

## Notes

# Counting the Right to Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment\*

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### Introduction

When the Congressional Research Service authored its centennial edition of constitutional analysis and interpretation, it called Section Two of the Fourteenth Amendment a “historical curiosity.”<sup>1</sup> What makes Section Two most curious, however, is not its historical insignificance but its overlooked contemporary value. Properly understood, Section Two remains an important tool to enhance voting rights in the United States. When read in light of current federal law, Section Two may make the ministerial Census Bureau one of the most powerful guardians of voting rights within the federal government.

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1. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 2191 (2d Sess. 2013).

Section Two sets forth a standard for congressional apportionment and penalizes states that disenfranchise certain citizens. States that deny or abridge the right to vote of enough citizens should lose apportioned congressional seats:

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.<sup>2</sup>

Put simply, states that deny or abridge the right to vote of any voting-age citizens—for any reason other than the citizens' rebellion or crimes—shall have their bases for apportionment reduced according to the percentage of such citizens whose right to vote has not been burdened.<sup>3</sup>

But the penalty has never been imposed. The rare attempts to carry out the new apportionment standards were rebuffed;<sup>4</sup> Congress and the courts continuously fail to act.<sup>5</sup> Yet the penalty would have serious consequences if enforced. A state would not only lose representation in Congress but would

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2. U.S. CONST. amend. XIV, § 2.

3. It is important to realize that the Nineteenth Amendment and Twenty-Sixth Amendment affect the terms of Section Two. As the Supreme Court has noted, the Nineteenth Amendment (which made it illegal to disenfranchise voters on the basis of sex) “applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state.” *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (emphasis added). This principle ought to be applied to any Constitutional provisions that existed at the time of the Nineteenth Amendment, such as Section Two. Thus, the penalty should exist when the right to vote is denied or abridged for any citizen, not just males. See George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 *FORDHAM L. REV.* 93, 122 (1961) (making the same point). That same logic extends to the Twenty-Sixth Amendment, amending Section Two’s “twenty-one years of age” phrase to “eighteen years of age.” U.S. CONST. amend. XXVI; U.S. CONST. amend. XIV, § 2.

4. CONG. RESEARCH SERV., *supra* note 1, at 2191.

5. For a general discussion of Congressional attempts of Section Two enforcement, see MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 81–82, 151–52 (1988); and Zuckerman, *supra* note 3, at 107–24. And for a discussion about how “courts have tended to shy away from any attempt to invoke Section 2,” see Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 *HASTINGS L.J.* 1121, 1185–90 (1994).

lose electoral votes for President.<sup>6</sup> With a punishment so severe, Section Two should be the opposite of a curiosity.

Voting rights activists typically rely on other constitutional and statutory provisions to protect the right to vote, but observers recently began worrying about a conservative Supreme Court's impact on this strategy.<sup>7</sup> And in *Shelby County v. Holder*,<sup>8</sup> the Court rendered inoperative a major mechanism of the Voting Rights Act,<sup>9</sup> causing scholars to explore other potential protections to the right to vote.<sup>10</sup> The practical impact was clear: jurisdictions began restricting access to the ballot in ways that the Voting Rights Act previously prevented<sup>11</sup> and the legal space to improve voting rights became much more limited than it once was.<sup>12</sup> In light of recent events, this Note reiterates the crucial role that Section Two can properly play in protecting voting rights.

This Note is hardly the first to argue for Section Two's enforcement, but academic arguments for its broad implementation were largely constrained to the Civil Rights Era of the 1960s.<sup>13</sup> This Note builds on the work of

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6. The number of presidential electors each state receives is equal to the states' number of congresspersons. U.S. CONST. art. II; *see also* Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 120 (1960) (discussing the electoral vote consequences).

7. *See, e.g.*, Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C.L. REV. 669, 672 (2006) (predicting that the Roberts Court "could see deregulation of campaign financing and a limitation of congressional power to impose national solutions to minority voting rights problems").

8. 133 S. Ct. 2612 (2013).

9. *Id.* at 2630–31 (striking down § 4(b) of the Voting Rights Act, which triggered a requirement of preclearance when certain states sought to implement new voting restrictions).

10. *See, e.g.*, Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 95–100 (2013) (proposing a new theory of voting rights protection).

11. *See* Tomas Lopez, 'Shelby County': One Year Later, BRENNAN CTR. FOR JUST. (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later> [<http://perma.cc/V7AU-CUZT>] (highlighting the efforts to restrict voting rights in the year immediately after *Shelby County*).

12. *See id.* (arguing that after *Shelby County* and its striking of the preclearance requirement, challenging discriminatory laws is less feasible and assessing changes in voting rights will prove much more difficult).

13. For the arguments for general Section Two enforcement, which were made primarily during the 1960s' Civil Rights Movement, *see generally* Bonfield, *supra* note 6; Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 LAW TRANSITION 128 (1963); Zuckerman, *supra* note 3; and Eugene Sidney Bayer, Note, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 W. RES. L. REV. 965 (1965). Most recent academic analysis relates not to the penalty for disenfranchisement itself but to the section's tacit authorization of the disenfranchisement of convicted criminals. *See, e.g.*, Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 259–64 (2004) (arguing that Section Two should be viewed as repealed and thus cannot justify felon disenfranchisement); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1153–54 (2004) (discussing felon disenfranchisement and Section Two). A few modern authors, however, have examined the penalty more directly. *See generally* Killenbeck & Sheppard, *supra* note 5, at 1208–14 (arguing that term limits could be seen as a Section Two abridgment for which to invoke

predecessors—particularly George Zuckerman, who examined Section Two’s history and concluded that the Census Bureau was best positioned to enforce it and discourage the denial of voting rights.<sup>14</sup> Zuckerman’s conclusions are still persuasive, but this Note necessarily reexamines the value of Section Two in light of a modern elections landscape that lacks literacy tests, direct poll taxes, or similarly high voting burdens.<sup>15</sup> Further, the Secretary of Commerce (through the Census Bureau) and the President actually have the authority and duty to enforce Section Two, so Zuckerman’s policy proposals can be initiated today.<sup>16</sup> The census is often seen as integral to protecting voting rights in redistricting,<sup>17</sup> but current law makes the census just as consequential in protecting access to the ballot. Once the federal government apportions congressional representation as the Constitution actually directs, it will deter states from disenfranchising voters in a way not previously accomplished.

This Note proceeds as follows. First, it reviews Section Two’s history to ascertain its meaning. Although the legislative history about Section Two is scant, some general conclusions can be drawn about the meaning of the clause. According to the Section, states’ basis of apportionment should be reduced by a proportion of voting-age citizens whose right to vote is denied or abridged for any reason other than that of a rebellion or crime, compared to the state’s total voting-age citizen population.

Part II embarks on a detailed analysis of Section Two’s meaning in the context of other legal voting protections. It compares and contrasts Section Two enforcement with current laws and other proposals to further protect voting rights, concluding that Section Two’s enforcement would protect voting rights in a way that is both more limited and expansive than current models.

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the penalty); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. (forthcoming 2015) (arguing that Section Two’s penalty, due to its severity, limits the constitutional meaning of the right to vote); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014) [hereinafter Tolson, *Constitutional Structure*] (arguing that Section Two should affect interpretations on the limits of Congressional authority to enforce voting rights by creating a “baseline for voting rights remedies”); Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. (forthcoming 2015) (arguing that the baseline of Section Two justifies Section Two of the Voting Rights Act as constitutionally valid); Katherine Shaw, Comment, *Invoking the Penalty: How Florida’s Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What To Do About It*, 100 NW. U. L. REV. 1439 (2006) (arguing for the penalty to be imposed on Florida, specifically, based on felon disenfranchisement that was too broad).

14. Zuckerman, *supra* note 3, at 131.

15. *See id.* at 128–29 (discussing vote denials and abridgments in the 1960s).

16. *Compare id.* at 131–35 (suggesting that the Census Bureau help enforce Section Two), with *infra* Part III (arguing that the Census Bureau already has that authority).

17. *See, e.g.*, Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 755 (2011) (“[R]ecent developments in voting rights law . . . have raised the legal stakes for this census.”).

Finally, Part III illustrates the Secretary of Commerce's authority and obligation to enforce Section Two. And if the Secretary fails to act as required by law, it should be forced by lawsuit before the 2020 Census.

### I. Congress and Section Two's Meaning

Section Two's apportionment mechanism would look much simpler if it merely stated that states' apportionment for the United States House of Representatives would be lowered based on the proportion of people whose right to vote is abridged or denied. That is what the Section, if enforced, would do. But that is not what it says. Instead, almost a full paragraph of text lays out that basic idea, with minor tweaks. And without any direct interpretive guidance from the Supreme Court,<sup>18</sup> any discussion about Section Two's implementation must begin by examining the legislative history of this paragraph's enactment and Congress's contemporary understanding of the clause.

