

THE 1821 CONSTITUTIONAL CONVENTION AND
THE CONSTITUTIONALIZATION OF RACIAL
DISCRIMINATION IN NEW YORK

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"I too have become acquainted with ambivalence."¹

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I. PRECIS

The 1821 New York Constitutional Convention removed property ownership for White males as a condition for voting while adding a requirement that Black voters possess a freehold estate worth

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¹ RALPH ELLISON, *INVISIBLE MAN* 10 (2d ed. 1995).

\$250.00.² White males were eligible to vote if they met the following requirements: (i) residence in the state for one year; (ii) residence in the county they were voting in for six months; and, (iii) either, paid property taxation, served in the militia or was a fireman, or labored on the public highways; Black men were eligible only if they possessed the freehold estate mentioned above, and had resided in the state for three years.³ With this addition, the 1821 Constitution became the first in the state's history to contain a provision making race a part of its constitutional fabric.⁴ This Article examines that decision and the role Martin Van Buren played in the context of the state's colonial background and constitutional tradition.

II. BACKGROUND

A. *Slavery Under the English*

The Dutch relinquished the colony of New Netherland to the English in 1664.⁵ The recognition of Dutch property rights and customs contained in the 1664 Articles of Capitulation included, at the insistence of General Peter Stuyvesant, continued recognition of the legal status and rights granted by the Dutch to Africans.⁶

The impact of that recognition was blunted as the English accelerated the importation of enslaved individuals. New York's Charters of Liberties of 1683 and 1691 were silent on the status of African Americans, enslaved or free.⁷ The New York Provincial Assembly's subsequent ban on the inheritance of real property by free African Americans eliminated the ability of families to retain land

² See N.Y. CONST. of 1821, art. II, § 1, https://history.nycourts.gov/wp-content/uploads/2018/11/Publications_1821-NY-Constitution.pdf [https://perma.cc/GR6Y-CJ3X].

³ *Id.*; *The Ballot Box in New York State*, HISTORIC GENEVA (Oct. 16, 2020), <https://historicgeneva.org/organizations/voting-history-in-new-york-state/> [https://perma.cc/67C4-89V6].

⁴ See LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 16 (2015).

⁵ See DAVID HACKETT FISCHER, AFRICAN FOUNDERS: HOW ENSLAVED PEOPLE EXPANDED AMERICAN IDEALS 138 (2022).

⁶ See *id.* at 138–39.

⁷ See *1683: Charter of Liberties and Privileges (New York)*, ONLINE LIB. OF LIBERTY, <https://oll.libertyfund.org/pages/1683-charter-of-liberties-and-privileges-new-york> [https://perma.cc/8UZV-33V5]; N.Y. COMMR'S OF STATUTORY REVISION, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 244–48 (1894).

holdings.⁸ Slavery “emerged as an explicit instrument of racial control” under English rule.⁹

By the opening of the eighteenth century, New York held a higher number and a greater percentage of enslaved individuals than any state north of Maryland.¹⁰ The growing number and diversity of Africans within the state increased slavery resistance, runaway slaves, and conspiracies to promote both.¹¹ Laws prohibiting the gathering of enslaved persons provoked defiance.¹² Occasional revolts, armed insurrections, and arson reflected the growing resistance.¹³ What is clear is that “[u]nder British rule, slaves stole more cash, clothing, and food from masters’ households and ran away more frequently than they had under the Dutch.”¹⁴ In response, the English adopted a series of colonial laws, commonly referred to as “Black Codes.”¹⁵ They imposed tighter regulations to prevent and punish those who “conspired, rebelled, and ran away relentlessly.”¹⁶ Among others, these laws forbade enslaved people to trade without the consent of their masters, gave owners the right to punish their enslaved for their crimes and offenses at the owner’s discretion, prohibited them from owning real property, made it a crime for them to possess weapons of any kind, and made gathering in groups of three or more illegal.¹⁷

The recurring fear of enslaved uprisings that haunted New York City residents reached a crescendo in 1741. City officials believed a revolt had begun. What came to be known as “The Great New York Conspiracy of 1741”¹⁸ resulted in the arrest of over a hundred free

⁸ Jasmine Bumpers & Jamie Brinkman, “*Land of the Blacks*”: America’s First Free Black Community, N.Y. ARCHIVES, Spring 2023, at 8, 8–9, https://www.nysarchivestrust.org/application/files/1416/8062/3671/ATSA_Archives_Magazine_V22-N4_Spring_2023.pdf [<https://perma.cc/RZ34-JZLH>].

⁹ MICHAEL KAMMEN, COLONIAL NEW YORK: A HISTORY 59 (Milton M. Klein & Jacob E. Cooke eds., KTO Press 1987) (1975).

¹⁰ DAVID N. GELLMAN, EMANCIPATING NEW YORK: THE POLITICS OF SLAVERY AND FREEDOM 1777–1827, at 4 (2006).

¹¹ See *id.* at 16, 22.

¹² See LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 37 (Kathleen Conzen, Timothy Gilfoyle & James Grossman eds., 2003); GELLMAN, *supra* note 10, at 17.

¹³ See GELLMAN, *supra* note 10, at 22.

¹⁴ HARRIS, *supra* note 12, at 37.

