Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?

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INTRODUCTION

The second sentence of Section 2 of the Fourteenth Amendment[1] presents one of the Constitution's most enduring mysteries. Adopted in 1868, this clause was designed to encourage the former Confederate states to enfranchise African-Americans by excluding former slaves from the state's population for purposes of apportioning Congress if former slaves were denied the right to vote. As Justice Thurgood Marshall explained, "Section 2 . . . put Southern States to a choice—enfranchise Negro voters or lose congressional representation."[2] Southern states systematically disenfranchised African-Americans after Reconstruction,[3] so the conditions triggering invocation of Section 2 existed for the better

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1. Section 2 of the Fourteenth Amendment provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Hereinafter, the term "Section 2" refers to the second sentence of Section 2.

2. Richardson v. Ramirez, 418 U.S. 24, 73–74 (1974) (Marshall, J., dissenting).

3. *See* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT (1982); MARSHA TYSON DARLING, RACE, VOTING, REDISTRICTING AND THE CONSTITUTION (2001); V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 533–54 (1949); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–16 (2000); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (1976); FRANK PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913, at 321–49 (1951). The reports of the U.S. Commission on Civil Rights are also useful. *See, e.g.*, U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS (1981);

part of a century. Yet, under both Republican and Democratic-controlled Congresses, no discriminating state lost even a single seat in the House of Representatives when Congress reapportioned itself.[4] From the era of *Plessy* to the era of *Brown* and beyond, no court ever declared that disenfranchised African-Americans would be excluded from a state's population. It was as if Section 2 had disappeared.

Although no other provision of the Constitution of 1787 or any of its amendments has been so comprehensively unenforced, Section 2 has hardly gone unnoticed. Akhil Amar,[5] Michael Curtis,[6] Pamela Karlan,[7] Michael Klarman,[8] and other scholars[9] point to nonenforcement of Section 2 as evidence of federal indifference toward Jim Crow.[10] They are right that the government could have done more, but there is a more fundamental explanation for Section 2's desuetude: It was repealed upon ratification of the Fifteenth Amendment in 1870.

Congress proposed the Fifteenth Amendment in 1869 because Section 2 had

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U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975); U.S. COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1965) (all *reprinted in* GABRIEL J. CHIN & LORI WAGNER, THE U.S. COMMISSION ON CIVIL RIGHTS REPORTS ON VOTING (William S. Hein, forthcoming 2004)).

4. THOMAS I. EMERSON & DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 325 n.5 (1952) ("No legislation to enforce this provision has ever been enacted.").

5. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 38 n.38 (2000) ("[F]or many decades the Court utterly failed to enforce blacks' voting rights under the Article IV Republican Government Clause, Section 2 of the Fourteenth Amendment, and the Fifteenth Amendment.").

6. Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 256 (2000) ("In spite of the guarantees of the Fifteenth Amendment (and even ignoring section two of the Fourteenth Amendment), African-Americans were deprived of the right to vote in large parts of the South.").

7. Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 n.26 (2001) ("Despite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger").

8. Michael Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 370 ("Congress was unwilling to enforce Section 2 of the Fourteenth Amendment against black disenfranchisement"); *id.* at 387–88 ("Congress . . . implicitly acquiesced in disfranchisement by declining to reduce southern congressional representation under Section 2 of the Fourteenth Amendment.").

9. *See, e.g.*, 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 540–41 (1953) (referring to "notorious" nonenforcement of Section 2); EMERSON & HABER, *supra* note 4, at 325 n.5; ARNOLD J. LIEN, CONCURRING OPINION: THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT 39 (Greenwood Press reprint 1975) (1957) ("A strict legal construction would seem to leave the section still operative, but there is no likelihood whatsoever that Congress will ever take any action under it."); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 141 (1966) (observing that Section 2 was "totally ignored").

10. In the early 1960s, several scholarly articles urged enforcement of Section 2. *See* Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 W. RES. L. REV. 965 (1965); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960); Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 L. TRANSITION 128 (1963); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961).

failed.[11] The former Confederate states had unanimously refused to enfranchise African-Americans in spite of Section 2's threat of reducing congressional representation.[12] Accordingly, even before the Fourteenth Amendment was ratified, Congress moved beyond Section 2's indirect approach, passing laws that actually granted African-Americans the right to vote. In 1867, Congress used the Army to enfranchise African-Americans in the South. It also required the former Confederate states to adopt constitutions allowing African-Americans to vote as a condition of ending military occupation.[13]

Six months after the Fourteenth Amendment became effective, Congress proposed the Fifteenth Amendment in 1869 to constitutionalize the enfranchisement already achieved through military force, federal statutes, and state constitutional law.[14] The Constitution thus adopted a permanent policy of actually allowing qualified voters to vote, regardless of race. There was never a moment when Section 2 offered coverage broader than other laws in force—never a moment, that is, when it could or should have been implemented to protect African-American voters in the South.

Section 2 is nevertheless critically important to contemporary voting rights law. Although intended to promote the right to vote, Section 2 has played an ironic role in limiting the franchise of African-Americans. In *Richardson v. Ramirez*,[15] the Supreme Court held that Section 2 allowed states to disenfranchise felons. The Court reasoned that Section 2 provided that the apportionment penalty was inapplicable if individuals were disenfranchised for conviction of "rebellion [] or other crime"; therefore, the Fourteenth Amendment affirmatively authorized felon disenfranchisement.[16] In addition, courts use Section 2 to restrict the scope of the Voting Rights Act of 1965, defeating arguments that apparently applicable provisions of the statute apply to state laws disenfranchising felons.[17]

Criminal disenfranchisement was widely used in the South after Reconstruction to suppress the vote of African-Americans.[18] It remains the major basis for

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11. The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

12. *See infra* notes 55–59 and accompanying text.

13. *See infra* notes 60–70 and accompanying text.

14. *See infra* notes 71–74 and accompanying text.

15. 418 U.S. 24 (1974).

16. *See infra* notes 289–301 and accompanying text.

17. *See infra* Part IV.D.

18. A number of studies examine felon disenfranchisement, most of them critically. *See, e.g.*, KEYSSAR, *supra* note 3, at 302–08; Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 770–74 (2000); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1054 (arguing that "criminal disenfranchisement runs contrary to the essential commitments of modern American political thought."); George P. Fletcher,

the disproportionate disenfranchisement of African-American adults. Thirteen percent of African-American men cannot vote because of criminal conviction, a rate seven times the national average.[19] Felon disenfranchisement has tremendous effects on the political landscape—leading researchers report that felon disenfranchisement "may have altered the outcome of as many as seven recent U.S. Senate elections and one presidential election."[20] Because the Fifteenth Amendment repealed Section 2, courts must reconsider the treatment of felon disenfranchisement.

As Part I of this Article explains, the Fifteenth Amendment repudiated Section 2's theoretical and structural approach to African-American suffrage. Section 2 recognized state authority over the vote, including the power to discriminate on the basis of race.[21] In states that denied the vote to African-Americans, white voters had extra impact because African-Americans counted for purposes of allocating seats in Congress but did not participate in electing those who served there. Section 2 thus encouraged states to let African-Americans vote by punishing states disenfranchising African-Americans, but it left the ultimate decision to the states. Instead of merely encouraging nondiscrimination, the Fifteenth Amendment imposed it, granting the right to vote to

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Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, 46 UCLA L. REV. 1895, 1900 (1999) ("The impact of disenfranchisement is felt primarily in the black community."); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1941 (2002) ("[S]kyrocketing incarceration rates have raised the stakes of criminal disenfranchisement, altering the composition of the American electorate."); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 543 (1993) ("Criminal disenfranchisement is an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with racially discriminatory intent and has operated throughout our nation with racially discriminatory results."); PATRICIA ALLARD & MARC MAUER, REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS (2000), *available at* http://www.sentencingproject.org/pdfs/9085.pdf (last visited Feb. 8, 2004); SENTENCING PROJECT, LEGISLATIVE CHANGES ON FELON DISENFRANCHISEMENT, 1996–2003, at 1 (2003) [hereinafter LEGISLATIVE CHANGES], ("Overall, the strong direction of movement on disenfranchisement is toward expanding the right to vote.") *available at* http://www.sentencingproject.org/pdfs/legchanges-report.pdf (last visited Feb. 8, 2004); THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998) [hereinafter LOSING THE VOTE], ("In the late twentieth century, the laws have no discernible legitimate purpose.") *available at* http://www.sentencingproject.org/pdfs/9080.pdf (last visited Feb. 8, 2004). *But see* Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159 (2001) (defending felon disenfranchisement).

19. *See* LOSING THE VOTE, *supra* note 18, at 2; *see also* NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 45 (2001) ("In states that enact a permanent loss of the right to vote, this feature combined with the demographics of the criminal justice system produces a significant and disproportionate effect on black citizens, to the extent that as many as one-sixth of the black population is permanently disfranchised in some states."), *available at* http://www.reformelections.org/data/reports/99_full_report.pdf (last visited Feb. 8, 2004).

20. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 794 (2002).

21. *See, e.g.*, Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 535 (1989) (reviewing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988)).

qualified African-Americans. The Fifteenth Amendment represented a newly restrictive view of both state power and the consequences of exceeding it.

Part II argues that Section 2 and the Fifteenth Amendment cannot simultaneously regulate voting discrimination. Section 2 is like the Fifteenth Amendment, except that it covers fewer people, fewer elections, and offers more limited remedies. Lesser in every way, Section 2 could never provide the rule of decision once the Fifteenth Amendment became law. Imagine a claim of voting discrimination against African-Americans, de facto or de jure, in large numbers or small, in any region of the country. If no discrimination could ultimately be demonstrated, no relief would be warranted under the Fifteenth Amendment or under Section 2. On the other hand, if unconstitutional discrimination were shown, the Fifteenth Amendment, which the Court held early on was self-executing, would require enfranchisement of African-Americans.[22] Once African-Americans were enfranchised, there would be no occasion to invoke Section 2. Given the Fifteenth Amendment, because both successful and unsuccessful race discrimination claims would not permit resort to the Section 2 remedy, it is entirely understandable that it was never invoked.[23] Likewise, because Section 2 could never apply given the Fifteenth Amendment, under established principles of statutory construction and repeal by implication,[24] Section 2 was repealed. Of course, the general concept embodied in Section 2 may be useful in particular cases; lawbreakers should be denied illegitimate power from their violation of the Constitution. However, the enforcement provision of the Fifteenth Amendment grants powers exceeding the remedy of Section 2, with none of Section 2's textual restrictions and limitations.[25]

Section 2 could still have an independent role if it were construed to cover suffrage restrictions other than race. However, as Part III explains, the Court has consistently read Section 2 narrowly, offering no rights or remedies not independently granted by other parts of the Constitution. Like the Court, Congress has also treated Section 2 as a nullity. Although it was often discussed, Congress has never actually used it to change the apportionment of congressional seats or presidential electors.[26]

Part IV examines the implications of Section 2's repeal. A repealed Section 2 cannot provide textual constitutional support for felon disenfranchisement. In 1868, Congress and the states ratifying the Fourteenth Amendment believed that felon disenfranchisement was within the power of the states. However, the modern Supreme Court's review of voting restrictions under the Equal Protection Clause of Section 1 of the Fourteenth Amendment, routinely employs strict scrutiny to invalidate restrictions like durational residency requirements that were common and thought to be permissible both in 1868, when the Fourteenth

22. South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966).
23. *See infra* Part II.B.
24. *See infra* Part II.A.
25. *See infra* Part II.C.
26. *See infra* Part III.D.

Amendment was ratified, and when the restrictions were struck down.[27] Only felon disenfranchisement has been exempted from analysis under strict scrutiny because the Supreme Court concluded that it was authorized by the text of the Fourteenth Amendment.[28] This conclusion has also made Section 2 influential in Voting Rights Act cases.[29] Because Section 2 is not a venerated part of the current Constitution, but instead part of a brief political experiment quickly recognized as a mistake and then abandoned, these decisions must be reconsidered.

That Section 2 offers no constitutional support for felon disenfranchisement does not necessarily mean that other justifications are insufficient to validate the practice. However, the Equal Protection Clause should be concerned with felon disenfranchisement because the penalty's purpose and effect has been to suppress the political power of African-Americans. The political effects on African-Americans are not simply a result of disproportionate rates of offending. After Reconstruction, felon disenfranchisement provisions in the former Confederate states were designed to cover crimes thought to be committed more often by African-Americans than by whites.[30] In some states, the convictions of white felons were overlooked while convictions of African-Americans were carefully accounted for by registrars.[31] With respect to drug offenders, the fastest growing portion of the felon population over the past thirty years, there is substantial evidence of prosecution and conviction of African-Americans disproportionate to their rate of offending.[32] With nearly a million felony dispositions in state and federal courts each year,[33] felon disenfranchisement has a major effect on the racial composition of the electorate.

I. THREE-FIFTHS, NO FIFTHS, AND BEYOND

The story of the Reconstruction Amendments is the story of the adoption of increasingly specific and forceful provisions as it became clear that earlier ones were insufficient to achieve the goals of their drafters.[34] Treatment of African-American suffrage reflects this pattern. Section 2 was the first approach employed; when it failed to accomplish its purpose, it was quickly supplanted by stronger measures.

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27. *See infra* Part IV.B.

28. *See infra* notes 289–93 and accompanying text.

29. *See infra* Part IV.D.

30. *See infra* notes 228–36 and accompanying text.

31. *See infra* notes 238–40 and accompanying text.

32. *See infra* note 245 and accompanying text.

33. *See* Bureau of Justice Statistics, Criminal Sentencing Statistics (noting that, in 2000, State and Federal courts convicted a combined total of nearly 984,000 adults of felonies), *at* http://www.ojp.usdoj.gov/bjs/sent.htm (last modified Dec. 10, 2003).

34. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 182–83 (1996).

A. THE THIRTEENTH AMENDMENT AND THE END OF THE THREE-FIFTHS COMPROMISE

At the conclusion of the Civil War, Congress faced a significant change in apportionment resulting from emancipation.[35] Article I, Section 2[36] of the original Constitution allocated representatives and electors[37] among the states on the basis of "numbers," including "three fifths of all other persons," that is, slaves.[38] With the Emancipation Proclamation,[39] the slaves in the South were freed, at least as far as the United States was concerned.[40] When ratification of the Thirteenth Amendment abolished slavery nationally, the category of "all other persons" ceased to exist. The large southern African-American population then counted as five-fifths for purposes of allocating seats in a Congress in which they could neither serve nor participate in electing.[41] Although the Confederacy lost the War, southern states gained national power.

Fortunately for the North, the problem of allocating seats in Congress did not

35. A number of sources offer overviews of the Civil War and its aftermath. *See* FONER, *supra* note 21; MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, VOLUME I: FROM THE FOUNDING TO 1890 (2d ed. 2002); *see also* KYVIG, *supra* note 34, at ch. 8 (discussing adoption of the Reconstruction Amendments); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (discussing the development of the Fourteenth Amendment).

36. Article I, Section 2 provided in full:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

37. *See* U.S. CONST. art. II, § 1, cl. 2 (allowing each state the same number of electors as the "whole number of Senators and Representatives to which the state may be entitled in the Congress").

38. The Constitution thus embraced a remarkable contradiction. If slaves were people, why were they slaves? If they were property—an odious concept but hardly an unintelligible one—why were slave owners entitled to enhanced voting rights compared to those who owned, say, shipyards or insurance companies? Of course, slaves counted as three-fifths for the apportionment of direct taxes as well as for the apportionment of representatives. The issue did not arise under the Articles of Confederation; states set the number of congressional representatives they wanted but shared one vote among them. ARTICLES OF CONFEDERATION art. V (U.S. 1781). The three-fifths compromise has become an icon of constitutional complicity with racism. *See, e.g.*, FLOYD MCKISSICK, THREE FIFTHS OF A MAN (1969). But whatever reasoning and persuasion the slave states used to obtain the three-fifths compromise, the real problem—at least from the perspective of abolitionists and slaves—was the institution of slavery and the Constitution's toleration of it. Fractionalization of African-Americans in this particular clause of the Constitution helped them and the anti-slave interests; a two-fifths or lesser compromise would have been better because it would have further reduced the power of slave interests in Congress.

39. Even before the Emancipation Proclamation, the Union offered emancipation to slaves under various programs. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863–1869, at 13–14 (1990).

40. Of course, technical freedom hardly put the former slaves on a level playing field. *See, e.g.*, DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997) (discussing African-Americans in the criminal justice system).

41. Oregon v. Mitchell, 400 U.S. 112, 157 (1970) (Harlan, J., concurring in part and dissenting in part) ("The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. . . . [T]he consensus was that the South would be entitled to at least 15 new members of Congress, and . . . new presidential electors.").

materialize immediately. The Southern delegation walked out of Congress after the attack on Fort Sumter and, even after the surrender, the Northern delegation decided it did not have to seat any Senators or Representatives from the former Confederate states until it determined that they had satisfactorily restored their relationship with the United States.[42]

B. SECTION 2: THE NO-FIFTHS COMPROMISE

On December 13, 1865, Congress created a Joint Committee on Reconstruction, consisting of six Senators and nine Representatives, charged with proposing constitutional amendments to resolve the political problems leading to the Civil War and raised by its conclusion. The Joint Committee's first measure on the suffrage issue, H.R. 51, provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[43] This proposal received more than a two-thirds vote in the House but only a simple majority in the Senate; several other proposals explicitly mentioning race and color also foundered.[44]

In June 1866, Congress adopted language obscuring the effect of the provisions on racial suffrage. The first sentence of the final version of Section 2 replaced Article I, Section 2 with an apportionment provision that counted all people equally, excluding Indians not taxed.[45] Substantively, this provision seems to have done nothing more than recognize that there were no longer any "all other persons" to count at sixty percent. Although it is aesthetically pleasing that the reference to slavery was removed, functionally, this clause is identical to the one it replaced.

The more meaningful clause of Section 2 encouraged the states to enfranchise African-Americans. It did not grant African-Americans voting rights, even though they were citizens under Section 1.[46] Instead, Section 2 set a price for disenfranchising them: States that disenfranchised "any" male citizen inhabitants over the age of twenty-one, "except for participation in rebellion, or other crime," would suffer a reduction of the basis of their representation in the House of Representatives. Because African-Americans were a majority or large minority in all of the former Confederate states, the consequences of triggering Section 2 would have been substantial.

On the other hand, if the South had called Section 2's bluff, Section 2's penalty

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42. *See, e.g.*, Act of Feb. 8, 1865, 13 Stat. 567 (excluding the Confederate states from the electoral college vote in the 1864 election).

43. BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 53 (1914).

44. *See id.*

45. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

46. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

offered African-Americans and Republicans something less than full compensation. At most, Section 2 would have amounted to a "no-fifths" compromise, restoring (and then some) the three-fifths compromise that had been undone by emancipation. Perhaps Section 2 would have amounted to even less; in some states, gerrymandering and other techniques would have nullified any undesirable aspects of African-American voting even if they were freely allowed to cast ballots. If so, segregationists could have had both complete control and the benefit of the African-American population for purposes of apportioning congressional seats.

