ESSAY

“IN WHOM IS THE RIGHT OF SUFFRAGE?": THE RECONSTRUCTION ACTS AS SOURCES OF CONSTITUTIONAL MEANING

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INTRODUCTION

The Civil War ended in the spring of 1865 and attention promptly turned to escalating the process of reconstructing the South. Reconstruction, which involved dismantling the planter-dominated slaveocracies and turning these political communities into multiracial, egalitarian societies centered around civil and political rights, fundamentally changed the nature of our system of federalism, as well as the universe of rights to which individuals were now entitled.

1 Dr. Benjamin Franklin, Remarks, in 3 THE CASKET, OR FLOWERS OF LITERATURE, WIT AND SENTIMENT 181, 181 (1828).

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Much of the recent legal scholarship on voting rights focuses on the main pillars of Reconstruction, namely the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as statutes passed pursuant to these provisions, in assessing the crisis of democracy that the country now faces. Unsurprisingly, the U.S. Supreme Court has dictated the terms of this debate, gutting the Warren Court jurisprudence that read these Amendments expansively at the height of the Civil Rights Movement. In *Shelby County v. Holder*, for example, the Court held that Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments do not extend to reauthorizing certain provisions of the Voting Rights Act absent substantial evidence of intentional racial discrimination in voting. By imposing conditions on certain jurisdictions with a history of voting rights violations, but not states with similarly dismal records, the Act violated the Constitution’s principle that all states have equal standing as sovereigns.

*Shelby County* stands as one example of the ways in which the scope and meaning of the Reconstruction Amendments of the Roberts Court bear little

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resemblance to their 1960s counterparts. The attempt by some states to circumscribe the right to vote and suppress turnout in the wake of Shelby County is yet another marker of why the past—and the true meaning of the Amendments—remains important for clarifying the protections to which the right to vote is entitled.

This Essay seeks to correct this oversight by looking to the Reconstruction Acts, which readmitted the former confederate states into the union, as a source of constitutional meaning. These statutes inform not only the right to vote under the Reconstruction Amendments, and in particular, Section 2 of the Fourteenth Amendment, but also the requirement of republican government embraced by the Guarantee Clause of Article IV, Section 4. Section 2 and the Guarantee Clause remain unenforced and under-enforced constitutional texts, respectively, but as this Essay will show, their principles are relevant to the Court’s jurisprudence in areas such as redistricting and felon disenfranchisement. Despite the fact that Congress enacted these statutes contemporaneously with the ratification of the Fourteenth and Fifteenth Amendments and, importantly, at a time when Congress aggressively enforced the Guarantee Clause, these provisions are overlooked because scholars have long viewed their terms as legally unenforceable.

As this Essay will show, this view is mistaken. The Reconstruction Acts memorialize those aspects of Reconstruction that make it a second founding by requiring that each of the former confederate states have “framed constitutions of State government which are republican” and, in the process,

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4 See Shelby Cty., 570 U.S. at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

5 See 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); 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 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870).

6 U.S. CONST. amend XIV, § 2.

7 U.S. CONST. art. IV, § 4.


9 Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 Yale L.J. 1584, 1628 n.240; see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 29 (2004) (“[P]romises that Congress had extracted from southern states seeking readmission not to restrict suffrage were of dubious constitutionality, as they deprived states of equal rights.”).


11 See, e.g., pmbl., 15 Stat. at 73.
updating the substantive scope of the Guarantee Clause. In 1787, it was unclear whether the majoritarianism that James Madison and other founding fathers advocated as central to republicanism, and embraced by the Guarantee Clause, had to reflect either the will of a majority of the people of the state or a majority of its voters.12 During the Antebellum period, Congress assessed whether territories seeking admission as new states were republican in form, yet slavery politics dictated the rigor with which Congress policed these political systems.13 By 1868, Congress’ position on this issue was clear—majoritarianism had to reflect the will of a majority of the voters within the state, and Congress took an active role in defining the parameters of this community. The readmission of the former Confederate states was the first time that Congress clearly articulated the requirements of republicanism, free from the albatross of slavery and in light of the suffrage requirements of the new Amendments. In the post-Civil War era, majoritarianism now required that civil and political rights be extended to all eligible individuals on a nondiscriminatory basis.

