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Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment

Michael T. Morley[†]

ABSTRACT

The modern “voting wars” involve repeated legal challenges alleging that procedures aimed at protecting the electoral process, such as proof-of-citizenship requirements for registration and voter identification laws, violate the fundamental constitutional right to vote. In adjudicating such cases, courts make effectively subjective judgments about whether the challenged statutes or regulations make voting too burdensome.

Section 2 of the Fourteenth Amendment offers critical, and previously overlooked, insight into the scope of the right to vote. It imposes a uniquely severe penalty—reduction in representation in the House of Representatives and Electoral College—when that right is violated or abridged. “Remedial deterrence,” a crucial component of the broader theory of remedial equilibration, teaches that courts take into account the severity of the remedy for violating a legal provision when determining that provision’s scope. Stripping a state of its seats in Congress and votes in the Electoral College is a uniquely severe penalty, effectively nullifying the results of one or more elections, disenfranchising the people who voted for the ejected representatives, diluting the vote of each member of the

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state's electorate, and potentially even changing control of Congress or the outcome of a presidential election.

For such a dramatic penalty to be appropriate, a state's actions would have to be especially egregious: direct disenfranchisement of certain disfavored groups of people. Facially neutral registration or voting procedures with which a person must comply in order to vote are insufficient to meet this demanding standard. This remedial deterrence interpretation of §2 is consistent with both the Fourteenth Amendment's legislative history and Congress' contemporaneous interpretation of that provision during its first attempt at enforcement. All of the state laws and constitutional provisions that were identified in the 41st Congress as violating §2 imposed additional qualifications for voting by disenfranchising entire groups of people, such as the poor, the illiterate, or racial minorities, due to their purportedly undesirable traits. A remedial deterrence interpretation of §2 provides an objective and constitutionally-based approach for determining whether various election laws violate the Fourteenth Amendment right to vote.

INTRODUCTION

In nearly every federal election cycle since *Bush v. Gore*,¹ plaintiffs have brought numerous lawsuits challenging the validity of various statutes and regulations governing the electoral process.² Many of these lawsuits have alleged that measures such as voter identification laws,³ deadlines for registering to vote⁴ or requesting absentee ballots,⁵ reductions in early voting periods,⁶ instant-runoff voting systems,⁷ changes to congressional district boundaries,⁸ and requirements for casting

¹ 531 U.S. 98 (2000).

² RICHARD L. HASEN, *THE VOTING WARS* 4 (2012).

³ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Frank v. Walker*, 17 F. Supp. 3d 837, 844–63 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2014); *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, and remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁴ See, e.g., *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119 (D. Conn. 2005) (challenging law requiring people to register to vote at least seven days before an election); see also *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 531, 545–49 (6th Cir. 2014) (challenging statute eliminating “Golden Week,” during which people could both register to vote and cast an early ballot on the same day).

⁵ See, e.g., *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014).

⁶ See, e.g., *NAACP*, 768 F.3d at 537–50; *Obama for Am. v. Husted*, 697 F.3d 423, 428–36 (6th Cir. 2012).

⁷ See, e.g., *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011).

⁸ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

provisional ballots⁹ violate the right to vote as protected by the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment.¹⁰ The plaintiffs in these cases invariably seek injunctive and declaratory relief to prevent election officials from applying or enforcing the allegedly unconstitutional requirements or procedures in impending and future elections.¹¹

Courts generally treat these lawsuits as they would any other suits seeking prospective relief against impending constitutional violations. Under *Burdick v. Takushi*,¹² a court begins by determining whether the challenged election law imposes “severe restrictions” on the right to vote, in which case the law is subject to strict scrutiny and generally invalidated.¹³ If the law does not impose such a burden—and most election laws do not¹⁴—the court then balances the goals the law seeks to further against the resulting burden on constitutional rights.¹⁵

⁹ See, e.g., *N.E. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591–99 (6th Cir. 2012); *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 834 (S.D. Ohio 2012).

¹⁰ U.S. CONST. amend. XIV, § 1. Other lawsuits have alleged that such restrictions and requirements violate various provisions of state constitutions. I have demonstrated elsewhere, however, that state constitutions generally do not provide “substantially greater protection for the right to vote than the U.S. Constitution.” Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 191 (2014). The test that the Supreme Court has adopted for determining whether election laws violate the First and Fourteenth Amendments, see *infra* notes 13–14 & accompanying text, is similar to the standards state supreme courts have been applying since the 1800s under their respective state constitutions. Morley, *supra* at 191–98.

¹¹ See, e.g., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248–49 (4th Cir. 2014) (enjoining elimination of same-day voter registration); *NAACP*, 768 F.3d at 532, 561 (affirming injunction prohibiting state from reducing early voting hours); *N.E. Ohio Coal.*, 696 F.3d at 604 (affirming preliminary injunction requiring election officials to count certain incorrectly cast provisional ballots); *Obama for Am.*, 697 F.3d at 437 (affirming injunction requiring local boards of elections to permit all voters to participate in early voting over the weekend before Election Day); *Hunter*, 850 F. Supp. 2d at 847 (enjoining board of elections from rejecting certain provisional ballots that were cast in the wrong precincts); see generally Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453 (2014) (explaining that injunctions are the most effective available mechanism for deterring constitutional and statutory violations by government officials).

¹² 504 U.S. 428 (1992).

¹³ *Id.* at 434 (internal quotation marks omitted).

¹⁴ See *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n. 9 (1983) (noting that the Court typically upholds “reasonable, nondiscriminatory restrictions” and “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself”).

¹⁵ *Burdick*, 504 U.S. at 434.

It is somewhat remarkable that these claims are litigated under §1 of the Fourteenth Amendment—whether the Due Process Clause or Equal Protection Clause—because §2 is the only portion of the Amendment that expressly mentions a right to vote.¹⁶ Section 2 provides, in relevant part:

[W]hen *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.¹⁷

Section 2 not only contains the Constitution's only express recognition of a right to vote,¹⁸ but provides a remedy for violations of that right. When a state "denie[s]" or "abridge[s]" the right to vote of any inhabitants who meet §2's age and citizenship requirements (and are neither felons nor former

¹⁶ Cf. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'") (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *accord* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

¹⁷ U.S. CONST. amend. XIV, § 2 (emphasis added).

¹⁸ The Constitution specifies that any person who is qualified to vote for "the most numerous Branch of the State Legislature" must also be deemed qualified to vote in elections for the House of Representatives and Senate. *Id.* art. I, § 2, cl. 1; *id.* amend. XVII, § 1. It also provides that people may not be deprived of the right to vote based on certain specified grounds. See *id.* amend. XV (race); amend. XIX (gender); amend. XXIV (failure to pay poll tax); amend. XXVI (age, for people who are at least 18 years old). These clauses do not require a state, however, to permit any particular segment of its citizenry to vote for either the state legislature, which would trigger eligibility to vote for Congress, or for President. "[T]he Constitution of the United States does not confer the right of suffrage upon any one." *Minor v. Happersett*, 88 U.S. 162, 178 (1874); see also *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) ("The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State."); *United States v. Reese*, 92 U.S. 214, 217 (1875) ("The Fifteenth Amendment does not confer the right of suffrage upon any one.").

Confederates),¹⁹ that state's "basis of representation" in the House of Representatives—and therefore the Electoral College, as well²⁰—must be proportionately reduced based on the percentage of such inhabitants whose voting rights are abridged or denied.²¹

Section 2 of the Fourteenth Amendment is all but ignored in contemporary constitutional discourse, doctrine, and litigation,²² and has never successfully been invoked as the basis for a cause of action.²³ This Article contends that §2 provides a critical, objective, and overlooked constitutional basis for determining the scope of the Fourteenth Amendment right to vote, whether that right is asserted directly under §2 itself, or instead under the Due Process Clause or Equal Protection Clause of §1.

Part I introduces the concept of remedial equilibration, a theory that contends that rights and remedies are integrally related and intertwined. One component of remedial equilibration, remedial deterrence, teaches that the scope of a right can be determined, as both a descriptive and normative matter, in part based on the severity of the remedy imposed for violations. Courts presently determine whether election laws violate the constitutional right to vote on a fairly subjective and *ad hoc* basis, assessing whether they pose too much of an inconvenience for too large a percentage of certain groups (such as racial minorities or the poor). Remedial equilibration puts an

¹⁹ The Nineteenth Amendment likely renders §2's limitation to males unenforceable, U.S. CONST. amend. XIX (prohibiting denial of the vote based on gender), while the Twenty-Sixth Amendment probably modifies §2's reference to twenty-one year-olds, *id.* amend. XXVI (prohibiting denial of the vote based on age to anyone who is at least 18 years old).

²⁰ See *id.* art. II, §1, cl. 2 (specifying that a state must appoint a "Number of [presidential] Electors, equal to the whole Number of Senators and Representatives to which such State may be entitled in the Congress").

²¹ *Id.* amend. XIV, §2.

²² EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 529 (1978) (labeling §2 a "historical curiosity"); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 916 (2008) ("The Court, Congress, and the nation have largely forgotten Section 2 of the Fourteenth Amendment."). Section 2's main role in constitutional doctrine to date has been to provide textual reaffirmation that states may prohibit felons from voting. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); see also Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1588 (2012) (discussing *Richardson*).

²³ See Curtis, *supra* note 22, at 958–59; Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260–61, 301 (2004); see, e.g., *infra* notes 327–59.

important new spin on this analysis: a voting regulation or procedure does not violate or abridge the right to vote protected by the Fourteenth Amendment unless it is sufficiently severe to warrant reducing a state's representation in the House and Electoral College.²⁴

Even if such reduction in representation is not the only constitutionally permissible remedy for violations of the right to vote,²⁵ the fact that it is an authorized remedy—and the sole one

²⁴ Franita Tolson is among the only scholars to have argued that §2's penalty provision should affect a court's interpretation of the right to vote, but she raised this point to support her conclusion that courts should broadly construe Congress's authority to enact legislation under §5 of the Fourteenth Amendment. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) (“[T]he extreme penalty in section 2 of the Fourteenth Amendment . . . influences the scope of penalties that Congress can impose pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments.”).

²⁵ Based on the debates surrounding the drafting of §2, a powerful argument could be made that reduction in representation is the only constitutionally permissible remedy for a denial of the right to vote, unless the denial is “on account of” a characteristic such as race or gender that other amendments prohibit, *see supra* note 18.

Section 2 is comparable to the Takings Clause, which provides, “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V, cl. 5. The Supreme Court has explained that “this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power [I]t is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987) (emphasis in original); *accord* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005). When the Government seizes or condemns private property, the Takings Clause renders unavailable remedies other than compensation, such as the return of the property. *See First English*, 482 U.S. at 314.

Similarly, §2 could be read, consistent with its legislative history, as implicitly barring courts from awarding remedies for violations of the right to vote other than a reduction in the offending states' representation in Congress and the Electoral College, such as an injunction against the unconstitutional statute or regulation. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 228–29 (1991) (“Section Two of the Fourteenth Amendment plainly assumed the lawfulness of racial discrimination in voting; it seems implausible that Section One, in which the Equal Protection Clause resides, was intended to prohibit what its successor section unambiguously tolerated.”); *Reynolds v. Sims*, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) (explaining that §2 “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,” subject to “its express provision of a remedy for such denial or abridgment” (internal quotation marks omitted)).

Indeed, the whole reason Congress enacted the Fifteenth Amendment, prohibiting states from denying the right to vote based on race, was because the Fourteenth Amendment did not actually confer an individually enforceable right to vote. *See Oregon v. Mitchell*, 400 U.S. 112, 154 (1970) (Harlan, J., concurring in part and dissenting in part); *see also* Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 820 (2009) (“[N]either the Republican

specified by the Fourteenth Amendment—still yields important insight into the scope of the underlying right. An election regulation warrants the extreme measure of stripping a state of its representation in the House or the Electoral College—thereby potentially changing control of Congress or even the Presidency—only if it constitutes direct disenfranchisement of certain disfavored groups of qualified voters. Viewed from this remedial equilibration perspective, the type of paperwork requirements, administrative inconveniences, and generally applicable procedures that all people must follow in order to vote that have been challenged in recent years²⁶ neither would be, nor should be, deemed violations of the right to vote.

Part II bolsters this remedial equilibration interpretation of the right to vote by reviewing §2's legislative history, demonstrating that its representation-stripping remedy was viewed as integrally intertwined with the underlying right. Reduction in representation was not enacted as simply one of many potential remedies for violations of the right to vote, but rather was seen as the exclusive remedy. Indeed, the Fourteenth Amendment's framers expressly recognized that §2 allowed states to decide for themselves whether to expand the franchise, or instead suffer reduced representation.

Part III goes on to examine how the 41st Congress, comprised largely of Representatives and Senators who had debated and passed the Fourteenth Amendment, attempted to enforce §2 through the Ninth Census. This enforcement effort

'moderates' nor the nation at-large seemed ready [at the time of the Fourteenth Amendment's framing] to require the formerly rebellious states to grant equal suffrage.").

Such an interpretation of §2 is bolstered by the phrasing of other constitutional provisions which expressly state that the remedies specified are not intended as an exclusive list, *see, e.g.*, U.S. CONST. art. I, §3, cl. 7 (limiting "Judgment in Cases of Impeachment" to removal from office and disqualification from any other office, but specifying that the impeached official "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"), or grant broad authority to enforce specific compliance or determine the consequences for violations; *see, e.g.*, *id.* art. I, §5, cl. 1 (providing that members of a House of Congress "may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide"); *id.* art. I, §5, cl. 2 ("Each House may . . . punish its Members for disorderly Behaviour."). I will address this stronger variation of the argument in future work. Even if one disagrees that §2 sets forth the exclusive means of enforcing the right to vote, however, the fact that the sole remedy specified in the Constitution for violations of that right is a reduction in representation still yields valuable insight into that right's intended nature and scope.

²⁶ *See supra* notes 3–9 and accompanying text (discussing judicial challenges to such measures).

reveals that the Fourteenth Amendment's framers believed that state laws which barred certain disfavored classes of people from voting violated the right to vote, while other laws that imposed administrative rules or established certain procedures for voting did not. Part IV rounds out the discussion by exploring the various ways in which the few courts and commentators to have considered §2 in any depth have approached the right to vote. Part V briefly concludes.

This Article approaches constitutional interpretation from a variety of perspectives. Most basically, §2's text provides important, and long overlooked, insight into the scope of the right to vote. The legislative history surrounding §2 also provides an intriguing perspective on Congress's original intent and understanding concerning the scope of that right. Even if one adopts a purely modern perspective, however, the severity of the remedy that §2 authorizes for violations of the right to vote strongly counsels in favor of construing the scope of that right narrowly, as protecting against actual disenfranchisement, rather than election regulations or procedures with which a person must comply when voting.

I. REMEDIAL EQUILIBRATION AND THE RIGHT TO VOTE

The scope of the Fourteenth Amendment right to vote may best be understood by considering the amendment as a whole. Section 1 does not expressly mention the right to vote.²⁷ To the extent §1 protects voting rights, it is as a component of substantive due process²⁸ or a field that triggers heightened protection for equal protection purposes.²⁹ Section 2, in contrast,

²⁷ See U.S. CONST. amend. XIV, § 1.

²⁸ *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) ("The Due Process Clause is implicated, and §1983 relief is appropriate, in the exceptional case where a state's voting system is fundamentally unfair."); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[A]n election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair."); *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); see also *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.").

²⁹ *Bush*, 531 U.S. at 104–05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); cf. *Reynolds*, 377 U.S. at 568 ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

provides that, when a state “denie[s] . . . or in any way abridge[s]” the “right to vote” of male citizens who are at least twenty-one years old at any election for specified federal and state offices, the state’s basis of representation in the House (and thereby the Electoral College) “shall be” proportionally reduced.³⁰ This remedial provision offers important—and typically overlooked—guidance about the scope of the Fourteenth Amendment right to vote.

