WHO IS EXCLUDED FROM THE BASIS OF REPRESENTATION? THE TRUMP APPORTIONMENT MEMORANDUM AND SECTION 2 OF THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

On July 21, 2020, the Trump Administration announced its intention to exclude undocumented aliens from the census count used for the interstate apportionment of the House of Representatives.[2] This memorandum is remarkably devoid of legal arguments to support such an exclusion. It cites the Constitution just twice. The first citation is to the Census Clause:

> In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (Article I, Section 2, Clause 3).

The second citation is to a piece of the Representation Clause: "[T]he Constitution requires the 'persons in each State, excluding Indians not taxed,' to be enumerated in the census."[3] It then asserts:

> that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term "persons in each State" has been interpreted to mean that only the "inhabitants" of each State should be included.[4]

The memorandum made clear the *political* rationale for the proposed policy: "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws

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[2] Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (Jul. 23, 2020), https://www.federalregister.gov [http://perma.cc/M4MS-Q576].
[3] *Id.* (quoting U.S. CONST. art. I, § 2, cl. 3).
[4] *Id.* at 44680.

passed by the Congress should not be rewarded with greater representation in the House of Representatives."[5]

On July 24, 2020, just three days later, the State of New York, along with twenty-one other states, the District of Columbia, fifteen cities and counties, and others, sued the Trump administration, challenging the legality of the proposed exclusion on both constitutional and statutory grounds.[6]

The Trump administration attempted to add support to their legal argument as the case quickly worked its way to the Supreme Court. In a filing to the district court, they argued:

> If anything, the debates over the Fourteenth Amendment on which Plaintiffs rely indicate that the rationale the Framers offered for including aliens in the apportionment base do not apply to illegal aliens. Specifically, various legislators made clear that unnaturalized aliens should be included in the apportionment base precisely *because the law provided them with a direct pathway to citizenship*—mainly, an oath of loyalty and five years of residence in the United States, *see* Act of Apr. 14, 1802, 2 Stat. 153.[7]

Call this the *pathway to citizenship* argument.

The Trump administration took a different tack in its opening brief to the Supreme Court and claimed, to the contrary:

> [T]hat an alien lacks permission to be in this country, *and may be subject to removal*, is relevant to whether he has *sufficient ties* to a State to rank among its "inhabitants."[8]

Call this the *removal* argument.

In its reply brief to the Supreme Court, the Trump administration argued:

> Appellees come closer to a viable theory of representation in asserting that apportionment should include "all the

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[5] *Id.*

[6] New York v. Trump, 485 F. Supp. 3d 422, 434 (S.D.N.Y 2020), *vacated on standing grounds*, 592 U.S. (2020).

[7] Memorandum of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction at 37, New York v. Trump, 485 F. Supp. 3d 422 (S.D.N.Y 2020) (20-CV-5770) (emphasis added).

[8] Brief for the Appellants at 30, Trump v. New York, 592 U.S. (2020) (No. 20-366) (emphasis added).

> members of a State or community" who "must all share its burdens," (citation omitted), but *of course illegal aliens might not shoulder common federal-law burdens like military service or taxation*.[9]

Call this the *obligations* argument.

In an amicus brief, Trump ally Representative Morris "Mo" Brooks of Alabama and others made an additional argument (presented here in outline form) not made by the Trump administration:

> A. IF a state denies or abridges the right to vote of any of its adult citizens
> B. THEN those citizens are removed from the basis of representation because they have been denied the right to vote
> C. THEREFORE illegal aliens, who cannot vote, should be removed from the basis of representation.[10]

Call this the *lack of suffrage* argument.

During oral argument before the Supreme Court, Acting Solicitor General Jeffrey B. Wall argued "that at least some illegal aliens" should be excluded from the apportionment base because they "lack enduring ties to the states."[11] Call this *the enduring ties* argument.

There are serious flaws with each of these arguments. The historical figures cited in the Trump filings who made the *pathway to citizenship* argument were correct that some aliens had a pathway to citizenship when the Fourteenth Amendment was ratified, but not all aliens. The statute cited in the Trump filing began, "[t]hat any alien, being *a free white person*, may be admitted to become a citizen of the United States, or any of them, on the following conditions, . . ."[12] In 1870 Congress extended the offer of

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[9] Reply Brief for the Appellants at 18, Trump v. New York, 592 U.S. (2020) (No. 20-366) (emphasis added). The Institute on Taxation and Economic Policy estimates that in 2022 undocumented immigrants paid $59.4 billion in federal taxes and another $37.3 billion in state and local taxes. *See* CARL DAVIS, MARCO GUZMAN, & EMMA SIFRE, TAX PAYMENTS BY UNDOCUMENTED IMMIGRANTS 2 (2024).

[10] *See* Brief for U.S. Reps. Morris Jackson "Mo" Brooks, Jr., Bradley Byrne, and Robert Aderholt as Amici Curiae in Support of Appellants at 18–19, Trump v. New York, 592 U.S. (2020) (No. 20-366).This argument was also made by the Cato Institute in Evewel v. Abbott, 578 U.S. 54 (2020).*See* Brief of the Cato Institute and Reason Foundation as Amici Curiae Supporting Appellants at 19, Evenwel v. Abbot, 578 U.S. 54 (2014) (14-940). *See also* Thomas A. Berry, *The New Federal Analogy: Evenwel v. Abbott and the History of Congressional Apportionment*, 10 N.Y.U J. L. & Liberty 208, 254 (2016).

[11] Transcript of Oral Argument at 6, Trump et al., 131 S. Ct. 530 (2020) (No. 20-366).

[12] Naturalization Law of 1802, Pub. L. No. 7-28, 1 Stat. 153 (emphasis added).

naturalization "to aliens of African nativity and to persons of African descent"[13] *and no others*.[14] The *removal* argument is flawed for a very different reason. To be sure, "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."[15] However, if the *removal* argument proves anything, it proves far too much. Many other aliens may be subject to removal.[16] If the removal argument were valid then potentially all aliens should be eliminated from the apportionment basis because they might be deportable.

The *obligations* argument ignores relevant law and its history. The income tax imposed by the 1861 Tax Act covered "every person residing in the United States" without regard to citizenship or immigration status.[17] So did the Tax Acts of 1894[18] and 1913.[19] Current tax law imposes a tax on "every individual."[20] It makes no distinction between citizens and resident aliens.[21]

Conscription followed a different path. An 1864 Act obliged declarant aliens and any alien who had ever voted to serve in the military if called upon by the President.[22] The 1917 Selective Service Act required declarant, non-enemy aliens to register.[23] The 1940 Act required all resident aliens to register and all declarant aliens to serve.[24] Less than a fortnight after Pearl

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[13] Naturalization Law of 1870, Pub. L No. 41-254, § 7, 16 Stat. 254, 256.

[14] *See* Act of Jul. 14, 1870 (amending § 2169 Rev. Stat.) (1870). As late as 1940 Congress denied naturalization to non-whites from Asia or Europe. *See* Naturalization Act of 1940, Pub. L. No. 76-853, § 302, 54 Stat. 1137, 1140 (1940). In 1952 Congress finally lifted all racial restrictions to naturalization. *See* Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239.

[15] 8 U.S.C. § 1227(a)(1)(A).

[16] *See* 8 U.S.C. § 1227(a) ("Any alien … in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: …"). I count 3,264 words in § 1227, just over one percent of them, thirty-five, appear in § 1227(a)(1)(A).

[17] Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (hereinafter *Revenue Act of 1861*).

[18] Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894).

[19] Underwood-Simmons Tariff Act, Pub. L. No. 63-16, § II, 38 Stat. 114, 166 (1913) (hereinafter *Revenue Act of 1913*).

[20] I.R.C. § 1(c). This is the text for single filers. There is similar text for married individudals filing jointly, head of households, and married filing separately. *See id.* at § 1(a), § 1(b) and § 1(d).

[21] However, the acts do distinguish between non-resident aliens and others. In some cases, non-resident aliens pay higher taxes on some classes of income than resident aliens. I.R.C. § 871. For the distinction between resident and non-resident aliens *see* I.R.C. § 7701(b)(1)(A)-(B).

[22] Act of Feb. 24, 1864, ch. 13, §§ 6, 18, 13 Stat. 6, 7, 9 (1864).

[23] Act of May 18, 1917, ch. 15, §§ 2, 40 Stat. 76, 77 (1917) (hereinafter *Selective Draft Act of 1917*).

[24] Act of Sept. 13, 1940, ch. 719, §§ 2, 3(a) 54 Stat. 885, 886 (1940).

Harbor, Congress extended the obligation to serve to all aliens except those willing to forego a path to citizenship.[25] Under current law all aliens *except* lawfully admitted, nonimmigrant aliens are required to register and to serve if the draft were reinstituted.[26]

The *lack of suffrage* argument, like the *removal* argument, proves too much:

> [T]he Framers of the Fourteenth Amendment … were evidently intending that only citizens would be counted in the apportionment base. …This fact lends further credence to a reading of the Apportionment Clause that not only *permits* the exclusion of illegal aliens in apportionment, but *requires* the exclusion of illegal aliens.[27]

If the *lack of suffrage* argument were valid, it would exclude all aliens from the basis of apportionment because no state grants full suffrage to any aliens,[28] and federal law makes it a crime for an alien to vote for federal office in almost all cases.[29]

I have previously exposed the flaws in the *enduring ties* argument by explaining how the Twenty-Seventh Congress reclassified the Africans on *The Amistad* as whole persons as they were returning Africa in January, 1842. They had formerly been counted as three-fifths of a person as they were awaiting final disposition of their case after a federal district court declared them to be free persons to be transported back to their homeland at the direction of the President.[30]

The remainder of this Article explains more deeply the flaws in these arguments, especially the *lack of suffrage* argument grounded in Section 2 of the Fourteenth Amendment.

Part II presents the history that refutes the *obligations* argument. Part II-A presents a very brief history of an alien's obligation to pay income tax. Part II-B presents a history of alien's exposure to conscription. Each of these obligation schemes began during Civil War, just before the adoption of the Fourteenth Amendment. Part III briefly reviews what Congress has

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[25] Act of July 3, 1941, ch. 273, § 2, 55 Stat. 544, 545 (1941).

[26] 50 U.S.C. §§ 3802(a), 3803.

[27] Brief for U.S. Reps. Brooks et al., as Amici Curiae *supra* note 10, at 19.

[28] Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (Feb. 1931). In some states, Aliens voted in every presidential election through 1924.

[29] 18 U.S.C. § 611(a).

[30] Michael L. Rosin, *How Were the Africans "Taken in* The Amistad*" Counted for the 1842 Apportionment of the House? A Lesson Relevant to Trump et al. v. New York et al.*, 61 CONN. HIST. REV. 94, 97–99, 102. (2022).

required the census to count, especially prior to 1866, serving as a prelude to Part IV.

Part IV is the heart of this Article, presenting a detailed history of the evolution of Section 2 of the Fourteenth Amendment in the Thirty-Ninth Congress. It demonstrates that Congress very carefully considered and rejected proposals to base representation on the number of citizens registered to vote or citizens with aliens excluded. Instead, Congress adopted text that only excludes "Indians not taxed."[31] No other individual persons were excluded from the basis of apportionment. The Indian Citizenship Act of 1924 extended citizenship, and therefore, taxation to all Native Americans born in the United States.[32] Thus, there are no longer any constitutional exclusions from the basis of representation. If a state is subject to the Penalty Clause with, say a ten percent penalty, the clause does not identify ten percent of a state's population and exclude them. Instead, the entire state—meaning each and every person in the state—is penalized by that amount. Understanding how the Penalty Clause actually works has greater importance now than when *Trump v. New York* was decided. Neither the *per curiam* opinion, nor the dissent in that case, attempted to explain how the Penalty Clause works.[33] Unfortunately, a 2023 federal district court opinion does, but it misinterprets the clause.[34] As a result, the interpretation that the Penalty Clause identifies individuals, and excludes them from the basis of representation, now has the patina of judicial authority.

Part V summarizes how an understanding of the outcome of the evolution of Section 2 of the Fourteenth Amendment directly refutes the *lack of suffrage* argument. It also renders moot the distinction between citizens and aliens central to the *removal* argument and the *pathway to citizenship* argument.

II. OBLIGATIONS

The *obligations* argument supposes "illegal aliens might not shoulder common federal law burdens like military service or taxation."[35] The government of the Union first imposed these two great obligations of membership in a political community during the Civil War. Since then,

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[31] U.S. CONST., amend. XIV, § 2. ("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.").

[32] Act of Jun. 2, 1924, ch. 234 § 43 Stat. 253 (1942).

[33] Trump v. New York, 592 U.S. 125, 134 (Breyer, J., dissenting) (2020).

[34] Citizens for Const. Integrity v. Census Bureau, 669 F. Supp. 3d 28, 29 (D.D.C. 2023), aff'd, 115 F.4th 618 (D.C. Cir. 2024). *See infra* text accompanying notes 305–306. I have been an historical consultant for Citizens in this case.

[35] *See supra* text accompanying note 9.

aliens have been obligated to pay income tax. The Civil War Congresses chose not to extend conscription to all aliens. During World War II Congress made that extension and it remains in place today.

A. INCOME TAX

The Constitution empowers Congress "[t]o lay and collect Taxes, Duties, Imposts and Excises."[36] A person can avoid paying duties, imposts and excises by not engaging in the activities or transactions on which they are levied. Taxes are another matter. The Direct Tax Acts of 1798, 1813, and 1815 obligated the owners of dwellings, land, and enslaved persons to pay the taxes imposed.[37] None of these Acts exempted aliens from taxation. Indeed, neither "alien" nor "citizen" appears in any of these Acts.

Nor did the Tax Act of 1861, which imposed the direct tax on dwellings and land, but not enslaved persons, exempt aliens in any way.[38] This Act imposed the first income tax in our history on "every person residing in the United States."[39] The Tax Act of 1894, invalidated a year later, imposed an income tax on "every citizen of the United States, whether residing at home or abroad, *and every person residing therein*."[40] Once again, the word "alien" never appeared in the Act. The 1913 Tax Act, enacted following ratification of the Sixteenth Amendment, was even clearer about its coverage of aliens—it imposed a tax on income on "every citizen of the United States, whether residing at home or abroad, and *to every person residing in the United States, though not a citizen thereof*."[41]

Current law obligates that all residents must pay tax on their income regardless of citizenship or immigration status.[42] Not surprisingly, aliens who are "lawful permanent resident[s] of the United States" are considered resident aliens for tax purposes.[43] So are aliens who are not lawful permanent residents, provided such individuals were present in the United States on at least 31 days during the calendar year, and the sum of the

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[36] U.S. CONST., art. I, § 8, cl. 1.

[37] *See* Act of Jul. 9, 1798, ch. 75, § 2, 1 Stat. 597–598 (obsolete 1798); Act of Jan. 9, 1813, ch. 90, § 4, 3 Stat. 22, 26 (1813); repealed by Act of Mar. 3, 1815, ch. 90, § 4, 3 Stat. 164, 166 (repealed 1815).

