THE READMISSION ACTS: RECONSTRUCTION'S FORGOTTEN VOTING RIGHTS STATUTES

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ABSTRACT

After the Supreme Court's decision in *Richardson v. Ramirez*, many believed federal protection against state felony disenfranchisement laws to be dead. However, recently, several litigators in Virginia have revived a set of old, Reconstruction-era statutes to argue that the federal judiciary not only can, but must, curb current felony disenfranchisement practices. Lost to history, this set of statutes, called the Readmission Acts, conditioned all but one of the former Confederate states' readmissions on the prospect that those states limit future disenfranchisement to "now felonies at common law."

This Note serves as a first-of-its-kind analysis of the Readmission Acts, sifting through 242 pages of legislative history to shine light on their meaning. First, it traces the history of felony disenfranchisement from Reconstruction until today. It then examines the Acts more specifically, pointing out the powers that Congress could have relied on to pass the Acts, conducting a statutory interpretation analysis to decipher their meaning, and outlining various remedies that courts can pursue for violations of the Acts. Finally, this Note will address some of the arguments against enforcing the Acts, responding to critiques related to the political questions doctrine, sovereign immunity, federalism more broadly, and the equal state sovereignty doctrine. When discussing the equal state sovereignty doctrine, this Note will uplift statements from the Reconstruction Congress that highlight the current Court's misalignment with the goals of Reconstruction.

Reconstruction wholly changed the nature of the United States legal system. The Acts are a further reflection of that legacy.

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In addition to changing the landscape of felony disenfranchisement laws in the United States, these Acts also speak to the Reconstruction Congress's view on federalism, one that the Supreme Court has seemingly abandoned in its current jurisprudence. This Note argues that the Readmission Acts could and should be leveraged to combat modern disenfranchisement.

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INTRODUCTION

Between 1866 and 1870, Congress passed a series of six Readmission Acts to readmit the former Confederate states into the Union.[1] Emblematic of the story of Reconstruction, these Acts carried with them various conditions for re-entry, tailored to each state.[2] This Note discusses one such condition, hereafter referred to as the "disenfranchisement provision."[3] This condition, present in every Readmission Act but Tennessee's, requires states to limit any future disenfranchisement to "now felonies at common law."[4]

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1. Joint Resolution Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (1866); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868) (readmitting Arkansas); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 51 Stat. 73 (1868) (readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870) (readmitting Virginia); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870) (readmitting Mississippi); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80 (1870) (readmitting Texas).

2. *See infra* note 3 and accompanying text (discussing the various conditions placed on the readmitted states).

3. This Note does not address several additional conditions present in the Readmission Acts. First, for Texas, Virginia, and Mississippi, Congress conditioned readmission on the requirement that the existing state constitutions "shall never be 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[s] of said State[s]." An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870). Congress also required all readmitted states to pass the Fourteenth Amendment to rejoin the Union. *See supra* note 1 (listing statutes that all required the passage of the Fourteenth Amendment).

4. An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 51 Stat. 73, 73 (1868); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868).

Felony disenfranchisement surged throughout the next century, and courts largely ignored this provision.[5] Indeed, all but two U.S. states disenfranchise people incarcerated for felonies.[6] Due to mass incarceration patterns in the United States, disenfranchisement has had particularly sweeping impacts on minority communities; as of 2018, the United States represents around 20% of the world prison population despite containing only around 5% of the world population.[7] 38.9% of U.S. prisoners are Black,[8] even though Black people make up 13.6% of the U.S. population.[9]

Recently, however, plaintiffs in Virginia have challenged the state's felony disenfranchisement scheme under the Virginia Readmission Act.[10] Plaintiffs allege that, in 1970, Virginia adopted a

5. State and federal courts have only ever referenced the Readmission Acts in thirty-two previous cases. *E.g.*, Richardson v. Ramirez, 418 U.S. 24, 75 (1974) (dismissing the Readmission Acts as "inapposite" in determining if the Fourteenth Amendment limits felony disenfranchisement); Hopkins v. Hosemann, 76 F.4th 378, 402 (5th Cir. 2023) ("Under the plain language of the Readmission Act, Mississippi may only alter its constitution to authorize disenfranchisement if it does so *as a punishment* for a common law felony offense."); Williams *ex rel*. J.E. v. Reeves, 954 F.3d 729, 741 (5th Cir. 2020) ("Yet while the Readmission Act imposes an obligation for the State to continue to provide the same educational rights that were protected in 1868, it does not demonstrate that Congress intended to force Mississippi to retain fixed, 200-year-old language in its education clause."); Jones v. Governor of Fla., 950 F.3d 795, 802 (11th Cir. 2020) (citing the Readmission Acts as "evidence in Florida's history that its policy of disenfranchising felons was consistent with the original understanding of the Fourteenth Amendment"). *See also* Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2004) (arguing that the Reconstruction Acts were constitutional).

6. *See infra* Section I.C (breaking down the disenfranchisement laws in various states).

7. ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018).

8. *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/SG9C-N5X2].

9. *QuickFacts*, U.S. CENSUS BUREAU, (July 1, 2023), https://www.census.gov/quickfacts/fact/table/US/PST045223 [https://perma.cc/9GY7-3TPP].

10. First Amended Complaint at 3, 30, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024); *see also Virginia Readmission Act Litigation*, PROTECT DEMOCRACY (June 26, 2023), https://protectdemocracy.org/work/virginia-readmission-act-litigation [https://perma.cc/M72S-LPH2] (detailing the background behind the litigation).

new constitution which disenfranchises people for any felony[11]—a broader category than the "now felonies at common law" restriction in the Virginia Readmission Act.[12] Though this case is still pending, plaintiffs' Readmission Act claims have survived a motion to dismiss[13] and the Fourth Circuit has recently rejected Virginia's sovereign immunity defense,[14] hinting that courts might be receptive to Readmission Acts claims.

The Readmission Acts have the potential to remake the legal landscape behind felony disenfranchisement. Enforcement of these Acts would result in anyone currently or formerly incarcerated for a crime that was not a felony at common law during Reconstruction regaining the right to vote. Since no state constitution disenfranchised for drug crimes at the time,[15] every person currently or formerly incarcerated for drug crimes would regain their right to vote. As of 2022, this would account for 12.5% of those imprisoned in state facilities[16] and 10.2% of Black people incarcerated in state facilities.[17] On average, this would account for 14.21% of the prison population in the former Confederate states, minus Tennessee.[18] Re-enfranchisement changes people's lives. It allows them to feel like

11. VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

12. First Amended Complaint at 20, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024).

13. The court held that the Virginia Readmission Act is not enforceable under Section 1983. King v. Youngkin, No. 3:23-cv-00408, 2024 WL 1158366, at *13 (E.D. Va. Mar. 18, 2024). However, the court allowed the plaintiffs with standing to proceed under *Ex parte* Young. *Id.* at *9; *see also* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326 (2015) (citing *Ex parte* Young, 209 U.S. 123, 155–56 (1908)) ("And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.").

14. King v. Youngkin, 122 F.4th 539, 542 (4th Cir. 2024).

15. *See infra* Section I.C (describing the lack of drug laws in the United States in the 18th and early 19th centuries).

16. E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUSTICE, PRISONERS IN 2022, at 29 (2023).

17. *Id.*

18. *Id.* at 31–32. For Alabama, that number is 13.7%. *Id.* at 31. For Arkansas, it is 16.9%. *Id.* For Florida, it is 11.3%. *Id.* For Georgia, it is 9.8%. *Id.* For Louisiana, it is 13.2%. *Id.* For Mississippi, it is 17.2%. *Id.* For North Carolina, it is 13.7%. *Id.* For South Carolina, it is 17.1%. *Id.* at 32. For Texas, it is 13.1%. *Id.* For Virginia, it is 16.1%. *Id.*

members of their communities,[19] feel more freed from their past incarceration,[20] and regain their voices.[21]

This Note, by engaging in a first-of-its-kind deep dive into the meaning of the Readmission Acts' disenfranchisement provision, argues that states must re-enfranchise many of those incarcerated today. More specifically, this Note analyzes 242 pages of legislative history to conclude that the Readmission Acts invalidate many modern disenfranchisement laws.

Part I of this Note examines the current state of disenfranchisement in the United States. It traces the relevant history of Black disenfranchisement from Reconstruction to today. Part I ends by pointing out current trends in disenfranchisement, including new litigation around the Readmission Acts.

Part II analyzes the Acts themselves. It first considers the constitutional powers that Congress invoked when it passed the Readmission Acts. It then looks to the canons of statutory interpretation to outline possible meanings of the Acts. Finally, this Part examines the potential remedies that are available to those who sue under the Readmission Acts.

Part III responds to counterarguments about the Acts' applicability today. This Part first debates whether or not the Readmission Acts deal with a political question, concluding that they do not implicate the doctrine because courts have "manageable standards for resolving" the questions.[22] It then rejects the argument that the Acts encroach on federalism principles, finding that the Readmission Acts are constitutional under the Supremacy Clause.[23] Part III continues by more closely examining whether the Readmission Acts are unconstitutional under *Shelby County v. Holder*,[24] which limits how much statutes can infringe on the "equal sovereignty of the states."[25] The Part argues that the Readmission

19. BRENNAN CTR. FOR JUST., MY FIRST VOTE 6 (2009).

20. *Id.* at 13.

21. *Id.* at 19.

22. Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012) (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

23. U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

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

25. *Shelby County*, 570 U.S. at 544 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States.").

Acts pass the Supreme Court's equal state sovereignty test and distinguishes them from Section 4 of the Voting Rights Act (VRA), which failed that test. Part III also presents evidence showing that members of Congress opposed the legal principle of equal state sovereignty during the Second Founding.[26]

I. DISENFRANCHISEMENT IN THE UNITED STATES

Disenfranchisement is nearly as old as the country itself.[27] This Part explores the history of disenfranchisement in the former Confederate states.[28] It begins by detailing the Reconstruction Congress' reaction to rampant disenfranchisement and examining how such disenfranchisement continued after Reconstruction,[29] eventually circumventing the VRA.[30] This Part concludes by highlighting some trends in disenfranchisement that might inform future litigation.[31]

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26. The Second Founding refers to a period of constitutional change following the Civil War. For a synopsis of the history of the Second Founding, see ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) [hereinafter FONER, THE SECOND FOUNDING].

27. *See infra* Section I.A (tracing the origins of disenfranchisement in the United States). This Note looks only at historical events after the Civil War to focus on the immediate problems facing the Reconstruction Congress; however, disenfranchisement through criminal conviction has a long history in the South that predates the war. *See generally* PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 20 (2014) (detailing disenfranchisement provisions in state constitutions from as early as 1812).

28. While disenfranchisement has occurred throughout the United States, this Note focuses on disenfranchisement in the former Confederate states because only those states are subject to the Readmission Acts. *See supra* note 1 (listing statutes that only cover the former Confederate states).

29. *See infra* Section I.B (outlining the Reconstruction Congress' passage of the Readmission Acts and Reconstruction Amendments and showcasing the southern states' (and Supreme Court's) disregard for the disenfranchisement protections in the Readmission Acts).

30. *See infra* Section I.C (overviewing current methods of disenfranchisement).

31. *See infra* Section I.D (examining recent disenfranchisement trends).

A. Reconstruction's Fight Against Disenfranchisement

After the Civil War, the former Confederate states enacted the Black Codes,[32] which had the effect of designating Black people as "infamous" under the law.[33] "Infamy" is a legal status rooted in English common law that strips a person of their citizenship rights.[34] Ordinarily, one would only become "infamous" after being convicted of an "infamous crime."[35] However, by enacting the Black Codes, the former Confederate states limited Black Americans' basic citizenship rights, keeping them in a de facto "infamous" legal status.[36] As Congress was debating the Fourteenth Amendment, which would grant citizenship rights to Black men, North Carolina chose an appalling path to work around the new amendment's protections. Since a person could be deemed "infamous" by receiving an "infamous punishment" for any crime, North Carolina engaged in whipping campaigns to, as one Union Major put it, "procure convictions for petty offenses punishable at the whipping post, and thus disqualify [Black people] forever from voting."[37] At the time, one southern state legislator brazenly admitted this aim, confessing: "We are licking them in our part of the State and if we keep on we can lick them all by next year, and none of them can vote."[38]

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32. For a general survey of the Black Codes and their effect on Black Americans, see generally BYNE FRANCIS GOODMAN, BLACK CODES, 1865–1867 (2021) (1912) (surveying the history and effects of the Black Codes).

33. *See generally* HOLLOWAY, *supra* note 27 (explaining the concept of infamy and how it was used to disenfranchise Black people in the South).

34. *Id.* at 3–4.

