Journal of Mississippi History

Volume 76 | Number 3 Article 3

2014

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I. Introduction

It was not until 1965 with the passage of the Voting Rights Act that the African American population fully gained the right to vote, despite the protections of the Fourteenth and Fifteenth Amendments of the United States Constitution. Section 2 of the Fourteenth Amendment allows for the apportionment of the U. S. House of Representatives and the Electoral College to be reduced if a state disenfranchises any of its adult male citizens by denying them the right to vote. For reasons that have never been fully explained, section 2 has never been enforced. The text of section 2 reads in its entirety:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[1]

The intent of section 2 was to alter how each state received representation in the U. S. House and the Electoral College and the manner of determining that

[1] United States Constitution, Amendment XIV, § 2. The Nineteenth Amendment modifies section 2, should the right to vote be denied or abridged, to include any citizen, not just males. See U. S. Const., Amend. XIX. The Twenty-sixth Amendment also modifies section 2, extending the right to vote to citizens eighteen years of age and older. See U. S. Const., Amend. XXVI.

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representation. Prior to the passage of the Fourteenth Amendment, the United States Constitution counted five slaves as three persons under the Three-Fifths Compromise,[2] though none of the southern states would have permitted them to vote. Now, under section 2, the former slaves would be counted as five persons.[3]

Although the most dramatic change was the removal of the three-fifths clause, the text of section 2 is not limited to racial classifications but applies to any restriction on the voting rights of men over twenty-one and reduces a state's apportionment if the state wrongfully denies any adult male's right to vote.[4] Section 2 did not forbid race-based voting restrictions. Instead, it only required the apportionment penalty;[5] however, the section 2 penalty provisions were never enforced during the period when the southern states passed laws and implemented policies disenfranchising African Americans.[6] Congress did not pass implementing legislation prohibiting disenfranchisement laws and policies until the passage of the Voting Rights Act of 1965.[7]

The disenfranchising conventions were never seriously challenged, despite violations of section 2 that would justify reapportionment of congressional representation. There has never been a successful implementation of all provisions of section 2.[8] No state has ever suffered a reduction in congressional representation because of its disenfranchisement of otherwise eligible voters.[9] There are three possibilities that explain the failure of section 2 enforcement. First, the Fifteenth Amendment, which eliminated the denial of a citizen's right to vote based on that citizen's "race, color, or previous condition of servitude," impliedly repealed section 2 of the Fourteenth Amendment. Repeal by implication is unlikely, since the text of section 2 is not limited to racial classifications but applies to any restriction on the voting rights of men over twenty-one; thus, section 2 is broader than the Fifteenth Amendment when applied to the type of discrimination. Secondly, the lack of section 2 enforcement is a result of the federal judiciary's failure to require

[2] U. S. Const., Article I, § 2, cl. 3. The three-fifths clause was rendered moot with the abolition of slavery by the passage of the Thirteenth Amendment in 1865.

[3] U. S. Const., Amend. XIV, § 2. Section 2 superseded art I, § 2, cl. 3 of the U. S. Constitution. Section 2 specifically states: "Representatives shall be apportioned . . . counting the whole number of persons in each State, excluding Indians not taxed. . . ."

[4] U. S. Const., Amend. XIV, § 2.

[5] *Donnell v. State*, 48 Miss. 661, 677 (1873). ("Under this [section 2], then, if a state chose to exclude any of its male citizens from the ballot . . . it could do so, electing thereby to accept a reduced representation."); see also *Richardson v. Ramirez*, 418 U.S. 24, 74 (1974) (Marshall, J., dissenting), ("[Section 2] put Southern States to a choice—enfranchise Negro voters or lose congressional representation.").

[6] George Davis Zuckerman, "Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment," *Fordham Law Review* 30 (October 1961): 124 ("[I]t is common knowledge that from the date of the ratification of the fourteenth amendment to the present day [1962], there have been denials and abridgments of the right of citizens to vote, particularly in the case of the Negro population in the South.").

[7] Voting Rights Act of 1965, Public Law. No. 89-110, 79 Stat. 437 (codified as amended at 42 U. S. C. §§ 1971, 1973 to 1973 bb-1 (1982)).

[8] Zuckerman, "Section 2 of the Fourteenth Amendment," 124.

[9] Ibid.

that the reapportionment remedy be imposed upon the offending southern states. The federal judiciary has avoided directly addressing the enforcement of the section 2 remedy with one exception in which it held section 2 implementation a non-justiciable issue, thus deferring the issue to the legislative branch. However, tolerance and often approval by the federal judiciary and the white electorate of disenfranchisement laws and policies after the Civil War contributed to the inability to find a workable solution for section 2 enforcement. Thirdly, the lack of section 2 enforcement is a result of congressional inability to ratify implementing legislation needed to carry out the reapportionment remedy, particularly by means of the decennial census. The difficulty of determining the number of disenfranchised citizens is apparent in the *Congressional Record* from the discussion and debate over the proposed enforcement and reapportionment calculations based on the decennial census. Congress was unable to find a solution for determining an accurate report concerning disenfranchised individuals.

The framers of the Fourteenth Amendment wrestled with the question of allowing representation by southern states while at the same time preventing disenfranchisement; a penalty reducing southern states representation in Congress was the solution. Although enforcement of the reapportionment penalty ultimately proved unsuccessful, Congress, on three significant occasions—1872, 1901, and 1957—proposed legislation that would have implemented section 2 by reducing the representation of southern states in Congress. In addition, legal challenges, although ultimately unsuccessful, were brought under section 2 in response to Mississippi and the other southern states' policies known as the Mississippi Plan that disenfranchised African American voters. Although as mentioned previously, section 2 is sometimes characterized as having been invalidated by the Fifteenth Amendment, a comparison of the scope of the two amendments and an analysis of Congressional legislation and Supreme Court rulings show that the Fifteenth Amendment was not viewed by Congress or the judiciary as invalidating section 2. Often overlooking section 2's history, recent discussions of the section 2 apportionment provision usually focus on its exception allowing disenfranchisement for persons with a criminal conviction. It is the writer's contention that the potential impact of the apportionment provision of the Fourteenth Amendment has been underestimated and that it was politics that undermined the enforcement of section 2. Thus, an understanding of the legal, legislative, and political history of section 2 can shed new light on the history of African American disenfranchisement in the South. This article addresses issues of Mississippi constitutional history, voting rights law and policy, political suppression, the modern civil rights movement, felon disenfranchisement, and the racial inequalities in the criminal justice system.

The lack of congressional enforcement has led some scholars to characterize

section 2 as a "historical curiosity"[10] and an "enigma" in constitutional history.[11]Presumably, the Fifteenth Amendment of the nineteenth century and the Voting Rights Act of the twentieth century precluded efforts to invoke section 2 of the Fourteenth Amendment, despite Mississippi and other southern states continuing disenfranchisement policies.[12] When section 2 is mentioned in the context of disenfranchisement, the clause is generally treated as part of the larger dispute over the original intent of the Fourteenth Amendment.[13]

Yet few explanations of section 2's meaning and application have been given by either the Supreme Court or Congress. The Court generally tolerated the individual states' discriminatory and disenfranchisement schemes from Reconstruction through the first half of the twentieth century. The Court upheld the poll tax and literacy tests in *Williams v. Mississippi*[14] and legalized racial discrimination in *Plessy v. Ferguson*.[15] The Court determined the scope of section 2 by denying that it created universal suffrage in *McPherson v. Blacker*.[16] In *Lassiter v. Northampton County*,[17] the Court emphasized that section 2's narrow scope allows states to consider residency, age, and previous criminal record in determining the qualifications of voters. In the *Lassiter* case, the Court stated that: "While § 2 of the Fourteenth Amendment . . . speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.'"[18] In *Reynolds v. Sims*,[19] Justice John Marshall Harlan, in his dissent, argued that the language and purpose of section 2 precluded finding an abridgement of voting

[10] Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Washington, D.C.: Government Printing Office, 2014), 2201; Mark R. Killenbeck, "Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation," *Hastings Law Journal* 45 (1994): 1121-22, 1177 (noting that "modern observers tend to characterize Section 2 as an 'historical curiosity' . . .").

[11] Zuckerman, "Section 2 of the Fourteenth Amendment," 93 ("Section 2 of the fourteenth amendment has been much of an enigma in American constitutional history.").

[12] Harold W. Chase and Craig R. Ducat, *Edward S. Corwin's The Constitution and What It Means Today*, 14th ed. (Princeton: Princeton University Press, 1978), 528-29, 535-39; Killenbeck, "Another Such Victory?," 1177.

[13] Robert Michael Goldman, "*A Free Ballot and a Fair Count": The Department of Justice and the Enforcement of Voting Rights in the South, 1877-1893* (New York: Fordham University Press, 2001), 2; Killenbeck, "Another Such Victory?," 1177; and below, note 20.

[14] 170 U. S. 213 (1898), overruled by the Voting Rights Act (1965), 42 U.S.C. §§ 1973–1973aa-6.

[15] 163 U. S. 537 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

[16] 146 U. S. 1 (1892) (unanimously rejecting claim of abridgement of the right to vote in violation of Sections 1 and 2 of the Fourteenth Amendment and of the Fifteenth Amendment based on the state of Michigan's switch from at-large to district election of presidential electors and finding no abridgment on any ground, including section 2).

[17] 360 U. S. 45 (1959) (upholding North Carolina's literacy test for voter registration); cf. *Cooper v. Aaron*, 358 U.S. 1 (1958) (upholding the binding nature of the school desegregation decision and individually signed by all the justices); *Baker v. Carr*, 369 U. S. 186 (1962) (holding that a claim of malapportionment of the state legislature is justiciable).

[18] Ibid. (quoting McPherson, 146 U.S. at 39).

