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### Richardson v. Ramirez: A Motion to Reconsider

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# Articles

## **RICHARDSON V. RAMIREZ: A MOTION TO RECONSIDER**

**Richard W. Bourne\***

### I. INTRODUCTION

In *Richardson v. Ramirez*,<sup>1</sup> the Supreme Court held that felon disfranchisement statutes are constitutionally authorized by Section 2 of the Fourteenth Amendment. By its terms, Section 2 limits a state's share of seats in Congress and its electoral votes to the extent that the state abridges voting rights and excepts from such limitation denials of the right to vote to persons on account of "rebellion, or other crime." The Supreme Court explained that the background and legislative history of Section 2 failed to shed light on the meaning of the exception clause, and, thus, left the Court free to give a literal application of its terms for determining whether Section 2 sanctioned state felon disfranchisement laws.<sup>2</sup>

This Article argues that members of the *Richardson* Court totally misread Section 2. The Court failed to uncover the legislative history of the Section,<sup>3</sup> to consider the provision in light of the other provisions of the Amendment as they were first contemplated,<sup>4</sup> or to read it in light of the purpose it was designed to achieve.<sup>5</sup> When read in light of the goals its language was designed to advance, Section 2 should not be construed as an explicit endorsement of felon disfranchisement statutes, much less as an authorization for the states to adopt them. Instead, Section 2 should be read as part of a larger scheme aimed at undergirding the Republican Party and the rights of the newly freed African American slaves, who were rightly perceived to be its likely adherents, by encouraging their inclusion in the electorate of a New American South

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\* Professor of Law, University of Baltimore School of Law. LL.B., University of Virginia, 1968; LL.M., Harvard Law School, 1975. I wish to thank my research assistant, Eric Massof, for hours of work ploughing through the Congressional Globe and other primary resource materials in developing the legislative history of Section 2 of the Fourteenth Amendment. Eric gave me a lot of ideas as I developed this piece; the errors, of course, are my own.

<sup>1</sup> 418 U.S. 24 (1974).

<sup>2</sup> See *infra* notes 17-24 (discussing the Court's opinion of the case).

<sup>3</sup> See *infra* Part III (exploring the history of Section 2 of the Fourteenth Amendment).

<sup>4</sup> See *infra* Part III (exploring the history of Section 2 of the Fourteenth Amendment).

<sup>5</sup> See *infra* Part III (exploring the history of Section 2 of the Fourteenth Amendment).

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while simultaneously excluding, from the same area's electorate unreconstructed whites who had participated in the lost cause of Confederate rebellion.

II. FELON DISFRANCHISEMENT STATUTES, THE RIGHT OF RACIAL AND ETHNIC MINORITIES TO VOTE, AND *RICHARDSON V. RAMIREZ*

In recent years, it has become obvious that the various felon disfranchisement<sup>6</sup> statutes of many states disfranchise large and disproportionate percentages of minority citizens. The statutory schemes under which felons are denied the right to vote are extraordinarily variable.<sup>7</sup> The number of persons who are so disfranchised necessarily varies from state to state and is impossible to

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<sup>6</sup> In the nineteenth century, and certainly throughout the debates about passage of the Fourteenth and Fifteenth Amendments, writers used the word *disfranchisement* rather than the more modern form of the same word, *disenfranchisement*. I have chosen to use the older form throughout this piece. One reason for this choice is simple: it is the way the word was used by the framers of the Fourteenth Amendment, whose intent we are trying to discern in this article. In addition, use of the more modern phrase is somewhat ahistorical in that it presumes that the persons whose voting rights were primarily at stake in the Reconstruction debates, the former slaves of the American South, had previously enjoyed access to the ballot, when in fact that was clearly not the case.

<sup>7</sup> See Susan E. Marquardt, Comment, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 284 (2004-2005). Marquardt notes that only two states, Maine and Vermont, afford all adult citizens the right to vote regardless of their criminal history. *Id.* The rest of the states, plus the District of Columbia, all deny voting eligibility to persons convicted of felonies and serving their terms in jails or penitentiaries, and thirty-seven states extend the period of disenfranchisement beyond the completion of a felon's sentence while he or she is on probation or serving out parole. *Id.* Fourteen of these thirty-seven have laws providing for disfranchisement of felons beyond the completion of their sentences, probation or parole. *Id.* See also, Tanya Dugree-Pearson, Note, *Current Public Law and Policy Issues: Disenfranchisement - A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLIN J. PUB. L. & POL'Y 359, 373-74 (2002). As Dugree-Pearson points out, most of the states that permit disfranchisement long after incarceration has ended do so on a permanent basis, though a few only bar ex-offenders permanently after they have committed two felonies. *Id.* Two states bar voting for ex-offenders only for felonies committed in the 1980's or before, and one state, Texas, restores the right to vote two years after an offender has served a full sentence, probation, and parole. *Id.* While most states provide some mechanism for restoration of voting rights, there is great disparity and confusion regarding when a felon can become eligible for reinstatement and what process or processes can be used to achieve this end. See Marquardt, *supra*, at 284. In some states, a pardon from the governor is required, while others mandate action by the parole or pardons board. *Id.* In a few states there is no method for reinstatement, short of a Presidential pardon that can only benefit those convicted of federal felonies. *Id.* Overall, the procedures for recovering voting rights once lost are daunting. See also JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT*, 84-90 (2006) (providing a detailed description of the processes for regaining voting rights and the difficulties felons often have in utilizing them).

pinpoint precisely, except in the few states that disfranchise only those who are presently incarcerated.<sup>8</sup> Nevertheless, reasonably good estimates demonstrate that felon disfranchisement statutes, particularly in states that permanently disenfranchise felons, deprive a sizable proportion of the voting age population of the franchise,<sup>9</sup> with the impact falling most heavily on minority communities.<sup>10</sup> Indeed, the evidence overwhelmingly demonstrates that felon disfranchisement statutes significantly water down the power of minority voting blocs<sup>11</sup> that otherwise might influence elections in ways favorable to their members.<sup>12</sup>

After the Civil War, Congress passed several Constitutional Amendments in order to assure that African-American freedmen, whose slavery had been at the center of the war, would not be denied basic rights after peace had been secured. The centerpiece of this constitutional legislation was the Fourteenth Amendment.<sup>13</sup> Limitations

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<sup>8</sup> See MANZA & UGGEN, *supra* note 7, at 72-76 (providing a description of the statistical difficulties involved in trying to ascertain precisely how many people in a given state may be disfranchised, at least in those states which deny the right to vote after incarceration has ended, since no actual counts are available, and attempts to make estimates from the actual prison populations of how many felons live in a state after incarceration are quite problematic).

<sup>9</sup> See *id.* at 248-250. According to Manza and Uggen, the states with the highest percentage of voting age populations disfranchised by these statutes are Florida (9.01%), Delaware (7.54%), Alabama (7.37%), Mississippi (6.89%), and Virginia (6.76%). *Id.*

<sup>10</sup> *Id.* at 251-53. According to Manza and Uggen, 8.25 percent of the voting age population of African Americans nationally is disenfranchised by these statutes. *Id.* The numbers are particularly high in several states with sizeable black populations, such as Alabama (15.30%), Florida (18.82%), and Virginia (19.76%). *Id.* Several states with much smaller black minorities have even higher percentage of the black voting age population disfranchised, including Iowa (33.98%), Kentucky (23.70%), Nebraska (22.70%), Arizona (21.08%), and Wyoming (20.03%). *Id.*

<sup>11</sup> The evidence is overwhelming. A much higher percentage of our African American population is affected by these statutes than is true of our majority white populations. This can be demonstrated easily by extrapolating from comparisons by race of the numbers of persons who are incarcerated or on parole in this country. See generally MANZA & UGGEN, *supra* note 7, for a relatively up to date analysis of this data.

<sup>12</sup> See *id.* at 191-98. The authors demonstrate that, without the felon disfranchisement statutes, demographic data as to how African American voters actually vote indicates that the Florida presidential tally in 2000, as well as many federal elections for the United States Senate and statewide elections for governor would have had quite different results. *Id.*

<sup>13</sup> The three Reconstruction Amendments were meant to afford protection to the victims and heirs of America's "peculiar institution." The Thirteenth Amendment, promulgated in early 1865 and ratified by the states by December 15 of that year, abolished slavery. See RALPH KORNGOLD, THADDEUS STEVENS: A BEING DARKLY WISE AND RUDELY GREAT, 229-33 (1955) [hereinafter Korngold]. The Fifteenth Amendment, proposed by the Congress in early 1869 and ratified nearly thirteen months later, prohibited denial of the right to vote on account of race or color. See EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED

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on the franchise, like other denials of fundamental rights, have generally been held unconstitutional under this Amendment because they do not serve a compelling governmental interest.<sup>14</sup> However, the Supreme Court has upheld felon disfranchisement laws under a little known, never enforced provision of the Fourteenth Amendment: Section 2, which provides:

Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote at any election for [federal officers or state executive or judicial officers or members of the state legislature] is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to whole number of male citizens twenty-one years of age in such State.<sup>15</sup>

It is anomalous that this Amendment, adopted in the mid-nineteenth century in order to enhance the voting power of black Americans, has been construed in the last quarter of the twentieth century to authorize felon-disfranchisement legislation which strikes at the heart of that power.