If a segregationist state calculated that even such carefully managed enfranchisement of African-Americans would have given them too much power, Section 2 left open the option of de jure disenfranchisement. This option would have deprived the state of any representatives in Congress attributable to the African-American population. But disenfranchisement in all elections for all offices could have led to sanction only with respect to the House of Representatives and the Electoral College. Because Section 2 offered segregationists choices, presumably in every instance they would choose the one that they calculated would give them the most power.[47]

Many slave owners and segregationists, it seems, were single-issue voters: they wanted national power primarily to protect their distinct social system. With that accomplished, they might have been unconcerned about their inability to affect other national issues,[48] particularly given the more limited role of the federal government then. From the perspective of citizens of other states, depriving Southerners of their illegitimate influence in national politics was at least a partial remedy. From the perspective of African-Americans in a particular state seeking political equality, however, it was not enough that segregationists would not have the benefit of African-American numbers in apportioning

47. Many considered Section 2's compromise too generous. In the words of George W. Julian, a Republican who supported the Fourteenth and Fifteenth Amendments, Section 2 was:

> a scheme of cold-blooded treachery and ingratitude to a people who had contributed nearly two hundred thousand soldiers to the armies of the Union, and among whom no traitor had ever been found; and it was urged as a means of securing equality of white representation in the Government when that object could have been perfectly attained by a constitutional amendment arming the negroes of the South with the ballot, instead of leaving them in the absolute power of their enemies.

GEORGE W. JULIAN, POLITICAL RECOLLECTIONS 1840 TO 1872, at 272–73 (1884). *See also* CHESTER JAMES ANTINEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 371 (1997) ("Many republicans in the majority had hoped for early suffrage for the Black Americans, but then concluded an amendment to this effect would not secure ratification in three-quarters of the states."); ROBERT F. HOROWITZ, THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY 118 (1979) (noting that Ashley, a Republican congressman from Ohio who supported the Fourteenth and Fifteenth Amendments, was "distressed that the question of black suffrage was left ultimately to a decision by the Southern states. But he said, 'I intend to go for it, however, because I believe it is the best proposition we can get, and because it reflects the aggregate sentiment of the country.'").

48. *Cf.* FONER, *supra* note 21, at 259 (noting the offer of Southern politicians to waive national representation entirely in exchange for self-government); JOHN S. WISE, A TREATISE ON AMERICAN CITIZENSHIP 234 (1906) ("[A] representative from the South . . . knows that he will be called upon to make many concessions . . . . In return he has, as a rule, but one concession to demand . . . . It is the privilege of being left alone in the management of his State affairs.").

Congress and the Electoral College. More than that, African-Americans should have been able to cast ballots at every level.

The race-neutral language of Section 2 raised the possibility that it applied to all grounds of disenfranchisement, imposing its penalty if individuals were disenfranchised for any reason, except those explicitly authorized. However, the Constitution's traditional discretion about race suggests that this conclusion is not compelled. The Constitution used race-neutral language when it meant slaves in at least three instances,[49] including in the very clause that Section 2 replaced.[50] Indeed, future President James Garfield, who participated in the passage of the Fourteenth and Fifteenth Amendments as a member of Congress, explained that Section 2 did not mention race for precisely the same reason that the original Constitution did not meution race:

> [W]hen the article was pending in Congress, someone suggested, in the spirit of a similar criticism made by Madison in the constitutional Convention, that the word "servitude" or "slavery" ought not to be named in the Constitution as existing or as exercising any influence in the suffrage; and hence this negative form was adopted to avoid the use of an unpleasant word.[51]

Alexander Bickel explained what precisely was unpleasant about the words that made the drafters adopt coy language: Given that white voters in many northern states opposed African-American suffrage, "it was politically inadvisable to go to the country in 1866 on a platform having anything to do with negro suffrage."[52] Historians[53] and judges[54] agree that the Fourteenth Amendment

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49. In the Migration Clause, which protected the slave trade until 1808, slaves were referred to as "such Persons as any of the States now existing shall think proper to admit." U.S. CONST. art. I, § 9, cl. 1. The Fugitive Slave Clause, mandating the return of escaped slaves, does not mention slaves, instead referring to "Person[s] held to Service or Labour." U.S. CONST. art. IV, § 2, cl. 3.

50. U.S. CONST. art. I, § 2, cl. 3. *See supra* note 36 and accompanying text.

51. CONG. GLOBE, 42d Cong., 2d Sess. 82 (1871).

52. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 44 (1955).

53. *See* FONER, *supra* note 21 at 260 ("[T]he Fourteenth Amendment was framed with the elections of 1866 very much in mind.... The Amendment supplied republicans with a platform for the fall campaign, while leaving to the future the issue of black suffrage."); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25 (1969) ("Most congressmen apparently did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage. They therefore designed a measure that would avoid the Negro issue in the North, yet exert indirect pressure on the South to accept Negro suffrage."); KEYSSAR, *supra* note 3, at 90 ("[T]he amendment took an oblique approach"); MALTZ, *supra* note 39, at 91 ("Thus, in the upcoming election of 1866, Republicans would not need to run solely as the champion of the rights of blacks."). Biographers of members of Congress also make this observation. *See* HOROWITZ, *supra* note 47, at 121 (noting that Representative Ashley was determined not to make an explicit issue of African-American suffrage during the 1866 campaign); WILLARD H. SMITH, SCHUYLER COLFAX: THE CHANGING FORTUNES OF A POLITICAL IDOL 243 (1952) (noting that Republicans downplayed African-American suffrage in the 1866 elections).

54. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 272 (1970) (Brennan, J., joined by White and Marshall, JJ., concurring and dissenting) ("[P]olitical considerations militated against clarification of issues and in favor of compromise.").

made no mention of race for political reasons, and Section 2 makes perfect linguistic sense if the term "African-American" is read into it.

C. NO COMPROMISE: MILITARY RECONSTRUCTION AND THE FIFTEENTH AMENDMENT

Section 2 was a dead letter before it became law. The South's emphatic rejection of the Fourteenth Amendment led Congress to recognize almost immediately that Section 2 would protect neither northern political interests nor the rights of the freedmen.[55] The Fourteenth Amendment was proposed by the Thirty-Ninth Congress in June 1866.[56] By spring 1867, as Representative George Julian put it, Section 2 was

> now generally condemned, and if the question had been a new one it could not have been adopted. This enlightenment of Northern representatives was largely due to the prompt and contemptuous rejection by the rebellious States of the XIV Amendment as a scheme of reconstruction, and their enactment of black codes which made the condition of the freedmen more deplorable than slavery itself.[57]

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55. In the *Slaughter-House Cases*, the Court stated that the Fifteenth Amendment was adopted because of the insufficiency of the Thirteenth and Fourteenth Amendments:

> Before we proceed to examine more critically the provisions of this amendment . . . let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence the fifteenth amendment . . . .

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872)

56. 14 Stat. 358 (June 13, 1866).

57. JULIAN, *supra* note 47, at 304; *see id.* at 273, 304 (African-Americans were "finally indebted for the franchise to the desperate madness of [their] enemies in rejecting the dishonorable proposition of [their] friends. . . . [I]t was rebel desperation which saved the negro; for if the XIV Amendment had been at first accepted, the work of reconstruction would have ended without conferring upon him the ballot."); *see also* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 212–13 (1974); MARY FRANCES BERRY, MILITARY NECESSITY AND CIVIL RIGHTS POLICY 98 (1977) ("Southern recalcitrance, the enforcement of Black Codes, [and] pogromlike race riots in Southern cities, including disturbances involving black soldiers, offered visible evidence of white Southern intentions to maintain the status quo ante bellum."); A. CAPERTON BRAXTON, THE FIFTEENTH AMENDMENT: AN ACCOUNT OF ITS ENACTMENT 32 (1934) ("When Congress assembled in December, 1866, the rejection of the Fourteenth Amendment by the Southern States . . . exasperated the advocates of that Amendment"); SHELBY M. CULLOM, FIFTY YEARS OF PUBLIC SERVICE 149 (1911) ("[T]he Legislatures of the Southern States and their Executives assumed so domineering an attitude, practically wiping out the results of the war, that the Republican majority in Congress assumed it to be its duty to take control from the Executive."); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 330–31 (1963); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN *REESE* AND *CRUIKSHANK* 11–12 (2001) ("The second section of the amendment was the stick, an admittedly 'clumsy'

Although Joint Committee Chair Thaddeus Stevens referred to the suffrage provision during the Fourteenth Amendment debate as "the most important [section] in the article,"[58] after gauging the southern reaction, Stevens "started to draft a new constitutional amendment to enfranchise the Negro before the Fourteenth Amendment was even ratified."[59]

Meanwhile, as the Fourteenth Amendment proceeded through the ratification process, Congress imposed African-American suffrage on the South by statute. On March 2, 1867, Congress overrode President Andrew Johnson's veto of "An Act To Provide for the More Efficient Government of the Rebel States."[60] Known as the Military Reconstruction Act, it established military governance of the South and provided for trial of offenses by "military commission or tribunal."[61] States subject to it would "be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom" only after a constitution had been drafted by a convention and approved by both the voters and Congress.[62]

The Military Reconstruction Act specified the group of individuals entitled to vote. In the election for delegates to the convention, in the referendum on the constitution produced, and in ordinary elections held after approval of the new constitution, the Act enfranchised

> male citizens of said State, twenty-one years old and upward, of whatever race, color or previous condition, who have been resident in said State for one year previous to the day of such election, except as may be disenfranchised for participation in the rebellion or for felony at common law.[63]

The state also had to ratify the Fourteenth Amendment, and readmission would occur "when such article shall have become a part of the Constitution."[64] A supplemental act passed later in March 1867 (by the new Fortieth Congress)

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attempt to bribe the southern states into granting voting rights to the freedmen. . . . It didn't work. . . . In response to the white southerners' outright rejection of the Fourteenth Amendment, Congress in March of 1867 passed the first of a series of Reconstruction Acts."); MALTZ, *supra* note 39, at 129 ("It soon became clear . . . that the southern state governments . . . were not going to ratify the Fourteenth Amendment. This realization spurred Republicans to impose additional requirements."); John E. Nowak, *The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1105 (2000) ("When Section 2 of the Fourteenth Amendment failed to spur Southern states to grant black persons the right to vote, there was enough Reconstruction sentiment left in the North for ratification of the Fifteenth Amendment").

58. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866); *see also* Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1177 n.287 (1994); Zuckerman, *supra* note 10, at 93.

59. GILLETTE, *supra* note 53, at 34.

60. Ch. 153, 14 Stat. 428 (Mar. 2, 1867).

61. 14 Stat. 428–29, §§ 3, 4, 6.

62. 14 Stat. 429, § 5.

63. *Id.*

64. *Id.*

provided for the registration of voters by the U.S. Army in occupied territory.[65] The Military Reconstruction Act "enfranchise[d] approximately one million blacks."[66]

Upon compliance with the conditions of the Military Reconstruction Act, a series of readmission acts restored representation in Congress to former Confederate states. The acts provided that restoration was subject to the following fundamental condition:

> That the constitution of [the state] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all of the inhabitants of said State . . . .[67]

The approach of the Military Reconstruction Act and the readmission acts differed substantially from that of the still unratified Fourteenth Amendment. As a general matter, the Fourteenth Amendment deferred to state authority over suffrage. The Military Reconstruction Act and the readmission acts did not defer;[68] rather, Congress simply decreed the suffrage qualifications it considered appropriate and set up machinery to implement them. Congress also chose not to use the incentive approach of Section 2. It did not provide, for example, that state legislative apportionment would also be affected if African-Americans were not enfranchised under the terms it set. Instead, it required actual enfranchisement. Finally, Section 2 did not allude to racial equality, but the Military Reconstruction Act and the readmission acts did.[69]

As expansive as they were, the Military Reconstruction Act and readmission

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65. Act of Mar. 23, 1867, 15 Stat. 2.

66. JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 79 (2d ed. 1994).

67. Act of June 22, 1868, ch. 69, 15 Stat. 72 (Arkansas); *see also* Act of Mar. 30, 1870, ch. 89, 16 Stat. 80 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67 (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62 (Virginia); Act of June 25, 1868, ch. 70, 15 Stat. 73 (North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida). The Acts allowed states to change the residence requirements of their constitutions. *See generally* Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2004).

68. Indeed, until a state was readmitted, "any civil governments which may exist therein [were] deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control or supersede the same . . . ." Ch. 153, 14 Stat. 428, 429 (1867).

69. President Andrew Johnson's Christmas 1868 message contained notice of an action that further reduced the likelihood that the Fourteenth Amendment would achieve its framers' goals. The President granted

> every person who directly or indirectly participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.

15 Stat. 711, 712 (Dec. 25, 1868). Accordingly, any possibility that Section 2 would justify the disenfranchisement of Confederates was lost.

acts offered an incomplete solution to the question of African-American suffrage.[70] They applied only in unreconstructed former Confederate states, and thus did not apply to Tennessee, for example, or anywhere in the North. More importantly, as statutes, they were subject to repeal. The Fortieth Congress therefore proposed the Fifteenth Amendment in February 1869, which was designed to make African-American suffrage permanent and national.[71] The Amendment shared the characteristics of military reconstruction: It was explicitly aimed at preventing denial of the right to vote based on "race, color or previous condition of servitude" and it gave no deference to state authority over suffrage.[72] The drafters of the Fourteenth Amendment recognized that the Amendment was the result of mutual concession;[73] the Fifteenth Amendment, all stick, no carrot, was similar to the radical proposals that had failed when the Fourteenth Amendment was being considered.[74]

After ratification of the Fifteenth Amendment in 1870, the Constitution seemed to contain two provisions regulating the same subject. Section 2 reduced the basis of representation for racial disenfranchisement, and the Fifteenth Amendment prohibited racial disenfranchisement.

II. SECTION 2 AND THE FIFTEENTH AMENDMENT IN OPERATION

In post-Reconstruction speeches, treatises, and memoirs, many framers of the Reconstruction Amendments and distinguished legal commentators stated that the passage of the Fifteenth Amendment repealed or otherwise undermined Section 2 of the Fourteenth Amendment. Representative George Boutwell, a member of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, and a principal drafter of the Fifteenth Amendment, wrote:

> By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court of the United States could not do otherwise than declare a State statute void which should disenfranchise any of the citizens described, even if accompanied with the assent of the State to a proportionate loss of representative power in Congress.[75]

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70. *Cf.* FRANKLIN, *supra* note 66, at 82 ("Few were satisfied with the temporary suffrage arrangements in the reconstruction legislation or with the vague provisions in the Fourteenth Amendment.").

71. Act of Feb. 27, 1869, 15 Stat. 346.

72. U.S. CONST. amend XV, § 1.

73. Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. 2 No. 30, *reprinted in* 2 FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 60–62 (1907); *see also* MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 217 n.69 (1999) (calling Section 2 a "crucial part of the compromise").

74. The biographer of Joint Committee Chair William Fessenden, for example, argues that "[a]s finally passed, the Fifteenth Amendment was exactly in line with Mr. Fessenden's proposition in the committee on reconstruction for the Fourteenth Amendment." FESSENDEN, *supra* note 73, at 315.

75. GEORGE S. BOUTWELL, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY 389 (1895). Boutwell was a Republican member of Congress from 1862 to 1869, later serving in the

Likewise, James G. Blaine was a member of the Congress that passed the Fourteenth and Fifteenth Amendments; he believed that "[t]he adoption of the Fifteenth Amendment seriously modified the effect and potency of the second section of the Fourteenth Amendment."[76] Republican Senator John Sherman participated in the passage of both amendments; he concluded that the "practical result has been that the wise provisions of the 14th amendment have been modified by the 15th amendment."[77]

In addition to the framers of the Reconstruction Amendments, many scholars agreed that the Fifteenth Amendment altered Section 2. Justice Story's *Commentaries on the Constitution of the United States* was probably the most influential constitutional law treatise of the pre-World War II era.[78] The 1873 edition, edited by Thomas Cooley, analyzed Section 2 as follows: "It will be manifest from its terms that the immediate occasion for its adoption passed away on the ratification of the succeeding article, and its importance, if any, will depend upon future events."[79] Edward S. Corwin of Princeton wrote of Sections 2, 3, and 4: "These sections are today, for the most part, of historical interest only."[80] More recently, Michael Perry observed simply that Section 2 was "no longer operative,"[81] and the Congressional Research Service called it "an historical curiosity."[82] Other commentators agreed that Section 2 was repealed or rendered doubtful by passage of the Fifteenth Amendment.[83] Although some of

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Senate and as Secretary of the Treasury. His legitimacy as a protector of African-American suffrage is suggested by his participation and authorship of *Mississippi in 1875: Report of the Select Committee to Inquire into the Mississippi Election of 1875* (1876).

76. 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 418 (1886). Blaine noted the theoretical applicability of Section 2 to other forms of disenfranchisement, but they were not "seriously taken into consideration when the Fourteenth Amendment was proposed by Congress. Its prime object was to correct the wrongs which might be enacted in the South . . . ." *Id.* The change it wrought, he explained, was that:

> Before the adoption of the Fifteenth Amendment, if a State should exclude the negro from suffrage, the next step would be for Congress to exclude the negro from the basis of apportionment. After . . . , if a state should exclude the negro from suffrage, the next step would be for the Supreme Court to declare that the act was unconstitutional, and therefore null and void.

Id. at 418–19.

77. 1 JOHN SHERMAN, RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET 450 (1895).

78. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 317 n.1 (1936) (citing Justice Story's *Commentaries*); Dimick v. Schiedt, 293 U.S. 474, 485 (1935) (same); Powell v. Alabama, 287 U.S. 45, 70 (1932) (same); Gitlow v. New York, 268 U.S. 652, 666 & n.9 (1925) (same); Boyd v. Nebraska, 143 U.S. 135, 158–59 (1892) (same); Tennessee v. Davis, 100 U.S. 257, 264–65 (1879) (same).

79. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 678 (4th ed. 1873).

80. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 427 (13th rev. ed. 1973).

81. PERRY, *supra* note 73, at 212 n.18.

82. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1528–29 (1973) ("With subsequent constitutional amendments adopted and the utilization of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.").

83. *See, e.g.*, HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 468–69 (1895) ("The purpose of this clause was of course to induce the states to extend the elective franchise to the colored race. But this was made obligatory by the fifteenth amendment. Still, the language of the clause

these commentators did not explicitly state that Section 2 had been repealed, like a suggestion that a business is insolvent or an individual dishonest, serious discussion of the question is significant in itself. Many other constitutional provisions are rarely used, but no others are subject to such widespread suggestion of repeal.

