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Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments

ABSTRACT. The Reconstruction Amendments are justly celebrated for transforming millions of recent slaves into voting citizens. Yet this legacy of egalitarian enfranchisement had a flip side. In arguing that voting laws should not discriminate on the basis of morally insignificant statuses, such as race, supporters of the Reconstruction Amendments emphasized the legitimacy of retributive disenfranchisement as a punishment for immoral actions, such as crimes. Former slaves were not just compared with virtuous military veterans, as commentators have long observed, but were also contrasted with immoral criminals. The mutually supportive relationship between egalitarian enfranchisement and punitive disenfranchisement – between voting and vice – motivated and shaped all three Reconstruction Amendments. Counterintuitively, the constitutional entrenchment of criminal disenfranchisement facilitated the enfranchisement of black Americans. This conclusion complicates the conventional understanding of how and why voting rights expanded in the Reconstruction era.

Criminal disenfranchisement's previously overlooked constitutional history illuminates four contemporary legal debates. First, the connection between voting and vice provides new support for the Supreme Court's thoroughly criticized holding that the Constitution endorses criminal disenfranchisement. Second, Reconstruction history suggests that the Constitution's endorsement of criminal disenfranchisement extends only to serious crimes. For that reason, disenfranchisement for minor criminal offenses, such as misdemeanors, may be unconstitutional. Third, the Reconstruction Amendments' common intellectual origin refutes recent arguments by academics and judges that the Fifteenth Amendment impliedly repealed the Fourteenth Amendment's endorsement of criminal disenfranchisement. Finally, the historical relationship between voting and vice suggests that felon disenfranchisement is specially protected from federal regulation but not categorically immune to challenge under the Voting Rights Act.

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ARTICLE CONTENTS

| | |
|--|------|
| INTRODUCTION | 1586 |
| I. THE IRONY OF EGALITARIAN DISENFRANCHISEMENT | 1592 |
| A. Formal Equality in Reconstruction | 1593 |
| B. The Thirteenth Amendment | 1598 |
| C. The Fourteenth Amendment | 1603 |
| 1. Section 2 | 1604 |
| 2. Section 3 | 1616 |
| D. The Reconstruction Acts | 1624 |
| E. The Fifteenth Amendment | 1630 |
| II. THE LAW OF CRIMINAL DISENFRANCHISEMENT | 1641 |
| A. Originalism and the “Affirmative Sanction” | 1642 |
| B. The Meaning and Scope of “Other Crime” | 1648 |
| C. The Case for (and Against) Implied Repeal | 1656 |
| D. Construing the Voting Rights Act | 1663 |
| CONCLUSION: VOTING, VALOR, AND VICE | 1669 |

INTRODUCTION

The United States disenfranchises approximately five million of its citizens for crime.¹ Most of these individuals committed felonies, but some states disenfranchise misdemeanants as well.² These practices make America a global outlier.³ In many other democratic nations, recent political and legal debates have centered not on whether released offenders should be afforded the right to vote (they already have that right), but rather on whether prisoners convicted of serious crimes should be able to vote during their terms of incarceration. For example, the Grand Chamber of the European Court of Human Rights ruled in 2005 that the United Kingdom could not automatically disenfranchise convicts serving custodial sentences.⁴ Similar rulings have issued in Australia, Canada, and South Africa.⁵

The propriety of American criminal disenfranchisement has come under increasing scrutiny. Critics point to the practice's racially disparate effects, doubtful public benefits, and high-profile impact on tightly contested

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1. See Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform 1997-2010*, SENT'G PROJECT 3 (Oct. 2010), http://www.sentencingproject.org/doc/publications/publications/vr_expandingtheVoteFinalAddendum.pdf.
 2. See Alec Ewald, A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law, SENT'G PROJECT, at i (Nov. 2005), <http://www.sentencingproject.org/pdfs/crazyquilt.pdf> (discussing states that disenfranchise incarcerated misdemeanants); see also *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011) (upholding Indiana's authority to disenfranchise convicts during their incarceration, while reaching only state law issues); *id.* at 785 (explaining that "several states, either by their constitutions or their statutes, disenfranchise all prisoners convicted of any crimes," including misdemeanors); cf. Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, AM. C.L. UNION & BRENNAN CTR. FOR JUST. 2-3 (2008), <http://www.brennancenter.org/page/-/publications/09.08.DeFacto.Disenfranchisement.pdf> (discussing de facto as opposed to de jure disenfranchisement of misdemeanants).
 3. ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 12 (2006) ("Virtually every other democratic nation in the world considers America's disenfranchisement laws unjust and punitive."). American criminal disenfranchisement is especially remarkable in light of America's leading role in the "constitutionalization of democratic politics." Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31 (2004) (discussing the "constitutionalization of democratic politics" that is "most acute in the United States Supreme Court, but . . . visible in other constitutional courts as well").
 4. *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2005).
 5. See *Roach v. Electoral Comm'r* (2007) 233 CLR 162 (Austl.); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.); *Minister of Home Affairs v. Nat'l Inst. for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC) at 288 (S. Afr.).

elections.⁶ Perhaps in response to these forceful criticisms, many states have softened their disenfranchisement regimes or facilitated the restoration of voting rights.⁷ Unlike reformers in many other countries, however, American critics of criminal disenfranchisement have not succeeded in enlisting the judiciary's assistance. Courts in the United States apply heightened scrutiny when reviewing challenges to most state voting qualifications,⁸ the use of voter identification cards,⁹ the design of political districts,¹⁰ and even the implementation of ballot recounts.¹¹ Yet these same courts have consistently declined to scrutinize criminal disenfranchisement laws.¹²

The constitutional law of American felon disenfranchisement turns on the otherwise obscure second section of the Fourteenth Amendment.¹³ Section 2 is "one of the Constitution's enduring mysteries."¹⁴ Though never enforced by Congress or the courts,¹⁵ Section 2 directs that states lose representation in Congress in proportion to their disenfranchisement of adult male citizens. But Section 2 exempts from this apportionment penalty state disenfranchisement based on "rebellion, or other crime."¹⁶ In the 1974 decision *Richardson v. Ramirez*, the Supreme Court concluded that Section 2's exception constituted an "affirmative sanction"¹⁷—or, as a later case would put it, an "implicit authorization"¹⁸—for felon disenfranchisement. In the Court's view, the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was

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6. See, e.g., *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1940-41 nn.13-18 (2002) (collecting criticisms of felon disenfranchisement) [hereinafter *Law of Prisons*].
 7. See generally Porter, *supra* note 1 (describing recent changes in disenfranchisement laws).
 8. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).
 9. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).
 10. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (relying on the Equal Protection Clause); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Voting Rights Act).
 11. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).
 12. See *infra* notes 20-21.
 13. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); see also U.S. CONST. amend. XIV, § 2.
 14. 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, 259 (2004).
 15. See *id.* at 260.
 16. U.S. CONST. amend. XIV, § 2.
 17. *Ramirez*, 418 U.S. at 54.
 18. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

expressly exempted from the less drastic sanction of reduced representation” provided under Section 2.¹⁹

Ramirez and its reasoning have had far-reaching implications. Today, *Ramirez* “is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime.”²⁰ Felon disenfranchisement laws, in other words, “have been exempted from standard fundamental rights equal protection analysis.”²¹ Only disenfranchisement provisions demonstrably motivated by racial animus are vulnerable to an Equal Protection Clause attack.²² Because *Ramirez* has stymied constitutional challenges to felon disenfranchisement laws, reformers who hope to challenge those measures have turned away from the Constitution and toward the Voting Rights Act (VRA).²³

But *Ramirez*’s interpretation of Section 2 has also shaped judicial interpretations of the VRA. Because it prohibits state voting qualifications with disparate racial impact, the VRA is most naturally read to preempt many state felon disenfranchisement laws.²⁴ Yet every federal circuit to rule on the question has held to the contrary, based in large part on *Ramirez* and Section 2.²⁵ The Eleventh Circuit’s 2005 en banc decision emphasized that “Florida’s discretion to deny the vote to convicted felons is fixed by the text of § 2 of the Fourteenth Amendment.”²⁶ The en banc Second Circuit noted in 2006 that its “starting point” would be “the explicit approval given felon disenfranchisement provisions in the Constitution.”²⁷ The First Circuit said in 2009 that “[t]he power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment.”²⁸ And in 2010, the en

19. *Ramirez*, 418 U.S. at 55.

20. *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir. 1981) (en banc), *vacated on other grounds*, 454 U.S. 807 (1981); *accord Perry v. Beamer*, 933 F. Supp. 556, 558 (E.D. Va. 1996) (quoting *Allen*).

21. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1153 (2004).

22. *See Underwood*, 471 U.S. at 227–28 (1985).

23. *See* Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

24. *See infra* note 429 and accompanying text.

25. *See Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24, 32 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

26. *Johnson*, 405 F.3d at 1228.

27. *Hayden*, 449 F.3d at 316.

28. *Simmons*, 575 F.3d at 32.

banc Ninth Circuit cited *Ramirez* to conclude that “felon disenfranchisement has an affirmative sanction in the Fourteenth Amendment.”²⁹

Despite its obvious legal importance, *Ramirez* has endured decades of withering criticism. Leading constitutional theorists argue that Section 2’s “other crime” language is a mere exception, not an “affirmative sanction,” and so cannot limit the meaning of separate constitutional provisions such as the Equal Protection Clause or the Fifteenth Amendment.³⁰ As a number of Second Circuit judges put it, “Declining to prohibit something is not the same as protecting it.”³¹ Other critics argue that the “crime” exception establishes no affirmative endorsement because it was included as a mere afterthought³² or because Section 2 as a whole was the unprincipled product of “political exigency.”³³ Yet other critics allege that *Ramirez* read the “other crime” phrase too broadly, since it originally referred only to crimes similar to rebellion or treason and so carried too narrow a meaning to support disenfranchisement for many modern offenses, such as possession of illegal drugs.³⁴ And still other critics contend that the Fifteenth Amendment’s blanket ban on racial discrimination in voting impliedly repealed the ostensibly more limited apportionment penalty in Section 2, thereby removing from the Constitution any affirmative sanction that Section 2 might once have enshrined.³⁵

This Article draws on the history of the Reconstruction Amendments to recover the original justification for the constitutionality of felon disenfranchisement. At the same time, the Article suggests a historically grounded line of argument against the constitutionality of criminal disenfranchisement for misdemeanors and other insufficiently serious offenses. The argument proceeds in two Parts.

Part I advances a novel historical thesis. It demonstrates that all three Reconstruction Amendments, as well as a number of important Reconstruction-era statutes, were motivated and shaped by what this Article

29. *Farrakhan*, 623 F.3d at 993.

30. See *infra* notes 325 & 328 (collecting sources).

31. *Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

32. See, e.g., GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 149 (2001) [hereinafter FLETCHER, *OUR SECRET CONSTITUTION*]; George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. REV.* 1895, 1903-04 (1999) [hereinafter Fletcher, *Disenfranchisement*].

33. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 74 (1974) (Marshall, J., dissenting) (quoting William W. Van Alstyne, *The Fourteenth Amendment, the “Right” To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 *SUP. CT. REV.* 33, 43-44).

34. See *infra* note 352 (collecting sources).

35. See *infra* note 392 (collecting sources).

calls “the irony of egalitarian disenfranchisement”—that is, the tendency of radical egalitarians in the Reconstruction era to justify the enfranchisement of black Americans by simultaneously defending the disenfranchisement of criminals. The political figures most responsible for the Reconstruction Amendments were legislators known as radical Republicans. These egalitarian figures were profoundly influenced by what James Q. Whitman has called “the philosophy of formal equality”—that is, the view that a legitimate political order distinguishes persons by their actions and not by their station.³⁶ The radicals drew on the philosophy of formal equality not only to insist on the liberation and then enfranchisement of former slaves, but also to endorse the disenfranchisement of criminals, rebels, and other wrongdoers. The same political philosophy thus underlay both the expansion of constitutional voting rights without regard to race and the constitutional entrenchment of punitive disenfranchisement. Because the historical relationship between racial enfranchisement and criminal disenfranchisement will strike many twenty-first century readers as paradoxical, this Article refers to it as an “irony.” But that characterization is deliberately anachronistic. In the Reconstruction Congress, even the most egalitarian legislators viewed racial enfranchisement and criminal disenfranchisement as two sides of the same philosophical coin.

Part II draws on the foregoing history to address four clusters of arguments concerning the contemporary lawfulness of criminal disenfranchisement. First, the irony of egalitarian disenfranchisement supports *Ramirez’s* intensely criticized conclusion that the Constitution exhibits affirmative approval of criminal disenfranchisement.³⁷ The “other crime” exception was not an accident, oversight, or political stratagem, as commentators have assumed, but rather the textual expression of a deep political principle—indeed, the very same principle relied on by the drafters and supporters of the Thirteenth Amendment, the Equal Protection Clause, and the Fifteenth Amendment. The historical record further demonstrates that Section 2’s drafters contemplated criminal disenfranchisement not just for “rebellion” but also for many conventional crimes.³⁸

Second, Section 2’s endorsement of criminal disenfranchisement was limited to offenses of sufficient gravity to constitute forfeiture of political rights. The term “crime” sometimes carried that narrower meaning, and Congress’s governing theory of political morality suggests that the narrow

36. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 51 (2003) (discussing formal equality).

37. See *infra* Section II.A.

38. See *infra* Section II.B.

meaning was intended. Only serious crimes replicated in miniature the Confederacy's "rebellion" against legitimate government. Supporting that inference, contemporaneous legislation combated racist disenfranchisement by using language narrower than Section 2's broad "other crime" locution. *Ramirez* and the "affirmative sanction" it identified might be construed in light of this history.

Third, criminal disenfranchisement's role in the drafting and ratification of the Reconstruction Amendments undermines the now-prominent argument that the Fifteenth Amendment impliedly repealed Section 2.³⁹ Even if Section 2 were impliedly repealed—itsself a highly dubious proposition—the "other crime" exception would continue to shed light on the remainder of the Fourteenth Amendment as well as the historically connected Fifteenth Amendment. Because the same pro-disenfranchisement worldview gave rise to the Fourteenth and Fifteenth Amendments, *Ramirez*'s "affirmative sanction" holding can survive Section 2's demise.

Fourth, Reconstruction history suggests that while criminal disenfranchisement is specially protected from federal regulation, it should not be categorically immune to challenge under the VRA. Even during military Reconstruction, Congress doubted the legitimacy of barring state felon disenfranchisement statutes. Yet Reconstruction history demonstrates that formal equality values sometimes favor federal prophylaxis to thwart invidious discrimination. Courts can honor that history by adopting a special presumption in favor of criminal disenfranchisement laws when applying the VRA's totality-of-circumstances analysis.⁴⁰

Finally, the Conclusion returns to the historical thesis outlined in Part I to note that the intellectual history of criminal disenfranchisement illuminates broader trends in the evolution of American voting rights. Constitutional historians have long observed that Reconstruction radicals cited the patriotism of black Civil War veterans as proof that the former slaves had earned the right to vote.⁴¹ Indeed, a group's assistance in times of armed conflict has often been associated with its inclusion in the franchise.⁴² But this familiar "ballots and bullets"⁴³ narrative had a flip side. Former slaves were not just exalted as

39. See *infra* Section II.C.

40. See *infra* Section II.D.

41. See *infra* note 88 (collecting sources).

42. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345, 1346 (2003) ("[T]hose who fight, or contribute to the war effort, acquire a moral claim to full participation in self-government.").

43. *Id.*

veterans but also contrasted with rebels and criminals, whose bad acts merited disenfranchisement.

The three-sided relationship between voting, valor, and vice casts criminal disenfranchisement in a new light. Commentators have grown accustomed to viewing criminal disenfranchisement as a product of antebellum classism or as a tool of racist oppression in the Jim Crow South—which it most certainly was.⁴⁴ Yet an investigation of Reconstruction history reveals a more complicated political and intellectual legacy. When invoked by nineteenth-century progressives determined to enfranchise former slaves, as well as women and other disenfranchised groups, public endorsements of criminal disenfranchisement facilitated radically egalitarian reform.

I. THE IRONY OF EGALITARIAN DISENFRANCHISEMENT

This Part demonstrates that the Reconstruction Amendments were motivated and shaped by the irony of egalitarian disenfranchisement—that is, the tendency for egalitarian legislators to defend the disenfranchisement of criminals even as those legislators fought for the enfranchisement of black Americans. The irony of egalitarian disenfranchisement is not merely that egalitarian constitutional norms were thought to be compatible with criminal disenfranchisement, in the way that the Equal Protection Clause may have been deemed compatible with segregated public education.⁴⁵ Nor is the point simply that the Amendments' framers—like more recent constitutional interpreters⁴⁶—identified a principled basis for criminal disenfranchisement. Rather, the point is that the same concept of formal equality that animated the Reconstruction Amendments also found expression in laws providing for the punitive disenfranchisement of rebels and criminals. Radical Republicans used

44. See, e.g., WARD E.Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845-1969*, at 43-44 (1974); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 51 n.19 (rev. ed. 2009); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 30-34 (2004); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 54-55 (2006); Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 597-98 (2003).

45. See John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1195 (2001) (noting that "Section 2 says nothing stronger on the subject of denying felons the franchise than that in 1868 it was assumed to be constitutional," much as "most of the amendment's framers and ratifiers did not believe they were invalidating racially segregated schools").

46. See, e.g., *Green v. Bd. of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967) (Friendly, J.).

the same philosophical system to argue both that black Americans had earned the right to vote and that rebels and criminals deserved disenfranchisement. Reconstruction legislators viewed criminal disenfranchisement as an integral part of their ideal legal order, and they accordingly referred to it when describing that ideal.

The argument proceeds as follows. Section I.A sets the stage by drawing on the work of James Q. Whitman to describe the philosophy of formal equality and to outline its importance to the radical Republicans—that is, to the political figures most responsible for the Reconstruction Amendments. Section I.B then identifies crime’s role in abolitionist political thought and in the Thirteenth Amendment, which included its own crime exception. Next, Section I.C discusses the two provisions of the Fourteenth Amendment that on their face addressed political rights: Section 2, which created an apportionment penalty for states that engaged in certain forms of disenfranchisement (including racial disenfranchisement), and Section 3, which addressed the political rights of a Reconstruction-era group contemporaneously compared with criminals: Confederate rebels. Section I.D then discusses foundational Reconstruction statutes to show that radical Republicans contemplated the possibility that Southern racists might use disenfranchisement laws to oppress black voters. Despite those well-founded concerns, Congress took deliberate steps to preserve criminal disenfranchisement, albeit in a limited form. Finally, Section I.E examines the Fifteenth Amendment’s drafting history and related floor debates. Throughout those debates, even the most radical supporters of broad voting rights strove to preserve criminal disenfranchisement. In fact, express endorsements of criminal disenfranchisement formed an integral part of radicals’ arguments against racial and other objectionable voting qualifications. This is the irony of egalitarian disenfranchisement.

A. Formal Equality in Reconstruction

Formal equality is the notion that what you do is more important than who you are, that voluntary actions are morally significant and so should be prioritized over inherited statuses. Drawing on the language of contemporary analytic philosophy, Professor Whitman has defined the philosophy of “formal equality” as a kind of “act-egalitarianism” in that it advocated “equal treatment for all persons who had committed the same act.”⁴⁷ In the Reconstruction era, leading members of the Republican Party advocated formal equality under the

47. WHITMAN, *supra* note 36, at 12, 51 (emphasis omitted).

banner of “equal[ity] before the law.”⁴⁸ This ideology was legalistic in that it supported only civil and political equality in law, as distinguished from social equality in private life.⁴⁹ Drawing on older egalitarian traditions in American political thought, Republicans argued that violations of formal equality yielded “oligarchy” or “aristocracy,” social structures antithetical to American values.⁵⁰

Republican Congressman William Loughridge provided a vivid example of formal equality reasoning during debates on the Fifteenth Amendment. Arguing against racial discrimination in the franchise, Loughridge bemoaned a world where:

if a man be of white blood, though he may be destitute of talent, intelligence, patriotism, or virtue . . . all the privileges of the governing class are freely accorded to him But if a man unfortunately be of African descent . . . although he may have an intellect of the highest order, a cultivated mind, and a character unsullied by vice . . . , yet notwithstanding all this he is ruthlessly and cruelly thrust down and consigned, without question and without reason, to hopeless degradation.⁵¹

Loughridge wanted the franchise to correspond with moral desert: a person’s “virtue” should earn him “all the privileges of the governing class.”

Loughridge was not alone. In the 1860s, Congress was led by legislators aptly known as “radical” Republicans.⁵² Embracing formal equality, these figures challenged entrenched status-based legal classifications, including the

48. See, e.g., *infra* text accompanying notes 112, 273 & 276.

49. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 230-31 (1988).

50. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 1971 (Mar. 18, 1868) (statement of Rep. Fernando Beaman); CONG. GLOBE, 39th Cong., 1st Sess. app. at 256 (July 9, 1866) (statement of Rep. Jehu Baker); *id.* at 1224-32 (Mar. 7, 1866) (statement of Sen. Charles Sumner); CONG. GLOBE, 38th Cong., 2d Sess. 1069 (Feb. 24, 1865) (statement of Sen. Charles Sumner); see also HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861 TO 1966, at 138-53 (2000) (discussing views on “equality before the law” during Reconstruction).

51. CONG. GLOBE, 40th Cong., 3d Sess. app. at 200 (Jan. 29, 1869) (statement of Rep. William Loughridge).

52. See, e.g., MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869, at 27-33 (1974) (providing one of many categorized lists of Reconstruction legislators). Radical Republicans exerted great but not unlimited influence. *Id.*; see also FONER, *supra* note 49, at 238 (explaining that “the Radicals, while hardly ‘in control’ of Congress, enjoyed substantial power, constituting nearly half the Republican members of the House and a lesser but significant portion of the Senate”).

dichotomies between slaves and freepersons, blacks and whites, women and men. The radicals found support for expanded voting rights in Christian scripture⁵³ and in the works of recognized jurists and philosophers of formal equality, such as William Blackstone,⁵⁴ Cesare Beccaria,⁵⁵ and John Stuart Mill.⁵⁶ The radicals' efforts yielded the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment conferring birthright citizenship and guaranteeing equal protection of the laws, and the Fifteenth Amendment barring racial discrimination in voting. By any standard, these measures constituted major egalitarian reforms.

But if the philosophy of formal equality had the egalitarian power to liberate, it also had the retributive potential to degrade.⁵⁷ Like traitorous rebels, criminals who violated the law's evenhanded commands were thought to have cast themselves beneath the equal dignity afforded by law. Precisely because egalitarian Republicans defined their desired legal order in terms of

53. Compare Acts 10:34 (King James) (Saint Peter famously declaring: "I perceive that God is no respecter of persons"), and Romans 2:11 (King James) ("For there is no respect of persons with God."), with CONG. GLOBE, 40th Cong., 2d Sess. 1966-68 (Mar. 18, 1868) (statement of Rep. Thaddeus Stevens) (deploying religious and contractarian arguments while proposing a bill that would eliminate racial vote qualifications but preserve criminal disenfranchisement for felonies at common law), CONG. GLOBE, 39th Cong., 2d Sess. 253 (Jan. 3, 1867) (statement of Rep. Thaddeus Stevens) ("I would say to those . . . who admit the justice of human equality before the law but doubt its policy: 'Do you believe in hell?')", and *infra* note 54. See also SALMON P. CHASE, THE ADDRESS AND REPLY ON THE PRESENTATION OF A TESTIMONIAL TO S.P. CHASE BY THE COLORED PEOPLE OF CINCINNATI 27 (Moonshiner Press 1989) (1845); *infra* note 118.
54. As Professor Whitman has observed, Blackstone drew on scriptural passages, see *supra* note 53, when praising the fairness of (often harsh) common law punishments, "which the law has beforehand ordained, for every subject alike, without respect of persons." WHITMAN, *supra* note 36, at 41-42 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *371). Borrowing from Blackstone and Saint Paul, Representative John Bingham argued that the Constitution should be amended to provide the former slaves political rights because "[t]he law in every State should be just; it should be no respecter of persons." CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866) (statement of Rep. John Bingham); see also George Washington Julian, The Slavery Question in Its Present Relations to American Politics (June 29, 1855), in GEORGE WASHINGTON JULIAN, SPEECHES ON POLITICAL QUESTIONS 102, 103-04, 119 (1872) (arguing that slavery is incompatible with Christian teachings).
55. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. app. at 101 (Jan. 30, 1869) (statement of Rep. Charles Hamilton) (quoting Beccaria); see also WHITMAN, *supra* note 36, at 42 (including Beccaria in a list of philosophers who shared the Enlightenment ideal of formal equality in the law).
56. See *infra* text accompanying notes 271-279.
57. See WHITMAN, *supra* note 36, at 41-55 (arguing outside the voting context that formal equality's "triumph" in the United States has created a tendency to "take all offenders down a peg" and so to dispense "harsh justice").

evenhandedness and impartiality, those legislators also tended to view willful violators of the law—criminals—as enemies and outsiders. Recall that in the passage just quoted, Representative Loughridge not only praised the “virtue” of black Americans, but also condemned the “vice” of many immoral whites.⁵⁸ In arguing so insistently that the former did not deserve “hopeless degradation,” Loughridge insinuated that the latter might.⁵⁹ Other radicals would make this implication explicit,⁶⁰ as evidenced by their most important legislative achievements.

The radicals thus adopted what might be called a thin conception of political virtue. Being entitled to vote did not mean professing articles of faith, belonging to an elite family, or inheriting racial purity. Consistent with modern voting rights precedents,⁶¹ the radicals did not condition enfranchisement on the likelihood of casting a ballot for one candidate or policy as opposed to another. Rather, being entitled to vote meant choosing to abide by standards of lawful conduct.⁶² On that view, statuses like race could not define a legitimate voting qualification, whereas the criminal law did. Other voting qualifications posed disputed marginal cases. For example, most

58. CONG. GLOBE, 40th Cong., 3d Sess. app. at 200 (Jan. 29, 1869) (statement of Rep. William Loughridge).

59. *Id.*

60. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 1956 (Mar. 18, 1868) (statement of Rep. John Broomall) (“I do not, of course, deny the right to disfranchise individuals as a punishment for crime, but I do deny the right to make the disfranchisement hereditary [through racial voting qualifications].”).

61. See *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (“The exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.” (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)) (alterations and quotation marks omitted)). Some modern defenders of criminal disenfranchisement’s lawfulness have advanced arguments that seem inconsistent with this principle. See, e.g., *Green v. Bd. of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967) (Friendly, J.) (“A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.”).

62. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 43 (Dec. 10, 1866) (statement of Sen. Henry Wilson) (“If you could establish as a standard of suffrage integrity of character, I would agree to it; but as only the eye of God can judge the heart of man we cannot make that standard a test.”). Because children cannot conform to law, they were not disenfranchised but rather by “nature” disabled from voting: for them, “the right may sleep, but it dies never.” CONG. GLOBE, 39th Cong., 1st Sess. app. at 104 (Feb. 19, 1866) (statement of Sen. Richard Yates). The same reasoning applied to the insane.