Section A introduces a form of “remedial equilibration” called “remedial deterrence” to explain how the remedies for violations of a legal provision help courts determine the provision’s meaning and scope. Section B examines §2 of the Fourteenth Amendment from a remedial deterrence perspective, arguing that reducing a state’s representation in the House of Representatives and Electoral College is an especially severe sanction. The severity of that penalty counsels strongly in favor of establishing a high threshold for what constitutes a violation of the right to vote. In other words, a statute should not be deemed to violate the right to vote unless it directly disenfranchises people. Mere procedural or identification requirements for voting should not be deemed to violate that right. Finally, Section C concludes this analysis by contending that the same remedial deterrence analysis applies to right-to-vote claims brought under the Due Process Clause or Equal Protection Clause of §1 of the Fourteenth Amendment.

A. Descriptive and Normative Perspectives on Remedial Equilibration

The Fourteenth Amendment neither defines the contours of the right to vote nor provides any express guidance as to what constitutes a violation of that right. Daryl Levinson’s theory of remedial equilibration, however, suggests how §2’s remedial provision yields insight into those issues. Remedial equilibration teaches that “rights and remedies are inextricably intertwined.”³¹ Rights depend on remedies “for their scope, shape, and very existence.”³² One type of remedial equilibration

³⁰ U.S. CONST. amend. XIV, §2 (emphasis added).

³¹ Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

³² *Id.*

is remedial deterrence, which is the principle that a right “may be shaped by the nature of the remedy that will follow if the right is violated.”³³

Levinson presents remedial deterrence primarily as a descriptive or positive theory of judicial behavior.³⁴ “[E]nhancing the remedy” for a constitutional violation, Levinson argues, will lead courts to “pare back the constitutional right” to minimize the need to grant stronger, potentially problematic relief.³⁵ In other words, “[t]he threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences.”³⁶ For example, the exclusionary rule sometimes allows guilty and potentially violent criminals to remain free and unpunished. Such undesirable consequences may lead courts to construe criminal defendants’ underlying Fourth Amendment rights narrowly to avoid having to conclude that a violation occurred and award such relief.³⁷

Conversely, when remedies become less severe or less available, courts may be more willing to recognize rights or construe them expansively.³⁸ John Jeffries argues that the qualified immunity doctrine, which makes it harder for courts to award damages against government officials who violate constitutional rights, may make courts more willing to conclude that constitutional violations have occurred.³⁹ Several other

³³ *Id.* at 884.

³⁴ *See id.* at 873, 884.

³⁵ Levinson, *supra* note 31, at 889.

³⁶ *Id.* at 885.

³⁷ William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991); cf. Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 694, 742 (2008) (arguing that, because international appellate tribunals are generally limited to either freeing brutal war criminals or ordering new multi-year trials for them, such tribunals are reluctant to conclude that errors occurred in defendants’ trials).

³⁸ Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123, 1130 (2013) (arguing that limits on the availability of injunctive relief against copyright infringement make courts more willing to conclude that infringement has occurred); Elizabeth Canter, Note, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Injury*, 95 VA. L. REV. 155, 156 (2009) (“As the chief remedy for Fourth Amendment violations—the exclusionary rule—has become a shadow of its former self, the Fourth Amendment right has been able to evolve in a more expansive direction.”).

³⁹ John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 122; John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90, 98 (1999). Sam Kamin responds that limits on remedies can

scholars, making a similar point, have contended that the scope of a right often depends upon the judicial context—*i.e.*, civil or criminal case—in which the right is asserted.⁴⁰

Remedial deterrence also may be viewed as a normative prescription, although Levinson does not present the concept in this manner. All else being equal, one reasonably might expect that, if a legal provision carries especially harsh consequences for violations, it would (and should) take a serious act to violate it. “[I]t is a precept of justice that punishment . . . should be graduated and proportioned to offense.”⁴¹ When a provision bearing a severe remedy is reasonably susceptible to multiple constructions, one generally should favor a construction that would require a correspondingly serious act to trigger those consequences.

For example, if a statute prohibited “wrongdoing,” but carried a death sentence, then the magnitude of that remedy (even absent constitutional avoidance canons or the rule of lenity) would strongly suggest that the law pertained only to extremely serious acts, such as murder.⁴² Conversely, if the maximum penalty for violations were either a small fine or confinement for a few days, one reasonably might conclude that the provision applied to fairly trivial acts, such as jaywalking. Indeed, federal law declares that an offense for which the maximum term of imprisonment is “five days or less” is only an

lead courts to refuse to consider whether constitutional violations have occurred. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 38 (2002). For example, government officials cannot be held liable for a constitutional violation unless the right was “clearly established” at the time of the alleged violation. This limitation on liability may make courts more willing to conclude that the officials’ conduct was unconstitutional. Because courts can dispose of such cases on the grounds that the underlying right was not “clearly established,” however, they instead can simply decline to consider the threshold question of whether the Constitution was violated. *Id.* at 38, 72; *cf.* David B. Owen, Comment, *Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563, 580, 585 (2010) (contending that limitations on remedies undermine rights by encouraging government officials to do the bare minimum to avoid imposition of an adverse remedy, rather than aiming to uphold the right itself).

⁴⁰ Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 407 (2012); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1006–07 (2010) (“The contours of rights are shaped by doctrinal, institutional, and administrative concerns that are unique to the adjudicatory arena in which they are litigated . . .”).

⁴¹ *Weems v. United States*, 217 U.S. 349, 367 (1910); *see also* *Graham v. Florida*, 560 U.S. 48, 59 (2010).

⁴² Such a statute, of course, likely would be unconstitutionally vague. *United States v. Williams*, 553 U.S. 285, 304 (2008).

"infraction";⁴³ an offense for which the maximum term is between six days and one year is a "misdemeanor."⁴⁴ These classifications reaffirm that statutes which carry limited remedies are generally understood as relating to minor misconduct, and therefore should not be interpreted to embrace serious or reprehensible acts (and certainly should not be read as pertaining exclusively to such acts).

Similarly, the Supreme Court has held that, when the penalty for violating a statute is "relatively small," and the statute itself does not discuss *mens rea*, courts may "dispens[e] with" an intent requirement and "hold[] that the guilty act alone makes out the crime" or civil violation.⁴⁵ From a pragmatic perspective, as the remedy for a statutory violation grows more lax, the harm that would result from an erroneous ruling correspondingly diminishes. Courts see less need to recognize implied statutory elements to ensure accurate adjudications, and such additional protections may be inefficient.

The absence of substantial remedies can affect not only a court's interpretation of a legal provision, but the procedure the court must employ in determining whether it has been violated. A civil jury is not required in federal courts if the amount in controversy is less than \$20,⁴⁶ and federal courts generally are unavailable to resolve disputes between citizens of different states (at least in the absence of a federal question) if the amount in controversy is only \$75,000 or less.⁴⁷ In criminal cases, a defendant does not have the right to counsel unless imprisonment is a possible penalty for an offense,⁴⁸ and does not have the right to a jury unless he faces imprisonment of six months or more.⁴⁹ Again, the absence of such procedural

⁴³ 18 U.S.C. § 3559(a)(9).

⁴⁴ *Id.* § 3559(a)(6)–(8).

⁴⁵ *Morissette v. United States*, 342 U.S. 246, 255 n.13, 256 (1952); *cf.* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978) ("The severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes.").

⁴⁶ U.S. CONST. amend. VII.

⁴⁷ 28 U.S.C. § 1332(a).

⁴⁸ *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Compare* FED. R. CRIM. PROC. 5(d)(1)(B) (requiring courts in felony cases to inform defendants that they are entitled to retain counsel "or to request that counsel be appointed if the defendant cannot obtain counsel") with *id.* R. 58(b)(2)(B)–(C) (same provision, with the proviso that a defendant may not request the appointment of counsel if he is charged with "a petty offense").

⁴⁹ *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

safeguards reflects the general, and reasonable, assumption that the gravity of an alleged violation can largely be inferred from the magnitude of the attendant penalty.

B. Remedial Equilibration and Voting Litigation Under § 2 of the Fourteenth Amendment

Section 2's remedial provisions provide important insight into the scope of the constitutional right to vote. It is helpful to begin by clearing away some of the provision's anachronistic underbrush. Section 2 refers to the right to vote of people who meet four qualifications: (i) males, (ii) who are at least twenty-one years old, (iii) are citizens of the United States, and (iv) have not been disenfranchised "for participation in rebellion, or other crime."⁵⁰ The first two limitations have been superseded by subsequent amendments, which prohibit the federal government or any state from "den[ying]" or "abridg[ing]" the "right of citizens of the United States to vote" on "account of sex"⁵¹ or, for persons "who are eighteen years of age or older," on "account of age."⁵² Thus, as modified by subsequent amendments, § 2 pertains to the right to vote of U.S. citizens (regardless of gender) who are at least 18 years old,⁵³ and have not been disenfranchised for committing a crime or participating in rebellion.⁵⁴

Section 2 differs substantially from subsequent amendments relating to the right to vote. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments all share common language, providing that "[t]he right of citizens of the United States" to "vote shall not be denied or abridged" on certain specified grounds (race, gender, and age, respectively).⁵⁵ None of these provisions actually creates a right to vote for any office, or

⁵⁰ U.S. CONST. amend. XIV, § 2.

⁵¹ *Id.* amend. XIX, § 1.

⁵² *Id.* amend. XXVI, § 1.

⁵³ See Curtis, *supra* note 22, at 958.

⁵⁴ Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (affirming the constitutionality of felon disenfranchisement, based primarily on § 2); see Re & Re, *supra* note 22, at 1660–61 (explaining that § 2's reference to "other crime" was intended to apply only to serious crimes). But see Chin, *supra* note 23, at 277 (contending that felon disenfranchisement is unconstitutional because the Fifteenth Amendment implicitly repealed § 2). For brevity, this Article's discussion of the right to vote under § 2 will not reiterate this limitation concerning felons and insurrectionists.

⁵⁵ U.S. CONST. amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXVI, § 1.

confers such a right on any person. Rather, each of these amendments simply protects otherwise qualified people from being deprived, based on the specified characteristic, of any right to vote to which they otherwise might be entitled. The mandatory language of these provisions strongly suggests that the rights they create are protected by property rules.⁵⁶ In other words, they are enforceable through injunctions compelling the governmental entity at issue to cease the prohibited discrimination and allow the victims of any such discrimination to vote.

Section 2, in contrast, does not employ such mandatory or prohibitory language concerning the right to vote. Moreover, unlike those other provisions—indeed, unlike virtually any other constitutional clause⁵⁷—§2 contains its own explicit remedial provision. Read at face value, §2 (as modified by the Nineteenth and Twenty-Sixth amendments⁵⁸) provides only that, “when” a state denies or abridges “the right to vote” of citizens who are at least eighteen years old, its basis of representation in the House, and therefore Electoral College, shall be reduced proportionately.

Under a strict plain-meaning interpretation, §2 neither affirmatively guarantees a right to vote nor requires states to refrain from violating any such right.⁵⁹ Instead, §2 puts states “to a choice[.] enfranchise . . . voters or lose congressional representation.”⁶⁰ A citizen who is eighteen or older yet prohibited from voting would not be able to sue for injunctive relief to compel the state to allow him to vote but, at most, would only be able to seek to have the state’s congressional delegation reduced as a penalty. It is highly unlikely, however, that a

⁵⁶ See Morley, *supra* note 11, at 2475–76 (explaining that the text of most constitutional provisions strongly suggests they are enforceable through injunctions).

⁵⁷ Cf. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

⁵⁸ See *supra* notes 51–53 and accompanying text.

⁵⁹ CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865) (statement of Rep. Stevens); Re & Re, *supra* note 22, at 1605; Curtis, *supra* note 22, at 957–58; Chin, *supra* note 23, at 266–67; Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RES. L. REV. 965, 973 (1965); see also *supra* note 25.

⁶⁰ Richardson v. Ramirez, 418 U.S. 24, 73–74 (1974) (Marshall, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) (explaining that §2 “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’”).

person improperly prohibited from voting would have standing to seek such a reduction in representation in court.⁶¹ "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."⁶² Reduction in a state's representation would do nothing to redress the injury caused by denying a qualified elector the right to vote. At most, reduction in representation would be a punishment aimed at compelling the state to restore the plaintiff's voting rights. Because there is no guarantee that either the threat or imposition of a reduction in representation would compel the state to acquiesce and permit the plaintiff to vote, the plaintiff would lack standing to seek such relief.⁶³

Such reasoning is a straightforward application of the Supreme Court's ruling in *Linda R.S. v. Richard D.*,⁶⁴ that a person generally lacks any judicially enforceable interest in the enforcement of criminal laws.⁶⁵ In *Linda R.S.*, state law made it a misdemeanor for a person to willfully fail to pay child support.⁶⁶ State courts had held that the law applied solely to legitimate children, and not illegitimate children.⁶⁷ The plaintiff was an unwed mother who was not receiving support payments from the father of her child. She sued, alleging that the district attorney for her area was violating the Equal Protection Clause by refusing to enforce the law against fathers who did not support their children born outside of marriage.⁶⁸ She sought an injunction forbidding the district attorney "from declining

⁶¹ The judiciary's likely desire to avoid determining whether a state's basis for representation in Congress should be reduced itself decreases the likelihood that a court would find that any plaintiff had standing to bring the claim. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 636 (2006) ("[C]oncerns about remedies exert a nearly ubiquitous, often unrecognized, and little understood influence in the shaping and application of justiciability doctrines."); see, e.g., 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, 1186 (1994) (arguing that the "tortured logic" of *Saunders v. Wilkins*, 152 F.2d 235, 237–38 (4th Cir. 1945), "reveal[s] a court struggling to avoid the [§2] issue, rather than one trying to determine whether the Constitution had been violated").

⁶² *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

⁶³ *Lampkin v. Connor*, 239 F. Supp. 757, 759–60 (D.D.C. 1965) ("*Lampkin I*"), *aff'd on other grounds*, 360 F.2d 505 (D.C. Cir. 1966) ("*Lampkin II*").

⁶⁴ 410 U.S. 614 (1973).

⁶⁵ See *id.* at 619.

⁶⁶ *Id.* at 615 (citing TEX. PEN. CODE art. 602).

⁶⁷ *Id.*

⁶⁸ *Linda R.S.*, 410 U.S. at 615–16.

prosecution on the ground that the unsupported child is illegitimate.”⁶⁹

The Supreme Court concluded that the plaintiff lacked standing to maintain her claim. Although she had been injured for Article III purposes “from the failure of her child’s father to contribute support payments,” the Court held that the injury did not stem from the district attorney’s selective enforcement of the child support law.⁷⁰ The Court explained that, if the plaintiff “were granted the requested relief, it would result only in the jailing of the child’s father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.”⁷¹ It concluded by reaffirming that “a citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another,” even if the citizen has been victimized by that other person’s crimes.⁷² Likewise, a person who is denied the right to vote would lack a judicially cognizable interest in having her state’s congressional delegation reduced in size; such a reduction would neither restore her right nor compensate her in any meaningful way for its loss.⁷³

⁶⁹ *Id.* at 616.

⁷⁰ *Id.* at 617–18.

⁷¹ *Id.* at 618.

⁷² *Linda R.S.*, 410 U.S. at 619.

⁷³ Other types of lawsuits seeking to reduce a state’s representation in Congress would be even more likely to fail on standing grounds. If a state violates § 2, citizens or Members of Congress from other states could plausibly contend that they have an interest in having that state’s congressional delegation reduced in size. The fewer representatives the offending state sends to Congress, the marginally more power Members and, indirectly, voters of other states, would thereby wield. It is slightly easier to pass legislation—and each Member’s vote is correspondingly worth more—if the House of Representatives has only 433 seated Members, as opposed to its full complement of 435.