None of these authorities explain fully why or how Section 2 was incompatible with the Fifteenth Amendment. However, the basic inconsistency as a matter of policy is plain: Section 2 recognized state power to disenfranchise African-Americans, while the Fifteenth Amendment removed that power. Courts hold[84] and commentators agree[85] that "instead of prohibiting race-based voting

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under consideration is general. And it is possible to conceive of cases where, without any reference to race or color, the states might so restrict the right of suffrage as to render themselves liable to have their representation reduced. But it has never been considered that the imposition of a reasonable educational qualification, or the requirement of the payment of a poll tax, was such an abridgement or denial of the right as is here contemplated."); CHARLES A. GARDINER, A CONSTITUTIONAL AND EDUCATIONAL SOLUTION OF THE NEGRO PROBLEM (1903), *reprinted in* REGENTS' BULLETIN 164 (June 29, 1903) ("The penalty clause was abrogated ... when the Fifteenth Amendment was adopted."); WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 15–16 (1898) (noting that Section 2 "was superseded in great measure by the Fifteenth Amendment, which was adopted subsequently and which established universal suffrage, so far as race was concerned" but noting that application of Section 2 could be triggered by other requirements, "particularly if arbitrarily imposed so as to discriminate against any class of voters"); Robert A. Maurer, *Congressional and State Control of Elections under the Constitution*, 16 GEO. L.J. 314, 338 (1927) ("What is the meaning to be given to this section and why does it seem to be ineffective ... ? Is it to be taken on the one hand literally, or on the other as abrogated by the adoption of the Fifteenth Amendment?"); Emmet O'Neal, *The Power of Congress to Reduce the Representation in the House of Representatives and the Electoral College*, 181 N. AM. REV. 530, 543 (1905) ("[T]he Fifteenth Amendment in effect repealed and nullified section two of the Fourteenth Amendment"); *cf.* Bonfield, *supra* note 10, at 115 (arguing against the repeal of Section 2 but concluding that "[e]ven if th[e] argument [that Section 2 offers an alternative remedy] fails to convince, the most that can be said is that the fifteenth amendment repealed section 2 to the extent of withdrawing the penalty in a case where the deprivation is based solely on race").

Some commentators have argued that Section 2 survived the Fifteenth Amendment on the premise that it covered non-racial restrictions on the franchise. *See infra* note 154.

84. As the Mississippi Supreme Court stated:

> Under this [Section 2], then, if a state chose to exclude any if its male citizens from the ballot ... it could do so, electing thereby to accept a reduced representation.
>
> The danger to be apprehended under the power left with the states, under the fourteenth amendment, was that, in those states where the white race predominated, the ballot might be denied to the colored people; and that, in those where the colored race was most numerous, the white race might be abridged in the right of suffrage. The fifteenth amendment makes that impossible, and guarantees to all citizens forever the elective franchise.

Donnell v. State, 48 Miss. 661, 677 (1873). *See also* Richardson v. Ramirez, 418 U.S. 24, 74 (1974) (Marshall, J., dissenting) ("[Section 2] put Southern States to a choice—enfranchise Negro voters or lose congressional representation."); Minor v. Hapersett, 88 U.S. 162, 174 (1874) ("Why [Section 2], if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants?").

85. *See, e.g.*, KEYSSAR, *supra* note 3, at 90–91 (Section 2 was a "constitutional frown" that "tacitly recognized the right of individual states to erect racial barriers."); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 228 (1991) ("Section Two of the Fourteenth Amendment plainly assumed the lawfulness of racial discrimination in voting"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1024–25 (1995) ("Section 2 of the Fourteenth Amendment presupposes the rights of states to restrict the franchise"); Jamin B. Raskin,

restrictions, Section 2 merely established a price for such restrictions."[86] By contrast, the Fifteenth Amendment categorically prohibits the states from discriminating on the basis of race; it "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."[87] The Fifteenth Amendment simply eliminated the power that Section 2 attempted to regulate. As the Supreme Court explained in *United States v. Reese*,[88] before the Fifteenth Amendment, "[i]t was as much within the power of a State to exclude citizens of the United States from voting on account of race, as it was on account of age, property, or education. Now it is not."[89]

Relatedly, the Fifteenth Amendment established a new and exclusive approach to remedy. Violation of Section 2 was remedied by reduction of the basis of representation; violation of the Fifteenth Amendment was remedied by granting the right to vote. Again in the words of the *Reese* Court, under the Fifteenth Amendment, "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guarantee against this discrimination; now there is."[90]

A. REPEAL BY IMPLICATION

Often new statutes will repeal older ones expressly, with a repealing clause, for example. However, courts recognize that sometimes a new provision is sufficiently inconsistent with existing law that current law is repealed by implication.[91] "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"[92]

Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391, 1438–39 (1993) (stating that the "negative implications of Section 2 . . . completely failed to confront the problem of black disenfranchisement"); Jeffrey Rosen, *Divided Suffrage*, 12 CONST. COMMENT. 199, 200 (1995) (noting that the Reconstruction Congress "refus[ed] to displace the states' control over the franchise" and "compound[ed] the effort with section 2 of the Fourteenth Amendment").

86. Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1418 (2002).

87. South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966).

88. 92 U.S. 214 (1875).

89. *Id.* at 217–18; *see also supra* notes 84–85.

90. 92 U.S. at 218. All members of the Court evidently shared this view. *See id.* at 247–48 (Hunt, J., dissenting) (Section 2 "was understood to mean, and did mean, that if one of the late slaveholding States should desire to exclude all its colored population from the right of voting . . . it could do so. . . . [When] the Fifteenth Amendment was [adopted,] the power of any State to deprive a citizen of the right to vote on account of race, color, or previous condition of servitude, . . . was expressly negatived.").

91. *See generally* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004); Note, *Repeal by Implication*, 55 COLUM. L. REV. 1039 (1955).

92. Branch v. Smith, 538 U.S. 254, 273 (2003) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)). General principles of statutory construction may be applicable to the Constitution. *See,*

Although most cases involving repeal by implication involve statutes, amendments to the Constitution can impliedly repeal or modify existing constitutional terms.[93] For example, the Supreme Court and other federal courts have recognized that the enforcement clauses of the Reconstruction Amendments impliedly altered the states' Eleventh Amendment immunity or gave Congress authority to do so.[94] Similarly, scholars conclude that amendments can operate as implied repeals of existing provisions of the Constitution;[95] according to John Hart Ely, "the Nineteenth Amendment repealed that part of Section 2 that adverted to the denial of the franchise to women."[96] Given the stringency of the test for implied repeals, it makes sense to apply the doctrine to the Constitution; it would be undesirable to obligate courts and Congress to apply an earlier provision even though it was in "irreconcilable conflict" with a subsequent amendment, or when the subsequent amendment was clearly intended to occupy the field.

There is an interpretive presumption against repeals by implication; therefore, in the absence of an express repeal, courts should construe new and old laws as

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e.g., Dillon v. Gloss, 256 U.S. 368, 373 (1921) ("[W]ith the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed."); United States v. Wong Kim Ark, 169 U.S. 649, 653–54 (1898) ("In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted."); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) ("The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."), *overruled in part on other grounds by* Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844); *see generally* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 COLO. L. REV. 1, 3 (2004) (noting but critiquing view of scholars and courts "that constitutional and statutory interpretation should converge.").

93. *Cf.* Evans v. Gore, 253 U.S. 245, 259 (1920) ("[U]nless there be some real conflict between the Sixteenth Amendment and [Article III, Section 1], effect must be given to the latter as well as to the former . . . ."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838) (holding that the court is "bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821) ("What, then, becomes the duty of the Court? Certainly, we think, . . . to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other.").

94. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); Jensen v. Conrad, 570 F. Supp. 91, 98 (D.S.C. 1983).

95. *See, e.g.*, Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002) ("Congress has the authority under post-Eleventh-Amendment delegations of power, such as Section 5 of the Fourteenth Amendment, to abrogate the states' Eleventh Amendment immunity, because the later-adopted provisions impliedly repealed that immunity."); David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 647 (2000) ("In 1815, a federal draft would have violated constitutional protections for state-based militia. By 1918, the draft was constitutional because the Fourteenth Amendment had tacitly repealed those protections.").

96. John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1190 (2001).

operating together if possible.[97] However, this principle must be applied to the Constitution while recognizing that amendments frequently alter or amend existing provisions without saying so explicitly—that is, by implication.[98] Sometimes, resolutions proposing amendments that affect provisions of the existing Constitution contain express repealing provisions,[99] but in many instances they do not.[100] Indeed, Section 2 itself repealed the three-fifths compromise[101] implicitly rather than explicitly.[102]

The Fifteenth Amendment repealed Section 2 under both aspects of the implied repeal test. First, the Fifteenth Amendment's prohibition of racial discrimination in voting was clearly meant to occupy the field, eliminating the states' authority to discriminate as recognized by Section 2.[103] Second, the

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97. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984) ("This court has recognized . . . that 'repeals by implication are disfavored.'" (quoting Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 133 (1974))); United States v. Borden, 308 U.S. 188, 198 (1939) ("It is a cardinal principle of construction that repeals by implication are not favored."); *cf.* King v. Cornell, 106 U.S 395, 396 (1882) ("While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."). This principle also applies to amendments by implication. *See* United States v. Welden, 377 U.S. 95, 102 n.12 (1964). Neither the congressional resolution proposing the Fifteenth Amendment nor its text indicates that any other parts of the Constitution are repealed. *See* 15 Stat. 346 (1869) (proposing the Fifteenth Amendment).

98. Although the states also participate in the constitutional amendment process, under Article V, the states vote for or against resolutions passed by Congress. Thus, although the states' views of what the resolution means may be of weight, they have no ability in the ratification process to change either the terms of the amendment itself or the terms of the resolution.

99. *E.g.*, U.S. CONST. art. I, § 3, cls. 1, 2 (legislative election of Senators), *amended by* U.S. CONST. amend. XVII (providing for the direct election of Senators) (proposed by H.J. Res. 39, 37 Stat. 646 (1912) and containing an express statement of repeal in the resolution); *see also* U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."); 2 Stat. 306 (1803) (proposing the Twelfth Amendment to the Constitution—which replaced Article II, Section 1, clause 3, providing procedures for electing the President—and containing a repealing provision).

100. *E.g.*, U.S. CONST. art. I, § 9, cl. 4 (requiring taxes in proportion to population), *amended by* U.S. CONST. amend. XVI (allowing taxation on income) (proposed by 36 Stat. 184 (1909)); *see also* 79 Stat. 1327 (1965) (proposing the Twenty-Fifth Amendment to the Constitution, which arguably amended Article II, Section 1, clause 6 and dealt with presidential disability); 47 Stat. 745 (1932) (proposing the Twentieth Amendment to the Constitution, which changed Article I, Section 4, clause 2, governing the first day of the session); 13 Stat. 567 (1865) (proposing the Thirteenth Amendment to the Constitution, which arguably repealed Article IV, Section 2, clause 3, the Fugitive Slave Clause); 1 Stat. 402 (1794) (proposing the Eleventh Amendment to the Constitution, which changed the scope of Article III, Section 2, clause 1).

101. *See* Utah v. Evans, 536 U.S. 452, 491 (2002) (referring to "Article I, § 2, cl. 3, as modified by § 2 of the Fourteenth Amendment"); Elk v. Wilkins, 112 U.S. 94, 102 (1884) ("Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons.").

102. 14 Stat. 358 (1866) (resolution proposing the Fourteenth Amendment). The Thirteenth Amendment retained slavery as punishment for crime, so to this day, there remains the possibility of a class of people who would fit into the category of "all other persons," although they would be characterized by their criminal sentences, not by their race.

103. *See supra* notes 88–90 and accompanying text.

remedy of the Fifteenth Amendment, pursuant to which African-Americans are actually allowed to vote, is in irreconcilable conflict with the penalty of Section 2, which permits denial of the right to vote on the basis of race.[104]

B. SECTION 2 AS AN INDEPENDENT PROVISION

For Section 2 to have an independent role following ratification of the Fifteenth Amendment, Section 2 must supply the rule of decision under some conceivable circumstance. However, in all cases, the Fifteenth Amendment applies exclusively of Section 2 or, if both can apply, provides more relief than does Section 2. Accordingly, after passage of the Fifteenth Amendment, there is no circumstance in which the remedy of Section 2 can be applied instead of the remedy of the Fifteenth Amendment.

1. The Incompatibility of Section 2 and the Fifteenth Amendment as Remedies

Functionally, the Fifteenth Amendment authorizes a broader remedy than that of Section 2.[105] To illustrate, imagine a former Confederate state that has ten seats in the House. It is populated by a forty-nine percent African-American minority, ninety-nine percent of which prefers Party *A* and one percent which prefers Party *B*, and by a fifty-one percent white majority, which votes ten percent for Party *A* and ninety percent for Party *B*. If the races are dispersed equally among the congressional districts, and everybody votes, over time Party *A* wins ten seats in the House of Representatives, two Senate seats, the governorship, control of the legislative branch of the state government, the judiciary, and twelve presidential electors. If African-Americans are unconstitutionally disenfranchised, Party *B* wins all the offices.

Section 2's remedy reduces but does not eliminate Party *B*'s illegitimate gains. By application of Section 2, African-Americans do not vote. Party *B* would keep five congressional seats, both Senate seats, the governorship, the legislature and judgeships, and seven presidential electors. Party *A* would get nothing; the lost House seats would go to other states. By contrast, under the Fifteenth Amendment's remedy, the majority rules. Party *A* would get ten seats (a fifteen-seat swing, in this example) and all the other offices. Disenfranchising African-Americans pays under Section 2 but not under the Fifteenth Amendment.

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104. *See infra* notes 105–11 and accompanying text.

105. Some decisions assume that Section 2 offers a lesser remedy without explaining precisely why. *See* Richardson v. Ramirez, 418 U.S. 24, 55 (1974) ("[W]e may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement."); Lampkin v. Connor, 360 F.2d 505, 511 (D.C. Cir. 1966) (declining to issue declaratory judgment on Section 2 because actual enfranchisement seemed to be on the horizon: "[S]ome considerable latitude would still seem to exist for appraisal of the effectiveness of the new Voting Rights Act before appellants turn in desperation once more to the indirect sanction they believe to be imbedded in Section 2 of the Fourteenth Amendment.").

Instead of an exclusive sanction, however, perhaps Section 2 could be retained as an additional sanction; for something as undesirable and as destructive as racial discrimination, the more sanctions, the better.[106] However theoretically attractive such an approach may be in this context, the Fifteenth Amendment's "non-discrimination" approach is incompatible in practice with the "no benefit from discrimination" approach of Section 2.

A concrete example demonstrates that the remedies cannot coexist. Assume that African-Americans prove in a U.S. District Court[107] that they have been denied the right to vote on the basis of race. Although money damages and injunctive relief may be available, there are two major potential remedies: reduction of apportionment under Section 2 and granting the franchise to those discriminated against under the Fifteenth Amendment. The enforcing court can mandate or facilitate one of four sets of remedies: (1) neither enfranchisement nor reduction of the basis of representation; (2) both enfranchisement and reduction; (3) reduction but not enfranchisement; or (4) enfranchisement but not reduction.

Presumably, Option 1, granting no relief for a demonstrated constitutional violation, would be insufficient. Option 2 is also unacceptable. Enfranchisement plus reduction of the population upon which representatives will be apportioned would reward the citizens who were discriminated against with a diluted vote—the new voters would participate in the election of a reduced number of representatives and presidential electors. Surely whatever satisfaction disenfranchised citizens would derive from knowing that the discriminators' vote was *also* diluted would not outweigh the violation of the letter and spirit of the Fifteenth Amendment.

Option 3, reducing the state's basis of apportionment as a substitute for granting the vote, would be acceptable only if Section 2 and the Fifteenth Amendment were read together to create alternative remedies. Just as some criminal statutes allow the court to impose a fine or imprisonment, perhaps denial of the right to vote on the basis of race allows the court or Congress to impose suffrage or reduction of the basis of representation.

This approach is unacceptable.[108] Although Section 2 claims are now clearly justiciable,[109] litigants cannot artfully raise only a Section 2 claim and, upon

106. *See, e.g.*, Bonfield, *supra* note 10, at 115 ("The fifteenth amendment in prohibiting any state from denying the franchise merely added an additional penalty, that of unconstitutionality, to that already imposed by section 2. The two amendments and remedies provided therein are not inconsistent, the penalty of section 2 being necessary and valuable as an alternative remedy to disenfranchisement by a state because of race."); Margolis, *supra* note 10, at 148 ("Different remedies for the same wrong are common.").

107. The following discussion can apply as well to findings by Congress.

108. The Fifteenth Amendment applies to the states, but also provides that the right to vote "shall not be denied or abridged by the United States" on account of race; thus, the text itself prohibits a federal court or Congress from participating in an action or decision disenfranchising on the basis of race.

109. The Supreme Court has decided a number of cases under the first sentence of Section 2; because these cases raise the same question as is raised under the second sentence (that is, "What is the method permitted or required by Section 2 for calculating the population of a state for purposes of apportioning Congress?"), there is no reason that these cases should not apply to claims under the

proving discrimination, win a judgment reducing the state's basis of apportionment and providing that thenceforth, members of the plaintiff's group will not be allowed to vote.[110] True, numerically small groups may sometimes prefer depriving their state of a House seat to enfranchisement, for example, if they conclude that they have little chance of prevailing in an election. But the history of our Constitution's expansion of suffrage and the direction of the Court's jurisprudence concerning the right to vote point to the conclusion that if some people are wrongfully denied the right to vote, the remedy is to allow them to vote.

Only Option 4, granting the right to vote but not reducing the basis of apportionment, is consistent with a Constitution that prohibits racial discrimination in the franchise. If racial discrimination is prohibited, a finding that the franchise has been denied on the basis of race mandates granting the right to vote.

The Fifteenth Amendment's radically different policy with respect to disenfranchising African-Americans presents an irreconcilable conflict with Section 2. "As a general rule, it is not open to controversy, that, where a new statute . . . prescribes different penalties for [offenses] enumerated in the old law, the former is repealed by implication, as the provisions of both cannot stand together."[111]

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second sentence. *See* Utah v. Evans, 536 U.S. 452, 479 (2002) (evaluating the Census Bureau's method of counting population); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 331–32 (1999) (holding that the loss of a representative and vote dilution were sufficient to give a voter standing to pursue a Section 2, clause 1 claim challenging statistical sampling); Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (holding that constitutional challenges to apportionment are justiciable under Section 2); Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992) ("[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the judiciary." (citing Davis v. Bandemer, 478 U.S. 109, 123 (1986); Baker v. Carr, 369 U.S. 186, 234–37 (1962))).

110. *Cf.* FED. R. CIV. P. 54(c) (except as to default judgments, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.").

111. United States v. Claflin, 97 U.S. 546, 552 (1878) (quoting Norris v. Crocker, 54 U.S. (13 How.) 429, 438 (1851)). In *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1870), for example, the Court explained that a change in penalties for the same wrong implied repeal. An 1813 statute prohibited and provided for the punishment of certain violations of the naturalization laws. An 1870 statute declared identical conduct felonious but provided for a minimum and higher maximum term of imprisonment, a lower minimum fine, and allowed imposition of both the fine and imprisonment as part of the same sentence, whereas the 1813 statute required the sentencing court to choose. The Court unanimously found that the 1813 statute had been repealed:

> There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

Id. at 92.

2. Section 2's Narrow Coverage

The Fifteenth Amendment covers more elections than Section 2, which is riddled with loopholes. The remedy of Section 2 is triggered if there exists discrimination in "any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the legislature thereof."[112] Section 2 does not cover elections below the state level. In spite of their importance to daily life and the protection of civil rights, elections for mayors, city councils, school boards, county commissioners, sheriffs, and prosecutors are exempt. Because Section 2 covers neither delegates to constitutional conventions nor votes on proposed constitutions or other ballot measures, it gave African-Americans no opportunity to participate in the framing of the constitutions of the southern states, when critical issues such as apportionment and taxation were decided. Section 2 is also inapplicable to elections for the U.S. Senate[113] and does not mention primary elections. During the Jim Crow era, Democratic domination made primaries dispositive in many parts of the former Confederacy, but, under Section 2, apparently African-Americans could have been excluded from them without penalty.