[19] 377 U. S. 533 (1964).

rights under section 1.[20] The Supreme Court did not address the manner in which the section 2 apportionment penalty should be enforced until its 1946 ruling in *Saunders v. Wilkins*,[21] when the Court deferred the question of enforcement to the Congress.[22]

Over the years, congressional attempts were made to effectuate section 2, but these efforts met with little success and much controversy. During debate, congressional members voiced concern over "grandfather laws," primary restrictions, literacy tests, and poll taxes being imposed by the southern states to keep African Americans away from the polls.[23] When addressing enforcement of the section 2 apportionment penalty, Congress determined that the enforcement mechanism would be derived from specialized census returns showing the percentage of the disenfranchised population.[24] Questions designed to identify disenfranchised individuals were added to the 1870 census; however, the census results yielded inaccurate statistics, and plans for enforcement fell through.[25] Additional reapportionment census proposals were made during the early twentieth century but died in committee.[26]

The intent of section 2's drafters was to use the penalty reducing Southern representation as an enforcement mechanism. Representative Thaddeus Stevens, leader of the congressional Republicans and outspoken Radical, characterized what became section 2 as the most important section in the Fourteenth Amendment.[27] The provision was regarded by another representative as the "cornerstone of the stability of our government."[28] The framers of the Fourteenth Amendment obviously did not intend to craft an unenforceable amendment, thereby rendering it meaningless. A number of members of Congress had been hesitant to create

[20] Ibid. (Harlan, J., dissenting), insisting that Section 2's explicit regulation of suffrage and specific remedy meant that suffrage could not be the subject of a claim under Section 1:

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

Cf. William W. Van Alstyne, "The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress," *Supreme Court Review* (1965): 33-86 ("[T]he dissent rests upon an extremely doubtful view of the original understanding [of section 2].").

[21] 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U. S. 870 (1946).

[22] 152 F.2d 235, 238 (4th Cir. 1945).

[23] Zuckerman, "Section 2 of the Fourteenth Amendment," 110-11.

[24] Margo J. Anderson, *The American Census: A Social History*, 2d ed. (New Haven: Yale University Press, 2015), 79-81.

[25] Ibid., 85; Zuckerman, "Section 2 of the Fourteenth Amendment," 107-16.

[26] Zuckerman, "Section 2 of the Fourteenth Amendment," 116-24.

[27] *Congressional Globe*, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens of Pennsylvania); and below, notes 48-49.

[28] Ibid. (Rep. George Miller of Pennsylvania).

section 2.[29] The Fourteenth Amendment would encourage the former Confederate states to enfranchise African Americans under the threat of excluding former slaves from the state's population count for purposes of congressional apportionment due to former slaves being denied the right to vote.[30] An increase in southern influence in Congress as a result of the war was not supported by the majority of the population in the northern states. By presenting to former Confederate states, as a condition of restoration to the Union, the alternative of African American suffrage or reduced representation the problem might be solved.[31]

After the ratification of the Fourteenth and the Fifteenth Amendments, African Americans gained the right to vote and the right to participate in the democratic process.[32] The enfranchisement of the African American population led to the creation of white supremacist organizations that resorted to intimidation, violence, and assassinations to prevent African Americans from exercising their civil and voting rights.[33] In the southern states especially, African American voting decreased dramatically under such pressure.[34] In the 1880s, southern legislators began devising statutes creating barriers to prevent African Americans, and often low-income whites, from exercising their right to vote.[35] The efforts of the state legislatures in Mississippi and throughout the south culminated in a series of disenfranchising conventions, held between 1890 and 1902.[36] Mississippi was the first state to legally disenfranchise African American voters with its Constitutional

[29] For an extensive discussion of the politics behind the passage of section 2, see George P. Smith, "Republican Reconstruction and Section Two of the Fourteenth Amendment," T*he Western Political Quarterly* 23 (December 1970): 829-53; Van Alstyne, "The Fourteenth Amendment," passim; and below, Part II.

[30] James M. McPherson, *Ordeal by Fire: The Civil War and Reconstruction* (New York: Alfred A. Knopf, 1982), 516-18; Joseph B. James, *The Framing of the Fourteenth Amendment* (Champaign: University of Illinois Press, 1956), 60.

[31] James, *Fourteenth Amendment, 60; Anderson, The American Census, 77; William Gillette, The Right To Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: John Hopkins Press, 1965), 24.

[32] Mississippi regained its representation in Congress following the adoption of the 1869 Constitution that enfranchised its African American population. See Morton Stavis, "A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 – and Beyond," *Mississippi Law Journal 57* (December 1987): 596.

The enfranchisement of the African American voting population during Reconstruction enjoyed only brief success. See Eric Foner, ed., *Freedom's Lawmakers: A Directory of Black Officeholders during Reconstruction*, rev. ed. (Baton Rouge: Louisiana State University Press, 1996) (More than 1,500 African American officeholders are identified during the Reconstruction period, 1865–1876).

[33] Reconstruction governments have been charged with gross fraud and corruption. Such charges were often used to justify disenfranchisement. See Stavis, "A Century of Struggle," 598 ("[T]hese conditions, to the extent that they existed, reflected the general low level of public morality throughout the nation during that period, not the fact that blacks participated in the governments."), 599-600; see also Eric Foner, Reconstruction: *America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), 388-89; and Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888-1908* (Chapel Hill: University of North Carolina Press, 2001), 10-12, 268-69.

[34] Perman, *Struggle for Mastery*, 58-59, 66-67, 88-89.

[35] Ibid., 18-20.

[36] J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale University Press, 1974), 139.

Convention of 1890;[37] South Carolina, Louisiana, North Carolina, Alabama, Virginia, and Georgia soon followed suit.[38]

As previously noted, section 2 authorizes a reduction in congressional representation for states that deny adult men the right to vote. Despite violations of section 2, it was never enforced. The view that section 2 was impliedly repealed by the Fifteenth Amendment is unlikely because of differences in scope and its legal history that shows section 2 was not seen as an invalidated provision. Enforcement of Section 2 failed because Congress was unable to pass workable implementing legislation and the federal judiciary did not require enforcement of the reapportionment penalty. Although the drafters of the Fourteenth Amendment intended to use section 2 as an enforcement mechanism to prevent the southern states from disenfranchising their African American voters, Mississippi and other southern states implemented continuing disenfranchisement policies.

II. The Framing of the Fourteenth Amendment

The Radical Republicans were hesitant about giving the South increased representation in Congress because they feared that the African Americans who were counted for the purpose of apportionment would not be allowed to vote.[39] The Fourteenth Amendment addressed the Republicans' concerns by providing protections for the civil rights of African Americans.[40] Section 2 was particularly significant because it imposed an apportionment penalty designed to prevent the southern states from disenfranchising the newly freed slaves from participation in the democratic process. Section 2 would also prevent southern representatives from becoming a significant power in Congress.[41] In addition, by eliminating the race or color component from the final version, section 2 also prevented the southern states from disenfranchising any other minority, uneducated or poor individual regardless of race.[42] The provisions of section 2, although ratified with the southern states in mind, applied equally to all states. The apportionment provi-

[37] Jere Nash and Andy Taggart, *Mississippi Politics*: *The Struggle for Power, 1976-2008* (Jackson: University Press of Mississippi, 2009), 96.

[38] Kousser, *The Shaping of Southern Politics*, 139. South Carolina followed suit in 1895, Louisiana in 1898, North Carolina, Alabama, Virginia, and Georgia all by 1910. See McPherson, *Ordeal by Fire*, 618; John Hope Franklin, *Reconstruction after the Civil War* (Chicago: University of Chicago Press, 1961), 236-37.

[39] Foner, *Reconstruction*, 228-61; Hans L. Trefousse, *The Radical Republicans: Lincoln's Vanguard for Racial Justice* (New York: Alfred A. Knopf, 1969), 327-28, 340-70; McPherson, *Ordeal by Fire*, 516-18.

[40] Trefousse, *The Radical Republicans*, 345-47, 408-09.

[41] Anderson, *The American Census*, 77; Van Alstyne, "The Fourteenth Amendment," 44; Zuckerman, "Section 2 of the Fourteenth Amendment," 94-95.

[42] Zuckerman, "Section 2 of the Fourteenth Amendment," 125.

sions of section 2 were never intended to be self-executing.[43] If the apportionment provisions were to take effect, enforcement would require additional congressional action.[44]

The Thirteenth Amendment, first of the Reconstruction amendments, became effective December 18, 1865.[45] The apportionment provisions of Article I, section 2, which included only three-fifths of the slaves in determining the basis for representation, were effectively repealed.[46] With the abolition of slavery, a large number of the African American population in the South would be added to the southern states' congressional representation. The South would gain about twelve representatives. The increase in representatives from the South did not rest well with the majority of members of the Thirty-ninth Congress, who understood that the southern states could easily gain the upper hand upon readmission by denying the African American population the right to vote.[47]

The most influential individual who would lead the Republicans to pass the Fourteenth Amendment and champion equal rights for all citizens was a United States Representative from Pennsylvania, Thaddeus Stevens.[48] Stevens had helped secure the passage of the Thirteenth Amendment and was known for what some believed to be "radical" egalitarian views due to his efforts to secure the civil rights of African Americans.[49] Representative Stevens was explicit in explaining the reasoning behind section 2. In the congressional debates, Stevens described section 2 as the "most important" provision of the Fourteenth Amendment as it would protect the North against an increase in Southern white political power by penalizing any state that abridged its citizens' right to vote.[50]

To prevent states from suppressing the African American vote, Stevens introduced a series of bills that were co-sponsored by other representatives and that

[43] *Congressional Globe*, 39th Cong., 1st Sess. 2544 (1866) (statement of Rep. Thaddeus Stevens conceding that section 2 would not be self-executing, that "as soon as [section 2] becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections . . ."); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 103, 107 ("The apportionment provisions of section 2 of the amendment were obviously not self-executing. If they were to be enforced, it would require additional congressional action.").

[44] *Congressional Globe*, 39th Cong., 1st Sess. 2544 (1866); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 103, 107.

[45] U. S. Const., Amend. XIII.

[46] Ibid.

[47] Anderson, *The American Census*, 76-78; Smith, "Republican Reconstruction," 832; Van Alstyne, "The Fourteenth Amendment," 44.

