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“The Cornerstone of the Stability of our Government”: The Forgotten Penalty Clause and Electoral Reform in the Aftermath of the 2020 Election

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The 2020 presidential election, which was preceded by months of efforts by Republican party members to disenfranchise voters during a global pandemic, highlighted the United States’ historic need for electoral reform. The tools for this reform might already exist in the Penalty Clause of the Fourteenth Amendment, which provides a built-in remedy—reduced representation in Congress—in cases where a state abridges the voting rights of its citizens. This Remark provides an overview of the history of the long-neglected Penalty Clause, including a discussion of how important its drafters viewed its role, as well as practical proposals for ways it could be implemented today.

INTRODUCTION

In the lead-up to the 2020 presidential election and continuing for weeks afterward, former President Trump and his close allies made repeated, baseless claims of voter fraud.¹ President Trump refused to concede the election until January 7, 2021, long after all the major networks had called the race for President Biden.² In alleging voter fraud, the

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1. See Jim Rutenberg, *How Trump’s ‘Voter Fraud’ Lie is Disenfranchising Americans*, N.Y. TIMES (Sep. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html> [<https://perma.cc/AR72-MCJV>] (providing an overview of President Trump’s repeated claims of voter fraud leading up to and following the election).
2. Kevin Liptak, Veronica Stracqualursi & Allie Malloy, *Trump Publicly Acknowledges He Won’t Serve a Second Term a Day After Inciting Mob*, CNN

Republican Party attempted to co-opt the long-time language of voting rights activists, despite long-term Republican opposition to the voting rights agenda.³ Indeed, this language eventually led to hundreds of Trump's supporters violently storming the U.S. capitol to champion Trump and his unfounded election fraud claims.⁴

Trump's baseless claims were ironic given that the only evidence of actual voting rights violations during the 2020 election was of prolific Republican efforts to disenfranchise voters.⁵ Indeed, various Democrat-led efforts to ensure enfranchisement encountered stark opposition from Republicans.⁶ In multiple states, the Republican Party actively worked to make voting less convenient, a particular concern during a global pandemic. Reports documented government officials limiting drop-off ballot sites in Texas,⁷ the California Republican Party placing deceptively labeled drop boxes for mail-in ballots throughout the state,⁸ and hours-long waits for

(Jan. 7, 2021), <https://www.cnn.com/2021/01/07/politics/trump-biden-us-capitol-electoral-college-insurrection/index.html> [<https://perma.cc/Y8BM-KV3D>].

3. JESSE H. RHODES, *BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT* (1st ed. 2017).
4. *The Capitol Siege: The Arrested and Their Stories*, NPR (March 26, 2021), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> [<https://perma.cc/L8QN-82G6>].
5. See, *infra*, notes 6-10.
6. In one example, Republican plaintiffs brought suit to demand that drive-through voting not be permitted on Election Day in Texas. Jolie McCullough, *Nearly 127,000 Harris County Drive-Thru Votes Appear Safe After Federal Judge Rejects GOP-Led Texas Lawsuit*, TEX. TRIBUNE (Nov. 2, 2020), <https://www.texastribune.org/2020/11/02/texas-drive-thru-votes-harris-county/> [<https://perma.cc/ME6J-CFCR>].
7. Maggie Astor, *Citing Security, Texas Governor Limits Counties to One Spot Each for In-Person Ballot Drop-Offs*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/elections/citing-security-texas-governor-limits-counties-to-one-spot-each-for-in-person-ballot-drop-offs.html> [<https://perma.cc/EDQ3-MNA8>] (The Texas Governor, Greg Abbott, issued a proclamation in October that there would only be one drop-off location for mail-in ballots per county.).
8. Glenn Thrush & Jennifer Medina, *California Republican Party Admits It Placed Misleading Ballot Boxes Around State*, N.Y. TIMES (Oct. 14, 2020),

early voters.⁹ In various states, citizens challenged stringent absentee ballot requirements, including requirements that absentee ballots be notarized and policies denying absentee ballot requests to people worried about contracting COVID-19.¹⁰

Months later, when reflecting on the 2020 election, it is important to take note of these serious instances of attempted and successful voting rights infringement and consider electoral reform moving forward. This is particularly important given more recent efforts by some Republican states to codify increased voting restrictions, such as a new voting rights law in Georgia which, among other things, makes it illegal to provide food and water to voters who are waiting in line to vote.¹¹ Indeed, Republicans in 43 states have proposed laws to limit voting, proposing reforms such as stricter voter ID requirements and limiting opportunities for mail-in voting.¹²

This moment should prompt consideration of a neglected tool for asserting voting rights – the Penalty Clause of the Fourteenth Amendment, which provides for docking representation in Congress for states that violate voting rights. The Penalty Clause could provide the necessary foundation for overhauling our electoral system. The Clause has been almost entirely ignored for decades, despite some early efforts to effectuate it, but penalizing states for disenfranchisement efforts might offer a long-lasting solution to voting right infringement.