35. *Id.* At the time, there were two schools of thought as to what constituted an "infamous crime." Under the English common law tradition, still widely followed in the United States, a crime was "infamous" if it resulted in an "infamous punishment." 2 FRANCIS RAWLE, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1553–54 (Vernon Law Book Co. 1914) (quoting *Ex Parte* Wilson, 114 U.S. 417, 423 (1885)). A crime might also be "infamous" because it "violated the moral code or exhibited disregard for principles of law, order, and truth." HOLLOWAY, *supra* note 27, at 4.

36. HOLLOWAY, *supra* note 27, at 31.

37. Letter from Major Rob't. Avery to Brevet Major General Jno. C. Robinson (Dec. 17, 1866) (in Records of U.S. Army Continental Commands, National Archives of the United States, Department of the South, Letters Received, file A-99 1866), *in* Steven F. Miller et al., *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners during Presidential Reconstruction, 1865-1867*, 70 CHI.-KENT L. REV. 1059, 1075 [hereinafter Letter from Major Rob't Avery]; *see also* HOLLOWAY, *supra* note 27, at 33–43 (describing North Carolina's mass whipping of its Black citizens to take away their right to vote).

38. Letter from Major Rob't. Avery, *supra* note 37.

This campaign engendered a reaction from the Reconstruction Congress. Under the Reconstruction Act of 1867, Congress specified that, in order to be re-admitted into the Union, the former Confederate states could only disenfranchise people for "participation in the rebellion or for felony at common law."[39] Under Section 2 of the Fourteenth Amendment, disenfranchised citizens could not count toward the apportionment of seats in the House of Representatives, unless that disenfranchisement was done for "participation in rebellion, or other crime."[40] At the time, Black people in the South regarded voting rights as one of their top priorities.[41] This is shown by the fact that almost all of the Black conventions "demanded the right to vote as 'an essential and inseparable element of self-government.'"[42] It was under this political climate that Congress passed the Readmission Acts, which restricted disenfranchisement to "now felonies at common law."[43] All of the Readmission Acts, aside from the one readmitting Tennessee, included this provision.[44]

B. Disenfranchisement After the End of Reconstruction

Throughout the next century, the former Confederate states flagrantly violated these Acts. After Reconstruction ended, these states expanded the universe of crimes that counted toward disenfranchisement.[45] During the 1870s, every former Confederate

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39. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867).

40. U.S. CONST. amend. XIV, § 2.

41. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 291 (1988) (describing the fight for voting rights in the Reconstruction South).

42. FONER, THE SECOND FOUNDING, *supra* note 26, at 52 (quoting GEORGE E. WALKER, PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900, at 268 (1986)).

43. *See supra* note 4 (listing statutes that all include the disenfranchisement provision).

44. *See supra* note 4 (listing statutes that all include the disenfranchisement provision). Congress did not explain why it omitted the disenfranchisement provision from Tennessee's Readmission Act. Notably, Tennessee did undergo a more voluntary Reconstruction than the other former Confederate states. *See* MARK WAHLGREN SUMMERS, THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION 21–22 (2014) (detailing how, under the leadership of military governor Andrew Johnson, Tennessee voluntarily ended slavery and refused to explicitly limit the vote to only white men).

45. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 55 (2006) [hereinafter MANZA & UGGEN, LOCKED OUT].

state, except Texas, disenfranchised for petty theft.[46] Starting in the 1890s, these southern states began instituting more robust disenfranchisement campaigns. This Section examines the post-Reconstruction constitutions of South Carolina, Alabama, and Virginia to provide three examples of how the former Confederate states weaponized criminal law to disenfranchise Black Americans beyond what was allowed by the Readmission Acts.[47]

South Carolina's 1895 Constitution disenfranchised people "by reason of mental incompetence or conviction of serious crime."[48] Though the provision is not explicitly racially discriminatory, it had discriminatory roots. One of the chairmen of the 1868 South Carolina Constitutional Convention criticized previously existing criminal disenfranchisement laws, arguing that "the intent of those laws was to deprive every colored man of their right to citizenship" by declaring "the most trivial offence a felony . . . ."[49]

In 1901, Alabama adopted a constitution that disenfranchised its citizens for crimes of "moral turpitude."[50] The historical record

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46. HOLLOWAY, *supra* note 27, at 55.

47. To avoid redundancy, this Note only analyzes three of the ex-Confederate state constitutions. A future survey of all post-Reconstruction disenfranchisement provisions could shed light on each state's unique disenfranchisement methods.

48. S.C. CONST. of 1895, art. II, § 7. These "serious crimes" might include "thievery, adultery, arson, wife-beating, housebreaking, and attempted rape." FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN, SOUTH CAROLINIAN 297 (1944) ("It is not difficult to perceive how these elaborate regulations were designed to discriminate against [Black men]."). John Fielding Burns, one of the key architects of Alabama's post-Reconstruction disenfranchisement provisions, "estimated the crime of wife-beating alone would disqualify sixty percent of [Black people]." Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993) (quoting Jimmie F. Gross, Alabama Politics and the [Black Person], 1874–1901, at 244 (1969) (graduate dissertation, University of Georgia)). Despite it being both incorrect and racist to assume that 60% of Black people at the time would have beat their wives, this statement speaks to the disenfranchisement-focused intent of those who were creating the South's post-Reconstruction constitutions.

49. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, 1868, at 540 (1868) (quoting Thomas J. Robertson); *see also* Shapiro, *supra* note 48, at 541 (arguing that the motive behind disenfranchisement was to target potential Black voters).

50. ALA. CONST. of 1901, art. VIII, § 182; MANZA & UGGEN, LOCKED OUT, *supra* note 45, at 56. The Supreme Court later invalidated this amendment. *See infra* text accompanying note 84 (striking down Alabama's "moral turpitude" provision). Georgia disenfranchises for "moral turpitude" in its current constitution, adopted in 1983. GA. CONST. art II, § 1, ¶ 3.

reveals the racially discriminatory aims of that provision. For example, when accepting the nomination for president of the 1901 Alabama Constitutional Convention, John B. Knox stated that "it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[51] He continued that the convention "must establish [white supremacy] by law."[52] Knox argued that Alabama's disenfranchisement was constitutional because "the [Black man] is not discriminated against on account of his race, but on account of his intellectual and moral condition."[53]

The Supreme Court allowed such constitutions to go unchecked. When Black voters challenged the constitutionality of Alabama's disenfranchisement regime in *Giles v. Harris*, the majority refused to grant any relief, arguing that the Court had "little practical power to deal with the people of the state in a body."[54] Similarly, in *Williams v. Mississippi*, the Court upheld Mississippi's post-Reconstruction felony disenfranchisement provision because the provision did not explicitly target race, just characteristics.[55]

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51. John B. Knox, President of 1901 Ala. Const. Convention, Opening Comments (May 22, 1901), *in* 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, at 8 (1940). To Knox, "the right of suffrage is not a natural right, because it exists where it is allowed to be exercised only for the good of the State . . . ." *Id.* at 12.

52. *Id.* at 8. In its 1901 constitution, Alabama drew inspiration from other states. *Id.* at 10–11 (praising Mississippi as a "pioneer State" in establishing poll taxes and literacy tests; referencing "the [poll tax] provision adopted in South Carolina"; and looking to "the methods of relief adopted" in Louisiana and North Carolina).

53. *Id.* at 12. Knox specifically referenced Supreme Court precedent at the time, in which the Court upheld a post-Reconstruction Mississippi constitutional provision because, "[r]estrained by the Federal Constitution from discriminating against [Black people], the Convention discriminates against its characteristics and the offenses to which its criminal members are prone." *Id.* (citing Williams v. Mississippi, 170 U.S. 213, 222 (1898)). This reasoning draws a striking similarity to the Court's current stringent test for determining discriminatory intent. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (outlining the test that plaintiffs must meet to establish discriminatory intent); *cf.* McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987) (refusing to acknowledge racial bias in Georgia's capital sentencing process because "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system").

54. Giles v. Harris, 189 U.S. 475, 488 (1903).

55. Williams v. Mississippi, 170 U.S. 213, 222 (1898); *see also supra* note 53 (mentioning that the president of the 1901 Alabama Constitution Convention referenced this case as supporting the state's indirect approach to disenfranchising Black people).

In 1902, Virginia passed its own disenfranchisement amendment, which took away the right to vote from those who committed *any* felony.[56] Like in South Carolina and Alabama, this decision was driven by racial animus. During the 1902 Virginia Constitutional Convention, Virginia State Senator Carter Glass explained that the purpose of the disenfranchisement provision was "to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every [Black] voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate."[57]

Over the next hundred years, legislators in the South would make a mockery of the Reconstruction Amendments by instituting Jim Crow laws, poll taxes,[58] literacy tests,[59] and other roadblocks to Black voting.[60]

56. VA. CONST. of 1902, art. II, § 23 (disenfranchising "persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretences, embezzlement, forgery, or perjury"). Virginia's current constitution still disqualifies people convicted of a felony from voting. VA. CONST. art. II, § 1.

57. 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076–77 (James H. Lindsay ed., 1906).

58. For examples of poll taxes as a voting requirement in state constitutions, see ALA. CONST. of 1901, art. VIII, § 194; ARK. CONST. amend. VIII, *repealed by* ARK. CONST. amend. LI, § 17; GA. CONST. of 1877, art. II, § 1, ¶ 2; S.C. CONST. art. II, § 4(a) (amended 1971) (stating, in the original 1895 text, that one of the qualifications for suffrage is the payment of a poll tax); VA. CONST. of 1902, art. II, § 18.

59. For examples of literacy tests as a voting requirement in state constitutions, see ALA. CONST. of 1901, art. VIII, § 181; VA. CONST. of 1902, art. II, § 19, cl. 5. The original text of Article II of the current South Carolina Constitution, S.C. CONST. art. II, § 4(c) (amended 1971), required a literacy test; the current version continues to allow the state legislature to institute one. S.C. CONST. art. II, § 6. Arkansas did not institute literacy tests. William P. Kladky, *Voting and Voting Rights*, ENCYCL. OF ARK., https://encyclopediaofarkansas.net/entries/voting-and-voting-rights-4916 [https://perma.cc/VH3N-3YRR].

60. *See* Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY.COM (Aug. 8, 2023), https://www.history.com/news/jim-crow-laws-black-vote [https://perma.cc/LH92-T7KY] (detailing ways in which southern states disenfranchised Black people during Jim Crow).

C. Modern Day Disenfranchisement

In 1974, despite the ratification of the Twenty-Fourth Amendment[61] and the passage of both the Civil Rights Act of 1964[62] and the VRA,[63] the Supreme Court gave a green light to would-be disenfranchisers. In *Richardson v. Ramirez*, the Court closed the door on any categorical constitutional challenge to felony disenfranchisement, holding that the Equal Protection Clause does not bar states from disenfranchising people incarcerated for felonies.[64]

The latter half of the twentieth century saw an expansion in the carceral system. During the nineteenth century and early twentieth century, virtually no drug laws existed at the state or federal level.[65] Further, statutes that regulated drugs were rarely enforced.[66] However, during the Nixon administration,[67] Congress passed the Congressional Drug Abuse Prevention and Control Act.[68] The Act criminalized the use of various types of drugs,[69] causing the percentage of people incarcerated for felonies in the United States to skyrocket.[70] This mass incarceration worsened when Congress passed—and President Bill Clinton signed—the Violent Crime Control and Law Enforcement Act of 1994.[71] The Act stripped judges

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61. U.S. CONST. amend. XXIV (banning the practice of disenfranchising people who fail to pay poll taxes).

62. Civil Rights Act of 1964, Pub L. No. 88-352, 78 Stat. 241 (codified as amended in scattered titles of the U.S.C.).

63. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–14, §§ 10501–08, §§ 10701–02).

64. Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

65. DAVID T. COURTWRIGHT, TREATING DRUG PROBLEMS: VOLUME 2: COMMISSIONED PAPERS ON HISTORICAL, INSTITUTIONAL, AND ECONOMIC CONTEXTS OF DRUG TREATMENT 2 (1992). The few drug laws that were on the books mainly focused on regulating labeling and sale of drugs considered "poisons." *Id.*

66. *Id.*

67. *Richard M. Nixon*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon [https://perma.cc/7MUC-EFHQ].

68. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

69. *Id.* at 1261.

70. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 782 (2002).

71. Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796.

of their discretion over sentencing and provided incentives for states to impose mandatory minimum sentences for a variety of crimes.[72]

Together with the South's new post-Reconstruction constitutions, this expansion of the carceral system resulted in mass disenfranchisement. According to a study by Christopher Uggen and Jeff Manza, "the total disenfranchised population has risen from less than 1 percent of the electorate in 1976 to 2.3 percent of the electorate in 2000."[73] In 2022, forty-eight states disenfranchised people with felony convictions to some extent, leaving a total of 4.6 million people barred from voting.[74] The study found that Black and Latinx people are much more likely to be incarcerated, with 33.34% and 10.9% of the total incarcerated population, respectively.[75] In 2022, one study looked at which states disenfranchised the highest percentage of their population.[76] Eight out of the ten states with the highest percentage of disenfranchisement were former Confederate states.[77]

Only Maine and Vermont do not disenfranchise people incarcerated for felonies.[78] Twenty-two states only disenfranchise people currently incarcerated for felonies, including formerly

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72. *Id.*

73. Uggen & Manza, *supra* note 70, at 782.

74. CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS 2 (2022). While not the subject of this Note, many incarcerated people who can legally vote face practical barriers to voting. *See* O'Brien v. Skinner, 414 U.S. 524, 531 (1974) (holding that New York state cannot disenfranchise people in pre-trial detention). *But see* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (disallowing practical disenfranchisement only if a "pretrial detainee is absolutely prohibited from exercising the franchise"). *See also* CHRISTINA DAS & JACKIE O'NEIL, DEMOCRACY DETAINED: FULFILLING THE PROMISE OF THE RIGHT TO VOTE FROM JAIL 9 (2023) (recommending "[j]ail-based poll sites" as a solution to overcome the informational, registration, and mail-in ballot barriers to voting); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/SL83-72UD] (finding that, on an average day, around 427,000 people are incarcerated in the United States without having been convicted of a crime).

75. UGGEN ET AL., *supra* note 74, at 16–18.

76. *Id.*

77. *Id.* at 16. North Carolina was the only former Confederate state with a relatively low percentage of disenfranchised people, only disenfranchising of 0.39% of its population. Statisticians are re-calculating Mississippi's disenfranchisement rate after finding an error in their methods. *Id.*

78. *Id.* at 3.

Confederate North Carolina.[79] Fifteen states disenfranchise people currently incarcerated, on parole, or on probation, including formerly Confederate Arkansas, Georgia, Louisiana, South Carolina, and Texas.[80] Eleven other states—including formerly Confederate Alabama, Florida, Mississippi, Tennessee, and Virginia—not only disenfranchise people currently incarcerated, on parole, or on probation, but additionally continue to disenfranchise people after incarceration if they are convicted of certain felonies, which vary by state.[81]

D. Recent Trends

Some states have softened their felony disenfranchisement laws. Since 1997, twenty-six states and the District of Columbia expanded the right to vote for people with felony convictions, leading to over two million Americans regaining the right to vote.[82] In *Hunter v. Underwood*, the Supreme Court considered the 1901 Alabama constitutional provision that disenfranchised people for "any . . . crime involving moral turpitude."[83] The Court struck down the provision as unconstitutional intentional discrimination, pointing to statements from its adoption in 1901 that show that the provision was intended to specifically disenfranchise Black people.[84]

The next frontier in the fight against felony disenfranchisement is the Readmission Acts. On June 26, 2023, the

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79. *Id.* Those states are California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington. *Id.*

80. *Id.* Those states are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *Id.*

81. *Id.* Those states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

82. NICOLE D. PORTER & MORGAN MCLEOD, SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2023, at 4 (Oct. 18, 2023), https://www.sentencingproject.org/reports/expanding-the-vote-state-felony-disenfranchisement-reform-1997-2023 [https://perma.cc/9NJT-EK2Q].

83. Hunter v. Underwood, 471 U.S. 222, 226 (1985); ALA. CONST. of 1901, art. VIII, § 182; *see supra* Section I.B (describing the provision in the context of the wave of disenfranchisement that occurred post-Reconstruction).

84. *Hunter*, 471 U.S. at 229, 233; Knox, *supra* note 51, at 8–12 (declaring white supremacy the policy of the state and promoting a racially discriminatory poll tax as "justified in law and in morals").

American Civil Liberties Union (ACLU) of Virginia filed a complaint[85] with the district court for the Eastern District of Virginia alleging that the 1902 amendment to the Virginia Constitution—which automatically disenfranchised anyone convicted of a felony[86]—violates the Virginia Readmission Act's requirement that the state can only disenfranchise for "now felonies at common law."[87] This claim has survived a motion to dismiss[88] and the Fourth Circuit has rejected the state's sovereign immunity defense under Ex Parte *Young*.[89]

II. THE READMISSION ACTS

This Part analyzes various aspects of the Readmission Acts. First, it examines which powers Congress could have used to pass these Acts.[90] Then, it uses canons of statutory interpretation to decipher the meaning of the disenfranchisement provisions in the Readmission Acts.[91] Finally, this Part explores the potential remedies that plaintiffs in Readmission Act suits could seek.[92]

A. Where Did Congress Get the Power to Pass the Readmission Acts?

Congress must have constitutional authority for every law it seeks to pass.[93] Article I of the U.S. Constitution outlines Congress'

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85. First Amended Complaint at 30, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024).

86. VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

87. An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870).

88. King v. Youngkin, No. 3:23-cv-00408, 2024 WL 1158366, at *9 (E.D. Va. Mar. 18, 2024).

89. King v. Youngkin, 122 F.4th 539, 542 (4th Cir. 2024).

90. See *infra* Section II.A (analyzing the various powers that Congress claimed to use when enacting the Readmission Acts).

91. *See infra* Section II.B (interpreting the meaning of the Readmission Acts' disenfranchisement provision).

92. *See infra* Section II.C (running through potential remedies to the Readmission Acts).

93. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[The government] can exercise only the powers granted to it."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) ("The enumeration of powers is also a limitation of powers.").

powers.[94] Any powers not delegated to the federal government by the Constitution must be "reserved to the States respectively, or to the people."[95] Because each of Congress' Constitutional powers carries unique limitations,[96] the power upon which Congress relied in enacting the Readmission Acts determines the extent of the Acts' enforceability against state disenfranchisement laws in court.

During the Arkansas Readmission Act debates, Senator George F. Edmunds argued that the Readmission Acts relied on the constitutional powers to "admit new States," "suppress rebellion," "guaranty republican forms of government in the several States," and "make war and [] conclude peace."[97] This Section will analyze this grab bag of powers one by one, including Congress' admission power, its power under the Guarantee Clause, and its rebellion- and war-related powers under Article I, Section 8.

1. The Admission Power

Congress could have passed the Readmission Acts using its admission power. Article IV, Section 3, Clause 1 of the Constitution states the following:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.[98]

If Congress had used its admission power to pass the Acts, it would have been bound by the "equal footing doctrine," which requires that "when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which

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94. U.S. CONST. art. I.

95. U.S. CONST. amend. X.

96. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (establishing the political question doctrine, and holding that only Congress, not the courts, can "decide what government is the established one in a State" under the Guarantee Clause); *see infra* note 116 (detailing the breadth of Congress' war powers); Coyle v. Smith, 221 U.S. 559, 573 (1911) (requiring that new states be "admitted with all the powers of sovereignty and jurisdiction which pertain to the original states . . . ").

97. CONG. GLOBE, 40th Cong., 2nd Sess. 2659 (1868) (statement of Sen. Edmunds).

98. U.S. CONST. art. IV, § 3, cl. 1.

pertain to the original States."[99] This prohibits Congress from placing conditions on the newly admitted state's powers if those conditions could not have been placed on the states after admission.[100]

In the House debates for the North Carolina, South Carolina, Louisiana, Georgia, and Alabama Readmission Acts, Representative John Bingham justified the Acts' disenfranchisement provisions. He pointed to Congress' "limitation" on Missouri's admission and argued that the state's "constitution never should be so construed, and never should be so enforced, as to deprive any citizen of the United States of the rights and privileges of a citizen of the United States within the limits of that State."[101] According to Representative Bingham, if Congress had the power to condition Missouri's admission, it could condition the South's.[102]

2. The Guarantee Clause

Alternatively, Congress might have relied on the Guarantee Clause of the Constitution to pass the Readmission Acts. That clause specifies that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." [103] The Acts can be read as a mechanism to enforce this guarantee of Republican government, by ensuring that the voting rights of those incarcerated for felonies are protected. The Supreme Court has interpreted the Guarantee Clause to grant Congress the authority "to decide what government is the established one in a State." [104]

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99. *Coyle*, 221 U.S. at 573.

100. *Id.* (holding that a newly admitted state's powers "may not be constitutionally diminished, impaired or shorn away 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").

101. CONG. GLOBE, 40th Cong., 2nd Sess. 2659 (1868) (statement of Rep. Bingham).

102. Professor Gabriel J. Chin has argued that the "equal footing doctrine" is more about ensuring that Congress is acting within its congressional authority when admitting a state. Chin, *supra* note 5, at 1598 ("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."). Accordingly, in *United States v. Chavez*, 290 U.S. 357 (1933), the Court clarified that "the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power." *Id.* at 365.

103. U.S. CONST. art. IV, § 4.

104. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). *Luther* concerned a revolt in Rhode Island known as Dorr's Rebellion, where Thomas W. Dorr proclaimed himself elected governor of Rhode Island and declared martial law. *Id.*

When debating a separate bill about whether to allow southern states to participate in the electoral college, Senator John M. Turnbull referenced the *Luther v. Borden* decision, arguing that by admitting the former Confederate states, Congress had declared which of their governments were legitimate:

> The Supreme Court has decided, all the departments of the Government have decided, that Congress, when it admits Senators and Representatives under a State organization, thereby decides what the proper State organization of a State is. That was decided in the Rhode Island case. There was an attempt to set up two State governments in Rhode Island, and the Supreme Court decided in that case that when the Congress of the United States had admitted Senators and Representatives from one of those State organizations that was conclusive and binding upon all the departments of the Government . . . . Now, we have admitted Senators and Representatives from a portion of these rebel States. We have, therefore, settled it finally and forever that the State organization under which those Senators and Representatives came here is the legitimate organization for the State.[105]

Determining the legitimacy of a local government could be perceived as a political question that should be left to Congress rather than the courts.[106]

During the Readmission Acts debates, many legislators referred either to political considerations or explicitly to *Luther*, suggesting that they relied on the Guarantee Clause when passing acts.[107] When debating Arkansas' readmission, Senator Edmunds

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at 37, 42; *see also Dorr Rebellion: Topics in Chronicling America*, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-dorr-rebellion [https://perma.cc/GBL8-JPA3] (summarizing the events of Dorr's Rebellion). The Supreme Court considered the legitimacy of Dorr's government. *Luther*, 48 U.S. at 41. The Court held that "under [Article IV Section 4] of the Constitution[,] it rests with Congress to decide what government is the established one in a State." *Id.* at 42.

105. CONG. GLOBE, 40th Cong., 2nd Sess. 3631 (1868) (statement of Sen. Turnbull).

106. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 426 (2001) (describing the political question doctrine).

107. *See, e.g.*, CONG. GLOBE, 40th Cong., 2nd Sess. 513 (1868) (statement of Rep. Bingham) ("[The Constitution] has clothed the legislative power of the nation with the authority to determine whether a republican government exists in any State of this Union, and if it does exist to guarantee its enjoyment to the people of the State."); *id.* at 2118–19 (statement of Sen. Stewart) ("The question of making

specifically noted that "[the Constitution] makes it the duty of Congress to guarantee republican forms of government in the several States."[108]

While the Guarantee Clause seems more in line with the purpose of the Readmission Acts, Congress might not have wanted to rely on this power because of its weak enforcement potential under the then-nascent political question doctrine. Therefore, it is also worth considering whether Congress intended to act under its Article I, Section 8 powers.

3. Article I, Section 8 Powers

i. Traditional Article I, Section 8 Powers

Congress could have used its Article I, Section 8 powers to pass the Readmission Acts.[109] Article I, Section 8 of the Constitution lays out the powers that Congress holds, including the power "to declare War"[110] and "suppress Insurrections and repel Invasions."[111]

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war or determining the political status of a State is as much beyond the power of the Supreme Court as it is beyond the power of the humblest individual."); *id.* at 3912 (statement of Sen. Conkling) (discussing *Luther* and arguing that "to Congress as the law-making power, or the political power of the country, belongs the recognition or the refusal to recognize a State government in any particular State as the legitimate government there").

108. *Id.* at 2659 (statement of Sen. Edmunds).

