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THE "VOTING RIGHTS ACT OF 1867": THE CONSTITUTIONALITY OF FEDERAL REGULATION OF SUFFRAGE DURING RECONSTRUCTION

GABRIEL J. CHIN

INTRODUCTION

As part of the process of readmitting the former Confederate states to representation in Congress, that body enacted statutes requiring certain political protections of the freed slaves. The Military Reconstruction Act and its amendments and implementing statutes—referred to as the "Reconstruction Acts"1—required the

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1. The basic framework was established by Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, amended by Act of Mar. 23, 1867, ch. 6, 15 Stat. 2, amended by Act of July 19, 1867, ch. 30, 15 Stat. 14, amended by Act of Mar. 11, 1868, 15 Stat. 41. See also 12 Op. Att'y Gen. 182 (1867), available at 1867 WL 2127 (addressing the powers and duties of military commanders under the Reconstruction Acts); 12 Op. Att'y Gen. 141 (1867), available at 1867 WL 2123 (outlining voter qualification and registration requirements under the Reconstruction Acts). Congress then declared, in a series of acts, that particular states had satisfied the requirements established in the earlier laws. See Act of June 22, 1868, ch. 69, 15 Stat. 72, 73 (readmitting Arkansas); Act of June 25, 1868, ch. 70, 15 Stat. 73, 73–74 (readmitting, subject to their ratification of the Fourteenth Amendment and conditioned upon their continued compliance in refraining from withdrawing the right to vote from any citizen or class thereof, North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida); Act of Apr. 10, 1869, ch. 17, 16 Stat. 40, 41 (authorizing referenda on new constitutions in Mississippi, Texas and Virginia); Act of Dec. 22, 1869, ch. 3, 16 Stat. 69, 61 (addressing reconstruction of Georgia); Act of July 15, 1870, ch. 299, 16 Stat. 363, 363–64 (declaring that Georgia had complied with all conditions and was therefore entitled to representation in Congress); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 62–63, amended by Act of Feb. 1, 1870, ch. 12, 16 Stat. 63 (declaring Virginia's compliance and readmission to representation in Congress); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 67–68 (readmitting Mississippi); Act of Mar. 30, 1870, 16 Stat. 80, 80–81 (readmitting Texas).
Southern states to grant broad and race-neutral access to the ballot. The Reconstruction Acts were highly effective in enfranchising African-Americans as the victorious U.S. Army directly enforced them during its occupation of the former Confederacy. Because the troops would not be there forever, Congress agreed to seat Southern delegates only on the "fundamental condition" that they include suffrage provisions, which could never be narrowed, in their constitutions. All of the states adopted such provisions, and their terms were approved by Congress.

The Reconstruction Acts had a much greater impact on African-American suffrage in the South than the Fourteenth or Fifteenth Amendments, at least until the end of Reconstruction and arguably until the Second Reconstruction in the 1950s and 1960s; for a while, they worked. They failed to prevent the political, cultural, and economic tragedy of Jim Crow, however, because the fundamental condition—unalterable suffrage requirements—was not honored. The suffrage provisions of the constitutions created under the Reconstruction Acts—indeed, in most of the South, the entire constitutions—were superseded by now notorious tests and devices designed to disenfranchise African-Americans: poll taxes, literacy

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2. The Reconstruction Act did not affect Tennessee, however, which was statutorily exempted from Military Reconstruction. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428–29 (omitting Tennessee from the list of rebel states).

3. The states were also required to ratify the pending Reconstruction Amendments to the U.S. Constitution. See Act of Mar. 2, 1867, ch. 153, 14 Stat. at 429 (requiring states to ratify Fourteenth Amendment); Act of Jan. 26, 1870, ch. 10, 16 Stat. at 62 (noting that Virginia had ratified the Fourteenth and Fifteenth Amendments).

4. The readmission acts for Virginia, Texas and Mississippi also provided that the state constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State." 16 Stat. at 63 (Virginia); 16 Stat. at 68 (Mississippi); 16 Stat. at 81 (Texas). See A-1 By D-2 v. Molpus, 906 F. Supp. 375, 378–79 (S.D. Miss. 1995) (holding that an educational right claim based on a readmission act was barred by the statute of limitations).

5. See supra notes 1–4 and accompanying text.


7. Military Reconstruction "enfranchise[d] approximately one million blacks." JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 79 (2d ed. 1994). By contrast, the Fourteenth and Fifteenth Amendments were, for a period, so comprehensively ineffective that there were calls for their repeal. See Nicholas Murray Butler, The New American Revolution, 10 A.B.A. J. 845, 848 (1924); John R. Dos Passos, The Negro Question, 12 YALE L.J. 467, 480 (1903).
tests, and grandfather clauses.8

The new constitutions were created in ways that raise eyebrows. In some cases, the amendment provisions of the state’s existing constitution were ignored.9 The Mississippi, South Carolina, and Louisiana constitutions were simply promulgated by the constitutional conventions that drafted them without being put to a vote of the people. This was because the drafting conventions “were convened primarily for the purpose of disfranchising the colored voters, and submission of their constitutions to the people might well have placed in peril the principal object which they had in view.”10 In all cases, “the Negro was all but completely excluded from the conventions called to consider his disfranchisement.”11 The broad effect of the new constitutions was to reject the principles of the Thirteenth, Fourteenth, and Fifteenth Amendments—lest anyone overlook the point, some states eliminated existing constitutional prohibitions on slavery, secession, or both.12 The particular method was to implement white supremacy by repudiating the fundamental condition of the Reconstruction Acts.

The broad voting rights protected by the fundamental condition apparently were never judicially enforced.13 The “redeemed”14

10. Walter F. Dodd, The Revision and Amendment of State Constitutions 67 (photo. reprint 1970) (1910); see also id. at 68 (noting that the Virginia constitutional convention “did not submit its constitution to the people, largely, it would seem, for fear of its being defeated by the elements to be disfranchised.”).
13. Several cases allude to voting claims under the Reconstruction Acts which were left unresolved. See, e.g., Underwood v. Hunter, 730 F.2d 614, 616 n.3 (11th Cir. 1984) (acknowledging Readmission Act claim regarding disenfranchisement of certain convicted criminals but granting relief on other grounds), aff’d, 471 U.S. 222 (1985); Allen v. Ellisor, 664 F.2d 391, 405 n.6 (4th Cir. 1981) (en banc) (Winter, J., concurring and dissenting) (recognizing Reconstruction Act claim in the disqualification of criminals from voting), vacated for consideration of mootness, 454 U.S. 807 (1981); Brickhouse v. Brooks, 165 F. 534, 546 (C.C.E.D. Va. 1908) (holding a claim challenging the validity of a voter registration ordinance to be a non-justiciable political question); State v. Franklin, 60 S.E. 953, 954 (S.C. 1908) (stating that a claim regarding suffrage provision of the readmission act “would be wholly inapplicable to our constitutional provisions in regard to juries”), aff’d sub nom., Franklin v. South Carolina, 218 U.S. 161, 166 (1910) (“If it could be held that the act of Congress restricted the state of South Carolina in fixing the qualifications
southern governments were unenthusiastic about Reconstruction in general.\textsuperscript{15} The Mississippi Supreme Court noted that the Mississippi Constitution of 1890 violated the Act but concluded that the Act itself was unconstitutional because "[t]he regulation of the right of suffrage belongs to the state," subject only to the Fifteenth Amendment's "prohibition of discrimination against persons on account of race or color."\textsuperscript{16} The Arkansas Supreme Court likewise rejected a challenge to a felon disenfranchisement statute on the same basis.\textsuperscript{17}