¹⁵ See GELLMAN, *supra* note 10, at 17; ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 12 (1967).

¹⁶ See *The Tightening Vise of Slavery in British Colonial New York: Gallery Overview*, SLAVERY IN N.Y., https://www.slaveryinnewyork.org/gallery_3.htm [<https://perma.cc/94SP-XPJH>].

¹⁷ ZILVERSMIT, *supra* note 15, at 12–24; GELLMAN, *supra* note 10, at 17–18.

¹⁸ See PETER CHARLES HOFFER, THE GREAT NEW YORK CONSPIRACY OF 1741: SLAVERY, CRIME, AND COLONIAL LAW 2–3 (2003).

and enslaved Black New Yorkers and twenty White New Yorkers plus thirty-four executions.¹⁹

B. The 1777 Constitution: Slavery and Suffrage

At the Provincial Convention, called during the Revolutionary War to write a Constitution for the newly independent state of New York, Delegate Robert Morris called on the Convention to recommend to the legislature that it take steps to end slavery in the state. He recommended the following language:

And whereas a regard to the rights of human nature and the principle of our holy religion, loudly call upon us to dispense the blessings of freedom to all mankind: and inasmuch as it would at present be productive of great dangers to liberate the slaves within this State: It is, therefore most earnestly recommended to the future Legislatures of the State of New-York, to take the most effectual measures consistent with the public safety, and the private property of individuals, for abolishing domestic slavery within the same, so that in future ages, every human being who breathes the air of this State, shall enjoy the privileges of a freeman.²⁰

The following day, April 18, delegates approved the body of the motion, 24-8, but postponed consideration of the preamble.²¹ On April 19, Morris moved that the preamble he proposed earlier be “obliterated.”²² Morris proposed removing the first “whereas” of his initial preamble²³ and substituting “Inasmuch as it would be highly inexpedient to proceed to the liberating of slaves within this State, in the present situation thereof.”²⁴ That motion passed 24-12.²⁵ Why? No reason can be gleaned from the record, but the initial preamble,

¹⁹ See JILL LEPORE, *NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN* xii, xvi (2005) (providing vivid a description of the event). Historians differ regarding the nature, extent, or even the existence of a conspiracy. See HOFFER, *supra* note 18, at 2–10; THOMAS J. DAVIS, *A RUMOR OF REVOLT: THE “GREAT NEGRO PLOT” IN COLONIAL NEW YORK* 227–28, 255–63 (1985). For a concise, balanced account, see FISCHER, *supra* note 5, at 161–65.

²⁰ *JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775–1776–1777*, at 887 (1842).

²¹ *Id.* at 889.

²² *Id.*

²³ Morris proposed removing “whereas . . . the principles of our holy religion, loudly call upon us to dispense the blessings of freedom to all mankind.” *See id.* at 887–89.

²⁴ *See id.* at 889.

²⁵ *Id.*

read before delegates whose numbers included individuals involved directly or indirectly in enslavement, had put the choice in uncompromising terms.²⁶ Delegates, perhaps willing to approve the recommendation, may have been hesitant to accept the religious or philosophical pronouncement. Morris's revised preamble removed this rhetoric without altering the objective: ensuring that every human being in this state shall enjoy the privileges of a freeman as a constitutionally grounded right.²⁷ Moreover, allowing the legislature to determine when emancipation could be safely achieved foreclosed objections that might have been raised if a time frame had been specified. Robert Livingston moved to adopt the preamble and body of the motion.²⁸ The motion carried 31-5, a fitting end to the new beginning.²⁹ What happened next is puzzling. On April 20, the Convention voted to approve the Constitution, but the approved Constitution did not contain the recommendation.³⁰ Nothing in the record sheds light on its absence. Did delegates decide, *sub silentio*, that a precatory thought, though good for the soul, absolved them of any responsibility for the action? Did they have doubts about placing exhortations rather than obligations in the fundamental law of the state?³¹

On April 29, John Jay wrote to Gouverneur Morris, lamenting the fact that there was no “[c]lause against the continuation of domestic Slavery.”³² Jay had been called away on April 17 due to his mother's death, thus missing the three days during which the Convention addressed the matter.³³

The Constitution contained a provision endorsing all the laws passed by the colonial legislature, in effect, if not intentionally, validating the slave codes.³⁴ Morris had attempted to defuse the tension between the philosophical and religious objections to slavery

²⁶ See *id.* at 887–89.

²⁷ See *id.*

²⁸ 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 553–54 (1906).

²⁹ *Id.* at 554.

³⁰ See *id.* at 554, 556.

³¹ See Daniel C. Littlefield, *John Jay, the Revolutionary Generation, and Slavery*, 81 N.Y. HIST. 91, 106 (2000). Littlefield described the motion as “more in the nature of a statement of principle than a call to commitment.” *Id.* Unlike the constitutions of Virginia, Pennsylvania, Maryland, and Delaware, among others, New York's Constitution confined the precatory and aspirational exhortations to its preamble. See *id.* at 95, 106, 111.

³² Letter from John Jay, Assemblyman, N.Y., to Robert R. Livingston, Chancellor, N.Y. and Gouverneur Morris, Assemblyman, N.Y. 3 (Apr. 29, 1777), <https://founders.archives.gov/documents/Jay/01-01-02-0227> [<https://perma.cc/UL2T-GXFA>].