Even though reducing the basis of representation of states that violate § 2 would benefit Representatives and voters from other states, they would lack standing to seek such relief, because it is not *their* right to vote that is being violated. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (holding that a litigant “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”). Moreover, the few courts that have considered such claims have held that, to establish standing, a plaintiff must show that the size of her state’s congressional delegation would increase. Merely eliminating representatives from other states is insufficient to give a plaintiff a concrete and particularized interest in pursuing a § 2 claim. *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (dismissing § 2 suit for lack of standing because, “even after approximate nation-wide reapportionment figures were derived, it might well be that, because of population shifts, or because New York itself disenfranchised a portion of its adult males, New York’s representation would not be increased as [plaintiff] claims”); *Lampkin I*, 239 F. Supp. 757, 760 (D.D.C. 1965) (dismissing a § 2 suit for lack of standing because “it would be sheer speculation that

Putting aside standing considerations, if a court were to entertain a §2 lawsuit seeking a reduction in representation,⁷⁴ the nature of the proceedings and the relief sought would unavoidably influence its determination concerning the scope of the right to vote. Scholars repeatedly have recognized that the manner in which a court interprets constitutional provisions often depends on whether the constitutional issue is raised in a civil proceeding or criminal prosecution.⁷⁵ A lawsuit seeking to reduce a state's representation in Congress, while nominally civil, is *sui generis* and would exert its own unique pressures and pathologies that would inexorably influence the court's merits determination. And, even if the nature of the proceedings itself does not influence the court's construction of the right to vote, the Court both should,⁷⁶ and likely would,⁷⁷ take into account the magnitude, gravity, and intrinsically political nature of the remedy sought in determining whether the right to vote was violated.

Eliminating one or more seats from a state's congressional delegation would be a remedy of extraordinary magnitude. Such a ruling would effectively nullify the outcomes of one or more elections, at least partially disenfranchising the tens or hundreds of thousands of people who voted in those elections. It also would likely trigger redistricting of the entire state, consolidating larger numbers of voters into fewer districts, thereby further diluting each person's voting power.⁷⁸ The ruling also could cut short the careers of influential federal politicians within the state whose seats are eliminated as a result of the reduction in representation. Control of the House of Representatives could shift based on the elimination of even a single Member. Even the outcome of a Presidential election

such data would result in the acquisition of one or more House seats by . . . the States in which [the] plaintiffs reside"); see also *Sharrow v. Fish*, 501 F. Supp. 202 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1062 (2d Cir. 1981); *Sharrow v. Peyser*, 443 F. Supp. 321, 325 (S.D.N.Y. 1977), *aff'd*, 582 F.2d 1271 (2d Cir. 1978).

⁷⁴ See *Curtis*, *supra* note 22, at 1007 (arguing that, if Congress will not enforce §2, then courts should do so); *Bayer*, *supra* note 59, at 989-93 (discussing structure of possible §2 action); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 129-36 (1960) (same).

⁷⁵ See *supra* note 40.

⁷⁶ See *supra* notes 41-44 and accompanying notes.

⁷⁷ See *supra* notes 33, 35-39 and accompanying notes.

⁷⁸ *Baker v. Carr*, 369 U.S. 186, 208 (1962) (recognizing vote dilution as a constitutional injury).

could be altered, since the number of electoral votes a state receives depends on the size of the congressional delegation to which it is "entitled."⁷⁹ There is a substantial risk that any such relief would be seen as unavoidably political, thereby potentially jeopardizing the judiciary's institutional legitimacy.⁸⁰ Thus, if a plaintiff filed a §2 lawsuit seeking the relief set forth in that provision, the court would, quite reasonably, be influenced by such considerations in determining whether the plaintiff's right to vote was violated.

Section 2's remedial provision remains relevant in determining the scope of the right to vote, even if reduction in representation is not the sole or required remedy for violations of that right. When a plaintiff seeks only an injunction invalidating a state election law or regulation, or an order directing that his vote be counted, a remedial deterrence approach still can help the court determine whether her rights have been violated. Reduction in representation is a constitutionally authorized, and perhaps even preferred, remedy for violations of the right to vote. It is the only remedy expressly mentioned in the document's text⁸¹ or discussed in the debates over the Fourteenth Amendment's framing.⁸² In construing the right to vote under the Fourteenth Amendment, a court should consider the only express guidance the Constitution gives as to the scope of that right.

Moreover, §2 does not distinguish between "serious" and "minor" violations of the right to vote, assuming that such concepts meaningfully exist. To the contrary, it expressly

⁷⁹ U.S. CONST. art. II, § 1, cl. 2.

⁸⁰ Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 112–13, 132 (1962) (contending that the Supreme Court should avoid politically charged issues that will bring it into conflict with other branches). Compare Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 110, 114 (Bruce Ackerman ed., 2002) (arguing that *Bush v. Gore* will "embarrass the Court for the rest of its history"), with Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 *STAN. L. & POL'Y REV.* 101, 117 (2002) ("[T]he Supreme Court's long-term legitimacy and effectiveness have not been irreparably damaged [by *Bush v. Gore*].").

⁸¹ Indeed, at least as a matter of plain meaning, original intent, and original understanding, see *infra* Parts II–III, it reasonably could be argued that reduction in representation is the sole constitutionally authorized remedy for a violation of the right to vote. Whatever the merits of such an argument, it runs contrary to well established precedents enforcing voting rights through injunctive relief under both the Due Process and Equal Protection Clauses. See *supra* notes 28–28.

⁸² See *infra* Part II.

contemplates reduction in representation as the remedy for both widespread and limited violations of the right; the more people a state disenfranchises, the more seats in the House and Electoral College it should lose. Thus, there is no basis for arguing that § 2 provides guidance only for the most egregious cases, while courts remain free to adopt broader conceptions of the right to vote when plaintiffs seek less extreme forms of relief.

The severity of the remedy set forth in § 2 strongly implies that the right to vote protects individuals against acts that are sufficiently serious to warrant the extreme relief of reduction in representation: actual, literal disenfranchisement. The enactment of mere procedural or administrative requirements that a person must satisfy in order to be permitted to vote are unlikely to warrant such relief, and therefore should not be deemed to violate the Fourteenth Amendment right to vote.

C. Remedial Equilibration and Voting Litigation Under § 1 of the Fourteenth Amendment

One may contend that the scope of the “right to vote” in § 2 of the Fourteenth Amendment and the remedy set forth for violations of that right tell us little about the “right to vote” as protected by the Due Process Clause or Equal Protection Clause of § 1.⁸³ The Supreme Court generally recognizes, however, that where a constitutional provision expressly and specifically addresses a particular right, that provision, rather than more general provisions, determines the scope of the right.⁸⁴ For example, claims relating to unreasonable searches should be litigated under the Fourth Amendment rather than independently under the Due Process Clause.⁸⁵ Similarly, claims relating to states’ restrictions on the right to vote should be

⁸³ See *supra* notes 27–28.

⁸⁴ *Albright v. Oliver*, 510 U.S. 266, 273 (1994); see, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2522 (2011) (“The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also sub silentio provide that right far more broadly in another, more general, provision.”); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (holding that, with regard to prison inmates, “the Due Process Clause affords . . . no greater protection than does the Cruel and Unusual Punishments Clause”).

⁸⁵ See *Graham v. Connor*, 490 U.S. 386, 395 (1989); accord *Conn v. Gabbert*, 526 U.S. 286, 293 (1999). Of course, for Fourth Amendment claims against state and local officials, the Fourth Amendment is incorporated through the Fourteenth Amendment’s Due Process Clause, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), but it is the Fourth Amendment’s substantive provisions that govern.

litigated under §2 of the Fourteenth Amendment, rather than the much vaguer provisions of §1. Section 1's general language should not be read as implicitly creating a broader right to vote than the finely tuned provisions in §2 that specifically and directly address the issue.⁸⁶

The Supreme Court has held that §1 creates a right to vote.⁸⁷ Even if one believes, consistent with precedent, that voting rights claims are cognizable under the Due Process and Equal Protection Clauses of §1, Justice Harlan's eloquent dissent in *Reynolds v. Sims*⁸⁸ holds true:

The [Fourteenth] Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee, which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States, which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate 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 [a different] result.⁸⁹

Reading the Fourteenth Amendment as a whole, the fact that reduction in representation was authorized as a remedy for violations or abridgements of the right to vote should guide courts in determining the contours and scope of that right, regardless of the provision of the Fourteenth Amendment under which it is invoked.⁹⁰

II. CRAFTING SECTION 2 OF THE FOURTEENTH AMENDMENT

The legislative history of §2 confirms that remedial equilibration is the proper lens through which to view the right to vote.⁹¹ Section 2's history can most easily be considered in

⁸⁶ Cf. *Morales v. TWA*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . .").

⁸⁷ *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

⁸⁸ 377 U.S. 533 (1964).

⁸⁹ *Id.* at 594 (Harlan, J., dissenting).

⁹⁰ Cf. Klarman, *supra* note 25, at 228–29.

⁹¹ Other scholars have parsed §2's legislative history in the course of different inquiries. See, e.g., Tolson, *supra* note 24, at 405–21 (arguing that §2's legislative history

three main stages: the original proposal of the Joint Committee on Reconstruction, the Committee's revised proposal, and finally the replacement proposals that ultimately were enacted as the Fourteenth Amendment.

A. Original Proposal of the Joint Committee on Reconstruction

Section 2 of the Fourteenth Amendment arose from three main concerns of congressional Republicans: the need to protect freedmen in the South against violence, the desire to secure their basic civil rights, and fears that representatives from the former Confederacy would return to Congress and stymie or undo post-war reforms. President Andrew Johnson and congressional Democrats, in contrast, wished to normalize relations with southern states as quickly as possible, caring little about protecting blacks or integrating them into American society or government. Indeed, several Democrats openly espoused theories of white supremacy on the floor of Congress.⁹²

The fight over southern representation in Congress erupted at the outset of the 39th Congress. The Clerk of the House of Representatives had been appointed at the behest of radical Republican Representative Thaddeus Stevens.⁹³ At Stevens'

shows that it was intended to increase Congress' power to protect voting rights); Re & Re, *supra* note 22, at 1604–17 (arguing that § 2's legislative history confirms that Congress' decision to refrain from guaranteeing voting rights for felons was deliberate and reasoned); Scarberry, *supra* note 25, at 800–02 (arguing that § 2's legislative history confirms that the District of Columbia is not entitled to representation in the U.S. House of Representatives because seats may be apportioned only to states); Killenbeck & Sheppard, *supra* note 61, at 1176–83, 1207–14 (explaining how § 2 permits states to establish term limits for Congress); William W. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 45–46 (contending that § 2, as originally understood, did not permit states to deny populations specified therein the right to vote); Chin, *supra* note 23, at 265 (arguing that § 2's legislative history confirms that it was repealed by the Fifteenth Amendment). For more general histories, see George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961); Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L.Q. 287 (2015); Bayer, *supra* note 59, at 968–72.

⁹² See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 214–22 (Jan. 12, 1866) (statement of Rep. Davis); *id.* at 353 (Jan. 22, 1866) (statement of Rep. Rogers) (arguing that blacks are "men of an inferior race" and "by the laws of God are stamped with an inferiority so indelible that nothing can wipe it out"); *id.* at 380 (Jan. 23, 1866) (statement of Rep. Brooks) ("I am in favor of my own color in preference to any other color, and I prefer the white women of my country to the negro."); *id.* at 448–49 (Jan. 26, 1866) (statement of Rep. Harding) (insisting that the United States is a "white man's Government").

⁹³ Benjamin B. Kendrick, *The History of the Joint Committee on Reconstruction*, in JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 131, 142 (Benjamin

direction, the Clerk excluded Representatives who had been elected from Tennessee, a former Confederate state, from the official roll of the House and refused to allow debate or a vote on the issue.⁹⁴ These maneuvers precluded the Tennessee Representatives from assuming office.

Seeking to further derail Johnson's plan for reconstructing the South, Stevens proposed a resolution to form a Joint Committee on Reconstruction in early December 1865. The Committee, to be comprised of nine Representatives and six Senators, would "inquire into the condition" of the former Confederate states and report on whether they were "entitled to be represented in either House of Congress."⁹⁵ Congress passed the resolution in less than two weeks.⁹⁶ Moderate Republican Senator William P. Fessenden was the Committee's chair,⁹⁷ and Stevens was one of its members.⁹⁸

The Committee convened on January 6, 1866, and immediately requested that the President "defer all further executive action in regard to reconstruction" until the

B. Kendrick, ed. 1914) (hereafter, *Joint Committee History*).

⁹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 3–4 (Dec. 4, 1865).

⁹⁵ *Id.* at 6 (Dec. 4, 1865).

⁹⁶ The House passed the resolution immediately, *id.* at 6 (Dec. 4, 1865), and the Senate passed it with minor amendments, *id.* at 30 (Dec. 12, 1865), which the House accepted, *id.* at 47 (Dec. 13, 1865). As originally proposed, Stevens' resolution would have prohibited either House of Congress from accepting any representatives from former Confederate states until the Committee issued a report and Congress acted on it. *Id.* at 6 (Dec. 4, 1865). The Senate struck that language, *id.* at 24 (Dec. 12, 1865) (proposing amendment); *id.* at 28 (Dec. 12, 1865) (adopting amendment), on the grounds that each chamber has indefeasible constitutional authority to decide for itself the elections, qualifications, and returns of its own members, *id.* at 24–25 (Dec. 12, 1865) (statements of Sen. Anthony and Sen. Doolittle). Some Senators went even further, arguing that members of the House should not have any input into whether putative Senators from southern states should be seated. *See id.* at 28 (Dec. 12, 1865) (statements of Sen. Saulsbury and Sen. Hendricks). But as Senator Lyman Trumbell cogently explained, "It would produce a very awkward and undesirable state of things . . . if the House of Representatives were to admit members from one of the lately rebellious States and the Senate were to refuse to receive Senators from the same State." *Id.* at 29 (Dec. 12, 1865) (statement of Sen. Trumbell).

The following month, after the Joint Committee had been formed and debate on its initial proposal dragged on, Congress revisited the issue of admitting Representatives and Senators from southern states. It adopted a joint resolution stating, "[N]o Senator or Representative shall be admitted into either branch of Congress from any of said [former Confederate] States until Congress shall have declared such State entitled to such representation." *Id.* at 950 (Feb. 20, 1866) (House passage); *Id.* at 966 (Feb. 21, 1866) (House on reconsideration); *id.* at 984 (Feb. 23, 1866) (initial Senate consideration); *id.* at 1147 (Mar. 2, 1866) (Senate enactment).

⁹⁷ *Id.* at 106 (Dec. 21, 1865).

⁹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 57 (Dec. 14, 1865).

Committee finished its deliberations.⁹⁹ Expressing his desire “to secure harmony of action between Congress and the Executive,” Johnson responded that he did not intend to take any further steps at that time.¹⁰⁰

As a starting point for its deliberations, the Committee agreed on January 12 that “the apportionment of representation in Congress, as now provided by the Constitution, ought to be changed.”¹⁰¹ Several Committee members suggested competing procedures for allotting representatives among states:

- Rep. Stevens proposed that representation be based on the number of legal voters in each state who were citizens and at least twenty-one years old.¹⁰² The Committee amended his proposal so that only male voters who were citizens of the requisite age would be counted,¹⁰³ but declined to further limit the basis of representation to those who were literate.¹⁰⁴ This proposal would have disadvantaged states with large populations of women and aliens, as well as states with voting qualifications such as property requirements.
- Rep. Justin Morrill proposed that representation be based on each state’s population, but if a state denied any person either civil or political rights, all members of that person’s race would be completely excluded from the population count.¹⁰⁵ This proposal would have had even more far-reaching effects than the version of §2 that ultimately was enacted. If even a single black person were denied his civil rights or the right to vote, that state’s entire population of blacks

⁹⁹ Benjamin B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction*, in *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 37, 39 (Benjamin B. Kendrick, ed. 1914) (hereafter, *Journal*).