#### A. *A Law for Congressional Apportionment*

Penalties are often viewed as individual punishments against bad actors, so some have understandably read Section Two as a penalty to be imposed against single states on a case-by-case basis.<sup>19</sup> But Section Two was always about nationwide congressional apportionment.

From the moment any legislation looking like the second section of the Fourteenth Amendment emerged, everyone knew that Congress and its Republican majority sought a solution to one special problem: the political

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18. Although the Supreme Court has not interpreted Section Two's penalty itself, it has referenced Section Two a few times. The Supreme Court first utilized Section Two in a broader analysis of a Fourteenth Amendment challenge, but the Court concluded only that the right to vote protected by the Section did not include a right to vote for every presidential elector in at-large elections (as opposed to a single presidential elector elected per each congressional district). *McPherson v. Blacker*, 146 U.S. 1, 24–25, 38–39 (1892). Another significant Supreme Court analysis of Section Two came in a dissent, when Justice Harlan objected to the Court's application of the Equal Protection Clause to voting rights based on the idea that Section Two was intended as the Fourteenth Amendment's only effect on voting rights. *Reynolds v. Sims*, 377 U.S. 533, 593–94 (1964) (Harlan, J., dissenting). The majority did not address Justice Harlan's claims in *Reynolds*, but Justice Harlan's historical interpretation has since been discredited. See generally William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33 (reviewing Section Two's history in comparison with Justice Harlan's claims). Only one major analysis of Section Two came in a modern majority opinion, but it was also used to interpret the Fourteenth Amendment at large rather than Section Two itself. By adopting a moderate approach inspired by Justice Harlan's extreme view, the Court determined that Section Two's implicit sanction to disenfranchise criminals meant that such a practice was allowed by the Fourteenth Amendment, despite the Equal Protection Clause. *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974).

19. See, e.g., *Saunders v. Wilkins*, 152 F.2d 235, 236 (1945) (attempting to impose Section Two only upon Virginia); Morley, *supra* note 13 (contemplating Section Two as a remedy against individual states for voting rights violations).

effects that freeing slaves would have on congressional representation.<sup>20</sup> The Three-Fifths Compromise had diminished the count of the African-American population for apportionment purposes before the Civil War, but fully counting African-Americans without granting them suffrage would give white Southerners greater power despite their defeat.<sup>21</sup> Specifically, the South would have gained about fifteen new seats in the House of Representatives after the passage of the Thirteenth Amendment.<sup>22</sup> And without the votes of freedmen in those states, Republicans believed that this representation change would give Democrats a strong chance of immediately winning the House and even competing for the presidency.<sup>23</sup> To avoid this result, congressional Republicans fought to reduce Southern States' representation if the freed slaves were not allowed to vote.<sup>24</sup>

Understanding that Section Two is primarily about national apportionment rather than individual penalties is important in determining how its enforcement would look today. Some states would receive different amounts of congressional seats under Section Two, as many interested parties realized during the Amendment's drafting.<sup>25</sup> The drafters even understood that other apportionment mechanisms, such as the census, would be necessary for Section Two's implementation.<sup>26</sup> Political and practical problems originally derailed Section Two's enforcement after its ratification,<sup>27</sup> but that does not mean that Congress meant for it to be anything other than a new, robust rule for the entire congressional apportionment. Changing the regular apportionment is the only means to honor Section Two's true purpose.

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20. See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 98–99 (William S. Hein & Co., Inc. 2003) (1908) (“It was somewhat freely admitted in the debates that . . . [the Republicans' chief goal in proposing enfranchisement was] to keep the control of the government in the hands of the Republican party.”).

21. Compare U.S. CONST. art. I, § 2, cl. 3 (creating the Three-Fifths Compromise for counting slaves), with U.S. CONST. amend. XIII (abolishing slavery, thereby rendering the Compromise irrelevant).

22. ANDERSON, *supra* note 5, at 72.

23. *Id.*

24. *Id.* at 74–75.

25. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 357 (1866) (statement of Mr. Conkling) (showing a table guessing at the representation of different states under different proposals); *id.* at 2942–44 (statements of Mr. Doolittle) (explaining how his proposal would affect the representation of different states and regions); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 23 (1956) (explaining that the *Chicago Tribune* had in 1865 published a state-by-state report of the potential changes of representation under a proposal to apportion representation based upon voting population).

26. See ANDERSON, *supra* note 5, at 73 (“All parties [to the drafting of the Fourteenth Amendment] agreed that the census would be needed to implement whatever constitutional changes were made.”). In fact, some amendment proposals even referenced the census directly. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (proposal of Mr. Stevens) (“A true census of the legal voters shall be taken at the same time with the regular census.”).

27. See ANDERSON, *supra* note 5, at 75–82 (exploring the initial attempts to enforce Section Two and why they failed).

*B. The New Political Compromise*

The Three-Fifths Compromise was replaced with a new compromise—this time between separate factions within the Republican Party that controlled Congress.<sup>28</sup> Any complete analysis of congressional intent must take congressional compromises into account,<sup>29</sup> so this section examines the Republican Party's factions that opposed different apportionment proposals to see how their motives are reflected in the final Fourteenth Amendment. Although some states sought to protect their nonracial voter disenfranchisements (such as the disenfranchisement of aliens), one faction's influence on Section Two stands out: the Radical Republicans' insistence that Section Two apply to all voting burdens, not just racially motivated ones.

The first proposed apportionment bills in the Thirty-ninth Congress all would simply have changed the basis of apportionment from the number of persons in each state to the number of legal voters.<sup>30</sup> This drastic change might have become law if not for its negative effect on the representation of Republican states that did not enfranchise all persons as voters.<sup>31</sup> Many states restricted the voting rights of immigrants and did not allow women to vote, while some also disenfranchised those who assisted the Confederacy's rebellion in the Civil War.<sup>32</sup> These practices disproportionately affected some Republican states (whose congressmen's support was necessary for a two-thirds vote), as New England's states had larger populations of women and immigrants<sup>33</sup> while Missouri had a large ex-rebel population.<sup>34</sup> Representative James Blaine compared Vermont and California to illustrate why this problem was so controversial: despite similar overall populations, California and its 207,000 voters would receive many more representatives than Vermont and its 87,000 voters if apportionment were based on the number of voters.<sup>35</sup> These concerns led to changes in the Amendment: apportionment would still be based upon total population, but an apportionment reduction would occur based upon any abridgment of the voting

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28. See FLACK, *supra* note 20, at 120–22 (explaining how the Republican caucus came together in the final days of negotiating the Fourteenth Amendment to harmonize the extreme Radicals and conservative Radicals within the Republican party and the resulting changes to the proposed amendment).

29. See *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (explaining that one cannot invoke a “plain purpose” of congressional legislation to support their interpretation, when that “‘plain purpose’ . . . takes no account of the processes of compromise”).

30. FLACK, *supra* note 20, at 98.

31. See, e.g., *id.* at 99 (documenting this concern in New England's Representatives).

32. Zuckerman, *supra* note 3, at 95, 101.

33. *Id.* at 101.

34. *Id.*

35. See *id.* at 95 (citing CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866)) (showing that in 1860, California's population was 358,110 and Vermont's was 314,369).

rights of only male citizens over twenty-one years of age, excepting those who had not “participat[ed] in rebellion or other crime.”<sup>36</sup>

If the Republicans’ troubles in passing the Fourteenth Amendment lay only with Congressmen from states that wished to limit the right to vote of white residents, however, an apportionment bill should have passed easily. Instead, Congress’s Reconstruction Committee endured multiple failures in trying to pass an amendment.<sup>37</sup> The toughest hurdle came in the Senate. One proposal faltered despite obtaining majority support of the Republican Party in both chambers and passing the House—it failed to achieve the necessary two-thirds of the upper chamber thanks to yet another faction’s opposition.<sup>38</sup> Senate Democrats obviously opposed any amendment that would weaken their party, but they blocked the proposal by teaming up with a group of “extreme Radical[.]” Republicans concerned principally with the voting rights of the African-Americans.<sup>39</sup>

Some radicals wished to declare universal enfranchisement or otherwise directly grant freedmen the right to vote, but that idea would not gain traction until after Congress passed the Fourteenth Amendment.<sup>40</sup> Instead, the Radicals sought to protect the African-Americans’ right to vote as much as possible through the confines of the discussed apportionment plan. The Radicals’ objection to earlier apportionment bills was in a qualifier to the proposed apportionment adjustment: that states’ basis of representation be lowered “whenever the elective franchise shall be denied or abridged in any State *on account of race or color*.”<sup>41</sup> Many radicals believed the latter phrase sanctioned vote denials on the basis of race, albeit with a penalty.<sup>42</sup> They also feared that Southern states could avoid the consequences of such an Amendment by depriving African-Americans’ right to vote for reasons other than race.<sup>43</sup> African-Americans could be disenfranchised just as much, for instance, by a law restricting the right to vote to only certain property owners as by a law restricting the right to vote only to white people.<sup>44</sup>

Representative Jehu Baker explained the Radicals’ preference for the eventual Fourteenth Amendment’s language: the basis of representation should be lowered for any disenfranchisement, “no matter on what ground

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36. *Id.* at 101–02.