³³ LINCOLN, *supra* note 28, at 556.

³⁴ N.Y. CONST. of 1777, art. XXXV.

and the validation of the state's positive law. In the context of an existential threat, he asked too much.

Though the Constitution did not take a position on slavery, it also did not place any race-based restrictions on suffrage. African American males meeting the property qualifications could vote under the 1777 Constitution.³⁵ In light of New York's harsh treatment of African Americans throughout the eighteenth century, this inclusion is remarkable. Before 1821, Black New Yorkers "exercised more influence than any other [B]lack constituency in the early republic."³⁶

The continued existence of enslaved New Yorkers during the Revolutionary War indicated that fears about the consequences of emancipation, along with slaveholders' determination to prevent abolition, had made resolution of the issue difficult. That resolution came slowly and in increments: slavery in New York would not vanish entirely until 1848.³⁷

C. Race, Slavery, and Suffrage Between Constitutions

With the end of the Revolutionary War, the sentiment for gradual manumission, manifested by the votes taken at the Constitutional Convention in 1777, intensified. In 1781, the legislature voted to manumit enslaved individuals serving in the armed forces.³⁸ Four years later, it entertained a proposal for gradual abolition, but the assembly bill also contained a provision that would have disenfranchised those emancipated.³⁹ The Council of Revision vetoed the bill for its racially coded provision.⁴⁰ This veto, among others issued by the Council, remains a bright light in an era during which the state (and country) groped in darkness. The legislature failed to override the veto,⁴¹ exposing the tangled relationship between race, suffrage, and citizenship.

The Naturalization Act of 1790 specified that "any alien, being a free [W]hite person," would be eligible to become an American

³⁵ See *id.* art. VII.

³⁶ VAN GOSSE, *THE FIRST RECONSTRUCTION: BLACK POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 309 (2021).

³⁷ See Michael Pollak, *Answers to Questions About New York*, N.Y. TIMES (Aug. 30, 2013), <https://www.nytimes.com/2013/09/01/nyregion/answers-to-questions-about-new-york.html> [<https://perma.cc/83XR-GBYC>].

³⁸ See *THE ENCYCLOPEDIA OF NEW YORK STATE* 19 (Peter Eisenstadt & Laura-Eve Moss eds., 2005).

³⁹ See GOSSE, *supra* note 36, at 319.

⁴⁰ See *id.* at 319–20.

⁴¹ See *id.* at 321.

citizen.⁴² What did that mean for Black individuals living in New York? Like other states, New York had not yet clearly defined citizenship. Ironies abounded. The Constitution of 1821 limited Black (but not White) voters to those who met a property qualification, but in doing so explicitly recognized Black residents as citizens of New York.⁴³ Previously, in 1785, the legislature succeeded in banning the importation of enslaved people into the state.⁴⁴ The game-changing statute, “An Act for the Gradual Abolition of Slavery,” became the state’s law in 1799.⁴⁵ It was *gradual* because only children born after July 4, 1799, would be free, with males serving until age twenty-eight and females until twenty-five.⁴⁶ The year 1799 “marked a permanent break from the state’s slave past.”⁴⁷ David Gellman provides background, textual analysis, and the significance of this law.⁴⁸ Later, in 1817, “An Act Relative to Slaves and Servants” declared all enslaved people free as of July 4, 1827.⁴⁹ This Act permitted non-residents traveling to or from or passing through the state to bring with them their enslaved individuals but limited their stay to no more than nine months.⁵⁰ That practice ended in 1841.⁵¹ Exactly when no enslaved person remained in New York is uncertain. Under the provisions of the 1817 statute, July 4, 1848, was the date when no person would be enslaved under the law, and slavery would vanish in the state.⁵²

III. THE 1821 CONVENTION

The 1821 Convention removed all property requirements for White males as a prerequisite for voting, leaving payment of taxes, service in the militia, as a fireman, or labor on the public highways, and establishing a six-month residency in a county and a year’s residency

⁴² Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

⁴³ See N.Y. CONST. of 1821, art. II, § 1.

⁴⁴ GELLMAN, *supra* note 10, at 52.

⁴⁵ *Id.* at 153.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 153–86.

⁴⁹ Act of Mar. 31, 1817, ch. 137, § 32, 1817 N.Y. Laws 136, 136, 144.

⁵⁰ *Id.* § 15, 1817 N.Y. Laws at 140.

⁵¹ Lemmon v. People, 20 N.Y. 562, 618–19 (1860).