[38] Act of Aug. 5, 1861, ch. 45, § 13, 12 Stat. 292, 297 (repealed 1862).

[39] Act of Aug. 5, 1861 ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862). (Imposing tax on "income, rents, or dividends accruing upon any property, securities, or stocks owned in the United States by any citizen of the United States residing abroad.").

[40] Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894) (emphasis added) (invalidated by Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)).

[41] Underwood Tariff Act, ch. 16, § 2.A, 38 Stat. 114, 166 (1913) (emphasis added).

[42] I.R.C. § 1.

[43] I.R.C. § 7701(b)(1)(A)(i).

number of days on which such individual was present in the United States during the current year and the two preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days[44]:

In the case of days in:	The applicable multiplier is:
Current year	1
1st preceding year	1/3
2nd preceding year	1/6

In 2020, Census Day was June 1, the 153rd day of the year. Accordingly, any alien continuously present in the United States since at least October 2, 2019, satisfied the 183-day test and was a resident alien for tax purposes on Census Day.

Non-resident aliens do not escape tax obligations. In general, non-resident aliens are obligated to pay a flat thirty-percent rate of income tax on salaries and wages.[45] For tax year 2023, citizens and resident aliens filing singly paid a lower rate on the first $182,100 of taxable income.[46] Aliens have always been subject to income tax. Certainly, they are not the only persons who have avoided this obligation.

B. CONSCRIPTION

The conscription obligation, in other words, the liability for training and service in the armed forces, did not reach aliens in general until just after Pearl Harbor.[47]

1. From the Framing to the Civil War

The Second Militia Act of 1792 limited the militia to "free able-bodied white male citizens."[48] During the War of 1812, Congress considered a conscription bill that embraced "the free white male population" of the United States.[49] While persons of color were excluded, aliens were not.

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[44] I.R.C. §§ 7701(b)(1)(A)(ii), 7701(b)(3)(A).

[45] I.R.C. § 871(a)(1)(A). Employers are obligated to withhold this tax at the same thirty percent rate. *See* I.R.C. § 1441(a)-(b).

[46] Your Federal Income Tax For Individuals, Tax Guide 2023, IRS Publication 17, at 125, https://www.irs.gov [https://perma.cc/4PMS-C7UY]. To have a total tax rate of thirty percent in tax year 2023, a citizen or resident alien filing singly would have needed to have a taxable income of just under $400,000.

[47] *See infra* text accompanying note 86 and text of note 90.

[48] Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (1792) (repealed 1903).

[49] "An act making further provision for filling the ranks of the regular army, by classifying the free male population of the United States," H.R. 7, 13th Cong. (1814).

Concerned that the Constitution did not grant it the power to implement conscription, Congress did not pass this bill.[50] During the antebellum period some state constitutions limited their militia to free white male citizens.[51] Others limited their militia to free white *persons* regardless of citizenship status.[52]

2. The Civil War

After two years fighting a Civil War with a volunteer army augmented by state militias, on March 3, 1863, Congress enacted the nation's first Conscription Act. It declared:

> That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, . . . are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.[53]

A year later Congress extended conscription to any non-declarant alien who voted "under the laws of any state, territory, or of the United States."[54]

3. World War I

The struggle to preserve the Union was a *civil* war. On April 6, 1917 Congress declared war against Germany.[55] The next day the House Committee on Military Affairs began hearings on conscription.[56] Congress ultimately enacted the Selective Service Act that made "all male citizens, or male persons not alien enemies who have declared their intention to

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[50] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 172–75 (2001). Searching the relevant pages of the 28 ANNALS OF CONG. (1814), for "alien" or "aliens" returns no relevant matches, https://babel.hathitrust.org [http://perma.cc/6XG8-7WCU].

[51] IOWA CONST. of 1846, art. VII, § 1 (1846); IOWA CONST. of 1857, art. VI, § 1 (1857); OHIO CONST. of 1851, art. IX, § 1 (1851).

[52] ILL. CONST. of 1818, art. V, § 1 (1818); ILL. CONST. of 1848, art. VIII, § 1 (1848); IND. CONST. of 1816, art. VII, § 1 (1816); IND. CONST. of 1851, art. XII, § 1 (1851); KY. CONST. of 1850, art. XII, § 1 (1850).

[53] Act of Mar. 3, 1863, ch. 75, § 1, 12 Stat. 731 (1863).

[54] Act of Feb. 24, 1864, § 18, 13 Stat. 6, 9 (1864).

[55] Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 (1917).

[56] *Increase of Military Establishment: Hearings Before the H. Comm. Mil. Aff.*, 65th Cong. (1917).

become citizens, between the ages of twenty-one and thirty years" liable for military service.[57]

During a House floor debate on April 26, 1917, Texas Democrat Thomas Blanton suggested there were "over 1,700,000 white aliens and 68,000 other aliens in the United States who could be selected, if necessary, at least to do industrial or agricultural service for the country."[58] Two days later, George Francis O'Shaunessy, a Rhode Island Republican, presented that matter somewhat more indelicately:

> I have submitted an amendment which occurred to me a few moments ago, bringing within the operation of this law a class of men whom I would denominate alien slackers. I refer to that particularly despicable class of men who reside in a country, take its privileges, its riches, its emoluments, but give no allegiance to its flag, who give no allegiance to any flag; men who have a reverence for foreign potentates and a liking for their pictures and other emblems of foreign governments, but a sad lack of regard and affection for the Stars and Stripes or of American patriots.[59]

After a brief, unresolved debate on the constitutionality of inducting non-declarant aliens into service,[60] the House rejected the O'Shaunessy amendment by voice vote.[61] When Indiana Democrat William Cox offered an amendment calling for registration of non-enemy, non-declarant aliens, the House rejected the amendment by a vote of 32-57.[62]

4. World War II

On March 14, 1940, the House Census Committee reported an apportionment bill that called for the President to "exclude aliens from the population totals in the several States and apportion the number of Representatives accordingly."[63] The New York Times reported the

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[57] Selective Service Act of 1917, 40 Stat. 76 § 2 (amending the act of August 1, 1894, in which only declarant aliens could enlist during peacetime).

[58] 55 CONG. REC. 1283 (1917). At the time, "other" aliens not of African descent had no path to citizenship.

[59] *Id.* at 1518.

[60] *Id.*

[61] *Id.* at 1522.

[62] *Id.* at 1538.

[63] "Apportioning Representatives in Congress," H. REP. NO. 76-1787, at 1 (1940).

committee approved this proposal by a vote of 13-1.[64] A month later, the House voted to delete the alien exclusion provision by a resounding vote of 209-23.[65]

That July, during Senate Hearings on the Selective Service Act of 1940, Chairman

Morris Sheppard, a Texas Democrat, and retired Major General Amos A. Fries, former Chief of the Chemical War Service of the War Department[66] engaged in the following colloquy:

> The CHAIRMAN: [W]hat would be your position on the drafting of aliens?
> General Fries: Drafting of aliens?
> The CHAIRMAN: Yes.
> General Fries: Well, I would draft them and make them do the dirty work in the camps and everywhere else. I would not exempt anybody.[67]

As reported to the Senate, S.4164 required "every male alien residing in the United States, who is between the ages of twenty-one and thirty-one, on the day or days fixed for registration, to present himself for and submit to registration."[68] However, it limited *conscription* to declarant aliens (of appropriate age).[69] That is how the bill passed the Senate.[70]

Several members of the House argued that actual service should be extended beyond just declarant aliens. Wisconsin Republican John Schafer asked, "[w]hat about the many alien refugees who are coming here now and hollering 'Stop Hitler?' Why not include them in the draft so that they can prepare to help stop him?"[71] Kentucky Republican John Robsion argued:

> If this Nation is in imminent peril these aliens—and there are hundreds of thousands of them that are British—should be conscripted as American boys are or be required to

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[64] *House Seats Bill Bars Alien Count*, N.Y. TIMES (March 13, 1940), at 14, https://timesmachine.nytimes.com [http://perma.cc/K4ZJ-E8TA].

[65] 86 CONG. REC. 4386 (1940). No roll call is recorded.

[66] *Compulsory Military Training and Service: Hearing on S. 4164 Before the S. Comm. on Mil. Aff.*, 76th Cong. 304 (1940).

[67] *Id.* at 306.

[68] S. REP. NO. 76-2002, at 2 (1940), *reprinted in* A Bill to Protect the Integrity and Institutions of the United States Through a System of Selective Compulsory Military Training and Service: Compulsory Mil. Training and Serv. Report of the Comm. on Mil. Affairs on S. 4164 (1940).

[69] *Id.* § 3(a), at 1. Hereinafter "of appropriate age" is always assumed.

[70] 86 CONG. REC. 11142 (1996).

[71] *Id.* at 11371.

> return to Great Britain and there enlist in behalf of their own country. Why conscript the American boys to help protect Great Britain and then exempt from the draft British subjects in this country?[72]

Somewhat more cynically, Texas Democrat R. Ewing Thomason told his colleagues:

> If the cowboys on the plains of Texas and those from the cotton fields of the South have been patriotic enough to voluntarily enlist up to the full strength of the desired quota, tell me, if you please, why the young men of alien extraction from the sidewalks of New York and other great cities, who are spending most of their time criticizing the Government under which they live, should not be compelled to serve?[73]

Michigan Republican Jesse Wolcott stated the community obligations argument best as he introduced an amendment to extend actual service to non-declarant aliens:

> An alien who comes to this country seeking asylum from the atrocities of totalitarian dictators, seeking protection from political degeneracy and from economic autocracy should at least be willing to fight to protect these principles of government under which he seeks protection. Surely we should not put the citizen youth of this Nation into the ironic position of having to fight to protect those who have fled from socialism, communism, fascism, and nazi-ism in foreign countries.[74]

During the short debate on Wolcott's amendment, Francis Case, a South Dakota Republican, noted, "[a]liens, whether they have declared their intention or not, are counted for the purpose of congressional apportionment."[75] Shortly after that the House rejected Wolcott's amendment 71-122.[76]

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[72] *Id.* at 11404.
[73] *Id.* at 11425.
[74] *Id.* at 11664.
[75] *Id.* at 11666.
[76] 86 CONG. REC. 11667 (1996). No roll call was recorded.

As signed into law on September 16, 1940, the statute required "every male alien residing in the United States" to register with Selective Service.[77] On October 4, Secretary of War Henry Stimson wrote to Attorney General Robert H. Jackson "requesting an 'interpretative ruling upon the meaning of the words 'male alien residing in the United States' under section 2.' "[78] Secretary Stimson desired to know whether "male alien residing in the United States" included the following classes of aliens:

> Temporary alien visitors for business or pleasure; transient aliens; bona fide alien seamen entering the United States temporarily in pursuit of their calling as seamen; treaty aliens; alien university students; and aliens on an immigration status which limits their sojourn in the United States to a specified future date, or to the happening of a specific contingency, and during which period such persons are under the supervision of the immigration authorities.[79]

Attorney General Jackson responded:

> It is my opinion that section 2 requires *every alien* between the ages of twenty-one and thirty-six *who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established,* to present himself for and submit to registration.[80]

On December 7, 1941, "the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan."[81] The next day, Congress declared war on Japan.[82] On December 11, Congress declared war on Germany[83] and then on Italy.[84] With those preliminaries out of the way, each of the two chambers turned its attention to conscription and concurrently considered bills to extend conscription to

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[77] Act of Sept. 16, 1940, ch. 720, § 2, 54 Stat. 885 (1940).
[78] 39 Op. Att'y Gen. 504 (1940).
[79] *Id.*
[80] *Id.* at 505 (emphasis added).
[81] 87 CONG. REC. 9504, 9519 (1941).
[82] S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941) [hereinafter Declaration of War on Japan].
[83] S.J. Res. 119, Pub. L. No. 77-331, 55 Stat. 796 (1941) [hereinafter Declaration of War on Germany].
[84] S.J. Res. 120, Pub. L. No. 77-332, 55 Stat. 797 (1941) [hereinafter Declaration of War on Italy].

"every male alien residing in the United States."[85] During a December 16 hearing of the Senate Military Affairs Committee, Washington Democrat Monrad Wallgren asked General Lewis Hershey, the Selective Service Director, "[w]hat do you do with a man who happens to be traveling through this country for a week or 10 days?" [86] Hershey's aide, Captain Francis Keesling, interjected, "[w]e obtained a ruling from the Attorney General on that."[87] Following that, Hershey responded, "[t]he Attorney General said if you are here, you are residing here, whether you are for a day or whether you go off the ship for the afternoon."[88]

Thus, when Congress extended liability for training and service as well as registration to include all male citizens and "every other male person residing in the United States,"[89] it did so with Attorney General Jackson's opinion setting the expansive limits as to who qualified as aliens "residing in the United States."[90]

5. From the Cold War to the Present Day

The draft expired on March 31, 1947[91] and Congress reinstituted it the next year.[92] As enacted, the 1948 Selective Service Act reinstated the obligation to register and the obligation to serve to "every male citizen of the United States, and every other male person residing in the United

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[85] For H.R. 6215 as introduced, see *Amending the Selective Training and Service Act of 1940: Hearing on H.R. 6215 Before the H. Comm. on Mil. Affs.*, 77th Cong. 1 (1941). For S. 2126 as introduced, see *Extension of Liability for Military Service and Registration of Manpower: Hearing on S. 2126 Before the S. Comm. on Mil. Affs.*, 77th Cong., 1 (1941).

[86] *Extension of Liability for Military Service and Registration of Manpower: Hearing on S. 2126 Before the S. Comm. on Mil. Affs.*, 77th Cong., 57 (1941).

[87] *Id.*

[88] *Id.*

[89] Selective Training and Service Act of 1940, §§ 2, 3, 55 Stat. 844, 845. As approved, H.R. 6215 (1941) extended liability to "every male alien, and every noncitizen national of the United States, residing in the United States," in other words, "citizens of any insular possession of the United States whose citizens owe allegiance to the United States." "Amending the Selective Training and Service Act of 1940," H.R. REP. NO. 77-1508 (1941), at 1, 4. A conference committee chose to adopt the language of S. 2126 as approved extending liability to "every other male person residing within the United States." "Amending the Selective Training and Service Act of 1940," H.R. REP. NO. 77-1554 (1941), at 3. The statute allowed resident aliens who were citizens or subjects of a neutral country to apply for relief from liability. Any person *making* such an application would "thereafter be debarred from becoming a citizen of the United States." Selective Training and Service Act of 1940, § 3, 55 Stat. 844, 845. Enemy aliens *could be* inducted for training and service if "acceptable to the land or naval forces." *Id.*

[90] *See supra* text accompanying note 80, at 505.

[91] Act of Jun. 29, 1946, ch. 522, § 7, 60 Stat. 341, 342 (1946) (extending the Selective Training and Service Act of 1940); Statement by the President on the Expiration of the Selective Training and Service Act (Mar. 31, 1947), https://www.trumanlibrary.gov [http://perma.cc/SH84-AKZQ].