Republicans viewed literacy qualifications as legitimate⁶³ and property qualifications as illegitimate.⁶⁴

Having used formal equality to distinguish political virtue from vice, the radicals took the further step of concluding that vice justified disenfranchisement. This second step is important, since formal equality in itself requires only equal treatment for equal acts, not any particular form of equal treatment. A society committed to formal equality could in principle punish all instances of bad conduct with equal mercy, though adopting that policy would diminish the salience of formal equality by reducing the difference in treatment between bad and good actors. The radicals adopted a different course, choosing to punish with formally equal harshness in the domain of voting rights. That approach increased the salience of formal equality and, therefore, of crime. As one legislator put it, “I will not consent to any disqualification except it be the commission of crime.”⁶⁵ Those who defied the rule of law were thought to have voluntarily set themselves apart from the body politic and to have forfeited the right to self-rule. Vice was defined by bad conduct, and bad conduct merited disenfranchisement.

Egalitarian disenfranchisement during the Reconstruction era can be viewed as a distinctive instantiation of a more general historical tendency among democratic societies. As political theorists have long observed, states often include new groups in democracy while self-consciously excluding others.⁶⁶ In the Congresses of the late 1860s, the relevant line of demarcation was in large part defined by formal equality: Republicans aspired to include those who abided by the law and to exclude those who violated it. The historic result was that millions of former slaves gained political power and millions of former Confederates and other criminals lost it. The irony of egalitarian disenfranchisement transformed America and its Constitution—as the remainder of this Part will show.

63. See *infra* Section I.E. Those with the opposite view often argued that the ballot was itself the best “educator.” *E.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 850 (Jan. 30, 1868) (statement of Sen. Aaron Cragin) (“I regard the ballot as a great educator . . .”); see also Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 934 nn.52-53 (1998) (collecting sources).

64. CONG. GLOBE, 40th Cong., 2d Sess. 850 (Jan. 30, 1868) (statement of Sen. Aaron Cragin); see also CONG. GLOBE, 39th Cong., 1st Sess. 385 (Jan. 23, 1866) (statement of Rep. Jehu Baker) (explaining that a “property qualification” is “quite as odious and quite as dangerous to liberty as disenfranchisement on account of race or color”).

65. CONG. GLOBE, 40th Cong., 2d Sess. 850 (Jan. 30, 1868) (statement of Sen. Aaron Cragin) (explaining that he was against race, property, and literacy qualifications while supporting “manhood suffrage”).

66. See Charles Taylor, *The Dynamics of Democratic Exclusion*, 9 J. DEMOCRACY, Oct. 1998, at 143.

B. The Thirteenth Amendment

In the wake of the Civil War, many radicals hoped that the Thirteenth Amendment would both free and enfranchise the slaves.⁶⁷ That vision was postponed, however, as the Thirteenth Amendment did not address voting rights. The Amendment's intellectual history nonetheless provides essential background to Reconstruction-era debates over suffrage. In short, leading abolitionists argued against slavery by contrasting that illegitimate institution with the concededly legitimate institution of criminal incarceration. A trace of the philosophical connection between permissible punishment and impermissible slavery remains in the Thirteenth Amendment's crime exception.

Cabining and eventually eliminating slavery had been the focal concerns of the Republican Party since its inception. As attention increasingly turned from emancipation to enfranchisement, Republicans built on the theoretical foundations they had already created. Though the intellectual landscape of American abolitionism was broad and complex,⁶⁸ one prominent landmark is particularly relevant here: John Locke's contractarian theory of government.⁶⁹ Leading abolitionists from Alvan Stewart⁷⁰ to Senator Charles Sumner⁷¹

67. See, e.g., XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 15-18 (1997) (discussing in particular efforts by Representative Ashley and Senator Sumner).

68. See generally WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

69. See David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 *LOY. L.A. L. REV.* 1187, 1194-95 (1992) ("The premise of [radical as opposed to moderate antislavery thought] was its view of the proper understanding of the relationship of Lockean political theory to constitutional interpretation."). Reconstruction Congressmen regularly propounded contractarian views reminiscent of Locke's political thought. See, e.g., *CONG. GLOBE*, 40th Cong. 3d Sess. app. at 127 (Feb. 5, 1869) (statement of Rep. James Mullins) ("Government stands based upon the natural right of every individual man, a right which can to a certain extent be compromised, so that the body-corporate may exercise certain powers surrendered by the parties who united to organize it.").

70. Consider the following passage from Alvan Stewart's 1837 speech to the New York Anti-Slavery Society, which focused on the practice of capturing fugitive slaves without trial: "The only difference between a freeman and a slave, under the Constitution, was that the freeman was deprived of his liberty by due process of law, for crime, and the slave was deprived of his liberty by due process of law, simply because he was a slave . . ." Alvan Stewart, *A Constitutional Argument on the Subject of Slavery, Address to the New York Anti-Slavery Society* (Sept. 1837), in JACOBUS TENBROEK, *EQUAL UNDER LAW* app. B at 287 (Collier Books 1965) (1951). TenBroek identified the argument outlined above as Stewart's major contribution to abolitionist thought. See *id.* at 281 (TenBroek introducing Stewart's speech).

invoked the Lockean notion that a legitimate government has a reciprocal relationship with its citizens.⁷² Under that theory, the state protects individual rights in exchange for the individual's loyalty to the state.⁷³ The contractarian tradition allowed for citizenship and residence requirements that delineated membership in a political community, but the same tradition also encouraged Republicans to define their polity in terms of adherence to law. In the years leading up to and during the Civil War, American abolitionists routinely appropriated contractarian political thought to distinguish the illegitimate treatment of slaves from the legitimate treatment of criminals.

Consider Theodore Weld, whose important⁷⁴ 1838 tract argued that Congress had the power to abolish slavery in the District of Columbia.⁷⁵ Weld's most fervent appeal was framed in abstract Lockean terms. Because slaves were a kind of subject from whom the federal government had exacted allegiance, Weld argued that the government had not just the power but also the responsibility to protect them. Weld's extensive argument culminated in a question: "Is the government of the United States unable to grant *protection* where it exacts *allegiance*?" Weld answered dramatically: "*Protection is the CONSTITUTIONAL RIGHT of every human being under the exclusive legislation*

71. See, e.g., Sen. Charles Sumner, Promises of the Declaration of Independence and Abraham Lincoln, Eulogy on Abraham Lincoln Before the Municipal Authorities of the City of Boston (June 1, 1865), in 12 CHARLES SUMNER: HIS COMPLETE WORKS 235, 295 (Lee & Shepard 1900) (1874) (insisting in his eulogy for Lincoln "on the equality of all before the law, and the consent of the governed" (emphasis omitted)).
72. See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 878 n.58 (1986) (collecting sources).
73. See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); see also Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1073-74 (discussing Locke's view "that criminals forfeit their political rights").
74. Weld's essay has been called "a restatement and synthesis of abolitionist constitutional theory as of that time." TENBROEK, *supra* note 70, app. A at 243; see also *id.* at 47-48. In the passage quoted in the main text, "Weld rephrases what was now the ark of the constitutional covenant for abolitionists: the protection of the laws." *Id.* Weld's essay had a significant legacy. As one commentator put it, "the 'foundation of [what would become the radical antislavery view] had been laid earlier by the abolitionist Theodore Weld," whose "analysis invoked the Lockean political theory that legitimate government must protect equal rights." Richards, *supra* note 69, at 1194.
75. THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER SLAVERY IN THE DISTRICT OF COLUMBIA (New York, American Anti-Slavery Society 1838), reprinted in TENBROEK, *supra* note 70, app. A at 278. President Lincoln would ultimately sign the Emancipation Act for Washington, D.C. on April 16, 1862, with the Emancipation Proclamation following five months later.

of Congress who has not forfeited it by crime.”⁷⁶ It is easy to overlook this climactic statement’s apparently disconnected last few words, which exempt from constitutional protection those who have “forfeited it by crime.” Yet Weld included this disclaimer, not as an afterthought, but because it was integral to his overall argument.⁷⁷ Criminals had not demonstrated “allegiance” to the state; therefore, they did not merit the state’s “protection.” Similar arguments became a staple of abolitionist literature.⁷⁸

In 1865, the Thirteenth Amendment achieved both halves of Weld’s contractarian vision: the Amendment prohibited racial slavery while specifically exempting slavery and involuntary servitude when imposed “as punishment for crime whereof the party shall have been duly convicted.”⁷⁹ As Professor Whitman has observed, the Thirteenth Amendment’s exception for punitive servitude appears to the modern reader as a “strange and striking fact.”⁸⁰ Remarkably, “American constitutional law formally embraced the idea that convicts were to be reduced to slaves in 1865—the year of the completion of the second revolution in America, the shining date in the history of American abolitionism.”⁸¹ But any perception of irony is anachronistic. As

76. *Id.* at 45. Bingham made a similar argument in Congress in 1857: “[T]he great democratic idea which [the Constitution] embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or State may rightfully take away, *except as a forfeiture for crime.*” CONG. GLOBE, 35th Cong., 2d Sess. 985 (Feb. 11, 1859) (statement of Rep. John Bingham) (emphasis added), *reprinted in* TENBROEK, *supra* note 70, app. D at 340.
77. As Weld wrote to Garrison: “I infer that the Society is based upon the great bottom law of human right, that *nothing but crime* can forfeit liberty.” See ROBERT H. ABZUG, *PASSIONATE LIBERATOR: THEODORE DWIGHT WELD AND THE DILEMMA OF REFORM* 88 (1980) (quoting Letter from Theodore Dwight Weld to William Lloyd Garrison (Jan. 2, 1833)).
78. See, e.g., CONSTITUTION OF NEW ENGLAND ANTI-SLAVERY SOCIETY pmb. (1832) (“[E]very person, of full age and sane mind, has a right to immediate freedom from personal bondage of whatsoever kind, unless imposed by the sentence of the law for the commission of some crime.”); RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860*, at 353 (1976) (quoting an 1859 Minnesota editorial arguing that the Republican Party must ensure “that not a chain shall clank nor a whip crack over human beings guilty of no crime”); George B. Cheever, *The Slaves Are Free by Virtue of the Rebellion and the Government Is Bound To Protect Them*, N.Y. INDEP., Jan. 16, 1862, *reprinted in* THE RADICAL REPUBLICANS AND RECONSTRUCTION, 1861-70, at 31, 36-37 (Harold M. Hyman ed., 1967).
79. U.S. CONST. amend. XIII, § 1.
80. WHITMAN, *supra* note 36, at 177.
81. *Id.*; see also *id.* at 174; *id.* at 176 (“[T]he Thirteenth Amendment expressly permitted prisoners to be reduced to the status of slaves . . .”). The Amendment imitated familiar language in the Northwest Ordinance, which also contained a crime exception. See, e.g., Northwest Ordinance of 1787, § 14, art. VI, ch. 8, 1 Stat. 50, 51 n.(a), 53 (“There shall be

Whitman recognized, the Thirteenth Amendment's simultaneous elimination and preservation of involuntary servitude was intuitive and not ironic in the Reconstruction era.⁸² Whereas racial slavery was an unjustifiable punishment, those "duly convicted" of crime might be—and, in fact, for many decades would be—sold into the service of private industrial interests and so forced to labor without pay.⁸³

About a month after passing the Thirteenth Amendment, Congress enacted a wartime measure that explicitly connected the Amendment's contractarian philosophy of formal equality with voting rights. Under the Federal Deserter Act, Civil War deserters who failed to return to service by May of 1865 were deemed to have "voluntarily relinquished and forfeited their rights of citizenship," including the right to vote.⁸⁴ In July 1866, the provision's constitutionality was upheld in *Huber v. Reily*, a widely reported Pennsylvania Supreme Court case.⁸⁵ Both the federal statute and the *Huber* decision

neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted"); CONG. GLOBE, 38th Cong., 1st Sess. 1488 (Apr. 8, 1864) (statement of Sen. Charles Sumner) (discussing the Northwest Ordinance); cf. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 56-57 (summarizing legislative history of the Thirteenth Amendment's crime exception); Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 625-32 (2008) (same). Faced with racist exploitation of the Amendment's crime exception, Congress later considered eliminating all slavery by statute. See CONG. GLOBE, 39th Cong., 2d Sess. 344-45 (Jan. 8, 1867).

82. See *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) ("[The criminal] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."); see also *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) ("[F]or much of this country's history, the prevailing view was that a prisoner was a mere 'slave of the state'"); *Ex parte Wilson*, 114 U.S. 417, 429 (1884) ("Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished."); *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) ("[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.").
83. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31 (1976).
84. Act of Mar. 3, 1865, ch. 79, 13 Stat. 487, 490. On March 11, President Lincoln executed the Act by proclamation. See Abraham Lincoln, Executive Proclamation 124: Offering Pardon to Deserters (Mar. 11, 1865), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=70073>.
85. See *Huber v. Reily*, 53 Pa. 112, 116 (1866) ("Disenfranchisement of a citizen as a punishment for crime is no unusual punishment" (citing *Barker v. People*, 20 Johns. (N.Y.) 457, 458

expressly contemplated the forfeiture of voting rights through wrongdoing, thereby exhibiting the contractarian political theory underlying so much abolitionist thought. *Huber* also illustrates the two-sided character of the antebellum period's egalitarian expansion of voting rights. As the Civil War approached, more and more states loosened property qualifications and expanded the franchise to include all white men. At the same time, a countervailing pattern emerged: broad criminal disenfranchisement laws increasingly became the national norm, particularly in Northern states.⁸⁶

The Civil War tightened the link between military service and suffrage. Many jurisdictions modified their residency and other voting requirements to allow soldiers to vote, including by absentee ballot.⁸⁷ And, as commentators have long observed, the Fifteenth Amendment drew essential support from arguments that black soldiers in the Union army had earned the ballot.⁸⁸ But if valiant citizens could earn enfranchisement through military service, then the

(1823) (holding disenfranchisement for dueling unlawful because dueling is not an "infamous" crime)); see also *Burkett v. McCarty*, 10 Bush (73 Ky.) 758, 762 (1866) ("So the Legislature may rightfully forfeit a citizen's right to vote as a penalty for perjury or other crime."); *State v. Symonds*, 57 Me. 148, 149-50 (1869) (finding error in the conviction of an alleged deserter for voting, on the ground that the indictment alleged only illegal voting and not desertion); cf. *Anderson v. Baker*, 23 Md. 531 (1865) (upholding state loyalty oath as a nonpunitive regulation of the franchise); *Blair v. Ridgely*, 41 Mo. 63 (1867) (same). The serious questions in *Huber* and similar postwar disenfranchisement cases were whether the punishment was *ex post facto* and whether criminal disenfranchisement could constitutionally be imposed on alleged deserters not convicted by court martial. Cf. *infra* Subsection I.C.2 (discussing similar arguments raised in connection with Section 3).

86. See KEYSSAR, *supra* note 44, at 50-51; MANZA & UGGEN, *supra* note 44, at 54 (noting the "striking" fact that "almost all of the 19 states established after 1850 included both near-universal white male suffrage and a law authorizing felon disenfranchisement").
87. See KEYSSAR, *supra* note 44, at 83.
88. Karlan, *supra* note 42; see, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 984 (Feb. 8, 1869) (statement of Sen. Edmund Ross) (deploring the view that former slaves "are good enough to fight but not good enough to vote," whereas a rebel can "forswear his crime" and be "reinvested with all the political privileges and prerogatives which his treason had forfeited"); *id.* app. at 93 (Jan. 28, 1869) (statement of Rep. Benjamin Franklin Whittemore); see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 396-97 (2005) ("The story of black ballots begins with black bullets."); WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 85 (1969) ("The importance and influence of this argument cannot be overstated."); Amar & Brownstein, *supra* note 63, at 932-33 & n.48 (1998) ("Even an uneducated but loyal emancipated slave had a more deserving claim to the right to vote than the traitors and rebels who formed the major part of the white voting constituency in the south."). The rhetorical link between "ballots" and "bullets" has a long history. CONG. GLOBE, 39th Cong., 1st Sess. 732 (Feb. 7, 1866) (statement of Rep. John Russell Kelso) (explaining that the freed slaves "know enough to cast bullets with judgment, and I have no doubt but that they would soon learn to cast ballots with equal judgment").

logic of formal equality suggests that disloyalty should trigger punitive exclusion from the body politic. Congress's 1865 deserter disenfranchisement statute bears out that inference. With the Civil War not yet formally concluded and the Thirteenth Amendment still pending ratification, the political philosophy underlying American abolitionism was already being redirected toward the right to vote.

C. *The Fourteenth Amendment*

Today, the most visible component of the Fourteenth Amendment is the Equal Protection Clause, a provision motivated by contractarian thought⁸⁹ and designed to promote formal equality.⁹⁰ Still, the Equal Protection Clause originally had a limited ambit. Plainly applicable to so-called "civil rights," such as property ownership and the right to contract, the predominant original understanding of the Equal Protection Clause was that it did not apply to "political rights," such as voting and office-holding.⁹¹ By affording Congress power to secure the civil rights of former slaves, the Fourteenth Amendment provided a constitutional basis for the foundational Civil Rights Act of 1866, which itself included three separate crime exceptions.⁹²

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89. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1435-36 (1992) (explaining that what the author called the Equal Protection Clause's subject, "protection," was predicated on a contractarian view of government).
90. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2459 (May 8, 1866) (statement of Rep. Thaddeus Stevens) ("Whatever law protects the white man shall afford 'equal' protection to the black man. . . . Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin.").
91. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2542 (May 10, 1866) (statement of Rep. John Bingham) ("The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . ."); see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 195-96, 216-18 (1998) (collecting evidence); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 126 (1987) ("Speaker after speaker lamented that blacks had not been given the vote [in Section 1]."); KLARMAN, *supra* note 44, at 29 (2004) ("The dominant understanding of the amendment ultimately adopted was that it protected civil, not political, rights."). *But see* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 57-58, 127-32 (1988) (collecting evidence against as well as in favor of this view).
92. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; *id.* § 2, 14 Stat. at 27; *id.* § 4, 14 Stat. at 28 ("[S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State . . .").

Unlike the Equal Protection Clause in Section 1, the Fourteenth Amendment's Sections 2 and 3 on their face did address political rights. The Subsections that follow demonstrate that the irony of egalitarian disenfranchisement is visible in the often-overlooked history of Section 2 and the even more rarely examined history of Section 3. The philosophy of formal equality that gave rise to the Equal Protection Clause in Section 1 of the Fourteenth Amendment also led Congress to protect and engage in punitive disenfranchisement in Sections 2 and 3.

1. Section 2

The North's victory in the Civil War ironically threatened to enhance the South's political power within the Union.⁹³ With slaves freed by the Thirteenth Amendment, the original Constitution's infamous three-fifths compromise had been broken. Freed slaves would henceforth count as whole citizens for apportionment purposes. That meant that Southern states would enjoy an *increase* in their number of congressional seats upon readmission to the Union. Yet the former slaves had not been afforded the right to vote. As Representative Eckley put it, "This present[ed] the anomaly of allowing five million white rebels to represent four million loyal blacks . . ."⁹⁴ Principle and partisanship alike motivated congressional Republicans to avoid that outcome.⁹⁵

Congress began grappling with the apportionment problem in late 1865. The most obvious solution was simply to enfranchise the former slaves, thereby creating a new Republican voting bloc in the South. But sentiment in the North was not yet thought to be supportive of black enfranchisement.⁹⁶

93. See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866) (statement of Sen. Jacob Howard) (explaining that the end of the three-fifths compromise would "increase the number of . . . Representatives [from the once slaveholding states by] nine or ten").

94. CONG. GLOBE, 39th Cong., 1st Sess. 2535 (May 10, 1866) (statement of Rep. Ephraim Eckley); see also *id.* at 2468 (May 8, 1866) (statement of Rep. William Kelley) (deploring that Southern rebels would include disfranchised blacks in the basis of representation and so, in terms of congressional influence, "be the equal of three of the best and most patriotic" Northerners); *id.* at 2508 (May 9, 1866) (statement of Rep. George Boutwell) (same); *id.* at 354 (Jan. 22, 1866) (statement of Rep. William Kelley) (same).

95. For a detailed account of Section 2's legislative history, 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).

96. Senator Howard again explains: "It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or

Another early suggestion was to link apportionment to each state's number of eligible voters.⁹⁷ That approach had its own problems, however, including that it would diminish the influence of New England states disproportionately inhabited by women and aliens.⁹⁸ A voter-based approach would also have penalized states like Missouri that had disenfranchised many former Confederates.⁹⁹ Republicans consequently decided on a third option: to impose an apportionment penalty on racial disenfranchisement, so that Southern states denying former slaves the right to vote would suffer a proportional loss in representation. If the South enfranchised the former slaves, then Republicans would see major electoral gains. And if not, the Democrat-dominated South would lose representation as compared with the Republican-dominated North. Either way, the Republicans' congressional majority would be secure.¹⁰⁰

In late January, Congress received language previously agreed to by the Joint Committee on Reconstruction: “[W]henver the elective franchise shall

under any restriction, to the colored race.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866) (statement of Sen. Jacob Howard).

97. See CONG. GLOBE, 39th Cong., 1st Sess. 9-10 (Dec. 5, 1865) (statements of Reps. Robert Schenck, Thaddeus Stevens, and John Broomall); see also *id.* at 1232 (Mar. 7, 1866) (statement of Sen. James Doolittle); *id.* at 535 (Jan. 31, 1866) (statement of Rep. Robert Schenck).
98. Many New England men migrating toward the West had been replaced by immigrants from Europe. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 877 (Feb. 16, 1866) (statement of Sen. Thomas Hendricks) (“Adopting the voting population, then, as the basis of representation and taxation, the six great agricultural states of the West . . . would have the advantage of New England by two or three representatives.”); *id.* at 141 (Jan. 8, 1866) (statement of Rep. James G. Blaine) (discussing regional implications of a voter basis); *id.* (statement of Rep. Thaddeus Stevens) (pointing out that “the cause of this disparity of men and women in Massachusetts and in the New England States” was “that the men go to the Western States as emigrants”). The realization that apportionment by voters would shift power from East to West “seems to have come as a shock to many” and doomed that approach. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 56-57 (1956); see also *id.* at 23, 61.
99. See CONG. GLOBE, 39th Cong., 2d Sess. 146 (Dec. 17, 1866) (statement of Sen. Thomas Hendricks) (pointing out that the “rebellion” exception in Section 2 solved this problem); CONG. GLOBE, 39th Cong., 1st Sess. 1315 (Mar. 10, 1866) (statement of Rep. Josiah Grinnell) (identifying the implications of disenfranchising former Confederates under the voter-based approach); *id.* at 1233 (Mar. 7, 1866) (statement of Sen. Henry Anthony) (discussing the issue in relation to Tennessee); *id.* at 535-36 (Jan. 31, 1866) (statement of Rep. John Benjamin) (discussing the problem in relation to Missouri).
100. See, e.g., JAMES, *supra* note 98, at 101, 137. This penalty was criticized. See CONG. GLOBE, 39th Cong., 1st Sess. app. at 119 (Feb. 14, 1866) (statement of Sen. John Henderson) (declaring the disenfranchisement penalty “as inefficient as it is evasive”); *id.* at 357-358 (Jan. 22, 1866) (statement of Rep. Roscoe Conkling) (submitting tables to criticize prior assessments of how various proposals would influence regional representation in Congress).

be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.”¹⁰¹ Because it penalized voting discrimination only when based on “race or color,” this proposal would have left the states free to disenfranchise criminals without penalty. That outcome had widespread support. Representative Bingham, the primary author of the Fourteenth Amendment’s Section 1, put the point succinctly: states lacked authority to disenfranchise their residents “except as a punishment for their own crimes.”¹⁰² Consistent with the contemporaneous views of other noted Republicans,¹⁰³ Bingham drew on contractarian thought, explaining that “[a] citizen may forfeit his right by crime, and the State may enforce that forfeiture.”¹⁰⁴ Radical Illinois Congressman John F. Farnsworth later made the same point about the final version of Section 2, arguing that a legitimate government ruled by the consent of the government “giv[es] to every citizen, white or black, who has not forfeited the right by his crimes, the ballot.”¹⁰⁵ To describe formal equality in the franchise was to acknowledge the propriety of criminal disenfranchisement.

The Committee’s initial proposal failed in the Senate due to an unexpected alliance between conservatives and extreme radical Republicans.¹⁰⁶ Led by Massachusetts Senator Charles Sumner, the extreme radicals argued that by merely penalizing racial disenfranchisement, the Committee version implied that racial disenfranchisement was constitutional.¹⁰⁷ Other leading Republicans

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101. CONG. GLOBE, 39th Cong., 1st Sess. 353 (Jan. 22, 1866) (statement of Rep. Andrew Rogers); BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 53-54 (1914).
102. CONG. GLOBE, 39th Cong., 1st Sess. app. at 57 (Jan. 29, 1866) (statement of Rep. John Bingham).
103. See, e.g., George Washington Julian, Suffrage in the District of Columbia, Speech Before the House of Representatives (Jan. 16, 1866), in JULIAN, SPEECHES ON POLITICAL QUESTIONS, *supra* note 54, at 291, 292-93 (noting that society deems the right to vote “forfeited on certain prescribed conditions” and that “in all free governments . . . disfranchisement is appropriately made a part of the punishment for high crimes”).
104. CONG. GLOBE, 39th Cong., 1st Sess. app. at 57 (Jan. 29, 1866) (statement of Rep. John Bingham); see also CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (Jan. 15, 1857) (statement of Rep. John Bingham) (proclaiming that “the rights of human nature belong to each member of the State, and cannot be forfeited but by crime”).
105. CONG. GLOBE, 39th Cong., 1st Sess. 2539 (May 10, 1866) (statement of Rep. John Farnsworth).
106. See JAMES, *supra* note 98, at 64-75.
107. See CONG. GLOBE, 39th Cong., 1st Sess. app. at 56-57 (Jan. 29, 1866) (statement of Rep. George Washington Julian) (referring to the proposed Section 2 as a “mere penalty against its violation, which at least *seems* to imply the right to violate it, if the penalty shall be accepted”); see also *id.* at 1256 (Mar. 8, 1866) (Sen. Richard Yates) (asking whether the

disputed this point,¹⁰⁸ but Sumner adhered to his position. To punish racial disenfranchisement as such, Sumner contended, would “crystallize into organic law the disenfranchisement of a race.”¹⁰⁹ By contrast, even the original Constitution had managed to avoid mentioning race.¹¹⁰ Sumner elaborated his views in one of his longest and most famous speeches.¹¹¹ Declaring that “Equality [is] the Alpha and the Omega” and “insist[ing] that all shall be equal before the law,”¹¹² Sumner elaborated a vision of suffrage predicated on act-egalitarianism. Race was an illegitimate voting qualification because one’s race is “permanent” and “insurmountable.”¹¹³ Sumner concluded that “[c]olor cannot be a ‘qualification,’ any more than size or the quality of [one’s] hair.”¹¹⁴

proposed amendment gave “constitutional sanction” to racial disenfranchisement); *id.* at 358 (Jan. 22, 1866) (Rep. Samuel Shellabarger) (expressing concern about “giving inferential power to the states to exclude a race”).

108. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 431-32 (Jan. 25, 1866) (statement of Rep. John Bingham) (“You place upon your statute-book a law punishing the crime of murder with death. You do not thereby, by implication, say that anybody may, of right, commit murder.”); Van Alstyne, *supra* note 33, at 51-53; see also CONG. GLOBE, 39th Cong., 1st Sess. 1255-56 (Mar. 8, 1866) (statement of Sen. Henry Wilson) (saying of an apportionment penalty triggered by racial disenfranchisement that “there is no implication in it, no compromise in it, no surrender of this Government of any power whatever”).
109. CONG. GLOBE, 39th Cong., 1st Sess. 1224 (Mar. 7, 1866) (statement of Sen. Charles Sumner).
110. *Id.* at 682 (Feb. 6, 1866) (statement of Sen. Charles Sumner) (arguing that the Founders “concealed [slavery] from view by words which might mean something else”). David Herbert Donald has suggested that Sumner’s speech may have been motivated by Massachusetts politics, not constitutional principle. See DAVID HERBERT DONALD, *Charles Sumner and the Rights of Man*, in CHARLES SUMNER 243-47, 261-65 (1996). But there is good reason to take Sumner at his word. The Committee version received other criticism on the ground Sumner identified. See *supra* note 107; see also FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 338-39 (1882) (recounting Douglass’s support of Sumner’s great speech); HANS L. TREFOUSSE, *THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN* 180 (1997). And several other ultra radicals who had opposed the race-based apportionment penalty joined Sumner in voting for the final version of Section 2. See DONALD, *supra*, at 263; see also *infra* notes 147-148 and accompanying text (noting that Congress and the Supreme Court would later draw a similar negative inference from Section 2’s inapplicability to gendered voting rules).
111. CONG. GLOBE, 39th Cong., 1st Sess. 673-87 (Feb. 6, 1866). For another extended discussion in the same vein, see *id.* at 1224-32 (Mar. 7, 1866) (statement of Sen. Charles Sumner).
112. *Id.* at 680, 685 (Feb. 6, 1866).
113. *Id.* at 684.
114. *Id.*; see CONG. GLOBE, 40th Cong., 3d Sess. 986 (Feb. 8, 1869) (statement of Sen. Charles Sumner) (explaining, during Fifteenth Amendment debates, that “qualifications” are things attainable by effort); see also Julian, *supra* note 54, at 120 (“You might as well disfranchise

In contrast, “[n]obody doubts” the legitimacy of excluding “persons of infamous life.”¹¹⁵ Sumner made clear that restrictions triggered by “infamous life”—as well as by “age,” “residence,” and perhaps “education”—“do not in any way interfere with the right of suffrage, for they leave it *absolutely accessible to all*.”¹¹⁶ Sumner would repeat this point in later colloquies, emphasizing his support of disenfranchisement for “crime.”¹¹⁷ In this way, Sumner’s radical critique incorporated an argument from formal equality justifying criminal disenfranchisement.¹¹⁸

After the Committee version’s failure in the Senate, legislators proposed the elimination of Section 2’s reference to disenfranchisement “on account of race” in favor of an apportionment penalty for disenfranchising adult males.¹¹⁹ Whereas the old draft had a “negative” structure in that it expressly penalized only racial disenfranchisement, the new drafts exhibited an “affirmative” structure. That is, the new Section 2 would penalize all forms of disenfranchisement, subject only to a few identified exceptions, such as age and sex. It was at this time that the exception for crime emerged. On March 12, in the wake of the Committee version’s failure in the Senate, Iowa’s Senator Grimes, a member of the Committee, introduced text that would have exempted disenfranchisement for “crime or disloyalty.”¹²⁰ Almost immediately thereafter, Sumner advanced a similar text proposing that the disenfranchisement of Confederate rebels be exempted from penalty.¹²¹

the emigrant for the size of his head, the length of his arm, the virtues or vices of his neighbors, or the height of our mountains.”).

115. CONG. GLOBE, 39th Cong., 1st Sess. 685 (Feb. 6, 1866) (statement of Sen. Charles Sumner).
116. *Id.* In a later speech, Sumner noted that property qualifications might be surmountable if not “unreasonably large,” but nonetheless considered “even” those qualifications unrepresentative. *See id.* at 1230 (Mar. 7, 1866) (statement of Sen. Charles Sumner).
117. *Id.* app. at 121 (Feb. 14, 1866) (statement of Sen. Charles Sumner).
118. *See* CONG. GLOBE, 40th Cong., 3d Sess. 902 (Feb. 5, 1869) (statement of Sen. Charles Sumner) (“If the prescribed ‘qualification’ were color of the hair or color of the eyes, all would see its absurdity. . . . Are we not reminded that the leopard cannot change his spots or the Ethiopian his skin?” (paraphrasing *Jeremiah*, 13:23)); DONALD, *supra* note 110, at 353. Sumner then said of Section 2: “Such is the penalty imposed by the Constitution on a State which denies the right to vote, except in a specific case.” CONG. GLOBE, 40th Cong., 3d Sess. 903. (Feb. 5, 1869) (statement of Sen. Charles Sumner).
119. *See generally* JAMES, *supra* note 98, at 100-16.
120. CONG. GLOBE, 39th Cong., 1st Sess. 1320 (Mar. 12, 1866).
121. *Id.* at 1321; *see also* Charles Sumner, The National Security and the National Faith, Speech at Worcester (Sept. 14, 1865), in CHARLES SUMNER, THE NATIONAL SECURITY AND THE NATIONAL FAITH: GUARANTEES FOR THE NATIONAL FREEDMAN AND THE NATIONAL CREDITOR (Boston, Rand & Avery 1865) (“As those who have fought against us should be disfranchised, so those who have fought for us should be enfranchised . . .”).

Echoing other radicals concerned that Southerners might abuse criminal and other disqualifications to oppress black voters,¹²² Sumner argued that his approach was not “open . . . to any evasions.”¹²³ He also emphasized that his proposed measure avoided implicitly condoning racial disenfranchisement.¹²⁴ These proposals, among others, were then referred to the Committee.

By April, the Committee was considering an entirely reworked version of the Fourteenth Amendment known as the Owen proposal.¹²⁵ This proposal still included a negatively structured apportionment penalty for states that engaged in racial disenfranchisement and so closely resembled the version that had failed in the Senate. The Committee then switched to an affirmatively structured measure akin to the ones Grimes and Sumner had proposed in the Senate, with Oregon Senator George Williams proposing a “rebellion or other crime” exception that closely paralleled the one suggested by Grimes.¹²⁶ “After discussion” (the contents of which unfortunately went unrecorded), the proposed substitution passed in the Committee¹²⁷ and, with small modifications, went on to become Section 2: “[W]hen the right to vote at any election for” a federal office “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”¹²⁸

122. See CONG. GLOBE, 39th Cong., 1st Sess. 383 (Jan. 23, 1866) (statement of Rep. John Farnsworth) (“We adopted an amendment to the Constitution that slavery should not hereafter exist in this country except as a punishment for crime. Yet we find those states reducing these men to slavery again . . . for every little petty offense They may provide that no man shall exercise the elective franchise who has been guilty of a crime; and then they may denounce these men as guilty of a crime for every little, imaginary, petty offense.”); see also *id.* at 406 (Jan. 24, 1866) (statement of Rep. Samuel Shellabarger) (anticipating grandfather clauses in arguing that a penalty for racial disenfranchisement might not reach “a provision disfranchising all who were slaves, or all whose ancestors were slaves”); *id.* at 376 (Jan. 23, 1866) (statement of Rep. Thomas Jenckes); *id.* at 359 (Jan. 22, 1866) (statement of Rep. Roscoe Conkling); cf. *infra* Section I.D (discussing similar concerns during debates on the Reconstruction Acts).

123. *Id.* at 1321 (Mar. 12, 1866) (statement of Sen. Charles Sumner).

124. *Id.* (“[I]t contains no words which can imply any recognition of the right of a State to disfranchise on account of color or race; and therefore seems to meet the objections which were adduced against the pending proposition [i.e., the House’s proposed amendment].”).

125. See NELSON, *supra* note 91, at 55-60.

126. See KENDRICK, *supra* note 101, at 102; see also JAMES, *supra* note 98, at 112.

127. See KENDRICK, *supra* note 101, at 102.

128. U.S. CONST. amend. XIV, § 2.

Judges and commentators often lament that there was no recorded explanation for the sudden shift toward Williams's proposed language, which avoided any express mention of race and included the fateful exemption for disenfranchisement on account of "crime."¹²⁹ But the legislative history suggests an answer: the Committee adopted Williams's approach to avoid Sumner's earlier critique and thereby ensure the Amendment's passage in the Senate.¹³⁰ By striking at racial disenfranchisement only by negative implication (that is, without explicitly mentioning race), the new language accorded with Sumner's stated views and, in fact, imitated Sumner's own proposal. Sumner later acknowledged as much.¹³¹ The desire to appease ultraradicals also explains why the Amendment's supporters were at pains to distinguish the new approach from the old one when advancing their case in the Senate.¹³² It is true that the new proposal included a crime exemption even though Sumner's proposal had not; but the Committee likely felt comfortable with that revision because the exception accorded with Sumner's repeated endorsements of disenfranchisement for both rebellion and crime. At this time, Congress was not swayed by the concerns of Sumner and others that Southerners might exploit criminal disenfranchisement for racist ends. The Committee's calculations proved accurate, as Sumner and a sufficient number of like-minded colleagues voted for the revised version of Section 2, including its "other crime" exemption. Congress thus satisfied the extreme radicals in the Senate while taking care to preserve constitutional space for criminal disenfranchisement.

129. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 44 (1974).

130. Sumner said that his earlier critique applied with equal force to the similar Owen proposal and that he was prepared to vote against the amendment yet again: "I must do my duty," Sumner explained, "without looking to consequences." See JAMES, *supra* note 98, at 101-02; see also ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 337-39, 340-41 (1988) (discussing Sumner's role in the making of Section 2, including the failure of the House version).

131. When he understood another Senator to be arguing that Section 2 established the constitutionality of racial voting requirements, Sumner leapt to his feet. See CONG. GLOBE, 40th Cong., 3d Sess. 1003 (Feb. 8, 1869) (statement of Sen. Charles Sumner) ("We did defeat [the House draft], and on that ground; that it conceded to the States the power to discriminate against colored persons. . . . Then this article was brought forward, and it was sustained on that avowed ground, that it did no such thing.").

132. See CONG. GLOBE, 39th Cong., 1st Sess. 3033-34 (June 8, 1866) (statement of Sen. John Henderson) (explaining that the final draft, unlike the earlier negatively structured one, did not "admit in express terms the right of the States to exclude from suffrage on account of color" and would apply to "disenfranchisement of white and black, unless excluded" by the exception for rebellion or other crime); see also *id.* at 2463 (May 8, 1866) (statement of Rep. James Garfield) ("I believe the section is now free from the objections that killed it in the Senate . . .").

Besides indicating that Sumner's formal-equality arguments influenced Section 2's final form, the provision's drafting history also suggests that the "other crime" exception was the product of deliberate legislative craftsmanship. Again, the Committee borrowed Grimes's proposal, despite the ready availability of Sumner's proposal, which had lacked a crime exception. Williams later proposed and discussed an amendment concerning the use of the phrase "the right to vote," as well as the provision's precise way of identifying affected elections.¹³³ Senator Reverdy Johnson discussed how Section 2 might affect municipal elections, which were deliberately left unaffected.¹³⁴ Wilson proposed a substitute designed to clarify the provision's reference to citizenship but that also omitted any reference to a crime exception.¹³⁵ Congress adopted Wilson's "inhabitant" language, but rejected the remainder of Wilson's proposal and thereby preserved the crime exception.¹³⁶ Some commentators insist that the Fourteenth Amendment was carelessly drafted,¹³⁷ but even the incomplete record available demonstrates that virtually every word in Section 2 was weighed, debated, and voted on. It is fair to infer that the "other crime" exception was deliberate.

Some radicals condemned Section 2 as a half-measure, but even they endorsed criminal disenfranchisement.¹³⁸ On one end of the spectrum, Congressman (and future President) James A. Garfield supported Section 2 while regretting that Congress had not "come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States,

133. See *id.* at 2991 (June 6, 1866) (statement of Sen. George Williams).

134. *Id.* at 3027 (June 8, 1866) (statement of Sen. Reverdy Johnson); *id.* at 2991; see also *id.* at 3029-30 (statement of Sen. George Williams) (stating that the Amendment was not intended to apply to municipal elections and proposing language to clarify that point).

135. *Id.* at 2770 (May 23, 1866) (statement of Sen. Henry Wilson).

136. *Id.* at 2897 (May 30, 1866).

137. See, e.g., Chin, *supra* note 14, at 292 ("[W]e should not expect too much from the drafters of these amendments . . .").

138. See FONER, *supra* note 49, at 255 (noting that Wendell Phillips wrote to Stevens that the Amendment was a "fatal and total surrender"); JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 355 (1964) (quoting Frederick Douglass's argument that, under the Amendment, he was "a citizen to . . . obey the laws, support the government, and fight the battles of the country, but, in all that respects voting and representation, I am but as so much inert matter"); cf. WENDELL PHILLIPS, *Address after the Assassination of President Lincoln* (Apr. 23, 1865), in 2 *SPEECHES, LECTURES, AND LETTERS* 446, 451 (Boston, Lee & Shepard 1894) ("My rule is, any citizen liable to be hanged for crime is entitled to vote for rulers.").

unconvicted of crime, shall enjoy the right of suffrage.”¹³⁹ Others were less restrained. Perhaps the most robust critique came in the form of a pamphlet by renowned abolitionist George B. Cheever.¹⁴⁰ The pamphlet began with the contractarian premise that government, here the federal government, has an obligation to protect the rights of persons loyal to it.¹⁴¹ Cheever then argued that the apportionment penalty had ceded to the states authority over federal voting rights, such that the states “can at their pleasure forbid you from voting for the United States Government.”¹⁴² This was intolerable, for “no State can disfranchise a citizen of the United States” and the “right to do so for anything but crime would be the right to enslave him.”¹⁴³ Cheever referenced the permissibility of criminal disenfranchisement throughout the tract, even as he inveighed against the Fourteenth Amendment for being insufficiently progressive—indeed, for being retrogressive.¹⁴⁴

Section 2 bitterly disappointed radicals for another reason: its apportionment penalty was limited to the disenfranchisement of twenty-one-year-old “male” inhabitants, thereby introducing gender discrimination into the Constitution.¹⁴⁵ Because Section 2 allowed states to disenfranchise women without incurring any penalty, suffragists feared that Section 2 might be read to endorse not just criminal disenfranchisement but also gender-based suffrage restrictions. Some modern commentators have thought that interpretive possibility absurd,¹⁴⁶ but the suffragists’ fears proved well-founded.

139. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (May 8, 1866) (statement of Rep. James A. Garfield).

140. GEORGE B. CHEEVER, *THE REPUBLIC OR THE OLIGARCHY? WHICH?* (New York, 1866).

141. See, e.g., *id.* at 334-35.

142. *Id.* at 335.

143. *Id.*

144. See, e.g., *id.* at 6 (“Shall their rights be protected, or shall they be taken away, without crime, by reason of the color of their skin? . . . And for this purpose shall the Constitution be so amended as to give the rebel States the power of disfranchising, without crime, on account of color or race?”).

145. See generally Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1155-63 (1988) (describing efforts to eliminate gender-based suffrage restrictions in the Amendment).

146. See Ely, *supra* note 45, at 1195 n.45 (“The list of exemptions from the representation-reduction sanction of Section 2 was patently not regarded as a listing of what was or was not constitutionally voidable in federal court.”); Fletcher, *Disenfranchisement*, *supra* note 32, at 1903-04.

Congressmen¹⁴⁷ and, ultimately, the Supreme Court¹⁴⁸ viewed Section 2's use of the term "male" as evidence that gender-based voting qualifications were originally understood to be compatible with the Fourteenth Amendment's Section 1. That textual inference finds historical support. As discussed below, Congress deliberately exempted gendered voting rules so as to permit them to remain in place without penalty. And since gender (like race) is an inherited status, Section 2's inapplicability to gendered voting restrictions demonstrates that Congress did not accept the full implications of formal equality.

Republicans who defended gendered voting rules generally raised two types of argument. First, they argued that disenfranchising women preserved their virtue by insulating them from politics and the responsibilities of governance, particularly military service. Second, they argued that women's interests, unlike the interests of oppressed Southern blacks, were already represented by their sons, fathers, brothers, and husbands. In other words, women were different from men, and gender was different from race.¹⁴⁹ These arguments were plainly in tension with Republicans' formal-equality arguments for black enfranchisement. Indeed, each argument had its racial cousin, as Southerners argued that blacks were by nature incapable of ruling themselves¹⁵⁰ and that their interests were protected by their white masters¹⁵¹—yet Republicans had rejected those arguments under the banner of equality

147. See, e.g., S. REP. NO. 42-21, at 4 (1872) (statement of Sen. Matthew Carpenter) (providing robust discussion and noting "the right of female suffrage is inferentially denied by the second section of fourteenth amendment").

148. See *Minor v. Happersett*, 88 U.S. 162, 174 (1875) ("[I]f [women] were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone?").

149. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 65-66 (Dec. 11, 1866) (statement of Sen. Frederick Frelinghuysen) (arguing that "the women of America vote by faithful and true representatives, their husbands, their brothers, their sons" and that women "do not bear the bayonet, and have not that reason why they should be entitled to the ballot"); *id.* at 56 (Dec. 11, 1866) (statement of Sen. George Williams) (arguing that "the sons defend and protect the reputation and rights of their mothers; husbands defend and protect the reputation and rights of their wives; brothers defend and protect the reputation and rights of their sisters"); *id.* at 40 (Dec. 10, 1866) (statement of Sen. Lot M. Morrill) (arguing that "the ballot is the inseparable concomitant of the bayonet"); see also *id.* at 64 (Dec. 11, 1866) (statement of Democratic Sen. Reverdy Johnson) (arguing that men should have exclusive right of suffrage because they "may be called upon to defend the country in time of war or in time of insurrection").

150. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 982 (Feb. 8, 1869) (statement of Sen. Adonijah Welch) (summarizing the position of those opposed to extending suffrage).

151. Cf. CONG. GLOBE, 39th Cong., 1st Sess. app. at 121 (Feb. 14, 1866) (statement of Sen. Charles Sumner) (rejecting the argument).

before the law.¹⁵² Recognizing that the Republicans were caught in an embarrassing contradiction, suffragists and strategically motivated conservatives pressed their advantage. They proposed women's enfranchisement not just during debates on Section 2,¹⁵³ but also during debates on the District of Columbia suffrage bill¹⁵⁴—which, as enacted, enfranchised blacks, was limited by the term “male,” and disenfranchised not only those who had “voluntarily” aided the rebellion, but also those who had been convicted of “any infamous crime or offence.”¹⁵⁵

Yet the “other crime” exception was viewed differently from Section 2's use of the term “male.” Consistent with the view that gender is a mere status, radical Republican feminists—not an insignificant group in the Reconstruction era—made clear that they had accepted Section 2's gendered language only because it was necessary to secure the measure's enactment and ratification. These figures hoped to postpone consideration of women's rights in favor of a more urgent and attainable goal. As the suffragist-abolitionist Wendell Phillips famously put it, “This hour belongs to the negro.”¹⁵⁶ Lucy Stone would echo that sentiment as late as January 1869, when she scuttled hopes for women's enfranchisement in the District of Columbia by announcing, “Woman must wait for the negro.”¹⁵⁷ In Congress, Republicans who endorsed women's suffrage while accepting its postponement included not just Stevens and Sumner, but also Anthony, Fowler, Julian, Wade, Warner, Wilson, and Yates.¹⁵⁸ Capturing this sentiment in 1866, Wade announced his support for

152. See CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT* 43 (1923) (“Every argument which could be made for Negro suffrage applied to women. There was no escaping that fact.”).

153. See CONG. GLOBE, 39th Cong., 1st Sess. 379-80 (Jan. 23, 1866) (statement of Rep. James Brooks).

154. See CONG. GLOBE, 39th Cong., 2d Sess. 46 (Dec. 10, 1866) (statement of Sen. Edgar Cowan).

155. See Act of Jan. 8, 1867, ch. 6, 14 Stat. 375.

156. Wendell Phillips, Thirty-Second Anniversary of the American National Anti-Slavery Society, Address Before the New England Anti-Slavery Society (May 9, 1865), in *NAT'L ANTI-SLAVERY STANDARD*, May 13, 1865, at 2.

157. FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* 165 (2011).

158. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 55-56 (Dec. 11, 1866) (statement of Sen. Henry Anthony) (“The time has not come for it, but the time is coming.”); *id.* at 63 (statement of Sen. Richard Yates) (“I am for suffrage by females . . . but that is not the point before us.”); JAMES, *supra* note 98, at 66 (noting that “Stevens took care to explain his personal opposition to the word ‘male’”); 2 *HISTORY OF WOMAN SUFFRAGE* 91 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., Rochester, N.Y., Charles Mann Printing Co. 1881) (noting Sumner's avowal that he struggled to redraft Section 2 without

the enfranchisement of “every person of mature age and discretion who has committed no crime,” including women.¹⁵⁹ “I know that the time will come,” Wade said of women’s enfranchisement, “not to-day, but the time is approaching.”¹⁶⁰ During later debates on the Fifteenth Amendment, Republicans would try to make good on Wade’s promise by proposing women’s enfranchisement.¹⁶¹

Republicans’ decision to elevate politics over principle during the 1860s had lasting effects on the women’s suffrage movement. Before the passage of Section 2, Susan B. Anthony and Elizabeth Cady Stanton opposed all legislation based on “class or caste,”¹⁶² pleaded that Republicans exhibit “logical consistency,”¹⁶³ and argued that “[t]he same logic and justice that secures suffrage to one class gives it to all.”¹⁶⁴ Even after the Amendment passed, leading suffragists continued to denounce Section 2 while distinguishing guiltless women from criminals.¹⁶⁵ But a rhetorical and

using the term “male,” but found that “it could not be done”); GEORGE WASHINGTON JULIAN, *POLITICAL RECOLLECTIONS*, 1840-1872, at 325 (1884); NELSON, *supra* note 91, at 137-38 (noting that even supporters of women’s rights acknowledged the need to postpone the women’s suffrage question); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 862 (Feb. 4, 1869) (statement of Sen. Willard Warner) (“I would admit woman But I know that woman’s suffrage is not now attainable, and I would not, as a practical legislator, jeopardize the good which is attainable by linking with it that which is impossible.”); *id.* at 670 (Jan. 28, 1869) (statement of Sen. Joseph S. Fowler).

159. CONG. GLOBE, 39th Cong., 2d Sess. 62 (Dec. 11, 1866).

160. *Id.* at 63.

161. *See infra* Section I.E.

162. Petition of Elizabeth Cady Stanton et al. to Congress, *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 380 (Jan. 23, 1866).

163. Letter of Susan B. Anthony to Congress (Jan. 20, 1866), *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 380 (Jan. 23, 1866).

164. Elizabeth Cady Stanton, *This Is the Negro’s Hour*, NAT’L ANTISLAVERY STANDARD (Dec. 26, 1865).

165. For example, the Resolutions of the Equal Rights Convention in New York City, published December 7, 1866, prominently endorsed universal adult enfranchisement, including for blacks and women—but only for those “not legally convicted of crime.” 2 *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY* 3 (Ann D. Gordon et al. eds., 2003). And in 1867, Elizabeth Cady Stanton routinely distinguished between female and criminal disenfranchisement. In a January 23 address, she stated, “How humiliating . . . for respectful and law-abiding women . . . to be thrust outside the pale of political consideration with those convicted of . . . infamous crime.” Elizabeth Cady Stanton, Speech Before the New York State Legislature (Jan. 23, 1867), *reprinted in* 2 *HISTORY OF WOMAN SUFFRAGE*, *supra* note 158, at 275. Similarly, in her May 9 Address to the First Anniversary of the American Equal Rights Association, Stanton deplored that women had been “thrust outside

philosophical change was already becoming apparent. As Garrett Epps has observed:

[I]n the wake of what they saw as male betrayal, Anthony, Stanton, and their allies began to argue that women needed the ballot—and deserved it—not because they were human, but because they were female. Not only would voting be a means of self-protection; it would elevate the political process by bringing the influence of women—purer, nobler, and more peaceable—into public life.¹⁶⁶

In other words, suffragists increasingly associated virtue with a status—namely, the status of being a woman.¹⁶⁷ This argumentative shift fostered discussion of the distinctive cultural and economic obstacles to women's enfranchisement, but it also created room for racist and classist rhetoric to become more prominent in the women's rights movement.¹⁶⁸ Suffragists' move toward status-based reasoning is a reminder that formal equality was not the only philosophy capable of supporting egalitarian reform during the mid-nineteenth century.

In sum, Republicans' accommodation of gendered voting distinctions stood in marked contrast to their inclusion of the crime exception. Reconstruction progressives, including at least a substantial bloc of leading Republicans, viewed Section 2's reference to gender as a concession to political necessity. In contrast, the crime exception was viewed as principled, even among the era's most radical proponents of broad voting rights.

2. Section 3

In the spring and summer of 1866, the nation debated whether Southern Confederates should be disenfranchised by constitutional amendment. The

the pale of political consideration with traitors, idiots, minors, with those guilty of bribery, larceny, and infamous crime." *Id.* at 189.

166. GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 219 (2006); *see also* ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 174-79 (1978) (discussing changes and divisions in the women's suffrage movement caused by Section 2 and subsequent debates over the Fifteenth Amendment); KEYSSAR, *supra* note 44, at 143-45 (same); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 44-45 (1965) (same).
167. Some Republicans raised early versions of these arguments against defenders of Section 2. *See* CONG. GLOBE, 39th Cong., 2d Sess. 55 (Dec. 11, 1866) (statement of Sen. Henry Anthony) (asserting that women were not "less virtuous," but "more" so).
168. *See* FONER, *supra* note 49, at 447-48; *infra* note 307 and accompanying text.