[48] For a thorough examination of Stevens's life and his role in shaping the Fourteenth Amendment as congressional leader of the Radical Republicans, see Hans L. Trefousse, *Thaddeus Stevens: Nineteenth-Century Egalitarian* (Chapel Hill: University of North Carolina Press, 1997), esp. 161-73, 178-80, 183-86. Other biographies include Fawn McKay Brodie, *Thaddeus Stevens, Scourge of the South* (New York: W. W. Norton, 1959); Ralph Korngold, *Thaddeus Stevens: A Being Darkly Wise and Rudely Great* (New York: Harcourt, Brace, 1955); Richard Nelson Current, *Old Thad Stevens: A Story of Ambition* (Madison: University of Wisconsin Press, 1942); and Thomas Frederick Woodley, *Thaddeus Stevens* (Harrisburg, Pa.: Telegraph Press, 1934).

[49] Trefousse, *Thaddeus Stevens*, 152-53, 205-06; Foner, *Reconstruction*, 229-30.

[50] *Congressional Globe*, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens); McPherson, *Ordeal by Fire*, 517-18.

were designed to apportion representatives in Congress according to the number of legal voters in each state.[51] Stevens proposed a provision requiring a census of legal voters to be taken along with the regular census.[52] However, the New England senators strongly opposed representation based on the number of legal voters believing their constituency would be affected because of their disproportionately large population of women and also the rules restricting aliens and educational requirements.[53]

Section 2's language was the subject of political controversy. During the congressional debates, one representative offered a proposal that would have accomplished the goal of depriving the Southern states of representation until the African American population was enfranchised without causing loyal states to suffer "offensive inequalities."[54] This bill provided that representatives should be apportioned based on the number of persons to whom "civil or political rights or privileges are denied… on account of race or color."[55] An amended version of this proposal provided that when any person is disenfranchised "on account of race, creed, or color, all persons of such race, creed, or color, shall be excluded from the basis of representation."[56] However, the language of the amended proposal engendered controversy. During debate some representatives opposed the bill as authorizing disenfranchisement, contrary to the constitutional requirement guaranteeing states a republican form of government. Other representatives objected that the proposals would allow the Southern states to get around the bill's restrictions by allowing disenfranchisement based on intelligence and property qualifications instead of race.[57]

After the controversy over the proposal's language, a new amendment was offered that would in effect exclude from a state's basis of representation all members of a class whenever one such member was disenfranchised because of race. [58] The bill was approved by the House and sent to the Senate where it was attacked as partial, sectional, and affecting only the Southern states.[59] Others attacked the

[51] *Congressional Globe*, 39th Cong., 1st Sess. 9-10 (A series of bills were introduced by Reps. Robert C. Schenck of Ohio, Thaddeus Stevens, and John M. Broomall of Pennsylvania).

[52] *Congressional Globe*, 39th Cong., 1st Sess. 10 (Rep. Thaddeus Stevens).

[53] Zuckerman, "Section 2 of the Fourteenth Amendment," 95-96; Anderson, *The American Census*, 78.

[54] *Congressional Globe*, 39th Cong., 1st Sess. 9-10, 141 (1866) (Rep. James G. Blaine of Maine).

[55] Ibid.

[56] Ibid.

[57] Zuckerman, "Section 2 of the Fourteenth Amendment," 125.

[58] *Congressional Globe,* 39th Cong., 1st Sess. 538 (1866) (Rep. Thaddeus Stevens); see also James, *Fourteenth Amendment*, 185, explaining the difference between this proposal and Section 2:

> The principal difference between this resolution and section of two of the Fourteenth Amendment lies in the penalty exacted for any denial of the ballot on account of race or color: The former provides for excluding from the basis of representation all members of those groups touched by discrimination; the latter, on the other hand, provides only for reduction of representation in proportion to those actually refused the vote. The document reported by Stevens did not include the word "male" and was much less detailed than the accepted version.

[59] Congressional Globe, 39th Cong., 1st Sess. 2459 (1866).

measure as not going far enough in preventing disenfranchisement.[60] When voted upon, the amendment failed to win the two-thirds approval required for constitutional amendments.[61]

A new amendment was drafted eliminating qualifications based solely on race in determining the basis of representation.[62] The new proposal required a reduction in representation when the right to vote is denied to any male inhabitants twenty-one years or older in proportion to the number of male citizens twenty-one years or older.[63] The new amendment was approved by the House, and transmitted to the Senate for its deliberations.[64] This amendment garnered additional support when the debate clarified that the amendment no longer included race as the sole basis for reapportionment.[65] The proposal provided that if any adult male is excluded from voting, the state loses representation in proportion.[66] Concerns were raised about the practicality of enforcement and whether the amendment still encouraged the southern states to continue to disenfranchise.[67] After minor revisions, section 2 of the Fourteenth Amendment was voted upon, approved in the Senate, and ratified on July 28, 1868.[68]

During Reconstruction, the Radical Republicans attempted to secure civil rights for African Americans with passage of the Fourteenth Amendment. Section 2 was intended to prevent the Southern states from suppressing the voting rights of African American citizens. However, debate over the wording of section 2 led to political compromise, excluding disenfranchisement based on race as the sole qualification for reapportionment. Instead, reapportionment was required when the right to vote was denied to any adult male.

III. Section 2: The Reapportionment Factor

Efforts by Congress to enforce the section 2 reapportionment penalty, primarily through determining apportionment by use of the decennial census, were unsuccessful. Three significant attempts to pass the implementing legislation were made. These efforts show that section 2 was a possible remedy on the table when Con-

[60] Ibid., 2800, 2939-40.

[61] Ibid., 2291.

[62] Ibid., 2286 (1866) (Apr. 30, 1866) (report to House of proposed amendment from Joint Committee); see also James, *Fourteenth Amendment*, 109-13; Gillette, The Right To Vote, 24.

[63] *Congressional Globe*, 39th Cong., 1st Sess. 2286 (1866); see also Smith, "Republican Reconstruction," 851.

[64] *Congressional Globe*, 39th Cong., 1st Sess. 2545 (May 10, 1866) (House passage).

[65] Ibid., 2766-67.

[66] Ibid., 2286.

[67] Ibid., 2800, 2939-42; see also Zuckerman, "Section 2 of the Fourteenth Amendment," 104-06.

[68] Ibid., 3042 (June 8, 1866) (Senate passage with amendments); ibid., at 3149 (June 13, 1866) (House passage as amended by Senate); 15 Stat. 708, 709-11 (1868) (ratification by three-fourths of the states officially proclaimed on July 28, 1868); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 107.

gress addressed prevention of disenfranchisement laws and policies.[69] Congress passed Section 6 of the Apportionment Act,[70] providing that a census report listing the number of disenfranchised citizens among the states be taken in conjunction with the ninth decennial census.[71] Secondly, Congress proposed the Apportionment Act of 1901[72] and subsequent bills in 1904 and 1906 to reapportion the House of Representatives following the completion of the twelfth census, which would determine the total number of adult male citizens whose voting rights had been abridged by state law.[73] Thirdly, the McNamara bill,[74] proposed during the debate over the Civil Rights Act of 1957, offered legislation implementing section 2 by authorizing Congress to determine if any state had abridged the voting rights of its citizens.[75]

The first congressional action taken to enforce section 2 occurred on December 19, 1868, in the form of a resolution approved by the Senate "inquir[ing] into the propriety" of "report[ing] a bill for the apportionment of representatives in compliance with the provision of section two of the fourteenth amendment…";[76] however, Congress adjourned before the House could act on the Senate resolution. The following year, another attempt was made in conjunction with the enumeration of the ninth census in 1870. Questions were added to the census for determining these two classes of the population: those whose voting rights were abridged and those whose rights were left intact.[77] The results were problematic. The numbers set down by the census takers indicated a very small number of adult male citizens whose right to vote was reportedly denied or abridged making the accuracy and reliability of the reports extremely doubtful.[78] The general consensus in Congress was that the census reports were unreliable and the results too insignificant to warrant any action.[79] A problem with the 1870 Census was that no statutory changes were made pertaining to apportionment. The Secretary of the Interior simply directed his assistant marshals, who were to enumerate the census, to list in separate tables the number of male citizens over twenty-one and the number of "male citizens…twenty-one and upward whose right to vote is denied

[69] See below, note 164.

[70] Act of Feb. 2, 1872, ch. XI, § 6, 17 Stat. 29 (codified as 2 U.S.C. § 6 (1988)).

[71] Ibid; Anderson, *The American Census*, 79-83.

[72] 34 *Congressional Record* 556 (1901).

[73] Ibid.; see also Zuckerman, "Section 2 of the Fourteenth Amendment," 116-20 (discussion of the Apportionment Acts of 1901, 1904 and 1906); and Anderson, *The American Census*, 85.

[74] S. 2709, 85th Cong., 1st Sess. § 2 (1957).

[75] Ibid.

[76] *Congressional Globe*, 40th Cong., 3d Sess. 158 (1868) (statements of Sen. James Harlan of Iowa and Sen. LymanTrumbull of Illinois); see also Killenbeck, "Another Such Victory?," 1182.

[77] Zuckerman, "Section 2 of the Fourteenth Amendment," 108; Anderson, *The American Census*, 79-83.

[78] *Congressional Globe*, 42d Cong., 2d Sess. 66 (1872); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 111.