⁵² Act of Mar. 31, 1817, ch. 137, § 4, 1817 N.Y. Laws 136, 136. The Act provides that someone born after its passage would remain indentured to their mother’s master until the age of twenty-one. *Id.* Therefore, while slavery was de jure ended in the state on July 4, 1827, it was not until July 4, 1848, that there were no longer enslaved individuals. See *id.* §§ 4, 32.

in the state as prerequisites.⁵³ Eliminations of the property requirement marked a shift away from the eighteenth-century Whig understanding that suffrage should be extended only to those who could demonstrate independence of mind and a stake or interest in the community, both of which presumed to accompany the possession of a freehold.⁵⁴ Delegates at the Convention spoke of the people's patriotic sentiment and love of country and service to the community as the essential factors in good citizenship, thus elevating service in the militia above property ownership as a measure of one's citizenship qualifications.⁵⁵ Work on public highways or as a firefighter would reflect a commitment to and involvement in the community.⁵⁶ Excluded under these conditions would be the rootless and impoverished. Delegates also authorized the legislature to disenfranchise anyone convicted of "infamous crimes."⁵⁷ These changes benefited residents of New York City and farmers with mortgaged farms ineligible for freehold status.⁵⁸ The debates at the Convention over a property qualification for voting have been called "one of the great suffrage debates in American history."⁵⁹ Delegates achieved what they considered to be universal suffrage. That judgment was colorblind. Although delegates defeated a motion to limit the franchise to Whites only, they approved a provision requiring "m[e]n of colour" to "be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon."⁶⁰ The provision disenfranchised all but a handful of Black New Yorkers. In 1825, only 298 of the nearly 6,000 free adult Black New Yorkers met the requirement.⁶¹

Twenty years earlier, the legislature recommended calling the state's second Constitutional Convention. The enabling legislation, "An Act recommending a Convention for the Purposes therein

⁵³ Compare N.Y. CONST. of 1777, art. VII (requiring property ownership to vote), with N.Y. CONST. of 1821, art. II, § 1 (only requiring property ownership if the citizen is Black).

⁵⁴ See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337-38 (1989).

⁵⁵ See NATHANIEL H. CARTER, WILLIAM L. STONE & MARCUS T. C. GOULD, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 239-40 (1821).

⁵⁶ See *id.* at 227, 273.

⁵⁷ N.Y. CONST. of 1821, art. II, § 2.

⁵⁸ See CARTER ET AL., *supra* note 55, at 220-21.

⁵⁹ CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 195 (1960).

⁶⁰ N.Y. CONST. of 1821, art II, § 1.

⁶¹ PHYLLIS F. FIELD, THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WAR ERA 37 (1982); PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 77 (1996).

mentioned” permitted “all free male citizens, of this State” to vote on the question.⁶² It did not include property ownership nor did it mention race as a condition for voting or serving as a delegate.⁶³ What happened between 1777 and 1821 that would account for the adoption of a race-based suffrage requirement?

A. *The Context*

Black men in New York City had become essential support for a fading Federalist Party, “vot[ing] consistently with the Federalists against a Republican organization in deep national alliance with Southern slaveholders.”⁶⁴ Dixon Ryan Fox noted that “[i]n New York City the proportion of Negroes to [W]hites at the beginning of the nineteenth century was several times larger than [in 1917].”⁶⁵

Tammany and Republican Party leaders knew this quite well. When freed, the enslaved men became voters on the same terms as a White man if they paid taxes, owned a freehold of twenty pounds, or rented a tenement of the yearly fee of forty shillings. After 1800, manumission became more general.⁶⁶

The Emancipation Act of 1799, in effect if not explicitly, constituted recognition of citizenship and the right to vote.⁶⁷ Nowhere was this more evident than in New York County. In 1790, two thirds of the Black population, which stood at 3,479, remained enslaved.⁶⁸ By 1810, the city’s population had tripled, with the percentage of Black individuals remaining roughly the same, but “nearly all were [now] free, and those men voted.”⁶⁹ In the first decade of the nineteenth century, a major bloc of Black voters existed in New York City.⁷⁰ “New York City’s [B]lack electorate tilted the state-wide balance of power.”⁷¹ Upstate towns such as Hudson have been described as an “enclave of [B]lack electoral participation” and Albany as containing “a substantial electorate of [B]lack small businessmen.”⁷² Black

⁶² Act of Apr. 6, 1801, ch. 69, § 4, 1801 N.Y. Laws 190, 190–91.

⁶³ *Id.*

⁶⁴ DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION 1774-1804*, at 264 (Jan Ellen Lewis, Peter S. Onuf & Andrew O’Shaughnessy eds., 2009).

⁶⁵ Dixon Ryan Fox, *The Negro Vote in Old New York*, 32 POL. SCI. Q. 252, 255 (1917).

⁶⁶ See GRAHAM RUSSELL HODGES, *ROOT & BRANCH: AFRICAN AMERICANS IN NEW YORK & EAST JERSEY 1613-1863*, at 171–73 (Waldo E. Martin Jr. & Patricia Sullivan eds., 1999).

⁶⁷ See GELLMAN, *supra* note 10, at 1–2 (explaining the effect of the Act of 1799).

⁶⁸ GOSSE, *supra* note 36, at 325.

⁶⁹ *Id.*

⁷⁰ See *id.* at 312, 325–27, 345–46.

⁷¹ *Id.* at 315.