Such a construction occurred in 1974 in *Richardson v. Ramirez*,<sup>16</sup> in which the Supreme Court held that when the framers of Section 2 exempted from apportionment persons denied voting rights because of "other crimes," their action constituted an affirmative authorization to the states to deny voting rights to people who had been convicted of

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STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, APRIL 15, 1865 - JULY 15, 1870 399, 545-56 (1871); CONG. GLOBE, 40th Cong., 3rd Sess. 1641 (1869). Sandwiched in between was the jewel of the Reconstruction, the Fourteenth Amendment, the source of due process and equal protection limitations on the exercise of state power. The Fourteenth Amendment was passed by the Congress in June 1866 and, after much wrangling, was ratified by the necessary three quarters of the state legislatures (including seven newly reconstructed former members of the Confederacy) on June 20, 1868. MCPHERSON, *supra*, at 102, 308.

<sup>14</sup> See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

<sup>15</sup> U.S. CONST. amend. XIV, § 2.

<sup>16</sup> 418 U.S. 24 (1975).

felonies. This conclusion obviated the need to apply the compelling governmental interest test, also known as strict scrutiny, which is otherwise used to determine whether state voting limitations violate the substantive provisions of Section 1 of the Fourteenth Amendment.<sup>17</sup>

Justice Marshall dissented vigorously from the *Richardson* decision. Accepting the point that felon disfranchisement was commonplace in nineteenth century America,<sup>18</sup> he nevertheless found the majority's shift from reading Section 2 as refusing to discount disfranchised felons for apportionment purposes, to finding in it an affirmative grant to the states to deny voting rights to be a gigantic leap, unauthorized by the purpose or language of the provision.<sup>19</sup> The purpose of Section 2, he argued, was clearly to encourage states to enfranchise former slaves, suggesting that otherwise the states might lose power in Congress and the Electoral College.<sup>20</sup> In Marshall's view, the framers of the provision may have recognized that felon disfranchisement existed and even

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<sup>17</sup> *Id.* at 54 (distinguishing such cases as *Dunn*, 405 U.S. 330; *Bullock*, 405 U.S. 134; *Kramer*, 395 U.S. 621; and, *Cipriano*, 395 U.S. 701). The opinion, written by Chief Justice Rehnquist, "rest[ed] on the . . . proposition that § 1, in dealing with voting rights . . . could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55. See also 42 U.S.C. § 1973 (2000). Because of *Richardson v. Ramirez*, the most recent attacks on the legality of the felon disfranchisement statutes have been based on the Voting Rights Act of 1965 ("VRA"), which as amended in 1982 prohibits any voting qualification or standard that has the effect of denial of the right to vote on account of race. *Id.*; see also *Hunter v. Underwood*, 471 U.S. 222 (1985); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Richardson* did not preclude suits challenging felon disfranchisement statutes where plaintiffs were prepared to show that the purpose of the disfranchisement statute itself was to deny the right to vote on account of race. *Hunter*, 471 U.S. at 222. But, it left plaintiffs with a huge burden of proof to demonstrate racial animus underlay the disfranchisement legislation, because constitutional claims attacking state laws on the theory that they discriminate on the basis of race requires proof that the purpose of the legislation is discriminatory. *Mobile*, 446 U.S. at 55. Minority plaintiffs have recently used the VRA "effects" language to challenge felon disfranchisement statutes in a way which obviated the need to show discriminatory purpose, with mixed results. Compare, e.g., *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), and *Muntaquin v. Combe*, 366 F.3d 102 (2d Cir. 2004) (refusing to apply the VRA to such statutes), with *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (VRA unambiguously encompasses felon disfranchisement statutes). This article does not address the issue posed in these cases, which was the meaning of the legislative prohibition of any state practice that has "...the effect of denying the right to vote on the basis of race or color." *Id.* (emphasis added). Suffice it to note that, if *Richardson* were overruled, the issue presented by *Johnson*, *Muntaquin*, and *Farrakhan* would probably be mooted, as a practical matter, and many felons, not just those from minority groups, would have the right to challenge the statutes on a non-racial basis.

<sup>18</sup> *Richardson*, 418 U.S. at 75.

<sup>19</sup> *Id.* at 73-74.

<sup>20</sup> *Id.* at 75.

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accepted the practice; however, he argued that such approval by no means justified the conclusion that the Amendment authorized the practice or that it could be used to exempt such practices from constitutional scrutiny.<sup>21</sup> The precise meaning of “other crime,”<sup>22</sup> he indicated, was unclear from the legislative history of the provision, which suggests that the members of Congress who passed it had given the meaning of the phrase almost no consideration whatever.<sup>23</sup>

Chief Justice Rehnquist’s majority opinion conceded that the legislative history regarding the meaning of the words “or other crime” in Section 2 was, “scant indeed,” but went on to state that what little there was “indicate[d] that this language was intended by Congress to mean what it says.”<sup>24</sup> Of course, what it said was simply that states would not lose representation if they denied the vote to rebels or those guilty of “other crimes.” How this exemption from Section 2’s coverage became an exemption from Section 1 is not explained, except through a rhetorical flourish that the framers simply could not have meant to prohibit behavior under Section 1 that they had not sanctioned under Section 2.<sup>25</sup>

## III. THE HISTORY OF SECTION TWO OF THE FOURTEENTH AMENDMENT

A. *The Background of Section 2*

The Fourteenth Amendment, including the “other crime” language contained in Section 2, was originally drafted by the Joint Committee of

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<sup>21</sup> See MANZA & UGGEN, *supra* note 7, at 41-68 (comparing the felon disfranchisement statutes that were common prior to the Civil War to post-Civil War laws). See also *Richardson*, 418 U.S. at 76. Justice Marshall’s dissent acknowledged that such statutes existed at the time of the framing of the Fourteenth Amendment and may well have been approved by many of the people who voted for the amendment. *Id.* But that fact does not indicate that the purpose of the amendment was to uphold such limitations on the right to vote, nor can it be used to exempt felon disfranchisement laws from strict scrutiny under the Fourteenth Amendment. *Id.* Dissenting in *Richardson*, Justice Marshall conceded that one-year durational residency requirements for voting rights were commonplace at the time of the Civil War, and indeed approved by Congress in various Reconstruction acts, but Marshall noted that the laws had nevertheless been subjected to strict scrutiny in *Dunn*, 405 U.S. 330, which found them constitutionally wanting. *Id.*

<sup>22</sup> *Richardson*, 418 U.S. at 43.

<sup>23</sup> *Id.* at 73. Justice Marshall stated, “the proposed § 2 went to a joint committee containing only the phrase ‘participating in rebellion’ and emerged with ‘or other crime’ inexplicably tacked on.” *Id.* Afterwards, the floor debates were found to be similarly unilluminating, with absolutely no discussion of why the phrase had been added to the proposed amendment with virtually no discussion of its meaning. *Id.*

<sup>24</sup> *Id.* at 43.

<sup>25</sup> See *id.* at 54-55.

Fifteen on Reconstruction. The committee became the fountainhead of both the Fourteenth and Fifteenth Amendments. Consisting of six Senators and nine Representatives, it was organized in December of 1865 to assist Congress in framing the debate on how the Union should be reconstructed after the Civil War.<sup>26</sup>

From beginning to end, discussion of the Fourteenth Amendment, insofar as it involved political rights, concerned what Charles Sumner, the leading Radical member of the Republican caucus in the Senate, called the dual principles of “inclusion” and “exclusion.” The principles focused on the righteous inclusion of newly freed African-Americans in the voting population of the newly reconstructed former Confederate states, and the exclusion from the franchise of the Southern whites who had aided and abetted the late rebellion.<sup>27</sup> Because the population in the victorious Northern states had not yet fully accepted the principle of equal suffrage for both races, it was impossible to directly push for that principle until much later. Only after the nation had become fed up with Southern resistance to reconstruction attempts through moderate methods, and after the South had flat-out rejected attempts to “encourage” the extension of voting rights to black citizens, did the North accept the principle of equal suffrage.<sup>28</sup>

The immediate occasion for passing Section 2 of the Fourteenth Amendment was the final passage of the Thirteenth Amendment, at the very end of 1865.<sup>29</sup> That provision, of course, ended once and for all the

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<sup>26</sup> See generally BENJ. B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914).

<sup>27</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2763-64 (1866).

<sup>28</sup> See KENDRICK, *supra* note 26, at 206 n.1 (noting that at the end of the Civil War, only six states had accorded blacks the right to vote, and even in those states, black voters sometimes were subjected to special educational or property qualifications). See generally, JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 48-67 (2nd ed. 1994). It took several years of southern recalcitrance and Northern frustration at Southern defiance of attempts to reconstruct the Southern states before sufficient political support enabled the Radicals to push through the Fifteenth Amendment, which prohibited denial or abridgment of the right to vote on account of race or color. *Id.* See WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 30-35 (2nd prt. 1969) (pointing out that it was the Southern refusal to respond to the incentive to extend the franchise to blacks created by Section 2 that led to the movement to pass the Fifteenth Amendment in 1868); GEORGE W. JULIAN, POLITICAL RECOLLECTIONS 1840 TO 1872 304 (1884) (discussing Congressman Julian, a Republican congressman who supported both the Fourteenth and Fifteenth Amendments, who recalled that by the Spring of 1867, Section 2 of the Fourteenth Amendment was “now generally condemned”).