[79] Zuckerman, "Section 2 of the Fourteenth Amendment," 111, 116 (noting that "[t]he trivial nature of the returns probably produced its mark in history, as no Congress since that date has seen fit to request a similar census report on the number of disfranchised citizens among the states.").

or abridged on grounds other than rebellion or other crime."[80] From the results, it is apparent that many census takers were unable to follow the instructions or were unable to accurately identify those whose voting rights were abridged. For example, the Census Bureau released statistics showing a reported 342 violations for Mississippi while Texas, with a comparable population, reported 2,766. Missouri was reported with the highest number of violations at 9,265, followed by Massachusetts with 3,719.[81] Most of the southern states reported low numbers of violations when compared with some of the northern states, reflecting the inaccuracy of the census results.[82] Intimidation and fear of reprisal in the South may have led disenfranchised individuals to keep silent, resulting in low numbers of reported violations.[83] The large number of reported violations in the northern states may be a reflection of property requirements for voting.[84] Section 2's requirements were added to the United States Code in 1872 as section 6 of the Act for the Apportionment of Representatives to Congress according to the ninth census.[85] Section 6 has never been enforced.[86]

The second congressional action to reduce representation by apportionment of those states that were disenfranchising a segment of their population came in the form of another census proposal under The Apportionment Act of 1901.[87] The concerns prompting this legislation were "grandfather laws," primary restrictions, literacy tests, and poll taxes being imposed by the southern states to keep African Americans away from the polls.[88] Marlin E. Olmstead of Pennsylvania cited the case of Mississippi, whose constitution excluded from suffrage those unable to read

[80] *Congressional Globe*, 42d Cong., 2d Sess. 82-83 (1872) (statement of Rep. James Garfield of Ohio defending the Secretary of the Interior's action taken in absence of statutory authorization).

[81] Ibid., 83; results reprinted in Zuckerman, "Section 2 of the Fourteenth Amendment," 136 app. (showing a table provided by the Census Bureau with reductions made from the total populations of each state, according to the proportion of their disenfranchised persons); see also Anderson, *The American Census*, 83-85.

[82] Ibid.

[83] Zuckerman, "Section 2 of the Fourteenth Amendment," 120.

[84] *Congressional Globe*, 42d Cong., 2d Sess. 82 (1872) (statement of Samuel Cox of New York protesting enforcement of section 2 based on the census results which would defy the intent of the amendment by punishing northern States. Representation would be reduced in states, such as Rhode Island, which disenfranchised men who own less than $134 in real estate or property or rent property for less than seven dollars per annum).

[85] Act of Feb. 2, 1872, ch. XI, § 6, 17 Stat. 29 (codified as 2 U.S.C. § 6 (1988)).

[86] Zuckerman, "Section 2 of the Fourteenth Amendment," 116 n.119.

[87] 34 *Congressional Record* 556 (1901).

[88] Ibid.; see also, Zuckerman, "Section 2 of the Fourteenth Amendment," 117. One proposal, introduced by William B. Shattuc of Ohio, read:

> Resolved . . . by the House of Representatives, That the Director of the Census is hereby directed to furnish this House, at the earliest possible moment, the following information: First. The total number of male citizens of the United States over 21 years of age in each of the several States of the Union. Second. The total number of male citizens of the United States over 21 years of age who, by reason of State constitutional limitations or State legislation, are denied the right of suffrage, whether such denial exists on account of illiteracy, on account of pauperism, on account of polygamy, or on account of property qualifications, or for any other reason.

or interpret its constitution, part of which was written in Latin.[89] The resolution would have called for a census committee of five members to investigate the question of alleged abridgement of the elective franchise in states where constitutional or legislative restrictions were claimed to exist.[90] After further debate, the legislation proposed to implement section 2 was defeated, 94 in favor to 136 against, over concerns of vagueness and disagreement over what remedy constituted a valid restriction of voting rights.[91] An effort was made to apply the mandate of section 2 to the 1901 Apportionment Act in 1904 and again in 1906.[92] The 1904 proposal spelled out the reduction numbers in the House of Representatives to take effect after March 3, 1907, in nine southern states, causing the total representation in the House to be reduced from 386 to 367 members.[93] The 1906 proposal differed from the previous 1901 and 1904 proposals in that it emphasized the effects of individual intimidation and fraudulent election practices.[94] Prior to this proposal, section 2 had been viewed in the light of the effect of state constitutional and legislative actions.[95] The 1906 proposal would have reduced the number of southern representatives by thirty-seven. Both 1904 and 1906 proposals ultimately suffered the same fate when they were[96] referred to the Committee on the Census, where the proposals died.[97] An accurate number of disenfranchised individuals cannot be clearly determined from the *Congressional Record*, and it becomes evident that is the primary reason section 2 enforcement never received majority support in Congress.[98] The 1872 census returns were clearly inaccurate, and the issue arose over how to accurately determine effects of private and legislative intimidation.[99] Another concern with the census returns was the unintended and disproportionate effect on Northern states that imposed property requirements for voting.[100] The new proposals did not resolve these issues. The 1901 proposal was vague and did not include proposed numbers. The 1904 and 1906 proposals had different

[89] Zuckerman, "Section 2 of the Fourteenth Amendment," 117.

[90] Ibid.

[91] 34 *Congressional Record* 748 (1901) (statement of Rep. Edgar Crumpacker of Indiana interpreting Section 2, emphasizing that "[r]estrictions upon the exercise of the elective franchise, reasonably necessary for the integrity of elections, are not denials or abridgments of the right itself within the meaning of the law."); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 118 ("Crumpacker also believed that the exclusion from suffrage of idiots, the insane, and persons under guardianship were not denials of the right to vote within the language of section 2 . . .").

[92] Zuckerman, "Section 2 of the Fourteenth Amendment," 116-20; Anderson, *The American Census*, 85.

[93] 39 *Congressional Record* 47 (1905). The exact method used to determine these numbers is not given, however, the record notes the bill was prepared by the Committee on National Affairs.

[94] 40 *Congressional Record* 3885-86 (1906).

[95] Ibid.; see also, Zuckerman, "Section 2 of the Fourteenth Amendment," 119.

[96] Zuckerman, "Section 2 of the Fourteenth Amendment," 119. The exact method used to determine this number is not given. The number is apparently based on an estimate by the sponsor of the bill of the number of individuals disenfranchised by the use of fraudulent ballots, shotgun policies, dishonest registration policies, and intimidation at the polls.

[97] Ibid.

[98] Ibid., 116ff.

[99] Ibid., 120.

[100] Ibid., 125-26.

definitions for calculating the number of the disenfranchised, which would result in different numbers, depending on which calculation theory was used. The proposals show how it is difficult and almost impossible to accurately determine the number of disenfranchised individuals. A major problem, of course, was unreported intimidation. Many eligible voters would be afraid to vote because of the threat of private violence while others would be clearly disenfranchised by legislative actions such as poll taxes and literacy tests. The issue that Congress had to wrestle with, and ultimately could not come to agreement on, was the difficulty in calculating and determining how much of a reduction in representation to make.[101]

The third congressional action to effectuate section 2 came in 1957 when then Senator Pat McNamara of Michigan offered an amendment during the debate on a bill that would eventually become law as the Civil Rights Act of 1957.[102] McNamara believed that an implementation of section 2 of the fourteenth amendment was essential to protect the right to vote.[103] Despite gaining some support from both Republicans and Democrats, many congressmen felt that the bill was defective in several areas, and this last attempt to enforce section 2 through legislation was rejected.[104]

Congress made three significant attempts to enact legislation implementing section 2. However, the disparity in the 1870 decennial census returns prevented determining an accurate number of disenfranchised citizens. Subsequent attempts to pass implementing legislation in 1901 and 1957 were mired in controversy and ultimately failed. Section 2 remained a possible congressional remedy when addressing the prevention of disenfranchisement laws and policies.

IV. The Mississippi Plan

Many whites in Mississippi, who feared black enfranchisement would lead to black political ascendancy, began obstructing the freedmen's right to vote by coercion in 1875 and by legal means in the 1890 constitution. Surprisingly, the southern states disenfranchisement schemes suffered few legal challenges under section 2 after Mississippi's Constitutional Convention of 1890. In 1892, the disenfranchisement

[101] Perman, *Struggle for Mastery*, 118 ("Reduction in representation ran into . . . difficulty—it was hard to implement. In order to punish vote suppression, Congress had to be able to prove that voters had been prevented from voting.").

[102] S. 2709, 85th Cong., 1st Sess. § 3(a) (1957); see also Zuckerman, "Section 2 of the Fourteenth Amendment," 120-21.

[103] Zuckerman, "Section 2 of the Fourteenth Amendment," 120-21.

[104] The wording of the bill was problematic. Ibid., 122:

> [A] discrepancy can be found between the wording in the bill and the language of the fourteenth amendment. The bill called on the joint committee to determine whether any state had denied or abridged the "right of inhabitants of such state to vote in any election" prescribed in section 2 and to reduce representation accordingly. The fourteenth amendment limits the effect of disfranchisement to "the male inhabitants of such State, being twenty-one years of age, and citizens of the United States."

scheme was challenged under the Readmission Act of 1870 in *Sproule v. Fredericks*.[105] In *Sproule*, the Mississippi Supreme Court agreed that the changes made to suffrage violated the prohibitions of the Readmission Act, but that the violations did not invalidate the new constitution, because Congress had no power to regulate suffrage in the states.[106]

A specific provision, the poll tax, was challenged in *Ratliff v. Beale*.[107] In *Ratliff*, the Hinds County sheriff, William Thomas Ratliff, was prohibited by injunction from collecting the poll tax because the poll tax was just a device used to suppress African American voting.[108] The Mississippi Supreme Court refused to invalidate the poll tax, holding that it was permissible and consistent with the purpose of the Mississippi Constitutional Convention of 1890, even though that purpose was to "obstruct the exercise of the franchise by the negro race."[109] The United States Supreme Court in *Williams v. Mississippi*[110] reviewed provisions of the state constitution that set requirements for voter registration, including the poll tax and literary tests. The Court held there is no discrimination in the state's requirements for voters to pass a literacy test and pay poll taxes, as these provisions were applied to all voters.[111] In *Williams*, the court quoted *Ratliff*, stressing that the challenged provisions were "within the field of permissible action under the limitations imposed by the federal constitution."[112] Several years after *Williams*, the Supreme Court, in *Giles v. Harris*,[113] heard a challenge to Alabama's constitution which set forth requirements similar to those in Mississippi's constitution for voter qualifications and registration. In *Giles*, the Court found that the voting requirements applied to all citizens and refused to monitor the election process.[114]

No sustained attempt was made in Congress to carry out the reapportionment penalty and the only judicial attempt to reach the Supreme Court was rebuffed

[105] 69 So. 898 (Miss. 1892).