⁷² *Id.* at 345.

leaders were outspoken Federalists because that party was tied to emancipation via Governor John Jay and the defense of Black voting rights by figures like Stephen Van Rensselaer.⁷³

Republican and Tammany Hall Party leaders realized the threat a growing Black constituency posed to their party's success. By 1800, united by an antipathy to class privilege, a commitment to enhancing the role of the people in government, and mild humanitarian reforms, Republicans achieved hegemony; but the party splintered in 1812 when Governor DeWitt Clinton challenged James Madison for the presidency.⁷⁴ With the support of Federalists, Clinton managed to win the governor's office in 1817.⁷⁵ "Bucktails," a faction of the Republicans who deserted Clinton, along with Tammany Hall, the executive division of New York County's Democratic-Republican Party, embarked on an extended campaign to shift the balance of power in the state by disenfranchising Black voters.⁷⁶ New York City election officials imposed byzantine registration and certification requirements on free Black men.⁷⁷ The campaign succeeded so well that the 1821 Convention has been described as "formaliz[ing] New York City's de facto disenfranchisement for the entire state."⁷⁸

Bucktails captured a commanding majority of delegate seats, enabling them to continue their campaign to limit Black voting.⁷⁹ They reiterated fears that the growing presence of Black Americans in New York City could "change the political condition of the whole state" and "let loose upon that city a host of voters that might give law to the Whites, and in the consequences affect the remotest corners of the state."⁸⁰

⁷³ See *id.* at 312, 325–27.

⁷⁴ *Id.* at 337, 324–25.

⁷⁵ *Id.* at 357–58.

⁷⁶ *Id.* at 349, 358, 364; *Tammany Hall: American Political History*, BRITANNICA, <https://www.britannica.com/topic/Tammany-Hall> [<https://perma.cc/YRAS-4P2J>] (Oct. 9, 2024). For further information on the history and developments of Tammany Hall, see TERRY GOLWAY, *MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS* (2014). Members of the Bucktail faction did not use that term, referring to themselves as "Republicans." See Michael Wallace, *Changing Concepts of Party in the United States: New York, 1815–1828*, 74 *AM. HIST. REV.* 453, 460 (1968).

⁷⁷ GOSSE, *supra* note 36, at 342–55 (providing a detailed description of the restrictions and the decade-long campaign to limit the voting of Black People).

⁷⁸ *Id.* at 362.

⁷⁹ See John A. Casais, *The New York State Constitutional Convention of 1821 and Its Aftermath* 73–76 (1967) (Ph. D. dissertation, Columbia University) (ProQuest). Casais found the fluid and factional character of the delegates is better captured by dividing them into four groups: Conservatives, Moderates, Radicals, and Outsiders. *Id.* at 73.

⁸⁰ CARTER ET AL., *supra* note 55, at 185–86, 198 (statements of Jacob Radcliff). Erastus Root, leader of the radical wing of the Bucktails, and Peter Livingston, echoed these sentiments. *Id.* at 185–86, 192, 198–99.

B. The Debate on Suffrage

On September 12, 1821, a seven-person Committee on Suffrage presented its report to the Convention. Its proposal included the phrase “[e]very [W]hite male citizen.”⁸¹ In his introduction to the report, the Chair of the Committee, Nathan Sanford, made no mention, let alone offer a defense for the racial exclusion.⁸² He concluded his remarks with the statement that “[t]he committee ha[d] no attachment, however, to this particular scheme, and are willing to see it amended or altered.”⁸³ This was a surprising non-endorsement of the Committee’s work, and likely an indication of a closely divided Committee. Immediately following the Chair’s remarks, Committee member John Ross filled the void left by the Chair, giving a full-throated defense of the exclusion of Black New Yorkers whom he labelled, “peculiar people.”⁸⁴ The report precipitated a spirited debate. Defenders of the exclusion claimed that Black suffrage would give Black people “power that may be wielded to the destruction of all we hold dear”;⁸⁵ that Black men did not share the “burdens . . . of the state,” were “incapable . . . of exercising that privilege with any sort of discretion, prudence, or independence,” and “ha[d] no just conceptions of civil liberty.”⁸⁶ Similar attacks against the character and worth of Black New Yorkers followed.⁸⁷

In response, Peter Jay, Robert Clarke, and Abraham Van Vechten offered powerful and moving defenses of racial equality as well as point-by-point responses to the arguments made by defenders of racial exclusion.⁸⁸ These speeches had an impact: on September 20, delegates voted to remove the “[W]hites only” phrase, 63-59.⁸⁹ The closeness of the vote, however, did not augur well for supporters of equal rights.

For nearly two weeks, other questions involving the suffrage took center stage. Suffrage debates consumed more time than any other issue at the Convention.⁹⁰ If property requirements were to be eliminated, what other conditions would ensure a responsible

⁸¹ *Id.* at 134.

⁸² *See id.* at 178–79.

⁸³ *Id.* at 180.

⁸⁴ *Id.*

⁸⁵ *Id.* at 199.

⁸⁶ *Id.* at 180.

⁸⁷ *See id.* at 191, 198.

⁸⁸ *See id.* at 183–85, 186–89, 193–95.

⁸⁹ *Id.* at 202.