109. This Note will not discuss Congress' commerce powers because the Reconstruction Congress did not reference that power in its debates. Regardless, the Readmission Acts likely regulate commerce. Through the Commerce Clause, Congress can "regulate and protect the instrumentalities of interstate commerce." U.S. v. Lopez, 514 U.S. 549, 558 (1995). Because incarcerated workers generate over $2 billion worth of goods, services, and commodities, Congress could in theory use that power to regulate the treatment and rights—including voting rights—of prison populations. ACLU & UNIV. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 37 (2022); *see also id.* at 24 (estimating that at least 791,500 incarcerated people work while incarcerated). At the very least, incarcerated people "substantially affect interstate commerce" through their labor. *Lopez*, 514 U.S. at 559 (citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

110. U.S. CONST. art. I, § 8, cl. 11. Congress has only declared war on eleven different occasions. *E.g.*, Declaration of War Between the United States and Great Britain, ch. 102, 2 Stat. 755 (1812) (declaring war on Great Britain); Declaration of War with Mexico, ch. 16, 9 Stat. 9 (1846) (declaring war on Mexico); Declaration of War with Spain, ch. 189, 30 Stat. 364 (1898) (declaring war on Spain). Aside from declaring war against Great Britain, Mexico, and Spain, Congress has only declared war during World War I and World War II. *About Declarations of War by Congress*, U.S. SENATE,

In addition, Congress can "make all Laws which shall be necessary and proper" to execute its enumerated Section 8 powers.[112]

When passing the Readmission Acts, Congress contemplated that the statutes would derive their constitutional power from Article I, Section 8 of the Constitution. Senator Joseph S. Fowler elaborated on how Congress might view itself as exercising its war power to prevent further violence. He argued that "[p]rudence, indeed, dictates some restraints upon the unfaithful and vicious . . . who, having failed in their revolution, still seek to thwart the advent of a new and better era of the State."[113] When debating the act to readmit North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, Senator Oliver P. Morton stated that the purpose of the act was to "secure the future peace and safety of the Republic and . . . exclude from power the men who have overwhelmed the country with blood."[114] The Readmission Acts themselves hint at their peacemaking motivations. In the first Readmission Act—the Tennessee Readmission Act—Congress referred to Tennessee as "seized upon and taken possession of by persons in hostility to the United States."[115]

These sentiments fit within the Supreme Court's broad interpretation of Congress' war powers.[116] In *United States v.*

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https://www.senate.gov/about/powers-procedures/declarations-of-war.htm [https://perma.cc/3Y9X-2EZT] (showing that the remaining eight declarations of war were against Germany and Austria-Hungary in 1917 and against Japan, Germany, Italy, Bulgaria, Hungary, and Rumania between 1941 and 1942).

111. U.S. CONST. art. I, § 8, cl. 14.

112. U.S. CONST. art. I, § 8, cl. 17.

113. CONG. GLOBE, 40th Cong., 2nd Sess. 2744 (1868) (statement of Sen. Fowler).

114. *Id.* at 2929 (1868) (statement of Sen. Morton).

115. Joint Resolution Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (1866).

116. The Supreme Court has found Congress' war power, read in conjunction with the Necessary and Proper Clause, to apply to a number of actions that are more tangential to declaring war, including chartering a National Bank in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407–08 (1819), recouping excess profits from defense contractors in *Lichter v. United States*, 334 U.S. 742, 792–93 (1948), and passing a rent control law in *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141–42 (1948). Notably, in *Woods*, Justice Douglas, writing for the Court, expressed hesitation about the broad scope of the war power, but ultimately decided that "[t]here are no such implications in today's decision." *Woods*, 333 U.S. at 143–44; *see also id.* at 146–47 (Jackson, J., concurring) (noting that the war power is "the most dangerous one to free government in the whole catalogue of powers" and warning that it should "be scrutinized with care"); Charleston Corp. v. Sinclair, 265 U.S. 543, 547–48 (1924) ("A law depending upon

Macintosh, the Supreme Court held that "[f]rom its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations unless found in the Constitution or in applicable principles of international law."[117] Congress' war powers are not limited to actions taken to fight against an enemy. In *Stewart v. Kahn*, the Supreme Court scrutinized President Lincoln's 1861 order of a blockade of all commerce between the Union and Confederate states.[118] The Court held that the order was within the government's Article I, Section 8 powers because "the [war] power is not limited to victories in the field . . . [as i]t carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."[119] This idea of "guard[ing] against the immediate renewal of the conflict" aligns with the reasoning Senators Fowler and Morton offered for passing the Readmission Acts.[120]

Even though the United States never formally declared war under Article I, Section 8 during the Civil War, the Supreme Court in *Stewart* described it as a war, and thus based its decision on Congress' war powers.[121] Therefore, it follows that Congress could have passed the Readmission Acts under its Article I, Section 8 powers as measures to secure the country from war.

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the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."). *See generally ArtI.S8.C11.2 Scope of Congress' War Powers,* CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C11-2/ALDE_00013588/#ALDF_00026384 (on file with the *Columbia Human Rights Law Review*) (surveying the common law to determine the scope of Congress' war powers).

117. United States v. Macintosh, 283 U.S. 605, 622 (1931).

118. Stewart v. Kahn, 78 U.S. 493, 505 (1870).

119. *Id.* at 507.

120. *See supra* notes 114–115 and accompanying text (detailing Congress' intent to prevent conflicts like the Civil War from starting up again).

121. *Stewart*, 78 U.S. at 507 ("It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, *which had the power to wage war and suppress the insurrection*, had no power to remedy such an evil, which is one of its consequences.") (emphasis added). The Court did not explain which actions by Congress were under its war powers, which were under its insurrection powers, and which were under both. It instead referred to Congress' legislation as "measures to be taken in carrying on war and to suppress insurrection." *Id.* at 506.

ii. The Readmission Acts as Part of a "Truce"

The Supreme Court's language in *Stewart* suggests that if Congress can declare war, it must also be able to maintain post-war peace.[122] This type of authority is reflected in another one of Congress' powers: the treaty power.[123] Professor John Harrison posits that, like treaties, the Reconstruction Amendments come from "the need for final and certain settlement."[124] Harrison likens the Reconstruction Amendments to the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War in exchange for Mexico ceding land to the United States that would later become all of California, Nevada, Utah, and New Mexico; most of Arizona and Colorado; and parts of Oklahoma, Kansas, and Wyoming (i.e., the Mexican Cession).[125] As such, just like Congress could condition the end of the Mexican-American War on the Mexican Cession, it could condition the end of the Civil War on the former Confederate states' compliance with the Reconstruction Amendments. One could equally apply this logic to the Readmission Acts. Like the Reconstruction

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122. *Id.* at 507 (stating that the war power extends to "guard[ing] against . . . renewal of conflict"). The case law is scarce as to whether this power comes from Congress' war powers or whether it is Necessary and Proper to realizing this war power. *Compare* U.S. CONST. art. I, § 8, cl. 11 (providing Congress with the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), *with* U.S. CONST. art. I, § 8, cl. 18 (allowing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

123. U.S. CONST. art. II, § 2, cl. 2. Congress' war power does not have to be exercised through its treaty power. *Compare* U.S. CONST. art. I, § 8, cl. 11 (providing Congress with the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), *with* U.S. CONST. art. II, § 2, cl. 2 (providing the President with the "Power, by and with the Advice and Consent of the Senate, to make Treaties").

124. Harrison, *supra* note 106, at 457. Harrison also argues that the treaty power would legitimate Congress' unorthodox adoption of the Fourteenth and Fifteenth Amendments. *Id.* at 377–78. This theory runs into a conflict with the Constitution's Article V amendment process and is outside the scope of this Note. *Id.* at 378–79. *See also* U.S. CONST. art. V (establishing the Constitution's amendment process).

125. Harrison, *supra* note 106, at 457; Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., art. V, Feb. 2, 1848, 9 Stat. 922 (describing post-Mexican-American-war borders); *see also Treaty of Guadalupe Hidalgo (1848)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo [https://perma.cc/5TQE-EJUD] (describing which modern-day states or portion of states formed from the Mexican Cession).

Amendments, the Readmission Acts sought to ensure a "final and certain settlement" to the Civil War,[126] as evidenced by Congress' conception of the Acts as "the advent of a new and better era of the State."[127]

This analogy poses a few problems. First, if the Readmission Acts are a truce, then they must follow the law of treaties. There is a general principle against coercion in international treaties, as reflected in the Vienna Convention on the Law of Treaties.[128] However, Henry Wheaton noted in his summary of international law in 1904 that "the welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding."[129] The principle behind this rule is that if a truce is never allowed due to coercion,

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126. Harrison, *supra* note 106, at 457.

127. CONG. GLOBE, 40th Cong., 2nd Sess. 2744 (1868) (statement of Sen. Fowler).

128. The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], would normally be the guiding authority on issues of treaty interpretation. Under the Vienna Convention, any treaty procured through coercion is invalid. *Id.* at art. 51 ("The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."). However, the Vienna Convention is not applicable to this case for two reasons. First, the United States has not ratified the treaty, *Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en [https://perma.cc/N9DG-NA74] (surveying which countries have signed and/or ratified the Vienna Convention on the Law of Treaties). Second, the treaty, adopted in 1969, contains a non-retroactivity clause. Vienna Convention, *supra*, art. 4 ("[T]he Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."). However, the United States does view "many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties," and therefore U.S. courts may find it to be persuasive. *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE: DIPLOMACY IN ACTION, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm#:~:text=The%20United%20States%20signed%20the,on%20the%20law%20of%20treaties [https://perma.cc/V48S-WZLF].

129. HENRY J. WHEATON, ELEMENTS OF INTERNATIONAL LAW 377 (James Beresford Atlay ed., Stevens & Sons rev. ed. 1904); *see also* Harrison, *supra* note 106, at 457 ("Coerced peace treaties are binding.").

then there is no feasible way to end a war.[130] Thus, to the degree that the Vienna Convention's prohibition on coercion serves as a persuasive authority on this issue, courts should make an exception for truces so that countries may have peaceful ends to wars.

The second issue with viewing the Readmission Acts as a truce is that the United States never accepted the Confederacy as a separate nation.[131] It is unclear whether this sort of intra-national armistice legally counts as a valid treaty. The Supreme Court has noted that "treaties . . . are primarily compact[s] between independent nations."[132] However, under international law at the time of the Civil War, there had been at least one example of a truce resolving a revolt: the Twelve Years Truce, which was initiated when Spanish King Philip III, then-sovereign over the Netherlands, signed

130. WHEATON, *supra* note 129, at 377 (arguing that, if truces were not allowed, "wars could only be terminated by the utter subjugation and ruin of the weaker party").

131. *See Confederate States of America*, HISTORY.COM (Jan. 9, 2024), https://www.history.com/topics/american-civil-war/confederate-states-of-america [https://perma.cc/VGS2-BPKD] ("[T]he Confederacy struggled for legitimacy and was never recognized as a sovereign nation."). In fact, the Union convinced other countries not to recognize the Confederacy as a sovereign nation. *Preventing Diplomatic Recognition of the Confederacy,* OFF. OF HISTORIAN, https://web.archive.org/web/20131022123353/http://history.state.gov/milestones/1861-1865/Confederacy (on file with the *Columbia Human Rights Law Review*) (detailing the Union's successful efforts to "ensure[] that the Confederacy would fail to achieve diplomatic recognition by even a single foreign government").

132. Lozano v. Montoya Alvarez, 572 U.S. 1, 11 (2014) (quoting Medellín v. Texas, 552 U.S. 491, 505 (2008)). The United States has entered treaties with Indigenous Tribes, which the U.S. considers "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831) ("[Indigenous tribes] may more correctly perhaps be denominated domestic dependent nations."); *see also, e.g.*, Treaty with the Delawares, 7 Stat. 13 (1778) (entering a treaty with Captain White Eyes, Captain John Kill Buck Junior, and Captain Pipe, who purported to represent their Tribes); Treaty with the Six Nations, 7 Stat. 15 (1784) (entering a treaty with "the Sachems and Warriors of the Six Nations, purporting to represent the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora tribes"). This Note does not touch upon the possibility of Confederate states being "domestic dependent nations" with which the United States can enter treaties. *Cherokee Nation*, 30 U.S. at 1. Any analysis of this subject, however, should be approached recognizing the moral issues with comparing Indigenous people and the Confederacy, not least because Indigenous people did not choose to engage with the United States in the first place. *See generally* History.com Editors, *Native American History Timeline*, HISTORY.COM (June 2, 2023), https://www.history.com/topics/native-american-history/native-american-timeline [https://perma.cc/GPD2-K5BM] (exploring the history of U.S. colonization of Indigenous land and how Indigenous people responded).

a treaty in 1609 to suspend hostilities between the Netherlands and the Spanish Monarchy.[133] More recently, in 2017, Colombia entered a peace treaty[134] with the country's largest rebel group—the Revolutionary Armed Forces of Colombia–People's Army (FARC–EP)—which has been revolting since 1964.[135]

Overall, the statements by Reconstruction Congress legislators and the Readmission Acts' passage in response to the Civil War make a strong argument that Congress used its rebellion- and war-related powers under Article I, Section 8 to pass the Acts.

4. Other Powers

At first glance, Congress seemingly had the authority to pass the Readmission Acts under the Elections Clause, which authorizes Congress to "make or alter" regulations on "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[136] However, this clause only applies to elections for "Senators and Representatives," while the Readmission Acts extend to disenfranchisement for state and local elections.