Notably, these statutes imposed limitations on southern states with respect to the voting rights of their citizens as a condition of reentering the union, shedding light on the reach of Section 2 of the Fourteenth Amendment and, importantly, the universe of crimes for which one can be disenfranchised consistent with its terms. Section 2 allows Congress to reduce a state’s delegation in the House of Representatives by removing disfranchised voters from the basis of population used for apportionment, but permits states to disenfranchise “for participation in rebellion or other crime.”14 Clarifying Section 2, the Acts readmitting Arkansas, North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida, Virginia, and Mississippi all contain similar language specifying that these states can disenfranchise their residents only for “punishment for such crimes as are now felonies at common law” rather than the hundreds of disenfranchising offenses that currently exist in these jurisdictions.15

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12 See Franita Tolson, In Congress We Trust? Enforcing Voting Rights from the Founding to the Jim Crow Era (forthcoming 2021) (manuscript at 2-3) (on file with author) (arguing that the controversy over the election of 1800 and the subsequent adoption of the Twelfth Amendment helped clarify the centrality of voters to republican theory).

13 Id. (manuscript at 30) (“The debate over the Kansas-Nebraska Act in the early 1850s and the resulting violence in the territory reveal how much of Congress’ power as well as the meaning of the republican guarantee was increasingly shaped by the national political controversy over slavery.”).

14 U.S. Const. amend. XIV, § 2.

15 See 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, 72 (1868) (conditioning state readmission on the requirement that the constitutions of these States never be amended to deprive a citizen the right to vote “except as a punishment for such crimes as are now felonies at common law”); An Act To Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (including a similar provision while readmitting Arkansas); An Act To Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870)
Even if unenforceable on their own terms, the Reconstruction Acts have significant implications for how we conceive of the right to vote under the U.S. Constitution today, in the midst of some of the most contentious voting wars in decades.\textsuperscript{16} Importantly, when states in the former Confederacy impermissibly disenfranchise their residents contrary to these statutes, this disenfranchisement violates the Guarantee Clause and Section 2 of the Fourteenth Amendment.\textsuperscript{17} The Court has ignored Section 2, the Guarantee Clause, and related federal statutes like the Reconstruction Acts in assessing the scope of congressional power to address these violations, a question that was front and center in the \textit{Shelby County} case.\textsuperscript{18} Turning to the recent debate in Florida over the re-enfranchisement of individuals with felony convictions, this Essay concludes that Florida’s felon disenfranchisement regime, which disenfranchises for crimes well beyond the felonies at common law permitted by the Reconstruction Acts, constitute an abridgment of the right to vote and renders Florida’s government unrepresentative in form. Because Congress’ enforcement authority empowers it to prevent such abridgments, that body has substantial authority, pursuant to Section 5 of the Fourteenth Amendment, to remedy this disenfranchisement through either reduced representation or other appropriate penalties.\textsuperscript{19}

I. A PROMISE UNFULFILLED?: SECTION 2, THE GUARANTEE CLAUSE, AND THE GHOST OF MADISON’S CONSTITUTION

The ratification of the U.S. Constitution in 1789 was not the only period in which states entered the Union, with each successive admission triggering a debate about the requirements of republicanism, but this fact is not readily apparent from the \textit{Shelby County} v. \textit{Holder} decision. In \textit{Shelby County}, the Supreme Court invalidated Section 4(b) of the Voting Rights Act of 1965, arguably one of

\textsuperscript{16} See generally Richard L. Hasen, \textit{Election Meltdown: Dirty Tricks, Dist revolt, and the Threat to American Democracy} (2020) (detailing the numerous legal and political battles fought over voting rights during the 2020 election).

\textsuperscript{17} This Essay focuses on the former confederate states that were subject to the Reconstruction Acts, but note that the argument presented here—that these states can only disenfranchise for crimes that were felonies at common law—is generalizable to all states. By their terms, the Reconstruction Acts, although targeted towards the southern states, updated the requirements of republican government under the Guarantee Clause (the text of which applies to every state in the union).

\textsuperscript{18} See Franita Tolson, \textit{What is Abridgment?: A Critique of Two Section Twos}, 67 Ala. L. Rev. 433, 435 (2015) (noting that “the U.S. Supreme Court has mostly overlooked Section 2,” despite it being the only provision in the Fourteenth Amendment that mentions voting).

\textsuperscript{19} See generally Franita Tolson, \textit{The Constitutional Structure of Voting Rights Enforcement}, 89 Wash. L. Rev. 379 (2014) (arguing that Section 2, like Section 1 of the Fourteenth Amendment, informs the scope of congressional enforcement authority under Section 5 of that provision).
the most successful pieces of civil rights legislation of the twentieth century and
one of the crown jewels of the Civil Rights Movement of the 1960s. In striking
down Section 4(b), which determined those jurisdictions required to preclear any
changes to their voting laws with the federal government before those changes
could go into effect, the Court opined that the racial discrimination that
permeated the 1960s and earlier decades was a relic of the past. Instead, the
strides made with respect to racial equality, as illustrated by the parity that
African Americans enjoyed with whites in voter registration and turnout, meant
that previously covered jurisdictions had returned to their pre-1965 status as
sovereigns with equal rights and authority as their non-covered counterparts over
voting and elections.

