enforce the 14th and 15th Amendments and many Black men were denied the right to vote, especially in Southern states. During the civil rights movement in the 1950s and 1960s, the federal government began to enforce these amendments.

Even today, the right to vote is debated. For example, states like Maine and Vermont have granted full voting rights to felons, including while they are in prison. In 11 states, felons lose their voting rights forever if they have committed certain crimes. Some advocate for a constitutional amendment guaranteeing the explicit right to vote so that felons may have equal access to the ballot, but others disagree with this measure. Many argue for an amendment guaranteeing the right to vote as state legislatures in some states pass laws to make voting more difficult. Recently, the state legislature of Georgia passed a law with stricter voter ID requirements and limited the number of ballot drop boxes during election periods. Some believe that with a “right to vote” amendment, Georgia residents might have a stronger constitutional basis for challenging this law. Without such an amendment, the states hold the power.

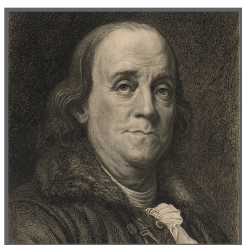
If an explicit right to vote were to be added to the U. S. Constitution, the Supreme Court of the United States would be able to set a standard for voting rights nationwide—a standard that states would need to follow. That amendment, however, would remove much of the power that state governments now hold.

The Founders' Conflicting Views

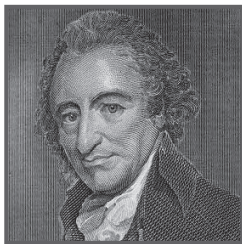
Source A: Quotes from John Adams, Benjamin Franklin, Thomas Paine, and James Madison (1776–1821)



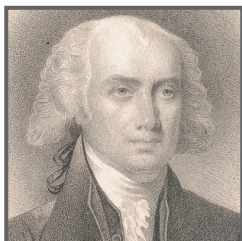
“Depend upon it, sir, it is dangerous to open So fruitfull a Source of Controversy and Altercation, as would be opened by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell. I am &c.” — *John Adams, letter to James Sullivan (1776)*



“Today a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next election the jackass dies. The man in the meantime has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers—but the jackass is dead and the man cannot vote. Now gentlemen, pray inform me, in whom is the right of suffrage? In the man or in the jackass?” — *Benjamin Franklin (1790)*



“The right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce a man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this case.” — *Thomas Paine, “Dissertation on the First Principles of Government” (1795)*



“The right of suffrage is a fundamental Article in Republican Constitutions. The regulation of it is, at the same time, a task of peculiar delicacy. Allow the right [to vote] exclusively to property [owners], and the rights of persons may be oppressed... . Extend it equally to all, and the rights of property [owners] ...may be overruled by a majority without property....” — *James Madison, “Note to His Speech on the Right of Suffrage” (1821)*

Source A Information: The Founders, sometimes also known as the Founding Fathers of the United States, were a group of white men who created the U.S. government and its Constitution in 1787, following the war for independence against Great Britain.

- *John Adams* was the second president of the United States and the nation’s first vice president. Adams was a member of the Federalist Party. He was well-educated, with multiple degrees and expertise in a wide variety of subjects including the law. Adams did not own enslaved people and believed slavery to be “abhorrent.”¹ ([See source at Library of Congress.](#))