<https://www.nytimes.com/2020/10/12/us/politics/california-gop-drop-boxes.html> [<https://perma.cc/XDG5-78WU>].

9. Devan Cole, Kay Jones & Rebekah Riess, *Texas Early Voting Opens with Long Lines and Waits*, CNN (Oct. 13, 2020), <https://www.cnn.com/2020/10/13/politics/texas-lines-early-voting-2020-election/index.html> [<https://perma.cc/BLU6-HVL4>].
10. *E.g.*, Arctic Village Council v. Meyer, No. 3AN-20-07858 CI, 2020 WL 5377308 (Alaska Super. 2020).
11. Kelly Mena et al., *Georgia Republicans Speed Sweeping Elections Bill Restricting Voting Access into Law*, CNN (March 26, 2021), <https://www.cnn.com/2021/03/25/politics/georgia-state-house-voting-bill-passage/index.html> [<https://perma.cc/DMZ8-ZUVB>].
12. Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-backed voting measures could create hurdles for tens of millions of voters*, WASH. POST (March 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/> [<https://perma.cc/J2PU-GS5Y>].

HISTORY OF THE PENALTY CLAUSE

While the Fourteenth Amendment was ratified in 1868, it took nearly one hundred years for the Supreme Court to even reference the Penalty Clause.¹³ This long-forgotten portion of Section Two of the Fourteenth Amendment provides a remedy in cases where a state abridges the voting rights of its citizens:

[W]hen 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 . . . 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.¹⁴

The Penalty Clause was not referenced in a Supreme Court majority opinion, concurrence, or dissent for nearly 100 years after its adoption. Justice Harlan first referenced it in 1964, in his dissent in *Reynolds v. Sims*, where he actually used it to support states' rights to *limit* citizens' rights to vote for members of the state legislature.¹⁵ Justice Harlan argued that the Penalty Clause provides states with a choice – they can either protect all citizens' voting rights or can choose not to do so and be subject to a penalty in the form of reduced representation in Congress.¹⁶ He argued that the Penalty Clause was essentially meant to protect federalism, and Alabama was permitted to exercise its choice to apportion electoral districts in a way that had resulted in huge size discrepancies between districts.

The only other instance where the Penalty Clause has played a role in a Supreme Court case has been in *Richardson v. Ramirez*, a 1974 case about

13. *Reynolds v. Sims*, 377 U.S. 533, 594 (1964).

14. U.S. Const. amend. XIV, § 2.

15. *Reynolds*, 377 U.S. at 594.

16. *Id.* (“I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny ‘or in any way’ abridge the right of their inhabitants to vote for ‘the members of the (State) Legislature,’ and its express provision of a remedy for such denial or abridgment.”).

felon disenfranchisement.¹⁷ There, the Court referenced other language in Section Two, which explicitly exempts states from sanctions if they deny people who have participated “in rebellion or other crime” the right to vote.¹⁸ The Penalty Clause has not been seriously considered by the Court neither before, nor since, these cases.

However, the congressmembers who drafted and debated the penalty clause of the Fourteenth Amendment by no means expected or intended it to become the dead letter it has.¹⁹ To the contrary, some members of the Reconstruction Committee referred to the addition of the provision as “the most important amendment” and “the cornerstone of the stability of our Government.”²⁰ Congressmembers justified its inclusion as essential to ensuring the protection of voting rights. They viewed the amendment as necessary for preventing former confederate states from having an outsized vote in Congress if they refused to grant all citizens, including former slaves, the right to vote. The amendment, they noted, sends a clear message to states that if they deny the vote to any portion of their citizenry, “they shall not assume to represent them and, as [they] have done for so long a time, misrepresent and oppress them.”²¹

The representatives fully expected the Penalty Clause to be used to ensure that states not discriminate against minority voters. Various representatives, including Representative Bingham, a principal architect of the Fourteenth Amendment, explained how he envisioned the Penalty Clause would function, noting that the “political power of any State” would not “be enlarged because of the residence within the State of portions of its citizens denied the right of franchise”²² He went on to make explicit the Penalty Clause’s role in penalizing states who discriminate:

17. Richardson v. Ramirez, 418 U.S. 24, 45 (1974).

18. *Id.*

19. For an in-depth history of the deliberation and ratification process of the Fourteenth Amendment, see Mark Graber, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights*, FAC. COLLOQUIA (2014), https://digitalcommons.law.uga.edu/facc/Spring_2014/Spring2014/2 [<https://perma.cc/NS5E-JYQJ>].