<sup>29</sup> See KORNGOLD, *supra* note 13, at 229-33. The Thirteenth Amendment, promulgated in early 1865 and ratified by the states by December 15 of that year, abolished slavery. *Id.* See also CONG. GLOBE, 38th Cong., 2nd Sess. 531 (1865) (stating that the House passed the

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institution of slavery.<sup>30</sup> An unintentional consequence of its adoption was the *pro tanto* destruction of the “three fifths” rule for apportioning voting power to the former slave states thereby enlarging the number of seats they would receive in the House of Representatives and the Electoral College.<sup>31</sup> The Committee of Fifteen submitted several versions of what ultimately became the Fourteenth Amendment before getting approval of the specific language that was ultimately submitted and ratified by the states. Representative Thaddeus Stevens of Pennsylvania, the foremost Radical in the House and the leader of the Committee of Fifteen, initiated the debate on what was to become the first version of Section 2 of the Fourteenth Amendment by arguing, on December 18, 1865, that the inevitable abolition of the infamous “three fifths” rule would have gigantic ramifications for apportionment once slavery was ended and the former rebel states were readmitted to the union.<sup>32</sup> In his view, readmission of the Southern states to the union required that the newly admitted states, at the very least, either fully enfranchise their

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amendment on January 31, 1865, the Senate concurred the following day, and Secretary Seward proclaimed its passage on December 18, 1865); MCPHERSON, *supra* note 13, at 6.

<sup>30</sup> U.S. CONST. amend. XIII.

<sup>31</sup> U.S. CONST. art. I. Section 2 of Article I of the original Constitution provided that representatives in the House were to “be apportioned among the several States . . . according to their respective Numbers [to be] determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.” *Id.* These “other persons” who counted as only “three-fifths” of a person were slaves living almost exclusively in the American South and border states, in many of which their numbers approached and in a few cases actually exceeded that of the free white population. *See* MCPHERSON, *supra* note 13, at 125. At the end of the Civil War, Mississippi and South Carolina had more slaves than free whites and blacks combined. No other state contained a majority of African Americans, though several, all in the deep South, had populations in which whites were a bare majority. *Id.* According to a table drawn from the 1860 census, the Southern states holding the highest percentage of slaves were as follows:

STATE	WHITE POPULATION	FREE BLACK	SLAVE POPULATION	TOTAL POPULATION	% WHITE
Alabama	526,271	2,690	435,080	964,201	54.6
Florida	77,747	932	61,745	140,424	55.4
Georgia	591,550	3,500	462,198	1,057,286	55.9
Louisiana	357,486	18,647	331,726	708,002	50.5
Mississippi	353,899	773	436,631	791,305	44.7
N. Carolina	629,942	30,463	331,059	992,622	73.2
S. Carolina	291,300	9,914	402,406	703,708	41.4
*Virginia	1,047,299	58,042	490,865	1,596,318	65.6

\*The figures for Virginia include the counties of the state that became part of West Virginia during the Civil War.

<sup>32</sup> *See* 2 JAMES E. BLAINE, TWENTY YEARS OF CONGRESS: LINCOLN TO GARFIELD 128-29 (1886).

black citizens, or suffer the consequence of having their entire black population excluded from the count when Congressional seats were awarded in the future.<sup>33</sup>

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<sup>33</sup> See BLAINE *supra* note 32 at 128-29. The Radical Republicans rarely differentiated between their own narrow partisan interests and loftier concerns about either protecting the Union from further attacks by the former rebels of the South or assisting the newly freed former slaves in gaining a full opportunity to participate in American life. *Id.* Often they called the Republican Party the Unionist (or simply the Union) Party, and they certainly wanted it to retain power over the country after the Civil War was over. *Id.* Near the end of the war, President Lincoln and President Andrew Johnson both attempted to pull the Union back together through the simple expedient of readmitting to the Union the governments of the states that had attempted to secede into the late Confederacy. *Id.* The Radical Republicans were dead-set against this policy, in part because they believed it would leave the former rebels in a stronger political position than they had enjoyed prior to the war, and in part because they increasingly came to understand that returning power to the Southern white state governments would frustrate the goal of protecting the newly freed slaves and integrating them into American life. *Id.* They accurately perceived that black people, if enfranchised, would likely side with their party in national politics. *Id.* During the Civil War, Charles Sumner argued that the Southern states had “committed suicide” when they seceded. Thaddeus Stevens treated them as conquered provinces, entitled to no more solicitude than that accorded to places that had never been admitted to the Union, and hence subject to the plenary control of the Congress. See generally, HERMAN BELZ, *RECONSTRUCTING THE UNION: THEORY AND PRACTICE DURING THE CIVIL WAR* (1969). According to Belz, the Radicals were by no means in control of the Republican Party’s congressional delegations at the end of the Civil War. *Id.* at 303-04. See KENDRICK, *supra* note 26, at 264-91. While the “conquered provinces” theory these men espoused was not universally held among members of the Republican majority in the Congress, the Radicals did gain political traction in the Congress as reports came in to Washington, first from General Schurtz (see *CONG. GLOBE*, 39th Cong., 1st Sess. 78 (1865) (noting introduction of General Carl Schurtz’ report)) and later from investigations conducted by subcommittees of the Joint Committee of Fifteen of widespread white terrorism against blacks, the enactment of onerous “black codes” to frustrate realization of basic civil rights among the new freedmen, and generalized repression of the new freedmen by the Southern state governments that had been elected by all-white electorates on the basis of pre-Civil War voter qualifications. *Id.* See also FRANKLIN, *supra* note 28, at 59. The committee called 144 witnesses, including 77 Southerners living in the South, eight African Americans, and 57 white Southerners, ranging from Southern loyalists to a few who, like Alexander Stephens and Robert E. Lee, had been prominent Confederate leaders. *Id.* The testimony demonstrated the necessity for continued army occupation of the South, continued operation of the Freedman’s Bureau, and continuing widespread Southern white hostility to the Union. *Id.* “The testimony ‘forced’ the committee to conclude that it [would be] ‘madness and folly’” to permit the Southern states to be reconstructed without radical change in their political structures designed to prevent a resurgence of political power among the former rebels and virtual re-enslavement of the region’s black population. *Id.*; see also KENDRICK, *supra* note 26, at 264-65. “[T]estimony taken by the joint committee on reconstruction [the Committee of Fifteen] . . . served as the *raison d’être* of the fourteenth amendment and as a campaign document for the . . . election of 1866. 150,000 copies were printed in order that senators and representatives might distribute them among their constituents.” *Id.*

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B. Section 2 of the Fourteenth Amendment: The First Attempt

Shortly after the speech, the Committee of Fifteen prepared and sent to Congress Representative Stevens' proffered version of Section 2 of the Fourteenth Amendment. Stevens had submitted his proposal to the committee on January 9, 1866,<sup>34</sup> and the Committee adopted the proposal on January 31, 1866.<sup>35</sup> Its language was sweeping, but was explicitly aimed at discouraging the Southern states from denying the right to vote on racial grounds. It read, in pertinent part that:

Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State . . . . Provided that whenever the elective franchise shall be denied or abridged in any state, on account of race or color, in the election of the members of the most numerous branch of the State legislature, or in the election of the electors for President or Vice-President of the United States, or members of Congress, all persons therein of such race or color shall be excluded from the basis of representation.<sup>36</sup>

There can be no doubt of the political purpose behind this legislation. Many proponents of the bill were quite open about their concern regarding the impact of the abolition of slavery on apportionment of Congressional power.<sup>37</sup> Opponents of the Amendment

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<sup>34</sup> KENDRICK, *supra* note 26, at 41.

<sup>35</sup> *Id.* at 58-60.

<sup>36</sup> *Id.* at 53, 59.

<sup>37</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 357 (1866). Representative Conkling of New York, a member of the Committee of Fifteen, was much exercised about the "new situation" that abolition of the three fifths' rule would create. *Id.* "The new situation," he said:

will enable those States when relationships are resumed, to claim twenty-eight Representatives beside their just proportion. Twenty-eight votes to be cast here and in the Electoral College for those held not fit to sit as jurors, not fit to testify in court, not fit to be a plaintiff in a suit, not fit to approach the ballot box. Twenty-eight votes, to be more or less controlled by those who once betrayed the Government . . . Shall all this be? Shall four million beings count four millions, in managing the affairs of the nation, who are pronounced by their fellow beings unfit to participate in administering government in the States where they live . . . ? Shall one hundred and twenty-seven thousand white people in New York cast but one vote in this House, and have but one voice here, while the same number of white people in

were quick to charge that the majority was playing partisan politics with the legislation, which was a charge the proponents of the Amendment did not shy away from.<sup>38</sup> The House of Representatives immediately passed the bill as written by an overwhelming vote. However, the

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Mississippi have three votes and three voices. [sic] Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living? Shall one white man have as much share in the Government as three other white men merely because he lives where blacks outnumber whites two to one? . . . Shall such be the reward of those who did the foulest and guiltiest act which crimson the annals of recorded time? No, sir; not if I can help it.

*Id.*; cf. statements by: Rep. Bingham, CONG. GLOBE, 39th Cong., 1st Sess. 431-32 (1866); Rep. Julian, CONG. GLOBE, 39th Cong., 1st Sess. app. 57-58 (1866); Rep. Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 536-37 (Jan. 31, 1866); Senator Fessenden, CONG. GLOBE, 39th Cong., 1st Sess. 702-03 (1866).

<sup>38</sup> KENDRICK, *supra* note 34, at 41. The supporters of Section 2 were quite open about their concern that readmission of the Southern states might weaken the political fortunes of the Republican Party. *Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 426 (1866). Their partisanship was duly noted by their Democratic opponents. *Id.* For instance, on the House floor, Representative Eldridge quoted Thaddeus Stevens as saying that the Southern states:

“ought never to be recognized as capable of acting in the Union, or being counted as valid States until the Constitution shall have been so amended as to secure perpetual ascendency to the party of the Union . . . If they should grant the right of suffrage to persons of color I think there would always be Union white men enough in the South, aided by the blacks, to divide the representation and thus continue the Republican ascendency.” Here, then, is the motive and purpose of the majority of this House. The States are to be held in the grasp of despotic power; the Government is to be revolutionized to secure the ascendency of the Republican party.

*Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 536 (1866). Speaking for the Committee of Fifteen, Stevens’ response a few days later was equally plain:

[A]ny man who knows anything about the condition of aspiration and ambition for power which exists in the slave States knows that one of their chief objects is to rule this country. It was to ruin it if they could not rule it. They have not been able to ruin it, and now their great ambition will be to rule it. If a State abuses the elective franchise and takes it from those who are the only loyal people there, the [proposed] Constitution says to such a State, you shall lose power in the halls of the nation, and you shall remain what you are, a shriveled and dried-up nonentity instead of being the lords of creation . . . If they exclude the colored population, they will lose at least thirty-five Representatives in this Hall. If they adopt it they will have eighty-three votes. Take it away from them and they will have only from forty-five to forty-eight votes, all told, in this Hall; and then, sir, let them have all the copperhead assistance they can get, and liberty will still be triumphant.

*Id.*

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provision died in the Senate, failing to achieve the necessary two-thirds majority.<sup>39</sup>

C. *The Committee's Second Shot: The Robert Owen Recommendation that Failed*

With the ball back in its court, the Committee of Fifteen set out to develop a new strategy. At an impasse as to what to do in the face of the Senate's refusal to adopt its earlier effort, Representative Stevens was open to suggestion, which came in the form of a secret plan and compromise offered by Robert Dale Owen, the son of a famous British reformer.<sup>40</sup> Stevens presented this new version to the Committee of Fifteen on April 21, 1866. In effect, Owen's plan accomplished several objectives. First, it prohibited discrimination by the state or federal government against any person on account of race, color, or previous condition of servitude. Second, it prohibited discrimination in voting rights after July 4, 1876. Third, it prevented, until that time, any class of person, as to whom the right to vote should be denied, to be counted in determining state representation. Fourth, it outlawed payment of Confederate debts. Last, it gave Congress the necessary enforcement powers.<sup>41</sup> The Committee considered Owen's suggestions and voted, on April 23, 1866, to report it to both houses of Congress. The proposal prohibited discrimination in voting rights before July 4, 1876, by providing that until that time, "no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation."<sup>42</sup> Apparently, public opinion, even from the perspective of those in the Radicalized Congress of early 1866, was not ready to grant full voting rights to America's black population.<sup>43</sup> After word leaked out regarding what the proposal was going to look like, some Committee members retreated, fearing that the more stringent

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<sup>39</sup> The vote, taken on March 9, 1866, was 25 in favor, 22 opposed. See MCPHERSON, *supra* note 13, at 104-05; BLAINE, *supra* note 32, at 203.

<sup>40</sup> HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN 184 (1997).

<sup>41</sup> See TREFOUSSE, *supra* note 40 at 184; KENDRICK, *supra* note 26, at 83-84.

<sup>42</sup> KENDRICK, *supra* note 26, at 84. See also Robert Dale Owen, *Political Results from the Varioloid*, ATLANTIC MONTHLY 660 (June 1875), <http://cdl.library.cornell.edu/cgi-bin/moa/moa.cgi?notisid=ABK2934-0035-149> (containing Owen's account of his discussions with Thaddeus Stevens, Senator Fessenden, and other Republican leaders).

<sup>43</sup> See *supra* note 27 and accompanying text.

provision would fail either in Congress or when submitted to the states for ratification.<sup>44</sup>

*D. The Final Version of Section 2*

It was in this context that the Committee decided to reconsider its earlier proposal, and ultimately came to adopt the final version of Section 2. On April 28, 1866, Senator George Williams of Oregon proposed the apportionment scheme set out in Section 2.<sup>45</sup> This final version excludes, for apportionment purposes, that part of the population that had been previously excluded from voting rights, without any specific reference to race, and includes the clause excepting from the exclusion those who were deprived of voting rights on account of “rebellion, or other crime,”<sup>46</sup> which was the language the *Richardson* Court relied on to justify felon disfranchisement statutes.<sup>47</sup>

*E. The Exception Clause: Failure to Discover its Full Legislative History*

What happened next lies at the crux of the argument about what the “other crime” language of Section 2 of the Fourteenth Amendment means. As previously noted, both the majority and dissenting opinions

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<sup>44</sup> See Owen, *supra* note 42, at 665-66. Owen’s account is fascinating. Apparently Senator William Fessenden, the committee chair, was absent from the committee the day the vote was held approving Owen’s amendment and report to both houses of Congress. *Id.* The good senator was reportedly “sick of the varioloid,” a mild form of smallpox. *Id.* at 665. Owen said Stevens told him that the committee decided that since Fessenden “would probably be well in a few days, and that it would seem a lack of courtesy if the most important report of the session should be made without his agency,” a brief delay was authorized. *Id.* Then, Owen wrote, quoting Stevens:

Our action on your amendment had, it seems, got noised abroad. In the course of [a] week the members from New York, . . . Illinois, . . . and . . . Indiana . . . held, each separately, a caucus to consider whether equality of suffrage, present or prospective, ought to form a part of the republican programme for the coming canvass. They were afraid, so some of them told me, that if there was ‘a nigger in the wood-pile’ at all (that was the phrase), it would be used against them as an electioneering handle, and some of them, - hang their cowardice! - might lose their elections. . . . Our committee had n’t [sic] backbone enough to maintain its ground. Yesterday. . . your amendment was laid on the table, and in the course of the next three hours we contrived to patch together . . . [what became § 2 of the Fourteenth Amendment].

*Id.* at 666. Owen then commented, “mortified as I was, I could not help smiling when Stevens, after his characteristic fashion, burst forth, ‘Damn the varioloid! It changed the whole policy of the country.’” *Id.* (emphasis in original).

<sup>45</sup> See KENDRICK, *supra* note 26, at 102.

<sup>46</sup> See *supra* note 15 and accompanying text.

<sup>47</sup> See *supra* notes 17-26 and accompanying text.

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in *Richardson v. Ramirez* indicated there was no evidence as to what occurred in the Committee of Fifteen to explain the origin of the exclusion clause other than the apparently inexplicable fact that Senator Williams suggested it at the April 28, 1866 meeting. In the *Richardson* majority's view, this justified a literal application of its language to uphold felon disfranchisement laws. The majority opinion concluded that such laws involve denying voting rights on account of "other crimes."<sup>48</sup>

Recent scholarship by Jason Morgan-Foster<sup>49</sup> indicates the Court erred in concluding that there was no history to Section 2's exclusion clause. In his writings, he has conclusively proven that the claim that no other "exclusion clauses" were presented to the Committee of Fifteen prior to Senator Williams' proposal is patently false. Morgan-Foster acknowledges that it is true that the first mention of such a clause in the Committee's Journal refers to Senator Williams' April 1866 proposal.<sup>50</sup> However, Morgan-Foster's research shows the Journal is incomplete, and utterly fails to account for earlier proposals that were before the committee.<sup>51</sup>

Well before April 21, 1866, when the Committee took up the consideration of what became Section 2, several versions of an "exception clause" had been proposed by sundry Congressmen and Senators. As early as March 8, 1866, Representative John Broomall, a Republican Congressman from Pennsylvania, had recommended removing references to race from Section 2 and replacing them with a simple limitation on apportionment when substantial numbers of voting age men were deprived of the right to vote.<sup>52</sup> Broomall thought it a lively question whether former rebels, men, who in his view, might well

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<sup>48</sup> *Richardson v. Ramirez*, 418 U.S. 24, 43-44 (1974). See also *id.* at 73 (dissenting opinion).

<sup>49</sup> Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT'L L. 279 (2005-2006).

<sup>50</sup> See KENDRICK, *supra* note 26, at 102.

<sup>51</sup> See Morgan-Foster, *supra* note 49, at 289-91 (describing research concerning other bills).

<sup>52</sup> See *id.* at 290 n.53 (citing ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 120 (1967)). According to Morgan-Foster, Broomall had proposed simply that states should lose representation to the same extent that they denied the elective franchise to any male citizens of twenty-one years old or older. *Id.* The reason he wanted to avoid directly mentioning race was that he feared that the Southern states would use more subtle mechanisms, such as literacy tests and poll taxes, to deny the freedmen the franchise. *Id.*

have forfeited any claim to citizenship because of their “past crimes[.]” should be accorded the right to vote.<sup>53</sup>

On March 12, 1866, shortly after the Committee’s first proposed version of Section 2 failed to gain passage in the Senate, Senator James Grimes of Iowa, a Republican committee member, endorsed Broomall’s bill. Grimes introduced it to the Senate as S.R. 42, a substitute for the previously submitted H.R. 51, which had already been submitted to Congress. Grimes’ bill proposed that representatives be apportioned among the states according to their population, providing that the basis of state representation should be reduced in any state in which the elective franchise is “denied to any portion of its male citizens above the age of twenty-one years, except for crime or disloyalty.”<sup>54</sup> In response, two Radical Republican Senators, Sumner and Henry Wilson, offered differing versions of H.R. 51, with Sumner’s version containing an exception clause “for participation in rebellion” and Wilson’s excepting citizens “disenfranchised for participation in any rebellion.”<sup>55</sup> Later, on April 27, 1866, a day before Williams’ proposal was placed before the Committee of Fifteen, another proposal, S.R. 76, was introduced in the Senate. This one provided for discounting from apportionment all males above the age of 21 “for any cause except insurrection or rebellion against the United States.” Each one of these proposals was ordered printed for consideration by the Committee of Fifteen before Senator Williams’ intervention on April 28, 1866.