¹⁰⁰ *Id.* at 41.

¹⁰¹ *Id.* at 44–45.

¹⁰² *Id.* at 41.

¹⁰³ *Journal*, *supra* note 99, at 41.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 43.

would have been excluded from its basis of representation.

- Sen. George Henry Williams similarly proposed that representation be based on each state's population, but if a state constitution barred members of a particular race from voting, all members of that race would be completely excluded from the population count.¹⁰⁶ This proposal was narrower than Morrill's because it did not protect civil rights, and the penalty mechanism was triggered only by voting restrictions contained in state constitutions.
- Rep. Roscoe Conkling proposed that representation be based on the number of U.S. citizens in each state, but if a state denied any person either civil or political rights "on account of race or color," all members of that person's race would be completely excluded from the population count.¹⁰⁷ This proposal also was a variation on Morrill's; it allocated representatives, in the first instance, based on the number of citizens in each state, however, rather than the state's overall population.¹⁰⁸
- Rep. George S. Boutwell proposed that representation be based on the number of citizens in each state. Instead of making adjustments or exclusions to that figure, however, his proposal ended by declaring, "and no State shall make any distinction in the exercise of the elective franchise on account of race or color."¹⁰⁹ This was the only proposal among the original submissions that affirmatively barred racial discrimination in voting.

¹⁰⁶ *Id.*

¹⁰⁷ *Journal*, *supra* note 99, at 44.

¹⁰⁸ *Id.* at 44.

¹⁰⁹ *Id.*

The Committee formed a five-member subcommittee, including Fessenden and Stevens, to consider these various apportionment schemes.¹¹⁰ On January 20, the subcommittee reported two alternate constitutional amendments. Article A reflects a combination of Conkling's and Boutwell's proposals; Article B can be traced to Conkling's and Williams' proposals:

Article A.

Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative or void.¹¹¹

and

Article B.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.¹¹²

These proposals reflect two very different approaches to the problem of black disenfranchisement. Article A would have affirmatively prohibited states from depriving people of civil and political rights based on race, color, or creed. Article B, in contrast, was far narrower, limited solely to the right to vote; it offered no protection for civil rights. Moreover, it did not even

¹¹⁰ *Id.* at 45–46. The Committee also formed other subcommittees that were each charged with investigating certain former Confederate states to determine whether they were now loyal and assess the “present legal position” of their freedman. *Id.* at 47–48.

¹¹¹ *Journal*, *supra* note 99, at 50.

¹¹² *Id.* at 50–51. The Subcommittee also reported an early version of the Equal Protection Clause, which the full Committee decided to consider separately. *Id.* at 51.

directly prohibit racial discrimination in voting rights. Rather, it allowed states to decide whether to engage in such discrimination, but imposed a penalty—reduced representation in the House and Electoral College—for those that chose to do so.

The Committee approved Stevens' motion to use Article B as the basis for further deliberations by a vote of 11–3–1.¹¹³ The Committee then voted to change the phrase "citizens of the United States in each State" in Article B to "persons in each State, excluding Indians not taxed,"¹¹⁴ and to delete the word "creed."¹¹⁵

As revised, the proposed constitutional amendment read:

Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; 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.¹¹⁶

On January 20, the Committee voted 13–1–1 to approve this language¹¹⁷ and report the proposal to Congress.¹¹⁸

On January 22, Fessenden introduced the Committee's proposal to the Senate as S.R. No. 22,¹¹⁹ and Stevens did so in the House as H.R. No. 51.¹²⁰ Stevens explained that the proposed amendment:

does not deny to the States the right to regulate the elective franchise as they please: but it does say to a State, "If you exclude from the right of suffrage Frenchmen, Irishmen, or any particular class of people, none of that class of persons shall be counted in fixing

¹¹³ *Id.*

¹¹⁴ *Id.* at 52.

¹¹⁵ *Journal*, *supra* note 99, at 52–53.

¹¹⁶ *Id.* at 53.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 53–54.

¹¹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 337 (Jan. 22, 1866).

¹²⁰ *Id.* at 351 (Jan. 22, 1866).

your representation in this House. You may allow them to vote or not, as you please; but if you do not allow them to vote . . . they shall be excluded from the basis of representation."¹²¹

Rep. Conkling echoed this sentiment, explaining:

Every state will be left free to extend or withhold the elective franchise on such terms as it pleases, and this without losing anything in representation if the terms are impartial as to all. Qualifications of voters may be required of any kind—qualifications of intelligence, of property, or of any sort whatever, and yet no loss of representation shall thereby be suffered.¹²²

Conkling explained that the proposal did not go further, because requiring States to extend civil and political rights to blacks would "trench[] upon the principle of existing local sovereignty" and "meddle[] with a right reserved to the States when the Constitution was adopted."¹²³ Such a mandate also would be unlikely to be ratified by enough states, since many northern states either barred blacks from voting, or imposed additional requirements on them.¹²⁴

Republicans offered many rationales for the amendment. Most basically, it was unfair to allow a state to receive increased political power based on people who could neither directly vote, nor have their interests indirectly represented by others (which was the perception for women and children at the time). Conkling declared that "political representation does not belong to those who have no political existence."¹²⁵ He elaborated,

¹²¹ *Id.* (statement of Rep. Stevens); *see also id.* at 357 (Jan. 22, 1866) (statement of Rep. Conkling) (distinguishing the proposed amendment from other proposals which would "deprive the States of the power to disqualify or discriminate politically on account of race or color"); *id.* at 358 (Jan. 22, 1866) (statement of Rep. Shellabarger) (recognizing that the amendment "might be construed to give powers to the States . . . in the way of excluding an entire race from the right of the elective franchise"); *id.* at 405 (Jan. 24, 1866) (statement of Rep. Shellabarger) (same).

¹²² *Id.* at 358 (Jan. 22, 1866) (statement of Rep. Conkling); *id.* at 376 (Jan. 23, 1866) (statement of Rep. Stevens) ("[I]f the law applies impartially to all, then no matter whether it cuts out white or black, a state's representation will not be reduced).

¹²³ CONG. GLOBE, 39th Cong., 1st Sess. 358 (Jan. 22, 1866) (statement of Rep. Conkling).

¹²⁴ *Id.*

¹²⁵ *Id.* at 356 (Jan. 22, 1866) (statement of Rep. Conkling); *see also id.* at 377–78 (Jan. 23, 1866) (statement of Rep. Donnelly); *accord id.* at 379 (Jan. 23, 1866) (statement

"[W]henever in any State, and so long as a race can be found which is so low, so bad, so ignorant, so stupid, that it is deemed necessary to exclude men from the right to vote merely because they belong to that race, in such case the race shall likewise be excluded from the sum of Federal power to which that State is entitled."¹²⁶ States should "build churches and school-houses, and found newspapers . . . and educate their people till they are fit to vote."¹²⁷

Rep. William Lawrence warned that, with the abolition of slavery, southern states' power in Congress would increase based on their populations of freedmen who were barred from voting.¹²⁸ Southern states would "enjoy as the reward of their perfidy and treason increased political power."¹²⁹ Echoing this sentiment, Rep. Martin Russell Thayer pointed out that the amendment would prevent the former Confederate states from gaining 12–13 new House seats based on disenfranchised blacks.¹³⁰ Rep. Ignatius L. Donnelly, addressing the same issue from a more cynical or self-interested perspective, urged northern representatives to vote for the measure in order to increase the North's representation in Congress, as southern states were unlikely to overcome their prejudice and enfranchise blacks.¹³¹

Counting disenfranchised blacks when allocating House seats also would give southern voters much more effective political power than northern ones. Conkling pointed out that, if Representatives were allocated based on total population, then 127,000 white people in New York would be entitled to a single representative, while an equal number of whites in Mississippi would have three representatives, due to the large number of disenfranchised blacks there.¹³²

of Rep. Sloan); *id.* at 404 (Jan. 24, 1866) (statement of Rep. Lawrence).

¹²⁶ *Id.* at 358 (Jan. 22, 1866) (statement of Rep. Conkling).

¹²⁷ CONG. GLOBE, 39th Cong., 1st Sess. 359 (Jan. 22, 1866) (statement of Rep. Conkling).

¹²⁸ *Id.* at 404 (Jan. 24, 1866) (statement of Rep. Lawrence).

¹²⁹ *Id.*; *see also id.* at 410 (Jan. 24, 1866) (statement of Rep. Cook).

¹³⁰ *Id.* at 354 (Jan. 22, 1866) (statement of Rep. Thayer).

¹³¹ CONG. GLOBE, 39th Cong., 1st Sess. 377–78 (Jan. 23, 1866) (statement of Rep. Donnelly); *see also id.* at 386 (Jan. 23, 1866) (statement of Rep. Jenckes).

¹³² *Id.* at 357 (Jan. 22, 1866) (statement of Rep. Conkling); *see also id.* at 379 (Jan. 23, 1866) (statement of Rep. Sloan); *id.* at 404 (Jan. 24, 1866) (statement of Rep. Lawrence) (noting that, without the amendment, "each rebel voter . . . will enjoy a political power more than double that of every loyal voter of" the North).

Conkling went on to explain why the proposed amendment allocated representatives based on total population, subject to a reduction in representation if certain people were disenfranchised on racial grounds, rather than based on the number of voters in each state. Allocating representatives based on voters, he argued, would unfairly penalize states whose "young men" had traveled west "in quest of more buoyant activities and more boundless fields," leaving behind populations comprised disproportionately of women and children who were unable to vote.¹³³ A voter-based allocation formula also would give states the supposedly destructive incentive to extend the franchise to women, minors, aliens, and recently arrived inhabitants, just to increase their representation in Congress.¹³⁴

Congressional Democrats, along with a few Republicans who supported President Johnson, spoke out against the resolution. Rep. Andrew J. Rogers argued that reducing southern states' representation in Congress would be tantamount to taxation without representation, in violation of the principles for which the Revolution had been fought.¹³⁵ Under the proposed amendment, members of a disenfranchised race would not be taken into account in determining a state's representation in Congress, yet still would be considered for purposes of allocating direct taxes among the states.¹³⁶ Moreover, the Founding Fathers had decided that representation should be "based upon the numbers of the people" in each state, rather than the states' respective "voting population[s]."¹³⁷

Rogers further lamented that the proposed amendment "inflicts upon the States a penalty for refusing to the colored

¹³³ *Id.* at 357 (Jan. 22, 1866) (statement of Rep. Conkling). Conkling argued that such concerns were greatly exaggerated, and the only real impact on the free states of allocating representatives according to their respective numbers of voters would be to shift a few seats to California. *Id.* at 358 (Jan. 22, 1866) (statement of Rep. Conkling). After reviewing the pertinent population figures, he concluded, "[I]t takes so many 'persons' or 'voters' to make up the required constituency for a single [Representative], that the preponderance of men over women, except in California, is too small in any State seriously to affect the result." *Id.*

¹³⁴ *Id.* at 357 (Jan. 22, 1866) (statement of Rep. Conkling); *id.* at 411 (Jan. 24, 1866) (statement of Rep. Cook).

¹³⁵ CONG. GLOBE, 39th Cong., 1st Sess. 353 (Jan. 22, 1866) (statement of Rep. Rogers).

¹³⁶ *Id.*

¹³⁷ *Id.*

population an unqualified right of suffrage which it does not inflict upon them for refusing the same thing to the white population.”¹³⁸ At the time, minors, women, foreigners, and people who failed to satisfy property or educational qualifications for voting were counted in a state’s population for representation purposes, despite their ineligibility to vote. Rogers claimed that states should have similar discretion to withhold the franchise from blacks without suffering a loss of representation.¹³⁹ He contended that the proposed amendment aimed “to debase and degrade the white race” and place blacks “upon a higher [constitutional] footing than the white [man].”¹⁴⁰ By stripping states of representation in Congress, the amendment indirectly attempted to “compel” them “to adopt unqualified negro suffrage.”¹⁴¹

The magnitude of the penalty, he maintained, was unreasonable:

[I]f New Jersey pass[es] a law allowing such of her black population to vote as can read the Constitution of the United States, and although every negro in that State could take advantage of that qualification and could read the Constitution of the United States except one, then New Jersey would lose the advantage of representation for the whole of that population.¹⁴²

Rogers concluded by maintaining that the decision to ratify the proposed amendment should be made, if at all, by specially elected conventions, rather than legislatures whose members were not elected with regard to this issue.¹⁴³

¹³⁸ *Id.*

¹³⁹ CONG. GLOBE, 39th Cong., 1st Sess. 353 (Jan. 22, 1866) (statement of Rep. Rogers); *see also id.* at 354 (Jan. 22, 1866) (statement of Rep. Rogers); *id.* at 380 (Jan. 23, 1866) (statement of Rep. Orth) (pointing out that Indiana would lose representation under the proposal because it disenfranchised blacks while Massachusetts would not, even though it disenfranchised just as many people due to purported ignorance); *id.* at 388 (Jan. 23, 1866) (statement of Rep. Trimble) (“A large portion of the white citizens of this country . . . are denied representation here, and no eloquent voice is raised in their behalf to-day; but the African has numberless champions to plead in favor of his right to vote.”); *id.* at 448–49 (Jan. 26, 1866) (statement of Rep. Harding).

¹⁴⁰ *Id.* at 354 (Jan. 22, 1866) (statement of Rep. Rogers).

¹⁴¹ *Id.*

¹⁴² *Id.* at 355 (Jan. 22, 1866) (statement of Rep. Rogers).

¹⁴³ CONG. GLOBE, 39th Cong., 1st Sess. 355 (Jan. 22, 1866) (statement of Rep. Rogers).

A wide range of other counterarguments was also raised. Rep. Charles A. Eldredge argued there was no constitutional basis for requiring southern states to approve the amendment as a condition for regaining representation in Congress.¹⁴⁴ Other Representatives similarly objected that the amendment primarily affected southern states, yet was being drafted and debated without their delegates present.¹⁴⁵ Rep. James Brooks attacked the proposal as hypocritical, since it penalized states for refusing blacks the right to vote while permitting them to disenfranchise Indians and women.¹⁴⁶ Rep. John W. Chanler forthrightly opposed it on the grounds that it would allow blacks, due to their numbers, to control the South;¹⁴⁷ Rep. Lawrence S. Trimble declared that it interfered with state sovereignty.¹⁴⁸

Several radical Republicans also opposed the measure, but for diametrically opposite reasons: they contended that the amendment did not go far enough in protecting blacks and implementing the principles upon which the nation was founded. Many Republicans emphasized that the amendment would dilute the Constitution's requirement that states maintain a republican form of government, by implicitly authorizing them to disenfranchise large fractions of their populations.¹⁴⁹

Another major concern was that southern states would be able to evade the amendment's prohibition on racial discrimination too easily.¹⁵⁰ Several Representatives pointed out that the proposal allowed states to effectively disenfranchise blacks by imposing voting qualifications other than race, such as property requirements.¹⁵¹ Rep. Jenckes explained that, if South

¹⁴⁴ *Id.* at 425 (Jan. 25, 1866) (statement of Rep. Eldredge); *see also id.* at 487–88 (Jan. 29, 1866) (statement of Rep. Raymond).

¹⁴⁵ *Id.* at 426 (Jan. 25, 1866) (statement of Rep. Strouse).

¹⁴⁶ *Id.* at 379–80 (Jan. 23, 1866) (statement of Rep. Brooks).

¹⁴⁷ CONG. GLOBE, 39th Cong., 1st Sess. 382 (Jan. 23, 1866) (statement of Rep. Chanler).

¹⁴⁸ *Id.* at 387–88 (Jan. 23, 1866) (statement of Rep. Trimble).

¹⁴⁹ *See, e.g., id.* at 428 (Jan. 25, 1866) (statement of Rep. Higby).

¹⁵⁰ *Id.* at 378 (Jan. 23, 1866) (statement of Rep. Sloan); *see also id.* at 406 (Jan. 24, 1866) (statement of Rep. Shellabarger).