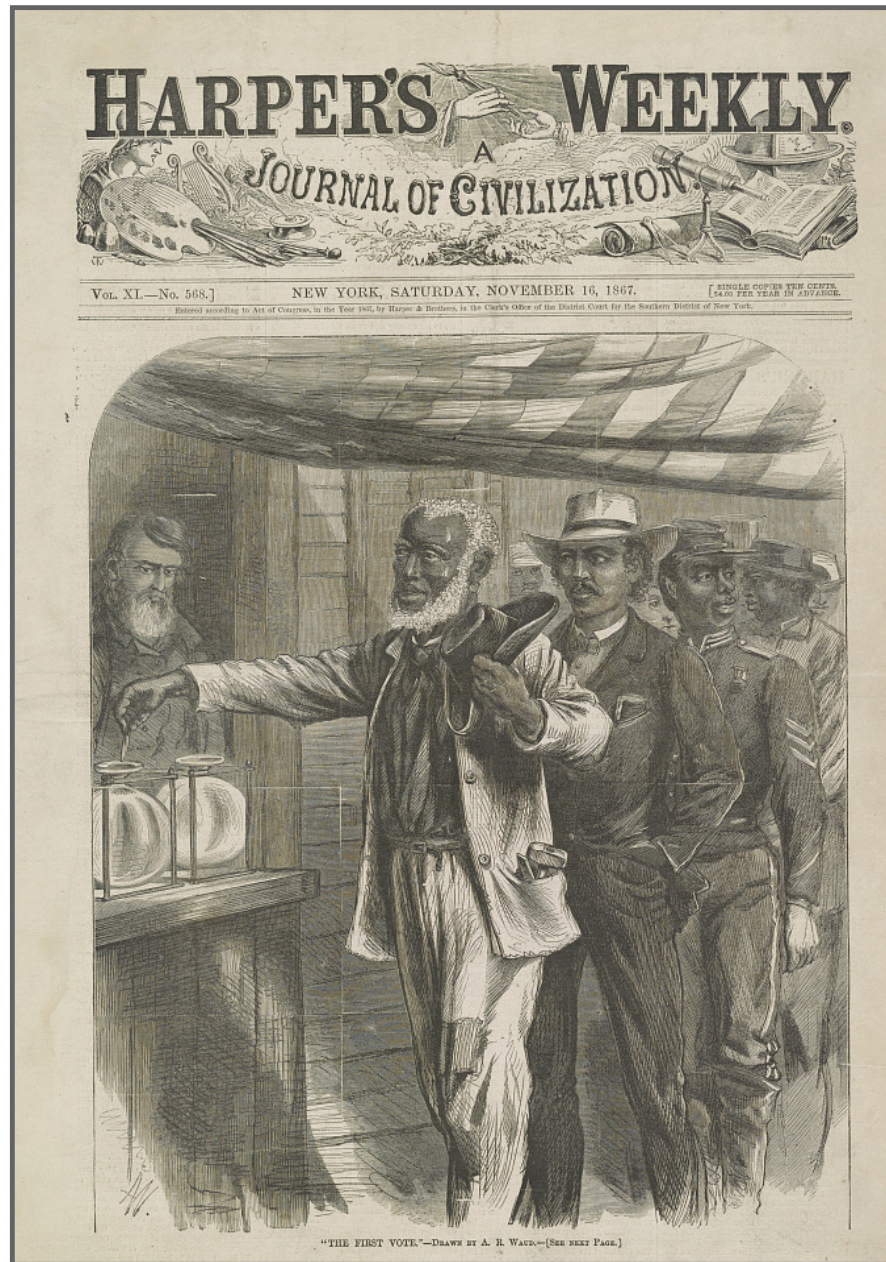
- *Benjamin Franklin* was a writer and printer, a politician, a scientist, an educator, and the first postmaster general of the United States. Prior to 1762, Franklin was a slaveholder and profited from the slave trade. After a visit to England, his views on slavery began to waver. By the end of his life, he was an abolitionist and led the Pennsylvania Abolitionist Society.² ([See source at Library of Congress.](#))
- *Thomas Paine* was a political philosopher, writer, and activist. His pamphlet *Common Sense* inspired many colonists to support independence from Great Britain. Paine lived much of his life outside of the United States and was a fervent objector to slavery.³ ([See source at Library of Congress.](#))
- James Madison was the fourth president of the United States and is known as the “Father of the Constitution” for the role he played in helping to draft the Constitution and the Bill of Rights. Madison was an organizer of the Democratic-Republic Party, one of the first major political parties. Madison enslaved people, though he sometimes held contradictory views about slavery.⁴ ([See source at Library of Congress.](#))

Questions to Consider for Source A:

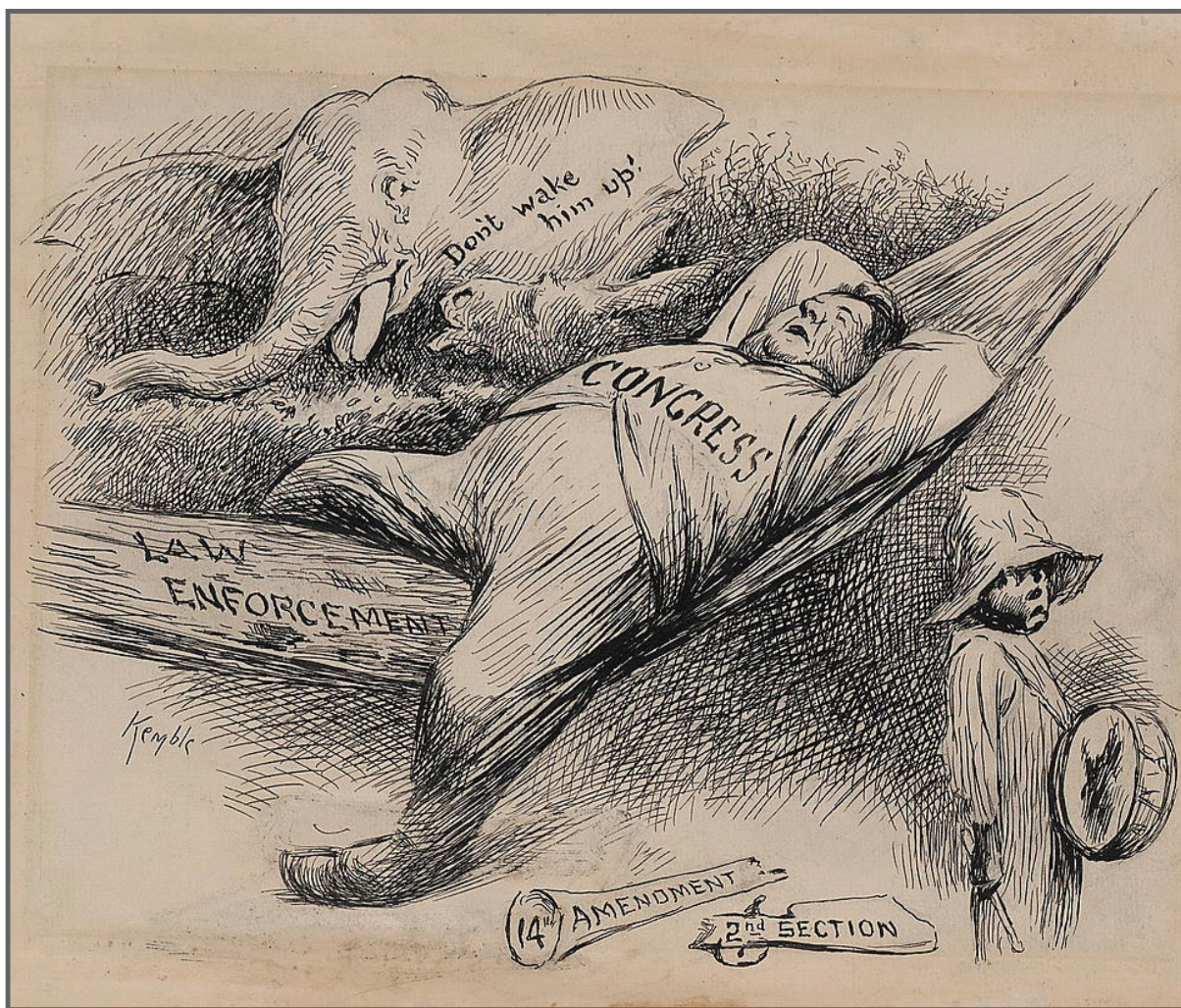
1. **Observe:** What do you notice about the quotes from the Founders, their pictures, and the source information?
2. **Reflect:** How do you think the Founders’ backgrounds and beliefs about other issues influenced the selected quotes? Explain which of the above Founders might support an explicit constitutional right to vote and which would not.
3. **Question:** What questions do you have about these quotes and the Founders behind each quote?