14. As recalcitrant white southerners reassumed political power in the waning days of Reconstruction, they began to "identify[] their cause with the mission of Jesus Christ—to the world, they announced themselves proudly as the South's 'redeemers.' " Edward A. Purcell, Jr., The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts", 81 N.C. L. REV. 1927, 1982 (2003).

15. See, e.g., Bourland v. Pollock, 249 S.W. 360, 363 (Ark. 1923) ("The Constitution of 1874 was framed... as the organic law of the state of Arkansas by representatives chosen by the people just after they had been disenthralled from a government which had been foisted upon them... during the period known as the Reconstruction Era"); Whitlock v. Hawkins, 53 S.E. 401, 405 (Va. 1906) ("The reconstruction acts were a flagrant violation of the Constitution, and the whole system which rested upon them was an usurpation... "); Grigsby v. Peak, 57 Tex. 142, 150 (1882), available at 1882 WL 9476, at *7 (holding statute of limitations suspended during and after the Civil War on grounds that "government by a military dictator... caused [the state's] whole judicial system to be greatly demoralized and impaired"); see also Davis v. Allison, 211 S.W. 980, 982 (Tex. 1919) (referring to "the alien Legislatures of the Reconstruction period"); cf. Dyett v. Turner, 439 P.2d 266, 272 (Utah 1968) (stating that Southern states' ratifications of the Fourteenth Amendment were accomplished by "spurious, nonrepresentative governments").

16. Sproule v. Fredericks, 11 So. 472, 474–75 (Miss. 1892). An important case following Sproule is Butler v. Thompson, 97 F. Supp. 17 (E.D. Va.) (three judge court), aff'd mem. per curiam, 341 U.S. 937 (1951), overruled in part by Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). In Butler, the district court rejected a challenge to a poll tax on several grounds, including that Congress had "no power in admitting a state to impose [a] restriction which would operate to deprive that state of equality with other states." 97 F. Supp. at 21. Although the Supreme Court affirmed this case without opinion, suggesting that this claim may have been correct, the affirmance was itself overruled, leaving the import of the District Court opinion somewhat murky.

17. See Merritt v. Jones, 533 S.W.2d 497, 502 (Ark. 1976). The Arkansas Supreme Court explained why the readmission act's suffrage provision was unconstitutional:

First, we must consider that this Act was in 1868, soon after the Civil War, and it was designed and intended to prevent unconstitutional criminal laws as a means of depriving former slaves of the right to vote. That is no longer a consideration. The Act purports to state the conditions upon which the State of Arkansas would be readmitted to the Union and be entitled to representation in Congress, but the Supreme Court has ruled that the Confederate states were never out of the Union and, hence, there was no necessity for readmission. Even if we assume that the Act has some force and effect, its enforcement is in the exclusive domain of Congress. Such was the determination when identical language was
Commentators have also doubted the constitutional validity of such acts:

Congress may dictate terms to territorial governments, and to provisional governments in states, and place upon them conditions, or insist on "irrevocable compacts," but once the state becomes a full fledged member of the Union, such conditions and compacts may remain as moral obligations but would hardly be enforcible [sic] at law.\textsuperscript{18}

Yet much may be said in defense of the Reconstruction Acts and the fundamental condition.\textsuperscript{19} First, by defining a class of persons who were per se eligible to vote, it anticipated Southern disenfranchisement techniques.\textsuperscript{20} Poll taxes, grandfather clauses, and literacy tests were invalidated with investigation, factfinding, litigation, and legislation over the course of decades.\textsuperscript{21} It was not until
the Voting Rights Act of 1965 that the legal status of African-American suffrage in the South reached the condition that Congress had first decreed in 1867.

The Reconstruction Acts also anticipated, with substantial accuracy, the scope of the modern right to vote.\textsuperscript{22} The Acts did not permit denial of the franchise based on failure to possess sufficient property, nonpayment of a poll tax,\textsuperscript{23} or flunking a literacy test,\textsuperscript{24} but did permit establishment of residency requirements\textsuperscript{25} and the disenfranchisement of some felons.\textsuperscript{26} Perhaps this congruence should not be surprising given that the Reconstruction Acts and the Fourteenth Amendment, the source of most voting rights jurisprudence, were both drafted by the 39th Congress.\textsuperscript{27}

Congress might also be credited with prescience (or at least sound judgment) about the importance of African-American suffrage to long term stability in the South. Without the vote, as it turned out, African-Americans were the subject of hostile legislation and discriminatory enforcement. The discriminatory treatment of African-Americans led to many negative consequences for the federal government, from the necessity to send federal troops to keep order (or suffer disorder),\textsuperscript{28} to the compromise of American military and diplomatic goals because of bad international publicity,\textsuperscript{29} to the

disenfranchisement of African Americans in Texas).

22. While the Reconstruction Acts accurately described the contours of the modern right to vote, they did not anticipate the expansion of that right by subsequent constitutional amendments. \textit{See} U.S. \textit{Const.} amend. XIX (granting women the right to vote); U.S. \textit{Const.} amend. XXVI (lowering the voting age to eighteen years).


24. \textit{Lassiter v. Northampton County Board of Elections}, 360 U.S. 45, 53-54 (1959), upheld the literacy test against an equal protection challenge, but the Voting Rights Act of 1965 suspended the literacy test, and it has been a dead letter since. \textit{See} Voting Rights Act of 1965, Pub. L. No. 89-110, \S\ 4, 79 Stat. 437, 438 (1965) (eliminating voting requirements that "deny[] or abridge[]" the right to vote "on account of race or color").


29. \textit{See}, e.g., Mary L. Dudziak, \textit{Desegregation as a Cold War Imperative}, 41 \textit{Stan. L. Rev.} 61, 62 (1988) (observing that "[a]t a time when the U.S. hoped to reshape the
inadequate medical and educational condition of African-Americans in the South called to military service. Had the Reconstruction Acts' fundamental condition been honored, it is much more likely that the relations between the races in the South would have been worked out without these enormous costs in lives and property.