[92] Selective Service Act of 1948, ch. 625, 62 Stat. 604.

States."[93] Another provision of the act allowed any alien not otherwise exempt from induction into service to request an exemption prior to induction. By making such an application, the alien was prohibited from becoming a United States citizen.[94]

In 1951, Congress slightly narrowed the scope of alien obligation. Registration with Selective Service continued to apply to "every male citizen of the United States, and every other male person now or hereafter in the United States,"[95] but aliens without permanent residence status who had not **"**remained in the US for at least a year" were exempt from service.[96]

Twenty years later, Congress eliminated this slight exemption as it made "every person required to register . . . liable for training and service in the Armed Forces of the United States."[97] At the same time, Congress made an exception in the registration provision when it specified that:

> The provisions of this section shall not be applicable to any alien *lawfully admitted* to the United States *as a nonimmigrant* under section 101(a) (15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.[98]

Almost by definition, an *illegal alien* contemplated by the Trump memorandum[99] cannot be "an alien *lawfully admitted* to the United States as a nonimmigrant."[100]

The law currently requires "every male citizen of the United States, and every other male person residing in the United States" except lawfully admitted, nonimmigrant aliens, are obligated to register with Selective Service, and are "liable for training and service in the Armed Forces of the

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[93] Selective Service Act of 1948, ch. 625, §§ 3, 62 Stat. 604, 605–06. The House version of the bill required non-declarant aliens to register but not to serve. *See* "Selective Service Act of 1948," S. REP. No. 80-2438, at 44-45 (1948).

[94] Selective Service Act of 1948, ch. 625, § 4(a), 62 Stat. 604, 606.

[95] Selective Service Act of 1948, ch. 144, § 2(c), 65 Stat. 75, 76 (amendments to sec. 1, §3(c)) (1951).

[96] Selective Service Act of 1948, ch. 144, § 2(d), 65 Stat. 76. The statutes retained that provision that an alien applying for an exemption was barred from becoming a citizen. *Id.*

[97] Military Selective Service Act of 1967, Pub. L. No. 92-129, 85 Stat. 348 (amendments to § 101(a)(2)) (1971). This statute also eliminated an alien's ability to apply for exemption to induction.

[98] *Id.* (emphasis added).

[99] *See Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. at 680.

[100] *See* Military Selective Service Act of 1967, Pub. L. No. 92-129, 85 Stat. 348 (amendments to § 101(a)(2)) (1971).

United States."[101] A 1982 memorandum inside the Reagan administration's Justice Department noted that "[i]llegal aliens, who are the appropriate sex and age, are required to register with Selective Service."[102]

In 1973, Congress and the Nixon administration chose not to extend the draft past June 30, 1973.[103] If aliens of any sort do "not shoulder common federal-law burdens like military service" as Trump argued,[104] it is because Congress has decided that *no one is legally obligated* to shoulder such burdens. *If* Congress reinstated a draft without further amendment to 50 U.S.C. §§ 3802(a) and 3803 then, as Attorney General—and later Associate Justice of the Supreme Court—Robert H. Jackson explained, the obligation would extend to "every alien . . . who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established" except for those specifically exempted by positive enactment of Congress in 1971.[105]

That 1971 enactment, now codified as 50 U.S.C. § 3802(a), references section 1101(a)(15) of title 8.[106] Section 1101(a) defines the terms "alien" to mean "any person not a citizen of national of the United States," and the term "immigrant" to mean "every alien except an alien who is within one of the following classes of nonimmigrant aliens."[107]

The specification of nonimmigrant aliens in § 1101(a)(15) takes over 4,300 words, not quite the length of the original Constitution drafted in 1787. For purposes of this paper, the most relevant classes of nonimmigrant aliens are those "having a residence in a foreign country which he has *no intention of abandoning* and who is visiting the United States temporarily for business or temporarily for pleasure"[108] and aliens "in immediate and continuous transit through the United States, for a period not to exceed 29

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[101] 50 U.S.C. §§ 3802, 3803.

[102] *Selective Service Prosecutions: Oversight Hearing Before the Subcomm. on Cts., C.L., and the Admin. of Just. of the H. Comm. on the* Juidiciary, 97th Cong. 68, 70 (1982) (statement of Lawrence Lippe, Chief, Gen. Litig. and Legal Advice Section, Crim. Div. to D. Lowell Jensen, Assistant Att'y Gen., Crim. Div.) https://catalog.hathitrust.org.

[103] David E. Rosenbaum, *Nation Ends Draft, Turns to Volunteers*, N.Y. TIMES, Jan. 28, 1973 at 1, https://timesmachine.nytimes.com [https://perma.cc/8EM4-4W6U]. For the 1971 authorization of the draft through June 1973, *see* Military Service Act of 1967, Pub. L. No. 92-129, § 101(w), 85 Stat. 348, 353.

[104] *See supra* text accompanying note 9.

[105] *See* Military Selective Service Act of 1967, Pub. L. No. 92-129, 85 Stat. 348 (amendments to § 101(a)(2)) (1971).

[106] 50 U.S.C. § 3802(a).

[107] 8 U.S.C. §§ 1101(a)(3), (a)(15).

[108] 8 U.S.C. § 1101(a)(15)(B) (emphasis added).

days."[109] Eight of the other nineteen provisions include the "intention of abandoning*"* criterion as a qualifier to other criteria stated.[110]

In 1976, Congress shifted statutory responsibility for "tak[ing] a decennial census *of population* . . ." from the Director of the Census, to the Secretary of Commerce.[111] Just two years earlier, Congress demonstrated that it could distinguish between citizens and legally admitted aliens from other aliens in statutory language. The Privacy Act of 1974 specified "the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence."[112]

When Congress has needed to classify aliens it has done so in the statutory language. But Congress has never done so in the context of the Census. Nor has Congress used classifications such as those in 8 U.S.C. § 1101, in Census statutes.[113] These classifications also did not appear in the Trump administration's July memorandum.[114]

III. WHAT HAS THE CENSUS COUNTED?

The Representation Clause states:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, ... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of Ten years, in such Manner as they shall by Law direct.[115]

Who has Congress by law directed to be counted?

The Census Act of 1790 required the census marshals "to cause the number of the *inhabitants* within their respective districts to be taken; omitting in such enumeration Indians not taxed, ..."[116] It continued:

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[109] 8 U.S.C. § 1101(a)(15)(C)(i).

[110] 8 U.S.C. §§ 1101(a)(15)(F), (H), (J), (M), (N), (O), (P), (Q).

[111] Census Act of 1976, ch. 5, 90 Stat. 2459, 2461 (codified as 13 U.S.C. § 141) (emphasis added).

[112] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1897, (codified as 5 U.S.C. § 552a(a)(2)). The term "individual" appears an additional 147 times in the act.

[113] 13 U.S.C. §141.

[114] Brief for the New York Immigration Coalition, at 42 n.22, Trump v. New York, 592 U.S. (2020).

[115] U. S. CONST. art. I, § 2, cl. 3.

[116] Census Act of 1790, ch. 2, 1 Stat. 101 (emphasis added).

> the name of every person, who shall be an inhabitant of any district, but without a settled place of residence, shall be inserted in the column of the aforesaid schedule, which is allotted for the heads of families, in that division where he or she shall be on [Census Day] . . . .[117]

During a House debate on the Census Act of 1800, Albert Gallatin suggested that if the term "inhabitant" were not sufficiently defined, then Congress ought to write that clarification into the law.[118] It did not. Thus, for every Census Act from 1800 until 1839, the language remained the same. This text endured in the Census Acts of 1810, 1820, 1830, and 1839.[119]

On February 26, 1840, President Van Buren signed into law a bill making several amendments to the 1839 Census Act.[120] One of them mentioned *transients* for the first time in a Census Act:

> That in the enumeration of *transient persons*, the name of every person who shall be an inhabitant of any district or territory without a settled place of residence, shall be inserted in the column of the schedule which is allotted for the heads of families in the division where he or she shall be on the said first day of June, eighteen hundred and forty.[121]

In 1850, the first permanent Census Act continued to call for an enumeration of *inhabitants*,[122] and that is the language found in the Revised Statutes of 1873.[123] In 1879, Congress amended the statutory text to call for "a census of the *population* . . . of the United States,"[124] and that language remains in the statutes today.[125]

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[117] Census Act of 1790, ch. 2, § 5, 1 Stat. 103.

[118] 10 ANNALS OF CONG. 214 (1801).

[119] Census Act of 1810, ch. 17, 2 Stat. 564; Census Act of 1820, ch. 25, 3 Stat. 548; Census Act of 1830, ch. 40, 4 Stat. 383; Census Act of 1839, ch. 80, 5 Stat. 331.

[120] Census Act of 1839, ch. 3, 5 Stat. 368.

[121] Census Act of 1839, ch. 3, § 2, 5 Stat. 368 (emphasis added). The other amendments dealt with compensation and administrative matters.

[122] Census Act of 1850, ch. 11, 9 Stat. 428 (emphasis added).

[123] Census Act of 1850, ch. 11, § 2176, 18 Stat. 381.

[124] Census Act of 1880, ch. 195, 20 Stat. 473 (emphasis added).

[125] Census Act of 1889, ch. 319, 25 Stat. 760; Census Act of 1899, ch. 419, 30 Stat. 1014; Census Act of 1909, ch. 2, 36 Stat. 1; Census Act of 1919, ch. 97, 40 Stat. 1291; Census Act of

The original Representation Clause commands:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[126]

Section 2 of the Fourteenth Amendment revised the basis of apportionment for Representatives:

> 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.[127]

Nothing in the language of either Section 2 of the Fourteenth Amendment or the original Representation Clause in the Constitution prevents the Census from counting persons not included in the apportionment basis. The 1889 Census Act authorized the Census to count *all* Indians *not* taxed and those taxed.[128] Whatever reason Congress might have had for gathering this information, it was not needed for the apportionment of Representatives.

1929, ch. 28, 46 Stat. 21 (codified as 13 U.S.C. § 141(a)). While these Acts mention gathering information on *inhabitants*, they call for a census of *population*.

[126] U.S. CONST., art. I, § 2, cl. 3.

[127] U.S. CONST., amend. XIV, § 2 (emphasis added).

[128] Census Act of 1889, ch. 319, § 9, 25 Stat. 760, 763.

Following ratification of the Fourteenth Amendment, the following information *is needed* to apportion Representatives among the states: (1) the number of persons in each state, (2) the number of non-felon, non-rebel adult citizens in each state whose right to vote has been denied or abridged, and (3) the number of adult citizens in each state.[129] How did that come to be?[130] Why are aliens included in the apportionment basis?

IV. THE EVOLUTION OF SECTION 2 OF THE FOURTEENTH AMENDMENT

Momentous changes occurred in the nine-month interval between the expiration of the Thirty-Eighth Congress on March 3, 1865, and the convening of its successor nine months later; the Civil War ended, Abraham Lincoln was assassinated, and Andrew Johnson succeeded him as president. Additionally, the constitutional abolition of slavery was close to being accomplished with the impending ratification of the Thirteenth Amendment.[131] Presidential reconstruction placed the states formerly in rebellion on a path to full reintegration into the Union government, albeit with state constitutions that continued to disenfranchise their Black

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[129] Evenwel v. Abbott, 578 U.S. 54, 103 n.7 (2016) (Alito, J. concurring.) ("Needless to say, the reference in this provision to 'male inhabitants … being twenty-one years of age' has been superseded by the Nineteenth and Twenty-sixth Amendments.").

[130] In his concurrence Justice Alito lamented "regrettably—the remedy was never used during the long period when voting rights were widely abridged." *Id.* They are still abridged today. As I have noted previously, a partial penalty can be computed by simply assuming that all adults are citizens and just counting the number of adults whose voting rights have been denied or abridged. *See* Michael L. Rosin, *So You Want to Enforce Section 2 of the Fourteenth Amendment?*, MEDIUM, Jul. 10, 2019, https://medium.com [http://perma.cc/9RR9-HHXW]. Congress has never authorized any governmental actor to count the second and third items just listed. A suit working its way through federal court in the District of Columbia seeks to have some governmental actors do just that. *See infra* text accompanying notes 305–06.
At the height of the Civil Rights Revolution Bonfield, Zuckerman, and Bayer each noticed that Congress had never mandated collection of the number of adult citizens whose voting rights had been denied or abridged. *See* Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L. Q. 108 (1960); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961); Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RSRV. L. REV. 965 (1965). For further historical analysis of Section 2 from the same era see William W. van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33 (1965); and George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WEST. POL. Q. 829 (1970).

[131] Act of Dec. 18, 1865, 13 Stat. 774. (1865). In this proclamation, Secretary of State William H. affirmed that three-fourths of all thirty-six states in the Union were needed for ratification, thereby affirming the Johnson (and Lincoln) administration's position that the states formerly in rebellion had never left the Union. *Id.* at 775.

population slavery abolished.[132] The formerly enslaved population of the eleven states in rebellion would now be counted as whole persons rather than just three-fifths, even if they remained disenfranchised. Based on the 1860 census, these states would see their share of the nation's apportionment basis grow by a bit more than one-tenth, from 26.04 percent to 29.23 percent.[133] When expressed in terms of seats in the House of Representatives, the formerly enslaved population, which had secured the former slave states eighteen representatives in the House, and eighteen electors in the Electoral College, would now secure twelve more in each of those bodies. The general consensus was that ten of these twelve seats would be in the states formerly in rebellion.[134]

Surely, the North had not waged the Civil War so that the South would benefit by continuing to disenfranchise its Black population as everyone expected. As Ohio Republican Representative William Lawrence noted: "If this injustice can be tolerated and perpetuated, and the late rebel States shall soon be admitted to representation, they will enjoy, as the reward of their perfidy and treason, increased political power. This will reward traitors with a liberal premium for treason."[135]

A constitutional amendment was needed to align the apportionment of the House of Representatives (and the Electoral College) with the new constitutional order created by the abolition of slavery. It would reward former slave states that gave the franchise to their Black population, and penalize those that did not.

A. THE FIRST PROPOSALS

The Thirty-Ninth Congress was not writing on a blank slate. The Thirty-Eighth House had narrowly approved a resolution submitted by Wisconsin Republican Ithamar Sloan. The resolution stated:

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[132] By December 1865, seven of the states formerly in rebellion adopted new state constitutions. All of them contained provisions that limited suffrage to adult white males. *See,* ALA. CONST. of 1865, art. VIII, § 1; ARK. CONST. of 1864, art. IV, § 2; FLA. CONST. of 1865, art. VI, §§ 1, 2; GA. CONST. of 1865, art. V, § 1; LA. CONST. of 1864, art. III, §§ 3,14; S.C. CONST. of 1865, art. IV, § 6; VA. CONST. of 1864, art. III, §§ 1, 7. The other four former states of the Confederacy retained their constitutional bans on black suffrage. *See* MISS. CONST. of 1832, art. III, §§ 1, 4; N.C. CONST. of 1835, amend. I, §§ 2, 5; TENN. CONST. of 1834, art. IV, §§ 1, 6; TEX. CONST. of 1845, art. III, § 1.