Morgan-Foster concludes, on the basis of this information, that contrary to the view taken by both Chief Justice Rehnquist and Justice Marshall in *Richardson v. Ramirez*, the “other crime” reference in Section 2 derives from the reference to treason and other crimes of disloyalty, referred to by Representative Broomall on March 8, 1866. He argues it should not be read in the disjunctive to “rebellion” in Section 2’s exception clause dealing with “rebellion or other crime.”<sup>56</sup> In effect, Senator Williams’ intervention in Committee on April 28, 1866, was the culmination of a series of proposals, each meant to except from the count

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<sup>53</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 1263-64 (1866). After a long speech in which he mentioned treason or crimes of rebellion at least seven times, Broomall concluded that the Government should still allow the people of the former rebel states to create new state governments and regain entry into the union, except “as far as [the citizens of the rebel states] have not been disqualified by treason.” *Id.* at 1264.

<sup>54</sup> CONG. GLOBE, 39th Cong., 1st Sess., 1320 (1866).

<sup>55</sup> See CONG. GLOBE, 39th Cong., 1st Sess., 1321 (1866).

<sup>56</sup> Morgan-Foster, *supra* note 49, at 291.

people guilty, *not of crimes generally*, but only of crimes involved in the rebellion.

F. *The Connection Between Section 2 and Radical Proposals to Strip Former Confederates of the Right to Vote: Herein of "Inclusion" and "Exclusion"*

Morgan-Foster's argument need not rest solely upon the fact that other versions of the exception clause were offered earlier to the Committee of Fifteen. Particularly, it is important to note two facts that Morgan-Foster does not emphasize. First, no exclusion clause was ultimately accepted until after Section 2 had been watered down to eliminate any specific reference to race. Second, the exclusion clause was first accepted in the context of Congressional efforts to disfranchise white men who had aided and abetted the Southern rebellion. The problem of non-racial limitation on apportionment—a denial of political power to any region that denied the right to vote to significant numbers of people for any reason—created a serious difficulty when it was conjoined with the plans of Radical Republicans to strip voting rights from those who had given aid and comfort to the recent rebellion. It was this difficulty that led directly to the adoption of the "rebellion and other crime" exception clause. Consideration of this difficulty is necessary to judge how the exception clause should be construed.

As previously noted, Congressional proponents of the Fourteenth Amendment were ardent supporters of what Senator Sumner, a Radical Republican leader in the Senate, had called the principles of "inclusion" and "exclusion."<sup>57</sup> As stated, this principle involved the dual strategies for enhancing Republican political power, and protecting the newly freed former slaves by including black participation in the political process while excluding unreconstructed whites from such participation.<sup>58</sup> The framers of Section 2's apportionment plan wanted to use the clause to encourage Southern states to give blacks the right to vote. They hoped to accomplish the second goal by passing a companion section, Section 3, aimed at weakening unreconstructed white voting power.

The final version of Section 2 that came out of Committee differed from earlier versions of the apportionment clause in three ways. First, for the first time, proponents of a new method of apportionment came up with a proposal that avoided any direct mention of providing voting rights to freedmen. Instead of cutting off apportionment for denials of

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<sup>57</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2763-64 (1866).

<sup>58</sup> See *supra* note 27 and accompanying text.

voting rights tied to race, it purported to cut off apportionment for denial of the vote for virtually any reason. Second, also for the first time, the apportionment penalty contained an exception clause, the “except for participation in rebellion or other crime” language that was the subject-matter of the *Richardson* decision. Finally, the new proposal substantially softened the penalty for denying the franchise by limiting the loss of representation to the percentage of a state’s adult male population that was actually deprived of the right to vote, rather than penalizing any state that discriminated against blacks by removing from its calculus the state’s entire African-American population.

A number of supporters of the new Section 2 voiced concern that the clause made no mention of race, and weakened the “penalty” Southern states would suffer should they discriminate against prospective black voters.<sup>59</sup>

### G. Section 3: Exclusion Through Constitutional Amendment

At first glance, the Committee’s final version of Section 2 appears to have been a substantial retreat from what the Committee had offered in January, and had tentatively passed just a few days earlier. However, it was not as big a retreat from earlier principles as it first appears. The Committee members were determined to see that the new freedmen were not trampled upon by their former masters, and they remained greatly concerned that the former rebels, once the three fifths rule was abolished, would return to Congress with more power than they had

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<sup>59</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2332-33 (1866). Senator Fessenden of Maine, the chair of the Committee of Fifteen, noted that the proposal was a compromise that was necessitated by the need to secure passage of the amendment in committee and later get passage before both houses of Congress and ultimately among the states. *Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Thaddeus Stevens admitted that:

[i]t falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this

*Id.* Many members of Congress would have preferred granting outright the ballot to the new freedmen to the apportionment scheme contained in Section 2, but they swallowed their principles and strongly supported the compromise. See, e.g., Remarks of: Representative Kelley, CONG. GLOBE, 39th Cong., 1st Sess. 2467-69 (1866); Representative Broomall, CONG. GLOBE, 39th Cong., 1st Sess. 2498-99 (1866); Representative Boutwell, CONG. GLOBE, 39th Cong., 1st Sess. 2507-09 (1866); Representative Eliot, CONG. GLOBE, 39th Cong., 1st Sess. 2511-12 (1866); Representative Farnsworth, CONG. GLOBE, 39th Cong., 1st Sess. 2539-40 (1866); Representative Longyear, CONG. GLOBE, 39th Cong., 1st Sess. 2536-37 (1866); Representative Beaman, CONG. GLOBE, 39th Cong., 1st Sess. 2537 (1866).

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enjoyed prior to the Civil War. Thus, on the same day that they withdrew the original Owen proposal and adopted Senator Williams' more generalized rule regarding apportionment, they also proposed a new Section 3 for the Fourteenth Amendment, this one aimed at implementing Senator Sumner's "exclusion" principle by stripping white confederates of the right to vote.<sup>60</sup> This proposed section would prohibit, until July 4, 1870, "all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, . . . from [exercising] the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States."<sup>61</sup> After replacing the prohibition against racial discrimination with what became Section 1,<sup>62</sup> the committee voted to report the entire amendment for adoption and ratification by the states.<sup>63</sup>

The pairing of the newly proposed Section 3 with the changes in Section 2, particularly the addition of Section 2's new exception clause, was unlikely to have been adventitious. While it is difficult to evaluate precisely what percentage of the Southern white electorate would have been disfranchised had Section 3 ultimately been adopted, it is likely that the number would have greatly diminished Southern representation in Congress.<sup>64</sup> If it were to pass, some sort of exception clause would be

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<sup>60</sup> KENDRICK, *supra* note 26, at 104-05.

<sup>61</sup> *Id.* at 53-57; *see also* FRANKLIN, *supra* note 28, at 43. The proposal was directly related to the fact that, in 1865, Southern states undergoing reconstruction under President Johnson's more lenient regime, with electorates substantially identical to those that had voted for elected officials before the Civil War, had elected a large number of ex-Confederates to political office. *Id.* "The Vice-President of the Confederacy, four Confederate generals, five Confederate colonels, six Confederate cabinet officers, and fifty-eight Confederate congressmen were elected to the Thirty-ninth Congress, which met in December, 1865." *Id.* Franklin points out that this "bold" action by the ex-Confederate states embarrassed the President. *Id.* The Congress refused to seat the people so elected, thus beginning the battle that wrested control of the Reconstruction process from the executive to the legislative branch.

<sup>62</sup> KENDRICK, *supra* note 26, at 106. In addition, the committee replaced the then pending version of Section 1, which prohibited racial discrimination by the federal or state governments, with the now familiar Section 1, prohibiting state action involving the privileges or immunities of United States citizenship and guaranteeing due process and equal protection rights. *Id.*

<sup>63</sup> KENDRICK, *supra* note 26, at 116-17. In addition to these clauses, the proposed amendment included a provision forbidding payment of the Confederate debt (Section 4) and an enforcement clause (Section 5). *Id.*

<sup>64</sup> *See* 1 BLAINE, TWENTY YEARS OF CONGRESS: LINCOLN TO GARFIELD 560 (1884). One must remember that, before and after the Civil War, only adult male citizens were accorded the right to vote. *Id.* In the South, it has been reported that nearly every white man capable of bearing arms rendered service to the Confederate army during the Civil War. *Id.*

necessary, since the disfranchisement of large numbers of white voters would certainly have had an impact on representation.