In addition, Section 2's penalty applied only upon disenfranchisement of "any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, . . . except for participation in rebellion, or other crime."[114] Accordingly, a state could allow white women to vote but not African-American women, set the voting age for African-Americans at twenty-one and at eighteen for whites, disenfranchise African-American but not white convicts, allow white immigrants to vote but only African-American citizens, and permit whites to vote in any election while restricting African-American suffrage to the instances specified. Section 2 seems inapplicable on its face to these situations because African-American male citizens over twenty-one can vote, but whites still control every election.

The Fifteenth Amendment's breadth is in stark contrast to Section 2's assemblage of exceptions. The Fifteenth Amendment prohibits denial of the "right to vote" on discriminatory grounds, apparently applying to all elections on all issues at all levels for all offices.[115]

3. Jurisdiction to Enforce Section 2 and the Fifteenth Amendment

Conceivably, there is an independent role for Section 2 because of who can enforce it; it offers Congress an additional tool to promote African-American

112. U.S. CONST. amend. XIV, § 2.

113. Presumably this is because Senators were elected by the state legislatures when the Fourteenth Amendment was enacted. U.S. CONST. art. I, § 3, cl.1, *amended by* U.S. CONST. amend. XVII, § 1.

114. U.S. CONST. amend. XIV, § 2.

115. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (applying Section 1 of the Fourteenth Amendment and the Fifteenth Amendment to a primary election).

suffrage, which can be deployed if for some reason the Fifteenth Amendment is unenforced. At one time the argument that only Congress could enforce Section 2 had some judicial support.[116] However, recent cases involving its first sentence make clear that Section 2 is judicially enforceable;[117] therefore, both Section 2 and the Fifteenth Amendment can be enforced by both Congress and the courts.[118]

The mandatory word "shall" in Section 2 raises the possibility that the provision was intended to operate automatically.[119] If so, it would operate independently of the Fifteenth Amendment because, although the Fifteenth Amendment automatically invalidated inconsistent restrictions, it did not automatically impose any particular sanction. This is a difficult argument. In 1869, a Republican Congress decided not to apply Section 2 to northern states that disenfranchised African-Americans;[120] because many of the framers of the Fourteenth and Fifteenth Amendments participated in that decision, it is entitled to great weight in discerning Section 2's meaning.[121] In addition, neither Congress nor any court ever applied Section 2 to reduce any state's basis of representation; so, at least in reality, Section 2 was not automatic. Indeed, it is difficult to see how Section 2 can operate without someone making findings of fact and issuing specific orders.

Finally, it might be argued that practically and with hindsight, because courts underenforced the Fifteenth Amendment, Section 2 should be regarded as preserved. Because the Fifteenth Amendment did not supersede Section 2 in fact, the argument would go, it should not be considered to have done so in law. The problem with this argument is that several unenforced provisions are no different than one. If Congress had been inclined to protect African-American voting rights, the highly effective Voting Rights Act of 1965, which rested on

116. Some early cases held that only Congress could enforce the second sentence of Section 2. *See* Dennis v. United States, 171 F.2d 986, 992–93 (D.C. Cir. 1948); Saunders v. Wilkins, 152 F.2d 235, 238 (4th Cir. 1945); *cf.* Sharrow v. Brown, 447 F.2d 94, 98 n.9 (2d Cir. 1971) (noting, but not deciding, the argument that Congress had discretion to enforce or not enforce Section 2). However, these cases do not explain why the Supreme Court construed the second sentence of Section 2 at the instance of individual claimants with no hint that the claims constituted political questions or were otherwise nonjusticiable. *See infra* notes 137–49 and accompanying text.

117. *See supra* note 109.

118. That is, Section 2 of the Fifteenth Amendment explicitly grants enforcement powers to Congress. The Court also said that the prohibition of Section 1 is self-executing. *See supra* note 87 and accompanying text.

119. *Compare* Zuckerman, *supra* note 10, at 103 (noting statements in Congress that Section 2 would not be self-executing), *with* Bonfield, *supra* note 10, at 115 ("Congress has no discretion in the matter and no enforcing legislation seems necessary.").

120. *See infra* notes 211–12 and accompanying text.

121. *See, e.g.*, Printz v. United States, 521 U.S. 898, 905 (1997) ("'[C]ontemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.'" (quoting Myers v. United States, 272 U.S. 52, 175 (1926) (citing numerous cases))).

the Fifteenth Amendment,[122] shows that the Fifteenth Amendment by itself was entirely sufficient. On the other hand, if Congress had been disinclined to protect African-American suffrage, one hundred pieces of law on the books would have made no difference.[123]

C. SECTION 2 AS A PROVISIONAL REMEDY

Sadly, the Fifteenth Amendment's prohibition on racial discrimination was not honored; many states defied the Constitution and discriminated anyway. Although Section 2 could not have been drafted or ratified as a means of enforcing a Fifteenth Amendment that did not yet exist, perhaps Section 2 and the Fifteenth Amendment could be reconciled by recasting Section 2 as a discretionary provisional remedy.[124] In this role, it would reduce a state's population basis not as final relief for racial discrimination, but as an interlocutory measure to help compel compliance with the Fifteenth Amendment while other judicial or congressional methods operated. Unquestionably, the threat of

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122. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)) (stating that the Voting Rights Act's purpose is to "enforce the fifteenth amendment to the Constitution of the United States").

123. JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 546 (1982) (African-Americans were disenfranchised "by subterfuges that were clearly contrary to the purpose of the Fifteenth Amendment . . . and [disenfranchisement could not have been accomplished] if the will to enforce the amendment that existed in 1869 still existed in 1899.").

The contention that an existing statute, otherwise impliedly repealed, must be saved because the new one may be wrongfully unenforced in the future, runs up against the presumption that the states, the United States, and the Supreme Court itself, will comply with and enforce the law. In addition, this argument has the flaw of eliminating all repeals by implication because any new provision of law may in the future go unenforced. For better or for worse, the Supreme Court has stated that "[t]he presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, as binding on all of its citizens and every department of its government." Neal v. Delaware, 103 U.S. 370, 389–90 (1880). If a state should "withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final and conclusive determination." Robb v. Connolly, 111 U.S. 624, 637 (1884); *see also, e.g.*, Alden v. Maine, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) ("[C]ourts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution."); Minnesota *ex rel.* Pearson v. Prob. Ct., 309 U.S. 270, 277 (1940) ("The applicable statutes are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution. On the contrary, we must assume that the Minnesota courts will protect appellant in every constitutional right he possesses.") (citations omitted). The presumption also applies to the United States. Silesian Am. Corp. v. Clark, 332 U.S. 469, 480 (1947). Therefore, an argument depending on the factual assumption that the guardians of our liberty will not do their duty is at odds with the way the Supreme Court decides cases.

124. That is, a remedy that would operate to preserve the status quo during litigation or help enforce compliance with a final judgment. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); *In re* Chiles, 89 U.S. (22 Wall.) 157, 168 (1874) (holding that civil contempt may be used against a party to "compel his performance of some act or duty required of him by the court, which he refuses to perform.").

Section 2's sanction or the opportunity to get out from under it could induce a reluctant state to comply with the law.

However, Congress and the courts have recognized authority far broader under the Fifteenth Amendment than can exist under Section 2. The Voting Rights Act, promulgated under the Fifteenth Amendment's enforcement power, suspended literacy tests, required federal preclearance of changes in state electoral practices, and provided for federal registration of voters. The Supreme Court unanimously upheld this comprehensive federal takeover of the state voting apparatus,[125] except for Justice Black, who dissented solely on the issue of preclearance.[126] None of this could have been accomplished under Section 2.

Although Section 2 takes away representatives and electors, so can the Fifteenth Amendment. It is quite clear that Congress and the courts are not required to treat as valid elections held in violation of the Fifteenth Amendment or the Voting Rights Act of 1965. Courts can enjoin illegal election procedures and illegal elections[127] and set aside elections held under invalid procedures.[128] This sort of judicial authority was well recognized at the time the Fifteenth Amendment was ratified.[129] Congress has the power to declare void elections

125. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

126. *Id.* at 356 (Black, J., concurring and dissenting in part).

127. *See, e.g.*, Clark v. Roemer, 500 U.S. 646, 652 (1991) (holding that the lower court erred in not enjoining election); Lucas v. Townsend, 486 U.S. 1301, 1305 (Kennedy, Circuit Justice 1988) (enjoining the election); Gilmore v. Greene County Democratic Party Executive Comm., 368 F.2d 328, 329 (5th Cir. 1966) (per curiam); Holmes v. Leadbetter, 294 F. Supp. 991, 993 (E.D. Mich. 1968).

128. *See, e.g.*, NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 182–83 (1985) (recognizing remedy); Interim Bd. of Trs. v. Coalition to Pres. Houston & Houston Sch. Dist., 450 U.S. 901 (1981), *aff'g* 494 F. Supp. 738, 742 (S.D. Tex. 1980) (three-judge court); Marks v. Stinson, 19 F.3d 873, 888–90 (3d Cir. 1994); Toney v. White, 488 F.2d 310, 315 (5th Cir. 1973) (en banc); Bell v. Southwell, 376 F.2d 659, 664–65 (5th Cir. 1967); Smith v. Clinton, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988); United States v. Onslow County, 683 F. Supp. 1021, 1023 (E.D.N.C. 1988) (three-judge court); Henderson v. Graddick, 641 F. Supp. 1192, 1203–04 (M.D. Ala. 1986) (three-judge court), *appeal dismissed*, 479 U.S. 1023 (1986); Coalition for Educ. in Dist. One v. Bd. of Elections, 370 F. Supp. 42, 57 (S.D.N.Y. 1974), *aff'd per curiam*, 495 F.2d 1090 (2d Cir. 1974); Clark v. Democratic Executive Comm., 288 F. Supp. 943, 947–48 (M.D. Ala. 1968); Brown v. Post, 279 F. Supp. 60, 64 (W.D. La. 1968).

129. In *quo warranto* actions or under statutes providing for election contests, courts could set aside elections and declare a candidate the winner. *See, e.g.*, Dubuclet v. Louisiana, 103 U.S. 550, 553 (1880) (alluding to R.S. § 2010, a federal statute allowing for suits to try title to offices alleged to have been obtained by racial discrimination against voters, without suggesting any questions about the statute's constitutionality); Kellogg v. Warmouth, 14 F. Cas. 257 (C.C.D. La. 1872) (No. 7667) (upholding the constitutionality of R.S. § 2010); Echols v. State *ex rel.* Dunbar, 56 Ala. 131 (1876); City Council of Montgomery v. State *ex rel.* Dickerson, 38 Ala. 162 (1861); Smith v. Magourich, 44 Ga. 163 (1871); Allen v. Crow, 48 Ind. 301 (1874); Lunsford v. Culton, 23 S.W. 946 (Ky. 1893); Pradat v. Ramsey, 47 Miss. 24 (1872); People *ex rel.* Judson v. Thacher, 55 N.Y. 525 (1874); *Ex parte* Daughtry, 28 N.C. 155 (1845); Commonwealth *ex rel.* Attorney Gen. v. Walter, 86 Pa. 15 (1877); Combs v. Stumple, 79 Tenn. 26 (1883); State v. Harris, 52 Vt. 216 (1879); State *ex rel.* Curran v. Palmer, 24 Wis. 63 (1869).

Courts could also enjoin elections held under invalid procedures. *See, e.g.*, Hardacre v. Dalton, 9 Ohio Dec. Reprint 527 (C.P. Hamilton County 1885); Brazie v. Fayette County Comm'rs, 25 W.Va. 213 (1884) (affirming an injunction against an invalid election procedure); State *ex rel.* Lamb v. Cunningham, 53 N.W. 35 (Wis. 1892). *See generally* GEO. W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS chs. 6–9 (2d ed. 1880) (dealing with *quo warranto* and other election contests and authored

for Congress,[130] presidential electors, or other offices because they violated the Fifteenth Amendment, and to create judicial or legislative procedures to establish unconstitutionality.[131]

Although the greater power does not inevitably include the lesser,[132] the power under the Fifteenth Amendment to invalidate an election in its entirety logically should include the power to invalidate it partially, as Section 2 would do. Congress may use any rational means for enforcing the Fifteenth Amendment;[133] partial invalidation is interference with precisely the same interest of the state, only to a lesser degree. It seems rational to conclude that sometimes invalidating an election as a whole will not be the best remedy. For example, the unconstitutionally disenfranchised group may be so small that even their full participation would not have affected the outcome of the election. The unconstitutional conduct may have occurred only in a discrete region of the state. The unconstitutionally disenfranchised group may have overwhelmingly supported some or all of the prevailing candidates. In those or other circumstances, Congress may conclude that invalidating the entire election would be the wrong means of promoting compliance with the Fifteenth Amendment. Partial invalidation, or even letting the results stand and using injunctions, contempt, or other measures, may be more effective in promoting the voting rights of the disenfranchised group and would be respectful of the rights of others, who are equally entitled to have their votes counted.

On the other hand, if proportional or other partial invalidation of an election

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by a former U.S. Circuit Judge and former chair of the U.S. House of Representatives Committee on Elections).

130. U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); *see also* CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789–1901 (1901).

131. *Katzenbach*, 383 U.S. at 327–28 (holding that Congress has power to impose "remedies for voting discrimination which go into effect without any need for prior adjudication"); *id.* at 326 ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."); *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) (upholding a prosecution for interference with African-American voters: "[T]his fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and congress has the power to protect and enforce that right."); *Ex parte* Virginia, 100 U.S. 339, 345–46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

132. *Compare* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996) ("[W]e do not dispute the proposition that greater powers include lesser ones . . . .") (dicta), *and* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."), *with* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) ("[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance." (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting))).

133. *Katzenbach*, 383 U.S. at 324.

is not a rational means of enforcing the Fifteenth Amendment, then it makes no sense to preserve Section 2 to perform that function. In sum, if the approach of Section 2 is consistent with the Fifteenth Amendment, the Fifteenth Amendment's own enforcement authority encompasses it. If it is inconsistent, it was repealed.

There is another difficulty with understanding Section 2 as a means of enforcing the Fifteenth Amendment: Section 2's coverage is much more limited,[134] and it offers a single remedy for violation. The relationship of the restricted Section 2 to the apparently broader Fifteenth Amendment can be understood in one of several ways. The least plausible argument is that both are in effect, and Section 2—in addition to offering the remedy of reducing the basis of representation—restricts the substantive and remedial scope of the Fifteenth Amendment. Notwithstanding its apparent expansiveness, under this reading the Fifteenth Amendment would not apply, for example, to women, or those under twenty-one, even in states allowing white women and white eighteen-year-olds to vote. The apparently broad grant of remedial power to Congress under Section 2 of the Fifteenth Amendment must be read restrictively in light of Section 2 of the Fourteenth Amendment. This argument seems untenable.

A second possibility is that both provisions are in effect but that the Fifteenth Amendment has modified Section 2, repealing all inconsistent provisions regarding coverage and remedy and retaining only the raw authority to deprive states of the benefit of unconstitutional disenfranchisement. But Section 2 with the limitations and restrictions removed (and the application to race made explicit) contains nothing not already in the Fifteenth Amendment, so it is hard to see what this alternative would add.[135]

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134. It covers fewer elections and fewer grounds of discrimination. *See supra* notes 112–115 and accompanying text.

135. Section 2 with the provisions inconsistent with the Fifteenth Amendment excised reads as follows:

> But when the right to vote ~~at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof,~~ [*These limitations would have to be struck because the Fifteenth Amendment applies to all elections.*]
>
> is denied to ~~any of the male inhabitants of such State, being twenty-one years of age, and~~ citizens of the United States, or in any way abridged, ~~except for participation in rebellion, or other crime,~~ [*These limitations would have to be struck because the Fifteenth Amendment applies to any unequal treatment of citizens based on race, color, or previous condition of servitude; as the Supreme Court held in* Hunter v. Underwood, *471 U.S. 222, 233 (1985), if white members of any of these classes are allowed to vote, so must African-Americans. The age and sex limitations are also inconsistent with subsequent constitutional amendments.*]
>
> ~~the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.~~ [*The limitation on remedy disappears because the remedy of the Fifteenth Amendment is not restricted in the way Section 2's is.*]

Of course, there are words and phrases in Section 2 remaining after those inconsistent with the Fifteenth Amendment are struck out. However, all the words in the sentence deal with a particular

A third understanding of the relationship makes much more sense: When Congress or a court acts to invalidate an election in whole or in part because of racial discrimination, it is not using a power granted by Section 2. However, Section 2, although itself inoperative,[136] suggests the breadth of the enforcement power that the Constitution granted to Congress and the courts under the Fifteenth Amendment.

III. SECTION 2 AND NON-RACIAL RESTRICTIONS

Although Section 2 and the Fifteenth Amendment cannot simultaneously regulate racial disenfranchisement, Section 2 may survive if it regulates grounds of disenfranchisement not explicitly covered by the Fifteenth Amendment, such as disenfranchisement for failure to pay a poll tax or pass a literacy test. However, as this Part will show, the Supreme Court has consistently read Section 2 narrowly, holding that it is at most redundant of protections of voting rights contained in other provisions of the Constitution. In addition, the right to vote protected by the Equal Protection Clause and other provisions of the Constitution encompasses the actual right to vote. Just as with racial restrictions on voting, therefore, the reduction in representation penalty of Section 2 can never be applied as a final remedy for the unconstitutional denial of the right to vote. As we have already seen, it is unnecessary as a provisional remedy because Congress has greater enforcement powers under other provisions of the Constitution. Accordingly, as to both scope and remedy, Section 2 could never be implemented once the Fifteenth Amendment became law.

A. THE SUPREME COURT AND SECTION 2

In *McPherson v. Blacker*,[137] the Supreme Court unanimously rejected a claim of abridgement of the right to vote in violation of Sections 1 and 2 of the Fourteenth Amendment and of the Fifteenth Amendment based on Michigan's switch from at-large to district election of presidential electors. The Court reached the merits, finding no abridgment on any ground, including Section 2. The Court observed that "the first section of the fourteenth amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged . . . then the basis of representation to

government action (reduction of representation) and the conditions for and exceptions to that action. Once the action itself is precluded, the remaining scattered pieces of the Section become meaningless because they are incapable of independent operation. Concretely, a provision of the Constitution stating in its entirety "But when the right to vote is denied to citizens of the United States or in any way abridged" is meaningless. *See infra* notes 206–07 and accompanying text.

136. That a statute has been repealed does not mean that it is irrelevant to the meaning of surviving statutes. *See* 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.04, at 172 (6th ed. 2002) ("[E]ven unconstitutional statutes relating to the same subject matter may be considered in order to determine the legislative intent in enacting a statute."). *See also infra* note 296.

137. 146 U.S. 1 (1892).

which each state is entitled in the congress shall be proportionately reduced."[138] However, the Court denied that Section 2 created universal suffrage: "There is no color for the contention that under the amendments every male inhabitant of the state, being a citizen of the United States, has from the time of his majority a right to vote for presidential electors."[139]

Instead, "[t]he right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state."[140] This language must be read in conjunction with the holding of *Neal v. Delaware*[141] that the Fifteenth Amendment's self-executing character amended discriminatory state suffrage law, rendering it "enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election."[142] Thus, as the Court explained in *McPherson*, the Fourteenth Amendment was designed to "preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people."[143] Under this narrow reading, Section 2 covered only discrimination that was invalid by virtue of some other provision of the Constitution.