The Court's assessment of state authority over elections is based on its view
that the Constitution of 1789 is the baseline from which state sovereignty should
be measured. According to the Court, "[n]ot only do States retain sovereignty
under the Constitution, there is also a fundamental principle of equal sovereignty among the States that is "essential to the harmonious operation of the scheme upon which the Republic was organized." In
criticizing the Voting Rights Act for applying to "only nine States (and several
additional counties)" "despite the tradition of equal sovereignty," the majority
ignored that Reconstruction—a period in which there was substantial
constitutional and statutory change to the very structure of our government—
altered "the scheme upon which the Republic was organized."23

Given the Shelby County Court's myopic focus on 1789, the fact that the
Reconstruction Acts have not featured more prominently in constitutional
interpretation is not surprising. Reconstruction fundamentally transformed
our system of federalism, resulting in a more active federal presence in which
Congress was willing to aggregate its powers to protect voting rights. The goal of
remaking southern governments and expanding their electorates was a
multi-year, multi-step process, involving numerous pieces of legislation that
all shed light on how the Reconstruction Amendments altered Madison's
Constitution. While this Essay focuses on the Reconstruction Acts, Congress
passed a number of statutes to implement the Reconstruction project and
expand/protect civil and political rights including the Civil Rights Act of
1866; 24 the Military Reconstruction Act of 1867; 25 the Enforcement Acts of

21 Id. at 547-49.
22 Id. at 544 (internal citations omitted).
23 Id.
24 Civil Rights Act of 1866, ch. 19, 14 Stat. 27.
1870 and 1871;\textsuperscript{26} and the Civil Rights Act of 1875,\textsuperscript{27} to name a few. This list is by no means exhaustive but makes the point: this contemporaneous legislation, much of which is either ignored or used in a piecemeal fashion by the courts, informs constitutional meaning. These provisions should have just as much import as the congressional debates, newspapers, ratification debates, statements by political elites, and so on in shedding light on the scope of constitutional provisions that bear on voting and elections.

This pluralism is important because history teaches us that Congress’ understanding of its powers in this area was complex and varied. The Guarantee Clause legitimized much of the Reconstruction program, especially as Congress brought the southern states under federal control to facilitate the creation of new, postwar governments. The Military Reconstruction Act of 1867 put the former confederacy into federal receivership,\textsuperscript{28} necessitating the creation of new governments and new state constitutions that would, in the process, update the standard for republican government. For their part, the Reconstruction Acts set a baseline level of enfranchisement necessary to meet the threshold of republicanism.

Likewise, Section 2 of the Fourteenth Amendment penalized states for disenfranchising individuals who were now entitled to be within the political community of voters, pursuant to the requirements of the Guarantee Clause, by reducing the states’ representation in Congress. Through Section 2, congressional Republicans formally recognized the political existence of African American men, a group that had been denied such recognition, first, with the \textit{Dred Scott}\textsuperscript{29} decision and, then post-Thirteenth Amendment, with the adoption of the “Black Codes” in southern states that relegated this group to quasi-slave status.\textsuperscript{30} Section 2 also informed the scope of Congress’s enforcement authority under Section 5 of the Fourteenth Amendment, with its penalty providing a basis for when congressional legislation is “appropriate.”\textsuperscript{31}

While Section 2 did not create an affirmative right to vote that would have further limited state authority over voter qualification standards,\textsuperscript{32} this

\textsuperscript{27} Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
\textsuperscript{28} \S\ 1, 14 Stat. at 438.
\textsuperscript{29} \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393, 404 (1857) (enslaved party, \textit{superseded by constitutional amendment}, U.S. CONST. amend. XIV (holding that Black people were not citizens).
\textsuperscript{30} \textit{See} Part III, infra.
\textsuperscript{31} Tolson, \textit{supra} note 19, at 385.
\textsuperscript{32} As I have argued elsewhere, we need this amendment. \textit{See generally} Franita Tolson, Legal Analysis of the Durbin-Warren Right to Vote Amendment (unpublished manuscript) (July 2020), https://advancementproject.org/wp-content/uploads/2020/08/Professor-Franita-Tolson-Legal-Analysis-of-the-Right-to-Vote-Amendment.pdf [https://perma.cc/LFZ7-NZSU] (analyzing the proposed amendment and explaining why it would be a powerful tool to protect voting rights).
provision recalibrated the relationship between the states and the federal government over the scope of (and protections entitled to) the right to vote. Specifically, the language of Section 2, with its relatively low threshold to trigger congressional action (abridgment of the right to vote on almost any grounds) and its high penalty (reduced representation) balanced these twin concerns of state sovereignty and voter access. Post-Fourteenth Amendment, states could still choose the qualifications of electors and set the ground rules for state and federal elections. However, Congress, pursuant to its authority under Section 5 of that provision, could intervene to protect the right to vote from “abridgment,” consistent with Section 2, and keep state governments republican in form, consistent with the Guarantee Clause. This authority is important, as it gives Congress the ability to legislate beyond the scope of the Fifteenth Amendment, which focuses on racially discriminatory denials of the ballot, and prohibits abridgment of the right to vote, on any grounds, under facially neutral state legislation.