⁹⁰ *See id.* at 215, 234, 255, 271–76, 283–88, 356–57, 370.

electorate? How might they be written in constitutional language? Delegates examined residency requirements, militia service, work on highways and payment of taxes, as well as a property requirement for senate elections.⁹¹ An attempt to reintroduce the word “[W]hite” into the proposal was deemed inadmissible by the rules of the house.⁹²

Delegates had voted overwhelmingly (100-19) to eliminate any property qualification, and by a much closer margin (59-63) they rejected any race-based restriction on the exercise of suffrage.⁹³ With the major issues settled and extensive debate having taken place on the question of non-property-based qualifiers—*viz.*, residency requirements, work on highways, service in militia, and payment of property taxes—Convention delegates appeared ready to vote. Instead, on September 29, Ogden Edwards moved:

That the committee of the whole be discharged from the further consideration of the report of the select committee appointed to consider the right of suffrage and the qualification of persons to be elected, and that the same, together with the amendments made thereto in committee of the whole, be referred to a select committee consisting of thirteen members, and that the committee also report their opinion upon the expediency of excluding people of colour from the right of suffrage.⁹⁴

In explaining the reasons for his action, Edwards stated:

[T]he object of this Convention, was to form such a constitution as would meet the approbation of the whole community—a constitution that would be deeply rooted in the affections of the people. All were in favour of granting to every man who was qualified to vote the elective privileges; but there were certain limits, beyond which we ought not to go. A select committee might embody the sentiments of all the members, and harmonize their different views.⁹⁵

⁹¹ *See id.* at 226–27.

⁹² *Id.* at 286.

⁹³ *See id.* at 270.

⁹⁴ *Id.* at 288.

⁹⁵ *Id.*

Delegates voted to discharge the first Suffrage Committee and appoint a new thirteen-person Committee.⁹⁶ The decision wiped the slate clean and provided a procedural patina for its reconsideration of the question of Black suffrage. That patina wore off quickly when Delegate Samuel Young revealed what he believed forming a constitution that would be “deeply rooted in the affections of the people” signified.⁹⁷ It was his intent to offer an amendment to insert “[W]hite” before “male citizens.”⁹⁸ Young stated: “many of the gentlemen in the majority upon this question are from the country; and know more about the feelings of the yeomanry, than those who, from their wealth, habits, and official stations, do not mingle among the people.”⁹⁹ The gloves were off.

The defense of a property requirement for Black suffrage raised intractable problems for Bucktail and Tammany Hall politicians who controlled the Convention. Bucktail delegates wanted all property qualifications removed for White voters but not Black voters.¹⁰⁰ Clintonian Federalists argued that property qualification would ensure independence and provide evidence of a stake in the community and thus should be required of all voters, Black and White.¹⁰¹ Having jettisoned property qualification as a condition for voting, Bucktails resorted to race-based justifications; denying Black New Yorkers equal status as human beings provided them with the ground for the differential treatment.¹⁰² However, it did not explain why any Black men—property owners or propertyless—should be granted the right to vote. Race-conscious delegates did not have the votes for total exclusion.¹⁰³ The defeat of the motion to restrict suffrage to Whites only and the number of delegates who did not support the motion for a Black-only property requirement suggests as much. The race-based restriction, though it did not deny the vote to all those with a “degraded character,” would significantly diminish the strength of the Federalist Party in New York. It is a reflection of the times and mores that claims of the incompetence and lack of character of Black Americans, among others, made to justify their exclusion, could be used as a cover for the reality that partisan

⁹⁶ *See id.* at 289.

⁹⁷ *See id.* at 288.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See GOSSE, supra* note 36, at 370.

¹⁰¹ *See id.* at 316.

¹⁰² *See ALVIN KASS, POLITICS IN NEW YORK STATE 1800–1830*, at 89 (1965); GALIE, *supra* note 61, at 76.

¹⁰³ CARTER ET AL., *supra* note 55, at 134, 202.

advantage may have been a salient factor in the minds of most delegates.

C. Martin Van Buren: Suffrage & Race

Martin Van Buren, the putative leader of the Bucktail majority, outlined his views on the political consequences of universal suffrage for Black and White men, but he did not focus on the character of Black people qua such.¹⁰⁴ He did not support universal suffrage, which he thought would result in “many evils.”¹⁰⁵ He favored eliminating the working-on-highways qualification for voting proposed by the Committee on Suffrage and substituting a household-ownership requirement.¹⁰⁶ Up to this point, Bucktail Party delegates had rebuffed all attempts to insist on a property requirement for White males.¹⁰⁷ Van Buren’s attempt to require that household ownership accompany working on highways, when the latter was relied on as a qualification for voting, precipitated a counter-proposal: “[E]very person of twenty-one years of age, having a certain term of residence, and excluding *actual* paupers, should be permitted to vote for any officer in the government, from the highest to the lowest.”¹⁰⁸ Alarmed by the possibility that such a motion would succeed, Van Buren laid out his objections to universal suffrage. He pointed out that the newly adopted reapportionment provisions would give New York City 25,000 votes rather than the current 13,000 or 14,000.¹⁰⁹ Secondly, the increases western counties like Ontario and Genesee would receive under the reapportionment provision adopted by the Convention, would “be surrendered to the worst population of the old counties and cities.”¹¹⁰ Who constituted the “worst populations”? Van Buren did not elaborate, but piecing together his remarks concerning suffrage, they appeared to be those who “ha[d] no interest in the government,” that is, no stake in the community, in which he included military service or household ownership and payment of taxes.¹¹¹ Lastly, as stated in the records of the proceedings and debates, “whatever might be our after conviction, founded on experience, as to the evil tendency of this

¹⁰⁴ *Id.* at 367.

¹⁰⁵ *Id.* at 367, 277–78.

¹⁰⁶ *Id.* at 367.

¹⁰⁷ *Id.* at 224–26, 234–39, 255–65.

¹⁰⁸ *Id.* at 367.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 367–68.