This reading was followed in *Lassiter v. Northampton County Election Board*,[144] which upheld North Carolina's literacy test for voter registration. Justice Douglas wrote for a unanimous Court, which included Chief Justice Warren and Justices Black and Brennan and, indeed, was largely the same group that demonstrated its commitment to racial equality and its expansive view of voting rights a year before in *Cooper v. Aaron*[145] and three years later in *Baker v. Carr*.[146] The *Lassiter* Court explained that "[r]esidence requirements, age, [and] previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."[147] The Court emphasized Section 2's narrow scope: "While § 2 of the Fourteenth Amendment . . . speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.'"[148]

If Section 2 applied to anything beyond explicit racial classifications, it

138. *Id.* at 38–39.
139. *Id.* at 39.
140. *Id.*
141. 103 U.S. 370 (1880).
142. *Id.* at 389.
143. *McPherson*, 146 U.S. at 39 (citing *In re* Kemmler, 136 U.S. 436 (1890)).
144. 360 U.S. 45 (1959).
145. 358 U.S. 1 (1958) (upholding the binding nature of the school desegregation decision and individually signed by all the Justices).
146. 369 U.S. 186 (1962) (holding that a claim of malapportionment of the state legislature is justiciable).
147. *Lassiter*, 360 U.S. at 51 (citation omitted).
148. *Id.* (quoting *McPherson*, 146 U.S. at 39).

should have applied to the notorious and transparent literacy test. *Lassiter* cited a summary affirmance of a district court decision invalidating a discriminatorily applied literacy test on Fifteenth Amendment grounds, so the Court clearly knew what it was dealing with.[149] Even so, the Court refused to invalidate literacy tests across the board.

McPherson and *Lassiter* do not say that Section 2 has been repealed. However, they hold something similar—namely, that Section 2 has no independent effect. Instead, Section 2 is triggered only if some other part of the Constitution grants the right to vote or renders the law at issue unconstitutional. But if some other provision of the Constitution grants the right to vote, then people in that class get to vote, and again there is no occasion to implement Section 2. That is, the Constitution has precisely the same content with or without Section 2, which is another way of saying that Section 2 means nothing.[150]

McPherson and *Lassiter* are awkward cases; *McPherson* was from the *Plessy* era, and *Lassiter*'s understanding of literacy tests was naïve[151] and overruled by the Voting Rights Act,[152] so it is perfectly conceivable that they are out of step with modern voting rights law. There is also a serious argument that the narrow reading of Section 2 is inconsistent with its plain language.[153] Section 2 contains no racial limitation—on its face it covers everything[154] beyond its

149. *See id.* at 53 (citing Davis v. Schnell, 81 F. Supp. 872, 873 (S.D. Ala. 1949) (three-judge court), *aff'd mem. per curiam*, 336 U.S. 933 (1949)).

150. Indeed, some Supreme Court opinions quote what appears to be the entirety of "Section 2" without indicating that it has a second sentence. Utah v. Evans, 536 U.S. 452, 512 (2002) (Scalia, J., dissenting); U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 444 n.1 (1992).

151. *See* Ward v. Columbus County, 782 F. Supp. 1097, 1103 (E.D.N.C. 1991) ("The literacy test was used in Columbus County until 1972, and was not applied in an even-handed fashion. Blacks were required to pass a literacy test at times when whites were not. [The test] intimidated many black citizens and, no doubt, kept many from attempting to register to vote.").

152. *See* Gaston County v. United States, 395 U.S. 285 (1969) (affirming the refusal to reinstate a literacy test that had been suspended under the Voting Rights Act); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding a provision of the Voting Rights Act prohibiting application of literacy test requirements to those who completed sixth grade in U.S. schools where the predominant language was not English); South Carolina v. Katzenbach, 383 U.S. 301, 333 (1966) (upholding the Voting Rights Act's suspension of literacy tests).

153. *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 338–39 (1816) ("If the text be clear and distinct, no restriction on its plain and obvious import ought to be admitted, unless the inference be irresistible.").

154. *See, e.g.*, ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW 441 (1908) (Rothman reprint 1985) ("This provision was inserted to secure the ballot to the negro, but the prohibition is general against all restrictions . . . ."); 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION 1650–53 (1910); 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 626 (2d ed. 1929) (arguing that Section 2 was not repealed because it "provides for a reduction not simply in cases where adult male inhabitants, citizens of the United States, are denied the right to vote because of race, color or previous condition of servitude, but for any cause whatever, saving for participation in rebellion or other crime"); WISE, *supra* note 48, at 232 ("Doubtless it was a solicitude for the protection of the colored citizen that inspired the XIV Amendment, but it is written in general terms and applies to all classes of people."); Bonfield, *supra* note 10, at 112 ("Though the plight of the Negro was the chief concern of the drafters of section 2, nothing in the words of the Committee report precludes the most natural interpretation of the

several express exemptions.[155] Under this broad reading, a state loses representation if it denies the franchise to any male citizen over twenty-one who is an inhabitant and not a convict. This broad reading proposes that the never-enforced Section 2, examined carefully and literally, is actually the Ten Commandments of voting rights law.

The Court's modern apportionment and right-to-vote cases, however, depend on the conclusion that Section 2 is surplusage. Justice Harlan, almost always in dissent, was the modern champion of Section 2. Beginning with *Reynolds v. Sims*,[156] Harlan argued—never successfully—that the language and purpose of Section 2 precluded finding an abridgement of voting rights under Section 1. The plaintiffs in *Reynolds* claimed that Alabama's legislature was malapportioned because some districts were much larger than others, giving voters in the smaller districts extra impact and diluting the votes of those in larger districts.[157] The Court created the principle of "one person, one vote" to invalidate Alabama's districting under the Equal Protection Clause.[158] Justice Harlan dissented, insisting that Section 2's explicit regulation of suffrage and specific remedy meant that suffrage could not be the subject of a claim under Section 1:

> Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way" abridge the right of their inhabitants to vote for "the members of the [State] Legislature," and its express provision of a remedy for such denial or abridgement. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today.[159]

In later cases, Justice Harlan adhered to the view that Section 2 was the Fourteenth Amendment's exclusive limit on state suffrage authority. The history

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amendment, one consonant with a literal reading of its terms."); Zuckerman, *supra* note 10, at 125 ("However, the proposition that the penalizing clause of section 2 is limited to instances of disenfranchisement based on race, color, or previous condition of servitude cannot be accepted in light of the events leading to the adoption of the fourteenth amendment.").

155. Section 2 covers male, citizen, inhabitant, adult, nonconvicts. Arguably, the explicit listing of this set of qualifications means that there are no others. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 & n.9 (1995) (holding that the Constitution's enumeration of qualifications for office prevented Congress from imposing additional qualifications); Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 674–75 (1873) (holding that a constitutional clause expressly forbidding the state to give financial aid does not prevent the state's municipal corporations from doing so).

156. 377 U.S. 533 (1964).

157. That is, each person in a district with a population of three is more likely to affect the outcome of an election than each person in a district of three million, affording each of those three individuals a much greater opportunity to have their preferences reflected in the legislative body.

158. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.").

159. *Reynolds*, 377 U.S. at 594 (Harlan, J., dissenting) (alteration in original).

of the Fourteenth Amendment and the decisions under it, he insisted, "plainly showed that the Equal Protection Clause was not intended to touch state electoral matters . . . . If that history does not prove what I think it does, we are at least entitled to know why."[160]

Justice Harlan was right that a broad and exclusive Section 2 would necessarily restrict the coverage of the Equal Protection Clause of Section 1. Yet, the Supreme Court has freely invalidated voting restrictions under Section 1 without requiring that those restrictions also be invalid under Section 2. Indeed, the Court has evaluated under Section 1 restrictions based on age,[161] sex,[162] and criminal conviction,[163] grounds explicitly excluded from the coverage of Section 2, and has applied equal protection analysis to elections beyond those listed in Section 2.[164] These cases establish that Section 2 does not preclude review of voting claims under Section 1, even when those claims are textually excluded from the coverage of Section 2.

The Justices rejecting Harlan's view answered him by asserting that Section 2 was nonexclusive:[165] Section 2 illustrated some (but not all) of the rights protected by Section 1 and suggested one (but not necessarily the only) way in which Congress might choose to remedy a violation using its Section 5

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160. Carrington v. Rash, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting).

161. The plurality in *Oregon v. Mitchell* held that allowing eighteen-year-olds to vote in federal elections was a legitimate means for Congress to enforce the Equal Protection Clause, even though Section 2 protects suffrage only of those twenty-one or older. 400 U.S. 112, 239–41 (1970) (Brennan, J., concurring and dissenting); *id.* at 135–44 (Douglas, J., concurring and dissenting).

162. Before passage of the Nineteenth Amendment, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), considered a claim of sex discrimination under Section 1 even though sex discrimination is specifically contemplated by Section 2. *See also* United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459). Of course, these cases ultimately found no right to vote. However, there is little question that a sex classification not covered by the Nineteenth Amendment could be invalidated under the Equal Protection Clause. If, for example, a state were to permit male noncitizens but not female noncitizens to vote in school board elections, that would present an extremely promising equal protection claim. *Cf.* KEYSSAR, *supra* note 3, at 32 (discussing states allowing male noncitizens to vote).

163. In *Hunter v. Underwood*, the Court invalidated discriminatory criminal disenfranchisement as a violation of equal protection even though it was contemplated by Section 2. 471 U.S. 222, 227–28, 233 (1985). *See also* McLaughlin v. City of Canton, 947 F. Supp. 954, 973, 976 (S.D. Miss. 1995) (finding an equal protection violation based on disenfranchisement for a misdemeanor conviction); Hobson v. Pow, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (invalidating a convict disenfranchisement provision applicable only to men); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary Assessment*, 90 HARV. L. REV. 293, 303 (1976) ("[T]here is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts."). Of course, the Supreme Court has upheld the constitutionality, in principle, of criminal disenfranchisement. *See infra* notes 289–93 and accompanying text.

164. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (applying equal protection analysis to a school district election).

165. Thus, Justices Brennan, Marshall, and White stated in *Oregon v. Mitchell* that they did not "find persuasive our Brother Harlan's argument that § 2 of the Fourteenth Amendment was intended as an exclusive remedy for state restrictions on the franchise, and that therefore any such restrictions are permissible under § 1." 400 U.S. at 276.

powers.[166] By itself, this interpretation is unsatisfying because it leaves Section 2 as surplusage or commentary, contrary to the presumption that every provision of the Constitution should be given independent effect.[167] After all, it is not as though the Constitution frequently uses examples to explain the meaning of its substantive provisions.[168]

This interpretation makes more sense, however, when coupled with the separate observations of President Garfield and Professor Bickel[169] that Congress had been deliberately disingenuous about the meaning of the Fourteenth Amendment's terms. The argument that Congress obscured Section 1's effect on racial suffrage so that it would be more palatable to the states is perfectly plausible[170] and is perfectly consistent with reading an implied term into Section 2 making it applicable only to racial disenfranchisement—if there were unwritten aspects of Section 1, Section 2 could have them as well. To this may be added the argument that we should not expect too much from the drafters of these amendments because Congress was under great pressure, and it is thus ahistorical to apply the canons of construction to the Fourteenth Amendment as if it were meticulously crafted and carefully discussed over time like the Uniform Commercial Code. Of course, this assumption is also consistent with the idea that Section 2 is really about race, and race alone, in spite of its plain language.

The repeal theory better answers Justice Harlan's argument: Whatever merit his argument may have had in 1868 and 1869 was lost in 1870 when the Fifteenth Amendment became law. Even if Section 2 was originally intended to create an exception for racial suffrage to the general equal protection principles of Section 1, the Fifteenth Amendment repudiated Section 2's implication that the states could disenfranchise on the basis of race. The Fifteenth Amendment may have been necessary in order to read Section 1 as covering voting. However, once the special treatment of the franchise in Section 2 was eliminated, nothing in the text of Section 1 itself suggests that it excludes suffrage.

B. SECTION 2'S PENALTY VERSUS THE RIGHT TO VOTE

The Supreme Court's voting rights jurisprudence from *McPherson* on suggests that Section 2's coverage is subsumed within, or is at most coterminous with, the other constitutional protections of the franchise. If it adds nothing to them, at least it is not inconsistent. However, Section 2's penalty provision

166. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

167. *See, e.g.*, Wright v. United States, 302 U.S. 583, 588 (1938) ("[E]very word must have its due force and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." (quoting Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840))).

168. *But cf.* U.S. CONST. amend. II (providing that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" and arguably including an example in the first part to explain the meaning of the remainder).

169. *See supra* notes 51–54 and accompanying text.

170. *See* William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 72–73.

contradicts the right to vote as described by the Court. Once a right to vote is recognized under some provision of the Constitution,[171] Section 2 can never be applied as a final remedy for many of the same reasons that Section 2 cannot be a final remedy for a Fifteenth Amendment violation.

In the modern right-to-vote and reapportionment cases, the question at issue has been "exercising the equal right to vote."[172] The Court has said that "the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters."[173] Qualified voters have a right to "cast their ballots and have them counted."[174] Section 2 contemplates that states have the power to discriminate, but the Supreme Court's decisions make clear that a judicial finding of a violation of Section 1 justifies imposition of whatever legal or equitable remedies are necessary to allow the deprived individuals to vote. In *Bush v. Gore*,[175] for example, the Court's conclusion that voting rights were being infringed did not lead to an order reducing Florida's basis of representation, and could not have under the reasoning and holdings of the Court's previous voting rights decisions.

The conception of the right to vote as involving actual voting is embodied in the text of the Constitution. Since Reconstruction, three amendments have addressed suffrage. The Nineteenth Amendment enfranchised women,[176] the Twenty-Fourth Amendment protected those who failed to pay a poll tax or other tax with respect to elections for federal offices,[177] and the Twenty-Sixth Amendment enfranchised those eighteen and over.[178] Providing the direct election of senators[179] and granting residents of the District of Columbia the right to participate in presidential elections[180] also expanded suffrage or its value. Each of these provisions operated like the Fifteenth Amendment by expanding the right to vote, rather than threatening to dilute the votes of others if a state failed to take particular action.[181]

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171. Or at least once it is recognized that a discriminatory denial of the right to vote violates equal protection.

172. Evans v. Cornman, 398 U.S. 419, 426 (1970).

173. Lubin v. Panish, 415 U.S. 709, 713 (1974) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)).

174. Gray v. Sanders, 372 U.S. 368, 380 (1963) (quoting United States v. Classic, 313 U.S. 299, 315 (1941)); *see also* United States v. Mosley, 238 U.S. 383, 386 (1915) ("[T]he right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.").

175. 531 U.S. 98 (2000).

176. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

177. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote [in federal primaries and general elections] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

178. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

179. U.S. CONST. amend. XVII (providing that Senators shall be "elected by the people" of each state).

180. U.S. CONST. amend. XXIII, § 1 (granting the District of Columbia presidential electors).

181. In addition, the amendments did not amend Section 2 to expand its coverage to Senate elections or denial of the vote to women or those over 18. One possible implication is that the Constitution thus

The apportionment cases present a particularly acute example of the tension between the current "right to vote" actually requiring the state to let people vote and Section 2's "right to vote" allowing the state to prevent people from voting but requiring that they be subtracted from the population. Malapportionment is an abridgement of the right to vote,[182] and if Section 2 covers all restrictions on the franchise, then Section 2 covers malapportionment. It would be ironic if Section 2 provided the exclusive or even an available remedy in apportionment cases because the application of Section 2 would reduce the basis of representation of malapportioned states, in effect remedying malapportionment of a state with malapportionment of the nation. Because the Supreme Court has held that equal protection requires congressional districts to be equally apportioned,[183] just as it did with state legislative districts,[184] the malapportionment suggested by Section 2 seems impossible as a matter of doctrine as well as logic.

Section 2 may be understood as a provisional remedy for malapportionment, but again, Section 5 of the Fourteenth Amendment authorizes, and subsequent amendments and legislation have enacted, more expansive ones.[185] For nonracial denial of the right to vote, just as for racial discrimination, the Constitution has moved beyond the approach of Section 2.

C. THE UNCERTAIN SCOPE OF SECTION 2

Another problem with the idea that Section 2 applies beyond race is the difficulty of calculating its coverage. If Section 2 applies to everything other than its textual exceptions, then states lose representation for denying the right to vote not only on such unlamented grounds as failure to pass a literacy test, pay a poll tax, or satisfy educational or property requirements, but also on arguably reasonable grounds such as failure to take an oath[186] or insufficient durational residence (even a week or a day), and even on highly defensible

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created a hierarchy of voting rights. Non-discrimination on the basis of race would be covered by both Section 2 and the Fifteenth Amendment. On the other hand, the right to vote without discrimination on other grounds was important enough to be mentioned in the Constitution, yet sufficiently less favored (or, perhaps, more favored) that it would not be protected by the provisions of Section 2. Another, more plausible, explanation is that the drafters of the amendments expanding suffrage did not amend Section 2 because they recognized that it was dead.

182. In *Reynolds v. Sims*, the Supreme Court explained:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

377 U.S. 533, 555 (1964).

183. Wesberry v. Sanders, 376 U.S. 1 (1964).

184. *Reynolds*, 377 U.S. at 560–64.

185. *See supra* Part II.c (discussing the broader remedies authorized by the Fifteenth Amendment); *supra* notes 173–75 and accompanying text.

186. *Cf.* Fields v. Askew, 279 So.2d 822 (Fla. 1973) (upholding an oath requirement for voter registration), *appeal dismissed mem.*, 414 U.S. 1148 (1974).

grounds such as nonregistration,[187] failure to provide proof of identity where there is a question, and adjudicated insanity or incompetency.

Even those who argued that Section 2 applied beyond race nevertheless recognized the possibility of implied exceptions. Representative James Garfield contended that Section 2 applied to nonracial grounds of disenfranchisement.[188] Nevertheless, he recognized that its literal language was in some tension with the intent of its framers:

> The language of this amendment seems to me unfortunately chosen, and I do not believe that those who put it into the Constitution saw, at the time, the full scope and extent of its meaning. As a matter of history, it was intended to declare simply that where suffrage was denied or abridged in any state on account of race, color or previous condition of servitude, representation should be diminished.[189]

Some scholars who argue that Section 2 applies broadly admit that it is subject to implied restrictions; voters can be turned away for nonregistration or insanity, for example.[190] The debates in Congress also acknowledge some unwritten restrictions: "[I]t did not mean to apply to that class of restrictions which every state, for its own security and its own protection and for the purity of the ballot-box, saw proper to throw around it;"[191] it would not apply to "a mere regulation to secure the purity of election,"[192] such as a residency or registration requirement.

These are fatal concessions. The argument that Section 2 applies beyond race is driven by its plain language. If the scope of Section 2 cannot be measured by its plain language, the argument loses its force, and it becomes difficult to justify not reading it in accordance with its acknowledged purpose of preventing racial discrimination.[193] Put another way, even Section 2's defenders believe

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187. *But cf.* Harman v. Forssenius, 380 U.S. 528 (1965) (voiding an alternative of filing a certificate of residence in lieu of paying a poll tax based on the Twenty-Fourth Amendment's abolition of the poll tax in federal elections).

188. CONG. GLOBE, 42d Cong., 2d Sess. 83 (Dec. 12, 1871) (arguing that Section 2 must be applied to nonracial grounds of disenfranchisement).