Would an Amendment Really Work? The Impact of the 14th and 15th Amendments

Source B: “The First Vote” Illustration by A.R. Waud (1867)⁵



Source B Information: *Harper's Weekly* published this illustration on November 16, 1867, depicting some of the first African American men exercising their right to vote. The 14th Amendment, ratified in 1868, granted citizenship to all formerly enslaved people recently freed. The 15th Amendment, ratified in 1870, said that the right to vote “shall not be denied or abridged” by the federal government or state governments “on account of race, color, or previous condition of servitude.” ([See source at Library of Congress.](#))

Source C: “Congress” Cartoon by E.W. Kemble (1902)⁶

Source C Information: This cartoon from E.W. Kemble was published in 1902, about 25 years after federal troops pulled out of former Confederate states during Reconstruction. The troops were in these states to enforce federal laws and newly passed amendments, including the 14th and 15th Amendments, which would allow Black men the right to vote. The broken gun at the bottom of the cartoon symbolizes the broken force the federal government could (but does not) use to enforce the 14th Amendment in Southern states. In the bottom right corner, there is a young Black boy who is holding a drum, and the elephant (which represents the Republican-led Congress at the time) tells the boy, “Don’t wake him up!” ([See source at Library of Congress.](#))

Questions to Consider for Sources B and C:

- 1. Observe:** What do you notice about each source? What symbols do you see in each source?
- 2. Reflect:** What might the symbols in each source represent? What messages do these cartoons convey about the effectiveness of constitutional amendments?
- 3. Question:** What questions do you have about this source?

The Supreme Court's Conflicting Views

Source D: Opinion in *Wesberry v. Sanders* (1964)⁷

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Source D Information: This is an excerpt from Supreme Court Justice Hugo Black's opinion in the 1964 case of *Wesberry v. Sanders*. This case, along with *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), established the principle of "one man, one vote." Each of these cases dealt with issues related to apportionment and redistricting. In these cases, the Supreme Court used the Equal Protection Clause of the 14th Amendment to justify its rulings that states must establish numerical equality in electoral districts. ([See source at Library of Congress.](#))

Source E: Opinion in *Bush v. Gore* (2000)⁸

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U. S. Const., Art. II, § 1.

Source E Information: This is an excerpt from the Court's opinion in the 2000 case of *Bush v. Gore*. In response to a presidential vote recount dispute in Florida, the Supreme Court ruled in a 5-4 decision that the state's recount must stop. Based on the Equal Protection Clause of the 14th Amendment, the opinion held that the state could not continue the recount because there was no statewide standard for how to count the ballots. ([See source at Library of Congress.](#))

Questions to Consider for Sources D and E:

- 1. Observe:** What do you notice about each source?
- 2. Reflect:** What similarities and differences do you see among these sources? Which opinion might be used to defend an existing constitutional right to vote? Which opinion might lead you to believe that an explicit constitutional right to vote does not exist? Why? How might having an explicit constitutional right to vote resolve the conflict between these two Supreme Court opinions?
- 3. Question:** What questions do you have about these sources?

A Proposed Amendment

Source F: House Joint Resolution 74 (2017)⁹

115TH CONGRESS
1ST SESSION

H. J. RES. 74

Proposing an amendment to the Constitution of the United States regarding the right to vote.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2017

Mr. POCAN (for himself, Mr. ELLISON, Mr. LEWIS of Georgia, Mr. RYAN of Ohio, Mr. TAKANO, Ms. NORTON, Mr. COHEN, Ms. KAPTUR, Mr. CUMMINGS, Mr. BRENDAN F. BOYLE of Pennsylvania, Ms. MOORE, Mr. CARTWRIGHT, Mr. GARAMENDI, Mr. LOWENTHAL, Mrs. WATSON COLEMAN, Ms. WASSERMAN SCHULTZ, Mr. DESAULNIER, Ms. SLAUGHTER, Mr. NORCROSS, Mr. MCGOVERN, Mr. BLUMENAUER, Ms. JUDY CHU of California, Mr. JEFFRIES, Mr. VEASEY, Mr. CONYERS, Mr. GRIJALVA, and Ms. ROYBAL-ALLARD) submitted the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the right to vote.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States after the date of its submission for ratification:

“ARTICLE —

“_SECTION 1. Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.

“_SECTION 2. Congress shall have the power to enforce and implement this article by appropriate legislation.”.

Transcription of Source F:

115th CONGRESS
1st Session

H. J. RES. 74

Proposing an amendment to the Constitution of the United States regarding the right to vote.