¹¹¹ *See id.* at 368.

extended suffrage,” it appears that “the door would have been entirely closed against retreat.”¹¹² Therefore, because the “just equilibrium between rights of those who have and those who have no interest in the government could, when once surrendered, never be regained except by the sword,” Van Buren pushed his objections to universal male suffrage.¹¹³

When the newly appointed thirteen-person Committee on Suffrage issued its report, Van Buren responded as follows:

He would . . . notwithstanding his desire to have the qualification of *house-holder* added to the electors of the third description remained unchanged, accept the report of the committee as it was, with the addition of the military qualification, which he thought ought to be adopted, for the sake of principle, if for no other reason.

He thought the committee, constituted as they were, had done themselves great credit by their concession to the opinion of those from whom they differed, and he, for one, returned them his sincere thanks. Under all circumstances, he would be well satisfied with the right of suffrage, as it will now be established, and would give it his zealous support, as well in his capacity of delegate, as that of citizen.¹¹⁴

The Committee had not been persuaded by Van Buren’s argument nor moved by his status as party leader.¹¹⁵ His support for a property qualification had put him closer to the Federalists than his own party! Bucktail delegates were not going to approve any property qualifications for White males. Recognizing that he had jeopardized his status, Van Buren acquiesced and moved on.

His justification for accepting the race-based property requirement also reflected his awareness of the party’s determination to adopt a racial requirement.

Van Buren said he had voted against a total and unqualified exclusion, for he would not draw a revenue from them, and yet deny to them the right of suffrage. But this proviso met his approbation. They were exempted from taxation until they

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 367.

had qualified themselves to vote. The right was not denied, to exclude any portion of the community who will not exercise the right of suffrage in its purity. This held out inducements to industry, and would receive his support.¹¹⁶

Van Buren's position on the importance of a property requirement and his vote against the motion to exclude Black men altogether from suffrage—issues central to the Bucktail Party—had threatened his status as its putative leader. His unwillingness to join the chorus of character assassinations of Black men and his insistence that Black men denied suffrage should not be required to pay taxes, suggest that Van Buren's political and/or moral sensibilities, though hardly immaculate, rose above those of his party. Van Buren's justification for accepting a race-based property qualification was echoed by other members of his party,¹¹⁷ indicating that their acceptance was part of a compromise made to forestall new attempts to exclude Black males altogether. That attempt did come in the form of a motion by Olney Briggs, a radical Bucktail, who rejected the compromise that gave propertied Black men the vote.¹¹⁸ Consistent with the Bucktail view, Briggs argued that property should not be a "standard of qualification" for voting for Black or White citizens.¹¹⁹ He called on delegates to revive the motion to exclude all Black men from suffrage.¹²⁰ A subsequent vote to remove the "other than a [W]hite man" phrase from the constitution lost 33-71.¹²¹ Convention delegates were not going to remove the property restriction for Black men, and they did not have the votes to exclude Black men entirely. The close vote preventing total exclusion (59-63), followed by the lopsided vote to keep the property qualification but not exclude Black men from suffrage, indicates that the compromise had closed the matter.¹²²

A less sympathetic interpretation of Van Buren's stance has been suggested. The "denaturalize[ation of B]lack [New] Yorkers . . . properly belongs not the outspoken 'radicals,' like . . . Erastus Root" and Samuel Young, "but to the 'little Magician' behind the scenes."¹²³ Van Gosse supports this assertion by claiming

¹¹⁶ *Id.* at 376.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 364; *see also* GOSSE, *supra* note 36, at 371.

¹¹⁹ *See* CARTER ET AL., *supra* note 55, at 364

¹²⁰ *See id.* at 364-65.

¹²¹ *Id.* at 374, 377.

¹²² Samuel Young, a member of the Suffrage Committee, said as much. *See id.* at 38, 376.

¹²³ GOSSE, *supra* note 36, at 362.

that, if Van Buren thought the Bucktail delegates had gone too far, he would have exercised more control over Root and the Bucktail delegates than he did.¹²⁴ However, Van Buren's control over the radical Bucktails had its limits. He thought universal suffrage an unmitigated evil and moved to require household ownership of all voters as a prerequisite for voting.¹²⁵ The radical Bucktail wing soundly defeated this move.¹²⁶ He lost control of the Bucktails when he pressed for the appointment of justices of the peace, and his party opted for popular elections.¹²⁷ When Bucktails attempted to abolish the old judiciary and create a new "democratic" one, Van Buren did his best to prevent some of the more extreme proposals, but he was no magician waving a magic wand; rather, he was engaged in damage control, hardly in the driver's seat.¹²⁸ Seeing Van Buren as more like a platonic demiurge, required to work with materials not of his own making or choosing, offers a better understanding of his decision on suffrage: voting to reject the limitation of suffrage to White males but accepting a provision that conditioned, but did not prohibit, Black male suffrage. Nonetheless, dirty hands would soil his reputation in the eyes of twenty-first-century historians.