House passed a version of the Fourteenth Amendment that included a provision, then designated Section 3, that would have excluded Confederates from federal elections until 1870.¹⁶⁹ The effect would have been to disenfranchise much of the white Southern population. This measure was widely viewed as a serious obstacle to successful national reunification and sparked a strongly negative reaction in May 1866, not just in the South but also in many quarters of the North.¹⁷⁰ That version of Section 3 was promptly and almost unanimously rejected by the Senate. Moderates then proposed substitute language that would have excluded from federal and state office persons who had taken a governmental oath of loyalty to the Union before joining or aiding the Confederacy.¹⁷¹ This alternative quickly passed in the Senate and the House and is now Section 3 of the Fourteenth Amendment.¹⁷²

The idea behind Section 3 arose during the Civil War. When he accepted his nomination as the 1864 Republican vice-presidential candidate, Andrew Johnson argued that “the traitor has ceased to be a citizen, and in joining the rebellion has become a public enemy.”¹⁷³ Johnson further reasoned that the traitor “forfeited his right to vote with loyal men when he renounced his citizenship.”¹⁷⁴ But Johnson changed his attitude toward the South after Lincoln’s assassination and his own ascension to the presidency, as evidenced

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169. The House proposal read: “Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.” CONG. GLOBE, 39th Cong., 2d Sess. 2545 (May 10, 1866); see also JAMES, *supra* note 98, at 115-16 (discussing Committee proposal); *id.* at 131 (discussing passage in the House).
170. For example, the *New York Times* published a steady stream of editorials inveighing against the House version and, ultimately, praising the Senate version. See, e.g., Editorial, *The Constitutional Amendment in the Senate*, N.Y. TIMES, June 2, 1866, at 4; Editorial, *Who Would Defeat and Destroy the Union Party?*, N.Y. TIMES, May 30, 1866, at 4; Editorial, *Bad Temper and Worse Taste*, N.Y. TIMES, May 28, 1866, at 4; Editorial, *The Reconstruction Committee’s Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4; Editorial, *The Radicals and Restoration*, N.Y. TIMES, May 18, 1866, at 4; Editorial, *Reconstruction—The Proposed Amendment to the Constitution*, N.Y. TIMES, May 14, 1866, at 4; *Beginning of the Reconstruction Discussion in the House*, N.Y. TIMES, May 9, 1866, at 1.
171. See CONG. GLOBE, 39th Cong., 1st Sess. 2869 (May 29, 1866) (introduction of near-final language in Senate).
172. See *id.* at 3149 (June 13, 1866) (Senate passage); FONER, *supra* note 49, at 254.
173. Andrew Johnson, Speech, Nashville, Tenn. (June 9, 1864), in EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 46 (1875).
174. *Id.*

by his controversial spate of presidential pardons to former Confederates.¹⁷⁵ Indeed, Johnson issued increasingly broad orders providing executive clemency for rebels. These actions flew in the face of Republican ideology, not only because they insulated wrongdoers from punishment but also because these clemency actions were discretionary judgments often based on little more than flattery.¹⁷⁶ As Whitman has noted, “it is characteristic of the American legal culture that the pardoning power [has] faced bitter opposition—and distinctively *egalitarian* opposition.”¹⁷⁷ Johnson’s pardons to former Confederates fit within that pattern.

The Fourteenth Amendment provided a vehicle for Republicans to punish Confederates in a degrading but uniform fashion while circumventing Johnson’s confounding pardon power. Proponents of broad Confederate disenfranchisement reasoned with reference to formal equality, often by alluding to Johnson’s earlier remarks. For example, on May 10, 1866, Senator James Nye of the newly admitted state of Nevada quoted—and emphatically agreed with—Johnson’s 1864 speech.¹⁷⁸ Nye’s arguments paralleled then-popular justifications for criminal disenfranchisement. Over and again, Republicans insisted that rebels and criminals alike were self-declared “public enemies” who had implicitly “forfeited” their political rights.¹⁷⁹ Section 2’s “rebellion, or *other* crime” phraseology evidenced this reasoning by demonstrating that “rebellion” is itself one type of “crime.” This point called to mind contemporaneous debates in which the South’s allies likened Southerners

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175. See JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 545 (1982); see, e.g., Thomas Nast, *Andrew Johnson’s Reconstruction*, *HARPER’S WKLY.*, Sept. 1, 1866 (cartoon).
176. See WHITMAN, *supra* note 36, at 181-85 (discussing post-Civil War pardons, among others); see also *id.* at 184 (“Pardons, it was argued, were inevitably *inegalitarian* . . .”).
177. *Id.* at 181.
178. CONG. GLOBE, 39th Cong., 1st Sess. 2523 (May 10, 1866) (statement of Sen. James Nye) (“Sir, human lips never uttered a more striking truth than that.”).
179. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 1013 (Feb. 8, 1869) (statement of Sen. Jacob Howard) (arguing that rebels should never be allowed to participate in government because they had committed “the double crime of perjury and treason”); CONG. GLOBE, 40th Cong., 2d Sess. 3056 (June 11, 1868) (statement of Sen. Charles Drake) (“We would disfranchise rebels for crime against their country.”); CONG. GLOBE, 39th Cong., 1st Sess. app. at 257 (July 9, 1866) (statement of Rep. Jehu Baker) (“Punishment should be visited upon so great a public crime as the late rebellion.”); *id.* at 792 (Feb. 10, 1866) (statement of Rep. Thomas Williams) (arguing that the government “might well disfranchise individuals, such as the traitors themselves, for an enormous crime”); *id.* at 781 (statement of Rep. Hamilton Ward) (“Ah! they have committed the most fearful and gigantic crime known in the records of time.”).

to George Washington¹⁸⁰ while Unionists condemned Confederates as criminals and distinguished them from America's beloved revolutionary fathers.¹⁸¹

When Congress debated Section 3, the main point of contention was whether rebellion and treason should be considered a type of crime. In other words, the common ground generally taken for granted was the propriety of disenfranchising criminals, and the principal dispute was whether rebels and traitors fell within that commonly accepted category. Thus Representative Andrew Rogers of New Jersey, a Democrat who sat on the Joint Committee on Reconstruction, argued on behalf of the South that traditional crimes were morally *worse* than rebellion: "Rebellion or revolution never has been considered by the civilized world," he argued, "as having that odiousness and moral turpitude that attaches to men for the commission of he[*in*]ous crimes."¹⁸² Rogers viewed Confederates as "political convicts" formerly engaged in an honorable act of war unlike the dishonorable actions of common criminals.¹⁸³

Perhaps sensing that Republicans did not share Rogers's sanguine view of the Confederate war machine, some of the South's allies advanced more nuanced arguments. "Treason is undoubtedly a crime," admitted Representative Benjamin Boyer, a Democrat from Pennsylvania and another opponent of the Fourteenth Amendment.¹⁸⁴ "But you cannot make new laws and a new Constitution" just to punish traitors.¹⁸⁵ In Boyer's view, Confederates could not legitimately be punished by a "bill of attainder or *ex*

180. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 355 (Jan. 22, 1866) (statement of Rep. Andrew J. Rogers) (arguing that Missouri's disenfranchisement of Confederates was a "burning disgrace" and insinuating that Southerners could look to George Washington when invoking "the right of revolution").

181. See, e.g., JOSEPH P. THOMPSON, REVOLUTION AGAINST FREE GOVERNMENT NOT A RIGHT BUT A CRIME (New York, Union League Club 1864).

182. CONG. GLOBE, 39th Cong., 1st Sess. 2539 (May 10, 1866); see also CONG. GLOBE, 40th Cong., 3d Sess. 1029 (Feb. 9, 1869) (statement of Sen. George Vickers) (proposing that the Fifteenth Amendment forbid disenfranchisement for "participation in the recent rebellion").

183. CONG. GLOBE, 39th Cong., 1st Sess. 2539 (May 10, 1866) (statement of Rep. Andrew Rogers) ("[Confederates] are not murderers, they are not thieves, they are not felons; they are simply political convicts . . ."); cf. WHITMAN, *supra* note 36, at 125-31 (discussing European treatment of high-class political convicts).

184. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (May 8, 1866) (statement of Rep. Benjamin Boyer).

185. *Id.*

post facto law such as is provided in the amendment before the House.”¹⁸⁶ This line of attack had previously been raised against the Section 2 apportionment penalty, as well as against a rebel disenfranchisement provision applicable to the District of Columbia.¹⁸⁷ Even the Supreme Court expressed concern about allegedly *ex post facto* Reconstruction measures.¹⁸⁸ As Senator Hendricks put it: “Now, sir, you say that these people have been in rebellion, that they have committed a great crime, which I agree to.”¹⁸⁹ But, Hendricks argued, the South had suffered punishment through defeat in war, and any additional legal sanctions would be *ex post facto*.¹⁹⁰

In calling Section 3 a bill of attainder or *ex post facto* law, Boyer and other conservatives¹⁹¹ were contrasting the disputed practice of disenfranchising Confederates with the concededly legitimate practice of disenfranchising criminals. Because people cannot change who they are or what they have done in the past, the government acts unfairly when it punishes individuals based on their identity (in violation of the Bill of Attainder Clause) or based on conduct that was legal at the time it was undertaken (in violation of the *Ex Post Facto* Clause).¹⁹² If an oppressive government used bills of attainder and *ex post facto* laws to divest disfavored classes of political power, then “no one, howsoever virtuous his conduct, would be safe.”¹⁹³ In contrast, a prospectively applicable criminal law provides notice as to a standard of conduct and so allows people to choose either to obey or to transgress. Critics observed that these commonplace protections, hallmarks of formal equality, were absent from retroactive efforts

186. *Id.* After quoting the *Ex Post Facto* Clause, Boyer said, “That single prohibition is in itself a complete answer to all that has been said in support” of Section 3. *Id.*

187. See CONG. GLOBE, 39th Cong., 2d Sess. 44 (Dec. 10, 1866) (statement of Sen. Edgar Cowan) (arguing that the disenfranchisement of rebels in the District of Columbia would violate “the plain provisions of the Constitution which forbid bills of attainder and which forbid *ex post facto* laws”).

188. See *Ex parte* Garland, 71 U.S. 333 (1866) (relying, in part, on the *Ex Post Facto* Clause to invalidate an oath limiting federal legal practice to persons who had neither fought for nor held office in the Confederacy).

189. CONG. GLOBE, 39th Cong., 1st Sess. 879 (Feb. 16, 1866) (statement of Sen. Thomas Hendricks).

190. *Id.*

191. See, e.g., Editorial, *The Constitutional Amendment in the Senate*, *supra* note 170 (endorsing Doolittle’s critique of Section 3 as “retroactive legislation”).

192. See Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 210 (1996) (“Without the nonattainder principle, the legislature could simply single out its enemies—or the politically unpopular—and condemn them for who they are, or for what they have done in the past and can no longer change.”).

193. See AMAR, *supra* note 88, at 124-25.

to punish rebels, including (but not only) the House version of Section 3. The foregoing points were tailor-made to appeal to moderate Republicans, many of whom had heard their colleagues raising similar arguments to condemn racial disenfranchisement.¹⁹⁴

The radical position on Section 3 eked out a victory in the House. On June 20, 1866, the Report of the Joint Committee on Reconstruction concluded that the Confederates had “voluntarily renounced the right to representation, and disqualified themselves by crime from participating in the government.”¹⁹⁵ In support of that conclusion, some argued that the Confederates were the worst kind of criminal.¹⁹⁶ For example, Representative Eckley distinguished between crimes “committed against property” and the crime “of treason,” which is committed “against the nation, against the whole people” and so is “the highest [offense] known to the law.”¹⁹⁷ While expressly endorsing criminal disenfranchisement,¹⁹⁸ Eckley emphasized that “[t]he only objection” to be made against Section 3 was “that it does not go far enough.”¹⁹⁹ Underscoring the need to treat rebels harshly, Eckley added, “I would disfranchise them forever.”²⁰⁰

The climactic statement on Confederate disenfranchisement came from radical leader Thaddeus Stevens. In a widely reprinted speech, Stevens

194. See, e.g., Cheever et al., *Petition*, reprinted in *THE RADICAL REPUBLICANS AND RECONSTRUCTION, 1861-1870*, *supra* note 78, at 273, 280-83 (Harold M. Hyman ed., 1967) (arguing that racial disenfranchisement constituted an “attainder of color” as well as an *ex post facto* law). Cheever also argued that racial disenfranchisement was a potential means of reintroducing slavery in violation of “the amendment of the Constitution, forbidding slavery except for crime.” *Id.* at 281.

195. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30, at xix (1866), available at <http://www.archive.org/details/jointreconstructoocongrich>.

196. See *supra* note 179 (collecting sources).

197. CONG. GLOBE, 39th Cong., 1st Sess. 2535 (May 10, 1866) (statement of Rep. Ephraim Eckley).

198. See *Richardson v. Ramirez*, 418 U.S. 24, 46 (1974) (quoting Eckley’s statements on general criminal disenfranchisement).

199. CONG. GLOBE, 39th Cong., 1st Sess. 2535-36 (May 10, 1866); see also CONG. GLOBE, 40th Cong., 2d Sess. 1969 (Mar. 18, 1868) (statement of Rep. Fernando Beaman) (“[W]hat proposition could be more lenient, more indulgent, more merciful to men who have committed the highest crime known to our laws”); CONG. GLOBE, 39th Cong., 1st Sess. 2460 (May 8, 1866) (statement of Rep. Thaddeus Stevens) (“My only objection to [Section 3] is that it is too lenient.”).

200. CONG. GLOBE, 39th Cong., 1st Sess. 2535 (May 10, 1866); see also *id.* at 2463 (May 8, 1866) (statement of Rep. James A. Garfield) (arguing that permanent disenfranchisement was more principled and so preferable to the House’s proposed disenfranchisement until a fixed date).

thundered: “Gentlemen here have said you must not humble these people. Why not? Do not they deserve humiliation? Do not they deserve degradation? If they do not, who does? What criminal, what felon deserves it more, sir?”²⁰¹ Stevens went on to suggest that if his audience wanted “to forgive and enfranchise,” it would do better to direct its attention toward those convicted of offenses “such as arson and larceny,” who “have not committed half as many crimes as the rebels.”²⁰² For Stevens, disenfranchising Confederates for rebellion was legitimate a fortiori given the undisputed propriety of disenfranchising common criminals.

As noted earlier, the radicals’ best arguments for mass disenfranchisement failed in the end, as the Senate rejected the House version of Section 3 and settled instead on an ostensibly milder version that passed in the House and now resides in the Fourteenth Amendment: “No person shall . . . hold any office . . . under the United States, or under any state, who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.”²⁰³

To a great extent, the final version of Section 3 reflected a refinement of the radicals’ philosophy of formal equality. Opposition to the broader House proposal arose in part from the widespread view that many Confederate soldiers, even if not conscripted, had little real choice but to join the Southern cause.²⁰⁴ In that light, the final version of Section 3 was not less punitive so much as it was more targeted. Whereas the House version promised to affect the rank and file, the Senate version would reach only the senior leadership. Moreover, the Senate version was in important ways harsher than the House version. The House measure would have sunset in 1870 and applied only to federal elections.²⁰⁵ By contrast, the final version permanently rendered

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

202. *Id.*

203. U.S. CONST. amend. XIV, § 3.

204. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2540 (May 10, 1866) (statement of Rep. John Farnsworth) (“Again, some rebels are deserving of a total and lasting disfranchisement, while others who are embraced in this provision [the House version of Section 3] are not near so criminal.”); Editorial, *The Constitutional Amendment in the Senate*, *supra* note 170 (“The idea of discriminating in respect of penalties between those who promoted or voluntarily adhered to the rebellion, and those who became connected with it under a certain duress, is too evidently reasonable to be easily controverted.”). Similar points would later be repeated during debates over the Reconstruction Acts. *See infra* note 217.

205. *See* FONER, *supra* note 49, at 259 (“The original provision had applied only to national elections, leaving the structure of state politics intact”); *supra* note 169 (quoting the provision, including its 1870 sunset date). Senator Howard argued that the House version of

“virtually the entire political leadership of the South ineligible for office,” both state and federal.²⁰⁶ The final version of Section 3 thus reflected a nuanced view: as compared with felons, Confederate officials were more deserving of punishment and Southern foot soldiers were less so.

Opposition to the House version was also substantially motivated by pragmatic considerations.²⁰⁷ For example, the *New York Times* insisted that “the expediency or in expediency of any course looking to reconstruction or restoration should determine its acceptance or rejection.”²⁰⁸ Believing that the House version of Section 3 would “insure the rejection of the amendment by the states concerned,” the *Times* praised the Senate’s “compromise” approach, which “the South may be asked to consider with some likelihood of acceptance.”²⁰⁹ The political climate later shifted even further, and Congress gradually lifted the disqualifications imposed by Section 3. That trend culminated in the General Amnesty Act, which applied to all state (but not federal) officers who had engaged in rebellion.²¹⁰ The Act passed in 1872—two years after the House version of Section 3 would have expired. Like moderates’ hopeful predictions of how the South would respond to the Fourteenth Amendment, the Amnesty Act sprang from a deep desire to return to normalcy

Section 3 would allow rebels to control state legislatures and, thereby, electoral college votes for President. See CONG. GLOBE, 39th Cong., 1st Sess. 2767-68 (May 23, 1866) (statement of Sen. Jacob Howard). Howard’s solution was to disenfranchise all rebels who were twenty-five years old when the war started, which would “ostracize . . . the really responsible leaders.” *Id.* at 2768.

206. FONER, *supra* note 49, at 259 (“[T]he final version of the Amendment, barring from office Confederates who before the war had taken an oath of allegiance (required of officials ranging from President down to postmaster), although seemingly more lenient, in some ways had broader implications.”).
207. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2543 (May 10, 1866) (statement of Rep. John Bingham) (raising pragmatic concerns about Section 3, including that it might “furnish demagogues a pretext for raising the howl” that Republicans were disfranchising rebels “only that we may control the next presidential election”); *id.* at 2540 (statement of Rep. John Farnsworth) (“I cannot regard this section [the House’s proposed version of Section 3] as of any practical value. I believe it to be difficult, if not impossible, of fulfillment; and I have fears that it may greatly embarrass, if not defeat, the adoption of the other sections should we pass it through this House.”); see also *id.* at 2461 (May 8, 1866) (statement of Rep. William Finck) (criticizing the House version as anti-reconciliation and partisan).
208. See Editorial, *The Constitutional Amendment in the Senate*, *supra* note 170; see also Editorial, *The Reconstruction Committee’s Amendment in the Senate*, *supra* note 170 (arguing that “[t]he Southern Legislatures would unquestionably refuse to ratify an amendment of which wholesale disfranchisement is the most prominent feature,” thereby dooming the “whole” of the proposed amendment).
209. Editorial, *The Reconstruction Committee’s Amendment in the Senate*, *supra* note 170.
210. General Amnesty Act, ch. 193, 17 Stat. 142 (1872).

in the postwar period. As should go without saying, formal equality was not the only value motivating lawmakers during this tumultuous period.

Section 3 calls to mind the Federal Deserter Act²¹¹ in that both measures showcased the punitive as opposed to the egalitarian aspect of radical political thought. Even as they drew on the philosophy of formal equality to support the immediate enfranchisement of black Americans, radicals relied on the same worldview to insist on the “degradation”²¹² of Confederates through their exclusion from political life. The final version of Section 3 stands as a pointed reminder of that outlook.

D. The Reconstruction Acts

The Reconstruction era’s simultaneous expansion and curtailment of voting rights was not limited to constitutional lawmaking. After the Fourteenth Amendment’s passage in Congress, almost all the Southern states initially refused to ratify the measure, largely based on opposition to the still-punitive final version of Section 3.²¹³ Congress needed a new blueprint for Reconstruction. The solution was the Military Reconstruction Act, enacted March 2, 1867.²¹⁴ The Act divided the former Confederacy into military districts and provided a path for Southern states to return to Congress. Besides requiring ratification of the Fourteenth Amendment, the Act mandated that the Southern states elect representatives to new state constitutional conventions. The results were truly historic. For the first time, large numbers of black Americans voted.

Yet the Act simultaneously extended and circumscribed the franchise. The crucial provision stated that the constitutions of reconstructed states would be drafted by delegates

elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election,

211. Federal Deserter Act, ch. 79, § 21, 13 Stat. 487, 490-91 (1865).

212. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (May 10, 1866) (statement of Rep. Thaddeus Stevens).

213. See FONER, *supra* note 49, at 268 (“Although many objected to the representation clause [Section 2] as an opening wedge for black suffrage, the section barring from office what one newspaper called ‘the best portion of our citizens’ [Section 3] aroused the strongest opposition.”).

214. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

except such as may be disfranchised for participation in the rebellion or for felony at common law.²¹⁵

Later, on March 23, 1867, Congress passed a supplemental measure that directed the Union generals governing the former Confederacy to create a register of eligible voters. The supplemental measure provided that all those registering to vote must take a series of oaths. One was “that I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States.”²¹⁶ Building on Section 3, other oaths required registrants to swear that they had never occupied a state or federal office before aiding the rebellion.²¹⁷ Because the foregoing statutes contained crime exceptions similar to Section 2’s, they show that Congress deliberately preserved disenfranchisement in Southern constitutional conventions and elections. All this is well known.²¹⁸

What is not well known is that these measures were the subject of a heated and fascinating debate. On January 7, 1867, when the Act was in early stages of consideration, Stevens proposed an amendment providing “that conviction for crime except for treason shall not take away the right to vote.”²¹⁹ Realizing that this proposal had raised eyebrows, Stevens asked the chamber to “indulge” him

²¹⁵ *Id.* § 5.

²¹⁶ Act of Mar. 23, 1867, ch. 6, § 1, 15 Stat. 2, 2.

²¹⁷ *See id.* This provision, like Section 3 of the Fourteenth Amendment, was animated in part by a sense that not all Confederates were equally culpable. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 1211 (Feb. 13, 1867) (statement of Rep. John Bingham) (arguing that widespread disenfranchisement of those who “aided the rebellion” would be unjust because many did so only “under an enforced conscription,” even though they actually “were friends of the Constitution”); *id.* at 815 (Jan. 28, 1867) (statement of Rep. Shelby Cullom) (“I think, sir, that the leaders of the rebellion should be cut off from participation either in elections or the right to hold office; but there are too many of those who engaged in the rebellion who did it because they were carried along by the force of popular excitement, and not from a disposition to destroy the Union.”); the Reconstruction Acts, 12 Op. Att’y Gen. 182, 204-05 (1867) (“A person forced into the rebel service by conscription . . . cannot be held to be disqualified from voting. . . . Forced contributions to the rebel cause . . . do not disqualify.”); The Reconstruction Acts, 12 Op. Att’y Gen. 141, 163 (1867) (“Nor must we forget that throughout these rebel States there were large classes of their population more or less opposed to the rebellious movement, and who were yet more or less necessarily involved in its support.”); *cf. supra* note 204 (discussing debates on Section 3).

²¹⁸ *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 48-52 (1974).

²¹⁹ CONG. GLOBE, 39th Cong., 2d Sess. 324 (Jan. 7, 1867) (statement of Rep. Thaddeus Stevens). Stevens’s proposed language read: “And no person shall be deprived of the right to vote or otherwise disfranchised by reason of conviction or punishment for any crime other than for insurrection or treason or misprision of treason.” *Id.*

so that his audience “may understand.”²²⁰ “I have received information,” Stevens explained, “that in North Carolina and other States where punishment at the whipping-post deprives the person of the right to vote, they are now every day whipping negroes for a thousand and one trivial offenses.”²²¹ Other radicals had expressed similar concerns during debates on the Fourteenth Amendment.²²² Now, based on the chilling revelation from North Carolina, Stevens argued that criminal disenfranchisement in the South should be limited to offenses similar to rebellion.²²³ Stevens believed this measure was necessary to prevent racists from disenfranchising blacks for petty or newly invented crimes. Representative Eliot (another radical) later moved to strike Stevens’s proposed language.²²⁴ In Eliot’s view, persons convicted of “murder, robbery, &c” should not vote.²²⁵ Stevens replied by repeating his own earlier rationale.²²⁶ Eliot yielded, saying that he would not “press” the issue.²²⁷

Though no Republican would have condoned the racist disenfranchisement Stevens described, Congress rejected Stevens’s impassioned proposal and instead preserved criminal disenfranchisement. In a major speech on January 16, Bingham thoroughly criticized Stevens’s draft, reserving his fiercest criticism for the proposed amendment on disenfranchisement.²²⁸ Saying that “a more monstrous atrocity never was presented in the form of legislation to the American Congress for its consideration,” Bingham quoted and paraphrased Stevens’s disenfranchisement proposal and reminded the House that the Act would establish conditions for admission into the Union.²²⁹ “What is this,”

220. *Id.*

221. *Id.*; see also JOINT COMM. ON RECONSTRUCTION, *Virginia, North Carolina, South Carolina*, in REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, pt. II, at 35 (1866) (testimony of Jonathan Roberts, Sheriff, Fairfax County, Virginia on January 31, 1866) (“They are now passing laws there to disfranchise men who have been voters there. They are passing vagrant laws on purpose to oppress the colored people . . .”).

222. See, e.g., *supra* text accompanying notes 122-123.

223. CONG. GLOBE, 39th Cong., 2d Sess. 324 (Jan. 7, 1867) (statement of Rep. Thaddeus Stevens).

224. *Id.* at 815 (Jan. 28, 1867) (statement of Rep. Thomas Eliot).

225. *Id.*

226. *Id.* at 815-16 (statement of Rep. Thaddeus Stevens).

227. *Id.* at 816 (statement of Rep. Thomas Eliot).

228. *Id.* at 503-04 (Jan. 16, 1867) (statement of Rep. John Bingham).

229. *Id.*; see also *id.* app. at 69 (Jan. 21, 1867) (statement of Rep. Elijah Hise) (attacking the radicals for enfranchising “felons and jail-birds”); *id.* at 451 (Jan. 14, 1867) (statement of Rep. John Bingham) (criticizing a draft of the Act, including because states would soon accept only “manhood, fidelity to the law, and citizenship” as prerequisites to voting); *cf.*

Bingham continued, “but asking this Congress to say in advance, if the insurgent States shall so frame their constitutions of State government, that thieves, robbers, and assassins shall never be deprived of the right of the elective franchise[,] it will be approved; otherwise their constitutions will be rejected.”²³⁰ Bingham’s critique relied not just on formal equality but also on principles of federalism and prudence. Still, the reaction sparked by Stevens’s failed proposal, as well as other statements of leading radicals,²³¹ leaves little doubt that at least some Republicans committed to black enfranchisement sought to preserve criminal disenfranchisement after the Fourteenth Amendment’s passage.

Criminal disenfranchisement again became the topic of debate when the House considered the conditions under which Southern states might be readmitted into the Union. On February 13, Bingham proposed a middle road between unlimited criminal disenfranchisement and Stevens’s suggestion of disenfranchising only traitors—namely, that the Southern states be required to enfranchise adult men “except such as may be disfranchised by reason of participation in rebellion or for felony at common law”²³² Echoing other Republicans opposed to mass disenfranchisement of rebels,²³³ Bingham reminded his audience that the Senate had rejected the House version of Section 3 and so had decided “against the proposition to disfranchise the whole body of men who participated in the late rebellion . . . until 1870.”²³⁴ Bingham concluded with yet another succinct statement of the philosophy of formal equality, praising “a Government that secures to every human being the equal protection of its laws; a Government that gives to all citizens who do not forfeit the privilege by crime, being male persons over twenty-one years resident therein, equal suffrage.”²³⁵ Distinguishing disenfranchisement for rebellion and for crime, Bingham favored only the latter.

KENDRICK, *supra* note 101, at 372 n.3 (calling Stevens’s proposal to curb criminal disenfranchisement “extraordinary”).