Congress might also find the power to pass the Readmission Acts in Section 5 of the Fourteenth Amendment,[137] which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[138] The Supreme Court has held that, in order for Congress to enforce the Fourteenth Amendment through Section 5, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and

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133. *See* Randall C.H. Lesaffer, *Introduction* to THE TWELVE YEARS TRUCE (1609): PEACE, TRUCE, WAR AND LAW IN THE LOW COUNTRIES AT THE TURN OF THE 17TH CENTURY, at i (Randall C.H. Lesaffer ed., 2014) (detailing the Twelve Years Truce between Spain and its revolting Dutch provinces). Even though this truce happened a long time before the passage of the Readmission Acts, Wheaton references the Twelve Years Truce when summarizing the state of international law on the subject of intranational treaties in 1904. WHEATON, *supra* note 129, at 497 (referencing the truce negotiated between "Spain and her revolted provinces in the Netherlands" in 1609).

134. Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (Nov. 24, 2016) *appended as annex II to* U.N. Secretary-General, Letter dated Mar. 29, 2017 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2017/272 (Apr. 21, 2017).

135. *FARC*, BRITANNICA.COM (Oct. 19, 2023), https://www.britannica.com/topic/FARC [https://perma.cc/CB58-7DLD].

136. U.S. CONST. art. I, § 4, cl. 1.

137. U.S. CONST. amend. XIV, § 5.

138. *Id.*

the means adopted to that end."[139] The "congruence and proportionality" test helps distinguish between "remedial" statutes—meaning statutes that aim to protect pre-existing Fourteenth Amendment rights—and "substantive" statutes—meaning statutes that would expand rights beyond those granted by the Fourteenth Amendment.[140] Integral to this inquiry is that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[141] Just as the VRA is within Congress' remedial power to enforce constitutional rights, so too are the Readmission Acts' protections against felony disenfranchisement within remedial power. In *Richardson v. Ramirez*, the Supreme Court held that states will not be penalized for disenfranchising people convicted of a felony[142]—although, for other disenfranchisements, Section 2 of the Fourteenth Amendment theoretically reduces a state's representation in Congress in proportion to the number of people who are disenfranchised.[143] The Court reasoned that the Constitution makes an exception to this reduction in representation for "other crimes."[144] Through its powers under Section 5 of the Fourteenth Amendment, Congress used the Readmission Acts to create a more stringent statutory obligation that some states should follow for felony disenfranchisement.

Consider the history of another form of vote denial. In *Lassiter v. Northampton County Board of Elections*, the Supreme Court held literacy tests to be facially constitutional.[145] In response, Congress banned such tests statutorily in the VRA in 1965,[146] which the Court held as constitutional in *South Carolina v. Katzenbach*.[147] In explaining why this ban was remedial, the *City of Boerne* majority emphasized that "[t]he new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws,

139. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

140. *Id.* at 520; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (describing Congress' powers under the Fifteenth Amendment as "remedial").

141. *Id.* at 519 (quoting U.S. CONST. amend. XIV, § 5).

142. Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

143. U.S. CONST. amend. XIV, § 2.

144. *Richardson*, 418 U.S. at 56 (quoting U.S. CONST. amend. XIV, § 2).

145. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–53 (1959).

146. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 52 U.S.C. §§ 10301–14, §§ 10501–08, §§ 10701–02).

147. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

. . . and the slow costly character of case-by-case litigation . . . ."[148] Similarly, the Readmission Acts responded to the conditions that led to the Civil War[149] and to the disenfranchisement that resulted from the Black Codes.[150] Therefore, if the Court considers the VRA to be remedying disenfranchisement that has occurred after Reconstruction, then it should surely hold that the Readmission Acts remedy the disenfranchisement leading up to it.

B. What Do They Mean?

All the Readmission Acts, aside from one, contain variants of the following language:

> [T]he constitution of [the State] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote 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.[151]

The disenfranchisement provision begins with a general prohibition on disenfranchisement by "amend[ments] or change[s]" to the state constitutions.[152] There are two exceptions to this prohibition. First, the Readmissions Acts effectively exempt any state constitutional disenfranchisement provision that was already in place before that state's readmission.[153] Second, the Acts allow states to

148. City of Boerne v. Flores, 521 U.S. 507, 526 (1997) (citations omitted) (citing *Katzenbach*, 383 U.S. at 313–15, 328).

149. *See supra* text accompanying notes 113–120 (describing Congress' intention to prevent another Civil War).

150. *See supra* text accompanying notes 32–38 (describing the disenfranchisement effects of the Black Codes).

151. An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868); *see also supra* note 4 (listing Readmission Acts, which contain similar language).

152. An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (stating that "the [constitution of the State] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized"); *see also supra* note 4 (listing Readmission Acts, which all include variants of the quoted language).

153. *See supra* note 4 (listing the Readmission Acts which limit the prohibition on disenfranchisement to "amend[ments] or change[s]").

disenfranchise individuals as "punishment for such crimes as are *now felonies at common law*."[154]

1. "Amended or Changed"

The plain meaning of the disenfranchisement provision indicates that the Readmission Acts exempt pre-existing state constitutional disenfranchisement provisions.[155] By limiting the prohibition to "amend[ments] or change[s],"[156] Congress plainly limited the scopes of the Acts to hinder expansion beyond the pre-readmission state constitutional disenfranchisement provisions.[157]

This interpretation is the most logical one given the Readmission Acts' structure. In a departure from the ordinary procedure for constitutional amendments and changes, Congress required formerly Confederate states to present their constitutions for congressional approval prior to their readmission.[158] Congress likely viewed the pre-readmission constitutions as more legitimate because states passed them under Reconstruction-era constitutional conventions, which often included Black delegates or delegates that supported federal policies.[159] As such, while litigating the

154. *See supra* note 4 (emphasis added) (listing the Readmission Acts which provide an exception for "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").

155. While there is often disagreement as to what the term "plain meaning" means, courts generally operate as if "Congress uses common words in their popular meaning, as used in the common speech of men." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

156. *See supra* note 4 (listing the Readmission Acts with the disenfranchisement provision).

157. The individual meanings of the words "amend" and "change," as used in the Readmission Acts, might be uncertain. Black's Law Dictionary narrowly defines "amend" as "[t]o correct or make usu. small changes to." *Amend*, BLACK'S LAW DICTIONARY (11th ed. 2019). Black's also broadly defines "amend" as "[t]o change the wording of; specif., to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words." *Id.* Even if one were to adopt a narrow definition of "amended," the statute's inclusion of the term "changed," which has a broad plain meaning, would likely cover any state constitutional disenfranchisement actions. *See Change*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (defining the word as "to alter or make different").

158. *See supra* note 4 (listing statutes that conditioned readmission on whether or not the states "framed constitutions of State government which are republican, and have adopted said constitutions by large majorities of the votes cast at the elections held for the ratification or rejection of the same").

159. *See* George Justice, *Reconstruction Conventions*, NEW GA. ENCYCLOPEDIA (Sept. 30, 2020),

Readmission Acts today, parties should consider the additional obstacles posed by any pre-readmission constitutional amendments which disenfranchised voters. Virginia, for example, recently relied on provisions in its pre-readmission constitution to justify the state's disenfranchisement of all people with felony convictions. [160] As this aspect of the Readmission Acts can hamper advocacy to curb the widespread disenfranchisement among the former Confederate states, litigators suing under the Readmission Acts should conduct their own analysis of the applicable Reconstruction-era constitution's disenfranchisement provision when deciding whether or not to pursue litigation.

2. "Now Felonies at Common Law"

To understand the meaning of "now felonies at common law," this Section first examines the text of the Readmission Acts. It then analyzes whether the doctrine of constitutional avoidance should play

https://www.georgiaencyclopedia.org/articles/government-politics/reconstruction-conventions [https://perma.cc/76CU-XJT6] (noting that, of the 169 delegates at the Georgia Constitutional Convention of 1868, thirty-seven of them were Black); *see generally* JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF GEORGIA (1868) (recording the debates in Georgia's Reconstruction-era constitutional convention, which ended two months prior to its readmission). For example, one of the delegates to the 1868 Constitutional Convention, George W. Ashburn, opposed allowing participants in the "late rebellion" to hold office in the provisional state government because "the Nation . . . must keep from place and power those who still hold to the pernicious ideas which brought on the war." *Id.* at 175. Shortly thereafter, Ashburn was assassinated by the Ku Klux Klan in one of its first acts of organized terrorism. Jonathan M. Bryant, *Ku Klux Klan in the Reconstruction Era*, NEW GA. ENCYCLOPEDIA (Aug. 12, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/ku-klux-klan-in-the-reconstruction-era [https://perma.cc/QJ3J-GTUA]. This Note focuses on the Readmission Acts' disenfranchisement exemption relating to "felonies at common law." However, given the additional exemption for pre-readmission disenfranchisement provisions, it would be fruitful to examine how each Reconstruction-era constitution disenfranchised people and to what degree that disenfranchisement is still relevant today.

160. Defendants' Memorandum in Support of Their Motion to Dismiss the First Amended Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 14, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024) ("Virginia did not [change or amend its 1869 Constitution] in the 1971 Constitution because all felons were excluded from the franchise in the 1869 Constitution that Congress approved."); VA. CONST. of 1868, art. III, § 1 ("[T]he following persons shall be excluded from voting . . . [p]ersons convicted of bribery in any election, embezzlement of public funds, treason or felony.").

a role in interpreting the meaning of "now felonies at common law." Finally, it parses the legislative debates surrounding the Readmission Acts to determine what the Reconstruction Congress likely intended the phrase to mean.

i. The Text

The Supreme Court in *Bannon v. United States* defined common law felonies as "such serious offences as were formerly punishable by death, or by forfeiture of the lands or goods of the offender."[161] Black's Law Dictionary similarly defines a common law felony as "an offense for which conviction results in forfeiture of the defendant's lands or goods (or both) to the Crown, regardless of whether any capital or other punishment is mandated."[162] Federally, common law crimes have been beyond the scope of courts' jurisdictions since 1812.[163] As such, common law felonies currently only exist at the state level; they most often include the crimes of treason, murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.[164]

The disenfranchisement provision also freezes the common law for disenfranchisement. Congress narrowed the conditions through which states can disenfranchise voters by adding the word "now" before "felonies at common law."[165] This was not a coincidence. In 1866, Congress passed the Tennessee Readmission Act with no reference to any "felonies at common law" language.[166] One year later,

161. Bannon v. United States, 156 U.S. 464, 468 (1895) (citing *Ex parte* Wilson, 114 U.S. 417, 423 (1885)). While the Supreme Court decided *Bannon* and Ex parte *Wilson* after the Readmission Acts were passed, these decisions were still roughly contemporaneous with the Readmission Acts.

162. *Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Felony*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (noting that felonies can be both statutory and at common law).

163. United States v. Hudson & Goodwin, 11 U.S. (1 Cranch) 32, 34 (1812) ("[A]ll exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.").

164. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO: WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES 2 (5th ed. 1861).

165. *See supra* note 4 (listing statutes with the disenfranchisement provision).

166. Joint Resolution Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (1866).

Congress passed the first Reconstruction Act.[167] This Reconstruction Act secured the right to vote for all male citizens, with exceptions for participation in rebellion and "for felony at common law."[168] Then, throughout the next couple years, Congress readmitted the remaining southern states, this time limiting the disenfranchisement provision to "now felonies at common law."[169] This insertion of the word "now" at the beginning of the phrase shows that not only was the Reconstruction Act of 1867 *in pari materia*[170] for the drafting of almost all the Readmission Acts, but also that these Acts intentionally strengthened the Reconstruction Act's voting protections."[171]

Under the canon of surplusage, the inclusion of the word "now" in the Readmission Acts must have a meaning.[172] "Now" could mean either (1) "now" at the time of the passage of the Acts or (2) "now" at the time the Acts are being interpreted or applied. The first option is the only reasonable interpretation, as reading "now" to essentially mean any time would render the word superfluous. Courts affirmed this reasoning when determining the meaning of the word "now" in the Process Acts of 1789[173] and 1792.[174] These Acts, which established civil procedure rules at the time,[175] included language requiring courts to use common law procedures that are "now used"

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167. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867).

168. *Compare id.* at 429 (containing the language "for felony at common law"), *with* Joint Resolution Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (1866) (lacking any felony disenfranchisement language).

169. *See supra* note 4 (listing statutes that all included the disenfranchisement provision).

170. *See* United States v. Freeman, 44 U.S. (3 How.) 556, 564–65 (1845) (holding that *in pari materia* should be considered in statutory interpretation).