37. FLACK, *supra* note 20, at 112.

38. *Id.* at 104–06.

39. *Id.* at 104.

40. *See id.* at 102–03 (observing that while universal enfranchisement “was not popular at the time, . . . it was later incorporated into our fundamental law by the Fifteenth Amendment”).

41. *Id.* at 100 (emphasis added). It was not just in the Senate that Radical Republicans had this objection, but the Senators’ objections were more consequential because “practically any measure could be forced through the House” in spite of that chamber’s radicals. *Id.* at 112.

42. *Id.* at 104.

43. Zuckerman, *supra* note 3, at 97–98.

44. *Id.*



[the state] so excludes them.”<sup>45</sup> Because prior proposals achieved majority Republican support but not enough votes to pass, this was perhaps the most important compromise intended by the drafters. States’ basis of representation would be lowered upon disenfranchisements that occur for almost any reason.

### C. *Uncertainty on the Breadth of Voting Rights*

While the fact of political compromise allows us to understand an extent of Congress’s intent behind Section Two, some of the text remains unexplained by legislative history. The need for compromise was so important that some Republicans voted against their personal positions in order to pass an amendment that the states could ratify.<sup>46</sup> Rather than understanding fully how this new apportionment would work, it seems that the Republicans—in their need to get an amendment passed<sup>47</sup>—left the details to future governments.<sup>48</sup> In terms of Section Two’s effect on voting rights, the most important area of confusion is the Amendment’s reference to someone’s right to vote being “abridged.”

The word “abridged” was included in every draft of Section Two, but its importance was almost never discussed.<sup>49</sup> The only framer to give the word any specific meaning was Senator Jacob Howard, who simply stated that the word “abridged” was meant “as a mere intensive.”<sup>50</sup> But Howard later showed that he did not truly understand the word’s purpose. In the final days before Congress passed the Fourteenth Amendment, Senator Howard proposed striking the word “abridged” because the language would introduce “confusion and uncertainty into our constitutional amendment” that might require litigation and Supreme Court clarification.<sup>51</sup> He expressed his misunderstanding bluntly: “I do not know, and I have not yet been able to find any gentleman who did know, what an abridgment of the right to vote really is.”<sup>52</sup> Howard heard no rebuttal that sought to explain the meaning of “abridged,” but his proposal to remove the word was rejected without further discussion

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45. *Id.* at 98 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 385 (1866) (statement of Rep. Baker)).

46. FLACK, *supra* note 20, at 123–26.

47. *See id.* at 112 (“The people were getting restless and dissatisfied with the progress made by Congress, . . . [and t]he party leaders realized the danger of permitting this dissatisfaction to grow . . .”).

48. *See, e.g.*, U.S. CONST. amend. XIV, § 5 (allowing Congress to pass laws in order to enforce the Fourteenth Amendment).

49. Van Alstyne, *supra* note 18, at 81 (“The word ‘abridged’ was included in every draft of § 2 . . . [But t]he particular significance of ‘abridged’ was not specifically discussed . . .”).

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

51. *Id.* at 3039.

52. *Id.*

on the matter.<sup>53</sup> So, although the Radical Republicans ensured that Section Two would protect against voting abridgments beyond those specifically aimed at African-Americans, the legislative intent is inconclusive on how far this goes.

*D. Further Confusion with the Fifteenth Amendment*

The imminent Fifteenth Amendment would theoretically rid the country of most vote denials by enfranchising all African-Americans, so the question of Section Two's impact on voting rights became even more critical to its implementation. In fact, the uncertainty on this matter is what doomed initial Section Two enforcement proposals. The Fifteenth Amendment's legislative history is itself inconclusive as to the Fifteenth Amendment's effect on Section Two of the Fourteenth,<sup>54</sup> but congressmen still attempted implementation in the wake of both Amendments. Most legislators agreed that Section Two still had some effect after the Fifteenth Amendment; they simply were unable to agree as to *how much* effect was still left.

As legislators prepared for the census during the Fortieth Congress, leaders of both the House and Senate sought to implement Section Two through the census's mechanisms.<sup>55</sup> But six months before the census was to be taken, the Fifteenth Amendment's forthcoming ratification became apparent, and James Garfield (who led the House's Select Committee on the Census) removed the Section Two provisions from his bill.<sup>56</sup> Although Representative Garfield still believed in the validity of Section Two, he hoped to temporarily avoid the difficulty of squaring Section Two with the Fifteenth Amendment.<sup>57</sup> Garfield's new bill passed the House, but the Senate refused to consider an apportionment bill that did not address Section Two.<sup>58</sup> Without agreement on a new bill by Congress, the 1870 census occurred without any congressional guidance on Section Two's mandates.<sup>59</sup>

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53. *Id.* at 3039–40. The only response to Howard was a speech by Democrat Thomas Hendricks complaining about Republicans pushing the Amendment for partisan purposes, even though some Republican congressmen disagreed with certain parts of the proposal. *Id.*

54. Compare Tolson, *Constitutional Structure*, *supra* note 13, at 414–20 (arguing “that section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment were supposed to complement each other”), with Chin, *supra* note 13, at 263, 272–75 (utilizing commentary on the Reconstruction Amendments to argue that the Fifteenth Amendment repealed Section Two of the Fourteenth Amendment, despite earlier acknowledging that “Section 2 could still have an independent role if it were construed to cover suffrage restrictions other than race”).

55. ANDERSON, *supra* note 5, at 76–77.

56. *Id.* at 77.

57. *Id.*

58. *Id.*

59. *Id.* at 78.

Even without a new statute, some congressmen commented that the Secretary of the Interior, the cabinet official in charge of the census, was still required to take Section Two into account when counting Americans.<sup>60</sup> Thus, the census attempted to tabulate the “male citizens of the United States of twenty-one and upward whose right to vote is denied or abridged on other grounds than rebellion or other crime.”<sup>61</sup> Without special congressional direction or other preparation, however, the superintendent of the census was not statistically confident about his reported numbers of disenfranchisements.<sup>62</sup> James Garfield still took the census results and determined that Rhode Island and Arkansas should lose one representative each, but fears about the abridgment numbers’ inaccuracy or statistical insignificance led to an 1870 reapportionment without any Section Two penalty.<sup>63</sup> Other congressmen even thought that a proper count would lead to a greater loss of representation than Garfield suggested, despite the enfranchisement effects of the Fifteenth Amendment.<sup>64</sup> Because Congress could not agree which states should lose representation and to what extent, no penalty was assessed. Congress instead would enact a bill calling simply for Section Two’s future implementation—but without any specifics.<sup>65</sup>

Despite the Fourteenth Amendment’s broad grant of congressional enforcement powers regarding Section Two,<sup>66</sup> Congress failed to provide the executive branch with any direction whatsoever. In the time shortly after the Fourteenth and Fifteenth Amendments’ passage, it was still understood that Section Two of the Fourteenth Amendment called for a reduction of representation for states that disenfranchised too many voters, but no one knew exactly how to do that.<sup>67</sup> This interpretative difficulty is a concern for Section Two’s modern implementation, but current uncertainty should not, itself, lead

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60. Zuckerman, *supra* note 3, at 110.

61. *Id.*

62. ANDERSON, *supra* note 5, at 80; Zuckerman, *supra* note 3, at 111.

63. Zuckerman, *supra* note 3, at 112–14.

64. *See id.* at 111–12 (explaining complaints that the census undercounted disenfranchised voters, especially in the South).

65. *Id.* at 114–16.

66. *See* U.S. CONST. amend. XIV, § 5 (granting Fourteenth Amendment enforcement powers).

67. Some scholars still argue that Section Two was repealed by the Fifteenth Amendment, see, for example, Chin, *supra* note 13 (arguing Section Two was repealed as part of a broader argument about felon disenfranchisement), but that view fails to take into account a holistic understanding of Congress’s actions in the wake of the Fifteenth Amendment. Professor Chin’s argument relies on the idea that the Fourteenth Amendment only affects race-related vote abridgments, but its legislative history clearly points to all abridgments. *See supra* subpart I(B). The repeal argument also contravenes the judicial maxim that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). A court would properly read Section Two and the Fifteenth Amendment to exist together with independent effects. *See, e.g.,* *Carpenter v. Cornish*, 85 A. 240, 242 (N.J. 1912) (reading the two clauses together).

to lack of enforcement. An interpretation of Section Two can still be made that would protect the right to vote.<sup>68</sup>

## II. Section Two's Benefits in a More Free and Voting Society

Past arguments for Section Two's general enforcement were predominantly articulated before the country felt the effects of modern voting rights jurisprudence and the Voting Rights Act—when direct denials of the right to vote were still prevalent.<sup>69</sup> Today, voting rights battles almost never involve direct denials of the right to vote but instead the simple “regulation of voting procedure”; the highest profile fights are about laws as simple as voter-identification requirements.<sup>70</sup> So, this Part explains why Section Two still matters. It begins by broadly examining the voting rights protections that are possible without Section Two and then evaluates Section Two in that context.

