[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022 and J-18E-2022]
[MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DOUG MCLINKO, Appellee v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants	:	No. 14 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 244 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Appellees v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellants	:	No. 15 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

DOUG MCLINKO	:	No. 17 MAP 2022
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 244
	:	MD 2021 dated January 28, 2022.
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: March 8, 2022
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	
	:	
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK	:	No. 18 MAP 2022
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court at No. 293
	:	MD 2021 dated January 28, 2022.
	:	
	:	ARGUED: March 8, 2022
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE	:	
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	

TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Cross Appellants v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellees	:	No. 19 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

CONCURRING OPINION

JUSTICE WECHT **DECIDED: August 2, 2022**

I join the learned Majority in full, except for its determination that Act 77 prescribed an "other method" of voting, pursuant to Article VII, Section 4 of our Constitution.

As this Court enters its fourth century of service to the Commonwealth, this appeal illustrates the simple truth that a great deal of our function as expositors of the Constitution of Pennsylvania boils down to how we treat our earlier decisions. This case raises fundamental questions about legislative power, with particular focus on the exercise of the elective franchise. Article VII, Section 1 of our organic charter sets forth the qualifications of Pennsylvania's electors. It provides, *inter alia*, that an elector "shall have resided in the election district where he or she shall offer to vote at least 60 days

immediately preceding the election." PA. CONST. art. VII, § 1. In 1862, the Court confronted a challenge to an act of the General Assembly providing for absentee voting by certain electors then engaged in military service too far away from their established election districts to vote in person. Invalidating that law, the Court declared that "[t]o 'offer to vote' by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it." *Chase v. Miller*, 41 Pa. 403, 419 (1862). And so it has been the general rule in Pennsylvania that voters cast their ballots in person. *See id.*

The Commonwealth Court discerned "nothing fusty" about that precedent. *McLinko v. Dep't of State*, 270 A.3d 1243, 1261 (Pa. Cmwlth. 2022). Following *Chase* to the letter, the lower court concluded that the General Assembly exceeded its power when it provided for universal, no-excuse mail-in voting via Act 77 of 2019.[1] *Id.* at 1273. Conversely, the Majority today dismisses the *Chase* Court's construction of "offer to vote" as non-binding *dicta*, both "incidental" and "unnecessary" to that holding. *See* Maj. Op. at 52. Finding that Article VII, Section 1 places no such limitation upon the General Assembly's plenary authority to extend remote voting to the electorate as a whole by statute, the Court upholds Act 77 as a valid exercise of legislative power. *Id.* at 74.

While I join the learned Majority in full with respect to its analysis of Section 13 of Act 77, *see id.* at 41-45, and similarly find no constitutional impediment to the General Assembly legislating universal mail-in voting, I write separately to underscore *Chase*'s infirmities relative to both its constitutional era and ours. *Obiter dictum* cannot compel an outcome in later disputes, but it may nonetheless retain some degree of persuasive

[1] Act of Oct. 31, 2019, P.L. 552, No. 77.

value.[2] While I do not necessarily disagree with the assertion that *Chase*'s treatment of "offer to vote" constitutes *dicta*,[3] its role in today's constitutional analysis merits further close examination here.

The Constitution "must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 925 (Pa. 2004). What existed as Article III, Section 1 at the time of *Chase*, *see* PA. CONST. (1838) art. III, § 1, and now occupies Article VII, Section 1, has survived two significant moments of constitutional revision. We therefore must consider the possibility that, when the people engaged in broad-spectrum revisions that culminated in the Constitutions of 1874 and 1968, they deliberately re-ratified this "offer to vote" provision as *Chase* understood it. In other words, even if the in-person requirement *Chase* gleaned from the Constitution was inessential to its ruling, what began as commentary with dubious legal effect might have *become* law when the citizenry preserved the same terminology that *Chase* had so described.

The value of consistency in constitutional interpretation militates in favor of preserving and faithfully applying this Court's past interpretations of our Constitution. *See Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006) ("The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, a conclusion reached in

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[2] "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Obiter dictum*, BLACK'S LAW DICTIONARY 1240 (10th ed. 2014). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (describing *dicta* as expressions "which may be followed if sufficiently persuasive[,] but which are not controlling").

[3] *See* Maj. Op. at 51 ("[T]he clear target of the Court's attention in *Chase* was that the Military Absentee Act permitted voting in locations other than in duly created legislative election districts."). I discuss the elements of *Chase* that retain precedential merit in greater detail *infra*, at 16-18.

one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different.") (cleaned up). Still, though, our respect for precedent can go only so far, especially in the constitutional arena, where we have held that blind adherence thereto is no excuse "for perpetuating error." *See id*. at 967 (quoting *Mayle v. Pa. Dep't of Highways*, 388 A.2d 709, 720 (Pa. 1978) ("[T]he doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.")). Whatever deference is owed, reviewing courts must always bow to the "force of better reasoning," *see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 408 (1932) (Brandeis, J., dissenting), and our "ultimate touchstone" is the text of the Constitution itself. *Firing v. Kephart*, 353 A.2d 833, 835-36 (Pa. 1976). So, while I am cautious not to hastily discount the persuasive value of *dicta*, I nonetheless reject the path of unquestioning adherence to *Chase*. *See McLinko*, 270 A.3d at 1273. The provisions that govern the franchise and its exercise have changed dramatically since 1862.[4] It would therefore disserve the foregoing principles to kick the proverbial tires of *Chase* and award it some perfunctory approval based upon a colorable theory of acquiescence. The contest between a requirement that may have been sewn into the fabric of the Constitution by the function of time or consistent legislative action and the document's plain language is no contest at all.