¹⁵¹ CONG. GLOBE, 39th Cong., 1st Sess. 385 (Jan. 23, 1866) (statement of Rep. Baker) (emphasizing that the amendment allows a state to “disenfranchise whom she pleases and to any extent she pleases,” so long as the basis is not race or color); *id.* at 386–87 (Jan. 23, 1866) (statement of Rep. Jenckes) (pointing out that a state could impose

Carolina permitted blacks to vote, but reinstated the requirement from its constitution of 1790 that a person must own property or pay a tax to be eligible to vote, then most blacks still could be excluded from the political process without triggering a reduction in the state's representation in Congress.¹⁵² These Members declared that states should not be able to exercise political power based on disenfranchised segments of their populations.¹⁵³

The House discussed a variety of alternate solutions. Jenckes urged that the amendment should expressly specify qualifications for voting, rather than leave it to the states.¹⁵⁴ Rep. John F. Farnsworth, also advocating a more direct approach, recommended that the amendment flatly prohibit states from disenfranchising their citizens, particularly based on race or color.¹⁵⁵ Other Representatives argued that the amendment should either base representation on the number of voters in each state¹⁵⁶ or, more narrowly, the number of male citizens who were at least 21 years old and eligible to vote.¹⁵⁷

It should be noted that both sides agreed that the term "abridge," as used in the proposal, referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people.¹⁵⁸ A requirement that applied to persons of all races did not "abridge" anyone's right to vote on account of race.¹⁵⁹ Conkling explained:

restrictions on the franchise "of age, of residence, of previous servitude, and of ignorance or poverty," or even exclude Union supporters); *see also id.* at 404 (Jan. 24, 1866) (statement of Rep. Lawrence); *id.* at 406 (Jan. 24, 1866) (statement of Rep. Eliot).

¹⁵² *Id.* at 376 (Jan. 23, 1866) (statement of Rep. Jenckes); *see also id.* at 386 (Jan. 23, 1866) (statement of Rep. Jenckes); *id.* at 383 (Jan. 23, 1866) (statement of Rep. Farnsworth). Democratic Rep. Samuel S. Marshall raised the interesting objection that the proposal was overbroad in a manner harmful to blacks. If a Southern state allowed some fraction of its black population to vote, but continued to discriminate against others (for example, by imposing a property or education requirement just upon blacks), then all blacks would be removed from that State's basis for representation, thereby reducing the political power of even enfranchised members of the race. *Id.* at 411 (Jan. 24, 1866) (statement of Rep. Marshall).

¹⁵³ *See, e.g., id.* at 406 (Jan. 24, 1866) (statement of Rep. Shellabarger).

¹⁵⁴ *Id.* at 386 (Jan. 23, 1866) (statement of Rep. Jenckes).

¹⁵⁵ CONG. GLOBE, 39th Cong., 1st Sess. 383 (Jan. 23, 1866) (statement of Rep. Farnsworth); *see also id.* at 405 (Jan. 24, 1866) (statement of Rep. Shellabarger).

¹⁵⁶ *Id.* at 380–81 (Jan. 23, 1866) (statement of Rep. Orth).

¹⁵⁷ *Id.* at 378 (Jan. 23, 1866) (statement of Rep. Sloan).

¹⁵⁸ *See, e.g., id.* at 353 (Jan. 22, 1866) (statement of Rep. Rogers).

¹⁵⁹ CONG. GLOBE, 39th Cong., 1st Sess. 353 (Jan. 22, 1866) (statement of Rep. Rogers).

"[I]f any State should impose qualifications alike upon white and black, and those qualifications thus impartially imposed should happen to include negroes, because they could not come up to them, notwithstanding that the State would be entitled to its entire negro population for this purpose of representation."¹⁶⁰

Due to the Democrats' opposition to protecting blacks' voting rights, as well as the concern of radical Republicans that the proposed amendment did not go far enough, Rep. Griswold moved to recommit it to the Joint Committee without instructions.¹⁶¹ He explained that he wished "to get the question back to the committee, so that they may express their views and give a report in the light of the discussion which has taken place for the last few days."¹⁶² Griswold felt that, if the Joint Committee deliberated further about the debates in the House, both the House and the public would have greater confidence in whatever amendment it reported, even if the revised version had only the "slightest possible variation" from the Committee's current proposal.¹⁶³ Stevens cautioned, "[I]f it goes to the committee we have nothing to guide us. There has been no indication of the disposition of the House. Let us have instructions so that we may know what is the sense of the House."¹⁶⁴ The House nevertheless voted on January 30, 1866, to recommit the measure to the Joint Committee without instructions,¹⁶⁵ and permitted members to submit their proposals directly to the Committee.¹⁶⁶

¹⁶⁰ *Id.* at 354 (Jan. 22, 1866) (statement of Rep. Conkling).

¹⁶¹ *Id.* at 492 (Jan. 29, 1866) (statement of Rep. Griswold).

¹⁶² *Id.*; see also *id.* at 493 (Jan. 29, 1866) (statement of Rep. Griswold) ("My object is to get before the committee the result of this entire discussion so that they may consider it in the light of that discussion.").

¹⁶³ CONG. GLOBE, 39th Cong., 1st Sess. 493 (Jan. 29, 1866) (statement of Rep. Griswold); see also *id.* at 492 (Jan. 29, 1866) (statement of Rep. Lawrence) (agreeing that "[n]o injury can result from that course," because the House was free to debate issues when the Committee reported its revised proposal).

¹⁶⁴ *Id.* at 492 (Jan. 29, 1866) (statement of Rep. Stevens).

¹⁶⁵ *Id.* at 508 (Jan. 30, 1866); see also *Journal*, *supra* note 98, at 58 (Jan. 31, 1866).

¹⁶⁶ CONG. GLOBE, 39th Cong., 1st Sess. 509 (Jan. 30, 1866); see also *id.* at 512 (Jan. 30, 1866) (proposal of Rep. Ashley).

B. The Committee's Revised Proposal

On January 31, the day after the House returned the proposed amendment to the Joint Committee, the Committee modified it by removing the phrase “and direct taxes.”¹⁶⁷ It rejected Sen. Reverdy Johnson’s recommendation that, if a state “denie[s] or abridge[s]” anyone’s right to vote for any reason, all people of that race should be excluded from the state’s basis of representation.¹⁶⁸ The Committee also declined, by a one-vote margin (6-7, with two members not voting),¹⁶⁹ to reduce a state’s representation if it disqualifies a person from voting based on his “former condition of slavery,”¹⁷⁰ most likely on the grounds that the draft’s language concerning racial discrimination already indirectly achieved that goal.¹⁷¹ The Committee reported the slightly modified version of the amendment back to Congress by a vote of 10-4-1,¹⁷² and it was re-introduced into the House as H.R. No. 51.¹⁷³

Responding to Republicans’ earlier critiques, Stevens explained that the proposed amendment did not grant states new authority to disenfranchise blacks, but rather penalized the exercise of their pre-existing power to do so.¹⁷⁴ If Congress attempted to go further and establish qualifications for voting, or directly prohibit states from denying the franchise to certain groups of people, it was unlikely that enough states would ratify the amendment for it to become part of the Constitution.¹⁷⁵

Stevens recognized that southern states would not immediately enfranchise blacks, but viewed that as a virtue of the proposal, because the South’s representation in Congress

¹⁶⁷ *Journal, supra* note 99, at 58 (Jan. 31, 1866); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 535 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁶⁸ *Journal, supra* note 99, at 59 (Jan. 31, 1866).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ CONG. GLOBE, 39th Cong., 1st Sess. 537 (Jan. 31, 1866) (statement of Rep. Stevens) (“[E]xclusion[] on account of previous condition of slavery[] must be an exclusion on account of race or color.”).

¹⁷² *Journal, supra* note 99, at 59-60 (Jan. 31, 1866).

¹⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 535 (Jan. 31, 1866).

¹⁷⁴ *Id.* at 536 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁷⁵ *Id.* (“[I]f you should take away the right which now is and always has been exercised by the States, by fixing the qualification of their electors, instead of getting nineteen States, which is necessary to ratify this amendment, you might possibly get five.”).

would be substantially reduced.¹⁷⁶ He did not want the former Confederacy to be fully represented until Congress “ha[d] done the great work of regenerating the Constitution and laws of the country according to the principles of the Declaration of Independence.”¹⁷⁷ In the meantime, “our Christian men shall go among the freedmen and teach them what their duties are as citizens.”¹⁷⁸ After four or five years, “when these freedmen . . . shall have become intelligent enough, and there are sufficient loyal men [in the South] to control the representation from those States,” the southern states would resume their full representation in Congress.¹⁷⁹

Rep. Robert C. Schenck proposed a substitute that would apportion Representatives based on the number of male voters in each state who were at least twenty-one years old.¹⁸⁰ Rep. John F. Benjamin pointed out that Schenck’s proposal would disadvantage loyal states with large rebel populations that were not permitted to vote.¹⁸¹ It also would cause northern states with large populations of non-citizen immigrants who were ineligible to vote to lose 15–20 representatives.¹⁸² Those states would never ratify such a measure.¹⁸³ Moreover, such a standard was impracticable to administer in states such as Missouri that required voters to take oaths at the time they deposited their ballots, affirming they had not been involved in the rebellion.¹⁸⁴ The House rejected Schenck’s substitute by a vote of 29–131–23.¹⁸⁵ Later that day—the same day the Committee returned the proposed amendment to the House—the House passed the Joint

¹⁷⁶ *Id.* at 536 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁷⁷ CONG. GLOBE, 39th Cong., 1st Sess. 536 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* In the course of this debate, a Representative equated fallen Union soldiers with dead Confederates, hailing both equally as “the dead of the nation.” Stevens replied that if “the loyal dead” heard such a pronouncement, they “would have broken the ceremonies of the tomb and stalked forth and haunted him until his eye-balls were seared.” *Id.* at 538 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁸⁰ *Id.* at 535 (Jan. 31, 1866) (statement of Rep. Schenck).

¹⁸¹ CONG. GLOBE, 39th Cong., 1st Sess. 535 (Jan. 31, 1866) (statement of Rep. Benjamin).

¹⁸² *Id.* at 537 (Jan. 31, 1866) (statement of Rep. Stevens).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 535–36 (Jan. 31, 1866) (statement of Rep. Benjamin).

¹⁸⁵ CONG. GLOBE, 39th Cong., 1st Sess. 538 (Jan. 31, 1866).

Committee's proposal by a vote of 120–46–16, more than the two-thirds required for passage.¹⁸⁶

The Senate began considering the revised version of H.R. No. 51 a few days later.¹⁸⁷ Fessenden explained that the Joint Committee removed the phrase “and direct taxes” because many House members thought that the amendment was “stronger” without it.¹⁸⁸ The phrase also was unnecessary because the Constitution already levies taxes according to population.¹⁸⁹

Numerous Senators expressed concern about the proposal and offered amendments. Sen. Charles Sumner believed that it compromised on basic human rights by affirmatively enshrining in the Constitution states' right to deny blacks the franchise.¹⁹⁰ Guaranteeing the right to vote for blacks was necessary to fully realize the promises of the Declaration of Independence;¹⁹¹ ensure that each state's government was truly “republican,” as the Constitution requires;¹⁹² and avert a “terrible” race war between freedmen and their former masters, who would continue to mistreat and marginalize them despite the abolition of slavery.¹⁹³

Sumner suggested replacing the proposed constitutional amendment with a bill prohibiting any “Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers,” or any “denial of rights, civil or political, on account of color or race” anywhere in the United States.¹⁹⁴ The proposed legislation further specified that “all persons . . . shall be equal before the law, whether in the court-room or at the ballot-

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 644 (Feb. 5, 1866) (statement of Sen. Fessenden); *see also id.* at 520 (Jan. 31, 1866) (initial introduction of proposal); *id.* at 1283 (Mar. 9, 1866) (reading proposal). The Senate approved a few modifications proposed by Senator Clark that did not substantively affect the measure, *id.* at 1287 (Mar. 9, 1866) (proposal of Sen. Clark); *see also id.* at 1284 (Mar. 9, 1866) (proposal of Sen. Clark), but those modifications were omitted from the final version of the amendment that the Senate voted upon, *id.* at 1288 (Mar. 9, 1866).

¹⁸⁸ *Id.* at 703 (Feb. 7, 1866) (statement of Sen. Fessenden).

¹⁸⁹ CONG. GLOBE, 39th Cong., 1st Sess. 703 (Feb. 7, 1866) (statement of Sen. Fessenden).

¹⁹⁰ *Id.* at 673 (Feb. 6, 1866) (statement of Sen. Sumner).

¹⁹¹ *Id.* at 674 (Feb. 6, 1866) (statement of Sen. Sumner).

¹⁹² *Id.* at 675, 684 (Feb. 6, 1866) (statement of Sen. Sumner).

¹⁹³ CONG. GLOBE, 39th Cong., 1st Sess. 675 (Feb. 6, 1866) (statement of Sen. Sumner).

¹⁹⁴ *Id.* at 674 (Feb. 6, 1866) (proposal of Sen. Sumner); *see also id.* at 1283 (Mar. 9, 1866) (reading Sumner's proposal).

box.”¹⁹⁵ The bill concluded by stating that it “shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.”¹⁹⁶ He later modified the proposal to limit its applicability exclusively to former Confederate states.¹⁹⁷ The Senate rejected Sumner’s plan by a vote of 8 to 39.¹⁹⁸

The Senate also rejected three other proposals that would have prohibited racial discrimination in granting the franchise. It voted 8 to 38 to reject another amendment Sumner proposed that provided, “And the elective franchise shall not be denied or abridged in any State on account of race or color.”¹⁹⁹ It likewise voted 10 to 37 to reject Sen. John B. Henderson’s suggestion to replace the Joint Committee’s proposal with: “No state, in prescribing the qualifications requisite for electors therein shall discriminate against any person on account of color or race.”²⁰⁰ Sen. Richard Yates’ proposal would have gone even further, prohibiting states from discriminating in any respect based on race, color, or previous condition of servitude, particularly with regard to all “civil and political rights, including the right of suffrage.”²⁰¹ This measure received the least support, suffering defeat by a vote of 7 to 38.²⁰²

After over a month of debate,²⁰³ the Senate ultimately voted on the original text of the resolution as it emerged from the

¹⁹⁵ *Id.* at 674 (Feb. 6, 1866) (proposal of Sen. Sumner).

¹⁹⁶ *Id.*

¹⁹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1288 (Mar. 9, 1866). Sumner also proposed modifying the last sentence of the Joint Committee’s draft to read, “[A]ll persons therein of such race or color shall be excluded from the basis of representation, and they shall be exempt from taxation of all kinds.” *Id.* at 811 (Feb. 13, 1866) (proposal of Sen. Sumner). Sumner later changed his mind and withdrew that amendment. *Id.* at 852 (Feb. 15, 1866).

²⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 702 (Feb. 7, 1866) (proposal of Sen. Henderson); *id.* at 1283 (Mar. 9, 1866) (reviewing Henderson’s proposal); *id.* at 1284 (Mar. 9, 1866) (rejecting Henderson’s proposal).

²⁰¹ *Id.* at 1287 (Mar. 9, 1866) (proposal of Sen. Yates).

²⁰² *Id.*

²⁰³ *See id.* at 673–87 (Feb. 6, 1866); *id.* at 702–08 (Feb. 7, 1866); *id.* at 736–42 (Feb. 8, 1866); *id.* at 763–70 (Feb. 9, 1866); *id.* at 810–11 (Feb. 13, 1866); *id.* at 831–35 (Feb. 14, 1866); *id.* at 876–86 (Feb. 16, 1866); *id.* at 957–65 (Feb. 21, 1866); *id.* at 981–91 (Feb. 23, 1866); *id.* at 1180–84 (Mar. 5, 1866); *id.* at 1203 (Mar. 6, 1866); *id.* at 1224–33 (Mar. 7, 1866); *id.* at 1254–58 (Mar. 8, 1866).