230. CONG. GLOBE, 39th Cong., 2d Sess. 504 (Jan. 16, 1867) (statement of Rep. John Bingham).

231. *See, e.g., id.* app. at 78-80 (Jan. 28, 1867) (statement of Rep. George Washington Julian) (“The citizen’s duty of allegiance and the nation’s obligation of protection are reciprocal. . . . [T]he citizen’s right of representation [may not be deprived] unless he himself forfeits it by his offenses against society . . .”).

232. CONG. GLOBE, 39th Cong., 2d Sess. 1211 (Feb. 13, 1867) (statement of Rep. John Bingham).

233. Others said that mass disenfranchisement itself was inconsistent with rule by “the consent of the governed,” and that Section 3 and the collateral effects of the war had already “humiliated” former Confederates. *See id.* at 1564 (Feb. 19, 1867) (statement of Sen. John Sherman).

234. *Id.* at 1212 (Feb. 13, 1867) (statement of Rep. John Bingham).

235. *Id.*

As ultimately enacted on March 2 over President Johnson's veto,²³⁶ the Military Reconstruction Act adopted Bingham's proposed language and so implemented a kind of compromise. Whereas Section 2's "other crime" phrase exempted all criminal disenfranchisement from the apportionment penalty and Stevens's proposal would have prohibited criminal disenfranchisement only for treason, the Act and its supplemental legislation took a middle path, permitting disenfranchisement only for conviction of a "felony at common law"²³⁷ or simply a "felony."²³⁸ The resulting state conventions likewise produced new constitutions with race-neutral suffrage and felon disenfranchisement.²³⁹ Congress later admitted these states while imposing a "fundamental condition" that they never constrict their franchises for reasons other than "felonies at common law."²⁴⁰ For the first time, broad felon disenfranchisement laws became the nationwide norm, including in the South.²⁴¹

The Reconstruction Act's relatively narrow references to "felony" disenfranchisement addressed Stevens's concern that the former slaves were being unjustly disenfranchised for "a thousand and one trivial offenses."²⁴² As Bingham put it, "The governments of the rebel states cannot make a man a

236. For an account of the bill's turbulent progress, see BENEDICT, *supra* note 52, at 216-43.

237. An Act To Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, § 5, 14 Stat. 428, 429 (1867).

238. Act of Mar. 23, 1867, ch. 6, § 1, 15 Stat. 2, 2 (amending the Military Reconstruction Act).

239. For example, Louisiana disenfranchised those guilty of "treason, perjury, forgery, bribery, or other crime punishable in the penitentiary . . ." LA. CONST. of 1868 art. 99 (adopted Mar. 8, 1868); *see generally* KEYSSAR, *supra* note 44, app. tbl. A.15 (compiling the era's disenfranchisement laws).

240. The states' constitutions were never to "be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law." An Act To Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868); *see also* An Act To Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act To Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); An Act To Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870). These requirements were widely viewed as legally unenforceable. *See* KLARMAN, *supra* note 44, at 29 & n.68.

241. *See* MANZA & UGGEN, *supra* note 44, at 49 fig. 2.1.

242. *See supra* text accompanying note 221. Imitating Section 2, the Act evolved from a simple negative prohibition to an affirmative one with a rebellion exception, and finally gained a crime exception as well. *See* CONG. GLOBE, 39th Cong., 2d Sess. 1176-77, 1182, 1211-14 (Feb. 12-13, 1867) (discussing the "Blaine Amendment"). The proper approach and exceptions continued to be a subject of debate. *See, e.g., id.* at 1384 (Feb. 15, 1867) (statement of Sen. John Henderson); *id.* at 1378 (statement of Sen. Henry Lane).

felon by statute who is not such at common law.”²⁴³ In other words, the Republicans realized – as later events would bear out²⁴⁴ – that it was easier both to invent and to prosecute trumped-up misdemeanor offenses like vagrancy, as compared with more serious and well-recognized common law crimes, such as murder.²⁴⁵ Congress’s views on criminal disenfranchisement thus appear to have changed after the passage of Section 2. Whereas broad criminal disenfranchisement powers may have seemed conducive to racial equality when wielded by the federal government, it later became apparent that placing those same powers in the hands of Southern states posed a major threat to racial justice. The Republicans came to realize that their commitment to formal equality pulled in divergent directions.

Bingham’s role in drafting the Act exemplifies the irony of egalitarian disenfranchisement. He insisted on the legitimacy of felon disenfranchisement in the South, even after hearing Stevens’s contrary arguments.²⁴⁶ Yet he also championed race-blind voting rights in elections to select representatives to the new state constitutional conventions. His statutory amendment – which, again, was ultimately included as a cornerstone of the Act – addressed both points. Bingham explained the connection in a compact passage. The “emancipated slaves” were finally to be “righteously clothed with the highest rights of citizens of the Republic.”²⁴⁷ This outcome was the product of republican governance and its requirement that “every man, being a citizen of the United States, shall have equal rights and full and equal protection until he forfeits it by crime”²⁴⁸ Once again, black enfranchisement and criminal disenfranchisement advanced together in the Reconstruction era.

243. CONG. GLOBE, 39th Cong., 2d Sess. 1328 (Feb. 18, 1867) (statement of Rep. John Bingham); see also *id.* (“Mr. Bingham: Does the gentleman say he objects to the disfranchisement of any man after conviction of felony at common law? Mr. Banks: I do not object . . .”).

244. See Shapiro, *supra* note 23, at 542 n.26 (explaining that Southern states’ selection of disenfranchisement crimes, including what would have been petty offenses in Northern states, was designed to facilitate easy convictions of blacks (citing JOHN L. LOVE, *THE DISENFRANCHISEMENT OF THE NEGRO* 16 (1899); and John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM. POL. SCI. REV. 17, 25-27 (1906))).

245. See Ewald, *supra* note 73, at 1094-95 (discussing *Ratliff v. Beale*, 20 So. 865, 867-68 (Miss. 1896)).

246. See *supra* text accompanying note 228-230.

247. CONG. GLOBE, 39th Cong., 2d Sess. 1211 (Feb. 13, 1867) (statement of Rep. John Bingham).

248. *Id.*

E. The Fifteenth Amendment

In 1868, Republican presidential candidate Ulysses S. Grant won a resounding victory in the Electoral College. Yet Grant bested his rival by only 300,000 popular votes—fewer than the 450,000 Southern blacks who overwhelmingly voted Republican.²⁴⁹ The returns provided an arresting glimpse into the potential power of black voters, including in the North.²⁵⁰ What had so recently seemed impossible suddenly became a partisan necessity: black Americans had to be provided a constitutional right to vote.²⁵¹ Criminal disenfranchisement played a central role in the ensuing debates. In short, radical Republicans argued that the former slaves should be included in the body politic for the same reason that criminals were to be excluded from it.

With a few notable exceptions,²⁵² Republicans offered Congress two approaches to what would become the Fifteenth Amendment: an affirmative approach and a negative approach.²⁵³ Under the affirmative approach, many

249. GILLETTE, *supra* note 88, at 40.

250. *Id.* at 80 (“Democrats and Republicans alike clearly recognized the strategic importance of the northern Negro vote.”).

251. *See id.*

252. Some marginal proposals mandated formal parity in the franchise. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1308 (Feb. 17, 1869) (statement of Sen. Jacob Howard) (proposing that citizens “of African descent shall have the same right to vote and hold office in States and Territories as other citizens”); *id.* at 1306 (statement of Sen. Joseph Fowler) (proposing forbidding “the right of citizens of the United States to vote and hold office” from being abridged or denied); *id.* at 708 (Jan. 29, 1869) (statement of Sen. Samuel Pomeroy read by Sen. Benjamin Wade) (proposing forbidding disenfranchisement “for any reasons not equally applicable to all citizens”); *see also id.* at 1305 (Feb. 17, 1869) (statement of Sen. James Doolittle) (proposing adding “[n]or shall any citizen be so denied, by reason of any alleged crime, unless duly convicted thereof by the verdict of an impartial jury” to the eventually adopted text of the Fifteenth Amendment).

253. *See* CONG. GLOBE, 40th Cong., 3d Sess. 863 (Feb. 4, 1869) (statement of Sen. Oliver Morton) (“I would prefer an affirmative amendment, an amendment declaring who shall have the right to vote, not a negation but an affirmation . . .”); *id.* app. at 97 (Jan. 29, 1869) (statement of Rep. Samuel Shellabarger). Professor William Gillette recognized a difference between “affirmative” and “negative” drafts, but viewed some drafts as “essentially” negative simply because they included negative terms (e.g., “shall not”), even if their overall effect was to establish a general right to vote (e.g., “states shall not violate the right to vote”). *See* GILLETTE, *supra* note 88, at 53–58. Consistent with Gillette’s categorization, Reconstruction figures did sometimes call drafts more or less “negative” based on the mere presence of negative language; but when they did so, they also took pains to emphasize the “essential” and, from a legal point of view, far more meaningful distinction between drafts that banned specific voting qualifications (what the main text calls negative) and drafts that banned all voting qualifications, subject to exceptions (affirmative). CONG. GLOBE 40th Cong., 3d Sess. app. at 97 (Jan. 29, 1869) (statement of Rep. Samuel Shellabarger).

Republicans (including Bingham)²⁵⁴ wanted the Fifteenth Amendment to establish a relatively comprehensive federal right to vote, subject to a limited set of delineated voting qualifications.²⁵⁵ This affirmative approach would protect against property, literacy, nativity, and religious qualifications, as well as grandfather clauses and other voting qualifications not yet imagined.²⁵⁶ Like any other form of restriction on the affirmatively described right to vote, criminal disenfranchisement would survive only if it received an express exemption. By contrast, the “negative” approach would prohibit only specifically repudiated qualifications, such as race.²⁵⁷ While it could have sweeping implications if a wide range of prohibited qualifications were listed, as some radicals proposed,²⁵⁸ the negative approach would preserve the states’

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254. CONG. GLOBE, 40th Cong., 3d Sess. 728 (Jan. 29, 1869) (affirmative structure); *id.* at 638 (Jan. 27, 1869) (same). Bingham and Boutwell also sometimes proposed negative formulations, including ones with lengthy lists of prohibited qualifications. *Id.* at 1425-27 (Feb. 20, 1869) (proposals ranging from a simple negative formulation prohibiting racial disenfranchisement to a negative formulation prohibiting disenfranchisement for “race, color, nativity, property, creed, or previous condition of servitude”); *see id.* at 694 (Jan. 28, 1869) (statement of Rep. Samuel McKee) (“infamous crimes” exception).
255. *See, e.g., id.* at 728 (Jan. 29, 1869) (statement of Rep. Samuel Shellabarger) (“No State shall make or enforce *any law* which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have his actual residence, such right to vote to be under such regulations as shall be prescribed by law, *except* to such as have engaged, or may hereafter engage, in *insurrection or rebellion* against the United States, and to such as *shall be duly convicted of infamous crime.*” (emphases added)); *id.* (statement of Rep. John Bingham) (“No State shall make or enforce *any law* which shall abridge or deny to any male citizen of the United States of sound mind and twenty-one years of age or upward the equal exercise, *subject to* such registration laws as the State may establish, of the elective franchise at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, *except* such of said citizens as shall engage in rebellion or insurrection, or who may have been, or shall be, duly convicted of treason or *other infamous crime.*” (emphases added)).
256. For Republicans expressing these concerns, *see supra* note 122.
257. *See, e.g.,* CONG. GLOBE, 40th Cong., 3d Sess. 542 (Jan. 23, 1869) (Senate Judiciary Committee proposal); *id.* at 378-79 (Jan. 15, 1869) (statement of Sen. William Stewart) (“Stewart Proposal”). *See generally* GILLETTE, *supra* note 88, at 55-57 (summarizing differences between the two approaches). Sumner proposed a substitute version that, among other things, forbade disenfranchisement “under any pretense of race or color.” CONG. GLOBE, 40th Cong., 3d Sess. 1041 (Feb. 9, 1869).
258. *See supra* note 254; *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1009 (Feb. 8, 1869) (statement of Sen. Henry Wilson) (“race, color, nativity, property, education, or religious belief”).

traditional default control over suffrage qualifications.²⁵⁹ In other words, the negative approach would leave intact any voting qualification not expressly mentioned. No special exemption would be necessary.

Radicals advocating the affirmative approach consistently specified that any new federal right to vote would not extend to serious criminals. For example, on January 29, 1869, Shellabarger proposed language permitting disenfranchisement for those “duly convicted of treason, felony, or other infamous crime.”²⁶⁰ Bingham proposed substantially identical language,²⁶¹ as well as language permitting disenfranchisement for “treason or other crime of the grade of felony at common law.”²⁶² In the Senate, Warner likewise proposed language that protected state disenfranchisement laws for those convicted of “treason, felony, or other infamous crime”²⁶³ and for “treason or other crime of the grade of felony at common law.”²⁶⁴

These drafts demonstrate that even the strongest proponents of broad enfranchisement took care to ensure that the Fifteenth Amendment would leave room for criminal disenfranchisement. All sides in the debates leading up to the Fifteenth Amendment understood that felon disenfranchisement would

259. The Fifteenth Amendment’s opponents gave many speeches invoking federalism principles. See, e.g., *id.* at 708 (Jan. 29, 1869) (statement of Sen. James Dixon).

260. Shellabarger’s exceptions clause at that time read in its entirety: “[E]xcept to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.” *Id.* app. at 97 (Jan. 29, 1869) (statement of Rep. Samuel Shellabarger). Shellabarger explained that the point of his draft was to cabin Southern discretion to use literacy, intelligence, or property tests to perpetuate black disenfranchisement. *Id.* Others proposed substantially identical language. See *id.* at 728 (Jan. 29, 1869) (statement of Rep. John Bingham); see also *id.* at 1426 (Feb. 20, 1869) (statement of Rep. George Boutwell) (proposing “infamous crime” language); *id.* at 1029 (Feb. 9, 1869) (statement of Sen. Frederick Sawyer) (same). After Boutwell proposed a prohibition on education and property qualifications, Bingham argued that those prohibitions would imply that other forms of voting qualifications, such as religious qualifications, were permissible. See *id.* at 726-28 (Jan. 29, 1869). Bingham’s fear of inferences from negative implication resembled Sumner’s. See *supra* notes 108-109 and accompanying text.

261. See *supra* note 255.

262. CONG. GLOBE, 40th Cong., 3d Sess. 638 (Jan. 27, 1869).

263. *Id.* at 861 (Feb. 4, 1869) (statement of Sen. Willard Warner); see also *id.* at 1041 (Feb. 9, 1869) (statement of Sen. Willard Warner) (proposing a draft whereby every “male citizen” would have an equal right to vote unless disenfranchised for “treason or other crime of the grade of felony at common law”). Warner argued in favor of the affirmative approach, pointing out that “nine tenths of [Southern blacks] might be prevented from voting and holding office by the requirement on the part of the States or of the United States of an intelligence or property qualification.” *Id.* at 862 (Feb. 4, 1869) (statement of Sen. Willard Warner).

264. *Id.* at 1041 (Feb. 9, 1869) (statement of Sen. Willard Warner).

be protected—either explicitly, by including express exemptions (the affirmative approach), or implicitly, by leaving intact the states’ broad default authority over suffrage (the negative approach).

To be sure, the competing drafts would have permitted criminal disenfranchisement to varying degrees. Most affirmative formulations would have confined disenfranchisement to certain types of crime, such as felonies at common law or “infamous” crimes. These proposals would have forbidden disenfranchisement for most or all misdemeanors. In contrast, the negative versions typically omitted any mention of criminal disenfranchisement and so did not prohibit it. The more confining affirmative drafts, like similar drafts of Section 2 and the Reconstruction Acts, may have sprung from a fear that Southerners were using disenfranchisement for petty offenses to oppress black voters. These drafts also reflected a belief that the right to vote can be forfeited only through serious crime.

In the end, the Fifteenth Amendment adopted the negative approach without mentioning criminal disenfranchisement: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”²⁶⁵ Though this provision was negatively structured, whereas Section 2 was affirmatively structured, both provisions exhibited a broadly permissive attitude toward criminal disenfranchisement.²⁶⁶ Moreover, the Fifteenth Amendment’s drafting process resembles that of Section 2. As proposed by the Joint Committee on Reconstruction and introduced in January of 1866, the Fourteenth Amendment’s Section 2 would have 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.”²⁶⁷ This proposed language closely parallels the final version of the Fifteenth Amendment. Both the draft version of Section 2 and the final version of the Fifteenth Amendment exhibited a negative structure in that they prohibited a specified voting qualification. By contrast, the final version of Section 2 and the radical drafts of the Fifteenth Amendment both displayed an affirmative structure in that they established broad protections for voting

²⁶⁵ U.S. CONST. amend XV, § 1.

²⁶⁶ See CONG. GLOBE, 40th Cong., 3d Sess. 863 (Feb. 4, 1869) (statement of Sen. Oliver Morton) (comparing the affirmative and negative approaches and ruefully explaining that the negative approach preserves states’ authority to disenfranchise “for other reasons save and except those mentioned” in the Amendment); GILLETTE, *supra* note 88, at 71 (asserting that the Fifteenth Amendment was “a moderate one in that its wording was negative”).

²⁶⁷ CONG. GLOBE, 39th Cong., 1st Sess. 351 (Jan. 22, 1866).

rights—subject only to limited exceptions, including for criminal disenfranchisement.

Criminal disenfranchisement was also frequently discussed during the debates on the Fifteenth Amendment. Consider the remarks of Ohio Representative James Ashley in December 1867, when the Fourteenth Amendment was nearing ratification and consideration of what would become the Fifteenth Amendment was still in its nascent stages. In a party known for its radicals, few could match Ashley in prominence and fervor. He had submitted the first draft of the Thirteenth Amendment²⁶⁸ and had been one of the earliest and most zealous advocates of impeaching President Johnson.²⁶⁹ True to form, in 1867, Ashley proposed an amendment extending the franchise to all residents, including women; repealing Section 2's apportionment penalty, which he ridiculed as a coward's half-measure; and creating a constitutional right to public education.²⁷⁰ Yet Ashley's proposed amendment made no bones about the propriety of disenfranchising common law felons. "Each state," Ashley's proposal read, "may disenfranchise any person for participation in rebellion against the United States, or for the commission of an act which is felony at common law."²⁷¹

Ashley drew on John Stuart Mill's 1861 *Considerations on Representative Government*, which argued that the elective franchise is best viewed not as an individual right but rather as a moral "trust" shared by all citizens.²⁷² Ashley explained that he "would withhold the ballot from no citizen of mature years, black or white, native or foreign born, without good cause" and that he would "plead for the equal rights of all before the law."²⁷³ Explicitly borrowing from Mill's writings in support of criminal disenfranchisement, Ashley made clear that he too "would not secure the ballot to barbarians, to uncivilized Indians or Indians while in the tribal relation, nor to persons *non compos*, but to all citizens 'not disqualified,' as John St[u]art Mill expresses it, 'by their own default.'"²⁷⁴

268. CONG. GLOBE, 38th Cong., 1st Sess. 19 (Dec. 16, 1863).

269. See generally ROBERT F. HOROWITZ, *THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY* (1979).

270. CONG. GLOBE, 40th Cong. 2d Sess. 117 (Dec. 10, 1867).

271. *Id.*

272. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (London, Parker, Son & Brown 1861). Henry Adams later concluded that the Fifteenth Amendment had implicitly denied "the dogma that suffrage is a natural right, and not a trust" in part because "[e]ducation and even property qualifications are not excluded" by it. See GILLETTE, *supra* note 88, at 76.

273. CONG. GLOBE, 40th Cong., 2d Sess. 119 (Dec. 10, 1867) (statement of Rep. James Ashley).

274. *Id.* at 118 (statement of Rep. James Ashley).

Ashley elaborated on this broad but pointedly limited conception of the franchise:

[I]t is remembered that citizenship, as we of the Republican party contend, makes the person on whom it is conferred a member of this great nation, that the privilege of franchise, which we contend ought also to be conferred and guaranteed with citizenship, constitutes him the equal of the native born citizen . . . [and] that with this citizenship, he has rights and duties, privileges and immunities, which cannot be taken away “except by his own default”²⁷⁵

This is an eloquent statement of the logic of formal equality. In “this great nation,” the newly naturalized citizen is “equal to the native born” because both are equal citizens before the law. But a criminal’s own “default” sets him apart in the eyes of the law. Ashley makes this point repeatedly, noting at one juncture, “Of course I refer to citizens who are guiltless of crime”²⁷⁶

Exhibiting the irony of egalitarian disenfranchisement, Ashley espoused a philosophy of both exaltation and degradation. While arguing fervently against limitations on the right to vote based on race, property, and education, Ashley repeatedly, sometimes in the very same breath,²⁷⁷ endorsed criminal disenfranchisement.²⁷⁸ Far from committing any wrong, Ashley explained, the former slaves had volunteered in large numbers to fight for the Union in the Civil War.²⁷⁹ In contrast, felons declared themselves enemies of the lawful political order and so replicated in miniature the Confederacy’s rebellion against legitimate government.

Ashley was hardly alone in combining a radically expansive conception of the elective franchise with a commitment to criminal disenfranchisement. Similar or identical views were expounded by many radical Republicans during the weeks leading up to the passage of the Fifteenth Amendment on February 26, 1869.

On January 27, 1869, Illinois Representative Shelby Cullom blessed criminal disenfranchisement even as he bemoaned Section 2 for impliedly

²⁷⁵. *Id.*

²⁷⁶. *Id.* at 117.

²⁷⁷. For example, Ashley argued for a right to vote “which would exclude no one of any race or nationality except for the commission of crime.” *Id.* at 118.

²⁷⁸. *Id.* at 119.

²⁷⁹. *Id.* (“Sir, if, after all the loyal white and black men of the South have done for this nation during the late rebellion, the Republican party should now abandon them, I must abandon it.”).

condoning racial disenfranchisement. Cullom said bluntly, “A State has the right to disfranchise its felons, but it has no right to disfranchise its citizens on account of race, color, or previous condition of slavery.”²⁸⁰ Government rules with “the consent of the governed,” Cullom explained, and so “[h]e who is subject to law, helps to uphold it, and performs all the duties of a citizen, shall have the right to vote in its affairs.”²⁸¹ Those properly enfranchised included “the rich,” “the poor,” “the uneducated”—indeed, “all classes in the State of sound mind and not felons.”²⁸²

On January 28, 1869, South Carolina Representative Manuel Corley explained that any republic must be ruled with the “consent of the governed.”²⁸³ He therefore concluded that no citizen, including women, should be excluded from the body politic—“except for rebellion or crime,” in which case the individual has broken the social compact.²⁸⁴ Corley’s language borrowed from Section 2’s “crime” exception and so indicated that Section 2’s endorsement of criminal disenfranchisement would survive the Fifteenth Amendment.

On January 29, 1869, Senator Samuel Pomeroy of Kansas argued that “the strength of the Republican party consists in its adherence to principle”—namely, the principle of “equality of rights among men.”²⁸⁵ Pomeroy condemned the “monstrous inconsistency”²⁸⁶ of slavery, argued from the “consent of the governed,” extolled women’s enfranchisement, and invoked John Stuart Mill.²⁸⁷ Yet for all his fervor, Pomeroy supported only the enfranchisement of those who “discharge[] faithfully the duties of a citizen” and opposed only the disenfranchisement of “any innocent citizen.”²⁸⁸

280. CONG. GLOBE, 40th Cong., 3d Sess. 651 (Jan. 27, 1869) (statement of Rep. Shelby Cullom).

281. *Id.*

282. *Id.*

283. *Id.* app. at 94 (Jan. 28, 1869) (statement of Rep. Manuel Corley).

284. *Id.* Corley endorsed women’s enfranchisement, saying, for example, “We wish to make her legally responsible for treason, as she is for other crimes.” *Id.*

285. *Id.* at 708 (Jan. 29, 1869) (statement of Sen. Samuel Pomeroy).

286. *Id.* at 709.

287. *Id.* at 710.

288. *Id.* at 709–10; *see also id.* at 906 (Feb. 5, 1869) (statement of Sen. Samuel Pomeroy) (stating, while discussing the disenfranchisement of Southerners, “I am for extending suffrage to all persons not convicted of crime, and I want it placed in the Constitution”); CONG. GLOBE, 39th Cong., 2d Sess. 43 (Dec. 10, 1866) (statement of Sen. Samuel Pomeroy) (“I shall vote to give the ballot to every man of the prescribed age and of the proper residence who has not been found guilty of a crime.”).

Also on January 29, Republican Representative Christopher Bowen of South Carolina drew on formal equality in order to oppose not just racial but also class-based constraints on suffrage:

Sir, in my opinion, in this age of progress, the time has now come that the Constitution of these United States should be so amended as to give to every citizen . . . whether white or black, that right sacred and dear to every American citizen—the right of suffrage. Sir, is poverty or color a crime, that it should deprive an American citizen of this boon?²⁸⁹

To answer Bowen’s rhetorical question, neither “poverty” nor “color” was viewed as a “crime” meriting disenfranchisement. Rather, they were deemed conditions or statuses—and illegitimate qualifications for the elective franchise.

On January 30, 1869, Representative John Broomall of Pennsylvania²⁹⁰ explained that everyone should have “an equal voice in making and administering the laws, unless debarred for violating those laws; and in this I make no distinction of wealth, intelligence, race, family, or sex.”²⁹¹ Broomall accordingly supported an “amendment to the Constitution securing to all citizens of full age, without regard to sex, an equal voice in making and administering the laws under which they live, to be forfeited only for crime.”²⁹² At that time, a “just nation, founded upon the full and free consent of the citizens, will be no longer a dream . . .”²⁹³

On February 4, Alabama Senator Willard Warner defended an affirmatively structured draft amendment on the ground that it would eliminate “aristocracies” of “birth,” “wealth,” and “learning.”²⁹⁴ He explained that American government is based “on the idea that the right of self-government is inherent in manhood,” and that “each individual” deserved “an equal share of political power.”²⁹⁵ Warner concluded, “I am in favor of giving equally to all citizens of the Republic of sound mind and unstained by great crimes the right

²⁸⁹. CONG. GLOBE, 40th Cong., 3d Sess. app. at 96 (Jan. 29, 1869) (statement of Rep. Christopher Bowen).

²⁹⁰. In 1866, Broomall had significantly participated in the debates over Section 2. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1262-65 (Mar. 8, 1866) (statement of Rep. John Broomall).

²⁹¹. CONG. GLOBE, 40th Cong., 3d Sess. app. at 102 (Jan. 30, 1869) (statement of Rep. John Broomall).

²⁹². *Id.* app. at 103.

²⁹³. *Id.*

²⁹⁴. *Id.* at 861 (Feb. 4, 1869) (statement of Sen. Willard Warner).