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[4] *Compare* PA. CONST. (1838) art. III, § 2 ("All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*."), *with* PA. CONST., art. VII, § 4 ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."). Beyond this clear expansion of legislative authority over the manner of holding elections, Article VII now also includes Section 14, which establishes a right to absentee voting for several enumerated populations. *See* PA. CONST. art VII, § 14. I discuss the function of Section 14 in more detail *infra*, at 20-24.

Upon closer examination, Justice Woodward's treatment of "offer to vote" represents precisely the sort of *ipse dixit* that exceeds this Court's constitutional prerogative. Judicial review is not an exercise in consulting oracles whose proclamations hold water by virtue of some inherent authority. Rather, it represents the deliberative and analytical work of courts effectuating the will of the people, from whom all power flows, *see* PA. CONST. art. I, § 2,[5] as they have expressed it in writing. The *Chase* Court's construction of "offer to vote" finds no basis in the text or structure of Article VII. It neither aligns with the meaning of those words—presently or at the time of their inclusion in our Constitution—nor does it reflect the apparent intent of the democratic body that adopted them. In my view, these deficiencies preclude us from following *Chase* today.

The 1862 Court's analysis suffers mightily from the outset. The Court began by observing that the General Assembly had drafted the Military Absentee Act of 1839—which was "virtually a reprint of" the Military Absentee Act of 1813—five years before its enactment. *Chase*, 41 Pa. at 416. From the bare fact that "the legislature passed [the 1839 Act] pretty much in the words submitted," the Court deduced that the General Assembly failed to recognize "the changes which . . . had taken place in our fundamental law" over the interim—*i.e.*, the revision of the Constitution of 1790. *Id.* at 417. "We are not to wonder at this," Justice Woodward relates, "for instances of even more careless legislation are not uncommon." *Id.* To wit, since the Legislature "did not hesitate to retain the substance of the Act of 1813[,]" the *Chase* Court theorized that it irresponsibly overlooked the ratification of the 1838 Constitution and the introduction of "offer to vote" between 1834 and 1839. *Id.*

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[5] "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. . . ."

But this Court presumes neither carelessness nor ignorance from our General Assembly. Rather, the Legislature's acts "enjoy a strong presumption of validity, and will only be declared void if they violate the Constitution clearly, palpably, and plainly." *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006) (cleaned up); *see Sharpless v. Mayor of Phila.*, 21 Pa. 147, 164 (1853) (opinion of Black, C.J.) ("[W]e can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly*; and in such manner as to leave *no doubt* or hesitation on our minds.") (emphasis in original). To succeed in challenging a statute's constitutionality is to bear a "very heavy burden," and we must resolve any doubt in favor of the constitutionality of legislative action. *Bullock*, 913 A.2d at 212 (quoting *Payne v. Commonwealth, Dep't of Corr.*, 871 A.2d 795, 800 (Pa. 2005)). By presuming unscrupulous action from a coequal branch of our Commonwealth's government, the *Chase* Court began its analysis on the wrong foot, in derogation of the separation of powers.

The parade of infirmities does not end there, though. As both the Majority and the Acting Secretary observe, the constitutional provision in which "offer to vote" appeared in 1838 concerned the *qualifications* of voters; the *method* of voting was prescribed elsewhere in Article III. *See* Maj. Op. at 30-35; Acting Secretary Br. at 39-46. Recognizing that drafters do not ordinarily "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), this distinction alone led several peer courts interpreting virtually identical "offer to vote" provisions to expressly reject *Chase*'s logic.[6] That its reading assumed the interpolation of a substantive constitutional