20. CONG. GLOBE, 39th Cong., 1st Sess., 2510 (1866).

21. CONG. GLOBE, 39th Cong., 1st Sess., 2539-40 (1866).

22. CONG. GLOBE, 39th Cong., 1st Sess., 2511 (1866).

The second section of the amendment simply provides for the equalization of representation among all the States of the Union, North, South, East, and West. It makes no discrimination. New York has a colored population of fifty thousand. By this section, if that great State discriminates against her colored population as to the elective franchise, (except in cases of crime,) she loses to that extent her representative power in Congress. So also will it be with every other State.²³

Despite the views of the members of the Reconstruction Committee that the Penalty Clause would function like a stop valve, ensuring that all states protect universal suffrage, it has remained largely forgotten. This is partly due to the events that unfolded in the aftermath of the ratification of the Fourteenth Amendment. The original impetus for including Section Two was to protect the voting right of Black citizens by penalizing states who failed to expand suffrage. Later, however, Congress imposed a readmission requirement on all former Confederate states, demanding that they allow Black citizens to vote prior to re-joining the union, and in 1870, the Fifteenth Amendment was ratified.²⁴

Not all congressmembers held the view that Section Two was rendered unnecessary by these changes. In 1870, for example, while the Fifteenth Amendment was being ratified, the House Census Committee compiled a list of state laws used to disfranchise citizens so that census takers could help count how many people's votes were denied in each state.²⁵ This effort was ultimately not successful, however. While the 1870 census did count the number of disfranchised male citizens in each state, lawmakers at the time found the report to be inaccurate, and Congress did not rely upon it.²⁶ Republicans again debated the possibility of passing legislation implementing Section Two in 1904 and 1906, proposing to reduce Southern states' representation unless they ensured suffrage, but these proposals did not make it out of committee.²⁷

23. CONG. GLOBE, 39th Cong., 1st Sess., 2543 (1866).

24. See Graber, *supra* note 19 at 101-02.

25. George Zuckerman, *A Consideration of the History and Present Status of Section Two of the Fourteenth Amendment*, 30 *FORDHAM L. REV.* 93, 108-09, 116 (1961).

26. *Id.* at 111-12, 116.

27. *Id.* at 119.

THE PENALTY CLAUSE IN THE NEWS IN RECENT YEARS

There have been some calls to enforce the Penalty Clause – most recently in the conversation about adding a Census citizenship question. These calls started when two legal scholars urged President Trump to justify his call for adding a Census citizenship question by referencing Section Two. They claimed that it is impossible to penalize states for abridging the rights of citizen voters by reducing their proportional representation without a clear sense of the denominator – exactly how many citizens there are in the state.²⁸ That is, they urged President Trump to argue that citizenship data had to be collected in order to ensure effective enforcement of Section Two. In the midst of this controversy, another commentator deftly pointed out that asking for citizenship data without any effort to collect data about instances where voting rights have been denied or abridged, which the Trump Administration was decidedly *not* asking about, would render the amendment unenforceable as well.²⁹

More recently, some have even gone so far as to argue that the Fifteenth Amendment effectively repealed Section Two by barring states from doing what Section Two only imposed a penalty against.³⁰ This ignores the language of Section Two, however, which protect the rights of all voting-age citizens, as opposed to the Fifteenth Amendment, which narrowly refers to the voting rights of racial minorities.

WHY NOW?

The current moment highlights the importance of resurrecting the provision of the Fourteenth Amendment that was deliberately given

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28. David B. Rivkin Jr. & Gilson B. Gray III, *How to Put Citizenship Back in the Census*, WALL ST. J. (July 4, 2019), <https://www.wsj.com/articles/how-to-put-citizenship-back-in-the-census-11562264430> [https://perma.cc/M4MY-W9FF].
 29. Michael Rosin, *So You Want to Enforce Section Two of the Fourteenth Amendment?*, MEDIUM (July 10, 2019) <https://medium.com/equal-citizens/so-you-want-to-enforce-section-2-of-the-fourteenth-amendment-e70b3646e62a> [https://perma.cc/WGT4-3RMA].
 30. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section Two of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2003).

remedial power. Voting rights litigation has been hampered in recent years following key Supreme Court decisions such as *Shelby County v. Holder*.³¹ By striking down Section Four of the Voting Rights Act (VRA), *Shelby County* effectively repealed one of the most powerful protective features of the VRA.³² More recently, the Supreme Court heard oral arguments in two consolidated cases about state laws that require certain ballots to be discarded if, for example, a voter votes in the wrong precinct.³³ Some commentators fear these cases could lead the Court to dismantle the remaining provisions of the VRA.³⁴

The limited legal recourse available to voting rights litigants coupled with the unprecedented nature of this past presidential election – a highly partisan, politically fraught election, taking place in the midst of a global pandemic, featuring widespread efforts by one political party to limit the voting power of the other – and continued efforts by Republican states to limit voter protections highlight the need for additional paths for ensuring enfranchisement.