[133] For the state-by-state count of enslaved and free persons in the 1860, *see* JOS. C.G. KENNEDY, PRELIMINARY REPORT OF THE EIGHTH ON THE EIGHTH CENSUS 134–35 (1862). The percentages given have not deducted West Virginia's census data from Virginia's.

[134] *See, e.g.*, the remarks of Roscoe Conkling and William Lawrence. CONG. GLOBE, 39th Cong., 1st Sess. 357, 404. (1866). These estimates all supposed that the size of the House would not remain fixed at 241 but be increased to accommodate the increase in the apportionment basis.

[135] *Id.*

> That the Judiciary Committee be instructed to inquire into the expediency of so amending section 2 of article 1 of the Constitution of the United States that representatives in Congress shall be apportioned among the several States which may be included within the Union according to their respective numbers of qualified electors, and to report by bill or otherwise.[136]

On February 6, 1865, Charles Sumner proposed that "Representative shall be apportioned among the several States which may be included within this Union, according to the number of male citizens of age having in each State the qualifications of electors of the most numerous branch of the State Legislature."[137] The Senate committed Sumner's proposal to the Judiciary Committee.[138] Neither Sloan's initiative, nor Sumner's proposals went any further in the Thirty-Eighth Congress.[139]

Thaddeus Stevens made a proposal on the very first day of the Thirty-Ninth Congress:

> Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters; and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners. Congress shall provide for ascertaining the number of said voters. A true census of the legal voters shall be taken at the same time with the regular census.[140]

He did not hesitate to tell his colleagues that he was making this proposal "so as to secure perpetual ascendancy to the party of the Union."[141]

Maine Republican Representative James Blaine subjected Stevens' proposal in particular, and all voter-based apportionment proposals in general, to a withering attack even before Stevens could formally submit to the Joint Committee on Reconstruction. Blaine recognized that "[t]he direct object thus aimed at, as respects the rebellious States, has been so generally

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[136] CONG. GLOBE, 38th Cong. 2d Sess. 6–7 (1864).
[137] *Id.* at 604.
[138] *Id.*
[139] *Id.*
[140] CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865).
[141] *Id.* at 74.

approved."[142] However, he was able to see farther and comprehend "the incidental evils which the proposed constitutional amendment would inflict on a large portion of the loyal States."[143] Blaine made a three-pronged attack against suffrage-based apportionment. He first contended that, "[a]s an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot."[144]

With that abstract proposition declared, Blaine moved on to the second prong of his attack, the impact on individual states. "The ratio of voters to population differs very widely in different sections, varying in the States referred to from a minimum of *nineteen per cent* to a maximum of *fifty-eight per cent*., and the changes which this fact would work in the relative representation of certain States would be monstrous."[145]

To demonstrate the impact of his claim, Blaine compared California to Vermont and then Indiana to Massachusetts.

	Population	Ratio	Voters	Ratio	Projected Representatives	Ratio
California	358,110	1.14	207,000	2.38	8	2.67
Vermont	314,369		87,000		3	
Indiana	1,328,710	1.09	316,824	1.39	15	1.50
Mass.	1,221,432		227,429		10	

Table 1 - Blaine's Comparison of California to Vermont and Indiana to Massachusetts

California, with a population almost fifteen percent larger than Vermont's, would have nearly three times the representation. Indiana, with a population less than ten percent greater than Massachusetts, would have fifty percent more representation.[146]

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[142] *Id.* at 141.

[143] *Id.*

[144] *Id.*

[145] *Id.* (emphasis in original).

[146] CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866). Blaine did not provide the source for his census data, voter numbers, or projected apportionments in his speech. Nor did he do so in his memoirs. *See* JAMES G. BLAINE, 2 TWENTY YEARS OF CONGRESS 194 (1886).
The final 1860 census reported the following aggregate population counts for these four states: California 379,994, Vermont 315,098, Indiana 1,350,428, and Massachusetts 1,231,066. JOSEPH C.G. KENNEDY, POPULATION OF THE UNITED STATES IN 1860: COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 598 (1864), http://www2.census.gov [http://perma.cc/G76A-BFWY] [hereinafter FINAL 1860 CENSUS]. Only California had a different count (362,196) in the preliminary census report. KENNEDY, *supra* note 133, at 131.

The final prong of Blaine's attack was a projected race to the bottom as states sought to enfranchise persons ever less worthy of the vote in his opinion.

> There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters, and all conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. *Foreigners would be invited to vote on a mere preliminary "declaration of intention,"* and the ballot, which cannot be too sacredly guarded and is the great and inestimable privilege of the American citizen, would be demoralized and disgraced everywhere.[147]

The only possible restraint to this descent would be congressional control of suffrage qualifications, which was not in the cards.[148]

Blaine had an alternative to present. After reading the original Representation clause, Blaine noted that the Thirteenth Amendment made the Three-Fifths clause "meaningless and nugatory . . . being thus a dead letter [that] might as well be formally struck out" and be replaced.[149] He then presented his alternative.

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by *(taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color.)"*[150]

Blaine applied his exclusion to direct taxation as well as representation, something Stevens' proposal had not done. In so doing, Blaine had unwittingly offered a tax break to the states that would

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[147] CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (emphasis added).

[148] *Id. Accord* Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 153–54 (2015); MARK GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 30 (2023).

[149] CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) .

[150] *Id.* at 141–42 (emphasis in original).

disenfranchise their black citizens.[151] Perhaps Blaine actually understood this consequence of retaining much of existing constitutional text when he suggested his approach would, "secure the right of suffrage to the colored population throughout the South in a very few years"[152] rather than leading to a race to the bottom as states competed to see which could expand the franchise to the most unworthy.

Stevens' proposal and Blaine's proposal are examples of the two primary approaches considered by the Thirty-Ninth Congress.[153] A *direct* approach apportioning the House directly on the number of persons (usually limited to adult male citizens) qualified to vote. And an *indirect* approach apportioning the House according to the total population (usually excluding Native Americans) or citizens, and then applying a penalty by making reductions based on the scope of voter disenfranchisement. Whether the revised apportionment basis would apply to direct taxes as well as representation would be an additional topic of debate in the Joint Committee on Reconstruction and the two houses of Congress.

B. THE JOINT COMMITTEE PROPOSES A PENALTY-BASED APPROACH

When the Joint Committee took up the issue at its first working session, a day after Blaine's remarks, Thaddeus Stevens and Roscoe Conkling immediately offered amendments to Stevens' direct, suffrage-

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[151] The Penalty Clause in any of its forms is any empty threat to the smallest states that can only receive a single representative regardless of apportionment basis. If the reduction in apportionment basis applied to direct taxation as well as representation the Penalty Clause would in fact be a Direct Tax Reduction Clause for such a state. Consider the case of Florida in 1866. Its non-white population of 62,678 represented nearly 45% of its total population of 140,425. Florida's total population was 0.45% of the nation's total population, however, its *white* population was only 0.29% of the nation's white population. If every state limited the franchise to white persons Florida's share of a direct tax burden would be reduced by just over 35%! Analysis based on data from KENNEDY, *supra* note 133, at 134–35.

[152] *Id.* at 142.

[153] There were two other proposals that do not quite fit into the two categories just presented. (1) Roscoe Conkling made two proposals that began by counting the number of United States citizens in each state and then made deductions based on the denial or abridgments of civil or political rights, or privilegesor (b) suffrage. *Id.* at 233 (Jan. 15, 1866). (2) Kansas Republican Senator James Lane proposed basing apportionment on the number of adult males. *Id.* at 1350.Early in the debates Roscoe Conklingrecognized a third variety of proposal, one that would "deprive the States of the power to disqualify or discriminate politically on account of race or color." *Id.* at 357 (Jan. 22, 1866). Several Fifteenth Amendment precursors were proposed as Congress revised the basis of apportionment. In the Senate, proposals were made by Republicans James Henderson (Mo.), *id.* at App'x 122 (Feb. 14, 1866); Samuel Pomeroy (Kan.), *id.* at 1182 (Mar. 5, 1866); Charles Sumner, *id.* at 1288 (Mar. 9, 1866); and William Stewart, *id.* at 1754 (Apr. 4, 1866). Ohio Republican James Ashley made a proposal in the House. *Id.* at 2879 (May 29, 1866). Only Sumner's proposal came to a vote and it was rejected by a margin of 8–38. *Id.* at 1288 (Mar. 9, 1866).

based proposal by restricting the basis of apportionment to adult (Stevens) male (Conkling) citizens.[154] Three days later the Committee heard proposals from Justin Morrill, George Williams, and Roscoe Conkling that were variations of the indirect approach suggested by Blaine in which apportionment bases were determined by counting all persons or citizens, and then deducting all members of disenfranchised groups.[155] Each of these proposals applied its exclusion to the basis of direct taxation and representation, and are depicted below in Table 2.

Author	Basis	Exclusion
Rep. Justin Morrill (Vermont)	Persons	All of any race or color, whose members or any of them are denied any of the civil or political rights or privileges
Sen. George Williams (Oregon)	Persons	Negroes, Indians, Chinese, and all persons, not white, who are not allowed the elective franchise by the Constitutions of the State
Rep. Roscoe Conkling (New York)	United States citizens	Whenever in any State civil or political rights or privileges shall be denied or abridged on account of race or color, all persons of such race or color

Table 2 - Penalty Clause Alternatives Considered by the Joint Committee on January 12, 1866

Massachusetts Republican Representative George Boutwell made a more radical proposal. Boutwell's proposal would have based apportionment (of representatives and direct taxes) on the number of United States citizens and prohibited "distinction in the exercise of the elective franchise on account of race or color."[156]

The Committee finished the first phase of its work on the revised basis of apportionment on January 16, 1866. It started by considering two candidate texts: Article A, inspired by Boutwell, and Article B inspired by Conkling. Both, excluded aliens from the apportionment basis. Article A states:

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[154] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 39TH CONGRESS, 1865-1867 at 41 (1969) [hereinafter JOURNAL OF THE JOINT COMMITTEE.]. The Committee rejected Justin Morrill's proposal to add a literacy requirement. In this section, "adult" means twenty-one years of age or older.

[155] *Id.* at 43–44.

[156] *Id.* at 44. Maryland Democratic Senator Reverdy Johnson also made a proposal to apportion representatives (but not direct taxes) according to the number of legal voters. It was rejected by a vote of 6–8. *Id.* at 45.

> Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.[157]

Article B states:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.[158]

By a vote of 11–3, the Committee chose the Conkling-inspired Article B, now amended to make the deduction against the basis of representation but not the basis of direct taxation.[159] Immediately following the Committee's decision, Conkling moved to change the initial basis of apportionment from United States citizens to "persons in each state, excluding Indians not taxed," a change the Committee approved by another 11–3 vote.[160] This final change put the amendment in the form delivered to the House of Representatives, which it approved by a vote of 13–1.[161] The Constitution currently reflects the following language:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed[162] [. . .] provided that whenever the elective

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[157] *Id.* at 50.

[158] *Id.* at 50–51.

[159] Yeas: Grimes, Harris, Williams, Stevens, Washburne, Morrill, Bingham, Conkling, Boutwell, Blow, and Rogers. Nays: Fessenden, Howard, and Grider. Absent: Johnson. *Id.* at 51–52.

[160] *Id.* at 52. Yeas: Grimes, Harris, Howard, Williams, Washburne, Morrill, Grider, Conkling, Boutwell, Blow and Rogers. Nays: Fessenden, Stevens, and Bingham. Absent: Johnson.

[161] *Id.* at 53. Reverdy Johnson was absent. New Jersey Democratic Representative Andrew Rogers provided the sole opposition.

[162] U.S. CONST. art. I, § 2, cl. 3.

> franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.[163]

C. THE HOUSE APPROVES THE JOINT COMMITTEE'S PENALTY-BASED APPROACH DESPITE OBJECTIONS

The House took up consideration of the Committee's proposal on January 22.[164] Members made many objections to the proposal over the ten days leading up to a final vote on January 31.

Illinois Republican John Farnsworth raised the most immediate objection to the Committee's proposal. It sanctioned a state's right to disenfranchise any portion of its citizens on account of race or color.[165] In response, John Bingham responded that the penalty embodied in the proposal no more sanctioned disenfranchisement than the death penalty sanctioned murder.[166]

With that preliminary dispute out of the way the House could focus on what the basis of apportionment ought to be. Should it be limited to voters or not? If not just voters, should it include women as well as men? Children as well as adults? Aliens as well as citizens? Once those issues were resolved, how should the penalty be calculated? Finally, should direct taxation be reduced for disenfranchisement along with representation? This debate was not purely academic for members from the free states. Although, the states formerly in rebellion were the clear target of proposals to revise the basis of apportionment, any one of the unresolved issues might have an impact on the free states.

On January 22, the very first day of the House debate, Wisconsin Republican Ithamar Sloan offered a voter-based direct approach as an alternative to the Committee's penalty-based approach.[167] Unlike Stevens' original proposal of December 4, Sloan's included alien voters, some of whom were enfranchised in Wisconsin, as well as citizen voters.[168] It also

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[163] U.S. CONST. amend. XIV, § 2.

[164] CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).

[165] *Id.* at 383. Ohio Republicans Samuel Shellabarger and Robert Schenck made similar comments. *Id.* at 405, App'x 298.

[166] CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866).

[167] *Id.* at 352. ("Sec. 1 Representatives in Congress shall be apportioned among the several States which may be included in this Union according to their respective number of qualified electors. The actual enumeration shall be made in the year 1870, and within every subsequent term of ten years, in such manner as Congress shall by law direct.")

[168] *See* WIS. CONST. of 1848, art. III, § 1.

differed from Stevens' proposal by dissociating taxation from representation.[169]

Shortly after Sloan made his proposal Roscoe Conkling amplified Blaine's concerns about states engaging in a race to the bottom to grant suffrage in order to swell their apportionment basis.[170] Anticipating concern that such an apportionment basis would shift seats out of New England, Conkling then proceeded to inundate his audience with data. He spoke "from tables, carefully prepared, and showing results under all the plans proposed with almost absolute accuracy, and with the utmost necessary accuracy."[171] Table 3 summarizes Conkling's apportionment projections by region based on the 1860 census.[172]

Region	Apportionment Basis				
	Actual (3/5 Rule)	Total Population	White Suffrage	Equal Suffrage	Committee Proposal
New England	27	26	31	27	29
Middle Atlantic	66	62	71	64	71
Midwest	65	62	67	60	69
Far West	22	21	24	24	23
South	61	70	48	66	49

Table 3 - Conkling's Summary of Proposals to Revise the Apportionment Basis – By Region

As Conkling explained it his audience, hardly any states outside the South needed to have any concerns.