### A. Current and Other Proposed Voting Rights Protections

The right to vote is not affirmatively granted by the Constitution's text.<sup>71</sup> In fact, Section Two is the first place the Constitution references a “right to vote” at all.<sup>72</sup> Later amendments only refer negatively to the right by declaring that the right to vote shall not be denied or abridged on account of race,<sup>73</sup> sex,<sup>74</sup> the failure to pay a poll tax,<sup>75</sup> or age (for citizens eighteen years of age or older).<sup>76</sup> Simply reading the Constitution and its amendments, one might conclude that the right to vote exists but may be denied or abridged in some way outside of these bounds, subject only to a Section Two penalty.<sup>77</sup> Indeed, even after the Fifteenth Amendment, the Supreme Court declared that suffrage was not one of the country's privileges or immunities.<sup>78</sup> The Court also stated that the Fifteenth Amendment did not grant the right to vote.<sup>79</sup>

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68. See *infra* subparts II(B)–(C).

69. See *supra* note 13. The one modern argument for direct enforcement was a short article in *The Nation*. Richard Kreitner, *This Long-Lost Constitutional Clause Could Save the Right to Vote*, NATION (Jan. 21, 2015), <http://www.thenation.com/article/195705/any-way-abridged> [<http://perma.cc/7V3E-Q8Z5>].

70. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 188–89, 203 (2008) (upholding the constitutionality of Indiana's voter identification law).

71. See generally U.S. CONST. (discussing methods for electing officials but not mentioning the right to vote).

72. *Id.* amend. XIV, § 2.

73. *Id.* amend. XV.

74. *Id.* amend. XIX.

75. *Id.* amend. XXIV.

76. *Id.* amend. XXVI.

77. See *Carpenter v. Cornish*, 85 A. 240, 242 (N.J. 1912) (reading the Constitution this way in respect to the ban on vote denial based on race).

78. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874), *superseded by constitutional amendment*, U.S. CONST. amend. XIX.

79. *United States v. Reese*, 92 U.S. 214, 217 (1875).

So in 1966, when the Supreme Court protected an individual's right to vote in state elections through the Constitution in *Harper v. Virginia Board of Elections*,<sup>80</sup> it utilized a general constitutional provision: the Equal Protection Clause.<sup>81</sup> Although this broad acknowledgement of voting rights led to many cases that protected or extended suffrage,<sup>82</sup> the new jurisprudence still allowed the right to vote to be curtailed in certain contexts. States were now restrained from "fixing voter qualifications which invidiously discriminate" but not from creating other qualifications that may limit the "right" to vote.<sup>83</sup> After all, Equal Protection doctrine does not protect completely: even in the strict scrutiny analysis of most voting cases, a state may abridge or deny franchise with a compelling state interest if less discriminatory alternatives do not exist.<sup>84</sup>

Note the implication: nondiscriminatory vote denials are almost entirely unprotected by Supreme Court jurisprudence. Thus, potential voting right abridgments have been upheld, ranging from voter registration deadlines<sup>85</sup> to restrictions on who votes in primaries<sup>86</sup> and more. With Equal Protection Clause analysis, the Supreme Court has reasoned that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."<sup>87</sup> Recently in *Crawford v. Marion County Election Board*,<sup>88</sup> the Court allowed Indiana's photo-identification requirement for voters on the ground that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*."<sup>89</sup> This reasoning thus justifies numerous burdens on voters, even those that might prevent a significant number from participating in a meaningful manner.<sup>90</sup>

Of course, the Equal Protection Clause's basic guarantees are not the only voter protections that exist. The Voting Rights Act also created many new voter protections,<sup>91</sup> and "the Act was pivotal in bringing black Amer-

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80. 383 U.S. 663 (1966).

81. *Id.* at 665.

82. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622–29 (1969) (following *Harper* and ruling in favor of plaintiffs who wished to vote in school elections).

83. *Harper*, 383 U.S. at 665–66.

84. JAMES A. KUSHNER, 3 GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 6:3, at 48 (2013).

85. *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (per curiam).

86. *Clingman v. Beaver*, 544 U.S. 581, 584 (2005).

87. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

88. 553 U.S. 181 (2008).

89. *Id.* at 189–90 (internal quotations omitted) (quoting *Celebrezze*, 460 U.S. at 788 n.9).

90. *Id.*

91. The Voting Rights Act was initially justified as a constitutionally allowed act through the Fifteenth Amendment's enforcement clause. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The current Act still stands, with the exception of a now-outdated coverage formula connected to § 5 of the Act. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

icans to the broad currents of political life—a transformation that shook the foundations of Jim Crow, triggered the realignment of partisan politics, and set the foundation for the election of an African-American President.”<sup>92</sup> The extraordinary measure provided by the Voting Rights Act was § 5 of the Act: it “required [certain] States to obtain federal permission before enacting any law related to voting.”<sup>93</sup> This process, known as “preclearance,” required the Attorney General or a D.C. federal district court to determine that any new election law in an identified jurisdiction did not have a retrogressive effect on a minority population’s voting rights.<sup>94</sup> The jurisdictions covered by § 5 were identified by a formula in § 4.<sup>95</sup> Another section, § 2, allowed minority voters to sue to invalidate a discriminatory law, regardless of § 5 preclearance.<sup>96</sup> Although current Voting Rights Act litigation focuses on § 2,<sup>97</sup> § 5 of the Act was the principle enforcer of the Voting Rights Act for decades.<sup>98</sup> The Supreme Court rendered § 5 inoperable in 2013, however, by striking the § 4 coverage formula.<sup>99</sup> Although the Court acknowledged that the § 4 formula was justified in 1965, it concluded that the nonupdated formula—at the time of its 2006 reenactment—was no longer properly grounded in Congress’s Fifteenth Amendment authority.<sup>100</sup> “[T]he conditions that originally justified these measures no longer characterize[d] voting in the covered jurisdictions.”<sup>101</sup> The important achievements of the Voting Rights Act cannot be diminished, but the Act’s limitation was made crystal clear: its enormous accomplishments are constrained by Congress’s Fifteenth Amendment authority to legislate in order to protect against vote denials or abridgements “on account of race or color.”<sup>102</sup>

Like the Voting Rights Act, any legislation based on the enforcement clauses of the Fifteenth, Nineteenth, Twenty-fourth, or Twenty-sixth Amendments would likely be limited by the Amendments’ purpose to protect against only specific types of discrimination. The Voting Rights Act and potential future acts, like the Equal Protection Clause’s protections, fail to adequately guard against nondiscriminatory vote denials or abridgments.

The restrictions on this “discrimination model” of voting are why Professor Samuel Issacharoff and others suggest further legislation similar to

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92. Issacharoff, *supra* note 10, at 95.

93. *Shelby Cty.*, 133 S. Ct. at 2618.

94. *Id.* at 2620.

95. *Id.* at 2618.

96. *Thornburg v. Gingles*, 478 U.S. 30, 35–36 (1986).

97. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. REV. 439, 440–41 (2015).

98. *See Shelby Cty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting) (recounting the success of § 5).

99. *Id.* at 2631 (majority opinion).

100. *Id.* at 2629–31.

101. *Id.* at 2618.

102. *Id.* at 2629.

the National Voter Registration Act (NVRA), an act based on constitutional authority under the Elections Clause of the Constitution.<sup>103</sup> The Elections Clause allows Congress to regulate “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.”<sup>104</sup> And the NVRA, federalizing voter-registration standards, has already succeeded in countering at least one state’s attempt to burden the right to vote: the Act preempted an Arizona law requiring proof of citizenship for voter registration.<sup>105</sup> But the text of the Elections Clause reveals that it, too, has a limited scope. First, it only applies to federal congressional elections.<sup>106</sup> Shortly after the Act successfully preempted Arizona’s legislation, for instance, Kansas split its voter registration system into separate federal and state systems in order to avoid federal mandates.<sup>107</sup> Second, Elections Clause legislation can only be administrative in nature: “[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.”<sup>108</sup>

In short, reliance on current jurisprudence and legislation like the Voting Rights Act or NVRA can only go so far in protecting the right to vote.