171. *Compare* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867) (limiting disenfranchisement "for felony at common law"), *with supra* note 4 (listing statutes that limit disenfranchisement more restrictively to "now felonies at common law").

172. *See* Holmes v. Jennison, 39 U.S. 540, 570–71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning."); ANTONIN SCALIA & BRYAN GARNER, READING LAW 440 (2012) ("[I]f possible, every word and every provision is to be given effect.").

173. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (repealed 1792).

174. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

175. Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 647, 652 (2015).

in state courts.[176] When interpreting the word "now" in the Process Acts, the Supreme Court read it as referring to "at the time of the passage of the act."[177] Courts should take the same approach to the Readmission Acts.

ii. Constitutional Avoidance

The doctrine of constitutional avoidance, which urges courts to interpret a statute in a way that avoids a constitutional question,[178] might compel judges to interpret the Readmission Acts as allowing states to disenfranchise for all felonies. The Supreme Court in *Bond v. United States* expanded this doctrine to require a clear statement that a law is applicable "when legislation 'affect[s] the federal balance.'"[179] The Readmission Acts, like the statute in *Bond*, might affect the federal balance in that they venture into criminal law, an area of law long reserved to the states.[180] However, this is not an ordinary venture into criminal law. The disenfranchisement provision only applies to situations in which the criminal carceral system infringes on people's voting rights, which Section 2 of the Fifteenth Amendment delegates to Congress.[181] In addition, the doctrine of constitutional avoidance would equally weigh against giving states free reign to disenfranchise since disenfranchisement might violate the Fifteenth Amendment.[182]

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176. *See supra* notes 173–174 (citing the Process Acts).

177. Fink v. O'Neil, 106 U.S. 272, 278 (1882).

178. NLRB v. Cath. Bishop of Chicago, 440 U.S. 490, 500 (1979) (establishing the constitutional avoidance doctrine).

179. Bond v. United States, 572 U.S. 844, 858 (2014) (alteration in original) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

180. *Id.* at 848 ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.").

181. U.S. CONST. amend. XV, § 2 (giving Congress the authority to enforce the Fifteenth Amendment). This is not to say that voting rights are exclusively reserved to the federal government. States are allowed to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, and many states have recently passed state-level voting rights acts instituting state-level voter protections. *See* MOVEMENT ADVANCEMENT PROJECT, STATE LEVEL VOTING RIGHTS ACTS (June 12, 2023), https://www.lgbtmap.org/img/maps/citations-state-level-voting-rights-acts.pdf [https://perma.cc/6E92-XMRS] (tracking the progress of state-level voting rights acts).

182. U.S. CONST. amend. XV, § 1 (barring disenfranchisement on account of race, color, or previous condition of servitude).

iii. The Legislative Debates

The legislative history of the Readmission Acts confirms the interpretation that "now felonies at common law" refers to such felonies at the time of the Act's passage. Senator Charles D. Drake summed up Congress' intent during debate on the Arkansas Readmission Act when he argued:

> [T]he white rebels of the South will, from the hour that the strong arm of the Government ceases to restrain them, bend all their energies to the disenfranchisement of the [Black person]; that they will plot and counterplot, and scheme, and strive, yea, agonize for his potential [re-enslavement]; that they will in this ferocious crusade against the rights of man deft alike the laws of God and man to the uttermost extent they dare."[183]

In the same debate, Senator Drake warned how simple it would be for a southern state to pass a disenfranchisement law.[184] Senator Drake's remarks reflect Congress' anti-racist intent, and courts ought to respect this intent by interpreting the Readmission Acts to expand—rather than limit—the right to vote when possible.

Senator Drake introduced an amendment to make the Arkansas Readmission Act even stricter on disenfranchisement.[185] While this amendment did not pass, Senator John Sherman—one of the Senators who voted against the amendment—noted that he only did so to avoid delay in Arkansas' readmission.[186] Senator Sherman further reassured the Senate that he believed that the enacted language was sufficient to protect Black men against disenfranchisement.[187]

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183. CONG. GLOBE, 40th Cong., 2d Sess. 2738 (1868) (statement of Sen. Drake). The southern states proved Senator Drake right. *See supra* Section I.B (detailing disenfranchisement in the South after the end of Reconstruction).

184. CONG. GLOBE, 40th Cong., 2d Sess. 2600 (1868) (statement of Sen. Drake) ("It is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to [Black] men.").

185. *See id.* ("[S]aid constitution shall never be so amended or changed as to deprive *any one* of the right to vote at *all elections held in said State* . . . unless such deprivation be imposed as a punishment for such crimes as are now felonies at the common law.") (emphasis added). This language hints that the Acts might have also covered non-citizen voting in non-government-run elections.

186. *Id.* at 2607 (statement of Sen. Sherman).

187. *Id.* ("There is no danger at all, is my judgment, of any portion of the people of the United States now possessing the elective franchise being deprived of the right of suffrage.").

In summary, "now felonies at common law" should be interpreted narrowly to apply only to felonies that existed at common law at the time of the Readmission Acts' passage. This interpretation also aligns with the remedial nature of the Acts, as the Reconstruction Congress' legislative history shows that it rightfully feared that the former Confederate states would disenfranchise Black men the moment they had the opportunity.[188]

C. What Remedy Do the Readmission Acts Require?

If a court finds that a state constitutional amendment has violated the Readmission Acts, what can the court do about it? There are several potential remedies, which this Note divides into three different categories: (1) invalidation of the state constitutional amendment, (2) expulsion from Congress, and (3) enforcement through other legislation.

One potential remedy for a Readmission Act violation is invalidating the disallowed state constitutional amendment. This would entail striking down any state constitutional amendment that conflicts with the Readmission Acts, including its limitations on disenfranchisement.

The most drastic potential remedy is to expel a breaching state from Congress. The logic behind this remedy is that Congress, through the Readmission Acts, determined the conditions upon which the southern governments would be recognized as the legitimate state authority.[189] As such, for a court to properly carry out the will of Congress, it could declare the breaching governments illegitimate—and ultimately expel them from Congress—if it finds that those conditions have not been met.

The third potential remedy is that a court could read the Readmission Acts as elaborating on Congress' authority under Section 5 of the Fourteenth Amendment[190] and Section 2 of the Fifteenth Amendment.[191] Under this interpretation, the Readmission Acts, passed contemporaneously with the Reconstruction

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188. *See supra* Section II.B.2.iii (analyzing the legislative history of the Readmission Acts).

189. *See supra* note 1 (listing statutes that conditioned readmission); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (giving Congress the authority to determine which state governments are "the established one[s] in a State" under the Guarantee Clause).

190. U.S. CONST. amend. XIV, § 5.

191. U.S. CONST. amend. XV, § 2.

Amendments, show that the Reconstruction Amendments authorize and potentially obligate Congress to pass legislation, like the VRA, which safeguards the right to vote.[192] This interpretation of the Readmission Acts might seem superfluous, as the Fourteenth and Fifteenth Amendments already contain enforcement provisions.[193] However, the Acts could be read as a clarification that Congress can specifically legislate to bar felony disenfranchisement under the enforcement clauses of the Fourteenth and Fifteenth Amendments. While this explanation might make sense in theory, it seems unlikely that Congress, which was attempting to enfranchise Black Americans, passed the Acts purely for clarification reasons.

Overall, of the potential remedies for a Readmission Act violation, the most logical option is for a court to issue an injunction ordering the state to invalidate the state constitutional amendment in question. For a court to issue no remedy would be an abdication of its role to ensure that states are complying with federal law. Yet, expelling a violating state from Congress would be akin to using a sledgehammer to crack a nut. By striking down the unlawful amendment, a court would be solving the problem of illegality with the appropriate amount of legal force.

III. ADDRESSING COUNTER-ARGUMENTS

In anticipation of the challenges litigants could face in bringing Readmission Act claims, this Part will introduce and respond to three different legal arguments against applying the Acts to invalidate disenfranchisement laws in the former Confederate states. First, this Part will address the argument that the Readmission Acts deal with a political question and thus must be enforced by Congress. Next, it will address the problems with the potential remedies that courts may impose. Finally, this Part will analyze whether *Shelby County*[194] invalidates the Readmission Acts under the case's equal state sovereignty principle.[195]

A. The Political Question Doctrine Critique

Litigants might argue that the Readmission Acts' limitations on felony disenfranchisement are political questions, which must be

192. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–14, §§ 10501–08, §§10701–02).

193. U.S. CONST. amend. XIV, § 5;.U.S. CONST. amend. XV, § 2.

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

195. *Id.* at 544 (discussing the equal state sovereignty principle).

decided by the other branches rather than judiciary. If Congress relied on its powers under the Guarantee Clause[196] to pass the Readmission Acts, re-enfranchising people incarcerated for felonies might be a political question. Proponents of this argument could draw on the Supreme Court's decision in *Luther*, which deferred to Congress' constitutional authority under the Guarantee Clause to determine the established government of the state.[197] Arguably, asking a court to invalidate disenfranchising state constitutional amendments would be analogous to the party's request in *Luther* asking a court to declare that a non-disenfranchising government is the "established one in [the] State."[198] However, unlike in *Luther*, Congress has spoken on this issue. Under the Readmission Acts, it is Congress, not the courts, that sets the standard for the established government—the courts must simply enforce that standard.[199] This fits with the Acts' intent to protect the rights of Black men by ensuring their right to vote.[200] *Luther* was also decided before the United States ratified the Reconstruction Amendments,[201] which authorize Congress to override state action that impairs the privileges of Americans.[202]

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196. U.S. CONST. art. IV, § 4, cl. 2. This Note argues that Congress instead used its rebellion- and war-related powers under Article I, Section 8 to pass the Readmission Acts, and thus the political question doctrine does not apply. *See supra* Section II.A (discussing Congress' powers).

197. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849); *see also* Defendant's Memorandum in Support of Their Motion to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 22–23, King v. Youngkin, No. 3:23CV408 (E.D. Va. Mar. 18, 2024) (arguing that there is no private right of action because violations of the Readmission Acts are political questions).

198. *Luther*, 48 U.S. (7 How.) at 42.

199. *Compare id.* (deciding the case in the absence of congressional guidance and law), *with supra* note 4 (listing the Readmission Acts with the disenfranchisement provision).

200. *See supra* Section II.B (describing evidence of Congress' intent to enfranchise); U.S. CONST. amend. XV (providing Black men with the right to vote); *Id.* amend. XIV (protecting voting rights by establishing equal protection and due process under the law).

201. U.S. CONST. amends. XIII, XIV, XV.

202. *See* The Civil Rights Cases, 109 U.S. 3 (1883) (establishing the state action doctrine); *see also Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746 (on file with the *Columbia Human Rights Law Review*) (listing cases which incorporated the Bill of Rights against the states).

The Court in *Zivotofsky v. Clinton*[203] outlined a post-Reconstruction test for what can be considered a political question. According to the *Zivotofsky* majority, the Court finds a political question "when there is 'a lack of judicially discoverable and manageable standards for resolving' the question before the court."[204] Regarding the Readmission Acts, however, Congress set a judicially manageable standard when it "decide[d] what government is the established one in a State"[205] and tasked the courts with enforcing its vision—including the limitations on felony disenfranchisement—through statutory interpretation.[206] The Fourth Circuit, holding that the Virginia Readmission Act does have a judicially manageable standard, similarly held that "'resolving whether a particular interpretation of a statute'—even an old one—'is correct represents a familiar judicial exercise, one for which there is a superabundance of tools that federal judges employ every day.'"[207]

Even if applying the Readmission Acts does not raise a political question, litigants have argued that the Readmission Acts do not contain a private right of action and therefore cannot be enforced

203. Zivotofsky v. Clinton, 566 U.S. 189 (2012).

204. *Id.* at 197 (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

205. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

206. Courts often enforce voting rights laws. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (establishing a test for determining violations of Section 2 of the Voting Rights Act); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447 (2006) (holding that a voting district redistricting plan violated the Voting Rights Act); Chisom v. Roemer, 501 U.S. 380, 403–04 (1991) (enforcing the VRA's vote dilution provisions in state judicial elections). Statutory ambiguity does not necessarily mean a lack of a judicially manageable standard; statutory interpretation is one of the court's central roles. Under both dominant theories of the court's role in statutory interpretation, the legal process theory and the faithful agent theory, the court's job is to carry out the will of Congress. *See* WILLIAM N. ESKRIDGE JR. ET AL., CASE MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 424, 446 (6th ed. 2020) (explaining both the legal process and faithful agent theories of statutory interpretation); *see generally* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958) (propounding the legal process theory, which views courts as a partner with the legislator to achieve its goals); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (viewing courts as faithful agents whose goal is to fulfill Congress' vision without imposing their own norms and rules).