[6] *See, e.g.*, *Moore v. Pullem*, 142 S.E. 415, 421-22 (Va. 1928) ("To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing such a statute, appears to us to

ignore fundamental rules of construction. The method of voting is elsewhere . . . specifically and unequivocally committed to the legislative discretion."); *Goodell v. Judith Basin Cty.*, 224 P. 1110, 1114 (Mont. 1924) ("In order . . . to hold that the clause 'at which he offers to vote' was intended to . . . describe the manner of voting, we must assume that the learned men who drafted [that provision] stopped short in the very midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to define . . . manner of voting, by the use of the language employed in [the voter qualifications provision]."); *Jenkins v. State Bd. of Elections of N.C.*, 104 S.E. 346, 349 (N.C. 1920) ("[T]he context of article 6 [of the North Carolina Constitution] indicates that the personal presence of the voter is not required in order to cast his ballot. An offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to [the] proper official. The section requires only that he must make that offer in the precinct where he has resided . . . ."); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916) ("It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, . . . but merely the qualifications on the voters. It is true, under this provision, a person can only vote in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote."); *accord Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936); *Bullington v. Grabow*, 298 P. 1059, 1059-60 (Colo. 1931). Other jurisdictions have rejected similar efforts to conflate voting methods with voter qualifications. *See Jones v. Smith*, 264 S.W. 950, 950-51 (Ark. 1924) (holding that voter qualifications provision of state constitution attaching the phrase "where he may propose to vote" to various residency requirements did not preclude absentee voting); *Morrison v. Springer*, 15 Iowa 304, 345-47 (1863) (same, where voter qualifications provision required sixty days' residency in "the county in which he claims his vote").

Eliding these precedents, Bonner relies heavily upon three decisions from the Supreme Court of New Mexico that credited *Chase*'s conclusion that "offer to vote" required manual delivery of one's ballot. *See* Bonner's Br. at 43-47 & n.8 (citing *Chase v. Lujan*, 149 P.2d 1003 (N.M. 1944); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936); *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936). While those cases *did* invoke our 1862 decision and those of the divided high courts of California and Michigan, *see Bourland v. Hildreth*, 26 Cal. 161 (1864); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865) (*seriatim*), the Majority aptly observes that what drove the New Mexico Supreme Court's decision was a long-standing statutory command, dating to the State's territorial days, that, "All votes shall be by ballot, each voter being required to deliver his own vote in person." *See* Maj. Op. at 27 n.20 (quoting L. 1851, p. 196, Code 1915, § 1999); *see Thompson*, 57 P.2d at 295-96, 301; *see also Lujan*, 149 P.2d at 1004-06 (identifying several other territorial-era election statutes containing "offer to" language, still in force when New Mexico attained statehood, requiring in-person participation for various purposes, including registering to vote). But the *Chase* Court had no such Pennsylvania legacy

requirement in a section that concerns an entirely distinct subject may not, by itself, prove fatal to *Chase*. It does, however, serve to fan the flames of skepticism.

Justice Woodward, himself a delegate to the 1837 constitutional convention, might also have grounded his analysis in the intent and aims of the men who chose to introduce "offer to vote" into the constitutional text. But he did not, and with good reason: any examination of that project would have yielded results that undermined his conclusion. Pages and pages of convention proceedings reveal a body preoccupied with the switch from at-large voting to precinct voting, with no mention whatsoever of any in-person voting requirement.

The most substantial discussion of the proposed Article III, Section 1 took place on Wednesday, January 17, 1838. In its initial draft, the provision did not use the phrase "offer to vote," nor did it require residence in a particular "election district."[7] In this respect, the draft language largely tracked that of the 1790 Constitution.[8] Delegate Emanuel C.

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upon which to rely. Thus, New Mexico's experience provides little support for Bonner's contention.

[7] When debate began on January 17, the provision read as follows:

> SECTION 1. In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state one year, and, if he had previously been a qualified elector of this state, six months, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. Provided that freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in this state one year before the election, shall be entitled to vote, although they shall not have paid taxes.

9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, MAY 2, 1837, 296 (Packer, Barrett, & Parke, pubs., 1839) ("PROCEEDINGS").

[8] *See* PA. CONST. (1790) art. III, § 1:

> In elections by the citizens, every freeman of the age of twenty-one years, having resided in the State two years next before the elections, and within

Reigart of Lancaster County then proposed inserting the words "and shall have resided in the district in which he shall offer to vote, at least ten days immediately preceding such election." 9 PROCEEDINGS, at 296. Ten days, according to Reigart, was a "sufficient time . . . for [an elector] to be assessed. A residence was obtained by the payment of a tax." *Id.* Another delegate, believing "that a residence of ten days was too long, as an absolute qualification," indicated his willingness to support "five, or seven days," *id.* at 303; yet another proposed "fifteen days," *id.* at 314. And after Reigart apparently acquiesced to a shorter timeframe, a third delegate proposed reverting to the original suggestion of ten days. *See id.* Other delegates fretted about which taxes might empower an individual to vote within a given election district. Proposals to include school taxes, poor taxes, and municipal corporation taxes failed by a vote of fifty-five to fifty-four. *Id.* at 313.[9] The convention eventually settled on state and county taxes, leaving that part of the provision unchanged from the 1790 Constitution. *Id.* at 316.

> that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, That the sons of persons qualified as aforesaid, between the age of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.