#### B. Section Two’s Voting Protections

Section Two of the Fourteenth Amendment also has a major limitation: it protects the right to vote only indirectly. When a voting restriction goes against these other protections, the voting restriction is voided through pre-emption<sup>109</sup> or otherwise overturned as unconstitutional.<sup>110</sup> Section Two just creates a penalty for a law that may stay in place.<sup>111</sup> But penalties can deter, and Section Two, if used effectively, can deter vote denials and abridgements that other protections do not bar.<sup>112</sup>

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103. Issacharoff, *supra* note 10, at 107–13; Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 506 (2008); Ceridwen Cherry, Note, *Increasing Youth Participation: The Case for a National Voter Pre-Registration Law*, 45 U. MICH. J.L. REFORM 481, 495–96 (2012).

104. U.S. CONST. art. I, § 4. The initial duty and power to regulate the times, places, and manner of elections is technically with the States, but the Constitution gives Congress “the power to alter those regulations or supplant them altogether,” effectively giving Congress the more powerful regulatory authority for elections. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013).

105. *Inter Tribal Council*, 133 S. Ct. at 2257–60.

106. U.S. CONST. art. I, § 4.

107. Doug Chapin, *Kansas to Proceed With Two-Track Registration This Fall*, ELECTION ACAD. (July 14, 2014), <http://editions.lib.umn.edu/electionacademy/2014/07/14/kansas-to-proceed-with-two-tra/> [<http://perma.cc/AD6R-CX2S>].

108. *Inter Tribal Council*, 133 S. Ct. at 2257.

109. *See id.* at 2260 (finding federal law preempted the Arizona law).

110. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (noting that unconstitutional acts become void).

111. *See supra* text accompanying notes 3–6 (setting forth the basic penalty for laws that deprive individuals of the right to vote).

112. *See supra* subpart II(A) (explaining the limits of other voting protections).

Although the legislative history is inconclusive on Section Two's voting rights breadth, a textual analysis shows how far it goes. The plain language of Section Two encompasses almost any voting burden, which is much greater in breadth than the Constitution allows for any other voting laws.<sup>113</sup>

The phrase in Section Two that most greatly affects its breadth is "when the right to vote [is] . . . in any way abridged."<sup>114</sup> And although the Court has not explored the direct scope of Section Two,<sup>115</sup> it has actually interpreted the abridgment of the right to vote in other constitutional voting contexts.<sup>116</sup> *Reno v. Bossier Parish School Board*<sup>117</sup> was about the term "abridge" in § 5 preclearance proceedings in the Voting Rights Act, but the Court compared "abridge" in that context to one of the Constitution's uses of the term.<sup>118</sup> The Court determined that right-to-vote abridgment in these preclearance proceedings was different than right-to-vote abridgment in other contexts:

The term "abridge," however—whose core meaning is "shorten"—necessarily entails a comparison. It makes no sense to suggest that a voting practice "abridges" the right to vote without some baseline with which to compare the practice. In § 5 preclearance proceedings—which uniquely deal only and specifically with *changes* in voting procedures—the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgment of the right to vote" or "abridge[s] [the right to vote]" relative to what the right to vote *ought to be*, the status quo itself must be changed.<sup>119</sup>

Justice Scalia, for the Court, compared VRA retrogression to the second section of the Voting Rights Act and the Fifteenth Amendment, but that analysis can just as easily apply to Section Two of the Fourteenth Amendment. Contemporary dictionaries around the Fourteenth Amendment's adoption agreed with Justice Scalia's definition, defining "abridged" as "made shorter."<sup>120</sup>

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113. See Bonfield, *supra* note 6, at 115 ("Practically all qualifications imposed on the exercise of the franchise constitute deprivations or abridgements within the contemplation of section 2.")

114. U.S. CONST. amend. XIV, § 2.

115. See *supra* note 18.

116. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333–34 (2000).

117. 528 U.S. 320 (2000).

118. *Id.* at 333–34.

119. *Id.* (alterations in original) (citation omitted).

120. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 4 (rev. ed. 1842).



So to determine when a right to vote is abridged, one should analyze what the right to vote “ought to be” and then determine when that is shortened. This is different from asking *who* has such a right to vote: that question is answered by the contours of Section Two, giving most citizens of constitutional voting age this right. The appropriate question is how and to what extent a person who has the right to vote is able to utilize it.

The most expansive American jurisprudence on the abridgment of rights regards the First Amendment’s freedom of speech.<sup>121</sup> Although imperfect, an analogy of Section Two voting to the First Amendment freedom of speech can be instructive. “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”<sup>122</sup> The freedom of speech allows Americans to say what they want, but that freedom is limited by what the freedom of speech *ought* to be: it ought to include most speech, but it ought to not necessarily include defamation, obscenity, or other forms of societally undesirable speech.<sup>123</sup> Similarly, someone’s right to vote is their right to cast a counted ballot in an election for a candidate of their choice, but that ought not to include forms of societally undesirable voting such as voting in someone else’s place, voting more than once, and voting despite open rebellion against the government.

The limitations on the First Amendment’s freedom of speech do not mean that the government may freely enact any law against such undesirable speech: if the protected freedom of speech is actually abridged, then the statute unconstitutionally abridges the freedom of speech even if the statute also stops undesirable speech.<sup>124</sup> Similarly, a statute intended to protect against voter fraud can still abridge the right to vote if its effects go beyond that intent. For example, a law requiring specific photo identifications to vote—although protecting against the impersonation of persons while voting—may abridge others’ right to vote by inhibiting their ability to cast a counted ballot for the candidate of their choice.

Some would argue that mere administrative voting procedures—such as voter-identification or registration requirements—should not, even under

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121. See U.S. CONST. amend. I (disallowing laws “abridging the freedom of speech, or of the press”).

122. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002).

123. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 4–5, 15–16 (Robert C. Clark et al. eds., 4th ed. 2014) (providing examples of the broad scope of expression—even offensive expression—permitted under the First Amendment before naming certain categories of unprotected speech including libel, obscenity, incitements to violence, etc.).

124. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“[I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . .”).

Section Two, be considered an abridgment of the right to vote.<sup>125</sup> But administrative procedural requirements can easily be a violation of the freedom of speech as well.<sup>126</sup> Indeed, “[a]s a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.”<sup>127</sup> Just as speech registration requirements can abridge the freedom of speech, voter registration requirements can abridge the right to vote. Administrative procedures like a registration requirement—whether in speech generally or in voting specifically—can stop people from exercising their relevant right.<sup>128</sup> Administrative election requirements have been justified in the past not because they do not abridge the right to vote but simply because they do not do so on the basis of race, sex, age, or failure to pay a poll tax.<sup>129</sup>

This is not to say that a voter registration requirement (or other administrative measure) is necessarily unjustified, and Section Two enforcement would not void any procedural law. Instead of a court facially invalidating the offending law due to its overbroad nature, like with First Amendment doctrine,<sup>130</sup> enforcement of Section Two of the Fourteenth Amendment leaves the law in place. Unlike the First Amendment, Section Two requires a determination of just how broad an offending law is—one must know the proportion of citizens whose right to vote has been abridged by the state in order to appropriately reduce the state’s basis of representation.<sup>131</sup>

Virtually any election law, even simple administrative procedures, can thus create an abridgment under Section Two. Although Section Two’s penalty will not affirmatively allow a voter to cast a counted ballot, Section Two scrutiny should occur as long as individual citizens’ right to vote is significantly burdened.

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125. *E.g.*, *Morley*, *supra* note 13 (insisting that the Fourteenth Amendment right to vote only protects against “the actual, direct disenfranchisement of disfavored groups of people, and not administrative procedures for registration or voting”).

126. *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 518 (1945) (invalidating certain Texas requirements for union organizers to file with the state’s Secretary of State before soliciting members).

127. *Id.* at 539.

128. *See, e.g.*, *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167–68 (2002) (describing how a solicitation permit requirement, which the Court invalidated, would stop some exercises of speech).

129. *See supra* subpart II(A).

130. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973) (outlining the long history of overbreadth claims in First Amendment jurisprudence).

131. *See* U.S. CONST. amend. XIV, § 2 (requiring that a state’s basis of representation be reduced in accordance with the proportion of citizens whose right to vote has been abridged).

C. *Section Two in Context*

This understanding of Section Two's wide breadth allows it to reach farther than the Equal Protection Clause, the Voting Rights Act, and any Elections Clause legislation. If one strictly applies the Amendment to even potentially benign voting procedures, Section Two might punish states for laws that the Supreme Court has already allowed. While laws like voter identification, registration, and more are clearly not facial violations of the Equal Protection Clause or election statutes, the far reaching text of Section Two would still punish states for these laws if they negatively burden a disproportionate number of voters.<sup>132</sup> And although most Americans either vote or choose to stay at home for personal reasons, some of America's otherwise legal voting procedures actually do keep people from voting.<sup>133</sup>

Even if one were to somehow derive a more limited understanding of Section Two vote denials and abridgments, it still can protect the right to vote further than other laws. Unlike Equal Protection and the Voting Rights Act, Section Two applies even to voting restrictions that do not discriminate. And unlike the Elections Clause, Section Two directly applies to voting burdens, even in state elections.<sup>134</sup> Although Section Two's operation is nothing more than a deterrent, it discourages strict voting regulations that are otherwise legal.