207. King v. Youngkin, 122 F.4th 539, 547 (4th Cir. 2024) (quoting Cawthorn v. Amalfi, 35 F.4th 245, 256 (4th Cir. 2022) (alterations and quotation marks removed)).

under Section 1983.[208] In general, "private rights of action to enforce federal law must be created by Congress."[209] When a statute itself does not provide a right of action, Section 1983 might provide one.[210] The Supreme Court in *Blessing v. Freestone*[211] established the following three-factor test to determine whether a law permits a private right of action under Section 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[212]

In the recent Virginia Readmission Act case, Virginia argued that the Readmission Acts do not meet *Blessing*'s first and third factors.[213] However, this argument does not align with the Supreme Court's interpretation of these factors. Clarifying the first *Blessing* factor, the Court held in *Health and Hospital Corporation of Marion County v. Talevski* that requirements relating to residents' *rights* are "indicative of an individual '*rights*-creating' focus."[214] The disenfranchisement provisions in the Readmission Acts fit this mold

208. Defendant's Memorandum in Support of Their Motion to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 21–22, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024). Section 1983 refers to 42 U.S.C. § 1983, a statute passed by Congress in 1871 to combat violence against Black people in the South. RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 986 (7th ed. 2015). The statute allows citizens to sue government officials for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

209. Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

210. 42 U.S.C. § 1983 (allowing "every person" to sue for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

211. Blessing v. Freestone, 520 U.S. 329 (1997).

212. *Id.* at 340–41 (citations omitted) (quoting Wright v. Roanoke Redev. Auth., 479 U.S. 418, 430 (1987)).

213. Defendant's Memorandum in Support of Their Motion to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 23–24, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024).

214. Health & Hosp. Corp. v. Talevski, 599 U.S. 166, 184 (2023) (emphasis added) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002)).

because they concern the right to vote.[215] During the congressional debate on the Virginia Readmission Act, Representative William Lawrence, a proponent of the Act, described the disenfranchisement provision as a "'fundamental condition' [that] fixes the *rights* of citizens."[216] The Readmission Acts also meet the third *Blessing* factor because the disenfranchisement conditions on state readmission are couched in "mandatory, rather than precatory, terms."[217] The Acts themselves have mandatory language, as they require that state constitutions "shall never be so amended or changed."[218] As such, plaintiffs have a private right of action under Section 1983.

B. The Federalism Critique

It might be unconstitutional for a federal statute to prevent a state from amending its constitution.[219] However, courts can invalidate state constitutional amendments when they conflict with federal law. The Supremacy Clause clearly states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[220] Furthermore, the Readmission Acts are a special

215. *See supra* note 4 (listing statutes with the disenfranchisement provision); Plaintiff's Opposition to Motion to Dismiss at 15, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024) (making the argument that the first factor is met due to the focus on the right to vote).

216. CONG. GLOBE, 41st Cong., 2d Sess. 432 (1870) (statement of Rep. Lawrence) (emphasis added); *see also* Plaintiff's Opposition to Motion to Dismiss at 15, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 28, 2024) (making the argument that the Readmission Acts are rights-creating).

217. *Blessing*, 520 U.S. at 341.

218. *See supra* note 4 (listing statutes that contain this language); Plaintiff's Opposition to Motion to Dismiss at 16, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 28, 2024) (making the argument that the third factor is met because of the obligatory nature of the Readmission Acts' conditions).

219. For a discussion of the Court's current anti-commandeering doctrine jurisprudence, which bars Congress from "tak[ing] over states' governing apparatuses and force them to do its bidding," see Heather K. Gerken, Comment, *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 101 (2014) ("The prohibition on commandeering may be fuzzy at the edges, but it's a workable rule that corresponds to a basic intuition: Congress can't take over states' governing apparatuses and force them to do its bidding.").

220. U.S. CONST. art. VI, cl. 2. Many court decisions have also involved courts striking down state constitutional amendments as inconsistent with the U.S. Constitution. *See e.g.*, Romer v. Evans, 517 U.S. 620, 635–36 (1996) (striking down a Colorado constitutional amendment for violating the Equal Protection Clause of the Fourteenth Amendment); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995) (striking down an amendment to the Arkansas

kind of federal statute. They were passed by the Reconstruction Congress,[221] which instituted these state constitutional restrictions as a condition on readmission.[222] These circumstances indicate that the Framers of the Second Founding saw conditions on future constitutions as key to enforcing the Reconstruction Amendments.[223]

On a similar note, litigants have argued that suing states under the Readmission Acts violates sovereign immunity. For example, in the Virginia Readmission Act case, Virginia argued that suing under the Act violates the Supreme Court's standard in *Pennhurst State School and Hospital v. Halderman*, which bars "federal court order[s] instructing 'state officials on how to conform their conduct to state law.'"[224] However, plaintiffs can sue a readmitted state for a violation of federal law under Section 1983[225] or under Ex parte *Young*.[226] The Supreme Court in *Verizon Maryland, Inc. v. Public Service Commission* held that "[i]n determining whether the doctrine of Ex parte *Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into

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Constitution that instituted term limits); Cook v. Gralike, 531 U.S. 510, 526–27 (2001) (striking down an amendment to the Arkansas Constitution that would have required labels on the ballot to identify candidates' positions on term limits); Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006) ("The amendment passed as a result of Initiative 300 thus fails the conditions that we set out in *Hazeltine*, and we affirm the district court's holding that Neb. Const. art. XII, § 8 violates the dormant commerce clause both on its face and based on its discriminatory intent.").

221. *See infra* note 264 and accompanying text (demonstrating that the Readmission Acts were contemporaneous with the Reconstruction Amendments).

222. *See infra* Section III.C.1 (detailing the background behind the enactment of the Readmission Acts).

223. *See* CONG. GLOBE, 40th Cong., 2d Sess. 2738 (1868) (statement of Sen. Drake) (illustrating Congress' fear that the South "will, from the hour that the strong arm of the Government ceases to restrain them, bend all their energies to the disenfranchisement of the [Black person]"); *see also supra* note 4 (listing the Readmission Acts which limit future amendments or changes to the former Confederate states' disenfranchisement provisions).

224. Defendant's Memorandum in Support of Their Motion to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 10, King v. Youngkin, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2024) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 206 (1984)).

225. 42 U.S.C. § 1983 (2023).

226. *Ex parte* Young, 209 U.S. 123 (1908). Ex Parte *Young* allows plaintiffs to sue state officers in their official capacity for injunctive relief for violations of federal law. *Id,* at x; *see also* FALLON, JR. ET AL., *supra* note 208, at 927 ("[C]ommentators have long regarded *Young* as significant because it . . . recognized a cause of action for injunctive relief directly under the Fourteenth Amendment . . . .").

whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[227] In a hypothetical Readmission Act case, a complaint could argue that a state's constitution violates a federal law—the Readmission Act—and could thus seek some form of prospective relief.[228] Indeed, the Fourth Circuit followed this logic in upholding the *King* plaintiffs' ability to sue under Ex Parte *Young*.[229]

C. The Equal State Sovereignty Critique

In its June 2013 decision in *Shelby County v. Holder*, the Supreme Court invalidated a portion of the VRA that articulated a formula for the Department of Justice to determine which jurisdictions required its pre-clearance before changing their voting laws.[230] In his majority opinion, Justice John G. Roberts argued that "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States."[231] Under this principle, if a law fails to apply state sovereignty equally, then the unequal treatment must be "sufficiently related to the problem that it targets."[232]

This Section examines how *Shelby County* and the Readmission Acts interact. It first argues that the Acts are not unconstitutional under the "equal state sovereignty principle" set out in *Shelby County*.[233] It then discusses the Acts' conditions' severability.[234] Finally, it analyzes the Acts as a critique of the equal state sovereignty principle.[235]

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227. Verizon Maryland, Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)).

228. *See supra* Section II.C (discussing potential remedies for a Readmission Act violation).

229. King v. Youngkin, 122 F.4th 539, 545 (4th Cir. 2024) ("But we conclude King and Johnson are seeking to enforce federal law, not state law.").

230. Shelby County v. Holder, 570 U.S. 529, 557 (2013); *see also* Voting Rights Act § 4(a), 52 U.S.C. § 10303(a) (outlining the VRA's coverage formula).

231. *Shelby County*, 570 U.S. at 544 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

232. *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

233. *See infra* Section III.C.1 (distinguishing the Readmission Acts).

234. *See infra* Section III.C.2 (discussing severability in the context of the Readmission Acts).

235. *See infra* Section III.C.3 (critiquing equal state sovereignty).

1. The Readmission Acts Pass *Shelby County*'s Equal State Sovereignty Test

When Justice Roberts outlined the Supreme Court's equal state sovereignty test, he did not mean to say that any disparate treatment of states was unconstitutional. Instead, he explicitly stated that disparate treatment of states with respect to their sovereignty can be constitutional if it "is sufficiently related to the problem that it targets."[236] To determine whether the Readmission Acts pass this test, this Note will compare them with the part of the VRA that was held unconstitutional in *Shelby County*.

Like Section 4(b) of the VRA, the Readmission Acts treat states differently. The Readmission Acts only imposed conditions upon readmitted states that were formerly part of the Confederacy.[237] Even readmitted states received disparate treatment, with Tennessee being the only state whose readmission lacked a felony disenfranchisement condition.[238] However, the Readmission Acts are substantively different than the VRA in five ways: the context in which Congress passed them, their application schemes, their temporality, their success, and their constitutional significance.

i. Different Contexts

Congress passed the VRA in response to procedural barriers that southern states instituted during Jim Crow to prevent Black people from voting.[239] Before the VRA, the Supreme Court repeatedly condoned southern states' refusal to enforce Black men's

236. *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203. The Readmission Acts could be de facto unconstitutional under the "equal footing" doctrine for Congress' admission powers. *See supra* Section II.A (discussing Congress' powers). Congress, however, likely did not intend to use this power. *See id.* (explaining why Congress likely did not rely on its admission powers).

237. The Readmission Acts, which put conditions upon the readmitted states, applied only to Texas, Mississippi, Virginia, North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida, Arkansas, and Tennessee. *See* Readmission Acts, *supra* note 1.

238. *See supra* note 4 (listing the Readmission Acts that did include a felony disenfranchisement provision, which exclude the one readmitting Tennessee). Tennessee's laxer treatment was most likely a result of its decision to undergo voluntary Reconstruction. *See* SUMMERS, *supra* note 44, at 21–22 (detailing how, under the leadership of military governor Andrew Johnson, Tennessee voluntarily ended slavery and refused to explicitly limit the vote to white men).

239. *See supra* notes 58–60 and accompanying text (summarizing the South's disenfranchisement methods under Jim Crow).

constitutional right to vote.[240] Sixty years later, Sections 4 and 5 of the VRA abolished the disenfranchisement measures that the South had used throughout the 20th century.[241]

By contrast, Congress passed the Readmission Acts in response to the Civil War [242] and to its loss of faith in the South's ability to provide fundamental rights to its Black citizens.[243] The Readmission Acts survive the departure from the principle of equal sovereignty because they are "sufficiently related to the problem"[244]—a potential recurrence of Civil War violence and a backsliding of the civil rights protections secured after the war—in two ways. First, the Readmission Acts' provisions conditioned formerly Confederate states' representation in Congress.[245] Second, Congress only readmitted states whose constitutions it deemed satisfactory.[246] Because the Readmission Acts were responding to a different problem than the one at issue in the VRA, and because the solutions implemented by the Readmission Acts are sufficiently related to that problem, the Readmission Acts should not be held unconstitutional under *Shelby County*.[247]

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240. *See supra* notes 54–55 and accompanying text (summarizing the Supreme Court's consistent upholding of post-Reconstruction constitutional provisions).

241. 52 U.S.C. §§ 10303–04; *see also* Shelby County v. Holder, 570 U.S. 529, 535 (2013) ("This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'") (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)).

242. *See supra* notes 122–127 and accompanying text (detailing Congress' intent to prevent conflicts like the Civil War from starting up again). The Civil War was the deadliest conflict for Americans in the nation's history. Bob Zeller, *How Many Died in the American Civil War*, HISTORY.COM (Aug. 23, 2023), https://www.history.com/news/american-civil-war-deaths [https://perma.cc/LS47-LLGL] (describing recent research estimating the casualty count of the Civil War, "the deadliest of all American wars," as between 650,000 to 850,000 people).

243. *See supra* note 183 and accompanying text ("[The South] will, from the hour that the strong arm of the Government ceases to restrain them, bend all their energies to the disenfranchisement of the [Black person.]").

244. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

245. *See supra* note 1 (listing statutes that conditioned representation in Congress).

