

THE PENALTY CLAUSE AND THE FOURTEENTH AMENDMENT'S CONSISTENCY ON UNIVERSAL REPRESENTATION

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*Many judges and scholars have read Section 2 of the Fourteenth Amendment as evidence of the Constitution's commitment to universal representation—the idea that representation should be afforded to everyone in the political community regardless of whether they happen to be eligible to vote. Typically, this analysis starts and stops with Section 2's first clause, the Apportionment Clause, which provides that congressional seats are to be apportioned among the states on the basis of "the whole number of persons in each State." Partly for this reason, the Supreme Court's lead opinion in *Evenwel v. Abbott* rejected the argument that "One Person, One Vote" requires states to equalize the number of adult citizens when drawing legislative districts, affirming that states can draw districts with equal numbers of persons.*

But skeptics of the universal representation theory of the Fourteenth Amendment, most notably Justice Alito, have complained that this analysis is flawed because it ignores Section 2's less-known and never-enforced second clause: the Penalty Clause. Under the Penalty Clause, states that deny or abridge otherwise qualified citizens' right to vote are penalized with a reduction of their congressional representation. Any theory of representation drawn from the Fourteenth Amendment, the skeptics argue, must grapple with all of Section 2.

This Article takes up that call and explains how the Penalty Clause is not only consistent with but also reinforces the Fourteenth Amendment's broader commitment to universal representation. Contrary to common misconceptions about the Penalty Clause, the Clause is structured so that the state as a whole loses representation in Congress, but no individual within the state is denied representation. In other words, the Penalty Clause does not operate by subtracting those wrongfully disenfranchised from a state's total population prior to congressional apportionment. Rather, it imposes a proportional reduction derived from the percent of the vote-eligible population denied the vote that is scaled to an offending state's total population. The Penalty Clause thus does nothing to upend Section 2's advancement of universal representation. If anything, the Penalty Clause actually reinforces Section 2's commitment to that idea. By reducing a state's representation proportionally, it contemplates the representational interests of nonvoters, a key feature of the universal representation theory.

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The Evenwel majority's reading of Section 2 is correct. Section 2 counts and represents everyone—and the Penalty Clause does nothing to change that.

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INTRODUCTION

The Apportionment Clause in Section 2 of the Fourteenth Amendment provides that congressional seats are to be distributed among the states on the basis of each state's total population.¹ But there is a less-known caveat, a feature of the congressional apportionment process that has been all but lost to history. Under Section 2's Penalty Clause, states that deny or abridge the right to vote of their citizens—for any reason other than for rebellion or crime—are penalized with a reduction of their apportionment basis used to determine congressional representation. Ratified in the wake of the Civil War and after the abolition of slavery, the Penalty Clause was designed to

¹ U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

incentivize states to enfranchise their Black populations.² In full, Section 2 provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.³

Though it has gone unenforced, the Penalty Clause does not have to be a dead letter. Professor Franita Tolson, for one, has extensively examined the history of the Penalty Clause and argued convincingly that “Section 2 embraces a principle of broad enfranchisement that Congress can enforce through its authority under the Section 5 of the Fourteenth Amendment.”⁴ Thus far, however, the Supreme Court has failed to utilize Section 2 in assessing congressional action intended to protect voting rights.⁵ Instead, the Penalty Clause has quietly served as a linchpin in some of the most contentious disputes over the meaning and reach of the Fourteenth Amendment.⁶ On the few occasions that the Supreme Court has discussed the provision, it has used the Penalty Clause as a looking glass through which to interpret the “majestic generalities”⁷ of Section 1. In every instance, the Penalty

² See *Richardson v. Ramirez*, 418 U.S. 24, 73–74 (1974) (Marshall, J., dissenting).

³ U.S. CONST. amend. XIV, § 2. The Nineteenth and Twenty-Sixth Amendments implicitly amended the Penalty Clause. Today, the Penalty Clause would reduce a state’s representation whenever it denied or abridged the right to vote of citizens over the age of eighteen, regardless of gender. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1148 n.7 (2016) (Alito, J., concurring).

⁴ Franita Tolson, *What is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 435 (2015) [hereinafter Tolson, *A Critique of Two Section Twos*]; see also Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) [hereinafter Tolson, *Constitutional Structure of Voting Rights Enforcement*] (noting the dearth of literature discussing Section 2 of the Fourteenth Amendment and arguing for a broad view of Congress’s enforcement authority over voting through the Penalty Clause).

⁵ Tolson, *A Critique of Two Section Twos*, *supra* note 4, at 436 & n.11.

⁶ Cf. Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1177 (1994) (“[The Penalty Clause] is generally treated as a pawn in the larger dispute over the original intent of the Fourteenth Amendment . . .”).

⁷ *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966).

Clause has been an obstacle to progress, enabling states to frustrate the movement for women's suffrage,⁸ withhold the ballot from young adults,⁹ and maintain Jim Crow through felony disenfranchisement.¹⁰ It is one of the great paradoxes of our Constitution that a provision designed to promote democracy has been contorted to provide cover for some of our country's most undemocratic practices.

Today, the Penalty Clause has once again been pulled into a consequential debate centering on the Constitution's theory of representation, specifically the meaning of One Person, One Vote. The gist of the One Person, One Vote doctrine is simple enough. As the Supreme Court explained in *Reynolds v. Sims*, "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."¹¹ Following this command, every state in the country has drawn political maps so that each district contains roughly the same number of persons.¹² But a looming conservative movement seeks to flip the doctrine on its head. Instead of drawing districts with equal numbers of *persons*, they argue, states should draw districts with equal numbers of *adult citizens* (a subset that excludes children and noncitizens).¹³ Because children and noncitizens are unevenly distributed within states, such a change would sharply shift political power in America from communities of color and diverse urban areas to white communities and rural areas.¹⁴

⁸ See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174–75 (1875) (reasoning that because Section 2's Penalty Clause did not impose a penalty for the disenfranchisement of women, Section 1's Privileges or Immunities Clause does not protect the right to vote).

⁹ See *Oregon v. Mitchell*, 400 U.S. 112, 295 n.14 (1970) (Stewart, J., concurring in part and dissenting in part) ("[S]o long as a State does not set the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies.").

¹⁰ See *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974) (reasoning that because Section 2's Penalty Clause did penalize the disenfranchisement of those with felony convictions, Section 1's Equal Protection Clause does not protect that population's right to vote).

¹¹ 377 U.S. 533, 568 (1964).

¹² See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (observing that "[t]oday, all States use total-population numbers from the census when designing congressional and state-legislative districts," with only a handful "adjust[ing] those census numbers in any meaningful way").

¹³ See Ari Berman, *Trump's Stealth Plan to Preserve White Electoral Power*, MOTHER JONES (Jan./Feb. 2020), <https://www.motherjones.com/politics/2020/01/citizenship-trump-census-voting-rights-texas> (describing the conservative movement's creep toward redistricting based on numbers of adult citizens).

¹⁴ See Brief of the Texas Senate Hispanic Caucus & the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees at 3–19, *Evenwel*, 136 S. Ct. 1120 (2016) (No. 14-940) (explaining how the redistricting plan at issue would disproportionately affect the Latino community).

These two approaches—population-based apportionment and adult citizen-based apportionment—embody two vastly different theories of representation.¹⁵ By creating districts that contain an equal number of persons, population-based apportionment vindicates the value of *universal representation*, the idea that everyone—voters and nonvoters, children and adults, citizens and noncitizens—is a member of the political community and therefore ought to receive “equitable and effective representation.”¹⁶ Adult citizen-based apportionment, in contrast, functions to elevate the value of *eligible elector representation*, linking equality in representation to whether one is likely to be eligible to vote and not to other civic interests.¹⁷ Loose language in early One Person, One Vote cases seems to point both ways,¹⁸ an ambivalence that has generated occasional litigation¹⁹ and no shortage of scholarly commentary.²⁰ In 2016, after carefully avoiding it for decades, the Supreme Court finally took a step towards resolving this doctrinal ambiguity in *Evenwel v. Abbott*.²¹ There, inconspicuously tucked away in a footnote to a concurring opinion, the Penalty Clause returned to play the only role it has ever known: helping the Supreme Court interpret the Fourteenth Amendment.