[9] *See also* 3 PROCEEDINGS, at 92-95. Regarding a proposal that "free male citizens, qualified by age and residence . . . who shall, within two years next before the election, have paid any public tax required by law should also be entitled to vote in the district in which they reside," one delegate stated his motivations plainly:

> His object in introducing [the amendment] was to give the right of suffrage to every citizen who had paid a State, county, road, school, or poor tax. It had happened that a man had gone and presented his vote, with a receipt of his having paid the poor tax—when he was told by the election officer that he had not paid his county tax, and consequently he could not vote. Now, the object of [the] amendment was to extend the elective franchise, to the greatest possible limits. He would not be in favor of any tax, were it not for ascertaining a man's residence.

The great thrust of the debate, though, concerned whether the Constitution should include a residency requirement at all. Delegate John Cummin of Juniata County, among others, noted that

> many mechanics and laborers were in the habit of removing from place to place. They might, for instance, live in this township today, and tomorrow, go a mile or a mile and a half off. So that, although a man might be a citizen of the state, and in the habit of voting, yet, if this amendment should be adopted, he might probably be deprived of . . . the sacred and invaluable right of suffrage.

Id. at 297.[10] Delegate William Hiester acknowledged the "great difference of opinion as to what constituted a residence. In some places, sleeping a night; in others, a day's residence, or having some washing done, was a sufficient evidence of his right to vote. There was great vagueness and uncertainty, connected with the matter." *Id.* at 298. One delegate wondered whether "a man residing in the city of Philadelphia [whose] house [is] destroyed by a fire," forcing him to move just beyond the city lines to the county of Philadelphia in the days before an election, would "be deprived of the right of suffrage?" *Id.* at 307.

Id. at 92.

[10] Numerous other delegates expressed precisely the same concern. *See, e.g.*, *id.* at 298 ("It was well known that a great many hands were employed, and that they had continually to remove from one county to another, and from township to township. A citizen of one county might remove over to another, and this amendment would deprive him of the right of voting."); *id. at* 304-05 ("[T]he mechanical and laboring classes of society . . . frequent[ly] change [ ] residence[s] in order to suit their occupation. . . . If a man moves into a district the night before the election—if his removal be for the purpose of pursuing the regular business by which he lives—I say that, unless it can be shown that there was fraud, there is no reason why, by a constitutional enactment, we should deprive him of the right to vote. I repudiate the doctrine altogether."). Others attempted to quell those fears, asserting that "[t]here were very few voters . . . who did not reside in their respective districts, for at least ten days before the election." *Id.* at 301.

Interspersed in these discussions are several intimations of the amendment's fundamental purpose. Delegate Walter Craig opined that, if Reigart's proposal were not adopted,

> it will be seen that no residence will be required, to entitle a man to vote in any district, ward, or borough, where he may choose to exercise this privilege; that is to say, if an individual shall have resided in one part of the state for a given space of time, and shall have paid a state or county tax, he will be entitled, in the absence of such an amendment . . . to vote at elections in any other place. The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; *it is to keep [electors] within their own proper districts.*

Id. at 300 (emphasis added). Delegate James Biddle put it succinctly: "Those who resided in a particular district, were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the election in that district." *Id.* at 309.

A lengthy speech by Delegate James Dunlop carried the day. Dunlop began by calling attention to the fact that the General Assembly had enacted a local (or "district") residency requirement by statute in 1799,[11] though he quickly acknowledged that "it might be a question of some doubt, whether an act of assembly could enlarge or restrict the qualifications of electors" beyond those contemplated by the Constitution. *Id.* at 317-18. Although Dunlop believed "this [local residency] requirement . . . long had been held to be the law of the land," he conceded that "considerable doubt" remained as to "whether a man was bound to reside in the district in which he voted." *Id.* at 318. Intimating that "judges and inspectors of elections" might "infringe the present law" on that basis, he opined that "the experience of half a century had shown the necessity of requiring a residence of the voter," such that "a provision ought to be inserted" into the founding charter to quash any lingering questions about the act's propriety. *Id.*

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[11] *See* Act of Feb. 15, 1799, 3 Smith's Laws 340.

Raising the specter of "import[ed] voters from different parts of the country," Dunlop then related a story about two individuals in Baltimore who "had no particular place of residence" and, taking advantage of an omission in the law that required "no particular time" to establish residency for purposes of voting, allegedly "had voted together in every ward but one." *Id.* at 318-19. "Could there be any doubt that under the operation of such a law, many unfair practises [*sic*] were obtained?" *Id.* at 318. Undoubtedly, Philadelphia was no stranger to the practice of such "great frauds." *Id.* "In the city of Pittsburg[h]," he added, "men had been apprehended, charged with having voted where they had no right to vote." *Id.* at 318. With these fears in mind, he concluded:

> [I]f a man could change his residence three or four times a day, there could be no evidence to prove that he was entitled to a vote, but when a man was compelled to reside a certain time in one district, before being permitted to vote, then we fixed the *indicia* of his residence.

Id. at 319 (emphasis in original). The convention then adopted the amendment by a vote of sixty-four to sixty. *Id.* at 320.