> No New England State would lose a single Representative either by making white men over twenty-one, or all men over twenty-one, the basis of apportionment. On the contrary, taking white men over twenty-one as the basis, [compared to the actual 1860 apportionment] Massachusetts would gain two, and Connecticut and Maine one each. New York would gain four. The losses would not be in the East. Upon a basis of male voters, black and white,

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[169] CONG. GLOBE, 39th Cong., 1st Sess. 352 (1866). ("Sec. 2. Direct taxes shall be apportioned among the several States according to the appraised value of taxable property therein respectively. The rule of appraisement of taxation shall be uniform.").

[170] *Id.* at 357. ("California may let her Chinese and half-breeds vote, Oregon her Indians, and any State its aliens.")

[171] *Id.* at 357.

[172] I have derived the same results using the population data presented by Conkling. Conkling presents census data for white and Black males twenty years old or older. FINAL 1860 CENSUS, *supra* note 146, at 592–97. In the absence of census data for twenty-one-year-olds, he makes this data the basis for his suffrage-based apportionment projections.

> Ohio and Illinois would lose one Representative each, and Pennsylvania two. California, almost alone of the States heretofore free, would gain. Her extraordinary abundance of male population would double her representation. It is now three; it would be six.[173]

Table 4 recapitulates Conkling's statements about particular states.

Region	Apportionment Basis				
	Actual (3/5 Rule)	Total Population	White Suffrage	Equal Suffrage	Committee Proposal
Massachusetts	10	9	12	10	11
Connecticut	4	4	5	4	4
Maine	5	5	6	5	6
New York	31	29	35	31	34
Ohio	19	18	19	17	20
Illinois	14	13	15	13	15
Pennsylvania	24	22	24	22	25
California	3	3	6	6	3

Table 4 - Conkling's Summary of Proposals to Revise the Apportionment Basis – Selected States

Conkling neglected to tell his audience that he was making his comparison of suffrage-based apportionments with the actual, three-fifths rule-based apportionment of 1862 rather than the Committee's proposal. Perhaps some of his audience recognized the representation numbers and had no need to be told that the comparisons were with the actual apportionment. More importantly, he also failed to mention that his analysis supposed that all adult males had the vote, including aliens, his worst case, race to the bottom scenario.

Two days later, Ohio Republican Robert Schenck introduced a proposal that limited the apportionment basis to adult male *citizens* eligible to vote for the most numerous branch of their state legislature[174] following

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[173] CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

[174] *Id.* at 407 (1866). It is no coincidence that the proposals and arguments for suffrage-based apportionment came from west of the Ohio-Pennsylvania boundary. Once the January work of the Joint Committee was done, almost all the proposals and arguments for suffrage-based apportionment came from the somewhat less immigrant-laden states west of that boundary (and north of the Ohio River), many of which enfranchised their declarant aliens. *See* IND. CONST. of 1851, art. II, § 2; KAN. CONST. of 1859, art. 5, § 1, cl. 2; MICH. CONST. of 1850, art. VII, § 1; MINN. CONST. of 1857, art. VII, § 1; MO. CONST. of 1865, art. II, § 18; OR. CONST. of 1857, art. II, § 2; WIS. CONST. of 1848, art. III, § 1. Michigan also granted suffrage to any alien resident on June 24, 1835, or January 1, 1850, the dates its first two constitutions were adopted. Schenck originally made a suffrage-based proposal on December 9. CONG. GLOBE, 39th Cong., 1st Sess. 9 (1865). (No text is given.) He then made the Joint Committee proposal on January 24, a day

a vigorous defense of suffrage-based apportionment by fellow Ohioan William Lawrence.

In his remarks two days earlier, Conkling noted that without a constitutional amendment, "one white man [would] have as much share in the government as three other white men merely because he lives where blacks outnumber whites two to one."[175] This was unconscionable to Lawrence, who believed that to "make the political power of every voter precisely equal all over the land[,]" it was necessary "... that the Constitution shall be so amended as that representation shall be based on citizens of the United States who may be male adult voters."[176] Most of Lawrence's argument in favor of suffrage-based apportionment merely restated his conclusion. The Committee's proposal, he argued,

> [P]erpetuates the very political evil which to some extent it remedies. It gives representation to women, children, and unnaturalized foreigners, all declared by the laws of the States unsafe or unnecessary depositaries of political power. It disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union. [I]f it is unjust to give local political power to the South by reason of her unenfranchised freedmen, is it not unfair to give similar power to unenfranchised aliens elsewhere?[177]

Lawrence had a particular objection to including women and children as part of the apportionment basis. After noting that some states had relatively more women, children, or aliens than others, he worried that "[t]he dominions of Brigham Young, if incorporated in the Union, would become the paradise of politicians, rich in unequal political power, because

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after Godlove Orth had made the same proposal. *Id.* at 381, 407. Schenck also added a provision setting the minimum ratio of representation at one in 125,000. *Id.* On March 12, Henry Wilson offered a similar proposal in the Senate with two key modifications: (1) Adding disenfranchised rebels otherwise qualified to vote to the apportionment basis. (2) Changing the minimum ratio of representation to one in 100,000. *Id.* at 1321.

[175] CONG. GLOBE, 39th Cong., 1st Sess. 357 (1866).

[176] *Id.* at 403. No one commented that Ohio's choice of limiting suffrage to its adult male citizens would give its voters slightly more power than voters in Wisconsin, which extended the franchise to adult male declarant aliens as well as citizens. OHIO CONST. 1851, art. V, § 1; WIS. CONST. 1848, art. III, § 1. Only a constitutional amendment adding a preemptive positive grant of suffrage to the apportionment basis proposal could solve that problem.

[177] CONG. GLOBE, 39th Cong., 1st Sess. 404–05 (1866).

of the multitudinous wives and innumerable children of the Saints of Utah."[178]

Additionally, Samuel Shellabarger recognized what he considered to be the best argument for suffrage-based apportionment.

> It approximates most nearly than any other plan to the attainment of that eminent justice of counting every man as the foundation of your Government who you may compel to fight for your Government; . . . This is done by making the basis of representation nearly the same relatively as that part of society which is capable of bearing arms.[179]

However, this argument was not good enough. To Roscoe Conkling, including all persons in the apportionment basis by default was already done by the Constitution.[180] Beyond that, changing the basis of direct taxation as well as representation from all persons to just enfranchised adult male citizens would shift the burden of direct taxation among the states[181] while leaving their alien taxpayers unrepresented.[182]

John Bingham expanded on Shellabarger's argument to preserve the default basis of apportionment that would continue to apply to direct taxation and representation. Native Americans, he noted, "are not part of the body-politic of the United States until they are subject to taxation."[183] By implication, Native Americans became part of the body politic as soon as they became subject to taxation, as immigrants were the moment they arrived on our shores. Bingham saw this as part of the Framers' grand scheme to incorporate immigrants into the American citizenry:

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[178] *Id.* Interestingly, data from the 1860 census reported more men, 20,255, than women, 20,018, in what remained of the Utah Territory after Congress split off its male-heavy western and eastern parts in early 1861 to form the Nevada and Colorado Territories (in part). *See* Act of Mar. 2, 1861, ch. 83, 12 Stat. 209 (1861); Act of Feb. 28, 1861, ch. 59, 12 Stat. 172 (1861). The 1860 census counted 6,137 men and only 720 women in what would become the Nevada Territory. It counted 32,691 men and 1,586 women in the Colorado Territory, most of which Congress had created from the western part of the Kansas Territory. KENNEDY, *supra* note 133, at 135.

[179] CONG. GLOBE, 39th Cong., 1st Sess. 406 (1866).

[180] *Id.* at 359 (1866). ("There are several answers to the argument in favor of 'citizens' rather than 'persons.' The present Constitution is, and always was, opposed to this suggestion. 'Persons' and not 'citizens' have always constituted the basis.")

[181] *Id.*

[182] *Id.* at 359; *See also, id.* at 411 (comments of Illinois Republican Burton Cook); *id.* at 434 (comments of New York Republican Hamilton Ward).

[183] *Id.* at 431. Bingham favored amending the Constitution so that, "no State in this Union shall make any distinction in the right of voting between male citizens of the United States resident within its limits and over twenty-one years of age, save in the case of persons convicted of infamous crimes after due trial.".

> It will be admitted, doubtless, that the framers of the Constitution inserted this provision to encourage immigration. They did so, not only by this provision of the organic law, which declares that the whole immigrant population should be numbered with the people and counted as part of them, but by the further provision that Congress should have power to pass a uniform naturalization law, and thereby provide that the alien population, by complying with the terms of the statute, should be clothed with the dignity of citizens of the United States and invested with the rights and powers of citizens.[184]

Most importantly, Bingham understood where the immigrant population lived. "Every man knows that the great body of the that the "immigrant population of America always has been and now is confined to the free loyal States. There is no considerable portion of it found anywhere within the limits of the eleven Rebel States."[185] Thus, removing aliens from the apportionment basis would shift political power from the loyal states to the "rebel" states.[186]

The Joint Committee's proposal to penalize denial or abridgment "on account of race or color" and then deduct "all persons of such race or color" from the basis of representation raised two key issues. First, there was disagreement as to how race and color would be defined. As Pennsylvania Republican John Broomall noted, "there is a great deal of indefiniteness in both those terms, 'race' and 'color' . . . the term 'color' is nowhere defined in the Constitution or the law."[187]

Perhaps more significantly, what would distinguish denial or abridgment of the franchise on account of race or color rather than some other criterion, appearing to be facially neutral with respect to these two factors but having a disparate impact on persons of color? Indiana Republican Godlove Orth noted that Massachusetts had exclusionary literacy tests.[188] Illinois Republican Henry Bromwell recognized that some states might impose property qualifications.[189] Fellow Prairie State

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[184] *Id.* at 432.

[185] CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866).

[186] *Id.* at 1256 (an attempt to quantify this shift see the analysis following the argument of Senator Henry Wilson).

[187] *Id.* at 433.

[188] *Id.* at 380.

[189] *Id.* at 409.

Republican Jehu Baker suggested that some states would add intelligence and other unanticipated qualifications that might appear to be racially neutral, but would disenfranchise large numbers of their people.[190] Indiana's Michael Kerr, a Democrat, asked how the penalty would work if a state like Ohio enfranchised its Black population to vote for members of the House, but not for state offices.[191]

The House heard a number of proposals. Rhode Island Republican Thomas Jenckes, who added taxes to the list of facially neutral qualifications intended to deny the Black vote, wanted to amend the Constitution to specify qualifications to vote for members of the House and for presidential electors.[192] Baker made a less intrusive proposal to add text banning property qualifications to the Committee's proposal.[193] New York Republican Hamilton Ward proposed grandfathering all existing qualifications and penalizing all new ones.

> That all persons who are deprived of the elective franchise in any state by reason of a tax or property qualification, or by reason of any other qualification which (other qualification) was not in force on the 1st day of January, 1866, in the State where the same is applied, shall be excluded from the basis of representation.[194]

Bromwell had a Gordian-knot alternative to the two problems facing the Committee's race-based proposal.

> Representatives in the House of Representatives of the United States shall be apportioned among the different States in the same proportion to the whole number of inhabitants in each State respectively (excluding Indians not taxed) as the number of male citizens qualified by the laws of such States to vote for representatives in the most numerous branch of the Legislature thereof is to the whole number of such citizens in such States, the enumeration and

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[190] *Id.* at 385. Indiana Republican Ralph Hill read the text of the proposal to allow a state to deny the vote to anyone "who has ever hitherto been a slave." *Id.* at 387.

[191] CONG. GLOBE, 39th Cong., 1st Sess. 457 (1866). Article I, § 2 requires qualifications to vote for members of the House of Representatives to coincide with qualifications to vote for members of the most numerous branch of a state legislature.

[192] CONG. GLOBE, 39th Cong., 1st Sess. 386 (1866).

[193] *Id.* at 385.

[194] *Id.* at 434.

> apportionment thereof to be made in such manner as Congress shall by law direct.[195]

This was the first proportional penalty, non-race-based proposal made, the progenitor of the final text of Section 2. Moreover, it specified the offices for which a state needed to provide universal male citizen suffrage in order to avoid a penalty.

A day later, John Broomall made a slightly different proposal that added the proviso that the male citizens be adults and used explicit proportionality language.

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed: *Provided* That whenever the elective franchise shall be denied by the constitution or laws of any State to any proportion of its male citizens over the age of twenty-one years, the same proportion of its population shall be excluded from its basis of representation.[196]

Broomall also made clear that the penalty he specified would not be limited to reasons of race or color.

> If Massachusetts should declare by law that she will not let her citizens who cannot read and write vote, and if by that there is one hundredth part of her male population over the age of twenty-one denied the elective franchise, why, Massachusetts must submit to have that proportion excluded from her basis of representation.[197]

On January 29 Thaddeus Stevens had the proposed amendment recommitted to the Joint Committee where, two days later, it underwent only the minor revision of removing the reference to "direct taxes" in the opening clause.[198] Later that day Stevens reintroduced the Committee's proposal on the House floor.

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[195] *Id.* at 409.

[196] *Id.* at 433. Note that Broomall's proposal did not list the office(s) for which disenfranchisement would trigger the penalty. Broomall made the same proposal on January 29. *Id.* at 493.

[197] *Id.*

[198] JOURNAL OF THE JOINT COMMITTEE, *supra* note 154, at 58.

> Representatives ~~and direct taxes~~ shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed: *Provided.* That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.[199]

Immediately presenting his proposal, Stevens allowed Robert Schenck to introduce an alternative proposal based on the number of adult male citizens qualified to vote for the most numerous branch of a state's legislature.[200] After a very brief debate, the House rejected Schenck's proposal with a vote of 29–131.[201] In spite of the objections made to the Committee's proposal, only six Republicans voted against it.[202] The other 116 Republicans voting on the measure joined four Unionists to approve the measure by a vote of 120–46. Every one of the thirty-four Democrats voting on the proposal voted against it, as did six Unionists.[203]

D. THE SENATE FAILS TO APPROVE THE INITIAL PENALTY-BASED APPROACH BECAUSE OF ITS OBJECTIONS

In spite of its smaller size, the Senate debate took place over nearly twice as many days as the House debate to accommodate the many objections raised by senators. Unlike the House vote, where party discipline ruled almost completely, twelve of thirty-five Republican senators broke rank and ultimately voted against the measure. Seven of them would later vote for the full Fourteenth Amendment package in June: James Henderson of Missouri, James Lane and Samuel Pomeroy of Kansas, William Stewart of Nevada, Charles Sumner of Massachusetts, Waitman Willey of West Virginia, and Richard Yates of Illinois.[204] The votes of these seven senators

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[199] CONG. GLOBE, 39th Cong., 1st Sess. 535 (1866). Deletion shown with strikethrough.

[200] *Id.*

[201] *Id.* at 538. Eight of the yea votes came from Illinois, including three Democrats; seven came from Ohio.

[202] *Id.* The six were John Baldwin (Massachusetts), Thomas Eliot (Massachusetts), Robert Hale (New York), Thomas Jenckes (Rhode Island), Thomas Noell (Missouri), and Henry Raymond (New York).