In *Evenwel*, voters in Texas challenged the state’s practice of apportioning state senate districts on the basis of total population. They argued that One Person, One Vote protected only an eligible

¹⁵ For an overview of these theories of representation, see generally Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681 (2018) [hereinafter Fishkin, *Virtual Representation*].

¹⁶ *Evenwel*, 136 S. Ct. at 1132.

¹⁷ Where we use the terms “universal representation” and “elector representation,” others talk about “representational equality” and “electoral equality.” See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763, 782, 785 (9th Cir. 1991) (Kozinski, J., concurring and dissenting in part). We decline to adopt the “equality” framework because the issue boils down to something else: Who deserves political representation—everyone or some subset of the population?

¹⁸ See *Evenwel*, 136 S. Ct. at 1130–31 (quoting passages from One Person, One Vote cases that advance elector equality but noting that for each quote “one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation”).

¹⁹ See, e.g., *Burns v. Richardson*, 384 U.S. 73, 90–97 (1966); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Garza*, 918 F.2d 763.

²⁰ Compare Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888 (2012) [hereinafter Fishkin, *Weightless Votes*] (making an argument for population-based apportionment), with Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL’Y 521 (1994) (making an argument for adult citizen-based apportionment).

²¹ In earlier cases posing similar questions, the Court either denied certiorari, see *Chen v. City of Houston*, 532 U.S. 1046 (2001); *Cnty. of Los Angeles v. Garza*, 498 U.S. 1028 (1991), or issued fact-specific opinions with little bearing on the larger constitutional question, see *Burns*, 384 U.S. at 94 (resting its decision in part on “Hawaii’s special population problems”).

elector's right to an equal vote, not universal representation, and that the Equal Protection Clause therefore requires that legislative districts contain the same number of adult citizens.²² The Supreme Court unanimously rejected this claim and held that drawing districts on the basis of total population satisfied One Person, One Vote.²³ Although the Court agreed on the result, it was divided by reasoning.

The six-member majority, in an opinion by Justice Ginsburg, approved of population-based apportionment in part because it is consistent with the Fourteenth Amendment's general commitment to universal representation.²⁴ The opinion emphasized the fact that Section 2 apportions congressional seats among the states on the basis of total population, not potential electors.²⁵ Though *Evenwel* dealt with the apportionment of legislative seats *within* states and not the apportionment of congressional seats *among* states, the majority saw the two as "analogous."²⁶ The theory of universal representation "underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within states."²⁷

In a concurring opinion, Justice Alito rejected this reading of Section 2. Among other objections, he faulted the majority for ignoring the Penalty Clause. Though "House seats are apportioned based on total population," Justice Alito explained, "if a State wrongfully denies the right to vote to a certain percentage of its population, its representation is supposed to be reduced proportionally."²⁸ In a footnote, Justice Alito observed that the penalty "is pegged to the proportion of (then) *eligible* voters denied suffrage."²⁹ The argument is thus that Section 2 contemplates a system of apportionment that is not tied exclusively to the entire population. And yet, the Penalty Clause "makes no appearance in the Court's structural analysis."³⁰ If the majority was going to extract a theory of representation from Section 2, Justice Alito seemed to suggest, it should grapple with *all* of Section 2.

The *Evenwel* case marked a victory for population-based apportionment, but the broader debate over Section 2's theory of represen-

²² *Evenwel*, 136 S. Ct. at 1126.

²³ *Id.* at 1126–27.

²⁴ *Id.* at 1132.

²⁵ *Id.* at 1128–29.

²⁶ *Id.* at 1127.

²⁷ *Id.* at 1128–29; *see also id.* at 1130 ("[T]he constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting.").

²⁸ *Id.* at 1148 (Alito, J., concurring).

²⁹ *Id.* at 1148 n.7.

³⁰ *Id.*

tation is not over. The Court unequivocally held that states are *permitted* to draw legislative districts based on total population, but held off on deciding whether states are *required* to do so.³¹ Conservative activists are gearing up to test this open question during the fast-approaching redistricting cycle.³² When the issue winds its way back to the Supreme Court, the Justices may once again look to Section 2 and the Penalty Clause for evidence of the Fourteenth Amendment's theory of representation.

This Article builds on the *Evenwel* majority's reading of Section 2 by showing how the Penalty Clause is not only consistent with but also bolsters the universal representation theory of the Fourteenth Amendment. It corrects a common misperception that the Clause links an individual's representation in Congress to their ability to vote. Rather, the text, legislative history, and postenactment history of the Penalty Clause make clear that the penalty is structured so that a state as a whole loses representation in Congress when an eligible voter is disenfranchised, but no individual within the state is denied representation. By providing for a proportional penalty, the Clause effectively counts not only the wrongfully disenfranchised voter when assessing the penalty but also other nonvoting residents, such as children, who lose their proxy by virtue of a voter's disenfranchisement. By effectively recognizing "proxy representation" in calculating a state's penalty, the Penalty Clause rejects the notion that all eligible voters must be weighed equally and provides further support to the universal representation theory. This is not to say, however, that those relying on proxy representation, in this context or others, categorically receive *effective* representation—just that they are part of the representational calculus.

This Article proceeds as follows. Part I explains the difference between universal representation and elector representation and discusses which version the Court embraced in *Evenwel*. Part II then turns to congressional history to determine how the framers of the Fourteenth Amendment intended the Penalty Clause to operate. Debates over the ratification of the Fourteenth Amendment and early attempts to enforce the Penalty Clause shed light on the Clause's theory of representation. Finally, Part III explains how the Penalty Clause aligns with the theory of universal representation and, in the process, rebuts Justice Alito's assertion that the Clause injects ambi-

³¹ *Id.* at 1132–33 (majority opinion).

³² See Berman, *supra* note 13 (quoting conservative activist Edward Blum predicting that many jurisdictions will use "a population metric other than total population" in the next redistricting cycle).

guity into how Section 2 of the Fourteenth Amendment should be interpreted.

I UNIVERSAL REPRESENTATION, ELECTOR REPRESENTATION, AND SECTION 2

Whether states are permitted to apportion on the basis of eligible electors comes down to what the One Person, One Vote doctrine is supposed to protect: the equality of all constituents, the equality of electors, or both. Unpacking these concepts is necessary to properly understand the debate over the theory and relevance of Section 2 of the Fourteenth Amendment to questions of what the Constitution permits.

A. *Two Theories of Representation: Universal Representation vs. Elector Representation*

At issue in *Evenwel* was which theory underlaid the One Person, One Vote requirement that legislative districts within a state be equally populated: universal representation or eligible elector representation.³³

Population-based apportionment forwards a theory of universal representation. By counting everyone, the equal population approach helps to ensure that all people—including nonvoters like children, noncitizens, and those disenfranchised due to felony convictions—receive “equitable and effective representation.”³⁴ Because they cannot vote, these constituencies (primarily)³⁵ receive *proxy* rather than *direct* representation³⁶: they must rely on their parents, siblings,

³³ *Evenwel*, 136 S. Ct. at 1126.

³⁴ *Id.* at 1132.

³⁵ We say “primarily” because the Constitution has long guaranteed nonvoters equal representation alongside voters through the nearly forgotten but once-critical Petitions Clause. See Maggie Blackhawk (formerly McKinley), *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1559–60 (2018) (observing that through the Petitions Clause, “[t]he unenfranchised . . . were afforded process on par with franchised petitioners”).