246. *Id.*

247. This Note should not be interpreted to downplay the severity of post-Reconstruction disenfranchisement that the VRA aimed to resolve. *See supra*

ii. Different Application Schemes

The Readmission Acts and the VRA differ in their application schemes. The VRA applied remedial measures only to jurisdictions that Congress deemed overly disenfranchised Black residents at the time the relevant provision was last amended, which was in 1975.[248] The problem with this metric, as emphasized by the Roberts majority in *Shelby County*, is that "[i]t would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."[249] On the other hand, the Readmission Acts explicitly defined their coverage: the former Confederate states.[250] As Senator Drake mentioned in the Arkansas Readmission Act debate, Congress feared that the former Confederate states would, "from the hour that the strong arm of the Government cease[d] to restrain them, bend all their energies to the disenfranchisement of the [Black person]."[251] Thus, the application of the Readmission Acts was limited to former Confederate states to prevent them from disenfranchising their Black population and does not suffer the same constitutional problems caused by the VRA's prolonged reliance on old data for remedial purposes.

iii. Temporality

Congress intended Section 4 of the VRA to be temporary.[252] The Roberts majority in *Shelby County* cited this sunset provision when striking down Section 4(b) of the VRA.[253] Conversely, the

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Sections I.B–C (detailing rampant disenfranchisement after the end of Reconstruction).

248. 52 U.S.C. § 10303(b) (conditioning the application of Section (a) on criteria set out in Section (b)), *invalidated by* Shelby County v. Holder, 570 U.S. 529 (2013); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 STAT. 437, 438 (original coverage formula); An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400, 400–01 (updating the coverage formula).

249. *Shelby County*, 570 U.S. at 556.

250. *See supra* note 1 (listing statutes applying to the former Confederate states).

251. CONG. GLOBE, 40th Cong., 2d Sess. 2738 (1868) (statement of Sen. Drake).

252. 52 U.S.C. § 10303(a) ("The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the [2006 reauthorization of the statute].").

253. *Shelby County*, 570 U.S. at 538 ("Sections 4 and 5 were intended to be temporary; they were set to expire after five years."). In 1970, Congress reauthorized the VRA, extending the sunset provisions. An Act to extend the

Readmission Acts have no sunset provisions.[254] Congress was aware of this during the legislative debates. Senator Roscoe Conkling, unsuccessfully arguing against the Arkansas Readmission Act, expressed his concern that the conditions in the Act would "stick to [Arkansas] forever, like the tunic of Nessus."[255] Here, the Reconstruction Congress, which passed the Readmission Acts shortly after the end of the Civil War, made a conscious decision to ignore these concerns and not include a sunset provision for the Readmission Acts. This decision should be afforded deference.

iv. Success

The Roberts majority in *Shelby County* cited the VRA's success when invalidating the coverage formula.[256] Indeed, immediately after Congress passed the VRA, more than 150,000 Black southerners registered to vote.[257] Fifty years after Congress passed the VRA, the number of Black members in the House of Representatives increased from six to forty-five.[258] Conversely, the Readmission Acts remain unenforced. People with felony convictions are still disenfranchised during and after their incarceration.[259] If the success of an act can provide grounds for its invalidation, then the ongoing challenges an act seeks to resolve should provide grounds for

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Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes, Pub. L. No. 91-285, 84 STAT. 314. Congress later reauthorized the VRA a number of times, most recently in 2006, which imposed a twenty-five-year sunset provision. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act of 2006, Pub. L. No. 109-246, § 4, 120 STAT. 577, 580.

254. *See supra* note 1 (listing readmission statutes, all of which lack a sunset provision).

255. CONG. GLOBE, 40th Cong., 2d Sess. 2608 (1868) (statement of Sen. Conkling).

256. *Shelby County*, 570 U.S. at 548 ("The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."); *see also id.* at 559 (Ginsburg, J., dissenting) ("In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy.").

257. U.S. COMM'N ON CIV. RTS., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT 25–26 (2018) (showing non-white voter registration skyrocketed after the enactment of the VRA).

258. CONG. RSCH. SERV., AFRICAN AMERICAN MEMBERS OF THE U.S. CONGRESS: 1870–2020, at 6–8 (Dec. 15, 2020), https://crsreports.congress.gov/product/pdf/RL/RL30378 (on file with the *Columbia Human Rights Law Review*).

259. *See supra* Section I.C (detailing modern day felony disenfranchisement in the United States).

its continued enforcement. Thus, contemporary disenfranchisement signals that the Readmission Acts are still greatly needed.

v. Constitutional Significance

Congress passed the VRA to enforce the Fifteenth Amendment.[260] However, the Eighty-Ninth Congress passed the statute[261] around one hundred years after the country ratified the Fourteenth[262] and Fifteenth[263] Amendments.

Conversely, Congress passed the Readmission Acts contemporaneously with the Reconstruction Amendments.[264] In fact, the same Congress that readmitted Tennessee passed the Fourteenth Amendment.[265] As such, courts should hesitate when invalidating the Readmission Acts since many who passed the Reconstruction

260. *See* Lopez v. Monterey County, 525 U.S. 266, 269 (1999) ("Congress enacted the Voting Rights Act under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination.").

261. *Voting Rights Act (1965)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/voting-rights-act [https://perma.cc/5NN6-Z3DX] (noting that the VRA was signed into law on August 6, 1965); *see also Dates of Sessions of Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/5Q4U-RMCT] (showing that the Eighty-Ninth Congress was in session in 1965).

262. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment [https://perma.cc/9NEH-YKGH] (noting that the Fourteenth Amendment was ratified on July 9, 1868).

263. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/15th-amendment [https://perma.cc/6VHY-RYCZ] (noting that the Fifteenth Amendment was ratified on February 3, 1870).

264. *Accord supra* note 1 (listing statutes passed intermittently between July 24, 1866 and March 30, 1870); *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/13th-amendment [https://perma.cc/5NNA-FRM2] (noting that the Thirteenth Amendment was passed by Congress on January 31, 1865); *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, *supra* note 262 (noting that the Fourteenth Amendment was passed by Congress on June 13, 1866); *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, *supra* note 263 (noting that the Fifteenth Amendment was passed by Congress on February 26, 1869).

265. *Accord 14th Amendment to the U.S. Constitution: Civil Rights (1868)*, *supra* note 262 (noting that the Fourteenth Amendment was passed by Congress on June 13, 1866); Joint Resolution Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (1866) (going into law on July 24, 1866); *Dates of Sessions of Congress*, *supra* note 261 (showing that the 39th Congress passed both statutes).

Amendments also passed the Readmission Acts and therefore presumably intended the two to interact in certain ways. In the past, the Supreme Court has looked to contemporaneous statutes to decipher the meaning of constitutional provisions, most famously in presidential removal cases.[266]

In addition, the Readmission Acts themselves are responsible for the ratification of the Fourteenth and Fifteenth Amendments. The Acts conditioned readmission on the states' ratification of the Fourteenth[267] and, in some cases,[268] Fifteenth Amendments. As such, any invalidation of the Readmission Acts might call into question the legitimacy of the Fourteenth and Fifteenth Amendments' ratifications.

Altogether, the context, application scheme, temporality, unachieved aims, and constitutional significance of the Readmission Acts mean they likely pass *Shelby County*'s equal state sovereignty test and that the South's actions prior to the passage of the Acts justified disparate treatment.

2. Severability

Proponents of applying equal state sovereignty here might argue that specific conditions in the Readmission Acts are severable, just as the Supreme Court in *Shelby County* found Section 4(b) of the VRA to be severable.[269] This would mean that a future court could invalidate the disenfranchisement provisions of the Readmission Acts

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266. *See* Myers v. U.S., 272 U.S. 52, 114–15 (1926) (citing the Decision of 1789 to support a strong presidential removal power); Seila Law, LLC v. CFPB, 591 U.S. 197, 214–16 (2020) (citing the Decision of 1789 to support a strong presidential removal power). *But see id.* at 271 (Kagan, J., dissenting) (quoting John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1965 n.135 (2011)) ("The best view is that the First Congress 'was deeply divided' on the President's removal power, and 'never squarely addressed' the central issue here.").

267. *See supra* note 1 (listing statutes that all required the passage of the Fourteenth Amendment).

268. For the provisions conditioning readmission on the ratification of both the Fourteenth and Fifteenth Amendments, see An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 80 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 67 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 62 (1870).

269. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (holding Section 4(b) of the Voting Rights Act unconstitutional but severing it from the other provisions, which remain in force).

as violating equal state sovereignty while maintaining the integrity of the other provisions. The Supreme Court's test for severability specifies that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[270] The felony disenfranchisement provisions of the Readmissions Acts would fail the Court's severability test, as the Reconstruction Congress would likely not have enacted the Acts without all the conditions included. This is evidenced by the context surrounding the passage of the Readmission Acts, as outlined by the drafters' motives to prevent a second Civil War and protect Black people's rights in the South.[271] In addition, unlike the VRA, the Readmission Acts do not have severability clauses.[272]

3. The Readmission Acts as a Critique of *Shelby County*

Not only would the Readmission Acts survive the equal state sovereignty test, but they also serve as a critique of the fundamental premise behind the equal state sovereignty doctrine. Professor Leah Litman has questioned its validity.[273] Litman argues that the doctrine's supposed origins in the nation's First Founding are dubious.[274] This Note adds to Litman's critique by showing that the Reconstruction Congress similarly did not see the Constitution as protecting the equality of the states. During the Readmission Acts debates, some Senators brought up the idea of equal state sovereignty to argue against the Acts. Senator Conkling hinted at an equal state sovereignty issue during the debate on the Arkansas Readmission Act, criticizing the bill for restricting Arkansas' "prerogative of

270. Buckley v. Valeo, 424 U.S. 1, 108 (1976) (quoting Champlin Refin. Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932)).

271. *See supra* Section III.C.1.i (detailing the context in which the Readmission Acts were passed).

272. *Compare* 52 U.S.C. § 10313 ("If any provision of . . . [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of . . . [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."), *with supra* note 1 (listing statutes that each lack a severability clause).

273. *See generally* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (questioning the validity of the equal state sovereignty test).

274. *Id.* at 1223–26 (critiquing the various origins of the equal state sovereignty doctrine).

equality."[275] Senator Edwin Morgan brought up a similar argument during the House debate on the admission of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, noting that a poll in Ohio had revealed that most of the state's citizens opposed Black re-enfranchisement.[276]

Senator Charles Sumner issued a strong retort:

> The Equality of States on the lips of slave-masters was natural, for it was a plausible defense against the approaches of Freedom; but this unauthorized phrase, which has deceived so many, must be rejected now, so far at least as it is employed against the Equal Rights of all. As one of the old garments of slavery, it must be handed to the flames.[277]

The texts of the Acts themselves call into question the legitimacy of the equal state sovereignty doctrine. The Acts explicitly single out certain states for coverage.[278] In fact, Congress treated the former Confederate states differently from other states throughout all of Reconstruction, declaring that "no legal State governments . . . now exist[] in the rebel States" and requiring that "said rebel States . . . be divided into military districts and made subject to the military authority of the United States."[279] Congress did not impose these conditions on any other state.[280]

In summary, Reconstruction reshaped the way the United States dealt with discrimination. The equal state sovereignty doctrine ignores the original intent of the Reconstruction Congress in favor of a dubious principle with little historical support. The Readmission Acts, in addition to articulating the Reconstruction Congress' value of incarcerated people's voting rights, more broadly call on the judiciary to safeguard our democratic system from the same forces which led to enslavement and the Civil War in the first place.

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275. CONG. GLOBE, 40th Cong., 2d Sess. 2608 (1868) (statement of Sen. Conkling) ("[I]f every other State has the right to regulate these provisions just as it pleases . . . how can we say . . . that we confer upon [Arkansas] the prerogative of equality."); *see also id.* at 2666 (repeating the argument later in the debate).

276. *Id.* at 2452 (statement of Rep. Morgan) ("[T]he people of Ohio . . . have by a majority of fifty-five thousand decided that [Black men are] unfit to exercise the elective franchise.").

277. *Id.* at 3025 (statement of Sen. Sumner).

278. *See supra* note 1 (listing statutes that imposed conditions on specific states).

279. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867).

280. *See id.* (imposing no restrictions on non-Confederate states).

CONCLUSION

The Readmission Acts, though relatively unexplored and unenforced throughout our nation's history, can provide courts with a new lens through which they can explore the remedial purposes of the nation's Second Founding. The Acts have provisions that would, if properly enforced, dramatically change the voting population that exists today, allowing millions of disenfranchised Americans in formerly Confederate states to regain the right to vote.[281] The Acts also challenge the Supreme Court's historical approach to voting rights, urging courts to fulfill the wishes of the Second Founding by tailoring legislation to a state's past, regardless of any disparate treatment of the states. Hopefully, this Note will serve as a tool for advocates to unlock the potential of the Readmission Acts to transform the way in which the legal field thinks about voting rights.

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281. *See supra* Section I.C (discussing disenfranchisement in the United States today).