²⁹⁵. *Id.*

to vote and hold office.”²⁹⁶ Warner’s primary regret was that his era was not yet ready for women’s enfranchisement.²⁹⁷

On February 8, Ohio Senator John Sherman outlined five widely employed but, in his view, inappropriate “causes of exclusion” from the franchise—namely, race, property, religion, nativity, and education.²⁹⁸ Sherman argued at length that “it would be wiser and better to declare that every male citizen of the United States, native or naturalized, above the age of twenty one years, shall have the right to vote, unless he is excluded for crime”²⁹⁹ Sherman underscored his exception, noting that disenfranchisement is inappropriate “unless where the right has been forfeited by crime.”³⁰⁰

Steeped in the philosophy of formal equality, these radical legislators viewed race (and often class, nativity, and sex) as mere statuses unlike morally culpable crimes meriting disenfranchisement. Radicals accordingly justified criminal disenfranchisement even while advocating major suffrage reforms, some of which would become law only many decades later. Their repeated statements are especially noteworthy because no proposal up for debate would have eliminated criminal disenfranchisement. Rather, the radicals discussed criminal disenfranchisement to explain and defend their affirmative conception of what it meant to have constitutional equality in the electoral franchise.

Conservative legislators were indifferent to formal equality and tended to oppose all federal regulation of the franchise as unwarranted intrusions into state sovereignty. For them, criminal disenfranchisement was not in a special moral category so much as it was another example of legitimate state prerogatives. To the limited extent that Democrats and conservative Republicans did single out criminal disenfranchisement, they, too, viewed it as a paradigm of legitimacy.³⁰¹ Consider Senator Doolittle’s unique hybrid draft combining a narrow prohibition on racial discrimination with an apparently

296. *Id.* at 862. Warner was alert to the practical dangers of allowing criminal disenfranchisement. *Id.* (explaining that the power to disenfranchise “may be used to build up an aristocracy,” whereas “[t]o give to States the power to disfranchise and disqualify for crime is a very limited and possibly not dangerous concession”).

297. *Id.*

298. *Id.* at 1013 (Feb. 8, 1869) (statement of Sen. John Sherman).

299. *Id.*

300. *Id.*

301. *See, e.g., id.* at 1305 (Feb. 17, 1869) (statement of Sen. James Doolittle) (opposing the “disfranchisement and exclusion of members of the superior race, unless they are convicted of crimes”).

redundant exemption for criminal disenfranchisement.³⁰² Doolittle had allied with President Johnson, opposed the Reconstruction Amendments, and often made openly racist statements on the floor.³⁰³ Why was Doolittle proposing drafts of the Fifteenth Amendment? Fearful of racist disenfranchisement, Republicans had proposed that disenfranchisement be confined to persons convicted of some crime.³⁰⁴ Doolittle co-opted this idea. By proposing that disenfranchisement be limited to those “duly convicted” of “crime,” Doolittle’s proposal purported to invalidate the federally mandated “loyalty oaths” that disenfranchised many Confederates, even if they had not been convicted of any crime.³⁰⁵ In other words, Doolittle hoped to highlight a tension between the radicals’ solicitude for former slaves and their eagerness to punish rebels.

To be sure, some prominent figures supported substantial voting reform yet balked at the full implications of the philosophy of formal equality.³⁰⁶ The most well-known example is Elizabeth Cady Stanton, who cast the Fifteenth Amendment in a decidedly negative light while arguing for women’s enfranchisement. Stanton asserted that “American women of wealth, education, virtue and refinement” should oppose the Fifteenth Amendment until they, too, might be enfranchised, lest “the lower orders of Chinese, Africans, Germans and Irish, with their low ideas of womanhood . . . make laws for you and your daughters.”³⁰⁷ Having abandoned the reasoning of formal equality, Stanton’s remarks reflected an understanding of virtue and vice driven by racist and other status-based prejudices. But Stanton’s arguments were also designed to take advantage of widespread Republican

302. See *id.* (“The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; nor shall any citizen be so denied, by reason of any alleged crime, unless duly convicted thereof by the verdict of an impartial jury.”). After Sen. Doolittle proposed this language, Senator Charles Buckalew asked if Doolittle would modify the last part of the sentence to read “duly convicted thereof according to law,” and Doolittle agreed. *Id.*

303. See, e.g., *id.* at 1010 (Feb. 8, 1869) (statement of Sen. James Doolittle) (arguing against black enfranchisement based on a racial supremacy theory); *id.* app. at 151.

304. See *supra* note 255 and accompanying text.

305. See CONG. GLOBE, 40th Cong., 3d Sess. 1305 (Feb. 17, 1869) (statement of Sen. James Doolittle).

306. See, e.g., *id.* at 901 (Feb. 5, 1869) (statement of Sen. George Williams) (condemning the “political filth and moral pollution” of Asian immigrant voters); *id.* at 862 (Feb. 4, 1869) (statement of Sen. Willard Warner).

307. Elizabeth Cady Stanton, *The Sixteenth Amendment*, REVOLUTION, Apr. 29, 1869, at 3; see also DUBOIS, *supra* note 166, at 178–79.

support for literacy and education qualifications, which, for many, seemed consistent with formal equality's prioritization of act over status.³⁰⁸

Republican views on literacy and educational tests were captured in an important paper by Charles Francis Adams, Jr. The piece assumed the contractarian premise that "the existence of caste is manifestly inconsistent with any theory of human equality" as well as with "the consent of the governed."³⁰⁹ Adams then accepted (albeit somewhat ruefully) that it was both inevitable and right that the franchise be extended without regard to race, sex, nativity, and property. Yet Adams bemoaned the Fifteenth Amendment and fretted that "Universal Suffrage can only mean in plain English the government of ignorance and vice."³¹⁰ Adams's solution was to insist on literacy and other educational qualifications.³¹¹ In the view of many Republicans, these so-called intelligence tests resembled criminal laws in that they rewarded achievement while punishing bad conduct. Adams accordingly extolled "the ideal Government founded on the popular consent" where "[n]o barrier to a purified suffrage will be recognized which cannot be surmounted by the moderate efforts of average humanity" and where "the highest privilege of the citizen, at once a right and a reward, will be given or refused on principles of even justice."³¹² This argument echoes Sumner's vision of an "accessible" franchise without "insurmountable" barriers.³¹³

Of course, formal equality was not the only guiding principle in the Reconstruction Congress. Consider California Congressman William Higby's statement on March 3 that "[i]n the fourteenth article we deny to the common felon and the traitor the right to vote."³¹⁴ Insisting that blacks should not be grouped "on the side with the felons and traitors," Higby asked, "[w]hy do we

308. See KEYSSAR, *supra* note 44, at 78-79; see also, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 98-99 (Dec. 13, 1866) (statement of Sen. Lafayette Foster) (supporting both women's enfranchisement and literacy tests). But see CONG. GLOBE, 40th Cong., 3d Sess. app. at 94 (Jan. 28, 1869) (statement of Rep. Manuel Corley); CONG. GLOBE, 39th Cong., 2d Sess. 350-51 (Jan. 8, 1867) (statement of Rep. John Broomall) (opposing literacy tests and pointing out that illiteracy among Southern blacks was largely due to Southern laws criminalizing the education of blacks).

309. See Charles Francis Adams, Jr., *The Protection of the Ballot in National Elections*, 1 J. SOC. SCI. 91, 104-05 (1869).

310. *Id.* at 108.

311. *Id.* at 111 ("Our efforts should be devoted to the practical development of these two principles of intelligence and impartiality in the suffrage . . .").

312. *Id.*

313. See *supra* text accompanying notes 110-118.

314. CONG. GLOBE, 40th Cong., 3d Sess. app. at 295 (Mar. 3, 1869).

deny the right to these classes?”³¹⁵ The answer: “In part as a penalty and in part to disarm dangerous men of power.”³¹⁶ Higby’s express endorsement of “felon” disenfranchisement as a legitimate “penalty” is best understood as an expression of formal equality; yet, Higby also adverted to “traitors” and the practical need to disempower “dangerous” Confederates. Plainly, Higby’s views on criminal disenfranchisement, like those of his contemporaries and of Americans today, cannot be reduced to any simple formula. Manifold considerations of justice, law, and politics influenced all the tumultuous events of Reconstruction, including Republican voting reforms.

The philosophy of formal equality nonetheless played a key role in the making of the Reconstruction Amendments and had special force for the most radical members of Congress. Criminal disenfranchisement was the logical consequence of the new equality of suffrage envisioned by Congress’s most radical progressives. The debates that gave rise to the Fifteenth Amendment accordingly included not just public justifications for racial *enfranchisement*, but also widely accepted reasons for criminal *disenfranchisement*.

II. THE LAW OF CRIMINAL DISENFRANCHISEMENT

The irony of egalitarian disenfranchisement sheds light on significant and ongoing legal debates. While the analysis that follows is based in large part on history, it is not just for originalists: today, even nonoriginalists agree that history is important to constitutional interpretation.³¹⁷ At least since the Supreme Court’s 1974 decision in *Richardson v. Ramirez*,³¹⁸ historical arguments have played a central role in the law of criminal disenfranchisement. This Part draws on the historical link between voting and vice to explore four clusters of arguments discussed in scholarship and case law. The result is a new and stronger justification for criminal disenfranchisement’s lawfulness—at least in connection with serious crimes.

315. *Id.*

316. *Id.*

317. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636–37 (2008) (Stevens, J., dissenting); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (discussing an emerging consensus that originalism is integral to constitutional interpretation); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (same).

318. 418 U.S. 24, 54 (1974).

A. Originalism and the “Affirmative Sanction”

Richardson v. Ramirez is the foundational Supreme Court precedent upholding the constitutionality of criminal disenfranchisement. The case involved a California statute that disenfranchised those who had committed “infamous crimes.” A class of convicted felons sued the State, claiming that the statute violated their fundamental right to vote as protected by the Equal Protection Clause of the Fourteenth Amendment. In response, the Court noted that Section 2 exempted from its apportionment penalty disenfranchisement for “crime.”³¹⁹ The Court then reasoned that the Equal Protection Clause contained in Section 1 “could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation” provided for in Section 2.³²⁰ The crime exception accordingly constituted an “affirmative sanction” for felon disenfranchisement, immunizing the practice from constitutional challenges based on the fundamental right to vote. After canvassing a range of additional historical sources, the Court concluded, “We hold that the understanding of those who adopted the Fourteenth Amendment . . . is of controlling significance.”³²¹ Just over a decade later in *Hunter v. Underwood*, the Court used even stronger language in referring to the “implicit authorization of § 2 to deny the vote to citizens ‘for participation in rebellion, or other crime.’”³²²

Ramirez has been criticized for relying on constitutional text alone to establish that there is something “affirmative” about Section 2’s “other crime” exception. As a number of Second Circuit judges explained, “Declining to prohibit something is not the same as protecting it.”³²³ And Section 2 is not even a prohibition; instead, it provides that disenfranchising states may suffer a loss of representation in Congress. As a logical matter, Congress could have created exceptions to that specialized penalty without endorsing anything. Whether a particular exception represents an endorsement depends on the exception’s meaning in light of its legal and social context. By analogy, a statute might require that “drug offenders, except for repeat offenders, shall participate in community service programs.” The exception in that hypothesized statute—“except for repeat offenders”—would not show that

319. *Id.* at 41-55.

320. *Id.* at 55.

321. *Id.* at 54.

322. 471 U.S. 222, 233 (1985) (citing *Ramirez*, 418 U.S. 24).

323. *Hayden v. Pataki*, 449 F.3d 305, 349 (2d Cir. 2006) (en banc) (Parker, J., dissenting).

repeat offenders were endorsed, tolerated, or even viewed as the lesser evil.³²⁴ It certainly would not imply that repeat offenders should be immunized from the more drastic penalty of incarceration. Instead, the exception would reflect a narrow judgment as to a particular remedy. Repeat offenders could have been exempted because they were thought to be incorrigible, because scarce resources might be better spent in other ways, or because of an arbitrary compromise.

On its face, the Fourteenth Amendment does not disclose the basis for criminal disenfranchisement's special exemption from the Section 2 apportionment penalty. As David L. Shapiro observed, "there is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases"³²⁵ Moreover, *Ramirez* "refers to no legislative history of the amendment suggesting such a barrier."³²⁶ The *Ramirez* dissenters agreed with that assessment.³²⁷ So did John Hart Ely. "All Section 2 tells us," Ely explained, "is that a state can deny felons the vote without opening itself to a congressional reduction of its representation in Congress."³²⁸ Some critics have gone even further, asserting that the "other crime" exception lacked any principled justification at all. For example, George Fletcher has suggested that the exception was included as a mere "afterthought."³²⁹ The *Ramirez* dissenters likewise thought it of "dispositive" significance that Section 2 was the unprincipled product of "political exigency"³³⁰ — an assessment that finds ample

324. Similar arguments were made to show that the negative version of Section 2 did not endorse racial discrimination. See Van Alstyne, *supra* note 33, at 59-60.

325. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976). Shapiro also suggested that the crime exception applies only when the right to vote is "abridged," not "denied." *Id.* at 303 n.34, 305. This idea is as hard to square with Section 2's text as it is with its history. Cf. Van Alstyne, *supra* note 33, at 81-85 (explaining that abridgement originally occurred when a voter was excluded from just a subset of the covered elections, as opposed to all of them).

326. Shapiro, *supra* note 325, at 304.

327. *Ramirez*, 418 U.S. at 75 (Marshall, J., dissenting) (arguing that the mere fact that "Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval" of that discrimination); see also Fletcher, *Disenfranchisement*, *supra* note 32, at 1903.

328. Ely, *supra* note 45, at 1195; see also FLETCHER, OUR SECRET CONSTITUTION, *supra* note 32, at 149; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-16, at 1094 (2d ed. 1988).

329. FLETCHER, OUR SECRET CONSTITUTION, *supra* note 32, at 149.

330. *Ramirez*, 418 U.S. at 73-74 (Marshall, J., dissenting) (quoting Van Alstyne, *supra* note 33, at 43-44).

scholarly support.³³¹ Even the *Ramirez* majority assumed that Section 2 was an “accident” of history with no deeper purpose.³³² Yet the Court had to rely on an inferred endorsement—what it called an “affirmative sanction”—in order to explain why Section 2 could limit the meaning of Section 1.³³³ In taking that inferential step, *Ramirez* introduced the possibility that the affirmative sanction could be refuted (or narrowed) by historical evidence. If the crime exception were unprincipled or even inadvertent, as critics have argued, then Section 2 might not illuminate the meaning of the Equal Protection Clause or the fundamental right to vote.

But *Ramirez*’s “affirmative sanction” holding is more defensible than either the Court or its critics have realized. Consistent with the above-described criticisms, *Ramirez* was wrong to suggest that the text of Section 2 alone dictates a particular interpretation of the Equal Protection Clause; some exceptions are just exceptions, not evidence of affirmative endorsement. Nonetheless, the exception for criminal disenfranchisement does have affirmative implications. It was understood at the time of its drafting, passage, and ratification to be consistent with, and even an expression of, constitutional equality. As shown in Part I, the crime exception is just one instantiation of a larger political philosophy supportive of criminal disenfranchisement.³³⁴ By exemplifying the radicals’ widely held view of what equality in the franchise meant, the crime exception sheds light on the norm of constitutional equality that animated and shaped the Equal Protection Clause, the rest of the Fourteenth Amendment, and the other Reconstruction Amendments.³³⁵ Once the irony of egalitarian disenfranchisement comes into focus, the proper basis for *Ramirez*’s “affirmative sanction” holding becomes clear. The “crime” exception was added because criminal disenfranchisement (at least in some form) was thought to be an altogether proper regulation of the franchise. When so reconsidered in light of Reconstruction-era political thought and the

331. See, e.g., HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 126 (1908); JOHN MABRY MATHEWS, *LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT* 14 (1909); Van Alstyne, *supra* note 33, at 43-44.

332. *Ramirez*, 418 U.S. at 55 (majority opinion).

333. *Id.* at 54.

334. Cf. *Alden v. Maine*, 527 U.S. 706, 729 (1999) (observing that the Eleventh Amendment has been interpreted “to stand not so much for what it says, but for the presupposition . . . which it confirms” (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 778 (1991) (alteration in *Alden*))).

335. See *supra* text accompanying note 90.

irony of egalitarian disenfranchisement, *Ramirez* rests on a powerful synergy of constitutional text and history.³³⁶

Even when *Ramirez* is so reconstructed, originalist and other historically minded interpreters might still criticize the decision's recourse to past understandings as internally contradictory. The Court assumed, based on prior case law, that the Equal Protection Clause applies to voting rights. But many of the Amendment's supporters expressly disavowed that interpretation.³³⁷ Given that history, *Ramirez*'s ostensibly originalist analysis might be criticized as counterfactual. The Court, in effect, asked, "If the Equal Protection Clause had originally been understood to protect the right to vote, would it also have been understood to prohibit felon disenfranchisement?" To answer that question, *Ramirez* simultaneously construed the Fourteenth Amendment both historically and ahistorically, such that the meaning of a provision that originally had nothing to do with voting rights (Section 1) was understood to have been qualified by a provision that did (Section 2). An originalist might view that approach as incoherent. It would be better, the originalist might say, to read Sections 1 and 2 independently—and best of all to conclude, consistent with historical understandings, that Section 1 has no applicability to voting rights at all. On this view, *Ramirez* either should have followed originalism to the utmost and made a radical break with precedent, or should simply have set history aside.

Yet *Ramirez*'s semi-originalist inquiry could more charitably be characterized as an attempt to honor the sometimes-competing values of text, history, and precedent. As the Court itself observed, the question before it—whether felon disenfranchisement laws infringe the fundamental right to vote—did not require adoption of Justice Harlan's more stringent originalist view that the Equal Protection Clause has no applicability to voting rights

336. *Ramirez* relied on the "crime" exception as evidence of the Constitution's endorsement of criminal disenfranchisement, but the text and the endorsement are not perfectly congruent. For example, the apportionment penalty by its terms does not apply either to disenfranchisement in municipal elections or (because it predates the Seventeenth Amendment) to elections for the Senate. Yet, the affirmative sanction plainly extends to those elections: the crime exception and its history illuminate the Equal Protection Clause and the fundamental right to vote, and those principles apply to all elections.

337. See Pildes, *supra* note 3, at 45 ("[I]n the domain of democratic governance, the Court has not confined itself to textual or originalist grounds. Indeed, the Court has acted not in the face of silence or ambiguity in these sources, but in outright defiance of them. That is the only fair characterization of the Court's recognition of the right to vote as a fundamental equal protection right under the Fourteenth Amendment . . ."); see also *supra* note 91 (collecting sources arguing that Section 1 of the Fourteenth Amendment was not originally understood to confer voting rights).

whatsoever.³³⁸ *Ramirez* instead held only that the Equal Protection Clause in Section 1 “could not have been meant” to forbid a practice exempted from the apportionment penalty in Section 2.³³⁹ “Perhaps the Equal Protection Clause originally applied to voting rights, perhaps it did not,” the Court could have said. “In any event, we can be certain of at least one thing—namely, that the Equal Protection Clause was *not* originally understood to prohibit felon disenfranchisement.” *Ramirez* accordingly honored a textually crystallized historical understanding—that felon disenfranchisement is a legitimate product of constitutional equality—while simultaneously respecting modern voting-rights precedents that had expanded the scope of the Equal Protection Clause beyond its original meaning. Under that approach, not all nineteenth-century views on the franchise would be “immutably frozen” in the Constitution “like insects trapped in Devonian amber.”³⁴⁰ Only views held by the Reconstruction Congress and crystallized in constitutional text would be treated as legally dispositive. *Ramirez* can thus be viewed as having preserved a role for constitutional text and original meaning in what would otherwise be an entirely ahistorical voting rights jurisprudence. Scholars of various stripes have recognized that similar interpretive flexibility is legitimate or even mandatory for historically-minded jurists.³⁴¹

Ramirez's critics sometimes suggest that felon disenfranchisement is entitled to no greater respect than the many nineteenth-century voting practices that the modern Supreme Court has held to be unconstitutional.³⁴² These critics assume that there is no principled difference between historical understandings that find textual recognition in the Constitution and those that do not. But there is a difference. Modern voting rights decisions regularly conclude that the Framers misunderstood the full implications of the text they

338. *Ramirez*, 415 U.S. at 54–55.

339. *Id.* at 55.

340. *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972).

341. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000) (discussing epistemic weight afforded precedent); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that a change in the legal landscape may affect the context and therefore the meaning of other constitutional provisions).

342. See *TRIBE*, *supra* note 328, § 13–16, at 1094 (calling *Ramirez* “fundamentally misconceived” because Section 2 “provides no warrant for circumscribing the reach of the equal protection clause which, as the Court had previously emphasized, is not bound to the political theories of a particular era”); Ely, *supra* note 45, at 1195 (“Not everything that was assumed to be constitutional in 1868 remains immune to the Equal Protection Clause (assuming it ever was) and Section 2 says nothing stronger on the subject of denying felons the franchise than that in 1868 it was assumed to be constitutional.”).

had drafted.³⁴³ Those cases present disputes between modern jurists and the Constitution's drafters, and so are consistent with the judiciary's responsibility to construe a written document distinct from the people who created it. It is quite another thing for a court to conclude that a textual provision resulted from a mistaken historical understanding and so should not have been written. A holding to that effect would come uncomfortably close to posing a dispute between the court and the Constitution itself. Because Reconstruction-era figures like Senator Sumner, Elizabeth Cady Stanton, and Susan B. Anthony appreciated this point, they worked to influence which historical understandings Section 2 would "crystallize into organic law."³⁴⁴

Ramirez's decision to respect a textually crystallized original understanding might be compared with the similar choice in *Gregg v. Georgia*.³⁴⁵ Just a few years after *Ramirez*, the controlling plurality in *Gregg* confirmed the constitutionality of capital punishment based in large part on the text of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. According to the controlling plurality opinion, the Constitution placed express limits on "capital" crimes and on the deprivation of "life," and so "contemplated the continued existence of the capital sanction."³⁴⁶ In other words, a practice recognized in the Constitution could not be *per se* unconstitutional. Together, *Ramirez* and *Gregg* illustrate text's unique authority to constrain legal interpretation, even in the most dynamic areas of constitutional law.³⁴⁷ The importance of textually crystallized understandings particularly helps explain how *Ramirez* could have issued in an era when, as

343. Compare, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) (maintaining that "the Equal Protection Clause is not shackled to the political theory of a particular era"), with *Oregon v. Mitchell*, 400 U.S. 112, 164-65 (1970) (Harlan, J., dissenting in part) (arguing, based on history, that the Equal Protection Clause does not confer voting rights), *superseded in part by constitutional amendment*, U.S. CONST. amend. XXVI, and *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting) (same).

344. CONG. GLOBE, 39th Cong., 1st Sess. 1224 (Mar. 7, 1866) (statement of Sen. Charles Sumner); see *supra* text accompanying note 162.

345. 428 U.S. 153 (1976).

346. *Id.* at 177 (plurality opinion).

347. Jed Rubenfeld has argued that that constitutional doctrine generally disregards original "No-Application Understandings," that is, specific original understandings of what a constitutional right does not prohibit. See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 14 (2005). No-application understandings crystallized in text, however, may constitute an exception to Rubenfeld's rule.

Justice Marshall pointed out in dissent, the Court's voting rights cases routinely overrode original understandings.³⁴⁸

Ramirez's textual foundation also helps explain felon disenfranchisement's widespread vitality in the United States, as compared with, for example, the United Kingdom. Professor Whitman has argued that formal equality's cultural prominence in the United States (partly the result of its origin as an English colony) helps explain the harshness of American punishments, as opposed to their French and German counterparts.³⁴⁹ Without attempting to answer the many comparative-law questions raised by the world's varied disenfranchisement laws, it is worth noting that the story of American criminal disenfranchisement fits Whitman's basic paradigm—with a legalistic twist. Again, the precise text of Section 2 is what allowed felon disenfranchisement to survive judicial review in *Ramirez*, even as the Court struck down many other longstanding voting practices. By comparison, the United Kingdom embraced criminal disenfranchisement in the 1870 Forfeiture Act, at roughly the time that America did.³⁵⁰ But because Britain lacked a written constitution, nineteenth-century notions of formal equality left no foothold for textual or originalist argumentation. Britain today disenfranchises criminals only when serving custodial sentences, and the European Court of Human Rights has directed the UK to enfranchise at least some incarcerated criminals.³⁵¹ If the United Kingdom's experiences are any guide, American criminal disenfranchisement may owe its continued legality to the fact that the United States is governed by an old and venerated written constitution.

B. The Meaning and Scope of "Other Crime"

Ramirez is often criticized for being inconsistent with the original meaning of Section 2. Based largely on the historical salience of Confederate rebels and the *ejusdem generis* canon, many commentators argue that Section 2's phrase "rebellion, or other crime" was originally understood to mean "rebellion, or similar crime," such that the phrase would capture only rebellion-related crimes like treason or espionage.³⁵² That conclusion is severely undermined by the

348. See *Richardson v. Ramirez*, 418 U.S. 24, 76-77 (1974) (Marshall, J., dissenting).

349. See WHITMAN, *supra* note 36, at 43, 158-70.

350. Forfeiture Act, 1870, 33 & 34 Vict. 2, c. 23, § 2 (U.K.).

351. See *supra* text accompanying note 4.

352. See, e.g., FLETCHER, OUR SECRET CONSTITUTION, *supra* note 32, at 149-50; MANZA & UGGEN, *supra* note 44, at 32 ("There is, in short, no clear evidence that the phrase 'or other crime[]' was intended to have any meaning outside the larger context of punishing the former Confederacy and its leaders."); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN

history recounted above in Part I, which demonstrates that traditional crimes were often at the forefront of Congressmen’s minds. Of course, “crime” must resemble (because it includes) “rebellion.” But that observation alone supplies little guidance, since it does not specify just how the terms might relate to one another.³⁵³ History illuminates that relationship. During Reconstruction, there was considerable doubt as to whether rebellion constituted a crime and was deserving of disenfranchisement. Radical Republicans wanted to degrade the rebels, whereas conservatives argued that Confederates were noble combatants deserving respect.³⁵⁴ Using the phrase “rebellion or other crime” made clear that the radicals won that debate: Confederate rebels belonged in the same category as common criminals.³⁵⁵

Ramirez’s critics, moreover, have identified no member of the Reconstruction Congress who felt that conventional criminal disenfranchisement would or should trigger Section 2’s apportionment penalty. To the contrary, the historical record—and, indeed, Ramirez itself³⁵⁶—contains ample evidence

AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 120-21 (2005) (arguing that “‘for participation in rebellion or other crime’ conceptually associates the defeated Confederate leadership . . . with other criminals” and that inclusion of the phrase “or other crime” was inadvertent); Richard W. Bourne, *Richardson v. Ramirez: A Motion To Reconsider*, 42 VAL. U. L. REV. 1, 30 (2007) (“[T]he exclusion clause had nothing to do with felon disenfranchisement statutes.”); see also John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 178 n.97 (2004); Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 291 (2006) (“[T]he ‘other crime’ at issue in addition to rebellion was treason.”); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender’s Right To Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 746 n.158 (1973) (“[Section 2’s] crucial words ‘or other crime[.]’ are utterly devoid of independent legislative intent, and take on historical meaning only as part of the phrase ‘participation in rebellion, or other crime.’”); cf. Abigail M. Hinchcliff, Note, *The “Other” Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L.J. 194 (2011) (buttressing the *ejusdem generis* argument with an intratextual one).