³⁶ What we call “proxy representation,” others describe as “virtual representation.” See, e.g., *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); Fishkin, *Virtual Representation*, *supra* note 15, at 1682; Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 N.W. U. L. REV. 503, 533 (2000) [hereinafter Bennett, *Extra Votes*]; Thomas A. Berry, *The New Federal Analogy: Evenwel v. Abbott and the History of Congressional Apportionment*, 10 N.Y.U. J.L. & LIBERTY 208, 240 (2016) [hereinafter Berry, *The New Federal Analogy*]; Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589, 1607 (1993). We use the term “proxy representation” for two reasons. First, we believe it better captures the phenomenon at issue; the representation that nonvoters receive is real, even if indirect.

neighbors, friends, and others who are from the same community and, ideally, share their “politically relevant interests” to represent them at the ballot box.³⁷ By equalizing total population, universal representation “ensures that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives.”³⁸

Adult citizen-based apportionment views districting and apportionment “exclusively in terms of the voting power of voters seeking actual representation.”³⁹ By divvying up representation based on the number of persons who are likely to be eligible to vote,⁴⁰ it holds up

Second, “virtual representation” is a loaded term, often used to refer to a number of distinct ways in which nonvoters receive representation. Compare, e.g., John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 180 n.74 (1984) (“Virtual representation is the representation of people in one district by legislators elected from other districts with interests similar to theirs.”), with Guinier, *supra*, at 1608 (“[V]irtual representation assumes that the district winner *indirectly* represents the district losers.”). To avoid confusion, we use “proxy representation” to refer to situations where voters represent the interests of nonvoters who are from the same community and share “politically relevant interests” with them.

³⁷ Our argument is not that proxy representation is a substitute for direct representation. To the contrary, voting is the single most effective way to secure adequate representation. But proxy representation is inevitable: No matter how broadly we expand the franchise, some people will not have the right to vote. The debate over the proper apportionment basis assumes that some people will not have the right to vote; if everyone had the right to vote, there would be no difference between a population-based apportionment and an adult citizen-based apportionment. Accordingly, we assume, but do not endorse the fact, that some people will not have the right to vote.

³⁸ Brief for the United States as Amicus Curiae Supporting Appellees at 5, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

³⁹ Fishkin, *Virtual Representation*, *supra* note 15, at 1685. In fact, it is far from clear what it means to draw districts with equal numbers of voters. At least four possibilities exist, each less precise than the next: (1) citizens of voting age; (2) eligible voters; (3) registered voters; or (4) actual voters. In litigation, some advocates of elector representation seek citizen voting age population (CVAP) based apportionment, which ignores whether individuals are actually eligible or registered to vote, under the assumption that it effectively if imperfectly promotes equal voting weight. See Fishkin, *Weightless Votes*, *supra* note 20, at 1891 n.6. None of these options, however, would perfectly vindicate elector representation, a point we discuss in note 40, *infra*.

⁴⁰ Drawing districts to equalize voters might help to equalize voting weight, but it will not guarantee it. The Census “measures population at only a single instant in time,” even as “[d]istrict populations are constantly changing.” *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973). And regardless of how many eligible or registered voters are in a district, there is no guarantee that any of them will actually turn out to vote. See *id.* at 747–48. The only way to *guarantee* equal voting weight, as Justice Stewart observed, is to abolish the practice of districting altogether and “hold[] . . . all elections at large.” *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting). That the Constitution does not require at-large elections—and, in fact, federal law has long banned at-large elections for Congress—tells us that “electoral systems are intended to serve functions other than” guaranteeing equal voting weight. *Id.* at 750 n.12. That function, we suggest, is universal representation.

“equal voting weight” as the *summum bonum* of democracy.⁴¹ Implicit in this regime is a theory of representation and equal protection that discounts the representational interests of nonvoting constituencies, instead centering and equalizing eligible electors. It would be a departure from longstanding practice, if deemed constitutionally permissible.

Functionally, population-based apportionment and adult citizen-based apportionment also differ in what it means to “weigh” and equalize votes. To see how, consider two equipopulous districts—District *A* and District *B*—each containing one hundred persons and each electing a single representative to the legislature. Suppose that District *A* contains fifty eligible voters and District *B* contains seventy-five eligible voters. Mathematically, the votes in District *A* are “worth” more than the votes in District *B* because fewer of them are needed to form a majority. Under adult citizen apportionment, these districts would therefore be considered malapportioned.

But this weighting between Districts *A* and *B* is not arbitrary. Population-based apportionment links the “weight” of a vote to the number of constituents within the community that the representative would serve.⁴² Because District *A* contains more nonvoting constituents than does District *B*, there are more persons who rely on proxy representation in District *A*. The “extra” voting power of voters in District *A* “need not be seen as ‘extra’ at all, but, rather, cast on account of an ineligible population that is entitled to regard in the processes of government.”⁴³ The key here is that voting, or the selection of a representative, is entwined with but ultimately distinct from representation itself, which is afforded to voting-eligible and nonvoting constituents alike.

B. *What is Section 2’s Theory of Representation?*

The *Evenwel* court divided over which of these two theories—if either—is embedded in Section 2 of the Fourteenth Amendment. Section 2 governs how congressional seats are apportioned among the states. While the question at issue in *Evenwel* was *intrastate* redis-

⁴¹ The concept of equal voting “weight” appears in many of the One Person, One Vote decisions without much explication, and, in our view, is a misleading term in tension with the doctrine’s animating value—that all persons be counted as residents of the communities to which they belong and where their interests will be represented. See generally Fishkin, *Weightless Votes*, *supra* note 20 (considering what it might mean to dilute the weight of a vote).

⁴² See Bennett, *Extra Votes*, *supra* note 36, at 515 (reasoning that the usual practice in intrastate apportionment involves including children in the base, which means extra “voting power” is exercised on their behalf and that of other nonvoting constituencies).

⁴³ *Id.* at 527.

tricting, the Court viewed the Constitution's treatment of *interstate* apportionment as "analogous."⁴⁴

The *Evenwel* majority explained that Section 2 embodies a theory of universal representation because congressional seats are awarded on the basis of total population, no matter how many constituents are permitted to vote.⁴⁵ The *Evenwel* majority made this point at some length:

As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.⁴⁶

But as Justice Alito observed in *Evenwel*, this argument did not explicitly contemplate the Penalty Clause, which "is pegged to the proportion of (then) *eligible voters* denied suffrage."⁴⁷ While Justice Alito did not flesh out this argument, he seemed to pick up on the idea presented in an amicus brief by the Cato Institute that the Penalty Clause undermines reading Section 2 to support universal representation.⁴⁸ The basic argument is that the Penalty Clause operates by "eliminat[ing]" or removing the wrongfully disenfranchised voters from a state's apportionment basis and stripping them of their congressional representation.⁴⁹ Versions of this Elimination Interpretation, as we call it, also make an appearance in the caselaw⁵⁰

⁴⁴ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127–30 (2016).

⁴⁵ See *id.* at 1132.

⁴⁶ *Id.* (citations omitted).

⁴⁷ *Id.* at 1148 n.7 (Alito, J., concurring).

⁴⁸ See Brief of the Cato Institute & Reason Foundation as Amici Curiae Supporting Appellants at 18–19, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) [hereinafter Brief of the Cato Institute]. In addition to this amicus brief, scholars associated with the Cato Institute published a couple of academic publications that "adapted and expanded" the arguments made before the *Evenwel* Court. See Berry, *The New Federal Analogy*, *supra* note 36; Ilya Shapiro & Thomas A. Berry, *Evenwel v. Abbott: The Court Shanks Its Punt on "One Person, One Vote,"* 17 FEDERALIST SOC'Y REV., June 2016, at 4 (arguing that the framers of the Fourteenth Amendment differentiated between those wrongfully disenfranchised and other nonvoting constituencies when crafting the Penalty Clause).

⁴⁹ See Brief of the Cato Institute, *supra* note 48, at 19.

⁵⁰ See, e.g., *Simmons v. Galvin*, 575 F.3d 24, 53 (1st Cir. 2009) (Torruella, J., dissenting) ("[The Penalty Clause] simply states that disenfranchised felons, unlike other persons disenfranchised by the States, are to be included within the census for purposes of apportioning representatives."); *Harvey v. Brewer*, 605 F.3d 1067, 1072 (9th Cir. 2010) ("If

and scholarship on the Penalty Clause.⁵¹ Of course, the judges and scholars giving nod to the Elimination Interpretation did not need to concern themselves with the Penalty Clause's precise operation, since it was subordinate to broader points and raised in passing.⁵² Still, under this reading, the Penalty Clause effectively rejects universal representation by withholding representation from some subset of the population—namely, those who have been wrongfully disenfranchised.⁵³

Unlike the *Evenwel* majority, Justice Alito, perhaps relying on the Elimination Interpretation, suggested that Section 2's Penalty Clause rejects or is otherwise inconsistent with universal representation. A look at the congressional history of the Penalty Clause, however, illuminates an interpretation that is consistent with universal representation.