WHAT WOULD IMPLEMENTATION LOOK LIKE?

A significant barrier to effectuating the Penalty Clause has been how to practically do so. Section Two is arguably not self-executing and would require an act of Congress to implement, a power conferred to Congress by Section Five of the Fourteenth Amendment. Thus, Congress would have to act in order to impose the penalty of reduced representation. To do so, Congress would not only have to overcome historic levels of gridlock but would also have to answer complicated questions about determining when a state has denied or “in any way abridged” the rights of voters. In doing so, Congress would have to address at least two questions: (1) what constitutes an abridgement or denial of the right to vote, and (2) how to measure how

31. *Shelby County v. Holder*, 570 U.S. 529 (2013).

32. *See The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/ZNL2-Z9RV>].

33. *Arizona Republican Party v. Democratic Nat'l Comm.*, 141 S. Ct. 1263 (2021).

34. Ian Millhiser, *The Supreme Court Will Hear a Case That Could Destroy What Remains of the Voting Rights Act*, VOX (Oct. 2, 2020), <https://www.vox.com/2020/10/2/21498587/supreme-court-voting-rights-act-amy-coney-barrett> [<https://perma.cc/YX2V-EHLN>].

many people were affected by a voting rights violation in order to determine how to reduce representation.

One proposal, a version of which originated in the 1960s, is that Congress could rely on the Census Bureau to ask citizens whether they tried to vote in a recent election and submit the statements of disenfranchised citizens to a Congressional committee, which would make decisions about apportionment.³⁵ One challenge with this approach is that it implicitly provides a narrow answer to the first question – about what constitutes an abridgement of the right to vote – by only penalizing states when a citizen has been directly barred from voting.

Preferable and more appropriate to today's voting reality might be an approach that defines abridgement more broadly, encompassing practices such as voter intimidation tactics. This approach would likely require Congress to create a commission of experts who could evaluate the implications of a particular anti-voting practice on a state's voting age population, providing an estimate of how many people's voting rights were denied or abridged, and help determine a proportional reduction in representation. Such estimation is in no way novel. For example, social scientists can estimate the effect of voter identification laws on voter turnout.³⁶ Legally, such a commission could be part of the Census Bureau. Individual voters or interest groups might alert the commission to a practice that violates Section Two, and the commission could then analyze the prevalence and implications of the practice. Given that the Census Bureau is already responsible for congressional apportionment, it could incorporate the commission's analysis into its apportionment process and apportion seats in the House of Representatives accordingly. Coupling it with the Census' decennial apportionment process would have the added benefit of ensuring that this process would not be overly disruptive.

To provide a more concrete example, imagine a hypothetical voter who lived in a rural part of Texas during the last presidential election and had a high-risk medical condition, making it medically unsafe for her to stand in line to vote at a regular polling station during the pandemic. Because the governor of Texas had limited counties to one drop-off ballot box location, the voter was ultimately unable to vote in the election. She could then alert the voting commission about the adverse effect the Texas policy had on her ability to vote. The commission, in turn, would compile all similar

35. See Zuckerman, *supra* note 26, at 131.

36. Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POLITICAL SCIENCE 363, 363-79 (2017).

statements, investigate the incident, and make a determination about whether her right to vote was abridged, per the Penalty Clause, and, if so, how pervasive the abridgement was on a statewide scale. The deliberation process could afford the locality or state responsible for the policy an opportunity to provide contrary evidence, arguing in favor of the ballot box policy, for example. The commission would then factor their determination as to whether voting rights were abridged into their apportionment process. To ensure fair and consistent decision-making, the commission could adopt certain procedures, including clear guidelines for what does and does not constitute a voting rights violation. This might include a clear stipulation that to be considered a violation, the action in question must be an adopted practice and not a single instance of wrongdoing by one official, for example.