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132. If every state had the same voting laws and practices, the basis of apportionment for each state would thus be reduced by virtually the same amount and no state would actually lose seats in Congress. See *infra* note 163 (describing the calculation of the Section Two penalty). This is an important realization, because it means that Section Two implementation would not wreak havoc on states' abilities to administer elections. As the Supreme Court has noted, many election laws "invariably" create "ordinary and widespread burdens" by "requir[ing] that voters take some action to participate." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). If such widespread burdens are truly required for proper election administration, each state would have similar burdens and thus these equally widespread burdens would likely not punish states' representation. Only when states' election administration disproportionately burdens citizens' right to vote will a penalty actually be levied.

133. See, e.g., IPSOS PUB. AFFAIRS, SURVEY OF VOTERS AND NON-VOTERS 2-3 (2012), <http://nonvotersinamerica.com/2012/12/2012-nonvoter-survey-topline/> [<http://perma.cc/YN6G-TYUD>] (listing reasons that nonvoters in 2012 did not vote or register to vote, including "No Way To Get To The Polls," "Did not receive ballot," "Registration issues/problems," "Registered to vote at previous address," and "Registration too late to vote"); UNIV. OF HOUS. HOBBY CTR. FOR PUB. POLICY & BAKER INST. FOR PUB. POLICY, THE TEXAS VOTER ID LAW AND THE 2014 ELECTION: A STUDY OF TEXAS'S 23RD CONGRESSIONAL DISTRICT 1 (2015), <http://bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf> [<http://perma.cc/VFT3-T9RW>] (explaining that a significant number of registered voters did not vote due to the new Texas Voter ID law). Beyond those people who fail to show up at polls, hundreds of thousands of Americans actually attempt to vote through provisional ballots that are not fully counted. U.S. ELECTION ASSISTANCE COMM'N, THE 2014 EAC ELECTION ADMINISTRATION AND VOTING SURVEY COMPREHENSIVE REPORT 15 (2015), [http://www.eac.gov/assets/1/Page/2014\\_EAC\\_EAVS\\_Comprehensive\\_Report\\_508\\_Compliant.pdf](http://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf) [<http://perma.cc/F8FR-22WE>].

134. See U.S. CONST. amend. XIV, § 2 (applying also to "the choice of electors for . . . the Executive and Judicial officers of a State, or the members of the Legislature thereof").

### III. Enforcing Section Two

In 1961, Mr. Zuckerman suggested that Congress employ the United States Census Bureau to enforce Section Two by “enumerating the number of disfranchised citizens in each state.”<sup>135</sup> The Census Bureau is an obvious choice, because it “is the only national agency that is capable of undertaking a state-by-state investigation to determine our representative as well as aggregate population within the time remaining between the execution of the census and the holding of the next congressional election.”<sup>136</sup> Despite the failure of the 1870 census, which did not adequately prepare for the task of counting disenfranchised citizens,<sup>137</sup> there is no reason to think that the Census Bureau could not accomplish a proper Section Two enumeration.<sup>138</sup>

But the Census Bureau is not only the best equipped governmental entity to enforce Section Two; the Secretary of Commerce, who is responsible for the Census Bureau,<sup>139</sup> already has the statutory authority to do so. In fact, the Bureau has a continuing duty to enforce it. Section Two should be enforced

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135. Zuckerman, *supra* note 3, at 131.

136. *Id.* at 132.

137. See ANDERSON, *supra* note 5, at 81 (outlining the biggest missteps of the 1870 census efforts).

138. See Zuckerman, *supra* note 3, at 132–35 (outlining a basic plan for the Census Bureau to count disenfranchised citizens). One might complain that it seems impossible to perfectly ascertain the number of disenfranchised citizens, but imperfections are no reason for the United States to ignore apportionment laws. Even in 2010, the Census still undercounted and overcounted different groups of people in its enumeration used for the most recent congressional reapportionment. Haya El Nasser & Paul Overberg, *Census Continues to Undercount Blacks, Hispanics and Kids*, USA TODAY (May 23, 2012, 10:05 AM), <http://usatoday30.usatoday.com/news/nation/story/2012-05-22/census-hispanic-black/55140150/1> [<http://perma.cc/7YZP-3VKG>]. The census obtains its information through a comprehensive survey, and social scientists have used surveys for years to determine why people do not vote. See, e.g., *About Us*, NONVOTERS IN AM., <http://nonvotersinamerica.com/about-us/> [<http://perma.cc/AZJ5-NFW3>] (explaining Northwestern University Professor Ellen Shearer’s research into nonvoters); *Who Votes, Who Doesn’t, and Why: Regular Voters, Intermittent Voters, and Those Who Don’t*, PEW RES. CTR. (Oct. 18, 2006), <http://www.peoplepress.org/2006/10/18/who-votes-who-doesnt-and-why/> [<http://perma.cc/NSW2-SRDS>] (summarizing the findings of a study about the motivations of voters and nonvoters). If the biggest difficulty in determining how many have had their voting rights abridged is in “isolating the truly apathetic from the disenfranchised,” Bonfield, *supra* note 6, at 134, then the Census Bureau certainly has social science upon which to build. The ability and appropriateness of the Census Bureau to count citizens is up for debate, however, and the Supreme Court may soon hear arguments on the matter. See Brief of Demographers Peter A. Morrison et al., as Amici Curiae in Support of Appellants at 3–4, *Evenwel v. Abbott* (filed Aug. 7, 2015) (No. 14-940), 2015 WL 4747987, at \*3–4 (arguing that current Census estimates for citizen population are sufficient for fuller use in redistricting); Brief of Former Directors of the U.S. Census Bureau as Amici Curiae in Support of Appellees at 23–26, *Evenwel v. Abbott* (filed Sept. 25, 2015) (No. 14-940), 2015 WL 5675832, at \*23–26 (“Asking Citizenship Status of Every Household Would Lead to Reduced Response Rates and Inaccurate Responses, While Multiplying Privacy and Government Intrusion Fears.”). But if the Census Bureau cannot effectuate Section Two, who can?

139. 13 U.S.C. § 2 (2012) (“The [Census] Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.”).

in the 2020 Census and the subsequent congressional reapportionment. No further authority from Congress is required.

A. *Reapportionment Law and the Census*

The power and obligation to regularly reapportion congressional seats is given to Congress by the Constitution.<sup>140</sup> Originally, Congress utilized the census results and determined for itself how to apportion congressional representation every decade, but in 1920, Congress failed in its constitutional duty to actually reapportion congressional seats.<sup>141</sup> Consequently, Congress passed the Act of June 18, 1929 to create an automatic apportionment system that provides the basic mechanisms the country uses to reapportion congressional seats today.<sup>142</sup>

Congress made reapportionment automatic by directing the President to “transmit to the Congress a statement showing . . . the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives.”<sup>143</sup> Current law thus makes the President the official who finally determines how many congressional seats each state receives in any reapportionment,<sup>144</sup> but the President does not reapportion until first receiving a census report from the Secretary of Commerce.<sup>145</sup> Statutorily, the Secretary’s report, based on the Census, shall include “[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress.”<sup>146</sup> This directive to tabulate population as required for the apportionment was the basic duty given to the Secretary of Commerce in the 1929 Act.<sup>147</sup> The Act does not define “as required for apportionment,” so one must look to other law to determine what the census must actually tabulate.

Section Two makes clear that to correctly apportion congressional representatives according to the law one must know the number of voting-age citizens whose right to vote has been denied or abridged for any reason other than rebellion or another crime. This requirement is memorialized in both the Constitution and federal statute.<sup>148</sup> The 1870 Census superintendent

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140. See U.S. Dep’t of Commerce v. Montana, 503 U.S. 442, 457 (1992) (noting that “Congress has a judicially enforceable obligation to select an apportionment plan,” with the caveat that “the Constitution places substantive limitations on Congress’ apportionment power and . . . violations of those limitations would present a justiciable controversy”).

141. *The Supreme Court, 1963 Term—Apportionment of Congressional Districts*, 78 HARV. L. REV. 244, 247 (1964).

142. *Id.* (citing Act of June 18, 1929, 46 Stat. 21).

143. § 22, 46 Stat. at 26.

144. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

145. *Id.* at 792.

146. 13 U.S.C. § 141(b) (2012) (emphasis added) (cited in *Franklin*, 505 U.S. at 792).