This Essay proposes that the Reconstruction Acts' restriction on the power of the former Confederate states to deny the right to vote was constitutional. Part I briefly describes the legal events following the Northern victory, focusing on the Military Reconstruction Act and its progeny. Courts and commentators doubting the constitutionality of the Reconstruction Acts often rely on the doctrine of equality of states, reasoning that the Acts imposed special restrictions on the former Confederate states which were inapplicable to others. Part II explains that the equality of states principle is inapplicable to Reconstruction because it invalidates only conditions or restrictions that are beyond the authority of Congress.

As befits one of the most important, costly, and complicated events in American history, the Civil War implicated many provisions of the Constitution. Perhaps the Reconstruction Acts could be justified as an exercise of the power of Congress to enforce the Fourteenth and Fifteenth Amendments. However, given that the postwar world in its own image, the international attention given to racial segregation was troublesome and embarrassing.

30. See George Q. Flynn, The Draft 1940–1973, at 207 (1993) ("American society ensured that black fell out of the draft pool by failing to meet physical and mental standards, a trend from the beginning of conscription.").

31. See infra notes 43–80 and accompanying text.

32. See infra notes 81–92 and accompanying text.

33. For discussion of some of the constitutional issues that arose from the Civil War, see generally Herman Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era (1998) (discussing, inter alia, the Civil War Amendments' effects on constitutional issues such as individual liberty and federalism); Daniel Farber, Lincoln's Constitution 1 (2003) (stating that the Civil War "raised questions about state sovereignty versus national power, executive authority versus congressional prerogatives, and individual rights versus national security."); David P. Currie, The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873, 51 U. Chi. L. Rev. 131 (1984) (discussing various strands of Supreme Court jurisprudence originating out of Civil War disputes over military trials, loyalty oaths, federal courts' jurisdiction, the illegality of secession, and the validity of paper currency); Barry Friedman, The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court, 91 Geo. L.J. 1 (2002) (addressing the political pressures faced by the Supreme Court during Reconstruction and analyzing how politics can both threaten and protect the Court's institutional role).

34. Specifically, the courts invalidated the poll tax, the white primary, the grandfather clause, racial gerrymandering, and discriminatory application of any voting requirement based on self-executing provisions of the Fourteenth or Fifteenth Amendments. See cases cited supra note 21. The Voting Rights Act eliminated the literacy test, see 42 U.S.C.
Reconstruction Acts both preexisted and caused the ratification of those amendments.\textsuperscript{35} even if technically plausible, the argument that the Reconstruction Acts led to the Amendments and the Amendments in turn legitimate the Reconstruction Acts involves too much bootstrapping for comfort if there is another ground for sustaining the Acts.

Primarily relying on the Reconstruction-era decisions of the Supreme Court, Part III proposes that a number of provisions of the then-existing U.S. Constitution authorized federal intervention. The critical preliminary step in evaluating the constitutionality of federal measures is the legal principle that in a civil war "hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."\textsuperscript{36} Accordingly, the Reconstruction Acts must be tested not only as an exercise of the power to repel invasion and suppress insurrection,\textsuperscript{37} and the obligation to guarantee a republican form of government,\textsuperscript{38} but also as an exercise of the war power,\textsuperscript{39} perhaps the greatest power possessed by the national government. Based on the Supreme Court's understanding of the scope of these powers, the Reconstruction Acts are comfortably within the authority of Congress.\textsuperscript{40}

Part III goes on to argue that in spite of the protection of the franchise under the Fourteenth Amendment and the Voting Rights Act of 1965,\textsuperscript{41} enforcement of the Reconstruction Acts would affect the scope of the right to vote in the former Confederate states in two ways. First, the Reconstruction Acts make clear that disenfranchisement is punishment, which requires that it be applied in

\textsuperscript{35} Recall that the Reconstruction Acts required the Southern states to ratify the Reconstruction Amendments as a condition of readmission to representation in Congress. See supra note 3.

\textsuperscript{36} The Brig Amy Warwick, 67 U.S. 635, 667–68 (1862).

\textsuperscript{37} U.S. CONST. art. I, § 8, cl. 15 (providing that Congress shall have the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

\textsuperscript{38} U.S. CONST. art. IV, § 4, cl. 1 (guaranteeing, inter alia, that "the United States shall guarantee to every State in this Union a Republican Form of Government").

\textsuperscript{39} U.S. CONST. art. I, § 8, cl. 11 (providing that Congress shall have the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

\textsuperscript{40} See infra notes 93–149 and accompanying text.

accordance with the criminal protections in the Bill of Rights. Second, the Reconstruction Acts limit disenfranchisement to certain serious crimes. Thus, they undermine the political utility of altering the criminal code to criminalize conduct thought to be disproportionately committed by African-Americans. They also eliminate the need for inquiries into the legislative motivation for, or selective enforcement of, criminal and election laws.\textsuperscript{42}

I. MILITARY RECONSTRUCTION

The relationship between the United States and the former Confederate states had to be repaired following the Civil War. A critical problem was Southern representation in Congress. The Southern delegation had resigned before the War, and there were no incumbent officeholders in 1865.\textsuperscript{43} Given that the Southern states had made war on the United States, it was far from obvious that representatives from the insurrectionist states should be readmitted immediately and unconditionally.

The issue of congressional representation was compounded by the changed political status of African-Americans. The Emancipation Proclamation declared the slaves in the South free on January 1, 1863, and the Thirteenth Amendment ended slavery on a national basis.\textsuperscript{44} Several political problems were created by emancipation. First, Article I, Section 2 of the United States Constitution discounted slaves for purposes of apportionment of representation in the House, counting each one as three-fifths of a person.\textsuperscript{45} After the Thirteenth Amendment, there were no slaves; therefore, the African-American population of the South would no

\textsuperscript{42} See infra notes 150-61 and accompanying text.

\textsuperscript{43} Senator John Carlile and Representative Charles Upton, Unionists from Virginia, were the only representatives from the Confederate states to appear for the organization of the 37th Congress in December, 1861. See CONG. GLOBE, 37th Cong., 1st Sess. 1, 1–2 (1861); see also CONG. GLOBE, 38th Cong., 1st Sess. 1, 4 (1863) (showing no representatives from Confederate states in House at organization of 38th Congress; only Unionists Carlile and Lemuel Bowden in the Senate from Virginia). After the War, Congress was also devoid of representatives from the former Confederate states. See CONG. GLOBE, 39th Cong., 1st Sess. 1, 3 (1865) (showing that only Senators and Representatives from loyal states were seated); see also J. Res. 58, 40th Cong., 2d Sess., 15 Stat. 257, 257–59 (providing that rebel states would not be entitled to representation in the electoral college, unless “such State shall have . . . become entitled to representation in Congress, pursuant to the Acts of Congress in that behalf”).

\textsuperscript{44} See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . . .”).