353. See Hinchcliff, *supra* note 352, at 231-32 (arguing that the *ejusdem generis* logic is compatible with “various limiting principles,” including serious-crimes-only and felonies-only rules).

354. See *supra* Subsection I.C.2 and Section I.D.

355. See CONG. GLOBE, 40th Cong., 3d Sess. app. at 130 (Feb. 5, 1869) (statement of Rep. James Mullins) (urging that Congress should “in our fundamental law brand that rebellion as a crime” and endorsing a draft containing “a declaration that the nation looks upon the recent rebellion as a heinous offense”).

356. *Richardson v. Ramirez*, 418 U.S. 24, 45 (1974) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2543 (May 10, 1866) (statement of Rep. John Bingham) (noting that Section 2 of the Fourteenth Amendment would apply if New York disenfranchised blacks “except in cases of crime”)); see also TRIBE, *supra* note 328, § 13-16, at 1094 (calling Ramirez “fairly persuasive” on this point).

that the apportionment penalty did not apply to traditional criminal disenfranchisement. For example, Senator Grimes proposed to penalize disenfranchisement “except for crime or disloyalty.”³⁵⁷ By putting “crime” first, Grimes conceptually separated it from “disloyalty.” The final version of Section 2 deviated from Grimes’s proposal only by clarifying that “rebellion” was itself a species of “other crime.”

Congress had good reason not to narrow the range of crimes exempted from the apportionment penalty in Section 2. A list of all such crimes would have much been far too long for a Constitution.³⁵⁸ And an open-ended exception for “felonies” or “infamous crimes” would have been ineffectual, leaving legislatures free to designate which crimes qualify under those categories—as Reconstruction legislators recognized.³⁵⁹ Congress may also have been attracted to a more administrable bright-line rule applicable to all state crimes, even before post-ratification experience revealed the full difficulties of implementing Section 2.³⁶⁰

Had Congress wanted to narrow Section 2’s ambit, it would likely have added a reference to common law felonies, thereby succinctly defining a closed set. As we have seen, Republicans in fact adopted that approach in Reconstruction legislation as well as in proposed drafts of the Fifteenth Amendment.³⁶¹ But even a common law approach would have had drawbacks. Many in Congress were wary of imposing permanent and inflexible constitutional rules on the states.³⁶² And excepting only common law felonies

357. CONG. GLOBE, 39th Cong., 1st Sess. 1320 (Mar. 12, 1866).

358. See, e.g., *id.* at 3029 (June 8, 1866) (statement of Sen. Reverdy Johnson) (“Murderers, robbers, houseburners, [and] counterfeiters”); *id.* at 2535 (May 10, 1866) (statement of Rep. Ephraim Eckley) (“pirates, counterfeiters, or other criminals”).

359. For example, in discussing the Reconstruction Act, Senator Charles Drake disclosed a newspaper report noting that in Florida “a negro who commits an assault and battery upon a white man may be sold into slavery for a period of twenty years.” CONG. GLOBE, 40th Cong., 2d Sess., 2600 (May 27, 1868). Senator Roscoe Conkling interrupted to ask, “Was that a felony?” *Id.* Drake responded, “They may declare it to be a felony or they may make other offenses felonies.” *Id.*

360. See CONG. GLOBE, 39th Cong., 1st Sess. 535-36 (Jan. 31, 1866) (statement of Rep. John Benjamin) (noting problems of practicability associated with the precursor to Section 2); see also *infra* text accompanying notes 410-415.

361. See *supra* Sections I.D & I.E.

362. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 899 (Feb. 5, 1869) (statement of Sen. George Williams) (worrying about imposing “a permanent and inflexible rule of government”); *id.* at 861 (Feb. 4, 1869) (statement of Sen. Willard Warner) (discussing the gravity of “amend[ing] the organic law” by modifying the constitution); *id.* at 670 (Jan. 28, 1869) (statement of Sen. Joseph Fowler) (arguing that the Amendment would “put into the

from Section 2's apportionment penalty might have discouraged disenfranchisement for grave common law misdemeanors like assault, kidnapping, and forgery, as well as any new offenses not yet defined.³⁶³ The most foresighted legislators may even have anticipated the need to encourage (that is, not penalize) what would soon become one of the radicals' major preoccupations: using federal authority to prosecute Southerners intent on perpetuating the Confederacy's racist legacy.³⁶⁴

Later, the threat of racially motivated disenfranchisement did cause Republicans to regret the breadth of Section 2's "other crime" exception, and Congress implemented that new preference in the Reconstruction Acts. But Congress did not adopt more limited constitutional language. Congress instead rejected the radical drafts of the Fifteenth Amendment that would have constitutionally curbed felon disenfranchisement. These efforts reinforce the conclusion that Section 2's "other crime" language was understood to be just as broad as its plain text would suggest. Congress knew how to use limiting language when it wanted to, and it thrice chose not to do so when drafting the Reconstruction Amendments.³⁶⁵ Indeed, Congress had inherited a refined constitutional vocabulary when it came to illegal acts. By the 1860s, the Constitution referred to "infamous crime," "capital" crime, and "high Crimes," as well as to "Treason," "Felony," "Felonies committed on the high Seas," "Misdemeanors," "Breach of the Peace," "Offences against the Law of Nations," and "Piracies."³⁶⁶ Yet Section 2 uses the broad, unadorned term "other crime."

A better argument for narrowing *Ramirez* is that the term "crime" was originally susceptible to two meanings: a broader one including all offenses, and a narrower one encompassing only serious offenses.³⁶⁷ Justice O'Connor outlined that argument in her 2010 decision for the Ninth Circuit in *Harvey v.*

Constitution an arbitrary and fixed rule that cannot be changed and cannot be reformed without revolution").

363. See *United States v. Watson*, 423 U.S. 411, 440 (1976) (Marshall, J., dissenting) (discussing the range of serious offenses considered misdemeanors at common law (citing Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572-73 (1924))).

364. See, e.g., Enforcement Act, ch. 114, 16 Stat. 140 (1870); CONG. GLOBE, 40th Cong., 3d Sess. 1041 (Feb 9, 1869) (statement of Sen. Charles Sumner).

365. Cf. *Harvey v. Brewer*, 605 F.3d 1067, 1077 (9th Cir. 2010) (O'Connor, J.) ("[W]hen the 39th Congress meant to specify felonies at common law, it was quite capable of using that phrase.").

366. U.S. CONST. art. I, §§ 6, 8; art. II, § 4; amend. V.

367. See CONG. GLOBE, 39th Cong., 2d Sess. 1890 (Feb. 27, 1867) (statement of Sen. Charles Sumner) (rhetorically distinguishing between a "trivial offense" and a "crime").

Brewer.³⁶⁸ In 1867, Webster's *Dictionary* offered two definitions of crime. The first defined "crime" broadly as "[a]ny violation of law, either divine or human; an omission of a duty which is commanded, or the commission of an act which is forbidden, by law."³⁶⁹ "Crime," then, had a second definition: "[g]ross offense, or violation of law, in distinction from a misdemeanor or trespass, or other slight offense. Hence, also, any aggravated offense against morality or the public welfare; any outrage or great wrong."³⁷⁰ This alternate meaning echoed Blackstone's *Commentaries on the Laws of England*. Under the "general definition," Blackstone had said, crime "comprehends both crimes and misdemeanors."³⁷¹ Blackstone had then gone on to say that "in common usage the word, 'crimes,' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of 'misdemeanors' only."³⁷² This line of argument finds support in the fact that at least some Reconstruction legislators had a narrow view of what offenses did or should trigger disenfranchisement.³⁷³ Even more significant is the Article III Criminal Jury Clause, which refers not just to "crime," but to "all crimes."³⁷⁴ Despite that textual breadth, the Supreme Court has relied on Blackstone and other

368. See *Harvey*, 605 F.3d at 1074 (suggesting the argument summarized in the main text as a possibility while holding that Section 2's reference to "crime," and therefore its affirmative sanction, are not limited to felonies at common law).

369. See NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 312-13 (Chauncey Goodrich & Noah Porter eds., 1867).

370. *Id.* at 313.

371. WILLIAM BLACKSTONE, 4 COMMENTARIES *5.

372. *Id.* In his subsequent discussion, Blackstone himself adopted the common usage, referring repeatedly to "crimes and misdemeanors." *Id.* at *5, *7.

373. See, e.g., *supra* text accompanying notes 296 and 314; see also CONG. GLOBE, 39th Cong., 2d Sess. 40 (Dec. 10, 1866) (statement of Sen. Lot M. Morrill) ("treason, felony, or other high crimes"); CONG. GLOBE, 39th Cong., 1st Sess. 792 (Feb. 10, 1866) (statement of Rep. Thomas Williams) (legitimate government "might well disfranchise individuals, such as the traitors themselves, for an enormous crime," but not "loyal people . . . impeached of no crime"); *id.* at 431 (Jan. 25, 1866) (statement of Rep. John Bingham) ("Well, then, some gentleman asks, why not go for a constitutional amendment which will declare, once for all, that no State in this Union shall make any distinction in the right of voting between male citizens of the United States, resident within its limits and over twenty-one years of age, save in the case of persons convicted of infamous crimes after due trial? I will answer with all my heart that I am ready to go for that.").

374. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); see, e.g., *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937).

historical sources to construe the Criminal Jury Clause narrowly, so that it refers only to offenses carrying a sufficiently severe sentence.³⁷⁵

Justice O'Connor was right that the foregoing history could "support the proposition that the word 'crime' in Section 2 refers only to serious crimes or felonies."³⁷⁶ Indeed, a similar argument was raised during Johnson's impeachment trial.³⁷⁷ But, as the Justice also noted, other authorities support a broader reading of "crime." Most salient is the Supreme Court's 1860 assertion that "[t]he word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony."³⁷⁸ That statement, issued on the eve of the Civil War, prioritized Blackstone's broader definition of crime, and construed the Article IV Extradition Clause—the only constitutional provision other than Section 2 that uses the precise phrase "or other Crime."³⁷⁹ So while there is a plausible argument that "crime" could have carried the meaning "serious crime," the issue is a close one. Further, this argument from original understandings lacks an account of why the Reconstruction Congress would

375. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 160–61 (1968) ("[I]t is necessary to draw a line in the spectrum of crime, separating petty from serious infractions."); *Cheff v. Schnackenberg*, 384 U.S. 373, 379–80 (1966) (viewing the proceedings as "equivalent to a procedure to process a petty offense, which . . . does not require a jury trial"); *Schick v. United States*, 195 U.S. 65, 69–72 (1904) (quoting Blackstone's definition of "crime" and distinguishing "crimes" from "petty offenses"); *Callan v. Wilson*, 127 U.S. 540, 549 (1888) (holding that the Criminal Jury Clause should be informed by the common law offenses to which a right of jury trial attached).

376. *Harvey v. Brewer*, 605 F.3d 1067, 1074 (9th Cir. 2010).

377. See CONG. GLOBE, 40th Cong., 2d Sess. supp. at 293 (Apr. 23, 1868) (statement of Thomas Nelson, representative for President Johnson) ("When the word 'crimes,' therefore, is used in the Constitution . . . it is to be understood as embracing felonious offenses, offenses punishable with death or with imprisonment . . ."); see also *id.* supp. at 254 (Apr. 20, 1868) (statement of Rep. John Logan, impeachment manager) (quoting Blackstone's definition of "crime").

378. *Kentucky v. Dennison*, 65 U.S. 66, 99 (1860), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219, 226–29 (1987); cf. *In re Voorhees*, 32 N.J.L. 141, 147 (1867) ("I am not aware that any jurist, in any age of the common law, has ever doubted as to the meaning of the word 'crime.' It . . . has always been considered as embracing every species of indictable offence."); *id.* at 148 (explaining that the term "other crime" in the Extradition Clause included "minor offences, such as assaults, libels, and the entire train of similar misdemeanors").

379. U.S. CONST. art. IV, § 2. Besides the meaning of "crime," *Dennison* also relied on the fact that the Constitutional Convention rejected the phrase "other high Misdemeanor," which had been used in the Extradition Clause of the Articles of Confederation. See 65 U.S. at 101–02; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437 (Max Farrand ed. 1911).

intend a narrower as opposed to a broader meaning, even assuming that both possibilities were linguistically available.

The strongest argument for cabining *Ramirez's* affirmative sanction would focus not just on the original meaning of "crime," but also on the principles that Section 2 endorsed. Even if Congress used the word "crime" to mean all offenses, perhaps for reasons of administrability, the term may nonetheless have evidenced an affirmative sanction that was more limited in scope.³⁸⁰ As argued above in Part I, Reconstruction Republicans' special solicitude for criminal disenfranchisement turned on a theory of political morality. Actions triggered disenfranchisement because they represented deliberate decisions to defy the legal order. In that key respect, "participation in . . . crime" did indeed resemble "rebellion." The Framers' coupling of rebellion and crime made sense during Reconstruction. Indictment and conviction at common law required *intentional conduct*, and intent requirements were read into most criminal statutes.³⁸¹ In the twenty-first century, however, the connection between political morality and conventional criminality has become more attenuated.³⁸² One might doubt, for example, that drug addicts and negligent regulatory offenders should be put in the same category as the rebels and common-law felons discussed by Reconstruction legislators.³⁸³ Indeed, the pervasiveness of modern criminalization may itself supply a reason for curbing *Ramirez's* affirmative sanction: the fear that widespread criminal disenfranchisement might undermine republicanism and rule by the consent of the governed prompted some Republicans to oppose even the disenfranchisement of many Southerners who had engaged in rebellion.³⁸⁴

380. On the lack of perfect congruence between Section 2 and the crime exception, see *supra* note 336.

381. See *United States v. Balint*, 258 U.S. 250, 251-52 (1922).

382. See, e.g., Karlan, *supra* note 21, at 1167 ("[M]uch not particularly blameworthy conduct is classified as a felony.").

383. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 74 (1974) (Marshall, J., dissenting).

384. See *supra* text accompanying note 233-234; see also CONG. GLOBE, 39th Cong., 2d Sess. 1563-64 (Feb. 19, 1867) (statement of Sen. John Sherman) ("If we exclude from voting the rebels of the South, who compose nearly all the former voting population, what becomes of the republican doctrine that all governments must be founded on the consent of the governed?"). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 2535 (May 10, 1866) (statement of Rep. Ephraim Eckley) (arguing that rebels have "no right, founded in justice, to participate in the administration of the Government or exercise political power"). Most Republican opponents of widespread Confederate disenfranchisement argued from pragmatism and from the premise that low-level Confederates lacked a meaningful choice but to fight against the Union. See *supra* Subsection I.C.2.

Critics of broad disenfranchisement regimes have so far met with no success in court,³⁸⁵ but they have not yet connected modern changes in the nature and perception of criminality to the ideology underlying the “other crime” exception. If *Ramirez*, “crime,” and the affirmative sanction were read narrowly in light of the Reconstruction era’s guiding political philosophy, then Section 2 might be understood as an endorsement of disenfranchisement only for crimes of sufficient moral gravity to constitute renunciation of one’s political allegiance to the state. As Justice O’Connor suggested,³⁸⁶ courts might look to modern legislative judgments for insight into constitutional seriousness, much as when interpreting the term “crime” in the Article III Criminal Jury Clause.³⁸⁷ If that analysis applied to Section 2, at least misdemeanors would be unprotected by *Ramirez*’s affirmative sanction. But a list of qualifying crimes could be more strictly limited. For example, the affirmative sanction might protect only felonies consistent with the common law intentionality requirement that was taken for granted in the Reconstruction Congress.³⁸⁸ In this way, the intellectual history of Section 2 may cast doubt on the constitutionality of many modern criminal disenfranchisement laws.

As a matter of precedent, any limits on the scope of Section 2’s affirmative sanction remain unspecified. *Ramirez* found an affirmative sanction specifically for the “exclusion of felons” after reviewing a state provision disenfranchising those convicted of “infamous” crimes.³⁸⁹ By contrast, *Underwood* invalidated an invidiously motivated disenfranchisement law encompassing many misdemeanors³⁹⁰—precisely the type of expansive disenfranchisement measure that Stevens and other Reconstruction radicals had feared.³⁹¹ *Ramirez* and *Hunter* leave open the possibility—supported by history—that disenfranchisement on account of misdemeanors and certain felonies may be unconstitutional even absent racial animus.

385. See *Law of Prisons*, *supra* note 6, at 1952 (“[C]ourts have refused to scrutinize states’ selection of certain felonies as disqualifying offenses.”).

386. *Harvey v. Brewer*, 605 F.3d 1067, 1075 (9th Cir. 2010).

387. See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

388. For a pointed comparison of the common law view of intent with contemporary standards of mens rea, see WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 260-62 (2011).

389. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

390. See *Hunter v. Underwood*, 471 U.S. 222, 224-25 (1985) (noting that the plaintiff class consisted of person disenfranchised for misdemeanors and the law was enjoined as to those plaintiffs).

391. See *supra* Section I.C.

C. *The Case for (and Against) Implied Repeal*

Judges and scholars have also criticized *Ramirez* on the ground that the Fifteenth Amendment impliedly repealed Section 2.³⁹² The argument for implied repeal offers an interesting case study in the changing terrain of Reconstruction historiography. In the early and mid-twentieth century, a number of scholars argued that Section 2 and its apportionment penalty should be enforced in support of black enfranchisement in the Jim Crow South.³⁹³ Because literacy tests, poll taxes, and other voting rules obviously deprived adult male citizens of the right to vote, those measures seemed to invite application of the Section 2 apportionment penalty. Yet those same voting rules arguably did not restrict the right to vote “on account of race” in violation of the Fifteenth Amendment. Defenders of Jim Crow accordingly advanced the case for Section 2’s implied repeal in order to defend the racist status quo.³⁹⁴ Times have changed. Today, the apportionment penalty lacks obvious application, yet Section 2’s reference to “crime” continues to legitimize criminal disenfranchisement. The result is that an argument once associated with entrenched racism has become popular among legal reformers.

The most comprehensive exposition of the case for implied repeal was recently set out by Gabriel Chin.³⁹⁵ Recognizing the “interpretive presumption against repeals by implication,”³⁹⁶ Chin adopted a demanding two-pronged test. First, the later provision must “clearly [be] meant to occupy the field” governed by the earlier provision.³⁹⁷ Second, the later provision must be in

392. See *Hayden v. Pataki*, 449 F.3d 305, 351 n.3, 352 n.4 (2d Cir. 2006) (en banc) (Parker, J., dissenting); FLETCHER, *OUR SECRET CONSTITUTION*, *supra* note 32, at 149-50.

393. See Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 W. RES. L. REV. 965 (1965); Arthur Earl Bonfield, *The Right To Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 112 (1960); Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 L. TRANSITION 128, 149 (1963); Zuckerman, *supra* note 95, at 125.

394. See Zuckerman, *supra* note 95, at 125 (discussing early twentieth-century arguments for implied repeal, which were used to criticize the 1904 Republican Party platform advocating implementation of Section 2). The basic argument for implied repeal is the same today as a century ago: The apportionment penalty in Section 2 is said to apply only to racial disenfranchisement laws later rendered null by the Fifteenth Amendment. *Id.*

395. Chin, *supra* note 14.

396. *Id.* at 276.

397. *Id.* at 277.

“irreconcilable conflict” with its predecessor.³⁹⁸ On reflection, however, Chin’s case for implied repeal cannot satisfy either requirement.³⁹⁹

The basic problem with the argument for implied repeal, one noted for over a century, is that Section 2 and the Fifteenth Amendment are only partially overlapping in scope.⁴⁰⁰ While the Fifteenth Amendment has a broader ambit in several respects,⁴⁰¹ it is also narrower in two important ways. First, the Fifteenth Amendment employs a negative structure, banning disenfranchisement “on account of race.”⁴⁰² In contrast, Section 2 employs an affirmative structure and 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. Absent invidious intent, these measures lie beyond the Fifteenth Amendment’s ban on racially discriminatory voting rules.⁴⁰³ Second, Section 2 empowers Congress to implement a unique apportionment penalty. Unless Congress’s Fifteenth Amendment Enforcement Clause authority includes the power to amend the Article I apportionment scheme,⁴⁰⁴ no apportionment penalty is available under the Fifteenth Amendment. Moreover, the apportionment penalty had distinctive appeal for the Reconstruction Congress because it could be implemented through legislative action alone.⁴⁰⁵ Chin is therefore wrong to

398. *Id.* at 278.

399. For criticism of Chin’s precedent-based arguments, see 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 2 of the Fourteenth Amendment and the History of the District*, 60 ALA. L. REV. 783, 802 n.59 (2009).

400. See MATHEWS, *supra* note 331, at 15; Bonfield, *supra* note 393, at 112 (arguing that Congress did not have the intention of limiting the imposition of the penalty to cases where the basis of discrimination is on account of race or color); Zuckerman, *supra* note 95, at 125 (explicating and rebutting the argument that the Fifteenth Amendment abrogated the apportionment-penalty provision of the Fourteenth Amendment).

401. Among its advantages, the Fifteenth Amendment empowered Congress to enact remedial legislation like the VRA and reached more elections. It also had equal effect in the North and the South, which at the time may have been viewed as its greatest contribution. See GILLETTE, *supra* note 88, at 46-48; KEYSSAR, *supra* note 44, at 75.

402. U.S. CONST. amend. XV, § 1.

403. See *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959) (upholding the constitutionality of literacy tests that are neither designed nor implemented to “perpetuate that discrimination which the Fifteenth Amendment was designed to uproot”).

404. See U.S. CONST. art. I, § 2 (providing for congressional apportionment); see also U.S. CONST. amend. XIV, § 2 (amending apportionment).

405. If any Reconstruction legislators thought that the federal courts would vigorously enforce the Fifteenth Amendment, they would be badly disappointed. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 308 (2000)

assert that “Section 2 is like the Fifteenth Amendment, except that it covers fewer people” and “offers more limited remedies.”⁴⁰⁶ In truth, Section 2 reaches people and circumstances that the Fifteenth Amendment does not, and offers an additional remedy.

The Fifteenth Amendment’s narrowness—like Section 2’s breadth—was not lost on the Reconstruction Congress.⁴⁰⁷ For example, during late debates on the Fourteenth Amendment, Senator Henderson celebrated the fact that Section 2’s apportionment penalty applied to disenfranchisement for literacy,

(discussing Southern resistance to the Fifteenth Amendment and the Supreme Court’s acquiescence in *Giles v. Harris*, 189 U.S. 475 (1903)); see also Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002) (same). For a powerful example of how congressionally controlled remedies sometimes operated even as the Fifteenth Amendment remained idle, see Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra*, at 308, which explains that “[f]rom 1869 to 1900, the House of Representatives used its constitutional power under the ‘Qualifications Clause’ to set aside election results in over 30 cases from Southern states in which the House Elections Committee concluded that black voters had been excluded due to fraud, violence, or intimidation.” Section 2 itself can be viewed as an effort to normalize Congress’s decision in the wake of the Civil War to exclude Southern delegations based on the Republican Guarantee Clause. See AMAR, *supra* note 88, at 368–70 (discussing the legal authority for Congress’s refusal to seat Southern delegates). Notably, both the exclusion of congressional delegates and the Section 2 apportionment penalty were not viewed as justiciable during Reconstruction.

406. Chin, *supra* note 14, at 263.

407. Compare CONG. GLOBE, 39th Cong., 1st Sess. 2767 (May 23, 1866) (statement of Sen. Jacob 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.”), with CONG. GLOBE, 41st Cong., 2d Sess. 40 (Dec. 8, 1869) (statement of Rep. Richard Haldeman) (noting that, under the Fifteenth Amendment, states may “deny the right of suffrage for idiocy, or poverty, or insanity, or want of property qualification, or want of education,” among other qualifications). Historians have noted the foregoing passages, and many others. See MATHEWS, *supra* note 331, at 15; Bonfield, *supra* note 393, at 112 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2459, 2510, 2511, 2539–40 (May 8–10, 1866) (statements of Reps. Thaddeus Stevens, George Miller, Thomas Eliot, and John Farnsworth)); Zuckerman, *supra* note 95, at 125; see also CONG. GLOBE, 42d Cong., 2d Sess. 610 (Jan. 26, 1872) (statement of Rep. Lyman Trumbull); *id.* at 81 (Dec. 12, 1871) (statement of Rep. Samuel Shellabarger); *id.* at 83 (table of states); *id.* at 64–65 (Dec. 11, 1871) (statement of Rep. Charles Willard); *id.* at 35 (Dec. 6, 1871) (statement of Rep. James Garfield); CONG. GLOBE, 40th Cong., 3d Sess. 863 (statement of Sen. Oliver Morton) (Feb. 4, 1869); *id.* app. at 97 (statement of Rep. Samuel Shellabarger) (Jan. 29, 1869); CONG. GLOBE, 39th Cong., 1st Sess. 3026 (June 8, 1866) (statement of Sen. Edgar Cowan); *id.* at 3031, 3033 (statement of Sen. John Henderson); *id.* at 2986, 2991 (June 6, 1866) (chronicling failed efforts to add exceptions); *id.* at 383 (statement of Rep. John Farnsworth) (criticizing the negative version of Section 2).

thereby providing the South no incentive “to keep the negro uneducated.”⁴⁰⁸ The Fifteenth Amendment, by contrast, did supply that undesirable incentive, along with many others. Representative Shellabarger made a similar point during debates on the Fifteenth Amendment, arguing that it “simply prohibits the States from . . . disenfranchising for . . . race, color, or former condition of slavery; thus by plain inference authorizing the States to disenfranchise upon any other grounds than these three.”⁴⁰⁹ These and many other statements are hard to square with Chin’s view that courts should read “an implied term into Section 2 making it applicable only to racial disenfranchisement.”⁴¹⁰ To do so would be inconsistent not just with the text, but also with expressed legislative understandings.

Confirming that Congress understood the Fifteenth Amendment not to repeal Section 2 impliedly, Congress attempted to enforce Section 2 even after the Fifteenth Amendment’s ratification, as Chin himself recounts.⁴¹¹ Congress enacted a statute to implement Section 2 in 1872, after ratification of the

408. CONG. GLOBE, 39th Cong., 1st Sess. 3033 (June 8, 1866) (statement of Sen. John Henderson) (criticizing the original Committee version of Section 2, which closely resembled the final version of the Fifteenth Amendment); *see also id.* at 2767 (recording that after Senator Clark asked whether Section 2 would penalize a state that “excluded any person, say as Massachusetts does, for want of intelligence,” Senator Howard replied, “Certainly it does, no matter what may be the occasion of the restriction”). A Virginia legislator testified it was “obvious” that Southern states would use literacy, property, and other qualifications to circumvent federal efforts to prevent race-based disenfranchisement. JOINT COMM. ON RECONSTRUCTION, *Virginia, North Carolina, South Carolina*, in REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, pt. II, at 35 (1866); FONER, *supra* note 49, at 252. Before the Fourteenth Amendment’s ratification, conservatives proposed a compromise amendment that would have replaced Section 2’s affirmatively structured apportionment penalty with a more easily circumvented negatively structured penalty limited to racial disenfranchisement. *See* Larry G. Kincaid, *The Legislative Origins of the Military Reconstruction Act, 1865-1867*, at 169 & n.8 (1968) (unpublished Ph.D. dissertation, Johns Hopkins Univ.) (on file with authors).