The pairing of Sections 2 and 3 in the Fourteenth Amendment draft that came out of the Committee of Fifteen goes a long way toward explaining the purpose of the exception clause. Looking at the world from the perspective of people in 1866, at the time the Fourteenth Amendment was drafted, the *only* classes to whom voting rights might be denied conceivably large enough to affect the non-racial apportionment scheme of Section 2, were (1) the group of black voters that the framers wanted enrolled and (2) the unreconstructed white voters the framers hoped to disfranchise. This limitation on voting power of the Southern states was clearly aimed at protecting African-American voters, even if the language did not explicitly mention them as a protected class. In 1866, when the drafters were at work, what group, other than potential *victims* of Southern unreconstructed rebels, was anticipated to both (a) be denied voting rights and (b) be large enough to affect apportionment? The obvious answer is the former rebels that the framers of the Fourteenth Amendment anticipated disfranchising through Sumner's policy of exclusion. This combination of facts, the planned disfranchisement of those guilty of disloyalty and the fact of their number, explains who the framers had in mind when they wrote the exception clause: those likely to lose voting rights because they had aided and abetted the Confederate rebellion or committed other crimes against the Union during the Civil War or in its aftermath. As Lord Coke explained over four hundred years ago, the "true meaning" of legislation like this requires consideration of "the mischief or defect" for which the law otherwise would not provide the "remedy the Legislature has appointed . . ." and "the reason of the remedy."<sup>65</sup> Without the exception clause, the anticipated disfranchisement of white voters occasioned by Section 3, when combined with the apportionment scheme of Section 2, would have led to a radical diminution of voting power of the newly admitted Southern states. To remedy this problem, the exception clause had to be inserted.

The combination of Sections 2 and 3 was ardently supported by the Radical members of the Republican caucus, though from the other side it appeared unduly punitive and anti-democratic. Thaddeus Stevens, one

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<sup>65</sup> *Heydon's Case*, (1584) Easter Term, 26 Eliz. I (Exch), reprinted in G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 35-36 (1888). See also 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 78, 80 (Steve Sheppard ed., 2003) (reporting the opinion, with Latin sentences fully translated).

of the major architects of the Fourteenth Amendment, continued to believe that the apportionment clause, even in its new format, remained by far the “most important” part of the proposed Amendment.<sup>66</sup> While it is difficult to evaluate precisely how many Southern whites would have been temporarily disfranchised by the measure, its impact would have been considerable.

Viewed in context, the final version of Section 2 was not much of a retreat at all. To secure Republican rule, the Radical Republicans believed that they needed to encourage black voting in the South, as a counterweight to the anti-Unionist sentiments of its white population, and to strip as many former rebels of the right to vote as was politically feasible. The proposed version of the Fourteenth Amendment that came out of committee on April 28, 1866, contained elements of both tactics: Section 3 would weaken the former rebels political grip in the newly reconstructed Southern states by temporarily disfranchising many of the Southern whites and Section 2 would encourage extension of the vote to black freedmen without offending those Northern “moderates” who were not yet fully ready to eliminate racial limitations on the franchise in the Northern states.

Supporters of the proposal recognized that while Section 2 was likely to pass, Section 3 might be considered unduly punitive. Nevertheless,

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<sup>66</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). He went on to say:

The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive. . . . Thus shorn of their power, they would soon become restive. Southern pride would not long brook a hopeless minority.

*Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 2766-67 (1866). Both supporters and opponents of Section 2 were aware of its likely impact on partisan and sectional politics. *Id.* Senator Howard, who temporarily became floor leader for the Joint Resolution when Senator Fessenden, the Committee of Fifteen chair, who was forced by illness to stay away from the debate, was quite clear that, since the committee doubted the Southern states would extend the right to vote to blacks, the Southern states would pay a big price in terms of representation in Congress and the electoral college. *Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 2939 (1866). The Democratic opponents of Section 2 were clearly aware of its potential political impact, and complained mightily of about how partisan it was. *Id.* For example, Senator Hendricks argued that the proposal ultimately put before the Senate was being rammed through the Congress for party advantage, lest its failure bring disastrous consequences for the Republicans in the fall elections; he noted wryly that there were so few blacks in New England and New York that Section 2 would not affect representation of there while it would “throw public affairs into their [the black voters’] hands” in the South. *Id.*

they were prepared to support it ardently. Thaddeus Stevens started out the debate in the House by admitting:

[the] third section may encounter more difference of opinion here [than Section 2]. Among the people I believe it will be the most popular of all the provisions; it prohibits rebels from voting for members of Congress and electors of President until 1870. My only objection to it is that it is too lenient. I know that there is a morbid sensibility, sometimes called mercy, which affects a few of all classes, from the priest to the clown, which has more sympathy for murderer on the gallows than for his victim. I hope I have a heart as capable of feeling for human woe as others. I have long since wished that capital punishment were abolished. But I never dreamed that all punishment could be dispensed with . . . Anarchy, *treason*, and violence would reign triumphant . . . I would be glad to see it extended to 1876, and to include all State and municipal as well as national elections. In my judgment we do not sufficiently protect the loyal men of the rebel states from the vindictive persecutions of their victorious rebel neighbors. Still I will move no amendment, nor vote for any, lest the whole fabric should tumble to pieces.<sup>67</sup>

Other House members took much the same view.<sup>68</sup> At the end of the House debate, Stevens was adamant:

[The Democratic] side of the House will be filled with yelling secessionists and hissing copperheads. Give us the third section or give us nothing. Do not balk us with the pretense of an amendment which throws the Union into the hands of the enemy before it becomes consolidated. Gentlemen say I speak of party.

<sup>67</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866) (emphasis in original).

<sup>68</sup> See, e.g., remarks of Congressman Kelley, CONG. GLOBE, 39th Cong., 1st Sess. 2468 (1866) (asking rhetorically whether “magnanimity requires us to hand the Government over immediately to the vanquished but unconverted rebels of the South,” concluding that Section 2 was required lest “the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights” and that Section 3 was needed to prevent from “govern[ing] this country . . . [t]he men who for more than four years sustained bloody war for its overthrow”); Congressman Schenck, CONG. GLOBE, 39th Cong., 1st Sess. 2470 (1866) (the Southern whites have “flung away their right to representation”).

Whenever party is necessary to sustain the Union I say rally to your party and save the Union. I do not hesitate to say at once, that section is there to save or destroy the Union party, is there to save or destroy the Union by the salvation or destruction of the Union party . . . . Gentlemen tell us it is too strong - too strong for what? Too strong for their stomachs, but not for the people. Some say it is too lenient. It is too lenient for my hard heart. Not only to 1870, but to 18070, every rebel who shed the blood of loyal men should be prevented from exercising any power in this Government. That, even, would be too mild a punishment for them.<sup>69</sup>

The resolution passed the House that day by a resounding vote, 128 to 37,<sup>70</sup> and was sent to the Senate, where debate opened on May 23, 1866.<sup>71</sup>

Section 2 of the proposed Amendment sailed through without much opposition. Section 3, however, foundered almost immediately. Seeing the two sections as representing two sides of the same “inclusion-exclusion” coin, Sumner moved to delay the vote because he believed the tide of public opinion would run more favorably toward full passage of a vigorous Amendment as reports of Congressional investigations of what was happening in the unreconstructed South gained currency.<sup>72</sup> Exhausted from the long legislative battle, and believing that quite enough time had elapsed since the matter had been reported out on April 30, 1866, the Senate rejected his ministrations and determined to take up the debate almost immediately. In the absence of Senator Fessenden, chair of the Committee of Fifteen, on account of a recurrence of the varioloid, Senator Jacob Howard of Michigan temporarily became floor manager for the proposal. While ardently supporting Section 2, he made no bones about the fact that he actually opposed Section 3. He stated, “I did not favor this section of the amendment in the committee. I do not believe, if adopted, it will be of any particular benefit to the

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<sup>69</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866).

<sup>70</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

<sup>71</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2764 (1866).

<sup>72</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2763-65 (1866).

country."<sup>73</sup> His preference, he indicated, would be to prevent those who had participated in the rebellion from holding state or federal office.<sup>74</sup>

As if on cue, Senator Clark of New Hampshire offered an Amendment for Section 3, eliminating the disfranchisement of those who had supported the Confederacy and replacing it with a prohibition on federal office holding by those who had previously taken the oath to support the United States government, and then voluntarily supported the rebellion.<sup>75</sup> Howard said he would accept Clark's proposed substitute language.<sup>76</sup>

The Senate conducted almost no debate on the Fourteenth Amendment after its initial introduction on May 23. After discussion the following day, it was taken off the agenda until May 29, 1866, and during the hiatus, Republican senators caucused several times to work out compromise language regarding the Amendment. After further delays, the compromise language was put to a vote and passed the Senate on June 8, 1866.<sup>77</sup> The House passed the revised resolution on June 13, 1866,<sup>78</sup> with only Thaddeus Stevens publicly expressing dismay at the Senate's weakening of the Amendment.<sup>79</sup>

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<sup>73</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2767-68 (1866). See KENDRICK, *supra* note 26, at 105-06, 311 n.4 (pointing out Howard's statement of how his vote in committee was false).

<sup>74</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866). His reasoning was that the provision would be inadequate to prevent control of the South by former rebel leaders because they would still have the franchise in state and local elections and could thereby influence elections not only locally but also for the Senate and presidential electors. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; see also KENDRICK, *supra* note 26, at 308. The extent to which this was a total sellout of the committee's position is hard to discern. *Id.* According to Kendrick, Section 3 was doomed almost from the outset. *Id.* He reports that:

there were enough Republicans opposed to the . . . section, who, together with the Democrats, could have stricken it out [in the House], had not about a dozen of the latter believed it good party tactics to make the whole amendment as obnoxious as possible, and so voted with the radicals rather than with the conservatives. As it was, the section was retained [in the House version of the resolution] by the narrow margin of 84 to 79. Among the Republicans who favored its elimination were [six of the nine House members] of the committee. All other Republican members of the committee voted for its retention as did also . . . two Democratic tacticians . . .

*Id.* (citation omitted).

<sup>77</sup> *Id.* at 312-19.