\textsuperscript{45} U.S. CONST. art. I, § 2.
longer be undercounted by two-fifths, thereby raising the number of congressional representatives and presidential electors apportioned to the South.

Moreover, the inclination of the white population of the South to subordinate African-Americans did not suddenly dissipate with Lee's surrender. The Southern states emphatically rejected the Fourteenth Amendment when it was proposed, and enacted a series of "Black Codes" circumscribing the rights and status of African-Americans. Accordingly, Congress and the North had to either accept permanent suppression of a now-free people in the South, continue the armed conflict indefinitely by occupying the South to protect free African-Americans, or find an alternative method of preventing a return to the institutionalized racism of the antebellum South.

It is against this backdrop that Congress began to legislate with respect to the future of the former Confederate states. In March of 1867, Congress passed the Military Reconstruction Act, which provided the basic framework for normalization of relations. The Act divided the South into military districts under military command. A state could get out from under this regime and regain its right to have delegates seated in Congress by (1) ratifying the Fourteenth Amendment, (2) holding a constitutional convention, (3) adopting a new constitution consistent with the federal Constitution, and (4) having the new constitution approved by Congress.

The Act established suffrage requirements applicable to the election of delegates to the constitutional convention, the referendum to approve the constitution produced by the convention, and elections held under the new constitution. Those entitled to vote included "male citizens of said State, twenty-one years old and upward, of whatever race, color or previous condition of servitude ... except such as may be disenfranchised for participation in the rebellion or for felony at common law."

All Southern states complied with the Act's requirements, adopting new constitutions with broad suffrage. For example,

48. Id. §§ 1–3.
49. Id. § 5.
50. Id.
Alabama enfranchised "[e]very male person, born in the United States, and every male person who has been naturalized, or who has legally declared his intention to become a citizen of the United States, twenty-one years old or upward." \(^5\) The constitutions of other states were similar. \(^3\) The states also ratified the constitutional amendments as required by the Act. \(^4\)

Singly and in groups, the rebel states were readmitted to representation in Congress. All of the acts restoring their representation in Congress included the "fundamental condition" that

the state constitution shall never be so amended or changed as to deprive any citizen or class of citizens of the United States who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State: Provided, that any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters. \(^5\)

Military government ended when the state constitutions were approved and civilian governments were restored. \(^6\) Federal troops stayed a few more years, but African-Americans were increasingly subject to violent confrontation when they tried to vote or exercise other civil rights. \(^7\) "The first efforts of the enfranchised [white] citizens ... were to obliterate the Constitution foisted upon them largely by renegades, carpetbaggers, and scalawags, and to re-establish a free government." \(^8\) "Force and threat of force had put the

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52. ALA. CONST. art. VII, § 2 (1867), reprinted in 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, supra note 51, at 91.
53. See, e.g., MISS. CONST. art. VII, § 2 (1868), reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, supra note 51, at 385 (declaring that all male citizens could vote, subject to some qualifications).
55. Act of June 22, 1868, ch. 69, 15 Stat. 72, 73 (readmitting Arkansas to representation in Congress). The acts readmitting other states to representation were virtually identical. See Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (Virginia); Act of June 25, 1868, ch. 70, 15 Stat. 73, 74 (North Carolina, South Carolina, Louisiana, Georgia, and Florida).
57. See FONER, supra note 46, at 291.
whites in power. Within 10 or 15 years after 1867 the premature enfranchisement of the Negro was largely undone, and undone by veritable revolution. 59 Fraud in addition to force was used, including "[g]errymandering, trickery in election administration, [and] fraud in casting and counting ballots." 60

Beginning with Mississippi in 1890, the Southern states utilized state constitutions to disenfranchise African-Americans more efficiently and permanently, and with the patina of lawfulness. The purpose was "to eliminate the supposed danger from the negro vote." 61 "Mississippi, South Carolina, and Louisiana invented the principal techniques for voiding the Constitution by constitutional means.... In 1890 Negroes made up more than 50 per cent of the population of each of these states." 62

The Mississippi Constitution of 1890 disqualified those convicted of certain crimes, and required voters to pay a poll tax, pass a literacy test and be able to read, understand and interpret the state constitution. 63 The South Carolina constitution of 1895 added a property exception to the literacy test. 64

In order to accomplish the goal of ensuring, as Louisiana’s Lieutenant Governor explained, "that every white man shall vote, because he is white, and no black man shall vote, because he is black," the Louisiana Constitution of 1898 invented the grandfather

59. KEY, supra note 8, at 536.

60. Id. at 540; see also, e.g., Albert E. McKinley, Two New Southern Constitutions, 18 POL. SCI. Q. 480, 482 (1903) ("It was well recognized [in Alabama and Virginia] that the existing practical disenfranchisement of the Negro by means of intimidation and dishonest election methods must give place to a constitutional limitation upon Negro suffrage.").

61. DEALEY, supra note 12, at 90.

62. KEY, supra note 8, at 537.

63. MISS. CONST. art. XII (1890), reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, supra note 51, at 424–25. See generally William Alexander Mabry, Disenfranchisement of the Negro in Mississippi, 4 J. S. Hist. 318 (1938) (discussing the Mississippi constitutional convention).

64. S.C. CONST. art. II, § 4 (1895), reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, supra note 51, at 505.

65. Amasa M. Eaton, The Suffrage Clause in the New Constitution of Louisiana, 13 HARV. L. REV. 279, 281 (1899). Professor Eaton agreed with the Louisiana convention’s conclusion that African-American suffrage was a mistake, but that unconstitutional disenfranchisement was not the appropriate response:

Let us freely admit that a great mistake was made in thus conferring the suffrage upon them, but let us not lend ourselves to another and perhaps a still more serious mistake by correcting this error by some ultra constitutional method. We may rest assured that in the long run the cause of constitutional liberty is best maintained by correcting errors only by the methods pointed out in the Constitution.

Id. at 283; accord Dos Passos, supra note 7, at 476 ("The best friends of the negro, of
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clause, which "exempted [from educational and property tests] persons entitled to vote on or before January 1, 1867, or the son or grandson of such person." Thus, the President of the Convention explained, Louisiana's constitution undid "the greatest crime of the nineteenth century, the placing of the ballot in the hands of the negro race by the Fifteenth Amendment to the Constitution of the United States."

Even many defenders of the successful campaign to eliminate the Reconstruction constitutions acknowledged the violence employed in achieving the goal of disenfranchising African-Americans. The Mississippi Supreme Court described the process in much the same way as did historian V.O. Key:

Our unhappy state had passed in rapid succession from civil war through a period of military occupancy, followed by another, in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power. The anomaly was then presented of a government whose distinctive characteristic was that it rested upon the will of the majority, being controlled and administered by a minority of those entitled under its organic law to exercise the electoral franchise.