Committee.²⁰⁴ The vote was 25–22, falling short of the two-thirds majority necessary for a constitutional amendment.²⁰⁵

C. The Replacement Proposals

Following the defeat of the Joint Committee's proposal, more members came forward with their own plans. Among the most prominent was Sen. William M. Stewart's proposed constitutional amendment that expressly prohibited "[a]ll discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage."²⁰⁶ The resolution was referred to the Joint Committee,²⁰⁷ which Stewart addressed "at length in support and advocacy" of the measure.²⁰⁸ Since his proposal would have enabled southern states to regain representation in Congress while continuing to effectively disenfranchise blacks through educational or property requirements, the Committee took no action on it.²⁰⁹

A few weeks later, in early April, an English reformer named Robert Dale Owen proposed a plan to Stevens, who introduced it to the Committee.²¹⁰ The proposal stated, in pertinent part:

Section 2—"From and after [July 4, 1876], no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude."

²⁰⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1288–89 (Mar. 9, 1866).

²⁰⁵ *Id.* at 1289 (Mar. 9, 1866).

²⁰⁶ *Id.* at 1906 (Apr. 12, 1866) (proposal of Sen. Stewart). Stewart previously had proposed a statute, S.R. No. 48, that would have permitted a southern state to send representatives to Congress only if, among other things, it amended its constitution to prohibit all "distinctions" based on race, color, or previous condition of servitude with regard to civil rights and the franchise. *Id.* at 1437–38 (Mar. 16, 1866) (proposal of Sen. Stewart). The measure had been referred to the Joint Committee. *Id.* at 1438 (Mar. 16, 1866).

²⁰⁷ *Id.* at 1906 (Apr. 12, 1866).

²⁰⁸ *Journal*, *supra* note 99, at 82 (Apr. 16, 1866).

²⁰⁹ *Joint Committee History*, *supra* note 93, at 295.

²¹⁰ *Journal*, *supra* note 99, at 83 (Apr. 21, 1866); *see also Joint Committee History*, *supra* note 92, at 296.

Section 3—"Until [July 4, 1876], no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation."²¹¹

The Committee accepted Stevens' recommendation to delete §2,²¹² as well as Williams' motion to replace §3 with the following language (which became the new §2):

Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such state shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.²¹³

The Committee also inserted the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clause as §1 of the proposal.²¹⁴

The Committee ultimately voted 12-3 to report the complete amendment to Congress.²¹⁵ Stevens later told Owen that the Committee modified his proposal because recent Republican caucuses in New York, Illinois, and Indiana had come out strongly against black suffrage.²¹⁶

²¹¹ *Journal, supra* note 99, at 83-84 (Apr. 21, 1866). The Committee accepted each of these proposals by wide margins. *Id.* at 84-86. After a few days of deliberation on other related matters, it voted 7-6-2 in favor of reporting the amendment, *id.* at 97, 99 (Apr. 25, 1866), but passed a motion to reconsider shortly thereafter, *id.* at 100, so that further changes could be made to the language.

²¹² *Id.* at 101 (Apr. 28, 1866).

²¹³ *Id.* at 102 (Apr. 28, 1866).

²¹⁴ *Id.* at 106 (Apr. 28, 1866).

²¹⁵ *Journal, supra* note 99, at 114 (Apr. 28, 1866); *see also id.* at 115-17.

²¹⁶ *Joint Committee History, supra* note 93, at 302.

Stevens reported this draft to the House on April 30, 1866,²¹⁷ and the House began considering it a week later. Stevens emphasized that the Committee's latest proposal was "all that can be obtained in the present state of public opinion [W]e did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this."²¹⁸ Reminding the House how the Senate had repudiated the Joint Committee's previous proposal, he lamented that the earlier version of the amendment had been "mortally wounded in the house of its friends."²¹⁹

Explaining §2, which he called "the most important in the article," Stevens stated:

If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. 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.²²⁰

He admitted the proposal was "not as good" as the one the Senate had rejected, which would have excluded all blacks from a state's basis of representation if it discriminated against any of them.²²¹ The new proposal, in contrast, "allow[ed] the States to discriminate among the same class, and receive proportionate credit in representation."²²² He reiterated:

True it will take two, three, possibly five years before [southern whites] conquer their prejudices sufficiently to allow their late slaves to become their equals at the polls. That short delay would not be injurious. In the mean time the freedmen would become more enlightened, and more fit to discharge the high duties of their new

²¹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2286 (Apr. 30, 1866).

²¹⁸ *Id.* at 2459 (May 8, 1866) (statement of Rep. Stevens).

²¹⁹ *Id.*

²²⁰ *Id.* (emphasis added).

²²¹ CONG. GLOBE, 39th Cong., 1st Sess. 2459–60 (Apr. 30, 1866) (statement of Rep. Stevens).

²²² *Id.* at 2460 (Apr. 30, 1866) (statement of Rep. Stevens).

condition. In that time, too, the loyal Congress could mature their laws and so amend the Constitution as to secure the rights of every human being, and render dilution impossible.²²³

Stevens also explained that subsequent legislation would be necessary to implement § 2:

[I]f this amendment prevails you must legislate to carry out many parts of it. You must legislate for the purpose of ascertaining the basis of representation. You must legislate for registry such as they have in Maryland. It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out²²⁴

Democrats objected that blacks should not have the right “to marry a white woman [or] the right to vote.”²²⁵ They also continued to oppose the measure on the grounds that it was a “mere scheme to deny representation to eleven States; to prevent indefinitely a complete restoration of the Union and perpetuate the power of a sectional and dangerous party.”²²⁶ Additionally, several Members reiterated their objection to considering constitutional amendments affecting the southern states while those states were excluded from Congress.²²⁷

Other members conveyed concern about constitutional amendments being “offered and passed” with too “much haste and facility.”²²⁸ Rep. Fernando C. Beaman expressed his disappointment with the Committee’s proposal, but recognized, “[P]erhaps it is as nearly satisfactory as any system that could have been agreed on with any well-founded hope of adoption.”²²⁹

²²³ *Id.* at 2459 (Apr. 30, 1866) (statement of Rep. Stevens).

²²⁴ *Id.* at 2544 (May 10, 1866) (statement of Rep. Stevens).

²²⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2538 (May 10, 1866) (statement of Rep. Rogers).

²²⁶ *Id.* at 2461 (May 8, 1866) (statement of Rep. Finck).

²²⁷ *Id.* at 2461–62 (May 8, 1866) (statement of Rep. Finck); *see also id.* at 2530 (May 10, 1866) (statement of Rep. Randall); *id.* at 2531 (May 10, 1866) (statement of Rep. Strouse).

²²⁸ *Id.* at 2531 (May 10, 1866) (statement of Rep. Strouse).

²²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2537 (May 10, 1866) (statement of Rep. Beaman).

The amendment ultimately passed the House by a vote of 128 to 37, with 19 members not voting.²³⁰

The Senate was deeply divided over the proposed amendment. Sen. Jacob M. Howard explained that §2 “leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.”²³¹ Under the proposal, “where a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded.”²³² The penalty will be triggered “no matter what may be the occasion of the restriction . . . whether a want of education, a want of property, a want of color, or a want of anything else.”²³³ Howard would have preferred guaranteeing either universal suffrage, or at least “restricted, qualified suffrage for the colored race,” but such proposals were unlikely to be ratified.²³⁴ He further clarified that a state “abridges” the right to vote for purposes of §2 if it “permit[s] one person to vote for a member of the State Legislature, but prohibit the same person from voting for a Representative, in Congress.”²³⁵

Republican Sen. Benjamin F. Wade opposed the proposal, arguing, “[M]any believe there are good reasons, for restricting universal suffrage, and upon such principles as not to justify the inflicting of a punishment or penalty upon a State which adopts restricted suffrage [A] State has the right to try that experiment” without losing her full representation in Congress.²³⁶

In late May, the Republican Senators caucused together for several days and hammered out several modifications to the House’s proposal.²³⁷ Following the caucus, Sen. George H. Williams implemented their decision by proposing a modified version of §2 that read:

²³⁰ *Id.* at 2545 (May 10, 1866).

²³¹ *Id.* at 2766 (May 23, 1866) (statement of Sen. Howard).

²³² *Id.* at 2767 (May 23, 1866) (statement of Sen. Howard).

²³³ CONG. GLOBE, 39th Cong., 1st Sess. 2767 (May 23, 1866) (statement of Sen. Howard).

²³⁴ *Id.* at 2766 (May 23, 1866) (statement of Sen. Howard).

²³⁵ *Id.* at 2767 (May 23, 1866) (statement of Sen. Howard).

²³⁶ *Id.* at 2769 (May 23, 1866) (statement of Sen. Wade).

²³⁷ *Joint Committee History*, *supra* note 93, at 316; *see also* Zuckerman, *supra* note 90, at 105.

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 whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, 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.²³⁸

Howard claimed that the proposal simplified §2 without altering its effects.²³⁹ Williams explained that this revised version replaced the phrase “the elective franchise” with “the right to vote any election held under the Constitution and laws of the United States or of any State,” to clarify that a state would be subject to a reduction in representation if it barred a person from voting in any election, not just elections for the U.S. House.²⁴⁰ Sen. Johnson complained that it was ambiguous whether a State would suffer reduced representation if it prevented its citizens from voting in city or county elections in places other than where they live, or because of other voting qualifications specific to local elections.²⁴¹ Henderson raised a similar concern about eligibility to vote for local public school officials.²⁴²

Henderson, a Republican, went on to object that the amendment did not go far enough. He declared that the amendment affirmed “the propriety[] of excluding arbitrarily a freeman from the elective franchise.”²⁴³ He also claimed that it

²³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2991 (June 6, 1866) (proposal of Sen. Williams); *accord id.* at 3026 (June 8, 1866) (proposal of Sen. Williams).

²³⁹ *Id.* at 2991 (June 6, 1866) (statement of Sen. Howard); *see also id.* at 3010 (June 7, 1866) (statement of Sen. Henderson).

²⁴⁰ *Id.* at 2991 (June 6, 1866) (statement of Sen. Williams); *accord id.* at 3010 (June 7, 1866) (statement of Sen. Fessenden).

²⁴¹ *Id.* at 2991 (June 6, 1866) (statement of Sen. Johnson); *see also id.* at 3027 (June 8, 1866) (statement of Sen. Johnson).

²⁴² CONG. GLOBE, 39th Cong., 1st Sess. 3010 (June 7, 1866) (statement of Sen. Henderson).

²⁴³ *Id.* at 3033 (June 8, 1866) (statement of Sen. Henderson).

permitted states to disenfranchise whites (likely referring to women) and aliens “without loss of representative power.”²⁴⁴ Finally, it presented “too great an incentive to the States to extend suffrage to persons who are ignorant and uneducated for the mere purpose of acquiring power,” to prevent such people from being “excluded from the basis of representation.”²⁴⁵

Henderson then suggested an amendment to the Republican caucus’ proposed modification of §2, to make it more specific.²⁴⁶ Under his revision, the penalty clause would be triggered “whenever the right to vote for Governor, judges, or members of either branch of the Legislature is denied by any State to any of its male inhabitants being twenty-one years of age.”²⁴⁷ The Senate adopted his amendment by a vote of 20 to 7,²⁴⁸ thereby removing potential concerns about §2’s applicability to local elections. The next day, Williams tweaked this language further, so that it referred to “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 members of the Legislature thereof.”²⁴⁹

Several opponents objected that it would be too difficult to determine the number of people who have been disenfranchised for improper, as opposed to permissible, reasons.²⁵⁰ Johnson added that it was unfair to require a southern state to “agree to an amendment which was to deprive her of a part of her representation unless she would consent to abandon a policy which she had adopted from the beginning of her existence.”²⁵¹ Echoing Henderson, he also pointed out that, under the amendment, aliens, women, minors, former rebels, and

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ CONG. GLOBE, 39th Cong., 1st Sess. 3011 (June 7, 1866) (proposal of Sen. Henderson).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 3029 (June 8, 1866) (proposal of Sen. Williams); *accord id.* at 3038 (June 8, 1866) (statement of Sen. Pomeroy) (noting that Williams had “modified” the Republican caucus’ proposed substitute version of § 2).

²⁵⁰ CONG. GLOBE, 39th Cong., 1st Sess. 3026 (June 8, 1866) (statement of Sen. Cowan); *id.* at 3038 (June 8, 1866) (statement of Sen. Howard).

²⁵¹ *Id.* at 3030 (June 8, 1866) (statement of Sen. Johnson); *see also id.* at 3029 (June 8, 1866) (statement of Sen. Johnson) (protesting that § 2 would “strip the South of a portion of her representation unless she will agree to change her suffrage laws”).

criminals still could be excluded from voting.²⁵² Johnson further argued, ironically, that the amendment harmed blacks' rights because it would "deny" them "the right to be represented" in the House by reducing the number of representatives allocated to their states of residence, "simply because they are not permitted to exercise the right of voting."²⁵³

Howard, a Republican, argued that the term "abridged" was too vague.²⁵⁴ "It is an invitation to raise questions of construction, and it will be followed . . . with an unending train of disputations in courts of justice and elsewhere, and there is no possibility of foreseeing what in the end will be the decision of the Supreme Court as to the meaning of the language 'or in any way abridged.'"²⁵⁵ The Senate rejected an amendment that would have deleted that term, however.²⁵⁶ A week later, in mid-June, it voted to replace the version of §2 that the House passed with the Republican caucus' alternative, as amended by Williams,²⁵⁷ and then passed the entire Fourteenth Amendment by a vote of 33 to 11.²⁵⁸ The House concurred in the Senate's amendments 120-32-32, thereby officially proposing the Fourteenth Amendment to the States for ratification.²⁵⁹

Section 2's legislative history confirms the propriety of a remedial equilibration interpretation. Throughout most of the debates surrounding the various drafts of the provision that eventually became §2, its authors and proponents candidly recognized that it does not require states to permit anyone to vote, but rather only reduces states' representation in Congress if they choose to deny that right to certain categories of people.²⁶⁰ Indeed, many representatives were concerned that the

²⁵² *Id.* at 3027 (June 8, 1866) (statement of Sen. Johnson).

²⁵³ *Id.* at 3029 (June 8, 1866) (statement of Sen. Johnson).

²⁵⁴ CONG. GLOBE, 39th Cong., 1st Sess. 3039 (June 8, 1866) (statement of Sen. Howard); *id.* at 3040 (June 8, 1866) (statement of Sen. Hendricks).

²⁵⁵ *Id.* at 3039 (June 8, 1866) (statement of Sen. Howard).

²⁵⁶ *Id.* at 3040 (June 8, 1866).

²⁵⁷ *Id.* (adopting, in the Committee of the Whole, Williams' modified version of the Republican caucus' proposal as an amendment to the version of § 2 approved by the House); *see also id.* at 3041 (June 8, 1866) (concurring on amendment made in the Committee of the Whole).

²⁵⁸ CONG. GLOBE, 39th Cong., 1st Sess. 3042 (June 8, 1866) (approving final version of the Fourteenth Amendment).

²⁵⁹ *Id.* at 3149 (June 14, 1866).

²⁶⁰ *See supra* notes 217, 219 and accompanying text; *see also supra* notes 173, 187 and accompanying text.

proposal did not go far enough, precisely because it did not affirmatively compel states to permit anyone to vote.²⁶¹

Even if the Fourteenth Amendment right to vote is directly enforceable through injunctive relief, the amendment's framers viewed reduction in representation as a primary—if not sole—remedy for violations of that right. Section 2's legislative history thus confirms that the severity of that remedy is a legitimate—indeed, critical—consideration in attempting to ascertain that right's scope.

II. THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT RIGHT TO VOTE

Congress' actions following the ratification of the Fourteenth Amendment yield further insight into the scope of the right to vote as originally understood by §2's framers. In December 1868, the Senate passed a resolution requiring the Senate Judiciary Committee to draft a bill to apportion representatives in compliance with §2,²⁶² but the session ended before the committee could act.²⁶³

The following year, in preparation for the Ninth Census, the House Select Committee on the Census reviewed the constitution and laws of each state in the nation to identify those which violated or abridged the right to vote of male citizens who were at least twenty-one years old.²⁶⁴ Its report identified the types of voting restrictions that violated the right to vote and the number of states that had adopted them:

²⁶¹ See *supra* notes 229–33, 241–43 and accompanying text; see also *supra* note 189 and accompanying text.

²⁶² CONG. GLOBE, 40th Cong., 3d Sess. 158 (Dec. 19, 1868) (statement of Sen. Harlan).

²⁶³ Zuckerman, *supra* note 90, at 107.

²⁶⁴ H.R. REP. NO. 41-3, at 52 (1869–70).

- | | |
|--|---------------------------|
| 1. On account of race or color | 16 States |
| 2. On account of residence on
lands of United States | 2 [States] |
| On account of residence less
than required time in United
States | 2 [States] |
| On account of residence in
State less than required time,
(six different specifications) | 36 [States] |
| On account of residence in
county, city, town, district, &c.,
(eighteen different
specifications) | 37 [States] |
| 3. Wanting property
qualifications or non-payment
of taxes, (eight specifications) | 8 [States] |
| 4. Wanting literary qualifications,
(two specifications) | 2 States |
| 5. On account of character or
behavior, (two specifications) | 2 [States] |
| 6. On account of service in army
or navy | 2 [States] |
| 7. On account of pauperism,
idiocy, and insanity, (seven
specifications) | 24 [States] |
| 8. Requiring certain oaths as
preliminary to voting, (two
specifications) | 5 [States] |
| 9. Other cause of exclusion, (two
specifications) | 2 [States] ²⁶⁵ |

The committee report directed the Department of the Interior to determine the number of citizens of age in each state that these provisions prevented from voting.²⁶⁶ The committee also reported a bill requiring the Interior Department to count the number of "[m]ale citizens of the United States twenty-one years of age, whose right to vote is denied or abridged on other

²⁶⁵ *Id.* at 52–53; *see also id.* at 71–93.

²⁶⁶ *Id.* at 53.

grounds than rebellion or other crime.”²⁶⁷ The bill further required the Secretary of the Interior to reduce states’ bases for representation based on those figures.²⁶⁸

At the behest of committee chair Rep. James Garfield, however, the House deleted these provisions from the bill.²⁶⁹ He pointed out that the Fifteenth Amendment was in the process of being ratified. The bill would cause many states with racially discriminatory voting laws to lose seats in the House for the next decade, even though such laws were going to be nullified imminently.²⁷⁰ The House agreed to delay considering reductions in representation under §2 until its next session.²⁷¹

Despite Congress’ failure to pass this measure, the Interior Department included a column in the Census counting the number of white male citizens twenty-one or older in each state who were disenfranchised.²⁷² The following session, the House passed a resolution directing the Interior Department to provide that data to it.²⁷³ The number of disenfranchised citizens reported in each state was fairly small.²⁷⁴ The Secretary of the Interior cautioned that the department was “disposed to give but little credit to the returns made by assistant marshals in regard to the denial or abridgement of suffrage,” on the grounds that they were ill-equipped to handle the “numerous questions of difficulty and nicety” such determinations required.²⁷⁵ Professor Zuckerman points out that, throughout the South, except for Texas, “the number of adult male citizens who were disenfranchised amounted to less than 0.5 percent.”²⁷⁶ Members of Congress attacked the results as “utterly inaccurate”²⁷⁷ and “unreliable.”²⁷⁸

²⁶⁷ CONG. GLOBE, 41st Cong., 2d Sess. 38 (Dec. 8, 1869) (statement of Rep. Garfield).

²⁶⁸ *Id.* at 40 (Dec. 8, 1869) (statement of Rep. Hoar).

²⁶⁹ *Id.* at 127 (Dec. 14, 1869).

²⁷⁰ *Id.* at 124 (Dec. 14, 1869) (statement of Rep. Garfield).

²⁷¹ CONG. GLOBE, 41st Cong., 2d Sess. 127 (Dec. 14, 1869).

²⁷² Zuckerman, *supra* note 90, at 110.

²⁷³ CONG. GLOBE, 42nd Cong., 2d Sess. 42 (Dec. 7, 1871).

²⁷⁴ *Id.* at 66 (Dec. 11, 1871).

²⁷⁵ *Id.* (correspondence from Secretary of the Interior Columbus Delano).

²⁷⁶ Zuckerman, *supra* note 90, at 112.

²⁷⁷ CONG. GLOBE, 42nd Cong., 2d Sess. 79 (Dec. 12, 1871) (statement of Rep. Mercur).

²⁷⁸ *Id.* at 670 (Jan. 29, 1872) (statement of Sen. Morrill).

Representative Garfield pointed out that Rhode Island and Arkansas each stood to lose a representative based on the Census results concerning disenfranchised voters.²⁷⁹ Congress concluded, however, that the numbers of disenfranchised voters in each state according to the Census report, which was of dubious validity anyway, were too small to warrant stripping any states of representation.²⁸⁰ In a vain attempt to prevent §2 from being effectively nullified, Congress enacted a statute reiterating its provisions that remains valid law to this day.²⁸¹ Despite this halfhearted compromise, §2 has never been enforced.²⁸²

Congress' attempts to implement §2 shortly after enacting it yield valuable insight into how its framers understood the Fourteenth Amendment right to vote. They focused on whether states imposed additional qualifications for voting, such as property, color, or education.²⁸³ In the words of Senator Howard, "No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion."²⁸⁴ Section 2 was understood as prohibiting states from disenfranchising groups of people—the poor, the ignorant, racial minorities—based on their possession of purportedly

²⁷⁹ *Id.* at 83 (Dec. 12, 1871) (statement of Rep. Garfield).

²⁸⁰ Zuckerman, *supra* note 90, at 113–14; *see, e.g.*, CONG. GLOBE, 42nd Cong., 2d Sess. 670 (Jan. 29, 1871) (statement of Sen. Morrill).

²⁸¹ The law stated:

[S]hould any State, after the passage of this act, deny or abridge the right of any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendments to the Constitution, article fourteen, section two, except for participation in the rebellion or other crime, the number of Representatives apportioned in this act to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

Act of Feb. 2, 1872, ch. 11, § 6, 17 Stat. 28, 29. A slightly reworded version of this provision remains in effect. *See* 2 U.S.C. § 6.

²⁸² Curtis, *supra* note 22, at 958.

²⁸³ *Cf.* Curtis, *supra* note 22, at 957 (pointing out that "literacy tests, educational tests, property qualifications, tests based on the ability to read and 'understand' the state constitution, and a host of other methods of denying the right to vote" were prohibited by § 2).

²⁸⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2767 (May 23, 1866) (statement of Sen. Howard).

undesirable traits.²⁸⁵ The 41st Congress's enumeration of all state laws and constitutional provisions throughout the country that violated the right to vote completely omitted any reference to administrative procedures or requirements that people had to follow or satisfy in order to establish their identity or eligibility to vote.²⁸⁶

Although photo identification requirements did not exist during the Reconstruction Era—at the time, photography itself was cumbersome and far less common than today—numerous other procedural requirements for voting existed that the House Census Committee did not identify as violating the right to vote. Alexander Keyssar, in his magisterial history of the right to vote, explains that, from the early 1800s, states had established “detailed rules governing the conduct of elections,” such as laws governing “what documents had to be presented as proof of citizenship”²⁸⁷ and “cumbersome registration procedures.”²⁸⁸ Before voter registration laws became common, state laws regulated the “documentary proofs (or witnesses)” that people had to bring to polling places with them in order to be permitted to vote.²⁸⁹ In the years after the Civil War, laws that “established the procedures that a potential voter had to follow in order to participate in elections” became of “increasing significance.”²⁹⁰ The omission of any of these types of statutes from the House Census Committee's report strongly suggests that the Members of Congress who debated and enacted §2 did not view such procedural requirements as denying or abridging the right to vote, even though people were required to satisfy them in order to be permitted to vote.

The 41st Congress' interpretation of §2 is comparable to how the Supreme Court has interpreted the Qualifications Clauses, which specify the age and citizenship requirements a

²⁸⁵ *Id.*

²⁸⁶ See *supra* note 264 and accompanying text.

²⁸⁷ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 24 (rev. ed. 2009); see also *id.* at 111 (“One such obstacle was to require naturalized citizens to present their naturalization papers to election officials before registering or voting . . . [T]his requirement, as lawmakers knew, was a significant procedural hurdle for many immigrants . . .”).

²⁸⁸ *Id.* at 104.

²⁸⁹ *Id.* at 122.

²⁹⁰ *Id.* at 103; see also *id.* (noting that, after the Civil War, many states “drew up increasingly detailed statutes that spelled out electoral procedures of all types . . . [M]any of these laws were straightforwardly administrative.”).

person must satisfy to run for Congress.²⁹¹ In *United States Term Limits, Inc. v. Thornton*,²⁹² the Court held that the clauses bar states from enacting laws that “render[] a class of potential candidates ineligible for ballot position.”²⁹³ It emphasized that the Qualifications Clauses do not prohibit states from enacting laws which “regulate[] election procedures,” because such provisions do not “even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position” or public office.²⁹⁴ Rather, procedural restrictions and other such requirements “protect[] the integrity and regularity of the election process, an interest independent of any attempt to . . . impos[e] . . . additional qualifications for service in Congress.”²⁹⁵

The Fourteenth Amendment’s legislative history demonstrates that the provision’s framers intended and interpreted the right to vote to prohibit states from establishing additional qualifications for voting comparable to the types of requirements the Qualifications Clauses prohibit states from imposing for congressional candidates. The House Census Committee—without apparent disagreement from any Members of Congress—deemed it a violation of the right to vote when states barred certain categories or classes of people from voting, such as racial minorities, those who lived on federal land, new residents, the poor, the illiterate, or the insane.²⁹⁶ There is no evidence that the right to vote was understood as limiting the ability of states to regulate the procedure for voting, including through laws establishing requirements for proving citizenship or identity.²⁹⁷

IV. SECTION TWO, COMMENTATORS, AND THE COURTS

Both courts and scholars have overlooked remedial equilibration as a guide for developing a more accurate,

²⁹¹ U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

²⁹² 514 U.S. 779 (1995).

²⁹³ *Id.* at 835.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See *supra* note 264 and accompanying text.

²⁹⁷ Cf. *supra* notes 284–89 and accompanying text (discussing types of voter identification and other administrative requirements that existed before and during the Reconstruction Era).

objective, and constitutionally based understanding of the scope of the Fourteenth Amendment right to vote. Professor Franita Tolson is among the few scholars who have considered §2's penalties in interpreting the Fourteenth Amendment.²⁹⁸ She cites §2's remedial provisions as the basis for Congress's authority to enact laws regulating state and local elections,²⁹⁹ such as the Voting Rights Act.³⁰⁰

Tolson begins her argument by pointing out that §5 of the Fourteenth Amendment allows Congress to enact "appropriate" legislation to enforce the rights conferred in §§1 through 4.³⁰¹ In *City of Boerne v. Flores*,³⁰² the Supreme Court held that Congress may enact a statute under §5 only if it is a congruent and proportionate response to violations of those rights that Congress has evidence are occurring.³⁰³ Under *Boerne*, Congress may use its §5 authority to enact laws to protect the right to vote as long as they are congruent and proportionate responses to actual voting rights violations.

Tolson recognizes that §2 imposes the "extreme penalty" of reduction in representation on states that violate the right to vote.³⁰⁴ She contends that the severity of that penalty necessarily makes any "lesser" penalties that Congress may enact for violations of that right "proportionate," and therefore permissible, exercises of Congress' §5 authority.³⁰⁵ She explains, "Lesser penalties, like the preclearance regime imposed on certain jurisdictions by sections 4(b) and 5 of the VRA, are an 'appropriate' means of protecting the right to vote because such remedies are less intrusive of state sovereignty than reduced representation under section 2."³⁰⁶ Thus, in Tolson's view, the

²⁹⁸ Tolson, *supra* note 24, at 384–85.

²⁹⁹ *Id.*

³⁰⁰ Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

³⁰¹ U.S. CONST., amend. XIV, § 5.

³⁰² 521 U.S. 507 (1997).

³⁰³ *Id.* at 519–20; *see also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

³⁰⁴ Tolson, *supra* note 24, at 384.

³⁰⁵ *Id.* at 401; *see also id.* at 384–85 ("[T]he extreme penalty in section 2 of the Fourteenth Amendment . . . influences the scope of penalties that Congress can impose pursuant to its enforcement authority" under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment.).

³⁰⁶ *Id.* at 385; *see also id.* at 439 ("[S]ection 2 represents the proper baseline from which to assess voting rights legislation enacted pursuant to section 5 of the Fourteenth

Voting Rights Act's preclearance and other requirements are constitutional.³⁰⁷

While the Voting Rights Act may be constitutionally defensible on a number of grounds,³⁰⁸ § 2 of the Fourteenth Amendment is not among them. Section 2 does not, and was not intended to, permit Congress to compel states to expand their electorates.³⁰⁹ Rather, § 2 was specifically drafted to permit states to deny the franchise to citizens they deem unqualified to vote; states that engage in such disenfranchisement suffer reduced representation in the House as a result. Despite imposing this severe consequence on states that limit the franchise, § 2 does not purport to deprive each state of the power and prerogative to ultimately make that choice for itself. Section 2 therefore cannot serve as constitutional authorization for statutes that affirmatively compel states to bestow or enforce a right to vote.

Professors Mark R. Killenbeck and Steve Sheppard also have argued in favor of a sweepingly broad construction of § 2, contending that term limits "may be characterized as an 'abridgment' of the right to vote" under that provision.³¹⁰ They contend, perhaps somewhat too summarily, that § 2 "seems to include within its ambit any measure that restricts the ability to vote for a particular candidate for federal representative."³¹¹ Under § 2, a State that imposes term limits for Members of Congress would "be required to forfeit some or all of its representatives in Congress and some or all of its electoral votes."³¹²

This argument seems to make virtually any ballot access restriction a violation of the right to vote. Moreover, this interpretation seems to imply that the Constitution's Qualifications Clauses, which establish age and citizenship

Amendment.").

³⁰⁷ *Id.* at 426.

³⁰⁸ *Cf. Shelby County Ala. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating § 4(a) of the Voting Rights Act, which identifies the "covered jurisdictions" to which § 5's preclearance requirements apply); *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203–04 (2009) (questioning the constitutionality of § 5 of the VRA).

³⁰⁹ *See supra* Part II.

³¹⁰ Killenbeck & Sheppard, *supra* note 61, at 1129.

³¹¹ *Id.* at 1208–09.

³¹² *Id.*

requirements for Members of Congress,³¹³ also abridge the right to vote. From a practical perspective, a person's right to vote cannot meaningfully be deemed abridged because a handful of potential candidates (such as those subject to term limits) are barred from running for office. "[N]ot all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates."³¹⁴

Professor Gabriel Chin, in contrast, offers an extremely narrow view of §2, arguing that it is "like the Fifteenth Amendment, except that it covers fewer people, fewer elections, and offers more limited remedies."³¹⁵ Chin explains, "Section 2 recognized state power to disenfranchise African-Americans, while the Fifteenth Amendment removed that power."³¹⁶ Moreover, §2's remedy for denials of the right to vote is reduction in representation, while the Fifteenth Amendment contemplates direct enforcement of that right.³¹⁷ Finally, §2 applies only to certain specified elections, while the Fifteenth Amendment applies to any.³¹⁸ In any case where §2 might be invoked, Chin maintains, the Fifteenth Amendment, which "require[s] enfranchisement of African-Americans," can be applied instead.³¹⁹ The Fifteenth Amendment therefore implicitly repeals §2.³²⁰

Tolson demonstrates that, although some Members of Congress adopted this interpretation of the Fifteenth Amendment during its ratification debates,³²¹ "very few people actually believed section 2 was a dead letter upon the adoption

³¹³ U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

³¹⁴ *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *cf.* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (upholding a statute barring candidates from running for office as the nominee of two or more different political parties, even though it "reduce[s] the universe of potential candidates who may appear on the ballot as [a] party's nominee . . . by ruling out those few individuals who . . . have already agreed to be another party's candidate").