Section 2 and the Guarantee Clause, when viewed collectively, vastly expanded congressional oversight of state and federal elections, making it impossible to return to the world envisioned by the Founders, when the federal role was more modest. These provisions gave Congress a role in defining the political community entitled to exercise a newly redefined right to vote, a right that was now federally protected and disconnected from its original status as a privilege reserved to the propertied elite. Voting now would serve as the vehicle through which “We the People” could join the community of “We the Voters” and express their sovereign authority.

The Reconstruction Acts, by prohibiting states from amending their constitutions to disenfranchise otherwise eligible voters and to disenfranchise for crimes not felonies at common law, reflected this shift of authority from the states to Congress over voting and elections. For example, the Reconstruction Act readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida provided, in relevant part:

[T]he constitutions of neither of said States shall ever 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

33 U.S. CONST. amend XIV, § 5.
34 U.S. CONST. amend XIV, § 2.
35 Tolson, supra note 18, at 435–36.
36 Tolson, supra note 12 (manuscript at 3).
felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State . . . 37

In passing this statute, Congress sought to cement the political rights that African Americans obtained in the wake of the Civil War. It complimented Section 2’s penalty by setting the perimeters of “lawful” disenfranchisement and emphasizing the republican principle of majority will. The new state constitutions and state governments in the South served as a baseline for republican government, consistent with the Guarantee Clause, from that point forward, maintenance of which would preserve the Republican Party’s governing coalition. 38

Towards this end, Congress aggressively policed the state procedures for ratifying these new constitutions, seeking to ensure that former Confederates did not use violence and intimidation to defeat the will of a majority of the qualified electors. For example, the gaps between voter registration and voter turnout became a significant issue in Alabama, in which turnout for the election to ratify the new constitution was almost 100,000 less than the number of registered voters. 39 To become law, 76,500 voters (or a majority of the registered voters) had to vote in favor of the new constitution, but the total vote was 71,817 votes in favor. 40 Various senators asserted that the gap between turnout and registration was attributable to a number of factors including threats of violence against, or blacklisting of, African Americans should they show up to vote. 41 Congress approved Alabama’s constitution, which could have been thwarted by voter intimidation, to elevate majoritarian principles—or the rights of those entitled to be within the community of voters—over the brute force that had superficially produced an outcome in which the proposed constitution garnered less than majority support.

Given the difficulties of guaranteeing that these new state constitutions would be ratified in elections free of fraud, violence, and intimidation, it was

37 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, 73 (1868).
38 TOLSON, supra note 12 (manuscript at 21-30).
39 See CONG. GLOBE, 40th Cong., 2d Sess. 2930-31 (1868) (comments of Sen. Lyman Trumbull) (arguing that Alabama’s constitution was not valid because it had not been ratified by a majority of the registered voters in the state). These objections were ultimately unsuccessful because turnout for the election to ratify the constitution was affected by a number of events (storms, the fact that some AL counties didn’t vote, voter intimidation, etc.), but the extended discussion signaled Congress’ concerns over whether the new states complied with the majoritarianism required by the Guarantee Clause, if for no reason other than there needed to be a loyal government in Alabama to ratify the Fourteenth Amendment. See id. at 2934 (comments of Sen. William Stewart) (“[T]he object of submitting this question to a vote at all was to ascertain if there were loyal men enough in the State willing to accept the congressional plan, to sustain a loyal State government.”).
40 Id. at 2861 (comments of Sen. John Sherman).
41 See id. (detailing the freedmen were often turned away when they showed up to vote and arguing that Congress should not “exclude this State on a barren technicality when we know that the exclusion will prevent the local government of the State from falling into loyal instead of rebel hands.”).
no surprise that the Reconstruction Acts sought to memorialize these
governments as the sine qua non of republican government, and even more,
to clarify the scope of the recent amendments expanding federal power over
elections. Yet, the Supreme Court has, by and large, ignored this key
legislation and constitutional text in interpreting the scope of congressional
power over elections under the Reconstruction Amendments.