189. *Id.* at 82. Garfield was hardly alone in the belief that the main purpose of Section 2 was "to prevent the disenfranchisement of the colored population." *Id.* at 65 (Dec. 11, 1871) (remarks of Rep. Maynard).

190. *See* Bonfield, *supra* note 10, at 116–17 ("[T]he requirement that an elector must register to cast his ballot is not an abridgement . . . ."); Zuckerman, *supra* note 10, at 129 ("In applying section 2, the difference between laws designed to secure the orderly administration of elections and the purity of the ballot on the one hand, and laws and regulations calculated to repress suffrage on the other, must continually be kept in mind"; thus, states may disenfranchise for "violation of registration laws" and "idiots and the insane" without inviting a Section 2 penalty).

191. CONG. GLOBE, 42d Cong., 2d Sess. 79 (Dec. 12, 1871) (remarks of Rep. Mercur).

192. *Id.* at 81 (remarks of Rep. Shellabarger).

193. By 1871, Congress was applying, rather than framing, the Fourteenth Amendment. Perhaps then, like a court, it threw up its hands in the face of a statute that was at least partially superseded and whose intent was indiscernible. *Cf.* Reno v. ACLU, 521 U.S. 844, 884–85 (1997) (declining to impose a

that there are reasonable and unreasonable grounds for denial of the franchise, but Section 2's drafters failed to catalog all of them in the text. The Equal Protection Clause, in retrospect, offered a far more useful framework for evaluating nonracial restrictions than did the formless Section 2, and the decisions in *Lassiter* and *McPherson* allow direct resort to this technique in voting rights and apportionment cases.

Understanding Section 2 as being concerned first with racial discrimination is consistent with the Court's jurisprudence before, during, and after Jim Crow. In the *Slaughter-House Cases*[194] decided in 1872, the Supreme Court made clear that the Reconstruction Amendments were to be interpreted in accordance with the purpose of their adoption:

> [O]nly the fifteenth amendment, in terms, mentions the negro . . . [but] each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth. . . . [I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.[195]

Courts[196] and commentators[197] agree that Section 2 was primarily concerned

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narrowing construction on an unconstitutional statute: "In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction. . . . The open-ended character of the [Communications Decency Act] provides no guidance what ever for limiting its coverage. . . . This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" (citations omitted)).

194. 83 U.S. (16 Wall.) 36 (1872).

195. *Id.* at 71–72. The Court has continued to recognize, as it did in *Shelley v. Kraemer*, that "[t]he historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten . . . [when] the provisions of the Amendment are . . . construed." 334 U.S. 1, 23 (1948). *See also, e.g.*, Ham v. South Carolina, 409 U.S. 524, 526 (1973); Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." (citing, inter alia, the *Slaughter-House Cases*)); Buchanan v. Warley, 245 U.S. 60, 76 (1917) ("In *Slaughter House Cases* it was recognized that the chief inducement to the passage of the amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the states.").

196. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 257 (1970) (Brennan, J., joined by White and Marshall, JJ., concurring and dissenting) ("The key provision on the suffrage question was, of course, § 2, which was to have the effect of reducing the representation of any State which did not permit Negroes to vote."); Holley v. Askew, 583 F.2d 728, 730 (5th Cir. 1978) ("[S]ection 2 of the Fourteenth Amendment, adopted soon after the close of the Civil War, was intended to force the southern states either to adopt universal suffrage or be denied representation in Congress. The . . . states were to be deterred from arbitrarily excluding blacks from exercising the right to vote." (citing, inter alia, *McPherson*)); Daly v. Madison County, 38 N.E.2d 160, 165 (Ill. 1941) ("Its primary purpose was to prevent an abridgment of the right of suffrage of a class of citizens who had been recently freed from involuntary servitude and given the right of suffrage."); Cofield v. Farrell, 134 P. 407 (Okla. 1913).

197. *See, e.g.*, ANTINEAU, *supra* note 47, at 372 ("As drafted, the intent of the proposed Second Section was to encourage the Southern States to provide Black males over twenty-one with the

with the question of African-American suffrage. If the *Slaughter-House* Court was right about the intent of Congress, then *McPherson* and *Lassiter* are consistent with the interpretive principle that the literal language of statutes need not be followed where doing so would frustrate congressional intent.[198]

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suffrage."); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.7, at 310 (3d ed. 1999) ("The declaration of citizenship in section one and the provision on voting in section two were clearly designed as specific protections for black persons."); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 779 (1994) ("Section 2 of the Fourteenth Amendment, reduc[ed] a state's congressional representation in proportion to its disenfranchisement of blacks in ordinary elections"); Bayer, *supra* note 10, at 987 ("The penalty provided in section 2 is determined by computing the proportional number of Negroes to the total eligible voters in the state."); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1352 n.427 (2000) (arguing that Section 2 was designed to address the problem of southern states gaining electoral power "even though they excluded blacks from voting"); Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 318 (1979) ("Section 2, roughly speaking, provided that if suffrage was denied on racial grounds, the state's representation in the House should be reduced accordingly."); Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congress*, 34 LAW & SOC'Y REV. 315, 340 (2000) ("[T]he Constitution prescribed penalties for states that disenfranchised black men (this is what Republicans hoped to accomplish with section two of the Fourteenth Amendment)"); Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 48 n.227 (1990); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 974 (2002) ("The civil/political distinction was reflected in Section Two of the Fourteenth Amendment itself, which permitted disenfranchisement of adult male African-Americans—the principal intended beneficiaries of Section One of the Fourteenth Amendment—so long as the disenfranchising states paid the price of reduced representation in Congress."); Fletcher, *supra* note 18, at 1900 ("Section 2 of the Fourteenth Amendment, had as it [sic] purpose the facilitation of black voting."); Randall Kennedy, *Comment on Donald Nieman's Paper*, 17 CARDOZO L. REV. 2149, 2150 (1996) ("Section two of the Fourteenth Amendment . . . declared, essentially, that while states could continue to exclude people from the ballot on a racial basis they could not be permitted to do so without paying a political price."); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1923 (1995) (asserting that before the Fifteenth Amendment, "Southern black suffrage was . . . secured [by repealable statutes] and whatever force Section Two of the Fourteenth Amendment might exert"); Nowak, *supra* note 57, at 1105 (noting that "Section 2 of the Fourteenth Amendment failed to spur Southern states to grant black persons the right to vote"); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 539 (2001) ("Section 2 of the Fourteenth Amendment was drafted with a transparent aim. . . . Black suffrage, at least in theory, was to be the price of an enlarged congressional delegation."); Shapiro, *supra* note 18, at 546 n.48 ("[S]ection 2 of the Fourteenth Amendment was adopted to punish Southern states that refused to allow blacks to vote."); Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & POL. 543, 548 (1988) ("[S]ection 2 was at least intended to protect the black franchise."); *Supplementary: Subjects Not Discussed Elsewhere*, *in* SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 601, 677 (Rothman reprint 1980) (1893) ("By the second section of the Fourteenth Amendment it was intended to protect the emancipated slaves in the exercise of their new political privileges.").

Although a few sources do not emphasize the racial focus of Section 2, *see, e.g.*, CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 157–58 (1922), none have been found that deny it.

198. Thus, in *Bob Jones University v. United States*, the Court explained:

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute: "The general words used in the clause . . . , taken by themselves, and literally construed,

There is still another practical problem with the argument that Section 2 survives the Fifteenth Amendment. As drafted, Section 2 was thought to finally resolve a limited number of transactions; that is, the state legislatures would either grant suffrage to African-American males or suffer the consequences. Occasionally, a state subject to the penalty might have been relieved of it by enfranchising the class wrongfully discriminated against. That might require recalculation, but the major burden of implementing Section 2 would have been a one-time calculation, updated at every census.

If Section 2 operates alongside the Fifteenth Amendment as a means of coercing universal suffrage and must be imposed upon a finding of discrimination and withdrawn when the discrimination is remedied, then in many periods of American history, daily reapportionments of Congress would have been required, as on Day 1 when Birmingham, for example, is found to have unconstitutional voting requirements, and then again when they are fixed on Day 7. If this ongoing, real-time reapportionment switches a seat in Congress for a month, must there be a new election, and then another when it shifts back?[199] It cannot be that the basis of representation is to be readjusted and reported on a daily basis like the Dow Jones Industrial Average or the pollen count. The virtual impossibility of implementing this reading of Section 2 suggests that it was not the reading Congress and the states intended when they passed it.

> without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law . . . .*"

461 U.S. 574, 586 (1983) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857) (emphasis added)); *see also, e.g.*, United States v. Campos-Serrano, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered."); Lynch v. Overholser, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute"); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940) ("All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); United States v. Katz, 271 U.S. 345, 362 (1926) ("General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation." (citing United States v. Jin Fuey Moy, 241 U.S. 394 (1916); Holy Trinity Church v. United States, 143 U.S. 457 (1892); United States v. Kirby, 74 U.S. 482 (1868); United States v. Palmer, 16 U.S. 610 (1818))).

199. Alternatively, perhaps Section 2 applies only at the reapportionment following the census. If so, states can enfranchise African-Americans for the few months every decade that the census is occurring, or only when Congress is debating apportionment, and then disenfranchise them again without penalty.

D. LEGISLATIVE HISTORY AND CONGRESSIONAL ACTION

If the legislative history made clear that the intent of Congress was for Section 2 to be the exclusive regulator of the franchise in the Fourteenth Amendment, it would be necessary to consider whether Justice Harlan was right notwithstanding the possible effects on four decades of voting rights law. However, the legislative history is ambiguous about Section 2's application beyond race. Congressional statements suggest that Section 2 would apply to various nonracial grounds of disenfranchisement, as well as to disenfranchisement on the basis of race.[200]

The conduct of Congress suggests that restrictions other than those listed in Section 2 were permissible and, therefore, that Section 2 did not apply to nonracial restrictions. For example, the constitutions of southern states approved by Congress in 1868 as a basis for readmission contained disqualifications other than those permitted by Section 2.[201] If Section 2 covered everything, presumably Congress would have brought the states into compliance when military reconstruction gave it the power to dictate the content of state constitutions.

The report of the Joint Committee on Reconstruction also suggests that Section 2 regulated only racial discrimination. The Committee concluded "that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race."[202] The Committee proposed an amendment to that effect, but it was rejected by Congress. However, "[t]he principle involved in that amendment is believed to be sound, and the committee . . . again proposed it in another form, hoping that it would receive the approbation of Congress."[203] Thus, Section 2 carried out the intent of the earlier version, specifically based on race or color, "in another form."

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200. Thus, Thaddeus Stevens said on the House floor:

> The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive. If they do not enfranchise the freedmen, it would give to the rebel states but thirty-seven Representatives.

1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 223 (1970). Although the first part of this quote suggests that Stevens meant "universal suffrage" in the broad sense, the example he used suggests that he could have meant "universal suffrage" in the sense of "universal *racial* suffrage." *See also id.* at 250 (statement of Rep. Bingham); *id.* at 262–64 (statement of Sen. Howard) (asserting that Section 2 was designed to encourage African-American suffrage).

201. *See, e.g.*, ALA. CONST. art. VII, § 2 (1867) (excluding soldiers, sailors, idiots, and the insane, and requiring an oath), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 91 (William F. Swindler ed., 1973) [hereinafter Swindler]; FLA. CONST. art. XV, § 7 (1868) (allowing educational qualifications for voting), *reprinted in* 2 Swindler, at 365; GA. CONST. art. II, §§ 2, 5 (1868) (excluding soldiers, sailors, and participants in duels), *reprinted in* 2 Swindler, at 499–500; MISS. CONST. art. VII (1868) (excluding idiots and the insane and imposing residence requirements), *reprinted in* 5 Swindler, at 385.

202. FESSENDEN, *supra* note 73, at 82.

203. *Id.*

The report also stated that Section 2 "would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise."[204] It is entirely improbable that the framers of the Fourteenth Amendment thought that it would unduly invade state authority to enfranchise African-Americans, yet that it would be acceptable to federalize the franchise as a whole.

Even if possible, definitive resolution of the question of original intent is unnecessary to sustain the *McPherson/Lassiter* view of Section 2. Even if Section 2 originally covered all ballot restrictions, all agree that promoting African-American suffrage was its central motivating purpose. However, it would violate the Fifteenth Amendment and therefore be unconstitutional for a court or Congress to remedy racial disenfranchisement by applying Section 2 instead of granting African-Americans the right to vote.[205] Under established principles of statutory construction, invalidation of the provision with respect to its motivating purpose invalidates the whole unless it can be said that the legislature would have passed it anyway:

> The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted these provisions that are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"[206]

However, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."[207] In such a case, the Supreme Court can only conclude that Section 2 would never have been

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204. *Id.*

205. *See supra* note 108–10.

206. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932))); *see also, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 767 (1996) (citing the same test).

207. *Alaska Airlines*, 480 U.S. at 684 (citing Hill v. Wallace, 259 U.S. 44, 70–72 (1922)). Thus, in *United States v. Jackson*, the Court held that it impermissibly burdened the right to a jury trial for Congress to authorize capital punishment only for those kidnapping defendants tried by juries. 390 U.S. 570 (1968). Yet the kidnapping statute as a whole was valid:

> The clause in question is a functionally independent part of the Federal Kidnapping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnapping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us.

Id. at 586; *see also* Lynch v. United States, 292 U.S. 571, 586 (1934) ("[N]o provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the Legislature intended the unobjectionable provision to stand in case other provisions held bad should fall." (citing Dorchy v. Kansas, 264 U.S. 286, 288 (1924)); Reagan v.

adopted if the Section applied to every basis for disenfranchisement except race. It would be understandable if the Court decided not to inflict on the states a Section 2 that would operate quite differently from the manner in which its framers intended.

The conduct of Congress does not undermine the Court's decisions that narrowly construe Section 2. Congress never applied Section 2 to take away a representative or elector from any state despite decades of unconstitutional discrimination. The actions of early Congresses, which contained many members who participated in proposing the amendments, are of particular interest.[208] Although some members of the Reconstruction Congresses treated Section 2 as potentially applicable, they never persuaded a majority of their colleagues to enforce it.[209] Of course, congressional inaction is inherently ambiguous. However, in the course of the debates about Section 2 in this period, members of Congress offered powerful grounds to believe that enforcement of Section 2 beyond the racial context would be difficult or impossible.[210] These debates are accordingly less likely to be evidence of Section 2's vitality and more likely to be an explanation for its obsolescence.

In December 1869, after the Fourteenth Amendment was ratified but before the Fifteenth Amendment was, Section 2 had a clean test. Whatever else it might cover, Section 2 applied to disenfranchisement based on race. In 1869, many northern states denied African-Americans the right to vote, while African-Americans voted in the South under military occupation or Reconstruction governments. When this issue came before the Congress, it seemed to be an open and shut case: Reduce the basis of representation of New Jersey, Ohio, Pennsylvania, Connecticut, and other states extending suffrage only to whites.

However, Representative James Garfield persuaded the House not to apply Section 2 because of the prospect of passage of the Fifteenth Amendment.[211] He explained:

> If the fifteenth constitutional amendment should not prevail the representative bases of all these States will be proportionately reduced. If we should adjust the apportionment before the fifteenth amendment prevails, then when it does prevail all the States entitled to an increase under the fifteenth amendment will be deprived of that increase during the whole of the coming ten years.[212]

Congressional acquiescence to Garfield's argument had significant implications. First, Section 2 was in effect and the Fifteenth Amendment was not, yet

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Farmers' Loan & Trust Co., 154 U.S. 362, 395–96 (1894)); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 230–43 (1891).

208. *See supra* note 121.

209. *See* Zuckerman, *supra* note 10, at 94.

210. *See infra* notes 215–16 and accompanying text.

211. CONG. GLOBE, 41st Cong., 2d Sess. 124 (Dec. 14, 1869).

212. *Id.*

Congress did not enforce Section 2. Many members of the Forty-First Congress participated in proposing the Fourteenth and Fifteenth Amendments. This practical precedent meant that Congress did not regard Section 2 as a doomsday device, automatically imposing severe sanctions if triggered. Instead, even in the face of a clear violation, Congress could choose whether, when, and how to enforce it.

Second, this debate illustrates Congress' belief that the passage of the Fifteenth Amendment would have no effect on disenfranchisement on grounds other than race. Accordingly, even if there was reason to wait and see with respect to racial disenfranchisement, there was no reason to delay application of Section 2 to any other grounds of disenfranchisement to which it applied. That the Fifteenth Amendment's pendency justified terminating application of Section 2 in its entirety suggests that Section 2 applied only to race.

In 1871, Garfield again addressed enforcement of Section 2.[213] The Fifteenth Amendment was in force, the North more or less complied with the Amendment, and federal troops defended enfranchisement of African-Americans in the South. Accordingly, there was no question of reducing any state's basis of representation as a penalty for disenfranchising African-Americans. Instead, the question was whether Section 2 applied to nonracial grounds of disenfranchisement, such as failure to pay a poll tax, or to satisfy an educational or property requirement.[214] The congressional debates made clear that a central problem with enforcing Section 2 was the availability of reliable data on the number of individuals disqualified and the grounds for such disqualification.[215] Garfield had a census report listing the number of people disenfranchised in each state and the underlying reasons,[216] but many in Congress questioned the accuracy of the compilation.[217]

It is intrinsically difficult to calculate how many people were disenfranchised by a test or device like a poll tax, particularly in the era before pre-election voter registration became universal.[218] Application of Section 2 to nonracial disqualification requires implementing a detailed system of accounting.[219] It is

213. *See supra* note 51 and accompanying text.

214. CONG. GLOBE, 42d Cong., 2d Sess. 81 (Dec. 12, 1871) (remarks of Rep. Shellabarger) (poll tax and educational requirements); *id.* at 82 (remarks of Rep. Cox) (discussing property requirements in Rhode Island).

215. *Id.* at 79–83.

216. *Id.* at 83.

217. *Id.* at 79 (remarks of Rep. Mercur) (noting that the Census Bureau's report was prepared "so imperfectly that it affords no satisfactory information to this House"); *id.* at 83 (remarks of Rep. Garfield (noting that the Secretary of the Interior "says officially that the result is not satisfactory nor trustworthy. I presume this is so.").

218. *See id.* at 106 (remarks of Rep. Kerr) (arguing that the numbers disenfranchised because of race can be readily determined, but that if Section 2 were understood as going beyond that, it would be impossible to administer; "the men who cannot read and write to-day may do so a week hence, or at the next election; so the poor man may acquire the requisite property.").