[106] Ibid.; cf. *Coyle v. Oklahoma*, 221 U.S. 559 (suggesting restriction on Oklahoma's capital is invalid based on the lack of congressional power, rather than the invalidity of conditions as such).

[107] 20 So. 865 (Miss. 1896). For a thorough discussion of Ratliff, see R. Volney Riser, *Defying Disfranchisement: Black Voting Rights Activism in the Jim Crow South, 1890-1908* (Baton Rouge: Louisiana State University Press, 2013), 55-60.

[108] Ibid., 866.

[109] Ibid., 868; cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding racial purpose counts as a racial classification); Contra *Washington v. Davis*, 426 U.S. 229 (1976) (adopting a rule *for the sake* of disparate impact counts as racial classification).

[110] 170 U. S. 213 (1898), *overruled* by Voting Rights Act (1965), 42 U. S. C. §§ 1973–1973 aa-6.

[111] Ibid., 216; cf. *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), aff'd, 336 U.S. 933 (1949); *Lane v. Wilson*, 307 U.S. 268 (1939); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); see also Voting Rights Act of 1965, 42 U.S.C. §§ 1973 (1982) (effectively overruling *Williams*).

[112] 170 U. S. 213 (1898); see also Stavis, "A Century of Struggle," 608. ("The [*Williams*] case is viewed by historians as effectively representing the Supreme Court's approval of the Mississippi disfranchisement plan as embodied in the 1890 constitution.").

[113] 189 U.S. 475 (1903).

[114] Ibid., 486-488.

when the Court denied certiorari in *Saunders v. Wilkins*.[115] In *Wilkins*, the plaintiff argued that Virginia was only entitled to four instead of nine representatives, to be elected at large, under the reapportionment penalty of section 2 of the Fourteenth Amendment.[116] The plaintiff further noted that the existing Congressional apportionment act and the redistricting act of Virginia failed to take into account the effect of a poll tax act, which allegedly disfranchised sixty percent of voters. [117]The Virginia secretary of state refused to certify Saunders as candidate for office of Congressman at large.[118] The Fourth Circuit Court of Appeals held that the reapportionment penalty of section 2 of the 14th amendment presented a political, not a justiciable, question, and hence complaint was properly dismissed.[119] Mississippi's disenfranchisement provisions remained in effect until their repeal during the decade following the Civil Rights legislation of the 1960s.[120]

Reconstruction began the process of allowing the eleven "seceding" states to regain representation in Congress and addressed the legal status of freedmen, especially their civil and voting rights. Mississippi's African American majority

[115] 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U. S. 870 (1946); see also *Dennis v. United States*, 171 F.2d 986, 992-93 (D. C. Cir. 1948) (holding only Congress can enforce the section 2 apportionment penalty); cf. *Sharrow v. Brown*, 447 F.2d 94, 98 n.9 (2d Cir. 1971) (noting, but not deciding, the argument that Congress had discretion to enforce section 2).

[116] 152 F.2d 235, 236 (4th Cir. 1945).

[117] Ibid.

[118] Ibid., 235.

[119] Ibid., 238.

[120] John W. Winkle III, The *Mississippi State Constitution* (New York: Oxford University Press, 2011), 147-49. The poll tax, Art. XII, § 243, and literacy requirements, Art. XII, §244, were repealed by the electorate in 1975: "In 1960 Mississippians approved an amendment [Art. XII, § 241A] stipulating that citizens demonstrate 'good moral character' as a precondition to register to vote. Five years later, the electorate repealed this subjective and selectively enforced impediment to voting."; The federal government ultimately abolished disenfranchisement laws. See *Harper v. Virginia State Bd. of Elections*, 383 U. S. 663 (1966) (abolishing poll taxes for state elections); Voting Rights Act of 1965, 42 U.S.C. §§ 1973 (1982) (abolishing lengthy residency requirements and prohibiting the use of any test to qualify voters); cf. *Shelby County v. Holder*, 570 U. S. 2 (2013) (holding the preclearance coverage formula in Section 4(b) of the Voting Rights Act unconstitutional); For a discussion of the tactics used to suppress the African American vote, see Michael Vinson Williams, "With Determination and Fortitude We Came to Vote: Black Organization and Resistance to Voter Suppression in Mississippi," *Journal of Mississippi History* 64 (Fall 2012): 195.

A number of articles have been written about enactment, implementation, apportionment, and extension by Congress of the Voting Rights Act. See, e.g., Armand Derfner, "Racial Discrimination and the Right to Vote," *Vanderbilt Law Review* 26 (April 1973): 523; Laughlin McDonald, "The Quiet Revolution in Minority Voting Rights," *Vanderbilt Law Review* 12 (May 1989): 1249; Neil McMillen, "Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960's," *The Journal of Southern History* 43 (August 1977): 351; Thomas Vocino, John H. Morris and D. Steve Gill, "The Population Apportionment Principle: Its Development and Application to State and Local Legislative Bodies," *Mississippi Law Journal* 47 (November 1976): 943; Frank R. Parker, "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," *Mississippi Law Journal* 44 (June 1973): 391; Frank R. Parker, "Protest, Politics, and Litigation: Political and Social Change in Mississippi, 1965-Present," *Mississippi Law Journal* 57 (December 1987): 677; Kathryn Healy Hester, "Mississippi and the Voting Rights Act: 1965-1982," *Mississippi Law Journal* 52 (December 1982): 803; Carroll Rhodes, "Enforcing the Voting Rights Act in Mississippi Through Litigation," *Mississippi Law Journal* 57(December 1987): 705.

population gained the right to vote under Congressional Reconstruction.[121] The right to vote was solidified with the passage, in 1868 and 1870, of the Fourteenth and Fifteenth Amendments that intended to end the restrictive "black codes" adopted by the former Confederate states in an attempt to govern the conduct of the newly freed slaves.[122] In an effort to see the amendments implemented, the federal government began a plan of reconstruction for the southern states.[123] However, the efforts to protect the rights of newly freed African Americans ultimately failed as white Southerners reestablished their hegemony, first by means of violence and discrimination, later by state constitutional and judicial means.[124] As a reaction to perceived abuses of federal power during reconstruction, the Democratic Party in the southern states began to look for ways to overthrow the Republican Party by means of organized threats of violence and disenfranchisement of the African American vote.[125] In 1875, the Mississippi Democratic Party and its sympathizers conducted a campaign to deny suffrage to the African American population that was characterized by fraud and violence.[126] The city of Vicksburg, in the August and November elections of 1874, set the precedent for the Mississippi Plan.[127] African Americans were denied suffrage under threat of violence from armed patrols.[128] In 1875 paramilitary organizations waged a campaign of intimidation and violence against white Republicans, many of whom were from the Northern states.[129] Intimidation of the African American population continued. The violence went unchecked, although Governor Adelbert Ames did request federal troops to curb violence and maintain order.[130] The Democrats won the 1876 election with a 30,000 majority,[131] a complete reversal of the 1874 city and presidential

[121] U. S. Const., Amend. XIV; U. S. Const., Amend. XV.

[122] Ibid.

[123] David G. Sansing, "Congressional Reconstruction," in Richard Aubrey McLemore, ed., *A History of Mississippi*, vol. I (Jackson: University & College Press of Mississippi, 1973), 571, 575.

[124] Foner, *Reconstruction*, esp. 604 ("What remains certain is that Reconstruction failed, and that for blacks its failure was a disaster whose magnitude cannot be obscured by the genuine accomplishments that did endure").

[125] McPherson, *Ordeal by Fire*, 593-95; Sansing, "Congressional Reconstruction," 575 ("[M]uch of the opposition to Radical Reconstruction is traceable to Mississippi's aversion for change in either the social or political organization of the state. . . .").

[126] *Mississippi in 1875: Report of the Select Committee to Inquire into the Mississippi Election of 1875, Senate Report No. 527*, 44th Cong., 1st Session, 2 vols. (Washington, D. C.: Committee Print, 1876), passim.

[127] Ibid., 1:LXXVI, 565, passim; Warren A. Ellem, "The Overthrow of Reconstruction in Mississippi," *The Journal of Mississippi History 54* (May 1992): 175, 176 ("The emergence of the color-line strategy in the elections of 1875 in Mississippi owed a lot to its successful implementation in the troubled city of Vicksburg during the [1874 elections] . . ."); Foner, *Reconstruction*, 558.

[128] *Mississippi in 1875*, passim.

[129] Ibid., esp. iii, passim; Foner, *Reconstruction*; 558-63; Stavis, "A Century of Struggle," 501; Ellem, "The Overthrow of Reconstruction in Mississippi," 175.

[130] Foner, Reconstruction; 558-63; Sansing, "Congressional Reconstruction," 587.

[131] McPherson, *Ordeal by Fire*, 595; John M. Murrin, *Liberty, Equality, Power: A History of the American People*, Concise 6th ed. (Belmont, CA: Thomson/Wadsworth, 2013), 1:402; see also Nash and Taggart, *Mississippi Politics*, 97 ("It was not until 1940 that more Mississippians voted in a presidential election than voted in 1876.").

elections when Republicans won with a 30,000 majority. This Democratic victory effectively signaled the end of Reconstruction as similar tactics spread to North and South Carolina and as other states began to follow Mississippi's disenfranchisement plan. The aim of the Mississippi Plan was to nullify the effect of the Reconstruction laws, to restore a white minority to power through the agency of the Democratic Party, and in so doing emphasize to the African American population once and for all that they were to be subservient to the white population.[132] The violations were never seriously challenged under either the Fourteenth or Fifteenth Amendments, and the reapportionment clause of section 2 was never considered a serious option for curbing the Mississippi Plan's widespread implementation of voter fraud, despite a congressional finding "that force, fraud, and intimidation were used generally and successfully in the political canvass of 1875."[133]

Following this period of extra-legal violence and intimidation, many whites began looking to legal means to achieve disenfranchisement. In 1890 the State of Mississippi moved its unofficial policy of obstruction of voting rights to effective denial of franchise. The constitutional convention of 1890 has been called the Second Mississippi Plan although, in effect, it was a continuation of the disenfranchising policies begun in 1875.[134] The new constitution replaced the 1869 Constitution adopted in Mississippi to gain its representation in Congress in 1870. [135]The 1869 Constitution had encouraged African Americans to register and vote in large numbers, and they won various political offices prior to 1875.[136] The success of the First Mississippi Plan had brought into power white Mississippians who were determined to control the African American vote to ensure continuation of white supremacy.[137] For the next fifteen years whites dominated all state elections.[138] There was, however, a widespread interest among many people in Mississippi to be free from using violence and coercive tactics at the ballot box;[139] the solution was the Constitutional Convention of 1890.[140]

The most influential individual, who led the Constitutional Convention of 1890 and successfully defended Mississippi's disenfranchisement policy, was Unit-

[132] Ellem, "The Overthrow of Reconstruction in Mississippi," 178.