[203] *Id.*

[204] Edward L. Gambill, *Who Were the Senate Radicals?* 11 CIV. WAR HIST. 237, 243 (1965). Three Republicans voted against the measure in March and against the full package in June:

would have been just enough to carry the measure in March. Why did they vote against it?

Charles Sumner's position was the clearest. On the very first day of the Senate debate he told his colleagues:

> I am at a loss to understand the origin of *a proposition which seems to me nothing else than another Compromise of Human Rights* . . . it is proposed to admit in the Constitution the twin idea of Inequality in Rights, and thus openly set at naught the first principles of the Declaration of Independence and the guarantee of a republican government itself, *while you blot out a whole race politically*.[205]

A month later, just two days before the Senate voted on the proposal, Sumner enumerated his many objections:

> [It] is *an admission of the idea of Inequality of Rights founded on race and color . . . it sanctions the acknowledged tyranny of taxation without representation.* A whole race, constituting a considerable part of the people of the United States, and embraced under the words of the preamble to the Constitution, "We the people," are left without representation in the Government, but nevertheless held within the grasp of taxation of all kinds, direct and indirect, tariff and excise, State and national. [It is] a new form of *concession to State Rights*. [It would be] *the constitutional recognition of an Oligarchy, Aristocracy, Caste and Monopoly, founded on Color* . . . petrifying in the Constitution the wretched *pretension of a white man's Government* . . . . What is the concession that the elective franchise may be denied or abridged "on account of race or color" but an insertion of the word "white" in the Constitution? . . . assuming what is false in constitutional law, *that color can be a qualification for an elector.*
>
> I denounce this proposition as positively *tying the hands of Congress in its interpretation of a Republican Government*,

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Edgar Cowan of Pennsylvania, James Doolittle of Wisconsin, and Daniel Norton of Minnesota. Connecticut's James Dixon and Missouri's Gratz Brown voted against the measure in March, and absented themselves in June. Gambill classified Pomeroy, Sumner, and Yates as radicals; Brown, Henderson, Lane, Stewart, and Willey as moderates; and Cowan, Dixon, Doolittle, and Norton as conservatives.

[205] CONG. GLOBE, 39th Cong., 1st Sess. 673 (1866) (emphasis added).

> so that under the guarantee clause it must recognize an Oligarchy, Aristocracy, Caste, and Monopoly founded on color, with the tyranny of taxation without representation as republican in character, which I insist they are not.
> I denounce the proposition as *positively tying the hands of Congress in completing and consummating the abolition of slavery*.
> And lastly, I denounce this proposition as a *Compromise of Human Rights*, the most immoral, indecent, and utterly shameful of any in our history.[206]

Samuel Pomeroy shared Sumner's indignation if not his verbosity. Pomeroy viewed the Committee's proposal as a mechanism to make the Constitution itself an instrument of injustice by which "colored men may fight for the Government, be taxed for the Government, but shall go unrepresented and disenfranchised forever."[207]

William Pitt Fessenden had a simple answer to the Sumners and Pomeroys of the Senate. The Committee's proposal no more condoned disenfranchisement on the grounds of race or color than a thirty-day prison sentence condoned theft.[208]

There was no such simple response to the issue raised by James Henderson, sponsor of the Thirteenth Amendment, who represented Missouri, which had been a loyal slave state during the Civil War and had recently adopted a new constitution continuing to limit suffrage to whites.[209] Was the Committee's proposed amendment "intended to deny representation to a non-voting population," or was it "intended to secure suffrage to the negro?" If the former, why were women, minors, and aliens included in the basis of apportionment? If the latter, how would the amendment operate effectively in the northern states with Black populations so small that their disenfranchisement would not likely lead to any loss of representation?[210]

To the Sumners, Pomeroys, and Henderson, Black suffrage and the threats to it, led inexorably to one of two solutions: either a constitutional amendment barring disenfranchisement on grounds of race or color (or previous condition of servitude), or suffrage-based apportionment. Henderson himself proposed a proto-Fifteenth Amendment during the

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[206] *Id.* at 1225–28 (emphasis in original).
[207] *Id.* at 1183.
[208] *Id.* at 1279.
[209] MO. CONST. of 1865, art. II, § 18 (1865).
[210] CONG. GLOBE, 39th Cong., 1st Sess. 673 (1866) (emphasis added).

debate on the Committee's proposal.[211] So did Sumner,[212] Pomeroy,[213] and Richard Yates.[214] William Stewart would not be far behind, offering a Fifteenth Amendment precursor in early April.[215] However, the Senate was not ready to ban disenfranchisement on account of race or color,[216] and rejected the proposals made by Henderson[217] and Yates.[218]

That left suffrage-based apportionment as the alternative, one that Sumner endorsed, at least in theory, when he noted that "strictly the representative system is the agent of legal voters."[219] On March 1, Stewart told the Senate that at the proper time, he would offer the following text as a replacement for the Committee's proposal:

> Representatives shall be apportioned among the several States which may be included within this Union according to the number of male citizens of the United States in each State over twenty-one years of age qualified by the laws thereof to choose members of the most numerous branch of its Legislature. And direct taxes shall be levied in each State according to the value of real and personal property situated therein not belonging to the State nor the United States.[220]

A week later, Massachusetts Republican Henry Wilson saw the real problem with apportionment schemes based on adult male citizen suffrage, *indeed with any apportionment scheme excluding aliens*:

> But suppose, Mr. President, the rebel States give the negro the right of suffrage, then they would stand in power just where they stand now. How is it with the loyal States? It throws out of the basis at least two and a half millions of

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[211] *Id.* at 702, 1283.

[212] *Id.* at 1229, 1288.

[213] *Id.* at 1182.

[214] *Id.* at 1287. This proposal also included a precursor to the Privileges or Immunities Clause of the Fourteenth Amendment.

[215] *Id.* at 1754. This proposal also included precursors to the Due Process and Equal Protection Clauses of the Fourteenth Amendment

[216] Maltz, *supra* note 148, at 153–54; GRABER, *supra* note 148, at 30.

[217] The vote was 10–37. CONG. GLOBE, 39th Cong., 1st Sess. 1283 (1866).

[218] The vote was 7–38. *Id.* at 1288. The Senate also rejected Sumner's proto-Equal Protection Clause. *Id.* at 1287.

[219] *Id.* at 1229.

[220] *Id.* at 1103. James Doolittle of Wisconsin offered an amendment to base on the number of adult male voters, without regard to their citizenship. *Id.* at 673.

> unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives in the other House and fifteen presidential electors; and they do not go from the East to the West, but from the North to the South.[221]

It is difficult to reconstruct the argument leading to the specific quantitative conclusions Wilson presents. He never presented tables as Conkling did.[222] One number he presents, 233,651 foreign-born persons in the former rebel states, exactly matches data in the 1860 census. Another number, 3,850,628 foreign-born in the loyal states, comes very close.[223] Rather than try to reconstruct Wilson's analysis, we present two of our own.[224]

Wilson expressed concern that the loyal states would lose representation for their alien population if the South enfranchised its black population.[225] However, even if every state, not just the ones in the South, kept its Black population disenfranchised, this still would have occurred. These are our two analyses.

In 1860 there was no constitutional imperative for the census to distinguish citizens from aliens or, specifically, adult citizen men from everyone else. Instead, the census distinguished the foreign-born from the native born,[226] and, of course, it distinguished whites from Blacks, and further distinguished Blacks who were enslaved from those who were free.[227] Not having any census data on naturalization rate by state, sex, or age, we parameterize it, taking its values at intervals of ten percent. Moreover, we make the following reasonable, but undoubtedly counterfactual, suppositions about race, foreign/native birth, and the naturalization rate: (1) the entire foreign-born population is white, (2) the entire Black population is native born and to be counted as citizens, (3) the naturalization rate does not very by state, and (4) the naturalization rate for adult males is identical to the overall naturalization rate. With these

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[221] *Id.* at 1256. Wilson was attempting to offer a quantified version of the claim John Bingham made in the House on January 25, 1866. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866).

[222] *See supra* text accompanying Table 3 and Table 4.

[223] The census gives a total of 4,088,215 foreign persons in all the states counted in 1860. That leaves 3,854,564 in the loyal states. FINAL 1860 CENSUS, *supra* note 146, at xxix. It is unclear how Wilson determined that over two and a half million unnaturalized foreign-born persons had not been naturalized, including roughly half of New York's 998,640 foreign-born persons.

[224] This analysis employes the Vinton method of apportionment adopted in 1850 *See infra* Part VI (Appendix) for a statement of the Vinton method and its implementation following the 1860 census.

[225] CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866).

[226] FINAL 1860 CENSUS, *supra* note 146, at xxix.

[227] KENNEDY, *supra* note 133, at 134–35.

assumptions in place, we can employ our calculated citizenry numbers as proxies for adult male citizen counts. The remaining parameter is whether to include Black population.

In the first analysis, we include the Black population to address Wilson's stated concern: the impact of excluding the alien base on the idea that no state denies the vote on the basis of race or color.

Region	1860 Actual	Naturalization Rate (Percentage)										
		100	90	80	70	60	50	40	30	20	10	0
New England	27	26	25	25	25	25	25	24	25	25	25	24
Atlantic	66	62	62	61	61	61	60	60	59	59	59	58
Midwest	65	62	62	62	62	61	61	61	61	61	61	61
Far West	22	21	20	20	20	20	20	20	20	19	19	19
South	61	70	72	73	73	74	75	76	76	77	77	79

Table 5 - Regional Impact of Excluding Aliens from Apportionment Basis *Supposing* Universal Black Suffrage

Assuming universal Black suffrage, and that the entire foreign-born population has been naturalized, a suffrage-based apportionment is equivalent to an apportionment based on total population. Due to their formerly enslaved population, the states formerly in rebellion, here labeled "South," get nine additional seats beyond the sixty-one they received in 1862. As the naturalization rate decreases, the South's representation increases. Alternatively, if none of the foreign-born population is naturalized, the South receives a total of eighteen additional seats.

Our second analysis demonstrates the extent to which the loyal states would lose representation even if the South (and every other state), disenfranchised their Black citizens. In this analysis we exclude all Black persons from our counts.

Region	1860 Actual	Naturalization Rate (Percentage)										
		100	90	80	70	60	50	40	30	20	10	0
New England	27	29	29	29	29	29	29	28	28	28	28	28
Atlantic	66	71	70	70	69	69	69	68	68	67	67	66
Midwest	65	69	69	69	69	69	68	69	70	70	70	68
Far West	22	23	23	22	22	22	22	23	22	22	22	21
South	61	49	50	51	52	52	53	53	53	54	54	58

Table 6 – Regional Impact of Excluding Aliens from Apportionment Basis *Supposing* Universal Denial of Black Suffrage

In the limit, if the entire foreign-born population has been naturalized, the functional equivalent of the Committee's proposal, then the South would have lost twelve seats in the House compared to the actual 1860

Three-Fifths Clause apportionment. This is attributed to the disenfranchising of its Black population as displayed above. However, as the naturalization rate decreased the South's representation increased. Alternatively, if none of the foreign-born population has been naturalized, the South would have received nine more seats, only three short of the number it received in 1862.

Compared to the Committee's proposal, any apportionment scheme that excluded aliens would undoubtedly shift political power *to the South* from the rest of the nation because the South housed only six percent of the nation's foreign born population.[228] Surely, the Committee's proposal was preferable, but on March 9, 1866 it was not good enough.

The final day of debate saw a number of alternate proposals before the final vote. New Hampshire Republican Daniel Clark offered an amendment basing apportionment on adult male citizens qualified to vote and then withdrew it almost immediately.[229] James Doolittle once again proposed basing apportionment on the number of adult males qualified to vote without, regard to citizenship.[230]Neither of these proposals came to a vote. Henderson, Sumner, and Yates made proposals that we recognize as precursors to: (1) the Fourteenth Amendment's Privileges or Immunities Clause, (2) its Equal Protection Clause, and (3) the Fifteenth Amendment. None of them received more than ten "yea" votes.[231] Sumner even revived a proposal that would exempt any disenfranchised group from taxation of all kinds. It was immediately rejected without a recorded vote.[232]

The one amendment the Senate approved came from Daniel Clark. It extended the reach of the Committee's amendment from race and color to include "descent or previous condition of servitude."[233] The Senate approved it by a vote of 26–20.[234] Shortly afterward, recognizing the imminent defeat of the amendment in any form and "not wish[ing] to

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[228] James saw suffrage-based apportionment proposals as generating unnecessary conflict among members of Congress from different sections of the loyal states. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 61 (1965). However, he never recognized that any apportionment scheme based on citizen-suffrage significantly benefitted the South, the sectional shift of most concern to members from the loyal states.

[229] CONG. GLOBE, 39th Cong., 1st Sess. 1284, 1287 (1866).

[230] *Id.* at 1287.

[231] The Senate defeated Sumner's proto-Equal Protection proposal by a vote of 8–39. *Id.* at 1287. It defeated Yates' Privileges or Immunities precursor combined with a Fifteenth Amendment precursor by a vote of 7–38. *Id.* Other Fifteenth Amendment precursors offered by Henderson and Sumner were defeated by votes of 10–37 and 8–38, respectively. *Id.* at 1284, 1288.

[232] *Id.* at 1288.

[233] *Id.* at 1287.

[234] *Id.*

embarrass the original proposition," Clark asked that his amendment be withdrawn.[235]

Clark's forecast was correct. The Committee's proposal only garnered twenty-five of the forty-seven votes cast, seven short of the two-thirds needed for ratification.[236] Changes needed to be made to secure the vote of at least seven of the Republicans who had voted nay.

Iowa Republican Senator James Grimes, a member of the Joint Committee, started the process within days of the Senate's vote. On March 12, 1866, Grimes proposed the following text for a proportional penalty for, but not limited to, disenfranchisement on the basis of race or color:

> Representatives shall be apportioned among the several States which may be included in this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; but whenever in any State the elective franchise shall be denied to any portion of its male citizens above the age of twenty-one years, *except for crime or disloyalty*, the basis of representation shall be reduced in the proportion to which the number of male citizens so excluded shall bear to the whole number of male citizens over twenty-one years of age.[237]

As he made the proposal, Grimes acknowledged that he had taken it from the one made in the House by John Broomall.[238] Grimes did not explain to the Senate that he altered Broomall's proposal to recognize a state's power to disenfranchise its felons and rebels as legitimate. A bit later in the session Charles Sumner, of all people, offered a slightly different proposal:

> Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by taking the whole number of persons, and excluding Indians not taxed; *Provided*, That whenever male *citizens of the United States* over the age of twenty-one years shall be excluded from the elective franchise in any State, except for participation in rebellion, the basis of representation

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[235] CONG. GLOBE, 39th Cong., 1st Sess. 1288 (1866).

[236] *Id.* at 1289.

[237] *Id.* at 1320 (emphasis added).