219. This is particularly true given that Congress fixed the number of representatives at 435 in 1911. U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 451 (1992). *See generally* Barry Edmonston, *Using*

far from clear that the Census Bureau is capable of generating those statistics, at least through its traditional collection of reports from individuals. Legislation applicable to an immutable characteristic such as race is easier to enforce; it is far easier to identify the number of African-American male citizens over twenty-one in a particular state who were disenfranchised by operation of law than to identify how many were denied the right to vote based on the results of a literacy test or because they could not produce the necessary poll tax receipts.[220] The issue of the availability of reliable data diminished in importance in 1871 after it became clear that the apportionment of Congress would be the same with or without the application of Section 2.[221]

In January 1872, Congress passed a statute similar to Section 2, which still appears in the United States Code.[222] Although the statute suggests that Congress did not think that Section 2 was repealed, it also offers little support for the idea that it is still in effect. The statute does not identify the grounds of disenfranchisement to which it applies, leaving open the difficult questions raised in the December 1871 debate. The statute neither grants any court jurisdiction nor identifies any procedure for enforcement; if, at least as a practical matter, Section 2 can be enforced only with litigation or legislation, then this statute is not a step forward. The statute also does not explain how it is to be applied. Section 2 reduced the basis of representation; this statute reduces the number of representatives in the House. It is easy to subtract, say, five thousand people from one hundred thousand people and calculate what apportionment would result; it is not so easy to subtract five percent from five Members of Congress.[223] The entire legislative history of the provision consists of this

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U.S. Census Data to Study Population Composition, 77 N.D. L. REV. 711, 714 n.33 (2001) (describing the mathematics of apportionment). Therefore, enforcement of Section 2 is not simply a question of taking away a representative from a discriminating state, but also of identifying a gaining state. This process cannot occur without accurate statistics for all states. *See* Saunders v. Wilkins, 152 F.2d 235, 238 (4th Cir. 1945) ("But we have no means of knowing the effect upon the suffrage of the restrictions imposed by the statutes of other states in the form of poll taxes or other qualifications for voting. We could not say, even if the question lay within our power, whether Virginia is entitled to nine out of the total number of four hundred and thirty-five Representatives provided by Congress without ascertaining the number to which other states are entitled when the provisions of the second section of the Fourteenth Amendment are taken into consideration.").

220. *Cf.* Sharrow v. Brown, 447 F.2d 94, 97 (2d Cir. 1971) (finding that the plaintiff had no standing to bring a Section 2 claim without presenting "a state-by-state study of the disenfranchisement of adult males, a task of great proportions.").

221. African-Americans voted across the country, and disenfranchisement on nonracial grounds was sufficiently minimal and proportional in the states that it would not affect apportionment of congressional seats. CONG. GLOBE, 42d Cong., 2d Sess. 111 (Dec. 13, 1871) (remarks of Rep. Bingham) ("applying the provision of the second section of the fourteenth article of amendment, there is not a State in the Union affected by it."); *id.* at 139 (remarks of Rep. Eames); *id.* at 674–75 (remarks of Sens. Sherman and Trumbull).

222. Act of Feb. 2, 1872, § 6, 17 Stat. 29 (codified at 2 U.S.C. § 6 (2000)). The problems with this statute are carefully analyzed in Zuckerman, *supra* note 10, at 114–16.

223. Thus, in *Dennis v. United States*, the court rejected a collateral attack on the legitimacy of Congressman Rankin of Mississippi in the defense of a citation for criminal contempt for failure to answer a question propounded in his committee. 171 F.2d 986, 992–93 (D.C. Cir. 1948). The court

speech by Representative Farnsworth: "I move the House concur in the amendments of the Senate. They can do no harm."[224] Even if Farnsworth were right, this statute neither represents a congressional commitment to enforce Section 2 nor does his statement suggest that it has any particular meaning.[225]

The early Congresses that refused to enforce Section 2 also passed the Ku Klux Klan Act, Section 1 of which became 42 U.S.C. § 1983. In addition to serving in the Union Army, many Republican members of the 1866–76 Congresses had earned battle stars in the fight for civil rights; they reconstructed the Constitution, passed important civil rights laws, tried to impeach President Johnson, and were firm with the South. That these noble[226] public servants lost interest and faith in Section 2 suggests a defect in Section 2 rather than in their fortitude and determination.

IV. THE LEGAL LEGACY OF SECTION 2

Section 2 was never invoked to serve its intended function of promoting the right to vote on a race-neutral basis, or at least of punishing discriminating states. Ironically, however, it serves a critically important role in suppressing African-American suffrage. After a century of vigorous nonenforcement, and just as the ink was drying on the Voting Rights Act of 1965, Section 2 was revived as a justification not to subject felon disenfranchisement laws to equal protection scrutiny. The rationale was that Section 2 was a textual authorization for felon disenfranchisement and thus precluded application of otherwise applicable laws that might have allowed African-Americans to vote.

This Part first describes the historical use of felon disenfranchisement as a tool of Jim Crow and its contemporary impact. It then describes the review of state disenfranchisement provisions under the Equal Protection Clause of the Fourteenth Amendment and suggests that there are serious reasons to doubt that felon disenfranchisement can survive strict scrutiny. Finally, this Part examines the cases that decline to review felon disenfranchisement under strict scrutiny or the Voting Rights Act and argues that their reliance on Section 2 is misplaced.

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found that Section 2 was not judicially enforceable, a conclusion invalidated by subsequent Supreme Court decisions, *see* supra note 109 and accompanying text. However, the court further found that Mississippi would be entitled to at least one representative even if Section 2 were enforced, and that it was not clear how a court should decide which ones to eject.

224. CONG. GLOBE, 42d Cong., 2d Sess. 713 (Jan. 30, 1872).

225. Indeed, the statute approved by both houses referred to Section 1 instead of Section 2 and had to be corrected. *See* ZUCKERMAN, *supra* note 10, at 116 & nn.118–19.

226. *See* Robert J. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 26 B.C. L. REV. 353, 365 (1985) ("Few men in American history, perhaps indeed the history of any nation, have made greater contributions to human rights and have been treated less generously by their nation's historians than those Republican politicians who, between the years of 1861 and 1876, abolished slavery and set the nation on the as yet unfinished path towards nonracial democracy.").

A. JIM CROW AND FELON DISENFRANCHISEMENT

Admittedly, it is hard to regard denying the franchise to convicted murderers, rapists, and kidnappers as a particularly urgent civil rights issue. Yet, felon disenfranchisement is a legitimate concern of the Reconstruction Amendments and other civil rights laws. African-Americans are disproportionately affected by felon disenfranchisement. As a result, their political preferences are less likely to meet with electoral success. Professors Uggen and Manza calculate that the Democratic Party would have controlled the Senate since 1986 and that the Democratic candidate would have won the 2000 presidential election but for felon disenfranchisement.[227]

Of course, African-Americans can avoid being disenfranchised simply by refraining from committing crimes. Yet, this does not entirely answer the question of fairness. "Many felon voting bans were passed in the late 1860s and 1870s, when implementation of the Fifteenth Amendment and its extension of voting rights to African-Americans were ardently contested."[228] There is strong evidence that the crimes leading to disenfranchisement were manipulated to accomplish the disenfranchisement of African-Americans.

In an 1896 opinion written with startling candor, a unanimous Mississippi Supreme Court wrote that the all-white 1890 constitutional convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race."[229] African-Americans, the court explained, were "a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites."[230] Accordingly, "the convention discriminated against . . . the offenses to which its weaker members were prone. . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not."[231] To this day, the disenfranchisement provision produced by the convention remains in effect.[232]

Mississippi was hardly alone. In *Hunter v. Underwood*,[233] Justice Rehnquist, writing for a unanimous Court, invalidated Alabama's felon disenfranchisement provision because it was aimed at African-Americans: "[T]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-

227. *See* Uggen & Manza, *supra* note 20, at 792–94.

228. Angela Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 559 (2003).

229. Ratliffe v. Beale, 20 So. 865, 868 (Miss. 1896).

230. *Id.*

231. *Id.*

232. *See* Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (rejecting a challenge to the provision); *see also* Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice, *157 F.3d 388 (5th Cir. 1998)*, 71 U. CIN. L. REV. 421 (2002) (criticizing *Cotton*).

233. 471 U.S. 222 (1984).

Reconstruction South to disenfranchise blacks."[234] As part of this movement, "Virginia's law adding petty larceny to the list of disqualifications was imitated because of its effect on the Negro vote."[235] An analysis of the factors inducing states to impose or eliminate felon disenfranchisement provisions concluded that "[s]tates with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system."[236] As of 2003, Alabama, Florida, Iowa, Kentucky, Mississippi, Nebraska, and Virginia were the only states disenfranchising all felons for life.[237]

Historically, Jim Crow states selectively enforced facially neutral felon disenfranchisement laws to discriminate against African-Americans,[238] just as they discriminated in enforcing other voting requirements. Accordingly, in some situations, "ineligible" whites were allowed to vote, while African-Americans were not. Some news reports stated that in the 2000 general election in Florida, a Republican-inspired voter purge "included people who committed only misdemeanors, not felonies; people who had never committed any sort of crime; and people whose names did not even match names on county voting rolls."[239] The errors in this purge disproportionately affected racial minorities.[240]

Two circumstances create the likelihood that the problem will continue. First, most of those who lose the right to vote because of criminal conviction would vote Democratic.[241] Second, race is a stronger predictor of party affiliation for

234. *Id.* at 229.

235. WOODWARD, *supra* note 3, at 56.

236. Behrens et al., *supra* note 228, at 596.

237. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (Jan. 2004) (noting that Alabama, Kentucky, and Virginia have adopted streamlined methods of restoration), *available at* http://www.sentencingproject.org/pdfs/1046.pdf (last visited Feb. 15, 2004).

238. See the reports of the U.S. Commission on Civil Rights cited above in note 3. *See* Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985); *see also* Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982) (allowing a claim of discriminatory enforcement of felon disenfranchisement provision to proceed).

239. Monique L. Dixon, *Minority Disenfranchisement During the 2000 General Election: A Blast from the Past or a Blueprint for Reform*, 11 TEMP. POL. & CIV. RTS. L. REV. 311, 323 & n.69 (2002); *see also* Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 645–46 (2002).

240. Gregory Palast, *Florida's Flawed "Voter-Cleansing" Program*, Salon Media Group, *at* http://dir.salon.com/politics/feature/2000/12/04/voter_file/index.html?pn=1 (Dec. 4, 2000). The "narrow tailoring" prong of strict scrutiny should require substantial accuracy in administration of a felon disenfranchisement program. The Fifth Circuit upheld Mississippi's disenfranchisement procedure, which did not automatically disenfranchise felons but required administrative action taken without advance notice. In applying the *Matthews v. Eldridge* factors, 424 U.S. 319, 334–35 (1976), the court held that the burden of further procedures outweighed the benefit to the individual, given that "Section 2 of the Fourteenth Amendment allows a state to prohibit a felon from voting." Williams v. Taylor, 677 F.2d 510, 514–15 (5th Cir. 1982). The conclusion that procedures would be futile is called into question by events in Florida in 2000, where a number of nonfelons were erroneously disenfranchised without notice because their name or other identifying characteristics was similar to that of someone who had been convicted. *See* U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, ch. 5 (2001). A felony disenfranchisement program that regularly disenfranchises nonfelons raises serious questions about whether it is narrowly tailored.

241. *See* Uggen & Manza, *supra* note 20, at 780–81.

African-Americans than for whites. Thus, suppressing the African-American vote is a winning strategy for Republicans in a way that suppressing the white vote will never be for any major party.[242] In the full contact sport of American politics, both parties will seek any advantage they can, so it is no special criticism to say that both parties would be pleased if many members of the opposing party chose to, or were compelled to, stay home on Election Day.[243]

It goes without saying that many Republicans and Democrats rise above partisan political interest and support policies they believe are right regardless of the consequences for their party.[244] Yet, Republicans have a terrible conflict of interest with respect to African-American voter turnout and its connection to felon disenfranchisement. Even Republicans who believe on the merits that relatively minor crimes do not warrant lifetime disenfranchisement, or that people should be allowed to reenter the community once their punishment has been fully discharged, may nevertheless pause before supporting legal changes that would slash their political power.

Unfortunately, felon disenfranchisement creates the possibility for electoral entrepreneurship. A significant portion of the increase in felon disenfranchisement has come from drug convictions. The most convincing evidence of racially disproportionate prosecution is in the area of drug crimes; the overwhelming majority of drug offenders are white, but African-Americans constitute a majority of those imprisoned for drug offenses.[245] In the abstract, many or most Republicans may support a public health approach to the drug problem rather than the expensive, and apparently unsuccessful, criminalization approach; many also deplore old-fashioned racism or whatever other factors result in the

242. The Democratic Party among others has accused Republicans of attempting to suppress voter turnout. *See* Press Release, Democratic National Committee, GOP Uses Suppression Tactics to Intimidate Voters Across the Country (Nov. 4, 2002), *available at* http://www.democrats.org/news/200211050001.html; *see also, e.g.*, Laughlin McDonald, *The New Poll Tax*, AM. PROSPECT (Dec. 30, 2002), *available at* http://www.prospect.org/print/V13/23/mcdonald-l.html.

243. A recent undergraduate honors thesis explores some of these issues. *See* Jason Belmont Conn, Excerpts from The Partisan Politics of Ex-Felon Disenfranchisement Laws (2003) (unpublished undergraduate honors thesis, Cornell University), *available at* http://www.sentencingproject.org/pdfs/conn-fvr.pdf (last visited July 8, 2004).

244. For example, the private National Commission on Federal Election Reform, which appointed Presidents Ford and Carter as its honorary co-chairs and a number of Republican and Democratic luminaries as members, issued a report recommending that states allow restoration of voting rights once a felon has completed the sentence imposed. *See* NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 19, at 44–45. In 2001, New Mexico Governor Gary Johnson, a Republican, signed a bill ending lifetime disenfranchisement of felons. *See* LEGISLATIVE CHANGES, *supra* note 18, at 5.

245. *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002). The determination of racial disproportionality is based on correlation of imprisonment, conviction, and arrest statistics with offender information based on self or victim reporting. This data shows, for example, that the disproportionality of African-Americans in prison for crimes like robbery and murder is substantially explained by differential rates of offending. However, it also shows that whites are less likely to be arrested than African-American offenders, less likely to be prosecuted if arrested, less likely to be convicted—or more likely to be convicted of a lesser crime—if prosecuted, and less likely to be imprisoned if convicted.

disproportionate prosecution of African-Americans.[246] Yet Republicans have these phenomena to thank for some of their political success. Alternatives such as successful preventative measures, noncriminal treatment of African-Americans or the nondiscriminatory prosecution of drug crimes, would put Democrats in office.

Felon disenfranchisement, then, was aimed in substantial part at African-Americans and continues to affect them disproportionately. Yet, precisely because of that disproportionality, the political process contains powerful incentives to maintain felon disenfranchisement, as well as those aspects of the criminal justice system resulting in disproportionate prosecution of African-Americans. Prisoners count for purposes of apportioning Congress, and sometimes state and local legislative bodies as well.[247] Accordingly, every African-American incarcerated not only suppresses a vote, but increases the voting power of everyone else in the jurisdiction.[248] It would hardly be surprising for some pragmatic politicians to conclude that, as important as the principles of racial equality and participatory democracy may be, vigorous measures to enforce them will have to wait until another day if the consequence would be a change in control of the White House and Senate. But, such pragmatism aside, there is no *a priori* reason that civil rights laws aimed at ending racial discrimination should leave felon disenfranchisement to the tender mercies of the political process.

B. THE RIGHT TO VOTE UNDER SECTION 1 OF THE FOURTEENTH AMENDMENT

The modern Supreme Court pays lip service to the idea that "the States have the power to impose voter qualifications."[249] In practice, however, voter qualifi-

246. The fact that African-Americans are disproportionately prosecuted is not necessarily caused by simple racial animus. Targeting African-Americans and other less affluent groups may result simply because they are less expensive targets of investigation and prosecution. The poor are less likely to be able to hire expert legal counsel, for example, and they are less likely to be able to retaliate politically.

247. *See, e.g.*, Garza v. County of L.A., 918 F.2d 763, 774 (9th Cir. 1990) ("The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens." (citing Fed'n for Am. Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980))); Longway v. Jefferson County Bd. of Supervisors, 628 N.E.2d 1316, 1318 (N.Y. 1993) (holding that, under New York law, prisoners count for purposes of apportioning local legislative bodies).

248. In many instances prisons are not located in the districts where prisoners tend to come from, causing additional potential incentives. *See* Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, *at* http://www.prisonpolicy.org/importing/importing.shtml (last updated May 20, 2002).

249. Dunn v. Blumstein, 405 U.S. 330, 336 (1972); *see also* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) ("It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States."); *id.* at 154 (Harlan, J., concurring in part and dissenting in part) ("[T]he Fourteenth Amendment was never intended to restrict the authority of the States to allocate the political power as they see fit . . . ; therefore . . . it does not authorize Congress to set voter qualifications"); *id.* at 241 (Brennan, J., concurring in part and dissenting in part) ("All parties to these cases are agreed that the States are given power, under the Constitution, to determine the qualifications for voting in state elections.") (citations omitted); *id.* at 294 (Stewart, J., concurring in part and dissenting in part) (declaring that the Constitution reserves for the

cations have been almost wholly federalized.[250] The Supreme Court has held that voting is a fundamental right, and therefore, subjects qualifications to strict scrutiny under the Equal Protection Clause of Section 1 of the Fourteenth Amendment.[251]

Applying strict scrutiny, the Court has invalidated broadly applied, traditionally accepted restrictions, including those in effect in 1868. In those cases, the Court has revealed little interest in the question of whether the restrictions were understood as permissible when the Fourteenth Amendment was adopted.[252] The Court also does not look at the class of individuals disqualified and ask whether it is permissible to regulate them differently from other classes of persons. Instead, it notes the fundamental nature of the right to vote and examines whether other, similarly situated classes are allowed to vote. If so, it invalidates the restriction. "[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."[253]

The Court has rejected the idea that voters must have certain kinds of connections to the state. In *Carrington v. Rash*, the Supreme Court invalidated a prohibition on the registration of soldiers from other states who were stationed

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states the power to set voter qualifications in state, local, and federal elections); Carrington v. Rash, 380 U.S. 89, 91 (1965) ("There can be no doubt either of the historic functions of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.'" (quoting Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959))).

250. *See* KEYSSAR, *supra* note 3, at 256; *see also* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995) (upholding the constitutionality of the National Voter Registration Act, which required states to allow registration in particular ways). Professor Richard L. Hasen has criticized the breadth of federal interference in this area. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 157–58 (2003).

251. At least the Court demands a compelling state interest when the right to vote is denied on the basis of membership in a suspect class, when "residents in a geographically defined governmental unit [are disenfranchised] in a unit wide election," or when the law has the effect of "diluting the voting power of some qualified voters within the electoral unit." Green v. City of Tucson, 340 F.3d 891, 899, 900 (9th Cir. 2003). *See generally* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 25–45, ch. 4 (2d ed. 2001); 3 ROTUNDA & NOWAK, *supra* note 197, at § 18.31(a).

252. The Court has recognized that it has not been engaging in a historical analysis. As it explained in *Lubin v. Panish*:

> There has also been a gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights:
>
> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Dunn v. Blumstein, 405 U.S. 330, 336 (1972)."

415 U.S. 709, 713–14 (1974) (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)).

253. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969).

in Texas,[254] even though this kind of restriction existed in other states.[255] In *Dunn v. Blumstein*, the Court invalidated a one-year residency requirement for voting in state elections,[256] even though one year was "the norm."[257]

The modern Court has also consistently rejected wealth requirements, even though "[p]roperty qualifications and poll taxes have been a traditional part of our political structure."[258] In *Harper v. Virginia State Board of Elections*, the Court invalidated a poll tax under a strict scrutiny analysis;[259] the Court disclaimed any reliance on racial discrimination as a basis for its decision.[260] *Harper* is particularly notable because two earlier decisions upheld "nondiscriminatory" poll taxes.[261] In addition, just two years before *Harper*, the Twenty-Fourth Amendment eliminated the poll tax in elections for federal offices,[262] implying that Congress and the states thought that states could impose them. In 1969, *Kramer v. Union Free School District No. 15* invalidated a requirement that voters in school board elections either have children or own property in the district.[263]

Strict scrutiny of statutes completely disenfranchising classes of citizens is extremely powerful. The homeless have been allowed to register to vote in the face of arguments that they are legally prohibited from living in public parks or other areas they claim as their residences.[264] Although traditionally disqualified,[265] "paupers" and recipients of social services can vote.[266] Pretrial detainees in jails have the right to absentee ballots.[267] At some profound level of impair-

254. 380 U.S. 89 (1965).