II

RECOVERING THE PENALTY CLAUSE'S PROPER OPERATION

The congressional history of the Penalty Clause from the Thirty-Ninth Congress, which passed the Fourteenth Amendment, and the Forty-Second Congress, which attempted to enforce the Penalty Clause, provide important insights into its design. The consistency between the two sets of debates helps to clear any confusion or ambiguity about the Clause's intended function, which, in turn, sheds light on Section 2's underlying theory of representation.

a State disenfranchises some number of otherwise eligible voters, *those disenfranchised persons* will count against the State's total population for purposes of determining its representation in Congress." (emphasis added)).

⁵¹ See, e.g., Tolson, *A Critique of Two Section Twos*, *supra* note 4, at 481 ("[The Penalty Clause] removes only the number of citizens whose right to vote has actually been abridged . . ."); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 259 (2004) ("[The Penalty Clause] was designed to encourage the former Confederate states to enfranchise African-Americans by excluding former slaves from the state's population for purposes of apportioning Congress if former slaves were denied the right to vote."); Katherine Shaw, Comment, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What to Do About It*, 100 NW. U. L. REV. 1439, 1445 (2006) ("In effect, [the Penalty Clause] operates to penalize any state that disenfranchises otherwise qualified voters by reducing that state's congressional representation by the number of disenfranchised persons . . .").

⁵² See sources cited *supra* notes 50–51.

⁵³ See Chin, *supra* note 51, at 267.

A. *The Thirty-Ninth Congress's Debates over the Ratification of the Penalty Clause*

Arriving in the capitol in December 1865, just months after the conclusion of the Civil War, the Thirty-Ninth Congress had a problem. The soon-to-be-ratified Thirteenth Amendment, which would abolish slavery, would also alter the apportionment provisions of Article I, Section 2 of the Constitution, including the notorious three-fifths clause.⁵⁴ The South's recently liberated Black population would soon gain the dignity of being fully counted for purposes of representation. As a result, former slave states stood to gain twelve representatives in Congress,⁵⁵ and at least ten of them, it was widely understood, would go to former Confederate states.⁵⁶ As George Zuckerman wrote, "[t]he vision of thirty Representatives from the South, based upon a [Black] population which was totally denied the right to vote, did not rest well with the majority of members of the Thirty-ninth Congress."⁵⁷

Unwilling to "reward traitors with a liberal premium for treason,"⁵⁸ Congress got to work devising a new apportionment system.⁵⁹ Ultimately, Congress would settle on Section 2 of the Fourteenth Amendment—a provision that apportions on the basis of total population and calls for a penalty to punish wrongful disenfranchisement of adult male citizens. But over the course of seven months, Congress considered other options, leaving behind a rich debate that helps to shine light on the Clause's purpose and operation.

⁵⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James G. Blaine) (stating that the Thirteenth Amendment made the three-fifths clause "meaningless and nugatory . . . being thus a dead letter [that] might as well be formally struck out").

⁵⁵ George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 94 (1961). And with them an additional twelve votes in the Electoral College. Michael L. Rosin, *The Thirty-Ninth Congress's Reformulation of the Basis of Apportionment* 5 (Aug. 20, 2020) (unpublished manuscript) (on file with authors).

⁵⁶ Rosin, *supra* note 55, at 5.

⁵⁷ Zuckerman, *supra* note 55, at 94; see also CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Samuel C. Pomeroy) ("[T]his injustice is the more apparent when we remember that this increase of representation is obtained while the true, loyal black man is allowed no vote and no voice.").

⁵⁸ CONG. GLOBE, 39th Cong., 1st Sess. 404 (1866) (statement of Rep. William Lawrence).

⁵⁹ While many Radical Republicans sought to forbid states from disenfranchising freedmen on account of their race, the consensus was that the states would not ratify such an amendment. See, e.g., *id.* at 536 (statement of Rep. Thaddeus Stevens) (supposing that such an amendment, requiring nineteen states to ratify, might get at most five in favor). Privately expressing his disappointment that he was unable to guarantee suffrage rights for Black men, Thaddeus Stevens ultimately derided the Fourteenth Amendment as a "shilly-shally bungling thing." KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865–1877*, at 141 (1965).

1. *Direct Proposals vs. Indirect Proposals*

One of Congress's first considerations, put forth by the ascendant congressional Republicans, was whether, at a high-level, a direct solution or an indirect solution would be better. The Radical Republicans, led by Thaddeus Stevens, advocated for a *direct* solution to the problem: apportionment based on the number of persons qualified to vote.⁶⁰ Others, led by James Blaine, pushed for an *indirect* solution: apportionment based on total population and then apply some sort of penalty by making reductions based on the scope of voter disenfranchisement.⁶¹

In the direct solution, by apportioning representatives according to the number of voters in each state, the Radical Republicans hoped to force the South to enfranchise its freedmen or else face a steep reduction in its congressional representation. Either way, the recently defeated rebel states would not seize control of Congress as a product of representation based on a broadly disenfranchised Black population. While politics clearly played a part, the underlying principle and many of the arguments for voter-based apportionment sounded in eligible elector representation. For example, Representative William Lawrence argued that use of total population would "give[] representation to women, children, and unnaturalized foreigners It disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union."⁶² Likewise, Representative Godlove Orth insisted that "the true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government."⁶³ And others criticized the concept of proxy representation.⁶⁴

⁶⁰ See CONG. GLOBE, 39th Cong., 1st Sess. 10 (1866) ("Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters; and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners. Congress shall provide for ascertaining the number of said voters. A true census of the legal voters shall be taken at the same time with the regular census."); Rosin, *supra* note 55, at 10.

⁶¹ See Rosin, *supra* note 55, at 10.

⁶² CONG. GLOBE, 39th Cong., 1st Sess. 404 (1866).

⁶³ *Id.* at 380.

⁶⁴ For example, Senator John Sherman believed that "every voter should vote for himself, and for no one else" and that "[i]f there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them." *Id.* at 2986. Sherman could find "no reason" why a voter in Massachusetts, which had a preponderance of women who could not vote, "should count more than a voter somewhere else"; or why a voter in New York, which had a "large element" of noncitizens, should have greater voting weight than a voter somewhere else; or "why . . . a white man [who] lives in the South . . . should have more political power than a white man in Ohio"; or why a voter

On the other side, Representative James Blaine led the push against voter-based apportionment and offered a number of reasons for its rejection: (1) a theoretical argument, sounding in proxy representation, “that population is the true basis of representation for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot”;⁶⁵ (2) a political argument that New England states, which had larger segments of noncitizens, women, and children than the Union as a whole, would never ratify a voter-based proposal;⁶⁶ and (3) a pragmatic argument that states, in a “rash and reckless effort to procure an enlarged representation,” would unduly expand the franchise.⁶⁷ One final “evil[] that [would] follow from the suffrage basis,” Blaine argued, is that if “you make suffrage the basis of distributing Representatives *among* the States, you inevitably, by logical sequence, make it the basis of distributing Representatives *within* the States.”⁶⁸ In other words, Blaine was worried that those excluded from a state’s *interstate* apportionment basis (by which congressional seats are distributed among the states) would likewise be eliminated from its *intrastate* basis, (by which congressional districts are drawn

in Ohio, which had a “greater proportion of voters . . . than they have in other States . . . should be deprived of political power.” *Id.*

⁶⁵ *Id.* at 141 (statement of Rep. James G. Blaine); *see also id.* at 705 (statement of Sen. William P. Fessenden) (articulating the view of the Committee on Reconstruction that “[t]he principle of the Constitution, [regarding] representation, is that it shall be founded on population; that the people who are voters . . . are not the whole people of a State; and . . . the representatives . . . do not consider themselves as representing males over twenty-one years of age alone, but as representing all”); *id.* at 2944 (statement of Sen. George F. Edmunds) (“The fathers who founded this Government acted upon the idea . . . that the representation, as a principle, in general was to be based upon population, independent of the franchise, independent of citizenship . . .”); *id.* at 2962 (statement of Sen. Luke P. Poland) (“The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own.”); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (“Much of the opposition [to voter-based apportionment] was grounded in the principle of representational equality.”).