[133] *Mississippi in 1875*, iii.

[134] See, e..g., C. Van Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press, 1951), 321; Stavis, "A Century of Struggle," 606. (The Mississippi Plan was so effective that it was copied by the other Southern states, and as Woodward characterizes it, was considered the "American Way."); Nash and Taggert, *Mississippi Politics*, 96 ("Known as the 'Mississippi Solution' or the 'Second Mississippi Plan,' its essential elements were copied by almost all of the southern states . . .").

[135] Ellem, "Overthrow of Reconstruction in Mississippi," 178.

[136] Ibid.

[137] Ibid., 178.

[138] J. P. Coleman, "The Origin of the Constitution of 1890," *Journal of Mississippi History* 19 (April 1957): 69, 81.

[139] Ibid.

[140] Ibid.

ed States Senator James Z. George.[141] George had maneuvered the Mississippi Plan of 1875, which successfully ended Reconstruction in Mississippi.[142] George was explicit in explaining the reasoning behind the new constitution's disenfranchisement laws. During a speech on October 21, 1889, he described the chief duty of the Convention as one to devise measures, consistent with the Constitution of the United States, to maintain a home government "under the control of the white people of the State."[143] The process of legal disenfranchisement was justified by newspapers and politicians as necessary to maintain law and order, and to end extra-legal schemes and contrivances used to nullify the African American vote.[144] These extra-legal schemes had led to corruption in politics. A Mississippi Judge, J. J. Chrisman, spoke on the floor of the Constitutional Convention of 1890, "it is no secret there has not been a full vote and a fair count in Mississippi since 1875." [145] Although followed by others, Mississippi was the first state to officially disenfranchise the majority of its African American voters.[146] The new constitution further limited suffrage for a portion of the white population by imposing a poll tax, effectively disenfranchising many poor whites in addition to the African American

[141] For a thorough examination of George's life and his role in shaping the disenfranchisements policies used by the southern states after Reconstruction, see Timothy B. Smith, *James Z. George Mississippi's Great Commoner* (Jackson: University Press of Mississippi, 2012), 102-113, 146-154; see also May Spencer Ringold, "Senator James Zachariah George of Mississippi: Bourbon or Liberal?" *The Journal of Mississippi History* 16 (July 1954): 164-83; Lucy Bryant Peck, "The Life and Times of James Z. George" (M.A. thesis, Mississippi State University, 1964), 48; and Margaret Armstrong, "James Zachariah George: Champion of White Supremacy" (M.A. thesis, University of Alabama, 1938), 20, 29-32, 38. Both theses present a mostly sympathetic account of George's support of the Mississippi Plan of 1875 and the 1890 Constitution with its disenfranchisement scheme.

[142] Smith, *James Z. George,* 103-113.

[143] Perman, "Struggle for Mastery," 42-43; Coleman, "The Origin of the Constitution of 1890," 85.

[144] Woodward, *Origins of the New South*, 326-27.

[145] United States Commission on Civil Rights, 89th Cong., *Voting in Mississippi* (Washington, D. C.: Committee Print, 1965), 5 (citing Jackson *Clarion Ledger*, September 11, 1890, 1). The quote reads:

> Sir, it is no secret there has not been a full vote and a fair count in Mississippi since 1875 - that we have been preserving the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down.

[146] Ibid.; Nash and Taggart, *Mississippi Politics*, 96.

vote.[147] Another provision that, although it primarily affected African Americans, also excluded many whites was the understanding clause.[148] Senator George was responsible for the understanding clause and successfully defended it along with the other disenfranchisement provisions on the floor of the United States Senate, citing similar practices by other states[149] The remaining southern states soon

[147] Miss. Const., Article XII, § 243 (repealed 1975) predecessor provision required:

> [1890] A uniform poll tax of two dollars, to be used in aid of the common schools, and for no other purpose, is hereby imposed on every male inhabitant of this State between the ages of twenty-one and sixty years, except persons who are deaf and dumb or blind, or who are maimed by loss of hand or foot; said tax to be a lien only upon taxable property. The board of supervisors of any county may, for the purpose of aiding the common schools in that county, increase the poll tax in said county, but in no case shall the entire poll tax exceed in any one year three dollars on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax.

See also William J. Cooper and Thomas E. Terrill, *The American South: A History*, 4th ed. (New York: Rowman & Littlefield, 2009), 2:549 (noting that "[t]he tax clauses, especially the poll tax, effectively disenfranchised many whites and most blacks in a state where the average income produced by a farm was about $400 a year"); Frank B. Williams, "The Poll Tax as a Suffrage Requirement in the South, 1870-1901," *The Journal of Southern History* 18 (Nov. 1952): 469, 471 ("The paramount reason usually accepted for the use of the poll tax was the desire to eliminate negro voters from politics. To this may be added the alleged intention of disenfranchising poor whites."); Kousser, *The Shaping of Southern Politics*, 255 (noting that many Southern politicians rejected "the idea of universal male suffrage either explicitly or implicitly, by denying that all whites should be allowed to vote.").

[148] Miss. Const. art. XII, § 244 (repealed 1975) predecessor provisions required:

> [1890] . . . [E]very elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D., 1892.
>
> [1954] Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.
>
> [1965] Every elector shall, in addition to the foregoing qualifications, be able to read and write. These reduced qualifications shall be required of every applicant for registration as an elector from and after the date of ratification hereof. The legislature shall have the power to enforce the provision of this section by appropriate legislation.

See also Cooper and Terrill, *The American South*, 549 (stating that "[s]ome Mississippi leaders feared that the requirement to interpret the state constitution would disenfranchise poor whites. Drafters of the new constitution attempted to assuage these by asserting that there was general understanding that registrars would pass illiterate whites and fail blacks").

[149] See Smith, *James Z. George*, 104; Perman, *Struggle for Mastery*, 22-23, 42-43, 73-77, 85-88; and James Z. George, *Defense of the Constitution of Mississippi: A Speech* (Washington, D. C., 1897), passim.

followed Mississippi with similar disenfranchisement plans.[150] Throughout the early and mid-twentieth century, many Southern leaders, including James K. Vardaman, Walter Sillers, Jr., John E. Rankin, Theodore G. Bilbo, James O. Eastland, and Ross Barnett of Mississippi, continued to advocate disenfranchisement and the Jim Crow segregation laws and policies supported by George and the Democratic party and set in place by the 1890 Mississippi constitution and subsequent legislation.[151]

The disenfranchisement measures of the 1890 Mississippi Constitutional Convention and similar policies implemented by other states were challenged in lawsuits under section 2 in *Sproule v. Fredericks, Ratliff v. Beale, Williams v. Mississippi, Giles v. Harris* (Alabama), and Saunders v. Wilkins (Virginia). These challenges failed and the disenfranchisement policies put in place by Mississippi in 1875 and 1890 and followed by other southern states continued until the Civil Rights movement of the 1950s and 1960s.

V. The Section 2 Reapportionment Penalty

Congress was unable to pass implementing legislation to enforce section 2 and the federal judiciary deferred deciding the question of enforcement. Indifference towards Jim Crow laws, disagreements in Congress over the means of implementing section 2, inaccurate census returns, and the difficulties in determining and proving the numbers of disenfranchised individuals are the reasons why section 2 was never enforced. Yet another explanation for lack of enforcement is that section 2 was impliedly repealed by the passage of the Fifteenth Amendment. However, there is no indication in the legislative history that Congress intended to repeal Section 2; nor has the Fifteenth Amendment been viewed by the judiciary as invalidating section 2. A comparison of the scope of section 2 with the Fifteenth Amendment

[150] Winkle, *The Mississippi State Constitution*, 14 (stating that "[t]he Mississippi scheme, in fact, became a prototype of sorts for lawmakers in other states to follow); see also Cooper & Terrill, *The American South*, 549 (noting that "[t]he Mississippi Plan was an important precursor to a South wide movement to eliminate blacks and, in some instances, large numbers of poor whites from the political process"). Other constitutional provisions indirectly disenfranchised voters by introducing a county unit system (Art. V, § 140) allotting each county one electoral vote regardless of population, and reapportionment of the legislature (Art. XIII, §§ 254 and 255) which, in effect, reduced membership in predominately black districts.

For an examination of the reapportionment provisions and their effect, see Albert D. Kirwan, "Apportionment in the Mississippi Constitution of 1890," *The Journal of Southern History* 14 (May 1948): 234; Eric C. Clark, "Legislative Apportionment in the 1890 Constitutional Convention," *The Journal of Mississippi History* 42 (Nov. 1980): 298; and Jere Nash and Andy Taggart, "Fifty Years of Legislative Reapportionment in Mississippi," *The Journal of Mississippi History* 72 (Summer 2010): 199.