Had the *Chase* Court searched for the impetus behind the convention's adoption of the "offer to vote" language, it would have found overwhelming evidence that the delegates were principally concerned with the change from at-large to precinct voting and carefully considered whether the imposition of a local residency requirement to establish one's *qualifications* as an elector could be sustained other than by constitutional amendment. The delegates wrestled with *where* an individual should be allowed to vote, with an eye toward the Commonwealth's ongoing westward expansion and the political rights of transient populations. They quibbled over the duration of the residency

requirement and what sorts of taxes would suffice. But I have found no evidence that delegates concerned themselves with *how* electors should vote.[12]

Even without support from the structure of then-Article III or the intentions that animated its drafting, an interpretation of "offer to vote" that incorporates an in-person requirement might still have prevailed today if it found traction in the plain meaning of those words. But here, too, *Chase*'s reading fails. Nothing about the verb "offer," as presently used or as employed in the nineteenth-century, mandates physical presence. Dictionaries of that era defined "to offer" as "to exhibit anything so as that it may be taken

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[12] The *Chase* Court conceivably might have found a modicum of support for its view in the comments of a lone delegate. James Biddle opined that the Reigart amendment would "make it more difficult for persons disposed to give fraudulent votes, to accomplish their ends." 9 PROCEEDINGS, at 309. An individual who had resided in a district for ten days, he said, "will be known by some person, and frauds cannot be perpetrated as they now are, one voter giving in a vote at perhaps one or two wards in the city, in Southwark and the Northern Liberties on the same day." *Id.* By requiring voters to establish "fixed residences," Biddle suggested "it will be in the power of some one at the polls, to point out where another resides, and if he votes in an improper place, he may be punished for his fraud and crime." *Id.* While this discrete deterrence justification coheres with the Court's eventual analysis, *see Chase*, 41 Pa. at 419 ("[T]he voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful."), it stands alone in the historical record. Moreover, it reinforces the notion that the principal evil that concerned delegates was the circumstance in which electors fraudulently attempted to vote *in more than one election district*, not the particular form of their votes. In any event, the Election Code long has imposed various fraud-control measures—above and beyond anything envisioned by nineteenth-century voter-fraud prognosticators—to ensure that an elector is qualified to vote in a particular election district, that only a qualified elector may obtain an absentee (or, now, mail-in) ballot, and that no elector is able to cast more than one ballot, no matter the method he or she chooses to vote.

or received"; "to attempt; to commence; to propose";[13] or even "to declare a willingness."[14] Not one of these meanings supports Justice Woodward's narrower reading. McLinko concedes that "one might imagine someone sending a contractual 'offer' through the mail"—indeed, the average Pennsylvanian in 1838 or 1862 certainly would have been familiar with offers to buy, sell, contract, appear, prove, etc., by way of a letter, *see, e.g.*, *Slaymaker v. Irwin*, 4 Whart. 369 (Pa. 1839) (adjudicating breach of contract executed by mail)—but nonetheless maintains that offering to vote by mail would be "far less common." McLinko's Br. at 11. In doing so, he devastates his own argument. Faced with two uses of a given word or phrase in the Constitution, both of which would have been understood by the ratifying voter, the Court cannot simply cast one aside as illegitimate on mere conjecture.[15]

It is for these reasons that the Court is justified in discarding *Chase*'s construction of "offer to vote." The text, structure, intent, and original public meaning of that constitutional provision all run counter to its ultimate conclusion. Without any discernible resort to conventional tools of constitutional interpretation, the Court's opinion turned instead on policy considerations, not entirely convincing in their own right, that fall outside the purview of the judicial branch. The General Assembly, the Court alleged, had "open[ed] a wide door for [the] most odious frauds," enabling "political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and

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[13] SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE 503 (1828 ed.); *cf.* 9 PROCEEDINGS, at 315 ("[H]e must prove that he has lived in some particular district for the last fifteen days prior to the election, at which he *purposes* [*sic*] to vote.") (emphasis added).

[14] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 689 (1828).

[15] To do so, in fact, would contradict our mandate to resolve all doubts about constitutionality in favor of the Legislature. *Cf. Payne*, 871 A.2d at 800.

substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law." *Chase*, 41 Pa. at 425; *id.* ("And this is the great vice of [the Act]—that it creates the occasion and furnishes the opportunity for such abominable practices."). These considerations do not belong in the courts, but in the halls of the General Assembly, and their prominence in the *Chase* Court's analysis engenders still more suspicion as to the legitimacy and soundness of its interpretation of "offer to vote."