IN THE HOUSE OF REPRESENTATIVES

February 15, 2017

Mr. Pocan (for himself, Mr. Ellison, Mr. Lewis of Georgia, Mr. Ryan of Ohio, Mr. Takano, Ms. Norton, Mr. Cohen, Ms. Kaptur, Mr. Cummings, Mr. Brendan F. Boyle of Pennsylvania, Ms. Moore, Mr. Cartwright, Mr. Garamendi, Mr. Lowenthal, Mrs. Watson Coleman, Ms. Wasserman Schultz, Mr. DeSaulnier, Ms. Slaughter, Mr. Norcross, Mr. McGovern, Mr. Blumenauer, Ms. Judy Chu of California, Mr. Jeffries, Mr. Veasey, Mr. Conyers, Mr. Grijalva, and Ms. Roybal-Allard) submitted the following joint resolution; which was referred to the Committee on the Judiciary

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Source F Information: In 2017, Representative Mark Pocan of Wisconsin and dozens of other co-sponsors introduced a proposed amendment to the Constitution for the explicit right to vote. Representative Keith Ellison of Minnesota, one of the co-sponsors, suggested that the amendment was needed to create “a renaissance of civic participation” and to stop states from creating laws that would restrict voting, including voter ID laws. ([See source at Congress.gov.](#))

Questions to Consider for Source F:

- 1. Observe:** What do you notice about this source?
- 2. Reflect:** If ratified, what problems might this amendment resolve? How do you know? What are some arguments against ratifying this amendment?
- 3. Question:** What questions do you have about this source?

Inquiry Question

Should the Constitution be amended to guarantee an explicit right to vote?

Explain your answer using the timeline and available documents.

Inquiry Extension Question

Research state legislation enacted over the last five years that added restrictions to voting, then review one or more recently proposed constitutional amendments for the right to vote.

Explain which state voting restrictions would be disallowed by this amendment and which restrictions might still be allowed.

Notes

- ¹ *John Adams* / SW., Photograph, [between 1870 and 1900\]. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/item/2002719747/>; “From John Adams to James Sullivan, 26 May 1776,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Adams/06-04-02-0091>. [Original source: *The Adams Papers*, Papers of John Adams, vol. 4, *February–August 1776*, ed. Robert J. Taylor. Cambridge, MA: Harvard University Press, 1979, pp. 208–213.]
- ² *Benjamin Franklin*, Photograph, 1898. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/item/2018697119/>; Benjamin Franklin, quoted in Scottie Lee Meyers, “Fight For Voting Rights Started With Founding Of U.S., Says Author,” Wisconsin Public Radio, June 6, 2016, <https://www.wpr.org/fight-voting-rights-started-founding-u-s-says-author>.
- ³ *Thomas Paine* / *Romney pinxt.; Wright sculpt*, Print/engraving, [179?]. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/item/2008676215/>; Thomas Paine, “Dissertation on First Principles of Government,” 1795, quoted in Victoria Bassetti, “In Search of the Right to Vote,” *Harper’s Magazine*, 2012, <https://harpers.org/archive/2012/10/in-search-of-the-right-to-vote/>.
- ⁴ *James Madison* / *on stone by A. Newsam.*, Print, [between 1830 and 1851]. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/item/2003655322/>; James Madison, “Note to His Speech on the Right of Suffrage,” 1821, quoted in “A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875,” Farrand’s Records, Volume 3, <http://memory.loc.gov/cgi-bin/ampage?collId=llfr&fileName=003/llfr003.db&recNum=453>.
- ⁵ A.R. Waud, “The first vote,” Illustration, *Harper’s Weekly*, November 16, 1867. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/resource/ppmsca.37947/>.
- ⁶ E.W. Kemble, “Congress,” Illustration, 1902. From Library of Congress Prints and Photographs Online Catalog, <https://www.loc.gov/item/2004679121/>.
- ⁷ *Wesberry v. Sanders*, 376 U.S. 1 (1964), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep376/usrep376001/usrep376001.pdf>.
- ⁸ *Bush v. Gore*, 531 U.S. 98 (2000), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep531/usrep531098/usrep531098.pdf>.
- ⁹ *Proposing an amendment to the Constitution of the United States regarding the right to vote*, H.J. Res. 74, 115th Cong., 1st sess., February 15, 2017, <https://www.congress.gov/bill/115th-congress/house-joint-resolution/74/text>.