³¹⁵ Chin, *supra* note 23, at 263.

³¹⁶ *Id.* at 275.

³¹⁷ *Id.* at 277–78.

³¹⁸ *Id.* at 281. Chin further points out that the Court's adjudication of voting rights issues under the Due Process Clause and Equal Protection Clause of § 1 effectively crowds out § 2, leaving it nothing to govern. *Id.* at 291–92.

³¹⁹ Chin, *supra* note 23, at 263.

³²⁰ *Id.*

³²¹ *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2720 (Apr. 15, 1870) (statement of Sen. Pool).

of the Fifteenth Amendment.”³²² Indeed, many of the Members of Congress and other contemporaneous commentators that Chin himself cites stated only that the Fifteenth Amendment modified § 2, not that it completely repealed § 2.³²³

Professor Richard M. Re and attorney Christopher Re also point out that § 2 “applies to all noncriminal disenfranchisement of adult male citizens in specified elections. Section 2 thus reaches many facially race-neutral voting rules, such as literacy tests and poll taxes.”³²⁴ The Fifteenth Amendment, in contrast, is limited solely to disenfranchisement based on race. Moreover, § 2 allows for the possibility of legislative action without the need for judicial involvement.³²⁵ Thus, Chin’s argument that § 2 has been effectively repealed is unpersuasive.

Finally, Professor Michael Kent Curtis contends that courts should largely abandon an originalist interpretation of § 2 and construe it to prohibit any “unnecessary obstacles to the right to vote or those that strike at the caste of economic class.”³²⁶ In effect, he appears to argue that courts should simply construe § 2 the way that courts currently apply § 1, as prohibiting unreasonable burdens on the right to vote. This interpretation would effectively strip § 2 of any independent significance. Like Curtis, this Article contends that §§ 1 and 2 of the Fourteenth Amendment should be construed harmoniously with each other. Unlike Curtis, it contends that the remedy expressly set forth in § 2 should be considered in determining the scope of the right to vote under § 1. Only direct disenfranchisement, sufficient to warrant a reduction in representation, should be deemed a violation of the right to vote, whether that right is asserted under the Due Process Clause, Equal Protection Clause, or § 2 itself.

For the first several decades following its enactment, federal courts construed § 2 consistently with its legislative history. In 1873, in *United States v. Anthony*,³²⁷ a federal trial court rejected Susan B. Anthony’s claim that women were

³²² Tolson, *supra* note 24, at 419.

³²³ Chin, *supra* note 23, at 272–73.

³²⁴ Re & Re, *supra* note 22, at 1657; *see also* Bonfield, *supra* note 74, at 112.

³²⁵ Re & Re, *supra* note 22, at 1657.

³²⁶ Curtis, *supra* note 22, at 1007.

³²⁷ 24 F. Cas. 829 (N.D.N.Y. 1873).

constitutionally entitled to vote.³²⁸ It held that §2 expressly limited that right only to males and that, in any event, states were free to decide whether to extend the franchise to everyone who fell within the amendment's scope, or instead suffer a reduction in representation.³²⁹

The following year, in *Minor v. Happersett*,³³⁰ the Supreme Court held that §2 implicitly recognized the right of each State to decide for itself whether to extend the franchise to certain people (although the Fifteenth Amendment barred States from denying the right to vote based on race).³³¹ It reaffirmed this ruling in *United States v. Reese*³³² and *United States v. Cruikshank*,³³³ reiterating that the Constitution does not confer an affirmative right to vote, but rather only prohibits states from denying the franchise based on race or color.

In *McPherson v. Blacker*,³³⁴ the Court held that §2 does not require states to hold elections for the office of presidential elector.³³⁵ It added, however, that if a state chooses to appoint electors based on the outcome of a popular election, then the right to vote at that election "cannot be denied or abridged without invoking [§2's] penalty."³³⁶ It elaborated, "[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."³³⁷

The Court arguably undermined §2 over a half-century later in *Lassiter v. Northampton County Board of Elections*.³³⁸ *Lassiter* upheld the constitutionality of literacy tests as prerequisites for voting, as long as they were administered in a fair, non-discriminatory manner, in order to "raise the standards for people of all races who cast the ballot."³³⁹ The Court also

³²⁸ See generally *id.*

³²⁹ *Id.* at 831.

³³⁰ 88 U.S. 162 (1874).

³³¹ *Id.* at 174–75 (holding that §2's remedy of reduction in representation would have been unnecessary "if it [were] not in the power of the legislature to deny the right of suffrage to some male inhabitants" or "if suffrage [were] the absolute right of all citizens").

³³² 92 U.S. 214, 219–20 (1876).

³³³ 92 U.S. 542, 555–56 (1876).

³³⁴ 146 U.S. 1 (1982).

³³⁵ *Id.* at 39.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ 360 U.S. 45, 51 (1959).

³³⁹ *Id.* at 53–54.

reaffirmed that the right to vote was “subject to the imposition of state standards,” so long as the state did not discriminate based on race.³⁴⁰ Quoting *McPherson*, the Court declared that, when §2 speaks of the right to vote, it is “the right to vote as established by the laws and constitution of the State.”³⁴¹

Interpreting this principle broadly, *Lassiter* concluded that states have “wide scope” to limit who may vote through residency requirements, age restrictions, prohibitions on felon voting, and literacy tests.³⁴² The Court recognized that literacy tests could be manipulated to disenfranchise blacks, or be enacted with discriminatory intent, but there was no evidence that the literacy test before it was tainted by such concerns.³⁴³ The Voting Rights Act, enacted pursuant to Congress’ authority to implement the Fifteenth Amendment,³⁴⁴ ultimately prohibited literacy tests,³⁴⁵ and the Court has upheld that portion of the statute.³⁴⁶ Nevertheless, *Lassiter* adopted a narrower conception of the scope of the right to vote under §2 than its framers had intended; literacy requirements were among the types of laws that the House Census Committee had identified as violating §2 shortly after that provision was ratified.³⁴⁷

Only a few plaintiffs have attempted to bring claims directly under §2, and they have been uniformly unsuccessful. Courts have disposed of §2 lawsuits on a variety of grounds.³⁴⁸ Some have concluded that §2 challenges are non-justiciable political questions to be resolved by Congress.³⁴⁹ The D.C. Circuit once

³⁴⁰ *Id.* at 51.

³⁴¹ *Id.* (quoting *McPherson*, 146 U.S. at 39).

³⁴² *Lassiter*, 360 U.S. at 51.

³⁴³ *Id.* at 53.

³⁴⁴ U.S. CONST. amend. XV, § 2.

³⁴⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10303(e)).

³⁴⁶ See *Oregon v. Mitchell*, 400 U.S. 112 (1970); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966); *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

³⁴⁷ See *supra* note 264 and accompanying text.

³⁴⁸ Courts have consistently rejected the argument that § 2 prohibits states from having appointed judges. *Holley v. Askew*, 583 F.2d 728, 730 (5th Cir. 1978); *Parker v. Maus*, No. 11-CV-1777-REB-CBS, 2012 U.S. Dist. LEXIS 137490 (D. Colo. Aug. 16, 2012), approved and adopted by 2012 U.S. Dist. LEXIS 137543 (D. Colo. Sept. 25, 2012), amended by 2012 U.S. Dist. LEXIS 139249 (D. Colo. Sept. 27, 2012); see also *African Am. Voting Rights Legal Def. Fund v. Missouri*, 994 F. Supp. 1105, 1120 (E.D. Mo. 1997), *aff’d*, 133 F.3d 921 (8th Cir. 1998) (per curiam).

³⁴⁹ *Dennis v. United States*, 171 F.2d 986, 993 (D.C. Cir. 1948), *aff’d*, 339 U.S. 162

relied on its equitable discretion to refrain from adjudicating a §2 claim for a declaratory judgment.³⁵⁰ It explained that the Civil Rights Act,³⁵¹ Voting Rights Act,³⁵² and Twenty-Fourth Amendment³⁵³—all of which, at the time, had only recently entered into effect—should be given the opportunity to remediate most of the plaintiffs' concerns about disenfranchisement.³⁵⁴

Many §2 cases are dismissed for lack of standing. Some plaintiffs sought to have other states' representation in the House (that is, representation of states in which they did not reside) reduced on the grounds that those states were denying the right to vote to certain segments of their populations.³⁵⁵ Courts rejected those claims because the plaintiffs were unable to show that their own states would receive additional seats in the House as a result of any such reductions.³⁵⁶ Other plaintiffs sought to have their own states' representation in Congress reduced on the grounds that their states were disenfranchising people in violation of §2.³⁵⁷ They argued that the threat of such reductions would likely induce their states to expand the

(1950); *Saunders v. Wilkins*, 152 F.2d 235, 237–38 (4th Cir. 1945) (declining to determine whether “the number of Representatives from Virginia and therefore of other states in the Union as set out in the Act of Congress is erroneous and should be changed”); *cf.* *United States v. Sharrow*, 309 F.2d 77, 80 (2d Cir. 1962) (questioning whether the political question doctrine continues to bar § 2 suits in light of *Baker v. Carr*).

³⁵⁰ *Lampkin II*, 360 F.2d 505, 511 (D.C. Cir. 1966) (“[O]ur discretion is best exercised by declining to compel the District Court to open the door to judicial relief until it can fairly be said that discrimination persists despite these new measures.”); *see also* *Sharrow v. Brown*, 319 F. Supp. 1012, 1016 (S.D.N.Y. 1970) (rejecting the plaintiffs’ § 2 claim because he failed to show that states continued to disfranchise voters following passage of the Voting Rights Act), *aff’d*, 447 F.2d 94 (2d Cir. 1971).

³⁵¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

³⁵² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

³⁵³ U.S. CONST., amend. XXIV.

³⁵⁴ *Lampkin II*, 360 F.2d at 511.

³⁵⁵ *See, e.g., Lampkin I*, 239 F. Supp. 757, 759–60 (D.D.C. 1965), *aff’d on other grounds, Lampkin II*, 360 F.2d 505 (D.C. Cir. 1965).

³⁵⁶ *Lampkin I*, 239 F. Supp. at 760 (“[I]t would be sheer speculation that such data would result in the acquisition of one or more House seats by . . . the States in which Group 1 plaintiffs reside.”); *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (“[E]ven after approximate nation-wide reapportionment figures were derived, it might well be that, because of population shifts, or because New York itself disenfranchised a portion of its adult males, New York’s representation would not be increased as [plaintiff] claims.”); *see also* *Sharrow v. Fish*, 501 F. Supp. 202 (S.D.N.Y. 1980), *aff’d*, 659 F.2d 1062 (2d Cir. 1981); *Sharrow v. Peyser*, 443 F. Supp. 321, 325 (S.D.N.Y. 1977), *aff’d*, 582 F.2d 1271 (2d Cir. 1978).

³⁵⁷ *See, e.g., Lampkin I*, 239 F. Supp. at 759.

franchise. The courts rejected such claims, as well, on the grounds that the possibility that a state would remove barriers to voting in response to a reduction in representation is “both remote and speculative.”³⁵⁸ In suits where plaintiffs sought to compel the Census Bureau to collect information concerning the number of people in each state who were impermissibly disenfranchised, courts have held that the Census Bureau is neither statutorily nor constitutionally required to collect such information to allow § 2 to be enforced.³⁵⁹

Thus, this Article’s proposal is a departure from other academics’ and courts’ approaches to § 2. Nevertheless, its recommendations are based on a straightforward interpretation of § 2’s plain meaning, consistent with both § 2’s legislative history and its framers’ understanding of the “right to vote” enshrined within it, and a commonsense application of remedial equilibration.

V. CONCLUSION

A substantial amount of election-related litigation concerns whether certain procedures or requirements for voting, such as proof-of-citizenship or voter identification laws, violate the fundamental constitutional “right to vote.” In making this decision, many courts make effectively subjective judgments about whether the challenged statutes or regulations make voting too burdensome.³⁶⁰

The Constitution, however, does not leave this determination solely to judges’ untrammelled discretion. Section 2 of the Fourteenth Amendment offers important insight into the scope of the right to vote by establishing a uniquely severe penalty—reduction in representation in the House of Representatives and Electoral College—for states that violate that right. Remedial deterrence, a component of Levinson’s theory of remedial equilibration, teaches that courts take into

³⁵⁸ *Id.* at 761.

³⁵⁹ *Sharrow v. Brown*, 447 F.2d 94, 98 (2d Cir. 1971) (“Although the Census Bureau may be the most efficient instrument for gathering these statistics . . . nothing in the Constitution mandates that the Census Bureau be the agency to gather these statistics.”); *United States v. Sharrow*, 309 F.3d 77, 79–80 (2d Cir. 1962); *Lampkin I*, 239 F. Supp. at 763–64.

³⁶⁰ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008); *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n. 9 (1983).

account the severity of the remedy for violating a legal provision when determining that provision's scope. Here, stripping a State of its seats in the House and votes in the Electoral College is an especially severe penalty. It effectively nullifies the results of one or more elections, disenfranchises the people who voted for the ejected representatives, dilutes the vote of each member of the state's electorate, and potentially even changes control of Congress or the outcome of a presidential election. For such a dramatic penalty to be appropriate, a State's actions would have to be especially egregious. Courts should employ this remedial equilibration approach when considering whether various election laws and regulations violate the Fourteenth Amendment right to vote.

This remedial deterrence interpretation of §2 is consistent with the provision's legislative history. Throughout most of the debates that led to its enactment, §2's supporters candidly acknowledged that reduction in representation would be the primary, if not exclusive, means of enforcing the right to vote. Even if modern courts will enforce the right to vote through injunctive relief, Congress' repeated focus, throughout the debates over the Fourteenth Amendment, on reduction in representation as the remedy for violations of that right underscores the need to construe its scope in light of that intended remedy.

Congress's early interpretation of §2 further bolsters a remedial deterrence interpretation. A House committee report, generated shortly after §2's ratification, listed every state law and constitutional provision in effect at the time that was deemed to violate the right to vote.³⁶¹ Importantly, there is no record of any Representative or Senator criticizing the report as under-inclusive or ignoring certain types of violations. All of the laws deemed to violate §2 imposed additional qualifications for voting by disenfranchising entire groups of people, such as the poor, the ignorant or illiterate, or racial minorities, due to their purportedly undesirable traits.³⁶² The list did not include any registration requirements, identification procedures, or other administrative rules governing the electoral process, despite the fact that such laws existed throughout the country.³⁶³

³⁶¹ See *supra* note 264 and accompanying text.

³⁶² *Id.*

³⁶³ See *supra* notes 286–89.

Thus, the text and structure of §2, the debates leading to its enactment, contemporaneous interpretation and application of that provision, and the persuasive considerations underlying the theory of remedial deterrence all counsel in favor of construing the Fourteenth Amendment right to vote as prohibiting the actual, direct disenfranchisement of disfavored groups of people, and not administrative procedures for registration or voting. Facially neutral paperwork or other administrative requirements that do not directly disenfranchise people are unlikely to warrant the uniquely severe remedy of stripping a state of its seats in the House or Electoral College. Even if one disagrees with this specific conclusion, however, remedial equilibration still provides a more accurate, objective, and constitutionally based approach to determining whether particular laws violate the Fourteenth Amendment right to vote than purely *ad hoc*, subjective interest balancing.