⁶⁶ *See* CHARLES A. KROMKOWSKI, *RECREATING THE AMERICAN REPUBLIC: RULES OF APPORTIONMENT, CONSTITUTIONAL CHANGE, AND AMERICAN POLITICAL DEVELOPMENT, 1700–1870*, at 415 (2002) (“New Englanders observed that their region under a male voter basis would be disadvantaged because they possessed a higher ratio of women to men than the other northern states.”).

⁶⁷ *CONG. GLOBE*, 39th Cong., 1st Sess. 141 (statement of Rep. James G. Blaine) (1866); *see also id.* (stating that voter-based apportionment would induce “an unseemly scramble . . . to increase by every means the number of voters”). As Wisconsin Republican Ithamar Sloan observed, however, this argument would not apply if Congress were apportioned not on the basis of all voters but only on the basis of adult-male-citizen voters. *See id.* at 378. That such proposals were also rejected suggests that the pragmatic arguments against voter-based apportionment were less important than the theoretical and political ones.

⁶⁸ *Id.* at 377.

within the states). Just as states with fewer voters would cede power to states with more voters, so a city with “a deficiency of males over twenty-one years of age would . . . lose its proper weight and power,” ceding representation to other cities in that state with more voters.⁶⁹

Ultimately, Congress rejected the direct approach and opted for the indirect approach, “which retained total population as the congressional apportionment base”⁷⁰ and penalized states that engaged in certain forms of voter disenfranchisement. Whatever other reasons Congress might have had, as the *Evenwel* majority observed, “it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.”⁷¹

2. *Race-Based Proposals vs. Proportional Proposals*

After deciding on an indirect approach, an important issue remained unsolved: How would the penalty operate? Over the course of the debates, Congress considered two kinds of indirect penalties: race-based proposals and proportional proposals.⁷²

Congress considered a variety of race-based proposals. One emblematic proposal, crafted by the Joint Committee on Reconstruction and presented to the House by Representative Thaddeus Stevens on January 22, 1866, provided, “whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.”⁷³

Three features of this proposal are noteworthy. First, it would only impose a penalty on states that disenfranchised people “on account of race, creed or color,” and would not reach race-neutral restrictions of the franchise.⁷⁴ Second, the proposal would exclude *all* members of a racial group when even a single member was wrongfully disenfranchised.⁷⁵ Finally, the proposal would seemingly incorporate (a version of) the Elimination Interpretation: It would “exclude” the

⁶⁹ *Id.*

⁷⁰ *Evenwel*, 136 S. Ct. at 1128.

⁷¹ *Id.* at 1129.

⁷² As with our discussion of the debate over the apportionment bases, we are mostly glossing over variations on these themes. Readers interested in an exhaustive retelling of the debates will find just that in Rosin, *supra* note 55.

⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).

⁷⁴ *See, e.g., id.* at 376 (statement of Rep. Thaddeus Stevens) (“All I can say is that if the law applies impartially to all, then no matter whether it cuts out white or black.”).

⁷⁵ To illustrate, suppose a state has a population of 1,000,000 people, 250,000 of them Black, and suppose that 50,000 of the Black people are disenfranchised on account of their race. Under a race-based penalty, the state would lose *all* 250,000 Black people from its apportionment—even though it only disenfranchised 50,000 of them. In fact, the state

wrongfully disenfranchised, along with all other persons of their race, creed, or color, from the state's basis of representation. As Representative Stevens explained, no one would be "authorized to represent" that state's Black population in Congress.⁷⁶

A number of objections were made to the race-based proposal. One set of objections concerned the proposal's administrability. Pennsylvania Republican John Broomall warned that "there is a great deal of indefiniteness in both these terms 'race' and 'color' . . . the term 'color' is nowhere defined in the Constitution or the law."⁷⁷ And, as a number of representatives suggested, states could avoid the penalty by enacting facially neutral restrictions on the right to vote, such as literacy tests,⁷⁸ property qualifications,⁷⁹ or tests that purported to measure intelligence,⁸⁰ that would just as effectively disenfranchise Black people.

Another widely shared concern was that the proposal would tacitly permit what many took the Republican Guarantee Clause⁸¹ to forbid: the disenfranchisement of an entire racial group.⁸² Petitioning the Senate to reject the proposal, Frederick Douglass asked that the Congress "favor no amendment of the Constitution of the United States which will grant or allow any one or all of the States of this Union to disfranchise any class of citizens on the ground of race or color."⁸³

But most relevant here is another line of objection: that the race-based Penalty Clause would strip Black people in the South of their congressional representation. Opponents argued that those who go uncounted in the apportionment basis do not receive congressional representation, pointing to a (now-inoperative)⁸⁴ provision of the

would lose all 250,000 Black people from its apportionment if it disenfranchised even a single Black man on account of his race.

⁷⁶ CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).

⁷⁷ *Id.* at 433 (statement of Rep. John M. Broomall).

⁷⁸ *See id.* at 380 (statement of Rep. Godlove S. Orth).

⁷⁹ *Id.* at 409 (statement of Rep. Henry P. H. Bromwell).

⁸⁰ *Id.* at 385 (statement of Rep. Jehu Baker).

⁸¹ U.S. CONST. art. IV, § 4.

⁸² *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 406 (1866) (statement of Rep. Thomas D. Eliot); *id.* app. at 298 (speech of Rep. Robert C. Schenck). The typical response was that the Penalty Clause no more sanctioned disenfranchisement than the death penalty sanctioned murder. *See, e.g., id.* at 432 (statement of Rep. John A. Bingham).

⁸³ *See id.* at 1282 (statement of Sen. Charles Sumner) (quoting a petition from Frederick Douglass and others).

⁸⁴ The exclusion of "Indians not taxed" has been inoperative ever since Indigenous persons first were subject to federal income tax laws around eighty years ago. *See Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935). Starting with the 1900 census, Indigenous persons have been counted towards the total population in each state. *Censuses of American Indians*, U.S. CENSUS BUREAU (June 30, 2021), <https://>

Constitution that expressly “exclude[s] Indians not taxed” from a state’s apportionment basis.⁸⁵ This provision was not intended to “penalize” states with large Indigenous populations but instead, as Representative John Bingham put it, reflected the fact that they “are tribal [and] are not part of the body-politic of the United States until they are subject to taxation.”⁸⁶

A number of representatives thought the race-based proposal would effectively treat the wrongfully disenfranchised as “Indians not taxed” by denying them congressional representation. Senator Henry S. Lane made the analogy most clearly when he explained that the race-based proposal would “cast[] out of the account Indians not taxed and all those that shall be excluded in any State on account of race or color.”⁸⁷ Senator Charles Sumner likewise protested that the race-based proposal would “exclude citizens counted by the million from the body-politic and practice the tyranny of taxation without representation.”⁸⁸ To remedy this injustice, Sumner introduced an amendment to the race-based proposal that would have exempted all excluded persons from taxation of all kinds.⁸⁹ After this proposed amendment was rejected, Sumner voted against the race-based proposal.⁹⁰

Along similar lines, concerns were raised during the debates over the sort of perverse incentives that the proposal would generate. Representative Blaine made the same argument against the race-based proposal that he did against the voter-based apportionments: Excluding the Black population from the apportionment basis would do more harm than good. Rather than protect these communities, the

www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html. We address this exclusion more below.

⁸⁵ U.S. CONST. art. 1, § 2, cl. 3.