255. *Id.* at 100 n.2 (Harlan, J., dissenting); *see also* KEYSSAR, *supra* note 3, at 246 (discussing the World War II-era Soldier Voting Acts, which federalized soldiers' right to vote by absentee ballot, registration to vote in towns in which they were stationed, and avoidance of poll tax payments).

256. 405 U.S. 330 (1972) (limiting Pope v. Williams, 193 U.S. 621 (1904)).

257. *See* KEYSSAR, *supra* note 3, at 275. *But see* Burns v. Fortson, 410 U.S. 686 (1973) (upholding the closing of registration books fifty days before an election).

258. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting).

259. *Id.* at 667.

260. *Id.* at 666 n.3, 667.

261. Butler v. Thompson, 341 U.S. 937, *aff'g per curiam* 97 F. Supp. 17 (E.D. Va. 1951) (three-judge court) (upholding Virginia's poll tax); Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding Georgia's poll tax).

262. U.S. CONST. amend. XXIV.

263. 395 U.S. 621 (1969).

264. *See, e.g.*, Collier v. Menzel, 221 Cal. Rptr. 110 (Ct. App. 1985) (invalidating California's refusal to register homeless persons who listed public parks as their addresses); *see also* Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984) (invalidating a New York law disenfranchising homeless voters without fixed addresses).

265. *See* KEYSSAR, *supra* note 3, at 271.

266. *See, e.g.*, Op. Tex. Att'y Gen. Letter Op. No. LO-88-129 (Nov. 21, 1988) (concluding that a Texas law disenfranchising recipients of public assistance was unenforceable (citing Tex. Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149 (S.D. Tex. 1981))); *see also* United States v. Andrews, 462 F.2d 914, 917 (1st Cir. 1972) (suggesting that disenfranchisement of public welfare recipients may be valid if based on "deliberate and avoidable refusal to support oneself," but not if based solely on economic status).

267. *See, e.g.*, Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984) (holding that denying pretrial detainees the opportunity to vote by absentee ballot violates the Equal Protection Clause (citing

ment, mental illness or retardation may warrant disenfranchisement,[268] but many courts have held that it violates the Constitution to disenfranchise individuals simply for being retarded or mentally ill or in a residential treatment facility, even by involuntary commitment.[269]

Only restrictions at the margin, usually temporary and/or partial, have survived strict scrutiny.[270] As Professors Rotunda and Nowak explain, "[l]aws that totally prohibit a class of persons from voting in a general election or laws that are designed to restrict the voting power of a particular class of persons in a general election are unlikely to survive such a standard."[271]

C. SECTION 2 AND THE RIGHT TO VOTE UNDER SECTION 1

Chief Justice Burger argued that to test voting restrictions "by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."[272] Accordingly, before the Supreme Court held that felon disenfranchisement was lawful per se in 1974, the equal protection challenge to felon disenfranchisement seemed quite likely to be successful;[273] indeed, several courts invalidated felon disenfranchisement statutes under Section 1.

A disenfranchisement statute for convicted felons is difficult to tailor nar-

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O'Brien v. Skinner, 414 U.S. 524 (1974))); Arlee v. Lucas, 222 N.W.2d 233, 236 (Mich. Ct. App. 1974) (finding an equal protection violation in Michigan's uneven application of a law denying absentee ballots to pretrial detainees).

268. Voting by Incompetent Persons, Op. Del. Att'y Gen. No. 00-IB11 (June 19, 2000) (concluding that disenfranchisement is permissible only for "persons who have been adjudged mentally incompetent by a court of law").

269. *See, e.g.*, Doe v. Rowe, 156 F. Supp. 2d 35, 56 (D. Me. 2001) (finding court-ordered guardianship for mental illness insufficient to warrant disenfranchisement); Manhattan State Citizen's Group v. Bass, 524 F. Supp. 1270, 1274–75 (S.D.N.Y. 1981) (finding involuntary commitment insufficient justification for disenfranchisement and suggesting that adjudication of incompetence would be sufficient); Boyd v. Bd. of Registrars of Voters, 334 N.E.2d 629, 632 (Mass. 1975) (holding that persons "may not be precluded from registering to vote solely because they reside at a State-operated facility for mentally retarded persons"); Voting Rights of Mentally Impaired Persons, 1992 Op. Alaska Att'y Gen. 123 (1992) (finding that under Alaska law, judicial guardianship results in disenfranchisement only if there is a specific finding to that effect); Voting: Residents of State Mental Health Institutions Cannot Be Denied the Right to Vote Because of That Status Without a Formal Finding of Incompetency, 58 Op. W. Va. Att'y Gen. 221 (1980) (finding that "involuntary commitment for treatment of mental illness, retardation, or addiction [would not] by itself be sufficient to justify depriving one of his right to vote" (construing *Boyd*; Carroll v. Cobb, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976))).

270. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992) (upholding restrictions on write-in voting); Ball v. James, 451 U.S. 355 (1981) (upholding restrictions on voting for narrowly tailored special-purpose entities); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (upholding a fifty-day residency requirement).

271. 3 ROTUNDA & NOWAK, *supra* note 197, at § 18.31(a).

272. Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting).

273. *See, e.g.*, Dillenburg v. Kramer, 469 F.2d 1222, 1224–25 (9th Cir. 1972) (ordering the formation of a three-judge court to examine the constitutional implications of Washington's disenfranchisement of convicted criminals).

rowly. If it disenfranchises too few convicts, letting those with similar convictions vote, it is invalid as underinclusive. Thus, a three-judge U.S. District Court held in 1970 that New Jersey's felon disenfranchisement provision was invalid under equal protection because there was no principled basis for distinction between disenfranchising crimes and nondisenfranchising crimes.[274] On the other hand, if a statute disenfranchises all felons, it may be invalid as overbroad. Accordingly, the California Supreme Court explained in 1966 that "[t]he unreasonableness of a classification disfranchising all former felons, regardless of their crime, is readily demonstrable: . . . since conspiracy to commit a misdemeanor is itself a felony, disfranchisement would automatically follow from conviction of conspiracy to operate a motor vehicle without a muffler . . . ."[275]

It is also difficult to identify the compelling state interest in disenfranchising felons. The typical justification[276] for felon disenfranchisement is maintaining the "purity of the ballot box,"[277] an idea which received influential support in an Alabama case conceptualizing the right to vote as a "privilege, which is grantable or revocable by the sovereign power of the state at pleasure."[278] Unfortunately, as the Supreme Court held in *Hunter v. Underwood*, Alabama's felon disenfranchisement provision was designed to maintain white supremacy; the ballot box purity was of the racial variety.[279]

Ballot box impurity cannot be based simply on the undesirable viewpoint of the voter; all of those who support reduction in the number of people incarcerated or some other controversial position cannot be disenfranchised, even if the majority takes the opposite view.[280] Ballot box impurity must be tied to the idea that felons will cast their votes corruptly. On this view, it is hard to see how lifetime felon disenfranchisement is narrowly tailored. As Justice Marshall argued, surely there are less restrictive means of achieving that goal, such as enforcement of existing election laws.[281]

Another overarching, critical fact opposing the idea that disenfranchisement of felons represents a compelling interest is that a supermajority of the states

274. Stephens v. Yeomans, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (three-judge court).

275. Otsuka v. Hite, 414 P.2d 412, 418 (Cal. 1966) (citation omitted).

276. The constitutional justification for felon disenfranchisement cannot be punishment because the safeguards associated with criminal punishment are not usually employed with respect to disenfranchisement. Persons pleading guilty to crimes are usually not told that they will lose their right to vote, as would be required if disenfranchisement were part of a criminal sentence. If disenfranchisement were deemed to be punishment, it could not be applied retroactively, and a guilty plea could be vacated if entered without knowledge of that consequence. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704–06 (2002).

277. Washington v. State, 75 Ala. 582, 585 (1884).

278. *Id.*

279. *See supra* notes 233–34 and accompanying text.

280. *See* Richardson v. Ramirez, 418 U.S. 24, 81–82 (1974) (Marshall, J., dissenting) (quoting Ciprano v. City of Houma, 595 U.S. 701, 705–06 (1969)).

281. *Id.* at 80.

allow persons who have completed their sentences to vote.[282] Those states have not been captured by evildoers, repealed their penal codes, or suffered waves of election fraud.[283] The laboratory of democracy has operated and given a result; the idea that felon disenfranchisement is necessary to achieve a compelling state interest has been disproved by experience.

Faced with these objections, the most comfortable way to save felon disenfranchisement was to find some reason in the first place to exclude it from equal protection review under Section 1 of the Fourteenth Amendment. Courts accordingly found that Section 2 constituted textual authorization for felon disenfranchisement, thus eliminating the need or permissibility of engaging in the question of whether felon disenfranchisement would satisfy strict scrutiny. One of the earliest decisions in this line was Judge Friendly's opinion in *Green v. Board of Elections*.[284] In addition to dicta from Supreme Court opinions[285] and colorful hypotheticals (the court rejected the idea that "the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges"),[286] the court relied on Section 2. "The framers of the amendment, says the Attorney General, could hardly have intended the general language of § 1 to outlaw a discrimination which § 2 expressly allowed. [This] argument is convincing."[287] Several three-judge district courts followed *Green* in opinions summarily affirmed by the Supreme Court.[288]

Finally, the issue received plenary review by the Supreme Court in 1974 in *Richardson v. Ramirez*.[289] According to the Court, Section 2's treatment of felon disenfranchisement was determinative. The majority recognized the vigorous protection generally granted by decisions recognizing voting as a fundamental right and subjecting restrictions on the franchise to strict scrutiny.[290] The Court distinguished those decisions because "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of other restrictions on the franchise which were invalidated in the cases on which respondents rely."[291] The Court held that "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of

282. *See* FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 237 (showing that thirty-seven states and the District of Columbia allow all convicts who have completed their sentence to vote; seven more allow some or most discharged convicts to vote).

283. "The vision of felons and ex-felons banding together to elect officials who would soften the criminal code seemed divorced from reality." KEYSSAR, *supra* note 3, at 303.

284. 380 F.2d 445 (2d Cir. 1967).

285. *Id.* at 451.

286. *Id.* at 451–52.

287. *Id.* at 452.

288. *See* Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972) (three-judge court), *aff'd mem.*, 411 U.S. 961 (1973); Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla.) (three-judge court), *aff'd mem. per curiam*, 369 U.S. 12 (1969).

289. 418 U.S. 24 (1974).

290. *Id.* at 54–55.

291. *Id.* at 54.

the Amendment's applicability to state laws disenfranchising felons, is of controlling significance."[292] Although the argument that Section 2 had been repealed was not raised, the Court nevertheless noted that "[Section 2] is as much a part of the Amendment as any of the other sections."[293] Courts and commentators have understood the outcome in *Richardson* as turning on the apparent textual authorization of felon disenfranchisement in Section 2.[294] *Richardson* rested on an assumption, rather than a determination, that Section 2 was in force. Because the possible repeal of Section 2 was not briefed, argued, or decided, *Richardson* does not constitute authority for the proposition that Section 2 still exists.[295]

If the Court erred in treating Section 2 as an affirmative constitutional authorization for felon disenfranchisement, it could at least use it as evidence that the framers of the Fourteenth Amendment did not consider felon disenfranchisement invalid across the board.[296] There are two problems with such reliance: one doctrinal and the other historical.

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292. *Id.* The Court elaborated: "[W]e may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55.

293. *Id.*

294. *See, e.g.*, Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) ("Unlike any other voting qualification, felon disenfranchisement laws are explicitly endorsed by the text of the Fourteenth Amendment"); Johnson v. Bush, 353 F.3d 1287, 1316 (11th Cir. 2003) (Kravitch, J., dissenting) ("[I]n *Richardson v. Ramirez*, the Supreme Court explained the felon disenfranchisement provisions are different from other state franchise rules because they are permitted by the Fourteenth Amendment's express language." (citing 418 U.S. at 54)); Perry v. Beamer, 933 F. Supp. 556, 558–59 (E.D. Va. 1996) ("According to the Justices [in *Richardson*], the Fourteenth Amendment's express language excepting from the franchise those involved 'in rebellion, or other crime' means exactly what it says—the States may disenfranchise criminals."), *aff'd per curiam*, 99 F.3d 1130 (4th Cir. 1996) (table decision); NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 19, at 45 ("The U.S. Supreme Court has specifically ruled that these laws do not violate the Equal Protection Clause, as there is language in Section 2 of the Fourteenth Amendment that appears to carve out a specific exception allowing denial of the right to vote 'for participation in rebellion, or other crime.'"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1094 (2d ed. 1988) ("In *Richardson v. Ramirez*, the Supreme Court held that, because § 2 of the fourteenth amendment apparently contemplates the disenfranchisement of convicted criminals, the equal protection clause of the fourteenth amendment does not invalidate state laws which deny the ballot to ex-felons.").

295. *See, e.g.*, Texas v. Cobb, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue." (citing Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."))); United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38 & n.8 (1952) (finding that the issue allegedly controlled by a prior decision "was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case [was] not a binding precedent on this point." (citing Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.")).

296. Determining the original intent, understanding or meaning of legislation is always challenging. *See, e.g.*, Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989) (exploring difficulties of reliably discerning original intent); *see also supra* note 136. It is even more difficult to determine how much weight should be given to particular parts of a law superseded as a whole because the legislature considered it misguided. Perhaps

The doctrinal problem is that history has been treated as irrelevant to the modern Court's evaluation of voting restrictions. Durational residence requirements, for example, were not only traditional and widespread, but specifically authorized in the readmission acts which were drafted by a Congress close in time and composition to the one that drafted the Fourteenth Amendment.[297] Yet, such requirements were invalidated under equal protection.[298]

More fundamentally, looking at Section 2 as evidence of the congressional view in 1868 offers an incomplete perspective because subsequent, but nearly contemporaneous, enactments were much stricter. Section 2 allowed disenfranchisement for any crime, presumably including speeding or other minor misdemeanors.[299] The Military Reconstruction Act and readmission acts also allowed disenfranchisement, but only for felonies at common law: "murder, manslaughter, rape, robbery, mayhem, burglary, arson, larceny and prison break."[300] Because "[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies,"[301] allowing disenfranchisement only for common law felonies would reduce the practice substantially. The Fifteenth Amendment, Congress's last word on African-American suffrage, however, gave no special authorization for disenfranchisement even of those who had committed the most serious crimes. Because Congress clearly recognized that criminal disenfranchisement could be used to undermine the political status of the freed slaves, it would seem reasonable for a court interpreting Section 1, a law designed to prevent racial discrimination, to give full consideration to these views as to the permissible scope of disenfranchisement for criminal conviction.

D. SECTION 2 AND THE VOTING RIGHTS ACT

The Voting Rights Act prohibits voting qualifications that result in a denial or abridgment of the right to vote on account of race or color, regardless of

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provisions not specifically repudiated should be treated as continuing to represent the legislature's views. Alternatively, perhaps once a majority decides to supersede a law, all of its provisions become at least doubtful. Having already determined to reject a law on one ground, legislators cannot reasonably be expected to spend much time exploring other potential rationales for decisions already reached. Therefore, the absence of specific criticism of particular pieces of a legal structure does not necessarily represent approval when the entire structure is being scrapped.

297. *See, e.g.*, Act of June 25, 1868, 15 Stat. 73 (restricting each readmitted state's ability to change its suffrage requirements; "Provided, That any alteration of said constitution may be made in regard to the time and place of residence of voters"). Georgia was covered by this statute; its constitution, approved by Congress, had a one-year residency requirement. *See* GA. CONST. art. II, § 2 (1868), *reprinted in* 2 Swindler, *supra* note 201, at 499.

298. Dunn v. Blumstein, 405 U.S. 330 (1972).

299. *See, e.g.*, Allen v. Ellisor, 664 F.2d 391, 396–98 (4th Cir.) (rejecting a claim that disenfranchisement could extend only to felonies), *vacated and remanded for consideration of mootness*, 454 U.S. 807 (1981).

300. People v. Martin, 214 Cal. Rptr. 873, 876 n.4 (Ct. App. 1985) (citing 1 WHARTON'S CRIMINAL LAW 81 (Torcia 14th ed. 1979)); *see also* Jerome v. United States, 318 U.S. 101, 108 n.6 (1943) ("[A]t common law murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies.") (citing WHARTON'S CRIMINAL LAW § 26 (12th ed. 1971)).

301. Tennessee v. Garner, 471 U.S. 1, 14 (1985) (citation omitted).

discriminatory intent.[302] Thanks to Section 2, however, felon disenfranchisement has survived. In *Baker v. Pataki*,[303] an equally divided Second Circuit, sitting en banc, affirmed a ruling that "results" liability under the Voting Rights Act could not be predicated on a provision disenfranchising some or all felons because "the legitimacy of felon disenfranchisement is affirmed in the text of the Fourteenth Amendment itself."[304] The narrow reading of the Voting Rights Act was necessary, for "any attempt by Congress to subject felon disenfranchisement to the 'results' methodology of § 1973 would pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments."[305] The Sixth Circuit reached the same conclusion.[306] Because Section 2 has been repealed, these courts interpret the Voting Rights Act under a nonexistent constraint.

CONCLUSION

Although courts have never considered the contention that Section 2 has been repealed, there is precedent for a repeal unnoticed by observers. In the *Panama Refining*[307] episode, a case reached the Supreme Court before anyone recognized that the law in question had been repealed before suit was filed. As in *Panama Refining*, courts have shaped the law based on the influence of "a provision which did not exist," but at least in *Panama Refining* the Court caught the mistake quite early. Although Section 2 was never vigorously enforced, it is time for the Court to declare that it is dead and apply the Constitution in effect now, rather than the version that prevailed before the Fifteenth Amendment granted African-Americans the right to vote.

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302. 42 U.S.C. § 1973(a). *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986); Shapiro, *supra* note 18.

303. 85 F.3d 919 (2d Cir. 1996) (en banc).

304. *Id.* at 929.

305. *Id.* at 930. A panel of the Second Circuit recently followed the reasoning of the judges voting to affirm. *See* Muntaquim v. Coombe, No. 01-7260, 2004 WL 870474 *17 (2d Cir. Apr. 23, 2004) (holding Voting Rights Act inapplicable to felon disenfranchisement; noting that Section 2 protected "felon disenfranchisement laws from the sanction of reduced representation.").

306. Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986); *see also* Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) ("There is yet a more fundamental problem with extending the VRA to reach felon disenfranchisement laws: Doing so seriously jeopardizes its constitutionality.").

307. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 412 (1935) (holding that a case is moot if it is based on a regulation that, at the Supreme Court level, was discovered to have been repealed before suit was filed: "Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist."). A more recent case presented the opposite scenario, in which all parties assumed that a statute had been repealed but the Supreme Court held that it was in force. *See* U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).