[238] *Id.* at 1321. For Broomall's proposal, *see* CONG. GLOBE, 39th Cong., 1st Sess. 433 (1866).

> therein shall be reduced in the proportion which the number thus excluded bears to the whole number of male *citizens of the United States* over the age of twenty-one in such State.[239]

Sumner made sure to leave no room for a state to claim that it was not disenfranchising *its* Black [*state*] *citizens*.

E. THE JOINT COMMITTEE REVISES ITS PENALTY-BASED APPROACH

When the Joint Committee resumed deliberations regarding the basis of apportionment, it did so in the context of a much more extensive amendment—the direct progenitor of the Fourteenth Amendment. As submitted by Thaddeus Stevens, it contained the following provisions:

> Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
> Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.
> Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.
> Sec. 4. Debts incurred in aid of insurrection or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any state nor by the United States.

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[239] *Id.* at 1321 (emphasis added). Note that Sumner's proposal does not recognize a state's power to disenfranchise its felons as legitimate. Henry Wilson also made a particularly inelegant proposal mashing together the adult male citizen suffrage base with disenfranchised rebels plus all aliens to form the apportionment basis.
> Representatives shall be apportioned among the several States according to the number of male citizens over twenty-one years of age having the qualifications requisite for electors of the most numerous branch of the State Legislature; citizens possessing like qualifications disenfranchised for participation in any rebellion; and persons of like age not naturalized. *Id.*

> Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.[240]

When Stevens moved to delete all of Section 2 and make permanent the slightly revised version of the Committee's original proposal for the basis of apportionment a week later, Oregon Senator George Williams intervened and made a proposal identical to the one made by Committee member James Grimes to the Senate on March 12.[241]

> Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.[242]

With only Howard, Stevens, and Washburne in opposition, the Committee quickly approved the proposal by a 12–3 vote and moved on to other matters related to the gestating Fourteenth Amendment.[243]

James described Williams' proposal as "very similar in wording and identical in meaning to that proposed by Conkling [in the Joint Committee] on January 12."[244] Flack described the two versions as "practically the same in essence."[245] Williams' version may have been similar in language to Conkling's, but it was certainly different in *meaning* because, as James

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[240] JOURNAL OF THE JOINT COMMITTEE, *supra* note 154, at 83–84. On April 21, 1866, the Committee approved Section 2 and 3 by votes of 8–4 and 9–3, respectively. The three Democrats on the Joint Committee opposed both sections. George Boutwell voted against Section 2, but in favor of Section 3. *Id.* at 87.

[241] CONG. GLOBE, 39th Cong., 1st Sess. 1320 (1866).

[242] *Id.* at 102.

[243] *Id.* James claims that Stevens voted nay to preserve his original proposal and that Howard and Washburne voted nay because of the recent deletion of Section 2 guaranteeing race neutral suffrage. JAMES, *supra* note 228, at 112.

[244] JAMES, *supra* note 228, at 102.

[245] HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 114 (1908). Flack's analysis recognizes that Williams' proposal incented the former slave states to extend suffrage to their Black population on a gradual basis while only being penalized in proportion to their disenfranchisement.

recognized, Williams' proposal made no mention of race or color, while Conkling's original proposal was limited to disenfranchisement based on these attributes.

More importantly, Williams' proposal had a very different *impact* from Conkling's, although there is no evidence that anyone in Congress recognized this difference. Unfortunately, the Joint Committee's report says very little about the evolution of the Penalty Clause (or anything else in the Fourteenth Amendment) except to express doubt that the states would ratify an amendment limiting their power to set qualifications for suffrage,[246] and to express regret that the Senate rejected the Penalty Clause in the form originally proposed.[247]

While both proposals defaulted to the entire population, excluding Native Americans not taxed; they differed greatly in determining the penalty when appropriate. Conkling's proposal, the progenitor of the one considered by the two chambers of Congress between January and March, deducted racial groups from the apportionment basis. On the other hand, Williams' proposal magnified the impact of the disenfranchisement by the size of a state's alien population *even if there were no alien members of the disenfranchised racial group.* An application of the two proposals to Conkling's New York reveals the disparate impact.

In the absence of census data on adult male citizens we couple Henry Wilson's claim of half a million unnaturalized foreigners in New York with the assumption of a constant proportion of the sexes by age and foreign/native birth to compute the different penalty factors if New York disenfranchised its entire non-white population.[248]

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[246] REP. OF THE J. COMM. ON RECONSTRUCTION, 39th Cong., 1st Sess. at xiii (1866) [hereinafter REP. OF THE J. COMM. ON RECONSTRUCTION].

[247] *Id.* at xiv. The bulk of the report's 800 pages presents testimony on conditions in the states formerly in rebellion.

[248] For Wilson's claim, *see* CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866). For the assumption set, *see* text preceding Table 5.

	Conkling Method	Williams Method
Total	3,880,735	3,880,735
Aliens	n/a	500,000
Citizens	n/a	3,380,735
Non-White	49,145	49,145
Penalty factor	n/a	1.45%
Penalty	49,145	56,413
Basis	3,831,590	3,824,322

Table 7 - Comparison of Impact of Two Penalty Methods on New York

The difference in the penalty computed is just over 7,000 persons. While 7,000 persons may seem insignificant because the ratio of representation established one representative for every 130,000 persons, a 7,000-person difference in the apportionment basis exposes New York to an additional five percent chance of losing a representative.[249]

F. CONGRESS APPROVES THE FOURTEENTH AMENDMENT WITH CHANGES MADE BY THE SENATE BUT NOT THE HOUSE

Thaddeus Stevens reported the Joint Committee's greatly expanded proposal for a constitutional amendment to the House on April 30th.[250] On May 8th, the House began its debate on the proposal.[251] Two days later, the House voted on the full package that had been left intact with nary an alteration before coming to a vote.[252] By a party line vote of 128–37, the House approved the measure as reported by the Joint Committee.[253]

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[249] 5.3% = 7,000/130,000.

[250] CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866). The following are the major differences, aside from the section on apportionment, between the amendment as reported by the Committee, and the version ratified by Congress and the states: Section 1 lacked any text regarding citizenship; Section 3 completely banned former rebels from voting for representatives in Congress or for presidential electors until July 4, 1870 (but it did not ban them from holding federal or state office as the final version does); Section 4 contained text voiding rebel debt and prohibiting compensation for emancipation but it contained no text concerning the public debt of the United States. JOURNAL OF THE JOINT COMMITTEE, *supra* note 154, at 117–18.

[251] CONG. GLOBE, 39th Cong., 1st Sess. 2458 (1866).

[252] James describes the House has having "very little enthusiasm" for the debate of May 9. JAMES, *supra* note 228, at 127.

[253] CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866). All 123 Republicans voting voted for the amendment, and all thirty-two Democrats voting voted against it. Of the ten Unionists who voted on the amendment, five voted for it and five against it. Interestingly, the vote proceeding to the main question passed 84–79. Fifty-four of 121 Republicans voting on the motion to proceed, voted against it including James Ashley, John Bingham, and James Blaine. Fourteen of thirty-two Democrats voting on the motion voted for it. *Id.*

Proceedings would not be so straightforward in the Senate, which began its consideration of the Committee's proposal on May 23rd.[254] Opponents, such as Reverdy Johnson, continued to argue that denial of suffrage to certain citizens should not generate an apportionment penalty. Why, they asked, should a penalty be assessed based on the number of disenfranchised adult Black male citizens, but not women, aliens, and children? They argued that in contrast to women, aliens, and children "the effect of the exception is to deny to the black man the right of representation unless the State shall secure to him the right of the franchise."[255] In making this argument, the opponents failed to realize, or simply ignored, that it was not a state's Black population that would go unrepresented. Instead, *the entire state would lose representation.*[256]

Not surprisingly, conservative Republican James Doolittle made two attempts to resurrect his suffrage-based apportionment proposals; both failed by votes of 7–31. The first did not limit qualified adult male electors to citizens.[257] The second did and added to their number "such citizens as are disqualified by participating in rebellion."[258] Could it be more obvious that Doolittle was trying to shift political power to the South from the North?[259]

The lengthier debate in the Senate allowed its members to consider some of the finer details in the Committee's revised proposal. When the Senate had debated the Committee's first, race-based version of the Penalty Clause in February, California Republican John Conness asked if a racially neutral property qualification would trigger the Penalty Clause.[260] Reverdy Johnson replied that it would not, so long as it applied to all races.[261]

Now that the Committee had expanded the Penalty Clause so that its trigger no longer had to be explicitly race-based,[262] the question arose whether there were any *impartial* suffrage qualifications that would not trigger the Penalty Clause. As Jacob Howard introduced the Fourteenth

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[254] *Id.* at 2764.

[255] *Id.* at 3027.

[256] Johnson's argument is just one of many examples of the failure to recognize that members of the House of Representatives represent their *states* and not just their districts.

[257] CONG. GLOBE, 39th Cong., 1st Sess. 2942 (1866). For the vote see *id.* at 2986.

[258] *Id.* For the vote see *id.* at 2991.

[259] One other proposal merits mentioning. John Sherman proposed an apportionment rule based on adult male citizens qualified to vote for the most numerous branch of a state's legislature plus "citizens disqualified for participating in rebellion." *Id.* at 2804. Sherman must have quickly come to his senses. He voted against Doolittle's similar proposals.

[260] *Id.* at 764.

[261] *Id.*

[262] John Henderson recognized that under the Committee's initial proposal "[t]he States … might have excluded the negroes under an educational test and yet retained their power in Congress. Under this they cannot." *Id.* at 3033.

Amendment to the Senate, Daniel Clark asked whether Massachusetts' strict intelligence test would result in it losing representation.[263] Howard's reply was emphatic:

> Certainly it does, no matter what may be the occasion of the restriction . . . No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters**,** and the State loses representation in proportion.[264]

Not everyone agreed. Senator Ben Wade thought "impartial qualifications founded on intelligence or property" should be allowed and proposed a version of Section 2 that explicitly added that phrase before "alienage, or . . . participation in rebellion or other crime" as grounds excluded from triggering a penalty.[265] Wade's proposal for Section 2 failed, and the only grounds excluded from triggering the apportionment penalty were the rebel and felon exceptions.

During the same introductory speech by Howard, William Stewart asked him how the Committee intended "abridged" to be understood.

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[263] CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).

[264] *Id.* Like everyone else, Howard failed to realize that the Penalty Clause penalized no state if all the states disenfranchised their adult male (non-rebel/felon) citizenry at a *uniform* rate. The Penalty Clause penalizes states that disenfranchise their adult male citizenry at a rate *greater than* the *least disenfranchising* state.

In a somewhat different context, Jack Rakove asks "[C]an we not speculate whether the Civil War amendments – especially the Fourteenth – are the most Madisonian elements of the American Constitution?." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 337–38 (1996). Commenting on an early version of the Penalty Clause, James Blaine was perhaps the first member of Congress to make clear that it conditions a state's share of its political power in the federal union on its fully sharing political power among its adult [male] citizenry. ("The proposed constitutional amendment would simply say to those States, while you refuse to enfranchise your black population you shall have no representation based on their numbers; but admit them to civil and political rights and they shall at once be counted to your advantage in the apportionment of Representatives." CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866)).

By reducing the basis of a state's share of political power but not its tax basis, it breaks the historic tie between taxation and representation. Is this not the most Madisonian aspect of the Civil War amendments? *See also*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 337–38 (1996) ("[C]an we not speculate whether the Civil War amendments—especially the Fourteenth—are the most Madisonian elements of the American Constitution?.")

[265] CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866). This was part of a general, alternative version of the Fourteenth Amendment. Its first section embedded the definition of citizenship into the Privileges or Immunities Clause. ("No State shall make or enforce any law which shall abridge the privileges or immunities of persons born in the United States or naturalized by the laws thereof[.]")

Howard responded that "abridged" meant allowing a person to vote for some, but not all offices.[266] Two weeks later, Howard put it in more tangible form:

> Suppose, for illustration's sake, that the whole number in a State of male citizens over the age of twenty-one is one hundred thousand, and suppose that by the laws of the State every one of those citizens is allowed to vote for members of the most numerous branch of its Legislature, and that only fifty thousand of them are allowed to vote for members of the upper or less numerous House of the Legislature. You will see, then, that there are fifty thousand citizens of the State excluded from the right to vote.[267]

Very late in the game Howard may have had second thoughts. Just before the final vote on the full Fourteenth Amendment, the Senate rejected Howard's proposal to limit the scope of the Penalty Clause to voting for members of the most numerous branch of a state's legislature.[268]

The Senate made three key changes to the Committee's text during debate. George Williams suggested the initial form of two of them and incorporated the third when proposing a complete replacement for the Committee's Section 2 on June 6, two days before the Senate's final passage of the entire amendment. Here is the text of Williams' proposal; deletions are struck through, and additions are underlined:

> Representatives shall be apportioned among the several States ~~which may be included within this Union,~~ according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the ~~elective franchise~~ right to vote at any election held under the Constitution and laws of the United States, or of any State, is ~~shall be~~ denied to any ~~portion of its~~ of the male inhabitants, being twenty-one years of age and citizens of the United States, ~~not less than twenty-one years of age~~, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein ~~in such State~~ shall be reduced in the proportion which the number of such male citizens shall

[266] *Id.* at 2767.
[267] *Id.* at 3011.
[268] *Id.* at 3039–40.

> bear to the whole number of male citizens not less than twenty-one years of age.[269]

The first and most important of these changes was replacing the phrase "the elective franchise" with the phrase "*the right to vote*."[270] George Williams, the author of this change, told his fellow senators that the substitution of "the right to vote" for "elective franchise" left the section's original substance and effect in place, and was intended to dispel any thought that it only covered elections to the House of Representatives.[271]

Seeing the change somewhat more stereoscopically sheds light on its author's modesty. He changed, "But whenever in any State the elective franchise shall be denied to any . . ." to "But whenever in any State the right to vote ay any election held under the Constitution and laws of the United States, or of any State is denied to any . . . ." [272]

Williams could have made the second change without the first. That phrase would have read "But whenever in any State the *elective franchise* shall be denied to any . . . in any election held under the Constitution and laws of the United States, or any state, . . ." This more modest change would have made it clear that the Penalty Clause applied to all elections, not just elections to the House. However, leaving the "elective franchise" language in place would have left some doubt whether suffrage is a right, or merely a gift bestowed by those governing. During the Senate's earlier February debates, Daniel Clark told his colleagues that negro suffrage was not a gift from the white man. Negro suffrage, like white suffrage, was a *right*.[273] Jacob Howard disagreed, as he explained the contents of Section 1 while introducing the Fourteenth Amendment:

> [T]he first section of the proposed amendment does not give to either of these classes [whites, blacks] the right of voting. The right of suffrage is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.[274]

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[269] *Id.* at 2991.
[270] *Id.*
[271] CONG. GLOBE, 39th Cong., 1st Sess. 2991 (1866).
[272] *Id.* at 2764.
[273] *Id.* at 833.
[274] *Id.* at 2766.