Accordingly, the constitutional convention took steps to legalize the violent disenfranchisement of African-Americans:

Within the field of permissible action under the limitations

which I profess to be one, are forced to admit, nearly forty years after the War, that negro suffrage in the South was a monumental error.


68. See infra notes 70-77 and accompanying text.

69. See supra notes 59-62.

imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.\textsuperscript{71}

Forty years later, the Mississippi Supreme Court looked back with admiration to what it regarded as the good works of the convention: "[T]hey enacted a Constitution that dissipated the clouds of venality and corruption which overhung the South during the reconstruction period, and the sunlight of peace, prosperity, and happiness has blessed the land since that time."\textsuperscript{72}

In \textit{Hunter v. Underwood},\textsuperscript{73} the U.S. Supreme Court invalidated the disenfranchisement provision of the Alabama Constitution of 1901. The Court noted that testimony of historians showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.... The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within

\textsuperscript{71} Ratliff, 20 So. at 868.
\textsuperscript{73} 471 U.S. 222 (1985).
THE "VOTING RIGHTS ACT OF 1867"

the limits imposed by the Federal Constitution, to establish white supremacy in this State.”

The evidence of the background of constitutional change in Louisiana is also unimpeachable. Edward White became Chief Justice of the United States Supreme Court after service as a Confederate officer. When he died, his friends on the Louisiana Supreme Court recounted with pride his service in the White League’s coup d’état against the Reconstruction government of Louisiana.

Over time, the purpose of the rules became a matter of open and common knowledge. For example, in Yuratich v. Plaquemines Parish Democratic Executive Committee, a white person who wished to stand as a candidate in a party primary but could not satisfy the property requirements argued that the constitutional provisions allowing parties to establish qualifications for candidates were “limited to such requirements as may be necessary to maintain White Supremacy in Louisiana.” He lost because the Louisiana Court of Appeals concluded that the power granted by the constitution “was not limited to such qualifications as relate to race,” acknowledging that racial concerns were at least one motivating reason.

II. EQUALITY OF STATES

The overthrow of the Reconstruction governments in the South was accomplished by methods contrary to the terms of the Reconstruction Acts. However, there is a plausible argument that

74. Id. at 229 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, at 8 (1940)) (internal citations omitted). For full transcripts of the convention, see OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA: MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_voll/1901.html; see also Bolden v. City of Mobile, 542 F. Supp. 1050, 1062-63 (S.D. Ala. 1982) (describing the Alabama convention); Ex parte Melof, 735 So. 2d 1172, 1181-83 (Ala. 1999) (providing portions of the convention transcripts).

75. Edward White: In Memoriam, 149 La. i, viii-xi (1922) [hereinafter White: In Memoriam].


77. White: In Memoriam, supra note 75, at vii. Interestingly, Chief Justice White authored the U.S. Supreme Court’s unanimous opinion invalidating the grandfather clause. See Guinn v. United States, 238 U.S. 347, 365 (1915).

78. 32 So. 2d 647 (La. App. 1947).

79. Id. at 650.

80. Id. at 651.
this statutory violation is irrelevant because the Reconstruction Acts were themselves unconstitutional. Because they imposed the fundamental condition that states grant a broad franchise only on some states, it could be argued that the Reconstruction Acts violated the well-established doctrine of "equality of states."

The "equality of states" doctrine holds that states must be admitted to the Union on equal terms. If the Reconstruction Acts are regarded as subject to this doctrine, it might be argued that they are invalid because of the special conditions imposed on the Southern states, which are not on an equal footing with the other states whose electoral practices are unregulated.

Yet, it seems obvious that all states need not be treated in precisely the same way. Of course, as the text makes clear, states are not protected by the Equal Protection Clause of Section 1 of the Fourteenth Amendment. The ordinary and apparently legal behavior of the national government seems to allow differential treatment. Time and again, Congress takes action benefiting some states and disadvantaging others—Massachusetts's Air Force base is closed while California's remains operational; Nevada gets a radioactive waste dump while Kentucky gets a hospital—and everyone understands that this is politics. Even in the context of voting rights, the Supreme Court has held that all states need not be subject to the same rules; the Court upheld the Voting Rights Act of 1965 even though some of its provisions apply to some states and not others.

81. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 3.6 (3d ed. 1999).
82. Technically, the Reconstruction Acts restored the Southern states to representation in Congress rather than readmitting them to the Union. In White v. Hart, 80 U.S. (13 Wall.) 646, 652 (1871), the Court examined the language of the acts readmitting the Southern states to representation in Congress on the one hand, and acts admitting states to the Union on the other, and came to the following conclusion:

The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed States had not been out of the Union, and that to bring them back into full communion with the loyal States, nothing was necessary but to permit them to restore their representation in Congress . . . .

Id.
83. The supreme courts of Mississippi and Arkansas accepted this reasoning, as did the decision underlying a summary affirmance by the United States Supreme Court, although that summary decision has since been overruled. See supra notes 15–17.
84. The Fourteenth Amendment is, after all, a limitation on—rather than a grant of—state authority. See U.S. Const. amend. XIV, § 1 ("No state . . . shall deny to any person within its jurisdiction the equal protection of the laws.").
85. See South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) ("The doctrine of
So what then does "equality of states" require? In Coyle v. Smith, the leading decision on equality of states, the Supreme Court invalidated a provision in the act admitting Oklahoma to statehood and designating a particular city as Oklahoma's capitol. The Court recognized the "constitutional equality of the states," explaining that the federal power to admit states is the power to admit states "equal in power, dignity and authority."

This language could be understood as meaning that states must be admitted to the Union on identical terms—any unique or special conditions are void. However, Coyle itself makes clear that this view is wrong. Instead, the determinative issue is whether the special condition is within the power of Congress. There is no hint that a statute, which would otherwise be a valid exercise of federal power, is unconstitutional because it comes in an act authorizing admission of a new state. The Court explained that state power cannot be limited "by any conditions, compacts, or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

Later in the Coyle opinion, the Court explicitly stated that the problem with Congress dictating the location of the state capitol was the absence of federal power over state capitols at all, rather than that Oklahoma in particular was being singled out or that the provision was contained in a statute admitting a state into the Union:

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation... which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation... derive[s] its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the

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the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.

86. 221 U.S. 559 (1911).
87. Id. at 580.
88. Id. at 580.
89. Id. at 567.
90. Id. at 573.
regulating power of Congress.\textsuperscript{91}

For obvious reasons, the flow of cases involving admission of states to the Union has trickled off in recent decades. However, in several cases decided after Coyle, the Court upheld special provisions of enabling acts on the ground that, unlike the location of state capitol, the provision was within federal power: "the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power."\textsuperscript{92} The question is whether the federal government has the power to do a particular thing, not whether the power is exercised in a statute admitting or readmitting a state to the Union. In this context, the pertinent question is whether the federal government had the power to regulate the Southern States' readmission to representation in Congress. It is to this question that the discussion now turns.