⁸⁶ CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866); see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1058 (2015) (stating that the exclusion of “Indians not taxed” “arguably reflected a conscious choice to place Natives outside the body politic”); Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692 (2016) (describing a variety of historical frameworks of citizenship for Indigenous peoples and noting the tension between U.S. citizenship and Indigenous self-determination).

⁸⁷ CONG. GLOBE, 39th Cong., 1st Sess. 740 (1866); see also *id.* at 404 (statement of Rep. William Lawrence) (explaining that while voter-based apportionment “makes citizens who are adult male voters the basis of representation,” the race-based proposal counts “the whole population except Indians not taxed, and persons of that race or color which may not enjoy equal or impartial suffrage”).

⁸⁸ *Id.* at 1228.

⁸⁹ See *id.* at 811, 1288.

⁹⁰ Sumner also objected on the ground that it would “petrify[] in the Constitution the wretched pretension of a white man’s Government.” *Id.* at 1228. The Constitution should not be marred with mention of slavery or race, Sumner insisted.

race-based proposal would “have precisely the opposite effect in the South, namely: if you cut off the blacks from being enumerated in the basis of representation in the southern States the white population of those States will immediately distribute Representatives within their own territory on the basis of white population.”⁹¹ In other words, the race-based proposal would actually result in Black communities receiving a smaller share of the penalized state’s already diminished representation.

Debates over the use of a race-based penalty lasted in the House from January 22 to January 31, 1866, when it passed largely along party lines.⁹² But the proposal foundered in the Senate, where an unusual coalition of conservatives (who thought the proposal unfair to southern states) and Radical Republicans (who thought the proposal unfair to freedmen) voted against the proposal.⁹³ As a result, it received only twenty-five of forty-seven votes cast, seven short of the two-thirds needed for ratification.⁹⁴

Congress also considered a few proportional proposals. One early version, offered by Representative John Broomall on January 25, 1866, provided: “Whenever the elective franchise shall be denied by the constitution or laws of any State to any proportion of its male citizens over the age of twenty-one years the same proportion of its population shall be excluded from its basis of representation.”⁹⁵ On March 12, just a few days after the race-based proposal faltered in the Senate, Senator James Grimes offered a proportional proposal:

Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; but whenever in any State the elective franchise shall be denied to any portion of its male citizens above the age of twenty-one years, except for crime or disloyalty, the basis of representation of such State shall be reduced in the proportion which the number of male citizens so excluded shall bear to the whole number of male citizens over twenty-one years of age.⁹⁶

This proportional proposal differed from the rejected race-based proposal in a number of key respects. First, the proportional proposal is a results-based test: Any denial or abridgement of the right to vote

⁹¹ *Id.* at 377.

⁹² Rosin, *supra* note 55, at 13, 20–21.

⁹³ See Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1606 (2012) (describing how the coalition formed).

⁹⁴ Rosin, *supra* note 55, at 27 (citing *CONG. GLOBE*, 39th Cong., 1st Sess. 1289 (1866)).

⁹⁵ *CONG. GLOBE*, 39th Cong., 1st Sess. 433 (1866).

⁹⁶ *Id.* at 1320.

would trigger the penalty, regardless of the state's motive.⁹⁷ Second, rather than exclude an entire racial or ethnic group from a state's apportionment count when even a single member was wrongfully disenfranchised, the proposal would operate proportionally. Finally, while both proposals would lower a state's apportionment basis and thereby possibly reduce its congressional representation, they operated in different ways: The race-based proposals would "exclude" a group of persons from the state's basis of representation, whereas Grimes's proportional proposal would "reduce" the state's basis of representation, imposing a penalty on the entire state rather than on some subset of the population.⁹⁸ In other words, the proportional proposal rejected the Elimination Interpretation.

This last point is important. Under the proportional proposal, a state's apportionment basis would be reduced neither *directly* by the number of disenfranchised adult male citizens nor by an entire racial or ethnic group, but by the *proportion* of disenfranchised adult male citizens to all adult male citizens in the state. A brief example may help clarify this distinction. Suppose a state has a population of 1,000,000 people. Suppose 400,000 are Black, 250,000 are adult male citizens, and 50,000 are wrongfully disenfranchised because they are Black. Under a direct penalty (as contemplated by an Elimination Interpretation), the state would simply lose the 50,000 disenfranchised adult male citizens from its apportionment base, leaving the remaining 950,000 (1,000,000 – 50,000) persons counted for the purposes of congressional apportionment. Under the race-based proposal, because the disenfranchised were disenfranchised on account of their race, the state would lose its entire Black population—400,000—from its

⁹⁷ The one caveat here is that states were not penalized for disenfranchising adult male citizens "for crime or disloyalty." *Id.* (emphasis added). This provision implicates legislative intent. If a state were to disenfranchise a Black felon, for example, the Penalty Clause would require Congress to discern whether the voter was disenfranchised because of his race or because of his felony conviction. Only the former would trigger the penalty. *Cf.* *Hunter v. Underwood*, 471 U.S. 222, 224, 233 (1985) (striking down Alabama's felony disenfranchisement provision, notwithstanding the Penalty Clause, because the provision was "intentionally adopted to disenfranchise blacks on account of their race" and "has had the intended effect").

⁹⁸ In fact, although Grimes claimed that he had simply taken his proposal from an earlier "proposition submitted by [Representative Broomall] in the House of Representatives," CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866), Broomall's proposal, like earlier race-based proposals, *see supra* notes 73–76 and accompanying text, used the term "exclude" rather than "reduce." *See supra* note 95 and accompanying text. Grimes did not call attention to this terminological shift when he introduced his proposal to the Senate. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1320–21 (1866).

apportionment base, leaving the remaining 600,000 (1,000,000 – 400,000) persons counted for the purposes of congressional apportionment.

But that is *not* what the proportional proposal calls for. Instead, it calls for a *proportional* twenty percent reduction of the state’s congressional representation because the state has disenfranchised twenty percent (50,000 / 250,000) of its adult male citizen population that is otherwise eligible to vote. The state would have a basis of 800,000 (1,000,000 – (1,000,000 * .20)) for the purposes of congressional apportionment. Even though the state “only” wrongfully disenfranchised 50,000 people, the clause would subtract four times that number—200,000—from its apportionment basis.

TABLE 1. EXAMPLES OF DIFFERENT PROPOSED PENALTIES

Proposal	Total Population	Wrongful Disenfranchisement	Penalty	Apportionment Basis
Direct	1,000,000	50,000	50,000	950,000
Race-Based	1,000,000	50,000	400,000	600,000
Proportional	1,000,000	50,000	200,000	800,000

Sumner—an outspoken opponent of the race-based proposal—immediately expressed his support for the proportional proposal.⁹⁹ He explained that the proportional proposal is not open “to any evasions”; and that “it contains no words which can imply any recognition of inequality of rights” or “which can imply any recognition of the right of a State to disfranchise on account of color or race.”¹⁰⁰ While Sumner did not expressly address his earlier concerns that the penalty would give rise to taxation without representation, he broadly concluded that the proportional proposal “seems to meet the objections which were adduced against the [race-based proposal].”¹⁰¹

But not everyone appreciated the distinction between the proportional and race-based proposals. On the final day of the Senate debate on the Fourteenth Amendment, June 8, 1866, Maryland Senator Reverdy Johnson delivered a speech “call[ing] the [Senate’s] attention . . . to what will be the operation of [the Penalty Clause].”¹⁰² Johnson attempted to demonstrate to the Senate that the two proposals were identical, that while “the manner of ascertaining” the penalty “is changed in point of form . . . the result is the same.”¹⁰³ But

⁹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866) (statement of Sen. Charles Sumner).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 3028.

¹⁰³ *Id.*

Johnson's speech makes clear that he misunderstood the Penalty Clause and thought that a state's apportionment base under either proposal would be reduced by exactly the number of wrongfully disenfranchised voters.¹⁰⁴ Senator Johnson thus articulated the first version of the Elimination Interpretation.