Unlike a number of his fellow Bucktails, Van Buren did not denigrate the humanity, intelligence, or moral character of Black New Yorkers. He did not share those sentiments or, at the least, did not believe such sentiments had any place in a public forum.¹²⁹ Van Gosse endorses a third possibility. He sees Van Buren as a sycophant hoping to avoid the "personal taint of racial animus;" his vote to strike "[W]hite" from the suffrage provisions was done to gain the respect of men like John Jay.¹³⁰

Partisanship and differences over the potential consequences of universal male suffrage had reached the boiling point with the survival of one, if not both, parties at stake. Governor Clinton needed to be destroyed. The critical factor from their respective perspectives in the survival of Clinton Federalists or the successful hegemony of the Tammany Republicans turned on the Black vote. Race provided

¹²⁴ See *id.*

¹²⁵ See CARTER ET AL., *supra* note 55, at 277, 367–68.

¹²⁶ See GOSSE, *supra* note 36, at 311.

¹²⁷ See JEROME MUSHKAT & JOSEPH G. RAYBACK, MARTIN VAN BUREN, LAW POLITICS AND THE SHAPING OF THE REPUBLICAN IDEOLOGY 154 (1997).

¹²⁸ See *id.* at 152, 155 (concluding that Van Buren's efforts made clear his "inability to control the convention" and "destroyed the aura of infallibility and respect he had earned" before the Convention).

¹²⁹ See MUSHKAT & RAYBACK, *supra* note 127, at, 152, 155.

¹³⁰ See GOSSE, *supra* note 36, at 357, 363.

a potent vehicle for success in an era when resorting to dog whistles was unnecessary.¹³¹

IV. REFLECTIONS

The 1821 Constitutional Convention proposed extensive revisions to the state's fundamental law. Those changes required the approval of voters who were overwhelmingly White Protestant men and predominantly rural. Of the 126 delegates, 68 were farmers, 37 were lawyers, 9 were merchants, 7 were mechanics (skilled workers), and 5 were physicians.¹³² No doubt political ideas and moral principles played a role in the decision: the speeches and the closeness of the votes, especially the defeat of the motion to exclude Black men from suffrage altogether, indicate as much.¹³³

Commentators from Alexis de Tocqueville and J.S. Mill to the present have maintained that “in the absence of certain social prerequisites, no constitutional order can produce a non-tyrannical republic.”¹³⁴ John Roche trenchantly observed: “The American legal system has always been vulnerable to community collectivism.”¹³⁵ He pointed to Catholics, another minority group who experienced intense legal and social discrimination in eighteenth- and nineteenth-century New York, claiming, “At the close of the colonial period, the only place where the public exercise of Catholic rites was permitted was Pennsylvania.”¹³⁶

In his description of the building of an “ideal” republic, Plato noted that one of the prerequisites for its success required sending all those over the age of ten out of the city—a radical, even preposterous suggestion—perhaps meant to suggest that an ideal republic must always remain an ideal, that is, a city in speech.¹³⁷

¹³¹ In an otherwise insightful analysis, GELLMAN, *supra* note 10, makes little or no reference to the crucial role political parties played, before and during the Convention.

¹³² See LINCOLN, *supra* note 28, at 630–32.

¹³³ The speeches by Peter Jay, Abraham Van Vechten, & Jonas Platt, among others, offered powerful, moving defenses of racial equality. See GOSSE, *supra* note 36, at 334, 355–69. These speeches did not convince a majority of delegates, and historians have rightly focused on the denigrating racial rhetoric of delegates opposed to equal racial suffrage. See generally *id.* Nonetheless these voices deserve to be read and remembered. See CARTER ET AL., *supra* note 55, at 193–95 (one of Abraham Van Vechten's speeches), 199–200 (one of Peter Jay's speeches), 211–12 (one of Jonas Platt's speeches).

¹³⁴ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 83 (Expanded ed. 2006) (1956).

¹³⁵ John P. Roche, *American Liberty: An Examination of the "Tradition" of Freedom*, in ORIGINS OF AMERICAN POLITICAL THOUGHT 9, 39 (John P. Roche ed., 1967).

¹³⁶ *Id.* at 24.

¹³⁷ See PLATO, THE REPUBLIC, bk. VII, at 531–32 (Benjamin Jowett trans., 2009) (c. 384 B.C.E.).

Determined both to enhance its party's power and prevent downstate from playing a deciding role in the state, Bucktails chose to follow Willie Stark's advice: "Tell 'em anything. But for Sweet Jesus' sake don't try to improve their minds."¹³⁸

The Convention's decision on suffrage did not—and perhaps *could* not—find an answer that would address the moral or human dimension. The compromise(d) decision bought time; the issue would return a quarter century later at the Constitutional Convention of 1846.¹³⁹

In 1776, New Yorkers embarked on an uneasy path to a "cautiously transforming egalitarianism."¹⁴⁰ Along the way, we have "become acquainted with ambivalence."¹⁴¹ "The owl of Minerva takes its flight only when the shades of night are gathering."¹⁴²

¹³⁸ ROBERT PENN WARREN, *ALL THE KING'S MEN* 77 (1946); *see also* CARTER ET AL., *supra* note 55, at 185–86.

¹³⁹ *See* GALIE, *supra* note 61, at 112.

¹⁴⁰ RICHARD B. MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 162 (Henry Steele Commager & Richard B. Morris eds., 1987).

¹⁴¹ ELLISON, *supra* note 1, at 10.

¹⁴² G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* xxi (S.W. Dyde trans., Dover Publ'ns 2005) (1820).