III. FEDERAL POWER

In its post-Civil War decisions, the Supreme Court was frank about the legal status of those who supported the Confederacy: individual Confederates were "traitors;"\textsuperscript{93} in the eyes of the law, they were enemies:

\begin{quote}
[I]n the war of the rebellion the United States sustained the double character of a belligerent and a sovereign, and had the rights of both.... [When] a rebellion ... has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels.\textsuperscript{94}
\end{quote}

The Confederacy was "a treason respectable only for the numbers and force by which it was supported."\textsuperscript{95} Its existence was illusory,

\begin{footnotes}
\footnote{91. Id. at 574.}
\footnote{92. United States v. Chavez, 290 U.S. 357, 365 (1933); see also Ex parte Webb, 225 U.S. 663, 691 (1912) (upholding statute under the Commerce Clause).}
\footnote{93. Wallach v. Van Riswick, 92 U.S. 202, 210 (1875).}
\footnote{94. Miller v. United States, 78 U.S. (11 Wall.) 268, 307-09 (1870).}
\footnote{95. Sprott v. United States, 87 U.S. (20 Wall.) 459, 463 (1874); see also, e.g., Ford v. Surget, 97 U.S. 594, 604-05 (1878) ("The district of the country declared by the constituted authorities, during the late civil war, to be in insurrection... was enemy territory, and all the people residing in it were... liable to be treated... as enemies."); White v. Hart, 80 U.S. (13 Wall.) 646, 650 (1871) ("The doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence. The late rebellion was without any element of right or sanction of law."); Mauran v. Ins. Co., 73 U.S. (6 Wall.) 1, 13 (1867) (noting that the Confederate governments "were wholly null and void").}
\end{footnotes}
except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal government. Its single purpose, so long as it lasted, was to make that treason successful. . . . Its existence and temporary power were an enormous evil, which the whole force of the government and the people of the United States was [sic] engaged for years in destroying. When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence.\[^96\]

Thus, for example, although there was a statute of the Confederate Congress creating the Confederate States' District Court for the Northern District of Alabama, it did not exist in the eyes of United States law.\[^97\] Accordingly, a person charged with treason against the Confederacy during the war could bring a false imprisonment action against a "judge" of the Confederate non-court.\[^98\]

However, the Supreme Court distinguished between benign acts of seceding states on the one hand and the Confederacy they formed on the other. The Confederacy had a primary purpose—separation from the United States—while the individual states had legitimate responsibilities for police, property, and family rights. The execution of those duties would be recognized as valid "where they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution."\[^99\] Thus, acts of the seceding states were valid, if innocent, but those designed to help the Confederacy or deprive loyal individuals of their rights were void.

The Confederacy has been sentimentalized in some quarters.\[^100\]

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\[^96\] Sprott, 87 U.S. at 464-65 (explaining that a claimant who purchased cotton from the Confederacy, which was subsequently seized by the United States, had no claim).

\[^97\] Hickman v. Jones, 76 U.S. (9 Wall.) 197, 201 (1869).

\[^98\] Id. at 200-01 (stating that because of the illegal nature of the southern states' rebellion, the Confederate District Court was "a nullity, and could exercise no rightful jurisdiction").

\[^99\] Horn v. Lockhart, 84 U.S. (17 Wall.) 570, 580 (1873) (holding that a trustee who invested in Confederate bonds was liable to beneficiaries); see also Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1868) (holding that otherwise valid acts of confederate governments would be held valid, while "acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens," would be deemed null and void).

\[^100\] See, e.g., Erickson v. City of Topeka, 209 F. Supp. 2d 1131, 1147 (D. Kan. 2002) (noting the potential positive connotations of the Confederate flag); Bosworth v. Harp, 157 S.W. 1084, 1088 (Ky. 1913) (upholding pensions granted to Confederate veterans by a
However, whatever the underlying merits—or lack thereof—of the Confederate view of constitutional law and the nature of human rights, legally the rebel military campaign against the United States had the same status as, say, the 1941 campaign of the Empire of Japan: all of the war powers of the United States could be deployed to suppress it. Under the Constitution, citizens who took up the Confederate cause had no more rights than Americans like Herbert Haupt and Yaser Esam Hamdi. Thus, in describing the rights of the United States in the captured city of New Orleans, the Court explained:

[G]overnment had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. . . . It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.

The decision in Stewart v. Kahn is particularly instructive. In Stewart, the Court upheld, under the war power, a federal statute suspending the statute of limitations in state courts. In so holding, the Court found that the measures to be taken in carrying on war and to suppress insurrection are not precisely defined in the text of the Constitution. The decision of all questions regarding the scope of the powers to conduct war and suppress insurrection rests, therefore,


101. Ex parte Quirin, 317 U.S. 1, 46 (1942) (holding that Herbert Haupt, whom the Court assumed arguendo to be a naturalized citizen of the United States, could properly be convicted by military commission for his participation in a sabotage plot sponsored by the German Reich).

102. Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003) (holding that American citizen Yaser Esam Hamdi, who had been “designated an enemy combatant . . . captured in an zone of active combat operations abroad,” was not entitled to habeas relief on grounds that “further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner’s detention”), cert. granted, 124 S. Ct. 981 (2004).


104. 78 U.S. 439 (1870).

105. Id. at 507.
wholly in the discretion of those in whom the Constitution vests the substantial powers involved. Further, the Court reasoned, the power to suppress insurrections is not limited to winning the battle; it naturally includes the power to "guard against the immediate renewal of the conflict, and to remedy the evils" which have arisen from its progress.\footnote{106}

\textit{Stewart v. Kahn} is significant because it recognizes that the war power does not terminate immediately upon cessation of hostilities; the belligerent's rights include doing what is necessary to ensure that "the evils" do not arise again. It is also significant because it is not a political question case, holding that courts cannot interfere with executive decisions.\footnote{107} Instead, the Court affirmatively enforced the statute.