In the alternative, it might be possible to argue that the Penalty Clause is self-executing, a theory does that not seem to have been tried in courts yet.³⁷ This would likely be a much more difficult way to achieve reform, but it may be possible. Justice Harlan's dissent in *Reynolds v. Sims* made no reference to the necessity of a statute to implement the provision.³⁸ In practice, self-execution might mean that the disenfranchised voter from the last example could sue the Department of Commerce under section 706(2)(b) of the Administrative Procedure Act, alleging that the agency violated the Penalty Clause by not reducing Texas's representation in Congress due to its denial of her ability to vote. This approach has various limitations. For example, the voter's "harm," being denied the right to vote, would not actually be remedied by reduced apportionment. An additional limitation is that courts have generally been wary of wading into debates about apportionment, which they view as prompting inappropriate consideration of a "political question."³⁹ Absent a congressional statute that sets out a judicially manageable standard, courts may dismiss such cases outright. That said, in cases where the Supreme Court has declined to

37. See, e.g., Michael Hurta, *Counting the Right to Vote in the Next Census: Reviving Section Two of The Fourteenth Amendment*, 94 TEX. L. REV. 147, 166 (2015) (arguing that the Secretary of Commerce already has the statutory authority to enforce Section Two without a need for any additional legislation).

38. *Reynolds*, 377 U.S. at 594 (Harlan, J. dissenting).

39. This hesitation stemmed from *Colegrove v. Green*, 328 U.S. 549, 556 (1946), where Justice Frankfurter in the Court's plurality opinion wrote that courts should not enter the political thicket, and was strengthened in *Baker v. Carr*, 369 U.S. 186 (1962), where the Court noted that it would avoid political questions where a right belongs to another branch and there is no judicially discoverable standard.

intervene on these grounds, complainants have not been able to argue that their claim is prompted by a constitutional amendment that provides explicit guidance on apportionment, specifically. In those cases, therefore, it has been easier to argue that apportionment should be a purely legislative question.

An additional legal challenge this proposal might face is an argument by states that they cannot be penalized for electoral policies that have not otherwise been found illegal under voting rights laws. That is, states might argue that the Penalty Clause says that states will be penalized for “abridging” or “denying” the right to vote, but there is no evidence that they have actually done so. This argument might be particularly salient given that, as referenced above, courts in recent decades have been reluctant to step into the political fray when it comes to voting rights violations, leading to few instances where a court has held that a state policy does, indeed, constitute a voting rights infringement. This concern is more easily mitigated if the Penalty Clause were to be implemented via congressional statute. In that case, Congress could take care to ensure that it sets out manageable standards for evaluating what constitutes a voting right infringement. Congress could also make clear that if a state policy violates that statute, the state’s congressional representation will be re-apportioned accordingly. This would mean that re-apportionment would not have to be preceded by a court hearing on voter abridgement.

A final possible shortcoming of this proposal is that such reform could be co-opted by Republican party leaders who believe their constituents are disenfranchised. The past few months, however, have been an important lesson in the futility of unmeritorious voter fraud claims. It is at least somewhat comforting that sixty-one of the sixty-two election-related lawsuits filed by former President Trump and his supporters failed, with judges across the political spectrum ruling against him time and again.⁴⁰ Therefore, there is no evidence, at least not yet, that reform such as the one proposed here could successfully be used to reduce voting power of a state when no voting rights violations can be found. On the other hand, the benefit to be gained from such reform is tremendous if it could, indeed, help protect and expand enfranchisement.

40. William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/indepth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/87KY-RQ4W>].

CONCLUSION

We currently do not have sufficient tools to penalize states for shoddy electoral practices. This recent election highlighted the need for such penalties more than ever before, with numerous states— supported and urged by President Trump— making active efforts to limit enfranchisement. The decision to not enforce Section Two has been just that – a choice made by courts and Congress to ignore voting rights violations and fail to use a ready tool at their disposal. Our government institutions have leaned on other constitutional provisions, namely the Fifteenth Amendment and the Voting Rights Act, to combat voting rights violations. This approach has not only been insufficient but has led to the dismantling of voting rights. Especially in the years since *Shelby County*, states have become creative with voter suppression tactics, ranging from new voter identification laws to purging minority voters from voter rolls.⁴¹ The fact that Section Two might be challenging to implement should not mean, in and of itself, that we do not try. Renewed efforts by states to limit voting rights in the aftermath of the 2020 election only further highlight the need for renewed election protections moving forward.

41. *Impacts of the Voting Rights Act and the Supreme Court's Shelby Ruling*, HARV. KENNEDY SCH. (Oct. 26, 2018), <https://www.hks.harvard.edu/research-insights/policy-topics/politics/impacts-voting-rights-act-and-supreme-courts-shelby-ruling> [<https://perma.cc/3FW5-JAB4>].