II. IGNORING THE SECOND FOUNDING: SECTION 2 AND THE
GUARANTEE CLAUSE IN RECENT SUPREME COURT CASELAW

Ignoring the Reconstruction Acts and many of the other provisions that
bear on voting and elections reflects a broader jurisprudential trend among
both the Supreme Court and lower courts of treating core voting rights issues
as distinct from questions of institutional design and the aggregation of
political power.42 This strategy allows the Court to pick and choose the
legislation and constitutional text that it deems relevant to any given voting
dispute. For example, the Court has treated structural disputes over the
drawing of district lines to involve the right to vote of the citizens living
within a challenged district, despite the incoherence of using an individual
rights framework to resolve disputes that implicate the political power of
groups rather than individuals.43 Such a singular approach to these issues also
fails to capture how Congress legislates in this area. When it comes to
elections, Congress regulates at the intersection of both structure and rights,
invoking multiple sources of constitutional power over elections, rather than
just one or two specific clauses.44 The range of legislation adopted pursuant
to these provisions is therefore immediately relevant to questions that arise
about the scope of the constitutional right to vote.

But the Court’s narrow approach means that when provisions such as
Section 2 of the Fourteenth Amendment and the Guarantee Clause have made
appearances in Supreme Court opinions, it is for reasons other than clarifying
the scope of congressional authority over voting and elections. This oversight

(describing Supreme Court caselaw that has not acknowledged the institutional and structuralist
failings inherent in political gerrymandering).

43 See Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 HARV. L. REV. 1663, 1718 (2001) (questioning why the Supreme Court has “ignored the possibility that dilution claims
are different than individual rights” and insisted on using an individual rights framework for a
dispute over the drawing of district lines).

44 See TOLSON, supra note 12 (manuscript at 3-4) (discussing how Congress used multiple sources
of constitutional power in the lead-up to the civil war to regulate and resolve election questions,
including the Guarantee Clause and the Elections Clause); see also H.R. 1, 117th Cong. § 3 (1st Sess.
2021) (invoking no fewer than five provisions, including the Guarantee Clause and the Fourteenth
Amendment, as the sources of constitutional authorization for omnibus election legislation that touches
on voter registration, felon disenfranchisement, and redistricting, among other areas).
arguably stems from the Court’s desire to keep the constitutional structure, which expressly delegates to Congress authority over various areas of the political system, as a separate and distinct entity from the right to vote under the Fourteenth and Fifteenth Amendments, which Congress has the power to protect subject to parameters set by the Court.

For example, the Court discussed the Guarantee Clause in Rucho v. Common Cause, which held that partisan gerrymandering claims are nonjusticiable political questions despite evidence that these gerrymanders rendered meaningless the votes of political minorities.45 In Rucho, the Court asserted that any argument “that partisan gerrymanders violate ‘the core principle of [our] republican government’ . . . ‘that the voters should choose their own representatives’ . . . is an objection more properly grounded in the Guarantee Clause,” which “does not provide the basis for a justiciable claim.”46

Notably, the malapportionment cases, starting with Baker v. Carr in 1962, were premised on the idea that judicial intervention was warranted precisely because the failure to redistrict violated the voters’ right to choose their representatives. Baker rejected the argument that the political nature of malapportionment meant that such claims were nonjusticiable.47 In making this distinction between “political questions” and “political cases,” Baker sought to evade the line of precedents finding Guarantee Clause claims to be nonjusticiable. But in doing so, the Court inadvertently rendered the Clause’s broader purpose and meaning inconsequential as it relates to issues other than justiciability, choosing instead to confine core questions of voting and representation to the Equal Protection Clause.48 Rucho exploits Baker’s distinction between political questions and political cases, further obscuring that the Guarantee Clause’s conception of republicanism marries rights based questions about the disbursement of political power with structural questions about how political power is aggregated and organized.

Similarly, the Supreme Court has not wholly ignored Section 2 of the Fourteenth Amendment, recognizing its potential for informing the scope of related constitutional provisions, but has nonetheless neglected the provision

45 139 S. Ct. 2484, 2507 (2019); see also id. at 2512 (Kagan, J., dissenting) (noting that partisan gerrymandering can make elections “meaningless”).

46 Id. at 2506 (majority opinion) (alteration in original) (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 801 (2018)).

47 See 369 U.S. 186, 217 (1962) (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”).

48 See id. at 218 (“We shall discover that Guarantee Clause claims involve those elements which define a ‘political question,’ and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.”).
in resolving core disputes over protections for the right to vote.49 In *Evenwel v. Abbott*, for example, the Court held that the Fourteenth Amendment's principle of one person, one vote did not require states to draw their state legislative districts based on eligible voters.50 Instead, states are permitted to construct districts based on total population figures because this practice is consistent with the Court's precedents, longstanding practice, and constitutional history.51 In reaching this conclusion, Section 2 figured prominently in the Court's analysis, with particular attention paid to the rejection of an apportionment standard based on total voters in the Thirty-Ninth Congress.52