The contemporaneous decisions of the Supreme Court suggest that the Reconstruction Acts were similarly constitutional. Southern states challenged Military Reconstruction by filing bills of complaint in the Supreme Court. In 1867, the Court dismissed Mississippi's suit, holding that President Andrew Johnson's allegedly unconstitutional actions taken pursuant to the Reconstruction Acts presented non-justiciable political questions.\footnote{108} The next term, Georgia's suit against the Secretary of War was dismissed on the same grounds.\footnote{109}

The following year, in 1869, the Court found a case presenting facts permitting it to reach the constitutional status of military reconstruction. That case, \textit{Texas v. White},\footnote{110} involved the validity of U.S. bearer bonds given to Texas in 1851 in settlement of a boundary dispute. Texas disposed of the bonds during the war, and the new Texas government sued the current holders of the bonds, claiming that the secessionist government transferred them illegally.\footnote{111} The bondholders responded by arguing that "Texas" had no right to sue, either because "Texas" ceased to be a state because of its secession, or, at least, that the government imposed by the Reconstruction Acts

\footnotesize{106. Raymond v. Thomas, 91 U.S. 712, 714–15 (1875) (citing \textit{Stewart}, 78 U.S. (11 Wall.) at 506); see also \textit{In re Yamashita}, 327 U.S. 1, 12 (1946) (noting that the laws of war apply after cessation of hostilities and therefore jurisdiction of military commissions continues).}

\footnotesize{107. See generally 1 \textsc{Rotunda} & \textsc{Nowak}, supra note 81, § 2.16 (stating that some executive or congressional decisions are not subject to judicial review).}

\footnotesize{108. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500–01 (1867).}

\footnotesize{109. Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 77–78 (1868); see also \textit{Bolling v. Lersner}, 91 U.S. 594, 595 (1875) (declining to reach the question of the constitutionality of the Reconstruction Acts because the question was not decided below).}

\footnotesize{110. 74 U.S. (7 Wall.) 700 (1869), overruled on other grounds by Morgan v. United States, 113 U.S. 476 (1885).}

\footnotesize{111. \textit{Id.} at 704–06.}
had no authority to file suit. The Court rejected both claims.

As to the contention that Texas had ceased to exist as a state, the Court concluded that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Accordingly, the secession was "absolutely null." The evocative phrase "indestructible States" has often been cited in support of states' rights, but its original usage was to underscore the state's breach of its indestructible constitutional duties: "The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired.

The Court also held that the Reconstruction government had authority to prosecute the suit on behalf of the State of Texas. While the Court did not "pronounce judgment upon the constitutionality of any particular provision of these acts," its analysis, discussed at length below, almost inevitably leads to the conclusion that the suffrage provision of the Reconstruction Act was constitutional.

First, the Court stated that the rebel states could be excluded from Congress for a period of time, and that therefore the "carrot" of the Reconstruction Act, readmission of the Southern delegations, was legitimately withheld. Although Texas was still in the Union after secession, that did not mean that the relationship between Texas and the Union was unaffected by the state's illegal and revolutionary acts:

No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress. All admit that, during this condition of civil war, the rights of [Texas] as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional

112. Id. at 709–10.
113. Id. at 720–21.
114. Id. at 725.
115. Id. at 726.
117. White, 74 U.S. at 726.
118. Id. at 726.
119. Id. at 731.
120. Id. at 730–31.
obligations, assumed the character of enemies, and incurred the consequences of rebellion.\footnote{121}

The Court explained that the United States had to defeat the Confederacy, which it was authorized to do under the war power and the power to suppress insurrection. Having achieved military victory, the national government was not obligated immediately to walk away; it could take steps to protect itself from people who had made themselves enemies. The national government was entitled to reestablish "the broken relations of the State with the Union."\footnote{122} According to the Court, this power arose from the federal government's constitutional promise to ensure a republican form of government for each and every state in the union.\footnote{123} In order to fulfill this obligation, the Court held, the national government must be able to effectively exercise the power to suppress insurrection, which itself was "a necessary complement"\footnote{124} to the guarantee of a republican form of government.

The Court explained that congressional exercise of the Guarantee Clause power was valid if the means were "necessary and proper for carrying into execution the power conferred."\footnote{125} The Reconstruction Acts' suffrage provision protected the freed slaves by imposing terms in the state constitutions. The Court held that both the purpose and the method were within the scope of the Guarantee Clause.\footnote{126} As to the freed slaves, the Court explained:

The new freemen necessarily became part of the people, and the people still constituted the State . . . . And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.\footnote{127}

With respect to the state constitutions, the Court stated that new state officials would have to be elected, and "before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to

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\footnote{121. Id. at 727.} \footnote{122. Id.} \footnote{123. Id. at 727–28. Here, the Court was referring to the "Guarantee Clause." See supra note 38.} \footnote{124. White, 74 U.S. at 727–28. See also Christian Feigenspan, Inc., v. Bodine, 264 F. 186, 194 (D.N.J. 1920) (noting that the Reconstruction Acts "were war measures, and applicable solely to the states then or then recently in a state of rebellion"). aff'd sub nom., 253 U.S. 350 (1920).} \footnote{125. White, 74 U.S. at 729.} \footnote{126. Id. at 730.} \footnote{127. Id. at 728–29.}
\end{flushleft}
the new conditions created by emancipation, and afford adequate security to the people of the State."\(^{128}\)

_Texas v. White_ suggests that Congress could protect the freed slaves by reforming the state constitutions under the Guarantee Clause.\(^{129}\) Analysis of whether granting suffrage to the freed slaves was a necessary and proper means of carrying out the Guarantee Clause turns on what the Guarantee Clause was designed to do. The Supreme Court has generally held that enforcement of the Republican Form of Government Clause presents a political question and claims under it are "therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress."\(^{130}\) Accordingly, the Court has only infrequently and succinctly explored the substantive meaning of the Clause. What it has said is fairly consistent: the Clause is designed to protect popular sovereignty.\(^{131}\)

In _Luther v. Borden_,\(^{132}\) one of the most important Guarantee Clause cases, the Court was faced with a claim arising out of the existence of rival governments in Rhode Island, each claiming

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128. _Id._ at 729.
129. Military Reconstruction was textually justified as a method of establishing republican governments. See, e.g., Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428-30 (1868) (military government imposed until loyal and republican state governments could be legally established); Act of June 22, 1868, ch. 69, 15 Stat. 72, 72 (1869) (noting that Arkansas has "framed and adopted a constitution of State government, which is republican").
130. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912); see also Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79-80 (1930) ("As to the guaranty to every state of a republican form of government . . . it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of the Congress and not the courts." (citations omitted)). But cf. New York v. United States, 505 U.S. 144, 185 (1992) (noting prior cases holding that the Guarantee Clause presented a political question but stating "[w]e need not resolve this difficult question today").
legitimacy. The Court rejected the plaintiff's claim for improper search of his home under martial law declared by the prevailing government, because Congress had recognized the prevailing government as legitimate. Nevertheless, the Court stated, "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it." Military government or a similarly undemocratic form would be unconstitutional because "the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure."

One of the most extended discussions of the Guarantee Clause can be found in Duncan v. McCall, a habeas corpus case in which the defendant argued that the Texas penal code had not been enacted in accordance with the state constitution. The Court concluded that the argument was committed to the state courts, in the absence of extreme circumstances:

This is not the case of a system of laws attacked ... as the product of revolution. By the Constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws. . . .

The Court noted that "[t]he state of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law."

The Supreme Court has stated that political accountability is an element of the republican form of government. In Downes v. Bidwell, the Court interpreted "republican government" under the Guarantee Clause "according to the definition of Webster"—as "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them."