[151] See Albert D. Kirwan, *Revolt of the Rednecks* (Louisville: University of Kentucky Press, 1951), 310-14; and Dennis J. Mitchell, *A New History of Mississippi* (Jackson: University Press of Mississippi, 2014), passim, esp. 257-59, 262-68, 354-56, 375, 384-87, 431-32. A notable exception to the race-based politics of Mississippi's leadership was Congressman Frank E. Smith, see Dennis J. Mitchell, *Mississippi Liberal: A Biography of Frank E. Smith* (Jackson: University Press of Mississippi, 2001).

shows that section 2 offers a broader solution applicable to a greater number of disenfranchised individuals while leaving some discretion to the southern states. The events leading to the adoption of the Fourteenth and Fifteenth Amendments and their subsequent history suggest that federal indifference toward disenfranchisement was the reason for the lack of enforcement of section 2.[152]

The view, noted above, that section 2 was impliedly repealed upon enactment of the Fifteenth amendment in 1870 is sometimes given to explain the lack of enforcement of section 2's reapportionment penalty.[153] After the Civil War the southern states routinely refused to enfranchise African Americans. Congress attempted to remedy the situation through passage of the Fourteenth Amendment and voting rights laws. Congress also required the former Confederate states to adopt constitutions allowing African Americans to vote as a condition of ending military occupation.[154] The Fifteenth Amendment was proposed by Congress to constitutionalize the enfranchisement already achieved through military occupation, federal statutes, and state constitutional law.[155] The argument that section 2 was repealed by implication suggests that Congress proposed the Fifteenth Amendment because enforcement of section 2 had failed.[156] In this view, the Fifteenth Amendment replaced section 2 by adopting a permanent policy of suffrage, regardless of race. Thus, section 2 did not offer coverage broader than other laws in force and could not have been implemented to protect African American voters in the South.[157] Section 2 essentially encouraged states to let African Americans vote by punishing states who refused to do so, but ultimately it left the decision to the discretion of the states.[158] Subsequently, the Fifteenth amendment took away the states discretion, imposing a requirement that the states grant the right to vote

[152] See below, note 172.

[153] Gabriel J. Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment," *Georgetown Law Journal* 92 (2004): 263. The implicit suggestion that section 2 was repealed by the enactment of the Fifteenth Amendment was made as early as 1895. See George S. Boutwell, *The Constitution of the United States at the End of the First Century* (Boston: D.C. Heath, 1895), 389 ("By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly…"). The argument that the Fifteenth Amendment repealed section 2 was advanced by Emmet O'Neal, United States Attorney for the Northern District of Alabama, in his attack against the 1904 Republican platform which had advocated the enforcement of section 2. See Emmet O'Neal, "The Power of Congress to Reduce Representation in the House of Representatives and in the Electoral College," *North American Review* 131 (October 1905): 530.

Other sources suggest that the Fifteenth Amendment modified section 2 rather than replaced it. See James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield*, (Norwich, Conn.: Henry Bill Pub. Co. 1886), 2:418 (stating that the "adoption of the Fifteenth Amendment seriously modified the effect and potency of the second section of the Fourteenth Amendment"); John Sherman, *Recollections of Forty Years in the House, Senate and Cabinet*, (Chicago: Werner, 1895), 1:450 (stating that the "practical result has been that the wise provisions of the 14th Amendment have been modified by the 15th Amendment").

[154] Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote," 261.

[155] Ibid.

[156] Ibid., 260-61.

[157] Ibid.

[158] U. S. Const., Amend. XIV, § 2; see also above, notes 5, 153 and accompanying text.

to African Americans.[159] The Fifteenth amendment restricted state power to the extent that its practical effect was to repeal section 2 of the Fourteenth Amendment.[160]

However, the legislative and legal history of section 2 suggests that Congress did not intend to repeal section 2 upon the passage of the Fifteenth Amendment. Because section 2 did not offer coverage broader than other laws in force, the view that section 2 is like the Fifteenth Amendment, except that it covers fewer people, fewer elections, and offers more limited remedies,[161] is incongruous because of the mismatch between section 2, which allows the reapportionment penalty for all disenfranchised males above twenty-one years of age regardless of race[162] and the Fifteenth Amendment which forbids disenfranchisement based solely on account of "race, color, or previous servitude."[163] Section 2 is broader than the Fifteenth Amendment in the sort of discrimination it applies to, such as literacy tests, property requirements, poll taxes, as well as purposeful racial discrimination. But section 2 is narrower in the penalty imposed for discrimination, which was reducing Congressional apportionment, but not banning discrimination completely. It is this mismatch that suggests that the Fifteenth Amendment did not repeal section 2. Section 2 allowed a broader solution applicable to a greater number of disenfranchised individuals, while leaving a certain amount of discretion to the southern states.

Instead of replacing section 2, the legislative history shows that Congress kept the section 2 apportionment penalty option on the table along with the Fifteenth Amendment remedy.[164] As stated previously, the implementation of the section 2 apportionment penalty was discussed during the House Census Committee meetings and in the Congressional debate over the Apportionment Acts of 1901, 1904 and 1906, and the Civil Rights Act of 1957.[165] After the passage of the Fifteenth amendment, the House Census Committee compiled a list of state laws, which effectively disenfranchised the voting population.[166] The list was intended to guide the census takers in the determination of the basis of representation under section

[159] Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote," 263.

[160] Ibid.

[161] Ibid.

[162] U. S. Const., Amend. XIV, § 2. ("[W]hen the right to vote at any election . . . is denied to *any of the male inhabitants* of such State, being twenty-one years of age, and citizens of the United States . . . the basis of representation . . . shall be reduced.") (emphasis added).

[163] U. S. Const., Amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State *on account of race, color, or previous condition of servitude*") (emphasis added).

[164] See Melvin I. Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States*, 3d ed. (New York: Oxford University Press, 2011), 1:501 ("[A]lthough Congress still retained the power to reduce a state's representation proportionate to its disenfranchisement of any group, Congress never had the will to do this during or after Reconstruction").

[165] Zuckerman, "Section 2 of the Fourteenth Amendment," 119-21.

[166] H. R. Rep. No. 3, 41st Cong., 2d Sess. 52 (1870) (report of Rep. James A. Garfield of Ohio); reprinted in Zuckerman, "Section 2 of the Fourteenth Amendment," 108-09.

2.[167] The Census Committee list included laws which in addition to race and color, denied the vote on account of residence, property tests, literacy qualifications, character tests, poverty, and insanity.[168] Also, Congress passed section 6 of the Apportionment Act of 1872 specifically authorizing a reduction in the number of representatives when a state denied the right of citizens to vote except for participation in rebellion or other crime.[169] Therefore, section 6 is a statutory enactment, based on section 2 of the Fourteenth Amendment, enacted after the passage of the Fifteenth Amendment.[170] It should also be noted that, when the section 2 enforcement was litigated, the United States Supreme Court did not find or suggest that section 2 was not enforceable or was impliedly repealed by the Fifteenth Amendment but, instead, deferred to Congress.[171]

The traditional explanation for the lack of section 2 enforcement is federal indifference toward Jim Crow policies in Mississippi and other southern states after the failure of Reconstruction and a corresponding lack of will to enforce section 2.[172] Section 2 was drafted to remedy the effects of discrimination after the Civil War. Thus, section 2 was clearly designed with the southern states in mind and was meant to be enforceable. Congressional attempts at implementing legislation were never effective, and much of the proposed enforcement legislation was mired in controversy.[173] Inaccurate returns on the 1870 apportionment census further

[167] Zuckerman, "Section 2 of the Fourteenth Amendment," 108.

[168] H. R. Rep. No. 3, 41st Cong., 2d Sess. 52-53 (1870).

[169] Act of Feb. 2, 1872, ch. XI, § 6, 17 Stat. 29 (codified as 2 U.S.C. § 6 (1988)).

[170] Zuckerman, "Section 2 of the Fourteenth Amendment," 126.

[171] 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946) (holding that enforcement of section 2 is non-justiciable).

[172] A number of scholars have voiced this explanation, see, e.g., Akhil Reed Amar, "Forward: The Document and the Doctrine," *Harvard Law Review* 114 (2000): 38 n.38 ("[F]or many decades the Court utterly failed to enforce blacks' voting rights under the Article IV Republican Government Clause, Section 2 of the Fourteenth Amendment, and the Fifteenth Amendment."); Michael Kent Curtis, "Teaching Free Speech from an Incomplete Fossil Record," *Akron Law Review* 34 (2000): 256 ("In spite of the guarantees of the Fifteenth Amendment (and even ignoring section two of the Fourteenth Amendment), African Americans were deprived of the right to vote in large parts of the South."); Pamela S. Karlan, "Unduly Partial: The Supreme Court and the Fourteenth Amendment in *Bush v. Gore," Florida State University Law Review* 29 (2001): 591 n.26 ("Despite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger"); Michael Klarman, "The Plessy Era," *Supreme Court Review* (1998): 370 ("Congress was unwilling to enforce Section 2 of the Fourteenth Amendment against black disenfranchisement"); Anderson, *The American Census*, 80.

In the early 1960s, prior to the passage of the Voting Rights Act, several scholarly articles urged enforcement of the section 2 penalty. See Eugene Sidney Bayer, "The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes," *Case Western Reserve Law Review* 16 (1965): 965; Arthur Earl Bonfield, "The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment," *Cornell Law Quarterly* 46 (1960): 108; Ben Margolis, "Judicial Enforcement of Section 2 of the Fourteenth Amendment," *Law Transition* 23 (1963): 128; Zuckerman, "Section 2 of the Fourteenth Amendment," 93; see also a recent revival of these arguments in Michael Hurta, "Counting the Right to Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment," *Texas Law Review* 94 (forthcoming 2015), *available* at http://ssrn.com/abstract=2652345.