But the Court's selective use of Section 2, without considering the universe of contemporaneous material that bear on its meaning, has led to disastrous results. In *Richardson v. Ramirez*, the Court held that felon disenfranchisement laws do not violate the Equal Protection Clause.53 The Court concluded that, because Section 2 expressly exempts disenfranchisement grounded on prior conviction of a felony from the penalty of reduced representation, then states do not violate section 1 of the Fourteenth Amendment by excluding these individuals from the franchise.54 Notably, the majority opinion referenced the Reconstruction Acts, but for the proposition that states retain significant authority to disenfranchise on the basis of felony conviction provided that the law is administered equally. However, the Court ignored the Acts' textual limitation that disenfranchisement be only for felons at common law.55

Similar to its approach under the Guarantee Clause, the Court has opportunistically used Section 2 to shed light on some constitutional

49 See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016) (using Section 2 of the Fourteenth Amendment to permit total population as the congressional apportionment base).

50 See id. at 1130 (noting that "consistent with constitutional history, this Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations" rather than "the voter-eligible population of districts").

51 See id. at 1123 ("Texas, like all other States, draws its legislative districts on the basis of total population.").

52 Id. at 1127-28 (emphasizing the explicit consideration the Thirty-Ninth Congress gave to the issue of apportionment and its ultimate rejection of apportionment based on voter population).

53 The Court in *Richardson* noted that

the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.


54 See id. ("As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment.").

55 Id. at 52-53.
controversies while ignoring its relevance to others. The Reconstruction Acts clarified a core concern raised in the context of debates over Section 2 of the Fourteenth Amendment—whether states could arbitrarily expand the list of felonies to disenfranchise more people than Section 2 and the Guarantee Clause permits. As Richard and Christopher Re have argued, Section 2—and its "relatively narrow references to 'felony' disenfranchisement"—addressed concerns by leading radicals in Congress "that the former slaves were being unjustly disenfranchised for 'a thousand and one trivial offenses.'" The requirement that disenfranchisement only be for crimes that were felonies at common law has broad implications for one of the current battles in the voting wars, namely, the debate over whether states can require payment of all fines and fees as a condition of re-enfranchisement. Using Florida as a case study, the next section shows that Section 2, as illuminated by the Reconstruction Acts, provides a blueprint for when states must enfranchise their populations, consistent with the Guarantee Clause.

III. THE RECONSTRUCTION ACTS AS A BLUEPRINT FOR REPUBLICAN GOVERNMENT: FELON DISENFRANCHISEMENT AND THE CONSTITUTIONALITY OF FLORIDA'S AMENDMENT 4

Florida leads the nation in the number of individuals disenfranchised due to felony conviction. Over 1.1 million individuals cannot vote, representing 7.7% of the voting age population in the state and 22% of the disenfranchised population nationally. As of 2020, 15.42% of African Americans in Florida are disenfranchised.

56 See John R. Cosgrove, Four New Arguments Against the Constitutionality of Felony Disenfranchisement, 26 T. JEFFERSON L. REV. 157, 178 n.97 (2004) (arguing that references crimes of insurrection and rebellion in Sections 3 and 4 of the Fourteenth Amendment are a limiting principle on Section 2); see also Abigail M. Hinchcliff, Note, The "Other" Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement, 121 YALE L.J. 194, 216 n.127 (2013) (noting that some jurisdictions disenfranchise for misdemeanors).

57 Re & Re, supra note 9, at 1628; see also id. at 1628-29 (noting in their discussion of statements by Representatives Thaddeus Stevens and John Bingham that "the Republicans realized—as later events would bear out—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").


In 2018, Florida voters passed Amendment 4, which provided that “any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.” The effect of Amendment 4 would have been quite far-reaching, enfranchising hundreds of thousands of people following its enactment.

After Amendment 4 went into effect, the state legislature passed SB 7066, which defined the phrase “completion of all terms of sentence” to include all fines and fees imposed as a part of any criminal sentence. The bill directly affected more than 774,000 people who were disenfranchised because of outstanding financial obligations, most of whom do not have the ability to pay. In September 2020, the Eleventh Circuit, in a 200-page opinion in a case entitled Jones v. Governor of Florida, upheld SB 7066, rejecting the argument that the financial obligation imposed by the statute was unconstitutional wealth discrimination in violation of the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution. The district court had found that SB 7066 violated the Equal Protection Clause as applied to indigent defendants unable to pay their fines and fees. Sitting en banc, the court reversed the district court’s ruling. Detailing Florida's long history of prohibiting those with felony convictions from casting a ballot, the court concluded that, unlike a poll tax, the requirement that those with felony convictions pay all fines and fees is “highly relevant to voter qualifications” because it “ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote.”