While the foregoing considerations establish why *Chase*'s reading of then-Article III (now-Article VII), Section 1 should be abrogated (to the extent they constitute binding precedent at all), other elements of that decision survive today's review. As the Majority recognizes, a great deal of the *Chase* Court's reasoning concerned the deputization of military commanders—who, in many cases, may not even have been Pennsylvanians—to create *ad hoc* election districts which may have fallen outside the Commonwealth's borders. Setting aside whether the General Assembly "could form a district *beyond* our territorial jurisdiction for the convenience of our own citizens," *id.* at 420 (emphasis in original), Justice Woodward, speaking for himself, granted that the General Assembly could "make a military camp in Pennsylvania an election district and declare that military sojourn and service therein for ten days should be equivalent to a constitutional residence for the purposes of election." *Id.* at 421.[16] But that is not what the Military Absentee Act of 1839 did. Rather, the Act delegated to "the commanding officer of the troop or company to which [the electors] belong" the authority to "appoint" "such place" at which the electors "may exercise the right of suffrage." *Id.* (quoting Section 43 of the Act).

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[16] *See id.* ("I would be extremely loth to think such a law unconstitutional. These observations, however, . . . must not be considered as expressing the opinion of the court, but only my own.").

As the Court explained, "the legislature had no power to authorize a military commander to make an election district." *Id.* at 422.

> It is a part of the civil administration—this designating of election districts—and however it may be committed by one of the three co-ordinate departments of the government to another of those departments, as by the legislature to the judiciary, no civil functions of either department can be delegated to a military commander. This would be to confound the first principles of the government. If the legislature had said in the most express terms that the commander might declare his camp, wherever it might happen to be, an election district, it could have availed nothing, for the constitution, in referring to the legislature for election districts, recognized them as among the *civil* institutions of the state, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the state. The constitution says "the military shall, in all cases and at all times, be in strict subordination to the civil power,[17] which is marking a distinction between the two powers with great emphasis. To the civil and not to the military power did the constitution intrust [*sic*] the formation of election districts, and therefore the civil cannot commit it to the military.
>
> If, then, the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under [Section 43 of the Act]? Without an election district there can be no constitutional voting. [Section 43] provides for no election district, and no military commander can be empowered to form one—hence it follows, as an inevitable deduction, that the "place" referred to in that section is inconsistent with the constitutional requisition of an election district, and that whatever votes have been cast in pursuance of that section since the Constitution of 1838 came in, have been cast without authority of law.

Id. In this respect, the Court relied not upon conclusory pronouncements untethered from the constitutional text, but longstanding principles of constitutional democratic governance and the separation of powers. The discussion of "offer to vote" being entirely

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[17] PA. CONST. (1838) art. IX, § 22 ("No standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.")*, since redesignated* PA. CONST. art. I, § 22.

severable from this more substantive and defensible analysis, *Chase* stands as good law insofar as it expounds principles of non-delegation vis-à-vis the military.[18]

Without *Chase*'s narrow construction of "offer to vote," McLinko and Bonner must find some other constitutional hook to establish that the General Assembly lacked authority to enact Act 77. But there is none to be found. Article VII, Section 4 requires that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." PA. CONST. art. VII, § 4. The Majority offers a persuasive account of the 1901 addition of "such other method" and the power that it confers upon the Legislature, *see* Maj. Op. at 64-69, but resort to that provision is wholly unnecessary to resolve this case. Mail-in ballots are ballots.[19] [20]

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[18] To be clear, *Chase* did not question the General Assembly's authority to delegate the creation of election districts to other *civil* powers, including the courts. The Court noted that, from the adoption of the 1799 law, "we have had innumerable Acts of Assembly creating, dividing, and subdividing election districts, until the legislature grew tired of the subject, and, in 1854, turned it over to the Courts of Quarter Sessions, to fix election districts, 'so as to suit the convenience of the inhabitants thereof.'" *Chase*, 41 Pa. at 420 (quoting Purd. 1069). Nor, curiously, did Justice Woodward impugn the Legislature's power to "sanction" election practices that deviated from "the natural and obvious reading of" Article III. *Id.* at 424, 428; *see id.* at 424 (citing, for example, the fact "that voters in the township of [Wilkes-Barre] . . . are accustomed to vote in the borough of [Wilkes-Barre], which is a separate election district, and other similar instances [that] are said to exist in Luzerne County, where votes are actually cast in an election district adjacent to that in which the electors reside"); *id.* ("If this practice have the sanction of an Act of Assembly, it is defensible; if it have not, I know of no principle on which it can be excused except that of *communis error*."). At bottom, the Court's concern was for "legislative control of election districts." *Id.* Because the General Assembly could not dictate the actions of military commanders, its efforts to delegate the creation of *ad hoc* districts to those commanders in their absolute discretion ran afoul of the Constitution.

[19] For this reason, I do not join the Majority's analysis in the paragraph that begins on page 71.

[20] The Commonwealth Court opined that, "where language has been retained [from one version of the Constitution to the next], this has been done advisedly in order to retain the original meaning." *McLinko*, 270 A.3d at 1263. To refer to the "1968 Constitution" or the "1838 Constitution," it explained, is a misnomer. These are "designations for

convenience only," because our founding charter "has been amended, *not replaced and not readopted*, by the proposals of the last four conventions." *Id.* (citing ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 7 (1985) (Commonwealth Court's emphasis)). The Majority appears to credit this view. Maj. Op. at 33 n.24.