After consideration of numerous options, Congress eventually adopted a version of the proportional proposal:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.¹⁰⁵

With Section 2 in its final form, the Senate approved the Fourteenth Amendment. And with hardly any discussion of the changes made to Section 2, the House approved the joint resolution calling for the submission of the Fourteenth Amendment to the states on June 13, 1866.¹⁰⁶ After a long and contested process, the Fourteenth Amendment was finally ratified in July 1868.¹⁰⁷

B. The Forty-Second Congress's Debates over the Enforcement of the Penalty Clause

Further evidence of the Penalty Clause's operation can be found in the Forty-Second Congress's attempt to enforce the Clause in 1871–1872, during the “first apportionment under the fourteenth article of amendments to the Constitution of the United States.”¹⁰⁸ This congressional record has become a key source for understanding the Clause's design. Since “many of the framers of the Fourteenth . . . Amendment[] participated in [the apportionment], it is entitled to great weight in discerning section 2's meaning.”¹⁰⁹ And the debates

¹⁰⁴ *Id.* (concluding that if Maryland disenfranchised its 38,030 Black voters, its apportionment basis would be reduced by 38,030).

¹⁰⁵ U.S. CONST. amend. XIV, § 2.

¹⁰⁶ CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

¹⁰⁷ KROMKOWSKI, *supra* note 66, at 417.

¹⁰⁸ CONG. GLOBE, 42d Cong., 2d Sess. 64 (1871) (statement of Rep. Charles W. Willard).

¹⁰⁹ Chin, *supra* note 51, at 282.

make clear that the Penalty Clause calls for a proportional penalty that is derived from but ultimately different than the number of wrongfully disenfranchised persons.

During the Ninth Census, Congress recognized that absent data on the scope of disenfranchisement, it would be impossible to enforce the newly ratified Penalty Clause.¹¹⁰ But because the soon-to-be ratified Fifteenth Amendment would nullify much of the disenfranchisement that the Penalty Clause intended to penalize, Congress declined to amend the Census to collect information about disenfranchisement.¹¹¹ Undeterred by the legislative inaction, however, the Secretary of the Interior independently directed the census enumerators to count both the number of adult male citizens and the number of such citizens who were disenfranchised.¹¹²

But the census data on disenfranchisement were deemed “utterly inaccurate,”¹¹³ largely because the returns showed little disenfranchisement across the country and, preposterously, almost none in the South, which systematically disenfranchised Black people.¹¹⁴ Indeed, “in all Southern States, except Texas, the number of adult male citizens who were disfranchised amounted to less than 0.5 per cent.”¹¹⁵ The only state with sizable recorded disenfranchisement was Rhode Island, at 6.4%, which was attributed to “that state’s requirement that electors possess at least 134 dollars-worth of realty.”¹¹⁶ Given these unreliable and “trifling” numbers, some representatives, under the (mistaken) belief that the penalty would not result in the

¹¹⁰ See, e.g., H.R. REP. NO. 41-3, at 52 (1870) (report prepared by Rep. James A. Garfield) (“The census is our only constitutional means of determining the political representative population.”).

¹¹¹ See Zuckerman, *supra* note 55, at 110.

¹¹² *Id.* To be sure, the Census did not ask for the citizenship information of all inhabitants—only adult males over the age of twenty-one. For a review of the limited contexts in which the Census has asked about citizenship status, see Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEO. L.J. ONLINE 1 (2019). Thus, to enforce the Penalty Clause, the Census Bureau would not need to ask a citizenship question on the short-form questionnaire that goes to everyone—it would only need to ask it of vote-eligible populations. Moreover, the citizenship information on the Census Bureau’s American Community Survey, which is used for Voting Rights Act enforcement, may be sufficient for giving the Penalty Clause effect.

¹¹³ Zuckerman, *supra* note 55, at 112 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 79 (1871) (statement of Rep. Ulysses Mercur)). Even the Secretary himself was “disposed to give but little credit to the returns made by assistant marshals in regard to the denial or abridgment of suffrage.” CONG. GLOBE, 42d Cong., 2d Sess. 66 (1871) (letter from Sec’y Columbus Delano).

¹¹⁴ Chin, *supra* note 51, at 259; see also *id.* at 259 n.3 (collecting sources).

¹¹⁵ Zuckerman, *supra* note 55, at 112.

¹¹⁶ *Id.* at 111–12; see also CONG. GLOBE, 42d Cong., 2d Sess. 82 (1871) (statement of Rep. Samuel S. Cox).

reduction of any seats, advocated to ignore the Penalty Clause and to simply apportion on the basis of total population.¹¹⁷

But James Garfield, then a Congressman and chair of the Committee on the Census, insisted that Congress “obey the [F]ourteenth [A]mendment” and “take the results as they come and make them the basis of apportionment of representation.”¹¹⁸ To that end, Garfield presented a table “received from the Census Bureau,” in which “the reductions have been made from the total population of each state, according to the proportion of their disenfranchised persons.”¹¹⁹ This table, which we reproduce in the Appendix, provides clear evidence of how the Forty-Second Congress understood and sought to operationalize the Penalty Clause.

Rhode Island is a good illustration. The Ninth Census counted 217,353 total inhabitants in the state, including 43,996 adult male citizens over the age of twenty-one, and 2,835 such citizens who were wrongfully disenfranchised.¹²⁰ After applying the penalty, Garfield’s table reduced Rhode Island’s apportionment basis from 217,353 to 203,347—a reduction of 14,006. While the Census Bureau did not show its work, the arithmetic is straightforward. Rhode Island disenfranchised 6.4% of its adult male citizens over the age of twenty-one (2,835 / 43,996), so the Penalty Clause called for a 6.4% reduction of the state’s congressional representation (14,006 / 217,353), leading to an apportionment basis of 203,347 (217,343 – 14,006). Evidently, the Penalty Clause would not simply subtract the wrongfully disenfranchised from the state’s apportionment base. Even though Rhode Island wrongfully disenfranchised “only” 2,835 people, its apportionment base would have been reduced by nearly five times that number. The same is true for every other state on the table.

Congress ultimately opted to “ignore [these] results in providing for the basis of apportionment,” and the Penalty Clause has gathered dust ever since.¹²¹ Nevertheless, the Forty-Second Congress’s clear illustration of the Penalty Clause’s function, along with the Clause’s text and legislative history, contain a couple of valuable lessons about Section 2’s theory of representation.

¹¹⁷ See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 82 (1871) (statement of Rep. Samuel S. Cox).

¹¹⁸ *Id.* at 83.

¹¹⁹ *Id.*

¹²⁰ See *id.*

¹²¹ Zuckerman, *supra* note 55, at 116.

III

SECTION 2'S INTERNAL CONSISTENCY ON UNIVERSAL REPRESENTATION

To answer the question raised by Justice Alito, the Fourteenth Amendment ratification debates and the debates over enforcement of the Penalty Clause demonstrate that the text and history of the Clause affirm the theory of universal representation that the *Evenwel* majority derived from Section 2 of the Fourteenth Amendment. Drawing upon the Clause's history, this Part will explain how the Penalty Clause is consistent with that theory. As Section III.A will discuss, the Penalty Clause imposes a penalty on the entire state polity, equally diminishing the representation of every resident in the state, thus contemplating voters and nonvoters alike for purposes of representation. And, as Section III.B will discuss, the operation of the Penalty Clause does not advance the cause of elector representation because two states that disenfranchise the same number of voters may receive penalties of differing magnitude depending on the number of *nonvoters* in each state. Under Section 2, everyone counts when representation is meted out, and the Penalty Clause does nothing to complicate that principle.