<sup>78</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

<sup>79</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866). "The third section has been wholly changed," he said. *Id.* After pointing out the difference between the House and Senate versions, he went on:

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*H. The Principles of Inclusion and Exclusion After the Fourteenth Amendment*

The Radical Republicans were frustrated in the end by the conservatism of the Senate, but their program of “inclusion and exclusion” did not end with the passage of the Fourteenth Amendment. Instead, it continued for some time after the war ended. However, the principle of “exclusion” failed well before Reconstruction ended and the principle of “inclusion” foundered after Reconstruction, only to be reconstructed in the late twentieth century with the passage of the Voting Rights Act of 1965.

But the Radical Republicans who controlled Congress in the immediate aftermath of the Civil War did not give up on these principles with the passage of the Fourteenth Amendment. Almost as soon as Congress proposed that the states ratify the Fourteenth Amendment, the Radicals began to push both enfranchisement of black voters in the former Confederate states and disfranchisement of rebels who had threatened the Union through other means. This attack proceeded on two fronts: through passage of the Fifteenth Amendment, directly prohibiting denial of voting rights on account of race, and thus preempting the operation of Section 2 of the Fourteenth Amendment; and more immediately through enactment of Reconstruction legislation, providing for military supervision throughout the former Confederacy of voter enrollment and requiring both the enfranchisement of black males and the disenfranchisement of whites who had voluntarily aided the rebel cause.

The story of the passage of the Fifteenth Amendment has been well told elsewhere. The former Confederate states were given a chance to voluntarily enroll black voters in compliance with Section 2. Their response was a resounding, unanimous rejection of the opportunity to avoid Section 2 sanctions. As one commentator points out, after gauging the Southern reaction to the Fourteenth Amendment, former aficionados of Section 2 began to perceive it a total failure and decided stronger

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This I cannot look upon as an improvement. It opens the elective franchise to such as the States choose to admit. In my judgment it endangers the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels. With their enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent.

*Id.*

medicine was needed to assure enfranchisement of the South's newly freed former slaves. Thaddeus Stevens started to draft a new Constitutional Amendment to enfranchise black voters before the Fourteenth Amendment was even ratified.<sup>80</sup> The passage of the Fifteenth Amendment was believed by its supporters to entirely supersede Section 2, which was essentially rendered a dead letter by passage of the Fifteenth Amendment.<sup>81</sup> In effect, Section 2 was repealed and replaced by the new Fifteenth Amendment, which, as one commentator points out, was stronger, broader, and more easily enforced than Section 2.<sup>82</sup>

The Reconstruction statutes were also instrumental in implementing the "inclusion/exclusion policy," inherent in the Joint Committee's proposed Fourteenth Amendment. In December 1866, Congress first tested the waters with legislation designed to extend voting rights to black residents of the District of Columbia. Congressional power became obvious when Congress easily overrode President Johnson's veto of the measure.<sup>83</sup>

Much stronger medicine soon followed. Over other presidential vetoes, the Thirty-Ninth Congress passed the Reconstruction Act on March 2, 1867. The Fortieth Congress added a Supplementary Reconstruction Act three weeks later, on March 23, 1867.<sup>84</sup> The statutes divided the South into five military districts, each governed by an Army general to be appointed by the President. All state and local governments were to be "provisional only," subject entirely to the authority of the national government.<sup>85</sup> Each state was to call a Constitutional convention, to which delegates would be elected, white and black, except for those whites rendered ineligible for office under the terms of the Fourteenth Amendment.<sup>86</sup> These conventions had to grant

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<sup>80</sup> See GILLETTE, *supra* note 28, at 34; JULIAN, *supra* note 28, at 304. George W. Julian, a Republican congressman who supported both the Fourteenth and Fifteenth Amendments, recalled that by the Spring of 1867, Section 2 of the Fourteenth Amendment was "now generally condemned." JULIAN, *supra* note 28, at 304.

<sup>81</sup> See 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, 272-75 (2003-2004) (citing GEORGE S. BOUTWELL, *THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY* 389 (1895)) (concluding that passage of the Fifteenth Amendment superceded Section 2 of the Fourteenth Amendment); BLAINE, *supra* note 32, at 418 (same); 1 JOHN SHERMAN, *RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET* 450 (1895) (same)).

<sup>82</sup> See Chin, *supra* note 81.

<sup>83</sup> FRANKLIN, *supra* note 28, at 70.

<sup>84</sup> See MCPHERSON, *supra* note 13, at 191-94 (providing the full text of these laws).

<sup>85</sup> FAWN M. BRODIE, *THADDEUS STEVENS: SCOURGE OF THE SOUTH* 303 (1959).

<sup>86</sup> *Id.*

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suffrage to adult black males of one year's residency, but could disfranchise former supporters of the Confederate cause.<sup>87</sup> The Constitutions they produced had to be approved by the same electorate that chose the delegates and then forwarded to Congress for approval.<sup>88</sup>

In order to gain readmission to the Union, the new state governments would have to approve the Fourteenth Amendment.<sup>89</sup> Section 5 of the Act of March 2, 1867, provided that the convention had to be elected by "delegates elected by the male citizens of [the] State twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident . . . for one year . . . except such as may be disfranchised for participation in the rebellion, or for felony at common law . . . []" or a person excluded from federal office by Section 3.<sup>90</sup> Section 1 of the March 23, 1867 statute, called for federal registration of voters for the conventions and precluded from registration, *inter alia*, those who refused to swear or affirm that they had not "given aid or comfort to the enemies" of the United States.<sup>91</sup> The precise impact of this oath on the white electorate in the South is unclear,<sup>92</sup> but there is no question that it was significant, at least in some states. As one historian reports:

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See MCPHERSON, *supra* note 13, at 192.

<sup>91</sup> *Id.* The statute was ambiguous. *Id.* It required that persons registered take a loyalty oath swearing or affirming that the prospective voter had "never been a member of any State legislature, nor held any executive or judicial office in any State and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof . . ." *Id.* See also FRANKLIN, *supra* note 28, at 18 (noting that this so-called "iron-clad oath," which looked backward as well as forward in terms of loyalty, had been first proposed as part of ill-fated legislation called the Wade-Davis Bill, in 1864).

<sup>92</sup> See FRANKLIN, *supra* note 28, at 99. Of course it is difficult to ascertain to what extent the oath was successful in excluding Southern whites who gained registration. *Id.* First, given the questionable efficiency of both the machinery and the personnel involved in the registration process, many clearly ineligible people probably were registered. *Id.* at 99. Second, there is a serious question regarding how many of the Southern whites who took the oath did so in good faith. One difficulty involved the fact that across the South procedures varied tremendously regarding how to enforce the rules. Some of the generals appointed to administer Reconstruction ordered that registrars refuse to register those who were not taking the oath in good faith. This led President Johnson to order, in June 1867, that those who took the oath should be "judges of their own honesty." *Id.* at 78, 99. On July 19, 1867, Congress responded by passing legislation empowering registration boards to deny registration to persons who were not taking the oath in good faith. *Id.* at 72. That same month, President Johnson removed several generals who had most vigorously enforced the limitations on white registration, including General Sheridan, in control of Louisiana and Texas, replacing them with people more sympathetic to Democratic - and Southern white - interests. *Id.* at 78.

In some states the percentage of white disfranchisement was much higher than in others because of the political sentiments of the general in charge. General Sheridan, in command over Louisiana, interpreted the oath so stringently that the *New Orleans Times* estimated that half the white males were barred from the polls, including all veterans and Democratic office holders. General Schofield in Virginia, on the other hand, was lenient, holding, for example, that “giving aid and comfort to the enemy” did not mean supplying charity but furnishing horses and guns. In Tennessee the new Radical constitution disfranchised more than half the white male citizens . . . . [African American] voters outnumbered the whites in five states - Florida, Alabama, South Carolina, Mississippi, and Louisiana - though only in the latter three did they number 50 per cent or more of the population.<sup>93</sup>

In several others their numbers came close to the number of white voters, substantially outstripping the black percentage of the general population.<sup>94</sup> Overall, when voter registration was completed for the new state constitutional conventions, in the ten former Confederate states, approximately 1,363,000 people qualified as voters, of whom 660,000 were white and 703,400 were African American.<sup>95</sup>

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<sup>93</sup> BRODIE, *supra* note 85, at 314-15 (citations omitted).

<sup>94</sup> *Id.* at 315. Brodie reports that blacks made up forty-nine percent of the voters but only forty-four per cent of the population in Georgia; and forty-seven percent of the voters in Virginia, a substantially higher percentage than was the black part of that state's general population. *Id.*

<sup>95</sup> FRANKLIN, *supra* note 28, at 79. The whites who qualified included Northerners who had taken up residence in the South as well as native Southerners who passed the ironclad oath requirement. *Id.* at 85. Franklin reports that registration figures for whites compare quite favorably with figures indicating that 721,000 whites had voted in these states in the 1860 election, although he concedes that the number of post-war white registrants includes a number of Northerners and Union army personnel who registered in the Southern states. *Id.* at 80. Franklin excludes Tennessee from the states he considers subject to Radical Reconstruction. *Id.* at 190. See also MCPHERSON, *supra* note 13, at 27, 152. Tennessee made no undertaking to enfranchise its black citizens, but it did exclude certain classes of white males from the franchise who had been identified with the Confederate cause, renounced slavery and the Confederate debt, and ratified the Fourteenth Amendment, and under these conditions Congress accepted Tennessee back into the Union in July 1866, nearly two years prior to readmission of other members of the Confederacy. See also FRANKLIN, *supra* note 28, at 224 (noting that each of the other states was subjected to more stringent conditions).