62 The Sent’g Project, supra note 59, at 13. Some media outlets place the number of affected individuals at well over a million. See, e.g., Lawrence Mower, What Happened to Florida’s Amendment 4? Five Takeaways from our Investigation, Tampa Bay Times (Oct. 11, 2020), https://www.tampabay.com/news/florida-politics/2020/10/11/what-happened-to-florida-amendment-4-five-takeaways-from-our-investigation/ ("The amendment was supposed to be America’s greatest expansion of civil rights in decades, allowing an estimated 1.4 million to vote.").
63 S.B. 7066, 2019 Leg., Reg. Sess. ( Fla. 2019), 2019 Fla. Laws 28 (defining “completion of all terms of sentence” to include “[f]ull payment of fines or fees ordered by the court”).
64 See Patricia Mazzei, Ex-Felons in Florida Must Pay Fines Before Voting, Appellate Court Rules, N.Y. Times (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rulings.html (reporting that an American Civil Liberties Union voting rights expert testified that over 774,000 felons in Florida have outstanding fines). Another study estimated that this number was as high as 900,000. The Sent’g Project, supra note 59, at 13.
65 See Jones v. Governor of Florida, 975 F.3d 1016, 1025, 1042 (11th Cir. 2020) ("[T]he text of the Constitution creates an inference that the right to vote stands in a different relationship to race, sex, and age than it does to the nonpayment of taxes.").
66 DeSantis, 462 F. Supp. 3d at 1234.
67 Jones, 975 F.3d at 1031.
Notably, the court discussed Florida’s first constitution, enacted in 1838, which disenfranchised those “convicted of bribery, perjury, or other infamous crime.”68 After briefly noting that Florida has disenfranchised those convicted of “infamous crime” since its entry into the union in 1845, the opinion then skipped ahead to the adoption of Amendment 4 in 2018.69 Noticeably absent from this discussion is Florida’s exit from the union to join the Confederacy in 1861 and its subsequent re-entry into the union, subject to certain conditions, in 1868.70 As a condition of re-entry, Florida, like the other confederate states, had to adopt a new constitution providing for universal male suffrage.71 But, as noted in Part I, Congress also imposed other limitations on Florida’s ability to alter its state constitution upon re-entry in the Reconstruction Act of June 15, 1868, prohibiting disenfranchisement for crime unless they “are now felonies at common law.”72

This language has significant implications for Florida’s regime of felon disenfranchisement. Notably, the Jones court assumed that paying fines and fees was an integral part of satisfying the debt that one owes to society; however, the court ignored that disenfranchisement as a punishment for crime can only be “highly relevant” to voter qualifications in the context of common law felonies.

Importantly, a felony at common law was a serious crime punishable, in some cases, by death.73 The nine traditional common law felonies under English law were murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem, and burglary.74 To this list, one can add the crimes listed in the Florida Constitution of 1868 as a ground for disenfranchisement, since these crimes were implicitly sanctioned by the 1868 Reconstruction Act that deemed the “framed constitutions of [Florida’s] government . . . republican.”75 Under the 1868 Florida Constitution:

The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the

68 Id. at 1025 (citing FLA. CONST. art. VI, § 4 (1838)).
69 Id.
70 See Today in History — January 10, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/january-10 [https://perma.cc/W985-3GRJ] (listing January 10 as the date of Florida’s secession from the Union).
71 See 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, 73 (1868) ("[T]he constitutions of neither of said States shall ever 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 . . . .); see also FLA. CONST. art. VI, § 1 (1838).
72 15 Stat. at 73.
75 15 Stat. at 73.
State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make or become, directly or indirectly, interested in any bet or wager, the result of which shall depend upon any election; or who shall hereafter fight a duel, or send or accept a challenge to fight, or who shall be a second to either party, or be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.\footnote{FLA. CONST., Suffrage and Eligibility, § 4 (1868).}

It is clear, from the list of common law felonies as well as the crimes added to this list by the 1868 Florida Constitution—i.e., bribery, perjury, larceny, betting on the election, participating in a duel—the realm of felonies that should result in disenfranchisement is appreciably small. Even the term “infamous crime” had a specific meaning at common law, referring to crimes that disqualify one from serving as a juror or testifying in court.\footnote{See Will Tress, Intended Collateral Consequences: Defining Felony in the Early American Republic, 57 CLEV. ST. L. REV. 461, 466 (2009) (“At common law, the term ‘infamous’ came to mean a person rendered incapable of being a juror or testifying in court.”).} These crimes include “treason, felony, piracy, perjury, and forgery . . . as well as any crime that was punished by the pillory, whipping, or branding.”\footnote{Id.} Nevertheless, it is undeniable that the Reconstruction Acts did not completely eliminate the possibility for official mischief, given the open-ended “infamous crime” language in the 1868 constitution that could arguably be used as a predicate to disenfranchise individuals for a host of new crimes, particularly those that sprang up in the wake of the Civil War.