The adoption of Williams' change in particular, and the Penalty Clause in general, changed all that. They elevated adult male citizen suffrage to a constitutionally recognized right,[275] on par with other constitutionally recognized rights, including: the right to assemble peaceably and petition the government for redress of grievances;[276] the right to keep and bear arms; [277] the right to be secure against unreasonable searches and seizures;[278] a defendant's rights in the critical stages of criminal prosecutions; [279] and in civil cases, the right to a trial by jury. [280]

Just as importantly, the explicit text concerning "the right to vote" and its "denial or abridgment" would serve as a template for the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments: the voting rights amendments to the Constitution.

The second substantive change descended from a concern that Charles Sumner shared in March about "citizen" meaning "citizen of the United States."[281] When Jacob Howard introduced this change on May 29th, he replaced the phrase "its male citizens" with the phrase "its male inhabitants, being citizens of the United States," to ensure that (1) no state could claim it was not denying the vote to *its own* Black citizens and (2) that no state was compelled to offer the vote to an adult male citizen of the United States visiting from another state. The presence of the phrase "citizen of the United States" in Section 2 and the Privileges or Immunities Clause of Section 1 created the impetus for the standalone Citizenship Clause that opens Section 1.[282]

The third and final substantive change approved concerned the scope of elections that triggered the Penalty Clause. Recall that on June 6th, George Williams added text so that the Penalty Clause applied to "any election held under the Constitution and laws of the United States, or of any State."[283] The following day, Missouri's John Henderson realized that his state placed property qualifications on school district elections. Not wanting

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[275] Michael T. Morley, *Remedial Equilibration and the Right to Vote under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 282 (2016); RANDY E. BARNETT AND EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 244 (2021). For a contrary view see GRABER, *supra* note 148, at xxvi.

[276] U.S. CONST. amend. I.

[277] U.S. CONST. amend. II.

[278] U.S. CONST. amend. IV.

[279] U.S. CONST. amend. VI.

[280] U.S. CONST. amend. VII.

[281] For Sumner's remarks *see* CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866).

[282] On May 30, 1866, Williams noted that "The first and second sections of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word 'citizens,' as employed in both sections is to be determined from the manner in which that word is used in both of those sections." CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

[283] *Id.* at 2764, 2991.

these elections to trigger the Penalty Clause, Henderson proposed limiting the trigger to "the right to vote for Governor, judges, or member of either branch of the Legislature."[284] Upon hearing Henderson's proposal, William Pitt Fessenden commented that it did not include representatives to Congress.[285] Henderson answered that their election would be covered by the suffrage qualification in Article I, Section 2.[286]

On the final day of the Senate's debate on the Fourteenth Amendment, Reverdy Johnson made one of the few contributions to its progress from the Democrats' side of the aisle.

> In all the States there are elections of a municipal character that are regulated by law, and in which the franchise is different from that which prevails in the general elections of the State; and the consequence would be that where any persons who are twenty-one years of age are denied the right to vote the basis of representation is to be lessened in the proportion that the that the number excluded shall bear to the whole number falling within the class.[287]

This persuaded George Williams to revise his own amendment. He extended Henderson's original list of offices when he proposed changing "But whenever the right to vote any election held under the Constitution and laws of the United States, or of any State," to "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 members of the Legislature thereof."[288] Later that session, the Senate approved Williams' late change without a recorded vote.[289] Then, the Senate approved his complete replacement of Section 2 by a vote of 31–11,[290] just before approving the entire Fourteenth Amendment by a vote of 33–11 on a straight party lines.[291] On June 13th,

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[284] *Id.* at 3011.
[285] *Id.*
[286] *Id.*
[287] *Id.* at 3027.
[288] CONG. GLOBE, 39th Cong., 1st Sess. 3029 (1866).
[289] *Id.* at 3039.
[290] *Id.* at 3041.
[291] *Id.* at 3042. Maryland Unionist John Creswell voted for the Fourteenth Amendment. West Virginia Unionist Peter Van Winkle voted against it.
See CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) for the substantive changes made by the Senate to the other sections of the amendment.

with less than a full day's debate on the Senate changes, the House approved the Fourteenth Amendment along party lines 120–32.[292]

V. CONCLUSION: NEITHER THE LACK OF SUFFRAGE ARGUMENT NOR ANY OF TRUMP'S OTHER ARGUMENTS WORK

The Trump memorandum was titled "Memorandum on Excluding *Illegal Aliens* From the Apportionment Base Following the 2020 Census."[293] The first statute barring certain persons from voluntarily "immigrating into the United States" was enacted into law on March 3, 1875.[294] As the Fourteenth Amendment was being ratified, the only aliens illegally present in the United States were persons brought into the United States "to carry on the slave trade" whose entry had not been apprehended and had not been "remov[ed] beyond the limits of the United States" following the enactment of the 1819 Slave Trade Act.[295] Chin and Finkelman have demonstrated the Thirty-Ninth Congress was aware that some recently emancipated enslaved persons had entered in this way and were not legally present in the United States, [296] and could hardly have meant to exclude these freedmen from the basis of representation.

Instead, the Thirty-Ninth Congress consciously chose to include aliens in the basis of representation (and taxation). As House Member Roscoe Conkling noted during debates, aliens were always counted in apportionments based on the original Representation Clause.[297] Moreover, excluding aliens from the basis of representation would shift power to the South,[298] hardly the result desired by Republican leadership.

When ratified, Section 2 of the Fourteenth Amendment excluded only one class of persons: "Indians not taxed." As John Bingham noted, Native Americans were not part of the body politic of the United States if they were not subject to taxation. Once they became subject to taxation, they became part of the American body politic, deserving of representation and inclusion

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[292] CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866). All nine Unionists who voted, voted for the Amendment.

[293] *See* Excluding Ilegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. at 679.

[294] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV., 1833, 1834 (1993). *See also*, Immigration Act of 1875, ch. 144, 18 Stat. 477 § 5.

[295] Slave Trade Act of 1819, ch. 101, 3 Stat. 532, 533 §§ 1, 2.

[296] Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2243, 2259–60 (2021).

[297] *See* CONG. GLOBE, 39th Cong., 1st Sess. 359 (1866).

[298] *See supra* text accompanying notes 228-230.

in the apportionment basis.[299] The Indian Citizenship Act of 1924 ended this exclusion by granting citizenship to "all noncitizen Indians born within the territorial limits of the United States."[300]

Since that enactment, no class of particular *persons* is excluded from the basis of representation. If a state is subject to the Penalty Clause with, say a ten percent penalty, the Penalty Clause does not identify ten percent of a state's population and exclude them personally and individually. This was Reverdy Johnson's argument against the Penalty Clause.[301] Instead, the entire state, and every person in the state, is penalized.

Neither the per curiam opinion nor the dissent in Trump v. New York attempted to explain how the Penalty Clause works.[302] Unfortunately, a 2023 Federal District Court did and got it wrong. In late 2021 Citizens for Constitutional Integrity brought suit against the Commerce Department seeking to have the Census Bureau (or some governmental actor) count the number of adult citizens whose right to vote had been denied or abridged and have those numbers plugged into the Penalty Clause for the apportionment based on the 2020 census.[303] On April 18, 2023 a three judge District Court panel dismissed the case for lack of jurisdiction. Before dismissing the case, the District Court gave the following explanation of Section 2 and provided an example of its application.

> Imagine a state with 100 people, 80 of whom are citizens old enough to vote. The state wrongfully abridges the right to vote of 8 people, or 10% of eligible voters. Under the Reduction Clause, the State's basis of representation (100 people) should be reduced by 10%. When it comes time to apportion representatives to our hypothetical state**,** *only 90 out of its 100 people will count*.[304]

If only ninety *persons* will count then, presumably, ten *persons* do not count. Even if we assume that all eight of the disenfranchised citizens are not counted, *who are the other two persons not counted?* The *Citizens* court does not suggest who they are. Nor can it.

Properly understood, Section 2 recognizes disenfranchised adult citizens as injured parties whose right to vote has been denied or abridged.

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[299] *See* CONG. GLOBE, 39th Cong., 1st Sess. 431–32 (1866).

[300] Citizenship to Indians Act of 1924, ch. 233, 43 Stat. 253.

[301] *See* CONG. GLOBE, 39th Cong., 1st Sess. 3027 (1866).

[302] Trump v. New York, 592 U.S. 125, 134 (2020) (*per curiam*) (Breyer, J., dissenting).

[303] Citizens for Const. Integrity v. Census Bureau, 669 F. Supp. 3d 28 (D.D.C. 2023), aff'd, 115 F.4th 618 (D.C. Cir. 2024).

[304] *Id.* at 31.

How strange it would be for Section 2 to deny representation to the injured citizens whose voting rights have been denied or abridged. Section 2 properly penalizes the party causing the injury: the offending state as a whole. It instructs the states that if they do not extend the franchise to the fullest extent possible to their adult citizenry, then they jeopardize their share of political power in the government of the Union. A proper understanding of the *Citizens* court's example is that the state *as an entire, unitary political community is penalized* by having its apportionment basis reduced. Unlike the notorious three-fifths rule that discounted enslaved persons by 40% before adding them into the apportionment basis, Section 2 discounts each and every person in the state's population after determining their total.

The *lack of suffrage argument*[305] does not work. The *enduring ties argument*[306] does not work. In 1842, Congress reclassified the Africans who had been on *The Amistad* as whole persons as they were arriving back in their homeland.[307] The *pathway to citizenship argument*[308] does not work. When Congress crafted the Fourteenth Amendment only white aliens had a pathway to citizenship.[309] The *removal argument*[310] does not work. Any alien might be deported.[311] The *obligations argument*[312] does not work. Aliens have always been obligated to pay income tax.[313] Under current law, all aliens, except some lawfully admitted non-immigrant male aliens, are obligated to register with Selective Service and would be obligated to serve if Congress reinstituted a draft.[314]

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[305] *See supra* text accompanying note 10.

[306] *See supra* text accompanying note 11.

[307] *See supra* text accompanying note 30.

[308] *See supra* text accompanying note 7.

[309] *See* Naturalization Law of 1802, § 2; *see* Naturalization Law of 1870, § 7; *see* Act of Jul. 14, 1870 (amending § 2169 Rev. Stat.) (1870); *see* Naturalization Act of 1940, § 302; *see* Immigration and Naturalization Act of 1952, § 311.

[310] *See supra* text accompanying note 8.

[311] *See* 8 U.S.C. § 1227(a)(1)(A); 8 U.S.C. § 1227.

[312] *See supra* text accompanying note 9.

[313] *See* Revenue Act of 1861, § 49; Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894); Revenue Act of 1913, § 2; I.R.C. § 1(c); I.R.C. § 871; I.R.C. § 7701(b)(1)(A)–(B) and Part II.A.

[314] *See* Act of Feb. 24, 1864, ch. 13, sec. 8, §§ 6, 18, 13 Stat. 6, 7, 9 (1864); An Act of May 18, 1917, ch. 15, §§ 2, 40 Stat. 76, 77 (1917); Act of Sept. 13, 1940, ch. 719, §§ 2, 3(a) 54 Stat. 885, 886 (1940); An Act of July 3, 1941, ch. 273, § 2, 55 Stat. 544, 545 (1941); 50 U.S.C. §§ 3802(a), 3803 and Part II.B.5.

Nothing works. The Thirty-Ninth Congress would not have approved of the Trump memorandum. More importantly, Section 2 of the Fourteenth Amendment forbids it.[315]

VI. APPENDIX: THE VINTON METHOD OF APPORTIONMENT AND THE APPORTIONMENT BASED ON THE 1860 CENSUS

In 1850, Congress adopted what is called the Vinton method of apportionment for a 233 seat House.[316] The Census Act of 1850 specified the following procedure for that apportionment:

> 1. Divide the sum of the apportionment bases of all the states by the target House size, 233, (and round down) to determine the *ratio of representation*.
> 2. Divide the *ratio of representation* into each state's apportionment basis and round down to determine the *initial apportionment* of House seats to each state with the proviso that each state be apportioned at least one House seat as required by the Constitution.
> 3. Multiply the number of House seats initially apportioned to each state by the ratio of representation. Subtract that product from the state's apportionment basis to yield the state's *fraction*.
> 4. Add together the number of House seats initially apportioned to each of the states. Subtract that sum from the target House size to yield the *shortfall*.
> 5. Suppose *shortfall*=N, apportion an additional House seat to each of the states with the N largest fractions.[317]

At the end of its session on July 8, 1861, the House received a report from the Department of the Interior transmitting the apportionment among

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[315] The Supreme Court did not reach this question in Trump v. New York. The *per curiam* majority dismissed the case for lack of jurisdiction. *See* Trump v. New York, 141 S. Ct. 530, 537 (2020). Nor did Justice Breyer reach this question in his dissent, holding that the Trump memorandum violated the Census Act of 1929. *See* Trump v. New York, 141 S. Ct. at 546, (Breyer J., dissenting).

[316] Census Act of 1850, ch. 31, §§ 23–25, 9 Stat. 428, 432–33. The 1850 Census Act intended to fix the size of the House at 233 seats. *Id.* at 432.

[317] For further details on Vinton's method, see MICHEL L. BALINSKI & H. PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 37–45 (2d. 2001) and LAURENCE F. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 74–75 (1941).

the States according to the 1860 census.[318] Sixteen states would lose a total of twenty-four seats. Minnesota and Rhode Island were the most prominent among the ten loyal states that would lose a total of fifteen seats. These two small states would each see their representation halved from two to one. Dissatisfied with the 233-seat apportionment's impact on these and other small states, the Republicans in Congress ultimately enacted a 241-seat bill that enumerated the eight states to receive an additional seat beyond the original 233-seat apportionment.[319] The Act provides no information regarding the method used to apportion these additional eight seats. In fact, Congress employed a regular, 239 seat Vinton method apportionment and then added seats to Minnesota and Rhode Island, the states in line for the 240th and 241st.[320] If Congress had adopted a genuine 241 seat Vinton-apportionment, the last two seats would have been apportioned to New York and New Jersey rather than Minnesota and Rhode Island.[321]

Changing the apportionment method to a genuine 241 seat Vinton-apportionment for the analyses presented here would have minimal impact on the South. None of the southern results at 100% or 0% would change. In one case, the South would lose two seats. In all other cases, the impact on the South is no more than one seat.

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[318] *See* CONG. GLOBE, 37th Cong., 1st Sess. 26 (1861); SEC'Y OF THE INTERIOR, APPORTIONMENT OF REPRESENTATION OF THE SEVERAL STATES, IN THE HOUSE OF REPRESENTATIVES, UNDER THE EIGHTH CENSUS, H.R. EXEC. DOC. 2 , 37th Cong., 1st Sess. (1861).

[319] Act of March 4, 1862, ch. 37,12 Stat. 353 (1862).

[320] For the key debate in the Senate, *see* CONG. GLOBE, 37th Cong., 1st Sess. 962–63 (1861).

[321] Spreadsheets and detailed historical analysis on file with the author.