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Ultimately, the effort to disfranchise former rebels failed. Whatever the Radicals in Congress had hoped would occur in the South, there is no question that the Reconstruction conventions that ultimately refashioned the Southern state governments, in no way represented “black rule.” The new electorate, consisting as it did of newly freed blacks, loyalist whites of both Northern and Southern origin, and those whites who dishonestly slipped through the loyalty oath barrier, was certainly very different in nature from the pre-Civil War electorate. However, they were not bent on excluding local whites from participating in the political process of the new South. Only in two Southern constitutional conventions did blacks come close to a majority.<sup>96</sup> Moreover, the black politicians of the New South generally favored reconciliation with the white people who were their neighbors,, and almost immediately began to take steps to remove political disabilities from whites.<sup>97</sup> After all, unlike the Radical Republicans in the Congress, the Southern blacks

<sup>96</sup> See FRANKLIN, *supra* note 28, at 102 (setting forth the data in the table below):

MEMBERSHIP IN STATE CONVENTIONS 1867-1868

STATE	BLACK	NATIVE WHITE	NORTHERN WHITE	TOTAL WHITE	TOTAL MEMBERSHIP
Alabama	18 (17%)	59 (55%)	31 (28%)	90 (83%)	108 (100%)
Arkansas	8 (13%)	35 (52%)	23 (35%)	58 (87%)	66 (100%)
Florida	18 (40%)	12 (27%)	15 (33%)	27 (60%)	45 (100%)
Georgia	33 (19%)	128 (74%)	9 (7%)	137 (81%)	170 (100%)
Louisiana	49 (50%)	*	*	49 (50%)	98 (100%)
Mississippi	17 (17%)	29 (29%)	54 (54%)	83 (83%)	100 (100%)
N. Carolina	15 (11%)	100 (75%)	18 (14%)	118 (89%)	133 (100%)
S. Carolina	76 (61%)	27 (22%)	21 (17%)	48 (39%)	124 (100%)
Virginia	25 (24%)	33 (31%)	47 (45%)	80 (76%)	105 (100%)
Texas	9 (10%)	*	*81 (90%)	90 (100%)	*

\* Indicates that a further breakdown is unavailable

Only South Carolina elected a black majority to the state constitutional convention. Louisiana’s even division between the races was by agreement, not through the electoral process. *Id.* at 101.

<sup>97</sup> *Id.* at 90-91. For example, in his first speech before the South Carolina convention, Beverly Nash, a black leader, “asserted that the Southern white man was the ‘true friend of the black man.’ [Nash] point[ed] to the banner containing the words ‘United we stand, divided we fall . . .’” *Id.* Thereafter several South Carolina blacks presented a resolution asking Congress to remove all political disabilities from the whites, and it was passed. *Id.*

realized that they would have to live for the foreseeable future with their white neighbors. In understanding the extent of white power and influence, they probably understood that any attempt to dominate them, even if possible in the short run, would in the long term end disastrously for them.

#### IV. CAN FELON DISFRANCHISEMENT STATUTES SURVIVE STRICT SCRUTINY?

As pointed out earlier in this Article, the *Richardson* Court held that the exception clause of Section 2 of the Fourteenth Amendment authorized states to adopt felon disfranchisement statutes, and, thus, obviated the need to apply the compelling governmental interest test to felon disfranchisement.<sup>98</sup> Assuming *arguendo* that *Richardson's* construction of Section 2 is in error, the question remains whether felon disfranchisement statutes would likely survive the strict scrutiny normally applied to restrictions on the fundamental right to vote?

Justice Marshall certainly believed felon disfranchisement statutes would fail to survive the strict scrutiny analysis.<sup>99</sup> Additionally, under the reading herein given to the exception clause of Section 2, only those denied voting rights for treason or other crimes of disloyalty could be outright denied the right to vote under Section 2.<sup>100</sup> If a state denied the right to vote to those found guilty of voting fraud, perhaps the denial might pass scrutiny in light of the state's need to prevent election-tampering. But, as Justice Marshall pointed out, most state statutes cover many crimes other than election tampering, and thus cannot be justified on the basis that they are needed to assure honest elections.<sup>101</sup> If a state tried to justify denial of the right to vote to persons who had previously committed major crimes on the theory that otherwise such people might take over the electoral process and elect bad candidates who might undermine the rule of law, it would be, in effect, denying the right to vote because of disapproval of the policies citizens might choose. Surely

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<sup>98</sup> See *supra* note 17 and accompanying text.

<sup>99</sup> See *Richardson v. Ramirez*, 418 U.S. 24, 77-83 (1974) (dissenting opinion).

<sup>100</sup> See *Morgan-Foster*, *supra* note 49, at 317.

<sup>101</sup> *Richardson*, 418 U.S. at 79-80. Justice Marshall believed that such statutes would fail because they are not the least restrictive means of preventing vote fraud. *Id.* But even if that were conceded, as he also pointed out, the state's legitimate interest in preventing voting fraud is ill served by most felon disfranchisement statutes, which he found both over-inclusive and under-inclusive. *Id.* As he pointed out, on their face most cover many crimes other than voting fraud. And, because in most states vote fraud crimes are misdemeanors only, those with proven disposition to interfere with the honesty of elections are not even covered by the statutes. *Id.*

this would be a seriously defective argument in a system whose legitimacy turns on popular sovereignty.<sup>102</sup>

Of course, the Supreme Court would ultimately become the final arbiter of whether and to what extent felon disfranchisement statutes could pass strict scrutiny, and it is somewhat presumptuous to prejudge the full panoply of cases that may arise. However, it does seem pretty clear that many such statutes would be at best problematic under such an analysis.<sup>103</sup>

#### V. CONCLUSION

The Supreme Court erred in concluding in *Richardson v. Ramirez* that the Fourteenth Amendment's exclusion clause of Section 2 authorized state enactment and enforcement of felon disfranchisement statutes. When considered in light of its legislative history and purpose, the exclusion clause had nothing to do with felon disfranchisement statutes. Instead, its only purpose was to prevent diminution of power given states through apportionment schemes, which would be occasioned by the framers' plans to strip political power from those who had participated in trying to undo the Union in the Civil War. Exclusion clauses that were proposed prior to the final version included in Section 2 explicitly limited exclusion to those who had participated in the rebellion or related crimes. There is no discussion of precisely how the language was changed to seemingly cover other crimes unrelated to the rebellion. There was no need to attach an exclusion clause to earlier versions of the apportionment scheme because it would only come into force if the state denied voting rights to citizens on account of race. Once the apportionment scheme was enlarged to come into effect when other large groups were denied the right to vote, a change was made.

At the time, aside from the African-American community, there was only one group of people in the country whose voting rights might be denied that was large enough to affect apportionment under a non-racial apportionment scheme—the unreconstructed Southern whites who had participated in the rebellion and who the framers of the new constitutional amendment specifically planned to disfranchise. The intent to disfranchise large numbers of white voters explains why there

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<sup>102</sup> *Id.* at 81-82. Justice Marshall then quoted *Carrington v. Rash*, 380 U.S. 89, 94 (1965), to the effect that denying the right to vote to "a sector of the population because of the way they may vote is constitutionally impermissible." *Id.*

<sup>103</sup> Compare *Morgan-Foster*, *supra* note 49, at 316-18, with *Chin*, *supra* note 81, at 311-13.

was a need for an exclusion clause in Section 2 of the Fourteenth Amendment and casts light on how that clause should be interpreted.

Section 2 was aimed at encouraging the reconstructed Southern states to provide their black citizens the right to vote by threatening to diminish their power if blacks were not included in the electorate. However, the framers of Section 2 also intended to strip political power from white males who had served the Confederate cause, at least until the governments of the newly reconstructed states could get on their feet. This would allow African-American voters, in conjunction with what loyal whites could be found, to provide protection to the freedmen in voting as a counterweight to the power of those who had previously brought the country close to ruin. The whites who were to be denied voting rights were an indeterminate, yet substantial number, and the framers of Section 2 did not want the newly reconstructed governments, if they permitted blacks to vote, to be deprived of representation because former rebels had been disfranchised. The only group of prospective disfranchisees large enough to affect apportionment was the whites who had given aid and comfort to the Confederate cause. It was this group of people that the framers of Section 2 intended to cover with the exception clause they tacked onto the Fourteenth Amendment.

The *Richardson* Court's interpretation of Section 2 ignores the obvious fact that its framers had in mind white voters who had given aid and comfort to the Confederate cause during the Civil War. The argument that the framers were concerned with felon disfranchisement when they wrote Section 2 ignores two other salient points. First, legislators rarely pass laws to cover problems they cannot imagine will ever arise. In the context of 1866, no one could have imagined a generalized "crime wave" that would create enough felons to affect the apportionment of seats in the national Congress or Electoral College. Therefore, there was no reason for them to have written an exclusion clause to make sure that the new apportionment scheme they contemplated would not be affected by felon disfranchisement of some mythical criminal class of the future. Second, the exclusion clause was passed with no discussion of an intent to deny voting rights to felons, the wisdom of such a rule, or lack thereof. Instead, the legislative history of Section 2 focused on the issues of that time: inclusion of newly freed black citizens in the electorate and exclusion of white citizens who had tried to destroy the Union.

The *Richardson* Court's lack of awareness of the many versions of the exclusion clause, its failure to consider the linkage between the policies of inclusion and exclusion that lay at the heart of the Radicals' political program, and its refusal to consider the realities of the time all led to an erroneous interpretation of Section 2 of the Fourteenth Amendment. The time is ripe to reconsider *Richardson v. Ramirez*.