147. Act of June 18, 1929, § 2, 46 Stat. at 21.

148. Compare 2 U.S.C. § 6 (2012) (memorializing Section Two in statute), with U.S. CONST. amend. XIV, § 2 (describing the apportionment penalty with virtually the exact words as the statute).

had the authority to calculate the number of citizens whose rights to vote had been infringed without any statutory directive,<sup>149</sup> so surely the current law that demands a counting “as required for the apportionment” gives the Secretary of Commerce that authority and duty today.

This conclusion is further in line with the legislative intent of the June 18 Act. The Act was necessary, according to the Senate Committee report, after “nine years during which Congress has refused to translate the 1920 census into a new apportionment . . . result[ing in] great American constituencies . . . robbed of their rightful share of representation.”<sup>150</sup> So, one should assume that Congress wished to delegate to the Secretary of Commerce the responsibilities necessary to avoid another “lapse in [the] fundamental constitutional function.”<sup>151</sup> Among the major controversies preventing Congress from apportioning after the 1920 census: enforcement of the Fourteenth Amendment.<sup>152</sup> This assumption of broad delegation is also supported by the fact that the 1929 Act was the very first Census Act in American history that did not specify which questions the census must ask,<sup>153</sup> giving the Secretary of Commerce authority to set the questions and parameters necessary to enact a proper census.

The argument that the census should count disenfranchised citizens according to Section Two has been made before, however, and one district court in the 1960s actually rejected the argument based on an analysis of the 1929 Act.<sup>154</sup> In dicta, the court viewed the 1929 Act as denying census authority to enforce Section Two because the House rejected amendments specifically directing Section Two enforcement.<sup>155</sup> But this reliance on the rejection of individual amendments assumes too much. “Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’”<sup>156</sup> Indeed, Representative Tinkham, who proposed the amendments in question, was only seeking “the *mandatory* direction of the fourteenth amendment.”<sup>157</sup> Although the text of the Act of June 18 should require apportionment in line with all requirements, including Section Two, Representative Tinkham was

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149. See notes 60–63 and accompanying text.

150. S. REP. NO. 71-2, at 2–3 (1929).

151. *Id.* at 3.

152. ANDERSON, *supra* note 5, at 151–52; CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S, at 35 (1990).

153. ANDERSON, *supra* note 5, at 159.

154. *Lampkin v. Connor*, 239 F. Supp. 757, 764–65 (D.D.C. 1965).

155. *Id.* at 765.

156. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

157. 71 CONG. REC. H2271 (daily ed. June 3, 1929) (statement of Rep. Tinkham) (emphasis added).

likely apprehensive about a political appointee carrying out this duty without a more specific instruction: after all, Mr. Tinkham spent a career failing to compel Section Two enforcement.<sup>158</sup> Rather, the text and overarching purpose of the Act should compel an interpretation of the Secretary's duty to follow constitutional apportionment mandates.

But the Act of 1929 is only the initial source of the Secretary's authority. Over time, Congress solidified and increased the Secretary's census authority. In the 1929 Act, the President's statement of the Secretary's apportionment determination was just the default apportionment in the event of inaction by future Congresses.<sup>159</sup> In 1941, Congress amended the Act to make the President's statement the actual apportionment without regard to other Congressional activity.<sup>160</sup> And when revising and codifying Title 13 of the United States Code in 1954, Congress explicitly gave the Secretary the authority to "determine the inquiries . . . for the statistics, surveys, and censuses provided for in this title."<sup>161</sup> Finally, in 1976, Congress specified that the Secretary should take the decennial census "in such form and content as he may determine."<sup>162</sup>

This updated statute led the Supreme Court to observe that, "[t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary."<sup>163</sup> If the 1929 Act did not give the Secretary of Commerce the census authority to tabulate and calculate apportionment under the requirements of Section Two, subsequent laws certainly did.

158. See *Reduction Redux*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Reduction/> [<http://perma.cc/DZW7-VYHC>] (chronicling Representative George Tinkham's attempts to enforce the Fourteenth Amendment's reduction penalty).

159. See Act of June 18, 1929, § 22(b), 46 Stat. 21, 26–27 (mandating specific apportionment "[i]f the Congress . . . fails to enact a law apportioning Representatives").

160. Act of Nov. 15, 1941, Pub. L. No. 77-291, 55 Stat. 761 (amending § 22, 46 Stat. at 26–27).

161. Act of Aug. 31, 1954, Pub. L. 83-740, § 5, 68 Stat. 1012, 1013 (codified at 13 U.S.C. § 5).

162. Act of Oct. 17, 1976, Pub. L. 94-521, § 7, 90 Stat. 2459, 2461 (codified at 13 U.S.C. § 141). Notably, this latter grant of authority to the Secretary of Commerce occurred after the few lower court opinions in the 1960s and 1970s that claimed that the Secretary was not required (or authorized) to enforce Section Two. See *Sharrow v. Brown*, 447 F.2d 94, 98 (2d Cir. 1971) ("[N]othing in the Constitution mandates that the Census Bureau be the agency to gather these statistics."); *United States v. Sharrow*, 309 F.2d 77, 79–80 (2d Cir. 1962) ("Irrespective of the Fourteenth Amendment's mandate the Congress, in the present state of the law, is not required to prescribe that census-takers ascertain information relative to disenfranchisement."); *Lampkin v. Connor*, 239 F. Supp. 757, 764–65 (D.D.C. 1965) (asserting that there is no census authority regarding Section Two).

163. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citing 13 U.S.C. § 141(a)). The Court would later say, however, that Congress could restrain this broad grant of authority through more specific sections. See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 ("[The] broad grant of authority given in § 141(a) is informed, however, by the narrower and more specific § 195 . . ."). But the Secretary's authority does not appear to be limited with regard to Section Two, especially since the mandate of Section Two is also a statutory mandate. 2 U.S.C. § 6 (2012).

With its broad delegated authority, the Secretary, through the Census Bureau, ought to tabulate the basic population as well as the populations required for Section Two's apportionment adjustment in the 2020 census. Once tabulated, ascertaining the new basis for apportionment is just a problem of simple arithmetic as directed by the latter parts of the Section.<sup>164</sup>

*B. Compelling the Census Bureau to Enforce the Fourteenth Amendment*

Ideally, the Secretary of Commerce and the Census Bureau would recognize their authority and responsibility to enforce Section Two of the Fourteenth Amendment. A President, Commerce Secretary, and Census Director who care about voting rights would be prudent to enforce Section Two on their own, but the long history of failed attempts to implement Section Two does not elicit confidence that they will suddenly pay attention to this constitutional clause. After all, current officials may simply follow the lead of predecessors in assuming they lack authority without an unequivocal statutory directive linking Section Two's reduction requirement to the census.<sup>165</sup>

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164. See U.S. CONST. amend. XIV, § 2. The proper equation, in order to reduce the basis of representation "in the proportion which the number of such [disenfranchised] . . . citizens shall bear to the whole number of . . . citizens [eighteen] years of age in such State," would be:

$$x = P * [(c - n)/n].$$

This is when  $x$  = the new basis of representation,  $P$  = the state's total population (or old basis of representation),  $n$  = the state's number of citizens aged eighteen whose right to vote was abridged for a reason other than rebellion or felony, and  $c$  = the state's Citizen Voting Age Population (CVAP).

We can apply this in an example of Texas, for example, using a district court's estimate of potentially disenfranchised voters and pretending that the Census Bureau ascertained this number as the amount of people whose right to vote is denied or abridged in Texas. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014) (finding that 608,470 registered voters lacked the requisite ID that a voter identification law mandated for voting). Note that this is obviously an imperfect estimate, because it only considers the voter identification law, but also not all citizens without a proper identification are necessarily encumbered by the law. But the number is sufficient for a simple hypothetical. For this hypothetical, we can also use the Census Bureau's most recent estimates of population and CVAP. *Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU, [https://www.census.gov/rdo/data/voting\\_age\\_population\\_by\\_citizenship\\_and\\_race\\_cvap.html](https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html) [<https://perma.cc/2RRH-ZP7T>]. Under this most recent estimation, Texas's total population was 25,639,375, which would be the state's basis for apportionment if that number is found as the total population in a census that does not utilize Section Two. Utilizing Section Two with our hypothetical numbers, however, we would calculate Texas's new basis of apportionment this way:

$$x = P * \left[ \frac{c-n}{n} \right] = 25,639,375 * \left[ \frac{16,200,040 - 608,470}{16,200,040} \right] = 25,639,375 * (0.96) = 24,676,366.$$

Thus, in this hypothetical, Texas's new basis of representation would be 24,676,366 instead of 25,639,375. That number is almost one million people lower. In 2010, the average size of each congressional district was significantly lower—710,767, KRISTIN D. BURNETT, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT 1 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<http://perma.cc/QT2H-5E79>], so there is a chance that Texas would receive one fewer representative in this hypothetical. But that of course would depend upon how much other states' bases of representation are lowered under Section Two, as well.