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133. Id. at 43-44.  
134. Id. at 45.  
135. Id. at 47.  
136. 139 U.S. 449 (1891).  
137. Id. at 461.  
138. Id. at 462.  
139. 182 U.S. 244 (1901).  
140. Id. at 279.
In *New York v. United States*, the Court held that a statute granting federal funds and the right to ship radioactive waste in interstate commerce based on passage of certain state laws did not deprive states of a republican form of government. The Court determined that whatever the states decided to do in response to those federal incentives, "[t]he states thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." In *Taylor v. Beckham (No. 1)*, the Court held that it had no jurisdiction to interfere with a disputed gubernatorial election in Kentucky, even though the state legislature resolved it in a way which might have deprived the rightful winner of the seat. Because the ordinary institutions of state government were functioning, "[a]ny remedy beside that is to be found in the august tribunal of the people, which is continually sitting, and over whose judgments on the conduct of public functionaries the courts exercise no control."

It is no coincidence that disenfranchisement occurred first in Mississippi, South Carolina, and Louisiana, jurisdictions with African-American majorities. Throughout the South, white political demand for disenfranchisement was "most acute ... in those counties and cities with black majorities." Where African-Americans were small minorities, disenfranchisement was unnecessary to render them powerless. This phenomenon makes clear that the suffrage provision of the Reconstruction Act was designed to protect government accountability to the majority of the people, and thus seems entirely consistent with the Guarantee Clause. African-Americans were made part of the people of the United States. Congress could reasonably conclude that it had to do something to protect African-Americans from hostile white neighbors in the South.

According to some historians, in jurisdictions without universal suffrage, the assumption was that disenfranchised groups were

142. *Id.* at 186.
144. 178 U.S. 548 (1900).
145. *Id.* at 580.
146. *Id.*
147. KEY, supra note 8, at 540.
virtually represented or were for some reason poor decisionmakers. Women and children are the classic examples of such groups. But the theory, at least, was that these groups were disenfranchised to protect the integrity of the electoral process, not simply so that they could be oppressed. Indeed, there can be no serious argument that disenfranchised African-Americans were virtually represented by whites.

Of course, many of the objectionable parts of the post-Reconstruction constitutions in the South have been invalidated by the courts, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. As a result of these judicial and legislative developments, voting is no longer conditioned on paying poll taxes or passing tests of literacy or constitutional interpretation. Nevertheless, enforcement of the Reconstruction Acts in the suffrage area would make at least two important changes in current law with respect to disenfranchisement of persons convicted of crime. First, if the Reconstruction Act applied, then disenfranchisement would be treated as punishment in former Confederate states. Currently, disenfranchisement of felons is treated as a mere civil disability.

150. The Supreme Court struck down the “grandfather clause,” designed to allow whites to vote automatically while requiring African-Americans to satisfy onerous procedures. See Lane v. Wilson, 307 U.S. 268, 277 (1939). It also invalidated the “white primary,” where only whites were allowed to participate in the purportedly “private” Democratic primary. See Smith v. Allwright, 321 U.S. 649, 664–66 (1944); United States v. Classic, 313 U.S. 299, 329 (1941).
155. Recall that the Acts provided that disenfranchisement could only be imposed as “punishment” for crime. See supra note 26 and accompanying text.
156. See, e.g., United States v. Osiemi, 980 F.2d 344, 349 (5th Cir. 1993) (“[I]f the defendant is informed of [Federal Rule of Civil Procedure 11’s] critical consequences, he need be informed of no others—such as possible consequent civil disenfranchisement or the like.” (citing United States v. Dayton, 604 F.2d 931, 937 (5th Cir. 1979))).
The practical difference is that persons pleading guilty to crimes are entitled to be informed of the resultant criminal punishments, but they are not entitled to be informed of civil disabilities that might result from their plea. Accordingly, under the Reconstruction Act, individuals considering whether to plead guilty to a crime (and over 90% of convictions result from guilty pleas) would be entitled to be fully informed that a guilty plea would result in a forfeiture of the right to vote.

More fundamentally, the Reconstruction Acts limit the crimes for which disenfranchisement can be imposed to common law felonies—e.g., murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. If the Reconstruction Acts applied, the group of people subjected to disenfranchisement would be reduced; presumably, non-violent drug offenders would be among the largest groups to benefit from such an application.

There are reasons to be suspicious of broad criminal disenfranchisement rules in this context; the Mississippi Supreme Court acknowledged that the 1890 Constitution’s rules were drafted to disenfranchise African-Americans: “Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.” Of course, provisions clearly based on racial animus can be struck down. But racial animus must be proved, and is not likely to be admitted by discriminators who know if they tell the truth their efforts to discriminate will fail. Accordingly, some statutes in fact motivated by racial animus are likely to survive judicial challenges. In addition, the inquiry itself is time consuming and costly. If the 39th Congress intended to come up with a safeguard for African-American suffrage that was cheap, effective, and difficult to manipulate, it found one in

157. See, e.g., id.
159. Jerome v. United States, 318 U.S. 101, 108 n.6 (1943) (citing WHARTON, CRIMINAL LAW § 26 (12th ed.)).
160. Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896); see also WOODWARD, supra note 11, at 56 (“Virginia’s law adding petty larceny to the list of disqualifications was imitated because of its effect on the Negro vote.”).
161. Hunter v. Underwood, 471 U.S. 222, 225 (1985) (finding a statute that contained voting restrictions to be unconstitutional on grounds that discriminatory intent was a motivating factor in its enactment).
CONCLUSION

The repudiation of the Reconstruction constitutions and their suffrage provisions has been called a coup d'état.\textsuperscript{162} The President of the Mississippi Constitutional Convention of 1890 agreed: "There was revolution. There is no manhood nor honesty in attempting to disguise it. There was revolution."\textsuperscript{163} These are strong words, but lesser ones would hardly fit. African-Americans were citizens and, by virtue of the Reconstruction Acts, in lawful possession of the ballot. Through fraud, force, and violence, they were deprived of the "fundamental political right, . . . preservative of all rights."\textsuperscript{164} This injustice was enshrined in law in the form of state constitutions made in flagrant defiance of the fundamental condition of the Reconstruction Act. The Alabama Constitution of 1901 and the Mississippi Constitution of 1890 remain in force; the constitutions in all of the former confederate states trace to instruments created by force, fraud, and the unconstitutional disenfranchisement of African-Americans.

\begin{itemize}
\item \textsuperscript{162} Key, \textit{supra} note 8, at 553.
\item \textsuperscript{163} S.S. Calhoon, \textit{The Causes and Events That Led to the Calling of the Constitutional Convention of 1890}, 6 PUBS. MISS. HIST. SOC'Y 105, 109 (1902).
\item \textsuperscript{164} Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
\end{itemize}