Interpreters might ask, though, if the Constitution is to be "interpreted in its popular sense, as understood by the people when they voted on its adoption," *Ieropoli*, 842 A.2d at 925, to which people and to which adoption do we refer? Following the Commonwealth Court's logic, it appears, our sole touchstone in determining the meaning of a term like "ballot" would be the 1776 constitution. *See* PA. CONST. (1776) ch. II, § 32 ("All elections . . . shall be by ballot . . . ."). We would assume that original meaning to have been intentionally retained in 1790, 1838, 1874, and 1968. But, as the lower court's own analysis demonstrates, what constitutes a "ballot" has evolved to no small degree. *See McLinko*, 270 A.3d at 1254-56. If the interpretive inquiry were limited to the popular sense of "ballot" in 1776, we might understand it to mean a "printed slate[ ] of candidate selections . . . that political parties distributed to their supporters and pressed upon others at the polls," to the exclusion of all other forms. *Id.* at 1255 (quoting *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1882 (2018)). But the 1968 ratifying voter, accustomed to the Australian ballot—which only made its way into Pennsylvania law in 1891, *id.* (citing *De Walt v. Bartley*, 24 A. 185, 186-87 (Pa. 1892); *Working Families Party v. Commonwealth*, 209 A.3d 270, 293 n.11 (Pa. 2019) (Wecht, J., concurring and dissenting))—might not have viewed such pre-ordained selections as a true "ballot" at all. Taken to its logical extreme, this principle might preclude use of both state-generated paper ballots, as well as certain voting machines that "display an electronic ballot on a screen and allow an individual to vote using a button, dial, or touch screen," *Banfield v. Cortes*, 110 A.3d 155, 159 (Pa. 2015)—none of which would have been familiar to the eighteenth-century Pennsylvanian.

There can be no doubt that, where language is retained, its extant meaning and prior constructions are relevant to its present interpretation. I decline, however, to spin Judge Woodside's comment about "designations" (as opposed to "constitutions") into a broader principle of constitutional theory that would render sacrosanct the understanding of the men who promulgated our 1776 Constitution—which, like the Constitution of 1790, was never submitted to the people of Pennsylvania for ratification, *see* PA. CONST. (1776) Whereas cl.; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 n.68 (Pa. 2018); *see generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 232-33, 307, 332-40, 438-46 (1998 ed.)—and would functionally ignore the likely understanding of the millions of Pennsylvanians who ratified our current governing charter in 1968. This Court has never passed upon whether our Commonwealth has had one moment of constitutional self-determination or five. We have, however, referred to the projects of 1790, 1838, 1874, and 1968 as culminating in "new" constitutions. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 744 (Pa. 2012) ("[T]he new Constitution . . . was approved by Pennsylvania voters [in 1968]."); *Appeal of Long*, 87 Pa. 114, 116 (1878) ("since the adoption of the New Constitution of 1874"); *Kittanning*

And neither McLinko nor Bonner contends that existing provisions of the Election Code fail to ensure constitutionally-prescribed secrecy. Accordingly, Act 77 finds no impediment in Article VII, Section 4.

Appellees' remaining arguments, which derive from Article VII, Section 14,[21] are strained and unconvincing. They claim that, to permit the legislature to provide for universal mail-in voting by statute (rather than by constitutional amendment) would render that provision mere surplusage. *See* McLinko's Br. at 21-24; Bonner's Br. at 52. The Commonwealth Court agreed. *McLinko*, 270 A.3d at 1263. In that court's view, "Section 14 established the rules of absentee voting as both a floor and a ceiling." *Id.* at 1264. That is, by exclusively granting this privilege to the populations enumerated therein, the Constitution foreclosed its availability to all others. *See* Bonner's Br. at 27-31. But, as the Majority explains, this is incorrect. Section 14 "*guarantees* that regardless of the legislature's exercise of its authority to determine the way that votes may be cast, those classes of absentee voters designated within it" retain an enforceable right "to exercise

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Coal Co. v. Commonwealth, 79 Pa. 100, 105 (1875) ("This power was possessed under the constitution of 1790 . . . and existed when the new constitution was framed and adopted."). Accordingly, the Commonwealth Court's commentary on the point should be recognized as nothing more than an expression of one available view among several, the selection of which could be quite consequential.

[21] Article VII, Section 14(a) provides:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a).

their franchise regardless of their location on Election Day." Maj. Op. at 73-74 (footnote omitted; emphasis added).

Appellees' argument also neglects to address Section 14's use of "shall," rather than "may." Legislative power is not circumscribed by just *any* implication from the constitutional text, but only that which is *necessary* to the document's coherence. *Bailey v. Waters*, 162 A. 819, 820 (Pa. 1932) ("A long line of judicial pronouncements declare that the Legislature may be prohibited by *necessary* implication from doing things which are not expressly prohibited in the Constitution."); *Commonwealth ex rel. Brown v. Heck*, 95 A. 929, 930 (Pa. 1915) ("If such power does not exist, it is because the Constitution has expressly withheld it or forbidden it by *necessary* implication."); *Appeal of Lewis*, 67 Pa. 153, 165 (Pa. 1870) ("A prohibition may be implied even in a constitution, but the implication must be very plain and *necessary*. The legislature possess all legislative power except such as is prohibited by express words or *necessary* implication.") (all emphases added).