165. See Letter from George H. Brown, Dir., Bureau of the Census, to Ogden Reid, Representative, U.S. House of Representatives (Oct. 20, 1979), <https://foiaonline.regulations>



Voting rights advocates may need to force the Census Bureau's hand.

Between the 1940s and early 1970s, several activists attempted to enforce Section Two through litigation, but courts balked and claimed that such lawsuits were not justiciable. Some claimed that this was a political question that could not be adjudicated by the courts.<sup>166</sup> Other courts simply insisted that the plaintiffs lacked standing.<sup>167</sup> But the Supreme Court has since made clear that a state or its citizens have standing to sue the Census Bureau and Secretary of Commerce regarding apportionment when that state could gain congressional seats from a change in apportionment procedures.<sup>168</sup> First, although apportionment cases raise “special concerns,” the Court has consistently followed *Baker v. Carr*<sup>169</sup> by insisting that the Political Question Doctrine does not bar the Court from deciding such cases; in fact, “the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”<sup>170</sup> And in multiple cases, the Court has upheld standing for plaintiffs (both private citizens and states) who believed that a different census methodology would lead to more favorable apportionment for their state.<sup>171</sup> The Court even upheld standing in a challenge to the census plan before the census actually occurred, pointing to an expert's indication that it was “substantially likely” that voters would experience harms in their representation due to the census.<sup>172</sup> These apportionment injuries are redressable by the courts because “[v]ictory would mean a declaration leading, or an injunction requiring, the Secretary to substitute a new ‘report,’”<sup>173</sup> and courts expect the Secretary of Commerce, President, and other officials to then follow the courts' “authoritative interpretation of the

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.gov/foia/action/public/view/request?objectId=090004d2807c14c0 [https://perma.cc/97J6-B8JH] (“Section 2 of the 14th Amendment was not used in 1960 and will not be used in 1970 in making these computations, inasmuch as the Congress has made no provision for implementing this Section.”).

166. *See, e.g.,* *Daly v. Madison Cty.*, 38 N.E.2d 160, 167 (Ill. 1941) (“This suit is, obviously, an attempt to ask the court to do indirectly what it cannot do directly,—i.e., pass on a purely political question.”).

167. *E.g.,* *Sharrow v. Brown*, 447 F.2d 94, 96–97 (2d Cir. 1971) (affirming a dismissal based on lack of standing).

168. *See* *Utah v. Evans*, 536 U.S. 452, 464 (2002) (affirming standing for Utah in a suit against the Secretary of Commerce over the Census Bureau's use of sampling procedures in the census); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 333–34 (1999) (affirming standing for numerous individual voters in a suit over the Census Bureau's use of sampling procedures in the census); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (affirming standing for Massachusetts and two of the state's registered voters in a suit over the Census Bureau's allocation of overseas employees to various states for purposes of congressional apportionment).

169. 369 U.S. 186 (1962).

170. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992); *see also* *Franklin*, 505 U.S. at 801 n.2 (following *U.S. Department of Commerce v. Montana* to reject the argument that the political question doctrine barred subject matter jurisdiction).

171. *Evans*, 536 U.S. at 460–64 (citing *Franklin*, 505 U.S. at 803 (plurality opinion)).

172. *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 333–34.

173. *Evans*, 536 U.S. at 463.

census statute and constitutional provision” by apportioning in a way that could net the plaintiff’s state additional congressional seats.<sup>174</sup> The justiciability of lawsuits about the census and apportionment is thus no longer in question.

It is now possible for states and their citizens to argue in court that the Census Bureau should tabulate for purposes of apportionment consistent with the requirements of Section Two so that the state might receive more congressional representation.<sup>175</sup> States best positioned to do that may be those—like Maine, Minnesota, and Illinois—that do not require photo identification when voting and also allow voter registration to occur on the same day as voting.<sup>176</sup> Both voter identification and registration are areas where states legally abridge the right to vote. And voter identification requirements are growing popular, as they were recently allowed by the Supreme Court despite still imposing a “burden on voters’ rights.”<sup>177</sup> Meanwhile, many states impose strict voter registration deadlines, also allowed by the Court,<sup>178</sup> despite voter registration’s history as a tool to limit voting rights.<sup>179</sup> More importantly, one can convincingly argue that both voter identification requirements and voter registration deadlines actually “abridge” the right to vote of a significant number of Americans.<sup>180</sup>

So, absent Census action otherwise, one of the states without these so-called “rational restrictions on the right to vote”<sup>181</sup> should sue the Secretary of Commerce and Director of the Census seeking enforcement of Section Two. Minnesota could easily stand to gain from such a lawsuit, for instance. Minnesota has been consistently projected to lose a congressional seat after the 2020 apportionment, but a small change in population counts could alter

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174. *Id.* at 464 (quoting *Franklin*, 505 U.S. at 803).

175. *See, e.g., Evans*, 536 U.S. at 464 (allowing Utah to sue over alleged defects in the census in order to increase its representation); *Franklin*, 505 U.S. at 803 (allowing Massachusetts and its voters to do the same).

176. *Compare Same Day Voter Registration*, NAT’L CONF. ST. LEGISLATURES (June 2, 2015), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [http://perma.cc/L4KK-NK5Z] (listing states with same day voter registration), with Wendy Underhill, *Voter Identification Requirements*, NAT’L CONF. ST. LEGISLATURES (Oct. 6, 2015), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [http://perma.cc/EN78-LMU3] (cataloguing each state’s voter-identification laws).

177. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202–04 (2008).

178. *See Marston v. Lewis*, 410 U.S. 679, 679–80 (1973) (per curiam) (upholding a fifty-day deadline).

179. *See Tokaji, supra* note 103, at 456–61 (describing a history of voter registration, which often “served the less worthy end of allowing those in control of the administration of elections to impede their political opponents’ supporters from participating”).

180. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014) (noting that the Texas identification law potentially disenfranchises 4.5% of voters); ESTELLE H. ROGERS & EMMANUEL CAICEDO, DEMOS, SAME-DAY REGISTRATION 1–2 (2014), <http://www.demos.org/sites/default/files/publications/SameDayRegistration-2015.pdf> [http://perma.cc/Y3E7-QZ83] (showing a consistent trend of higher voter turnout in states with same-day registration than in all other states).

181. *Crawford*, 553 U.S. at 189.

that result.<sup>182</sup> Thus, even if enforcing Section Two only means a small adjustment in lowering other states' apportionment bases, Minnesota could avoid losing that congressional seat.<sup>183</sup> Minnesota should argue that the Census Bureau ought to enforce Section Two by counting disenfranchised voters in each state, taking into account factors such as voter-registration and voter-identification laws. Upon potential success in the lawsuit, the census would alter its 2020 Census Plan by incorporating Section Two's mandates and reflect those changes in its reapportionment report to the President.

Although it is unclear how many states would gain and lose congressional seats from Section Two, the 2020 apportionment could count vote denials and abridgments in a way that actually benefits states (like Minnesota) that do not create barriers to the ballot while other states would receive fewer congressional representatives than they otherwise would have. A clear message would be sent to legislators throughout the country: Make it harder for your constituents to vote only if you are willing to risk representation in Congress.

#### Conclusion

*Shelby County* incited new discussion among voting rights activists seeking to protect the rights that were previously protected by the Voting Rights Act's preclearance regime, but that discussion has been too limited. Enforcement of Section Two is a powerful protection to add to today's post-*Shelby* legal regime. Section Two enforcement would protect voting rights in a way that, absent a new constitutional amendment, no other law can. And the updated Census Act delegates Congress's broad constitutional census authority to the Secretary of Commerce, making the Census Bureau pivotal in the fight to protect voting rights. Without needing to wait on an ever-deadlocked Congress, the Census Bureau should accept its responsibility under the law or a court should compel it to do so. Accepting and enforcing the Constitution, the census in 2020 and beyond would profoundly protect Americans' right to vote.

—*Michael Hurta*

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182. See Kevin Diaz, *South by Southwest, Minnesota on Cusp of Losing Political Clout*, STAR TRIB.: HOT DISH POL. (Jan. 3, 2014, 4:59 PM), <http://www.startribune.com/minnesota-on-cusp-of-losing-political-clout-in-2020-census/238649961/> [<http://perma.cc/53G7-3NJZ>] (explaining Minnesota is projected to lose a seat because "America's population growth skews South and West"); Press Release, Election Data Servs., *New Census Estimates Show Slight Changes for Cong. Apportionment Now, but Point to Larger Changes by 2020* (Dec. 23, 2014), [http://www.electiondataservices.com/wp-content/uploads/2014/10/NR\\_Appor14bwTablesMaps.pdf](http://www.electiondataservices.com/wp-content/uploads/2014/10/NR_Appor14bwTablesMaps.pdf) [<http://perma.cc/KS65-7VRL>] (estimating the 2020 reapportionment numbers based on current apportionment practices).

183. Minnesota's population would be comparatively larger.