[173] Zuckerman, "Section 2 of the Fourteenth Amendment," 94-95.

doomed enforcement of the section 2 penalty.[174]

When the federal judiciary addressed section 2, enforcement was held by the United States Supreme Court in *Wilkins* to be a non-justiciable political question, thus deferring the issue to Congress.[175] In *Wilkins*, the court did not hold section 2 invalid; it only recognized that the legislature had not created implementing legislation for its enforcement.[176] Both Congress and the courts were aware of the continuing disenfranchisement policies in force throughout the South beginning with the Mississippi Plan in 1875.[177] The judiciary's tolerance of disenfranchisement laws and discriminatory policies during the post-Reconstruction period is evidenced by the United States Supreme Court decisions in overturning the Civil Rights Act of 1875,[178] *Plessy v. Ferguson*,[179] *Williams v. Mississippi*,[180] and other cases.[181]

Most recently, Section 2 was reviewed by the United States Supreme Court during 1974, in the context of voting rights for convicted felons, in *Richardson v. Ramirez*.[182] In *Ramirez*, the Court held that section 2 allowed states to disenfranchise felons. The Court reasoned that section 2 provided that the apportionment penalty was inapplicable if individuals were disenfranchised for conviction of "rebellion [. . .] or other crime". [183] Such restrictions are allowed as long as they do not violate the Equal Protection Clause of the Fourteenth Amendment.[184] Also, the courts used section 2 to restrict the scope of the Voting Rights Act of 1965, defeating arguments that, apparently applicable provisions of the statute, apply to state laws disenfranchising felons.[185] An odd result of section 2's language allowing dis-

[174] Ibid., 111, 116; Anderson, *The American Census*, 79-83.

[175] 152 F.2d 235, 237 (4th Cir. 1945), *cert. denied*, 328 U. S. 870 (1946).

[176] 152 F.2d 235, 237 (4th Cir. 1945).

[177] *Mississippi in 1875*, iii, passim; Stavis, "A Century of Struggle," 606; Woodward, *Origins of the New South*, 321.

[178] 109 U. S. 3 (1883) (overruling The Civil Rights Act of 1875, 18 Stat. 335-337) (holding that Congress lacks constitutional authority under the enforcement provisions of the Fourteenth Amendment to outlaw racial discrimination by privately owned businesses, rather than state and local governments).

[179] 163 U. S. 537 (1896) (holding that state laws requiring racial segregation in public facilities are constitutional under the doctrine of "separate but equal"), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

[180] 170 U. S. 213 (1898) (holding state law requiring voters pass literary tests and poll taxes is constitutional) , *overruled* by Voting Rights Act (1965), 42 U.S.C. §§ 1973–1973aa-6.

[181] See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903) (upholding Alabama state poll taxes and other voter registration requirements as applicable to all citizens); *Giles v. Teasley*, 193 U. S. 146 (1904) (upholding Alabama's disenfranchising voter registration requirements); cf. *Guinn v. United States*, 238 U. S. 347 (1915) (holding a Oklahoma statute drafted to favor white voters while disenfranchising African Americans unconstitutional); *Lane v. Wilson*, 307 U. S. 268 (1939) (holding a Oklahoma voter registration law that disfranchised everyone qualified to vote who had not registered to vote in a 12-day window unconstitutional); *Smith v. Allwright*, 321 U. S. 649 (1944) (holding that primary elections must be open to voters of all races).

[182] 418 U. S. 24 (1974).

[183] Ibid.

[184] *Hunter v. Underwood*, 471 U. S. 222, 229 (1985) (holding unconstitutional Alabama's disenfranchisement law because it "was enacted with the intent of disenfranchising blacks").

[185] 418 U. S. 24 (1974), at 54-55.

enfranchisement of convicted criminals is that an amendment designed to remedy the disenfranchisement of the African American population has been held to permit disenfranchisement for those convicted of a crime, most often a felony, resulting in a denial of voting rights for African Americans and other minority groups at a rate disproportionate to their percentage share of the population.[186] Mississippi, and a number of other states, arrest African Americans at higher rates and permanently bar at least some felons from voting.[187]

The inability of Congress to pass implementing legislation and the federal judiciary's tolerance of disenfranchisement laws and discriminatory policies prevented enforcement of the section 2 reapportionment penalty. The Fifteenth Amendment did not invalidate section 2 but offered an additional remedy to race-based discriminatory laws and policies. In 1974 the Supreme Court held that section 2 allowed states to disenfranchise felons. Thus, one ironic result of section 2 is that African Americans are denied the right to vote at a disproportionate rate.

VI. Conclusion

A sustained effort to enforce the Fourteenth and Fifteenth Amendments did not occur until the civil rights legislation of the 1950s and 1960s because of federal indifference toward disenfranchising laws and policies and a corresponding lack

[186] Many scholars are critical of felon disenfranchisement statutes that disproportionately affect racial minorities and the Court's reading of section 2 as an endorsement of such felon disenfranchisement statutes. See, e.g., Pippa Holloway, *Living in Infamy: Felon Disfranchisement and the History of American Citizenship* (New York: Oxford University Press, 2014); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010); Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006); Katherine Irene Pettus, *Felony Disenfranchisement in America: Historical Origins, Institutional Racism, and Modern Consequences*, 2d ed. (Albany : State University of New York Press, 2013); Elizabeth Hull, The Disenfranchisement of Ex-Felons (Philadelphia: Temple University Press, 2006); Richard W. Bourne, "*Richardson v. Ramirez:* A Motion to Reconsider," *Valparaiso University Law Review* 42 (2007): 30-32; George Brooks, "Felon Disenfranchisement: Law, History, Policy, and Politics," Fordham Urban Law Journal 32 (2004): 859; Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote," 61-62; Gabriel J. Chin, "Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction," *Journal of Gender, Race, & Justice* 6 (2002): 253; Andrew L. Shapiro, "Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy," *Yale Law Journal* 103 (1993): 537; Pamela S. Karlan, "Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement," *Stanford Law Review* 56 (2004): 1147; Christopher R. Murray, "Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965," *Alaska Law Review* 23 (2006): 289; Michael A. Wahlander, "Comment, Constitutional Coexistence: Preserving Felon Disenfranchisement Litigation under Section Two of the Voting Rights Act," *Santa Clara Law Review* 48 (2008): 181.

[187] Therese Apel, "Race, Arrest Rates Examined: In Mississippi and across nation, more of those arrested are black," Jackson *Clarion Ledger*, November 20, 2014, pp. 1A, 4A; Reynolds Holding, "Why Can't Felons Vote?," *Time Magazine*, November 1, 2006, http://content.time.com/time/nation/article/0,8599,1553510,00.html (accessed November 21, 2014).

of will to enforce the congressional remedies.[188] Many courts and state legislatures in Mississippi and in other states throughout the South did not believe it was in their best interest or in their constituency's best interest to protect the voting rights of African Americans. The lack of interest in protecting the voting rights of all citizens is a reflection of the sociocultural attitude toward African Americans among a majority of the white population during that time period who generally approved of disenfranchisement.[189] Although there were individuals in Congress and elsewhere concerned over the southern states' blatant violation of African American voting rights, they never held enough influence to carry out implementation of the section 2 apportionment penalty.[190] The inability of Congress to find a means of accurately determining the number and percentage of the population being disenfranchised led to congressional gridlock. The difficulty in determining and proving the number of disenfranchised citizens is apparent in the debate over proposed enforcement and reapportionment calculations examined in decennial census returns.[191] The 1870 Census results and the subsequent congressional debate show that it is difficult to tell exactly how much of a reduction in representation to make.[192] The inability of Congress to agree upon and to find a solution for determining an accurate report of disenfranchised individuals is why section 2 of the Fourteenth Amendment was never implemented during the period prior to what is now known as the modern-day civil rights movement that received legal recognition with *Brown v. Board of Education* and led to the eventual enfranchisement of the African American voting population through the Voting Rights Act[193] and subsequent civil rights legislation.[194]

Today, section 2 is usually discussed in the context of the constitutionality of felon disenfranchisement laws and the current racial inequalities in the criminal justice system. The history and intent behind creation of section 2 is often

[188] The landmark United States Supreme Court case, *Brown v. Board of Education*, 347 U.S. 483 (1954) (abolishing state laws establishing separate public schools for black and white students), signaled a change in attitude toward disenfranchisement. The *Brown* decision paved the way for The Civil Rights Act of 1957, Pub.L. 85–315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1971 (1982)) (establishing the Civil Rights Commission), The Civil Rights Act of 1960, Pub.L. 86–449, 74 Stat. 89 (codified as amended at 42 U.S.C. § 1971 (1982)) (establishing federal inspection of local voter registration polls), Civil Rights Act of 1964, Pub.L. 88–352, 78 Stat. 241 (codified at 42 U.S.C. § 2000d-h (1982)) (abolishing discrimination based on race, color, religion, sex, and national origin by federal and state governments), Civil Rights Act of 1968, Pub.L. 90–284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619 (1982 & Supp. IV 1986)) (abolishing discrimination in sale, rental, and financing of housing based on race, creed, and national origin).

[189] See above, Part IV.

[190] See above, Part III; and Zuckerman, "Section 2 of the Fourteenth Amendment," 107-16 (see discussions regarding manner of section 2 enforcement and failure of the census committees to implement enforcement through decennial census returns).

[191] See above, Part III; and Zuckerman, "Section 2 of the Fourteenth Amendment," 117 (noting that Congress also faced the difficulty of distinguishing between persons afraid to vote because of private violence from persons disenfranchised by other means such as literacy tests).

[192] See above, Part III, esp. notes 77-86 and accompanying text.

[193] See above, note 120 and accompanying text.

194 See above, note 188 and accompanying text; and Anderson, *The American Census*, 85, 214-15.

overlooked. Section 2 was designed to remedy the ongoing disenfranchisement of all persons legally allowed to vote, with the southern states newly freed African American population specifically in mind. For a number of political and practical reasons, section 2 failed to deliver on its promises and was followed by Jim Crow and eventually the modern civil rights movement in the 1950s and 1960s. The history of section 2 is also significant to the history of Mississippi, the state whose leadership was responsible for some of the most serious violations of section 2 of the Fourteenth Amendment and the state whose disenfranchisement laws strongly influenced Southern policy making. The failure of the enforcement of section 2 helped ensure the success of the disenfranchisement policies and laws put in place in Mississippi in 1875 and 1890. Such systemic failures prolonged the judicial, legislative, individual, and organizational attacks that culminated in the civil rights movement that would make the Voting Rights Act possible in 1965.