To illustrate the problem that this presents for Appellees' argument, imagine that a dog-owner hires a neighbor to check in on Fido while she is at work. She instructs the neighbor that he "shall" give Fido one cup of kibble in his bowl, fresh water, and a walk around the block. No reasonable interpretation of those requirements *necessarily* prohibits the neighbor from also playing fetch with Fido, or rubbing his belly, or giving him a treat. The neighbor would not need special dispensation to go above the bare minimum, and likely would not face adverse consequences as long as that bare minimum was met. Had the owner wished to set both a floor *and* a ceiling with respect to the neighbor's activity, she could have used "may" instead of "shall"—in which case a *necessary* implication of her omitting anything about fetch, belly rubs, or treats from the instructions is that they are beyond the neighbor's purview. *See, e.g.*, *Thompson v. Thompson*, 223

A.3d 1272, 1277 (Pa. 2020) ("Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.") (internal quotation marks omitted).

In an earlier era, Appellees' claims might have held water. Between 1949 and 1967, the Constitution was amended several times to permit—but not to require—the General Assembly to provide a means of absentee voting for certain "qualified war veteran voters,"[22] and, later, voters who might be "unavoidably absent from the State or county of their residence because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper

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[22] Article VIII, Section 18 was added by amendment November 8, 1949. It provided:

> The General Assembly *may*, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters, who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their being bedridden or hospitalized due to illness or physical disability contracted or suffered in connection with, or as a direct result of, their military service, may vote and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VIII, § 18 (emphasis added); *see* 1949 Pa. Laws 2138. The circumstances covered by Section 18 were refined on November 3, 1953, but the permissive language was retained:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters may vote, who are unable to attend at their proper polling places because of being bed-ridden or otherwise physically incapacitated, and may provide for the return and canvass of their votes in the election district in which they respectively reside. Positive proof of being bed-ridden or otherwise physically incapacitated shall be given by affidavit or by certification of a physician, hospital or other authenticated source.

PA. CONST. (1874) art. VIII, § 18; *see* 1953 Pa. Laws 1496.

polling places because of illness or physical disability."[23] But that state of affairs changed significantly on May 16, 1967, when Section 18 was repealed and Section 19 was altered considerably. Renumbered Article VII, Section 14, the newly ratified provision commanded that:

> The Legislature *shall*, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VII, § 14 (emphasis added); *see* 1967 Pa. Laws 1048. In 1985, the class of guaranteed absentee voters covered by Section 14 was expanded to include voters "who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee." PA. CONST. art. VII, § 14; *see* 1985 Pa. Laws 555.[24]

The electorate having amended the operative verb in Section 14 from the permissive "may" to the obligatory "shall" in 1967, this provision now functions as a

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[23] Article VIII, Section 19, added by amendment November 5, 1957, provided:

> The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VIII, § 19; *see* 1957 Pa. Laws 1019.

[24] The most recent amendment to this provision, replacing "State or county" with "municipality" and adding a new subsection containing a definition for the same, was ratified November 4, 1997. *See* 1997 Pa. Laws 636.

bulwark against the prospect of a temporal majority that might stand to benefit if the populations enumerated therein were excluded from the democratic process. Were that hypothetical antidemocratic majority to repeal the Election Code in its entirety, Section 14 guarantees those discrete classes of electors relief in the form of an absentee ballot. Any member of those enumerated populations could petition the courts to compel the General Assembly to fulfill its constitutional obligations to them. But the same cannot be said of those entitled to vote by mail without an excuse under Act 77. If the General Assembly were to repeal that statute tomorrow, the ordinary voter would have no constitutional claim to a no-excuse mail-in ballot; absent a constitutional *mandate*, the courts have no authority to compel the Legislature to extend such a forbearance beyond the protected classes of electors expressly identified. Thus, Section 14 and Act 77 accomplish fundamentally different ends, and the Majority's reading renders no part of the Constitution surplusage.

In announcing its decision today, the Court looks past the celebrated bipartisan nature of this law's passage; past the fact that several of the challengers in the instant suit voted for its adoption; past whatever reliance interests may have developed as millions of Pennsylvanians became accustomed to voting by mail these past several years; and even past the startlingly offensive, antidemocratic overtones[25] of the *Chase* Court's rationale. We consider only whether any defensible construction of the text of our Constitution mandates in-person voting. Having afforded *Chase* its proper scrutiny, I conclude that no such construction exists, and that Act 77 must stand.

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[25] *See Chase*, 41 Pa. at 426 ("[The Pennsylvania Constitution of 1838] withholds [suffrage] altogether from about four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject.").