Florida, like many other former confederate states, enacted “Black Codes”, which imposed various restrictions on African Americans in the wake of emancipation by, for example, requiring them to sign yearly contracts or face re-enslavement; limiting the type of property that African Americans could own; and imposing a host of restrictions on their freedom of movement.\footnote{See FLA. RIGHTS RESTORATION COAL., BRENNAN CTR. FOR JUST., HISTORY OF FLORIDA’S FELONY DISENFRANCHISEMENT PROVISION 1 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_38222.pdf [https://perma.cc/5YSV-LR7F] (“Studies show that many states, especially those of the former Confederacy, passed restrictive felony disenfranchisement laws in the period directly following the extension of voting rights to freedmen.”).} The Codes also expanded the criminal justice system, making minor offenses that legislators thought were more likely to be committed by African Americans, such as certain types of theft, vagrancy, burglary, and assault, into...
crimes subject to the penalty of death or, alternatively, imprisonment and, later, disenfranchisement.\textsuperscript{80}

Written with the pernicousness of the Black Codes in mind, the Reconstruction Acts inform the scope of the Guarantee Clause, both by their very terms and within the context of Section 2’s penalty, which has an exception for disenfranchisement for the commission of a crime.\textsuperscript{81} The Acts suggest that the “treason, or other crime” language should be interpreted narrowly, for example, by applying the noscitur a sociis interpretive canon to limit “other crime” to those crimes that are of similar seriousness as treason.\textsuperscript{82} A government that disenfranchises for a broader swath of crimes is, by definition, unrepulican.

The Acts not only serve as explicit limitations on the universe of crimes that can disenfranchise (“except as a punishment for such crimes as are now felonies at common law”), but also as a limit on the ability of the state to disenfranchise under laws not “equally applicable to all the inhabitants.”\textsuperscript{83} For this reason, the so-called Black Codes that were common in Florida from 1865-1868 could never serve as a predicate for disenfranchisement because of their racially discriminatory intent and effect. Even more significantly, there is no reasonable interpretation of “infamous crime” in the Florida Constitution of 1868—or any of the later iterations of that document—that could support Florida’s current system, which disenfranchises individuals who commit any one of 533 different felonies, the overwhelming majority of which are not felonies at common law.\textsuperscript{84}

The fact that people are impermissibly disenfranchised for crimes that were not felonies at common law makes the Florida statute requiring payment of all fines and fees a poll tax. Because of the Reconstruction Act of 1868, disenfranchisement cannot be imposed for crimes that are not felonies at

\textsuperscript{80} See id. ("A crucial component of the Codes was an expansion of the criminal justice system to deal with minor offenses that legislators believed blacks were likely to commit and that had been formerly punished by their masters."); see also generally DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (Anchor Books 2009) (2008) (arguing that the post-Civil War practice of leasing black convict labor to private corporations was a continuation of slavery).

\textsuperscript{81} U.S. CONST. amend. XIV, § 2.

\textsuperscript{82} See Yates v. United States, 574 U.S. 528, 543 (2015) ("We rely on the principle of noscitur a sociis—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." (quoting Gustafson v. Allied Co., 513 U.S. 561, 575 (1995))).

\textsuperscript{83} 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, 73 (1868).

common law (or that are implicitly sanctioned by the 1868 state constitution). Requiring the payment of fines and fees thus functions as “a prerequisite to the registration for voting,” independent of the underlying offense, in violation of both the Fourteenth and Twenty-Fourth Amendments. In finding that Florida’s system requiring payment of fines and fees to be “highly relevant” to voter qualifications, the Eleventh Circuit ignored that the very system it endorses cannot, by definition, be a basis for determining voter eligibility since many individuals are disenfranchised in violation of the republican ideal.

CONCLUSION

The controversy over felon disenfranchisement in Florida illustrates the continued relevance of the Reconstruction Acts and the poverty of a jurisprudence that ignores these provisions to the detriment of our democratic republic. The Reconstruction Acts, by their terms, deemed each state republican in form upon their re-entry into the union. Florida has violated the terms upon which it reentered the union by disenfranchising those convicted of crimes that were not felonies at common law. Falling below what the statutes require—here by disenfranchising for many more crimes than the Acts permit—means that Florida’s current government is no longer republican in form. As such, Congress can remedy this disenfranchisement and lack of republicanism by imposing the penalty of reduced representation under Section 2 of the Fourteenth Amendment, or alternatively, by prohibiting this disenfranchisement outright through Section 5 of the Fourteenth Amendment. 85

85 See generally H.R. 1, 117th Cong. § 3 (1st Sess. 2021) (invoking Congress’s powers under Section 2 and Section 5 of the Fourteenth Amendment to enfranchise those convicted of felonies for purposes of voting in federal elections).