409. CONG. GLOBE, 40th Cong., 3d Sess. app. at 98 (Jan. 29, 1869) (statement of Rep. Samuel Shellabarger); *see also id.* at 899-900 (Feb. 5, 1869) (statement of Sen. George Williams) (describing potential for circumvention, including through criminal disenfranchisement); *id.* at 862 (Feb. 4, 1869) (statement of Sen. Willard Warner) (“[T]he *animus* of this amendment is a desire to protect and enfranchise the colored citizens of the country; yet, under it and without any violation of its letter or spirit, nine tenths of them might be prevented from voting and holding office by the requirement on the part of the states or of the United States of an intelligence or property qualification.”); *id.* at 862-63 (statement of Sen. Oliver Morton); GILLETTE, *supra* note 88, at 57-58 (discussing the foregoing quotations and similar remarks).

410. Chin, *supra* note 14, at 292.

411. *Id.* at 301-04. *See generally* Zuckerman, *supra* note 95, at 107-18.

Fifteenth Amendment in 1870.⁴¹² Also in 1870, the Census Bureau gathered evidence in an attempt to implement the Section 2 apportionment penalty, and Congress debated how apportionment should be affected.⁴¹³ Congress turned its attention away from Section 2 only because it seemed that imposing the penalty would not substantially affect any state's congressional apportionment.⁴¹⁴ Plainly, Congress understood Section 2 to be operative both at the time of the Fifteenth Amendment's ratification and in the years thereafter. Chin may be right to conclude that this history "suggests a defect in Section 2" in the sense that its implementation posed challenges that had been unappreciated⁴¹⁵ (if not entirely unforeseen⁴¹⁶), but that is a far cry from showing that the Fifteenth Amendment was understood to have repealed Section 2. The better inference is that Congress recognized that Section 2 and the Fifteenth Amendment could operate in tandem. In other words, state disenfranchisement could result in *both* a judicial response under Section 1 of the Fifteenth Amendment *and* a congressional response under Section 2's apportionment penalty.⁴¹⁷ Congressional enforcement of Section 2 is likewise compatible with the availability of judicial relief under the Equal Protection Clause.

There is an even more fundamental defect in the argument for implied repeal. Chin and others assume that the key question is whether the Fifteenth Amendment impliedly repealed the whole of Section 2's apportionment penalty. That approach is insufficiently nuanced. Even if Section 2's apportionment penalty were inoperative due to repeal, the "other crime" exception would still support *Ramirez's* inference that the Equal Protection Clause was not originally intended to prohibit criminal disenfranchisement. To negate that inference, an advocate for implied repeal would have to show not that the Fifteenth Amendment repealed the apportionment penalty, but rather

412. An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, ch. 11, § 6, 17 Stat. 28, 29 (1872).

413. Chin, *supra* note 14, at 302-03; Zuckerman, *supra* note 95, at 110-11.

414. Chin, *supra* note 14, at 303 & n.221; Zuckerman, *supra* note 95, at 112-14.

415. Chin, *supra* note 14, at 304; see also MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH: 1888-1908, at 117-18 (2001) (describing Republicans' difficulty imposing the apportionment penalty during the 1890s).

416. See CONG. GLOBE, 39th Cong., 1st Sess. 3038-39 (June 8, 1866) (statement of Sen. Jacob Howard) (discussing the impracticality of identifying both disenfranchised citizens and the grounds for such disenfranchisement by census).

417. Cf. Van Alstyne, *supra* note 33, at 51-55 (discussing the Framers' view that the availability of an apportionment penalty would be consistent with viewing racial disenfranchisement as separately barred by the Republican Guarantee Clause and legislation passed to enforce it).

that it repudiated the “other crime” exception’s specific endorsement of criminal disenfranchisement. What the argument for implied repeal needs, in other words, is something like the Nineteenth Amendment’s specific repudiation of Section 2’s use of the term “male.” In a brief attempt to make that more targeted showing, Chin points out that the Fifteenth Amendment “gave no special authorization for disenfranchisement even of those who had committed the most serious crimes.”⁴¹⁸ But even if silence could count as repudiation, the Fifteenth Amendment’s lack of an express crime exception simply reflected its narrow negative structure. As discussed in Section I.E, the Fifteenth Amendment included no crime exception because it did not call criminal disenfranchisement into question.

If anything, the Fifteenth Amendment’s legislative history shows that Congress remained committed to criminal disenfranchisement. Republicans deployed formal equality arguments to defend not only the Fifteenth Amendment’s expansion of voting rights but also the legitimacy of criminal disenfranchisement. The most radical proposals displayed broad affirmative structures, and they all had express crime exceptions. So if the “other crime” exception ever shed light on the Equal Protection Clause, it continued to do so after the Fifteenth Amendment became law. And because the same political philosophy was at work in both provisions, the interpretive shadow cast by Section 2 stretches out from the Fourteenth Amendment and over the Fifteenth Amendment. *Ramirez*’s “affirmative sanction”⁴¹⁹ holding would therefore stand even if arguments from implied repeal were correct.

Once the argument for implied appeal is set aside, it is possible to clarify the relationship between the Fourteenth and Fifteenth Amendments, as well as between *Ramirez* and the Supreme Court’s next most prominent felon disenfranchisement case, *Hunter v. Underwood*.⁴²⁰ *Ramirez* left open whether the “affirmative sanction” contained in Section 2 would immunize criminal disenfranchisement laws not just from fundamental right to vote challenges, but from all challenges under the Equal Protection Clause. *Underwood* put those questions to rest: Alabama’s disenfranchisement scheme was held to violate the Equal Protection Clause because it had been expressly adopted and designed to target black voters. The Court hardly endeavored to reconcile this new holding with *Ramirez*, asserting simply that “§ 2 was not designed to permit the purposeful racial discrimination” evident in the Alabama law.⁴²¹ But

⁴¹⁸ Chin, *supra* note 14, at 315.

⁴¹⁹ *Id.* at 313 (quoting *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)).

⁴²⁰ *Hunter v. Underwood*, 471 U.S. 222 (1985).

⁴²¹ *Id.* at 233.

how can only some aspects of the Equal Protection Clause apply to criminal disenfranchisement laws?

The history set out above in Part I points toward a solution. As we have seen, the Reconstruction Congress supported enfranchisement for virtue and disenfranchisement for vice. These mutually complementary goals found expression in two separate provisions, such that Section 2 best exhibited the Framers' special approval of criminal disenfranchisement and the Fifteenth Amendment demonstrated their insistence on racial equality in the franchise. Happily, if somewhat inadvertently, both halves of that original vision have found recognition in precedent: *Ramirez* acknowledged the implicit endorsement of criminal disenfranchisement exhibited in Section 2, and *Underwood* honored the Framers' absolute objection to racial voting qualifications as expressed in the Fifteenth Amendment. So while the Supreme Court resolved *Underwood* on the basis of the Equal Protection Clause, that decision's rule might best be understood as a displaced Fifteenth Amendment holding.

Indeed, all three Reconstruction Amendments are consonant with Section 2's affirmative sanction for criminal disenfranchisement. Against that view, George Fletcher has suggested that "the Fifteenth Amendment, on its face, prohibits depriving felons of their voting rights simply because they were subject to 'involuntary servitude' as punishment for their crime."⁴²² But while the Fifteenth Amendment did forbid disenfranchisement "on account of . . . previous condition of servitude,"⁴²³ criminals were not thought to have been disenfranchised "on account of" their imprisonment. Instead, criminals were both incarcerated under the Thirteenth Amendment and disenfranchised under Section 2 for their past actions. Race, slavery, and involuntary servitude, by contrast, were viewed as "condition[s]" or statuses that the Fifteenth Amendment rightly banished from voting law.⁴²⁴ Formal equality brings all three amendments, including the Thirteenth and Fourteenth Amendment "crime" exceptions, into alignment.⁴²⁵

422. Fletcher, *Disenfranchisement*, *supra* note 32, at 1904 (quoting U.S. CONST. amend. XIII, § 1).

423. U.S. CONST. amend. XV, § 1.

424. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 983 (Feb. 8, 1869) (statement of Sen. Edmund Ross) ("[T]he late enslavement of the black man gives rise to the prejudice against his enfranchisement. . .").

425. Consider also the Twenty-Fourth Amendment, which provides that the right to vote in a federal election "shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax." The breadth of this provision suggests a provocative question: Could someone convicted of tax evasion argue that he cannot be disenfranchised for his crime? See Sloan G. Speck, Comment, "Failure To Pay Any Poll Tax or Other Tax": *The Constitutionality of Tax*

D. Construing the Voting Rights Act

In recent years, the most intensely discussed and litigated issues in the law of criminal disenfranchisement have concerned the Voting Rights Act (VRA). Section 2(a) of the VRA prohibits any state “voting qualification” that “results in” disenfranchisement “on account of race.”⁴²⁶ Section 2(b) provides that prohibited voting qualifications are to be identified based on a “totality of circumstances” test relating to a group’s “opportunity . . . to participate” in the political process.⁴²⁷ While it is unclear just what is required to show an unlawful denial of the right to vote,⁴²⁸ plaintiffs have raised a straightforward argument that felon disenfranchisement laws fall within the VRA’s prohibition: Those laws appear to impose a “voting qualification,” and criminal disenfranchisement laws have a disparate impact on minority racial groups.⁴²⁹ One might think that these points would make out a *prima facie* VRA violation and require application of section 2(b)’s totality-of-circumstances

Felon Disenfranchisement, 74 U. CHI. L. REV. 1549, 1550 (2007) (pointing out this question and proposing a solution unrelated to formal equality). The intuitive answer is no. The Twenty-Fourth Amendment was designed to thwart racist and classist voting restrictions, not to provide special protection for tax evaders. But can that intuition be squared with the Amendment’s text? Assume for the sake of argument that the purpose of the Twenty-Fourth Amendment was to implement formal equality. Resolving the Reconstruction-era debates over this precise point, the mid-twentieth century Congress might have concluded that being poor is more of an involuntary status than an immoral choice. Given that premise, Congress’s principled purpose in creating the Twenty-Fourth Amendment might inform our understanding of the Amendment’s protection for persons disenfranchised “by reason of failure to pay any . . . tax.” For example, a sharecropper’s “failure to pay” his taxes in the Jim Crow South would have been viewed as the direct result of his dire economic circumstances and so would not represent a morally defective decision. The same cannot be said of white-collar tax defrauders. They are disenfranchised not so much “by reason of” their failure to pay, but rather “by reason of” their willful choice to defy the law—or so the argument might go, if adequately supported by historical materials.

426. 42 U.S.C. § 1973(a) (2006).

427. *Id.* § 1973(b).

428. See *Chisom v. Roemer*, 501 U.S. 380, 394-96 (1991) (discussing the section 2 “results test” and related totality-of-the-circumstances test); *Thornburg v. Gingles*, 478 U.S. 30, 43-51 (1986) (discussing standards for VRA section 2 vote dilution claims, as opposed to vote denial claims); see also Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 717 (2006) (discussing uncertainty regarding the appropriate test in VRA vote denial cases and suggesting a modified disparate-impact test modeled on Title VII jurisprudence).

429. On applying the Voting Rights Act, see *Hayden v. Pataki*, 449 F.3d 305, 368 (2d Cir. 2006) (en banc) (Sotomayor, J., dissenting), in which then-Judge Sotomayor concluded that “Section 2 of the [Voting Rights] Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.”

standard. Yet every court of appeals to reach the question has held that state criminal disenfranchisement laws are immune to challenge under the VRA, at least absent a finding of intentional discrimination.⁴³⁰ These courts have all construed the VRA in light of *Ramirez's* statement that Section 2 of the Fourteenth Amendment embodies an "affirmative sanction" for felon disenfranchisement.⁴³¹ Critics of these decisions often raise arguments already discussed: that Section 2 of the Fourteenth Amendment does not endorse criminal disenfranchisement, that any such endorsement is narrow, and that the Fifteenth Amendment impliedly repealed Section 2.⁴³² But the VRA litigation also raises a distinct constitutional issue: whether and to what extent Congress has authority to regulate state disenfranchisement laws.

Some judges and commentators have suggested that the VRA is unconstitutional to the extent that it forbids state felon disenfranchisement,⁴³³ but courts have so far avoided ruling on the ultimate question of congressional power. Courts have instead construed the VRA's perceived ambiguity in favor of *Ramirez's* affirmative sanction. Despite the VRA's apparent applicability to any voting qualification, the Second and Ninth Circuits found the VRA's scope ambiguous primarily based on the statute's legislative history,⁴³⁴ while the First, Sixth, and Eleventh Circuits identified a particular textual ambiguity—namely, that criminal disenfranchisement may not be "on account of race."⁴³⁵ While each decision used a somewhat distinctive approach, they can all be viewed as having adopted a constitutionally inspired canon of statutory construction against federal preemption of state criminal disenfranchisement

430. The First, Second, and Eleventh Circuits held felon disenfranchisement immune to challenge under the VRA, see *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden*, 449 F.3d 305; *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc), while the en banc Ninth Circuit held "that plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent." *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam) (emphasis added).

431. See *supra* text accompanying notes 25-29.

432. See *Hayden*, 449 F.3d at 349-50 (Parker, J., dissenting).

433. See *id.* at 330 (Walker, J., concurring); *Farrakhan v. Washington*, 359 F.3d 1116, 1121-25 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc); see also Richard L. Hasen, *The Uncertain Congressional Power To Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 779-83 (2006) (arguing that it is unclear whether Congress may ban state felon disenfranchisement under the Supreme Court's "New Federalism" jurisprudence).

434. See *Gregoire*, 623 F.3d at 993; *Hayden*, 449 F.3d at 315 (majority opinion).

435. See *Simmons*, 575 F.3d at 35; *Johnson*, 405 F.3d at 1229 n.30; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

laws.⁴³⁶ The challenge is to bridge the substantial gap between, on the one hand, *Ramirez's* “affirmative sanction” holding regarding the fundamental right to vote and, on the other hand, the VRA cases’ special rule of statutory construction. Courts have so far crossed that bridge by arguing that the canon is either a clear-statement rule implementing federalism values or a product of constitutional avoidance.⁴³⁷ Under these approaches, the key question is whether Congress would strain the Constitution’s federal structure by regulating state disenfranchisement laws.⁴³⁸ If the answer is yes, then ambiguity regarding the VRA’s scope might be construed in favor of criminal disenfranchisement, even if similar uncertainty should not be construed in favor of voting practices that lack affirmative constitutional approval.

Reconstruction history substantially strengthens the argument that Congress would stretch its lawmaking authority and impinge on federalism values by preempting state criminal disenfranchisement laws. As discussed in Part I, criminal disenfranchisement was viewed as a constitutional good because it realized the formal equality values underlying the Reconstruction Amendments. Further, there is a Reconstruction-era precedent for congressional efforts to regulate felon disenfranchisement. As discussed above in Section I.D, radical leader Thaddeus Stevens learned that Southerners were applying the criminal law in a racially discriminatory manner to oppress the former slaves. In the hope of ending that practice, Stevens proposed legislation eliminating criminal disenfranchisement in the South during the Fourteenth Amendment’s ratification. Congressman Bingham and other moderates resisted. The successful opposition to Stevens’s proposal rested on two interrelated points: that noninvidious criminal disenfranchisement accorded with constitutional equality and that federal regulation in this area would be a grave intrusion on state sovereignty. This episode is illuminating. The South lacked representation in Congress, was subject to military rule, and was required to hold federally regulated elections. Despite all that, Republicans still believed that criminal disenfranchisement fulfilled foundational governmental

436. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (applying a “plain statement” rule inspired by federalism values in order to avoid a “constitutional problem”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”).

437. See *Simmons v. Galvin*, 575 F.3d 24, 42 (1st Cir. 2009) (constitutional avoidance); *Hayden*, 449 F.3d at 326-28 (clear statement rule); *Johnson*, 405 F.3d at 1229 (constitutional avoidance); cf. *Gregoire*, 623 F.3d 990 (not clearly identifying either approach).

438. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the states.”).

interests and that Southern states undergoing Reconstruction accordingly retained a residual sovereign interest in implementing that practice. Congress's reluctance to eliminate state felon disenfranchisement even in 1867, at state sovereignty's lowest ebb, raises a serious question whether the Fourteenth or Fifteenth Amendments conferred that authority.

A number of Second Circuit judges tried to deflect questions of congressional authority and *Ramirez's* "affirmative sanction" by moving the debate away from the Fourteenth Amendment and toward the Fifteenth. Contending that "§ 2 of the Fourteenth Amendment . . . in no way diminishes Congress's power to enforce the Fifteenth Amendment,"⁴³⁹ these judges suggest that Congress should have a free hand when regulating felon disenfranchisement pursuant to its Fifteenth Amendment, as opposed to its Fourteenth Amendment, enforcement authority.⁴⁴⁰ Essential to this facially persuasive rejoinder is the notion that the Fifteenth Amendment was "not an extension or continuation of § 2 of the Fourteenth Amendment."⁴⁴¹ As argued above in Section I.E, however, the Fifteenth Amendment was a logical extension of Section 2's endorsement of felon disenfranchisement.⁴⁴² The framers of both measures believed that morally significant actions like crime, and not morally insignificant statuses like race, provided a lawful basis for disenfranchisement. The same political philosophy underlay both the "other crime" exception in Section 2 of the Fourteenth Amendment and the ban on racial voting qualifications enshrined in Section 1 of the Fifteenth Amendment. Critics of felon disenfranchisement, therefore, gain nothing by shifting attention toward the Fifteenth Amendment. Congressional authority over state criminal disenfranchisement should stand or fall equally with regard to both amendments.

Some commentators have pointed to the Reconstruction Act as evidence that Congress possesses ample authority to regulate criminal disenfranchisement laws.⁴⁴³ Under this view, felon disenfranchisement laws should be treated no differently from any other type of voting restriction. This argument has some force. It is true that the first Reconstruction Act restricted Southern criminal disenfranchisement to the limited set of common-law

439. *Hayden*, 499 F.3d at 350 (Parker, J., dissenting).

440. *Id.*

441. *Id.* at 352.

442. See *supra* Section I.E.

443. See Ryan P. Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in Farrakhan v. Gregoire*, 111 COLUM. L. REV. SIDEBAR 51, 61 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/51_Haygood.pdf.

felonies.⁴⁴⁴ What is more, Congress's decision to curtail Southern voting practices preceded the Fifteenth Amendment's definitive prohibition on invidious discrimination in the franchise, which affirmatively empowered Congress to enact prophylactic regulation uprooting invidious state voting laws. But the Reconstruction Act must be understood in its extraordinary context. It was a temporary measure enacted when war had diminished the Southern states' status as sovereigns; it was narrowed based on constitutional objections; it was followed by a supplemental measure implementing by oath disenfranchisement for all felons;⁴⁴⁵ and the constitutions of admitted states generally imposed broad criminal disenfranchisement.⁴⁴⁶ Perhaps most importantly, the Act was passed in the wake of the Black Codes and reports that Southerners were using criminal disenfranchisement to oppress black voters. By contrast, the VRA's legislative record contained no showing of invidious felon disenfranchisement, even though it included ample evidence that literacy tests and other Jim Crow election rules were used for racist ends.⁴⁴⁷ On balance, Congress's experiences during Reconstruction suggest that federal regulation of criminal disenfranchisement laws pose unique constitutional difficulties.

Still, the history recounted in Part I shows that Republicans' support for felon disenfranchisement was bounded by their conceptually linked condemnation of racial voting rules. When Bingham opposed Stevens's ban on felon disenfranchisement, he was concerned that Stevens would have eliminated in its entirety a practice that was viewed as good in itself.⁴⁴⁸ Stevens's position could be compared with the argument advanced by the plaintiffs in *Ramirez*—namely, that the fundamental right to vote rendered unconstitutional all criminal disenfranchisement, even though that practice was expressly contemplated in Section 2. In contrast, the VRA (like the first Reconstruction Act) did not impose a blanket ban on criminal disenfranchisement. Instead, judicial inquiry under section 2(b) of the VRA is open-ended and could be interpreted so as to honor both the “affirmative sanction” and the Fifteenth Amendment's historically-related authorization to eliminate invidious disenfranchisement. For example, courts might adopt a

444. See *supra* Section I.D.

445. See *supra* note 238 and accompanying text (citing Act of Mar. 23, 1867, ch. 6, § 1, 15 Stat. 2, 2 (Mar. 23, 1867) (amending the Military Reconstruction Act)).

446. See *supra* note 239 and accompanying text.

447. See *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970) (opinion of Black, J.); *Farrakhan v. Washington*, 359 F.3d 1116, 1122-23 (9th Cir. 2004) (Kozinski, J, dissenting from denial of rehearing en banc).

448. See *supra* Section I.D.

special presumption, based on states' constitutionally endorsed interest in denying criminals an "opportunity to participate" in the political process, that felon disenfranchisement laws do not disenfranchise "on account of race."⁴⁴⁹ That relatively nuanced approach finds some support. The Sixth Circuit rebuffed a VRA-based challenge not because the felony disenfranchisement laws at issue were categorically exempt from the VRA, but rather based on the section 2(b) "totality of circumstances" analysis. Echoing Sumner, the court reasoned that felons are not typically disenfranchised "because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."⁴⁵⁰ Adopting a similar tack, the United States Solicitor General has opined that some (though not all) felon disenfranchisement statutes may be unlawful under the VRA based on a totality-of-the-circumstances test sensitive to the legal consequences of criminal conviction and incarceration.⁴⁵¹ These approaches leave open the possibility that the design or effect of particular felon disenfranchisement laws could raise reasonable concerns that the resulting disenfranchisement is really "on account of race," rather than crime.⁴⁵² Congressional prophylaxis might then be warranted, even without a conclusive showing of invidious discrimination.

Like courts in the VRA cases, the Reconstruction Congress confronted a dilemma of principle. On the one hand, formal equality counseled strongly in favor of protecting blacks from recognized victimization at the hands of Southern racists. On the other hand, formal equality aligned with more conservative federalism principles to counsel respect for state criminal disenfranchisement practices. The fact that Congress was torn over this choice—even during military Reconstruction—supplies the strongest argument for narrowing the scope of the VRA in favor of the Constitution's "affirmative sanction" of criminal disenfranchisement. But even the "affirmative sanction" has limits, as Congress's Reconstruction experience shows. Heeding the lessons of history, courts today can honor the Constitution's special endorsement of criminal disenfranchisement without categorically immunizing criminal disenfranchisement from VRA challenge.

449. 42 U.S.C. § 1973 (2006).

450. *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986). Reconstruction legislators, too, would likely have viewed offenders' morally significant actions as the proximate cause of their disenfranchisement. *See supra* note 425.

451. *See* Brief for the United States as Amicus Curiae 11-15, *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2010) (No. 08-1569).

452. 42 U.S.C. § 1973(a).

CONCLUSION: VOTING, VALOR, AND VICE

Felon disenfranchisement's integral role in one of American history's most egalitarian chapters comes as a significant surprise. In the judgment of one eminent scholar, it is "difficult to argue" that those disenfranchised for crime "enjoy equal protection of the laws."⁴⁵³ While many twenty-first century commentators would no doubt concur, the framers of the Reconstruction Amendments—who abolished slavery, championed the Equal Protection Clause, and extended suffrage without regard to race—would vigorously dissent. Under the philosophy of formal equality, all these policies, including felon disenfranchisement, were of a piece. Existing commentary is therefore quite wrong to suggest that Section 2's reference to criminal disenfranchisement is a quirky "mystery," a constitutional "afterthought," or the unprincipled product of "political exigency."⁴⁵⁴ The intellectual history of American felon disenfranchisement is not limited to the racist voting practices prevalent in the Jim Crow South. On the contrary, radical Congressmen supported the enfranchisement of former slaves for much the same reasons that they preserved room for states to deny criminals the right to vote. A trace of the historical relationship between voting and vice remains visible today in the Fourteenth Amendment's Section 2—which does indeed evidence its drafters' affirmative approval of criminal disenfranchisement.

The widely recognized historical connection between "ballot and bullets"—that is, between a group's military service and its subsequent receipt of voting rights—tells only part of the story. Commentators have rightly observed that the Fifteenth Amendment was justified in part based on the patriotic heroism of black veterans.⁴⁵⁵ But the Fifteenth Amendment was not satisfied to enfranchise black veterans, as Lincoln proposed doing shortly before his assassination.⁴⁵⁶ Nor was it content to protect the descendants of former slaves,

453. FLETCHER, *OUR SECRET CONSTITUTION*, *supra* note 32, at 151.

454. *See supra* text accompanying notes 14 and 32-33.

455. *See supra* notes 42-44, 88, and accompanying text.

456. *See* Abraham Lincoln's Last Public Address (Apr. 11, 1865), in *SELECTIONS FROM THE WORKS OF ABRAHAM LINCOLN* 219, 223 (Harry W. Hastings & Harold W. Thompson eds., 1921) (arguing that the right to vote should be "now conferred on the very intelligent, and on those who serve our cause as soldiers"); *see also* JAMES, *supra* note 98, at 5 (discussing Chase's similar views); PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 64-66 (1999) (discussing similar views held by Grant and Lincoln); MCKITTRICK, *supra* note 130, at 338 (discussing similar proposals by Senator Howard and President Johnson).

as some in Congress suggested.⁴⁵⁷ The Amendment instead aspired to abolish racial voting qualifications for all Americans. At the same time, the Amendment was tragically limited in that it forbade only racial discrimination while permitting indirect means of denying the former slaves political power.⁴⁵⁸ The Fifteenth Amendment's limited scope reflected a fragile consensus in the Republican Party: statuses (such as race and previous condition of servitude) should not serve as voting qualifications, even if other voting qualifications that might function as proxies for race (such as criminality or literacy) were permissible.⁴⁵⁹

While emphasizing the direct relationship between voting and valor, commentators have lost sight of the inverse relationship between voting and vice. Yet it was the three-sided interaction of voting, valor, and vice that helped bring about the liberation and then enfranchisement of black Americans.

457. See CONG. GLOBE, 40th Cong., 3d Sess. 1008 (Feb. 8, 1869) (statement of Sen. Jacob Howard) (proposing amendment protecting "Citizens of the United States of African descent"). *But see id.* at 1008 (statement of Sen. William Stewart) (rejecting Howard's proposal because "it is not based on the theory of the amendment that there is to be no distinction on account of race and color"); *id.* at 1009 (statement of Sen. Willard Warner) ("I think to single out one race is unworthy of the country and unworthy of the great opportunity now presented to us.").

458. See *supra* note 407 and accompanying text.

459. See KEYSSAR, *supra* note 44, at 81 ("[T]he narrow [and final] version of the Fifteenth Amendment probably represented the center point of American politics, the consensus view even within the Republican Party.").