A. *The Penalty Clause's Inclusion of the Wrongfully Disenfranchised for Representation*

While the Penalty Clause certainly contemplates reducing representation, it does not tie any individual's or discernible group's representation to their ability to vote and, in theory, maintains congressional representation for all residents post-reduction. Indeed, the Thirty-Ninth Congress rejected versions of the Penalty Clause that would have by their own terms "excluded" a discrete group of persons from an offending state's apportionment basis. Instead, the framers of the Fourteenth Amendment adopted a version that "reduces" a state's basis of representation "in the proportion which the number of [wrongfully disenfranchised voters] shall bear to the whole number of [eligible voters] in such state."¹²²

For example, consider a state that has a population of 1,000,000 people and 250,000 adult male citizens, 50,000 of whom are wrongfully disenfranchised. A wrongful disenfranchisement of 50,000 people would result in a 200,000 "person" reduction of the apportionment basis. If the Penalty Clause reduces the state's representation by "eliminating" discernible people or groups, and even if the 50,000

¹²² U.S. CONST. amend. XIV, § 2.

wrongfully disenfranchised individuals could be deemed discernable, at least 150,000 “persons” would not be identifiable. That is because the penalty does not correspond one-to-one with any person or group of persons in the state. Instead, everyone counted under the Apportionment Clause would be penalized equally. In the given example, the representation awarded to each person in the state is reduced by twenty percent. Thus, every individual is still represented in Congress (in other words, universal representation values are preserved), but collectively, state residents have fewer representatives, and thus less overall representation.

By penalizing the state as a whole, the final version of the Penalty Clause avoided two key problems that doomed earlier efforts. First, unlike the race-based proposals, the final Penalty Clause does not subject the wrongfully disenfranchised to taxation without representation. As discussed above, this was of great concern during the congressional debates, especially for Senator Sumner, who withheld his support from the race-based proposal partly on the ground that it would have “practice[d] the tyranny of taxation without representation.”¹²³ Only after Congress moved on to the proportional proposal did Senator Sumner come to support the Clause without insisting on tax exemptions for the wrongfully disenfranchised.

Of course, ensuring that the wrongfully disenfranchised receive proxy representation so they could be taxed in good conscience does not remedy the deprivation of the vote. As mentioned, proxy representation is no substitute for direct representation, particularly given the history of mass disenfranchisement as a tool of racial oppression.¹²⁴

Nonetheless, the basic dignity of continuing to count not only ensures continued membership in a state’s political community but also avoids the second problem associated with the race-based proposals: It prevents the wrongfully disenfranchised from shouldering a disproportionate burden of the state’s representational penalty. As discussed, the race-based proposals were criticized on the ground that they would have resulted in the disenfranchised population being excluded not only from a penalized state’s interstate apportionment basis but also from the intrastate redistricting basis.¹²⁵ This would have allowed a state legislature to shunt much of the representational penalty onto the wrongfully disenfranchised when drawing district lines.

¹²³ CONG. GLOBE, 39th Cong., 1st Sess. 1228 (1866).

¹²⁴ See *supra* notes 36–37.

¹²⁵ See *supra* notes 84–91 and accompanying text.

Indeed, as Joseph Fishkin has argued, interstate apportionment and intrastate redistricting are interconnected.¹²⁶ States awarded congressional seats on the basis of some population must draw congressional districts on that same basis.¹²⁷ For example, if a state earns an additional House seat on the basis of total population because of its fast-growing Latino population in one part of the state, it would undermine the premise of equal representation if that state could award that new seat “to areas hundreds of miles away, perhaps in other, whiter parts of the state with fewer children and non-citizens.”¹²⁸ This is precisely the sort of “distortionary windfall” that led the Supreme Court to hold that the objective in congressional districting is “equal representation for equal numbers of people.”¹²⁹

While the One Person, One Vote doctrine had not yet been articulated in the nineteenth century, such concerns over intrastate redistricting were salient during the debates over the Fourteenth Amendment. Notably, Representative Blaine worried that “if you cut off the blacks from being enumerated in the basis of representation in the southern States the white population of those States will immediately distribute Representatives within their own territory on the basis of white population.”¹³⁰ In other words, Blaine feared that whatever basis the Constitution used for interstate apportionment would also be used by state legislatures for intrastate redistricting. And these fears were not unfounded. In the mid-nineteenth century, some state constitutions expressly used the Constitution’s apportionment basis—then, total population with the Three-Fifths Clause—as the basis for drawing and equalizing their congressional districts.¹³¹

Representative Blaine’s fears go to the heart of the issue. Under a race-based proposal, a penalized state would be assigned congressional seats solely on the basis of its white population. Because a penalized state’s Black population would not be counted for purposes of interstate apportionment, a legislature might conclude that it was entitled to exclude the Black population for purposes of intrastate redistricting and to draw districts exclusively on the basis of its white population. As a result, a race-based proposal may have resulted in

¹²⁶ Fishkin, *Virtual Representation*, *supra* note 15, at 1726.

¹²⁷ *Id.*; see also *Kalson v. Paterson*, 542 F.3d 281, 289 n.16 (2d Cir. 2008) (“The Court derived the principle of equally populous districts *within* a state from the Article I statement that congressional representation be apportioned *between* states based on the states’ population.”).

¹²⁸ Fishkin, *Virtual Representation*, *supra* note 15, at 1725–26.

¹²⁹ *Id.* at 1726 n.119; *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (citing *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964)).

¹³⁰ CONG. GLOBE, 39th Cong., 1st Sess. 377 (1866).

¹³¹ See, e.g., VA. CONST. of 1851, art. IV, §§ 13–14.

little representational losses for white communities and complete erasure for Black ones, who could be divvied up arbitrarily among districts drawn according to the number of white persons. In other words, the wrongfully disenfranchised population would bear the brunt of the representational penalty. The Elimination Interpretation produces a feckless, even backward, Penalty Clause—one that harms the very groups it is designed to benefit.

The Penalty Clause avoids this problem. It provides that a penalized state received its congressional representation on the basis of its entire population, but each person—voters and nonvoters alike—counts for less congressional representation. Because everyone counts for purposes of interstate apportionment, the state would have to continue drawing congressional districts based on its entire population, thereby equally reducing the quantum of representation afforded to each resident. If a penalized state loses one congressional seat, every person in the state will end up in larger congressional districts—that is to say, everyone will suffer representational harm equally.¹³²

B. The Number of Nonvoters Guides the Magnitude of Any Representational Penalty

The Penalty Clause also bolsters the universal representation theory because it functions to treat voters as proxy representatives for nonvoters and therefore does not “weigh” voters equally across states. Thus, in practice, a state’s ultimate deduction under the Penalty Clause is magnified by the number of nonvoters receiving proxy representation.

The 1871 apportionment¹³³ bears out this point. Under Representative Garfield’s proposed application of the Penalty Clause, Minnesota had 75,274 adult male citizens among its total population of 439,706. That means that every eligible voter in the state, on average, represented by proxy 5.84 persons ($439,706 / 75,274$). Because Minnesota disenfranchised 117 of its adult male citizens, the Penalty Clause would have reduced its apportionment base by 683 ($((117 / 75,274) * 439,706)$). Nevada, meanwhile, had 18,652 adult male citizens among its total population of 42,491, meaning every voter rep-

¹³² This representational harm would likely constitute a concrete injury-in-fact sufficient to confer Article III standing on every person in the state, regardless of whether they are eligible to vote. See *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 607 n.49 (S.D.N.Y. 2019), *aff’d in part, rev’d in part, and remanded on other grounds*, 139 S. Ct. 2551 (2019) (holding that the loss of a congressional representative undermines “the representational rights of every individual of the community at large,” regardless of whether they are eligible to vote).

¹³³ See *infra* Appendix.

resented by proxy 2.28 persons. And because Nevada disenfranchised 16 of its adult male citizens, the Penalty Clause would have reduced its apportionment base by 36 $((16 / 18,652) * 42,491)$. Note the difference in how the Penalty Clause weighs the votes of eligible voters in Minnesota and Nevada. In Minnesota, the “cost” of disenfranchising a single voter is 5.84 $((1 / 75,274) * 439,706)$; in Nevada, it is 2.28 $((1 / 18,652) * 42,491)$. Put differently, the Penalty Clause treats a wrongfully disenfranchised vote in Minnesota as weightier—twice as weighty, in fact—than one in Nevada.

TABLE 2. ILLUSTRATIONS OF THE PENALTY CLAUSE’S APPLICATION

State	Total Population	Adult Male Citizens	Disenfranchisement	Penalty	Penalty per Voter
Minnesota	439,706	75,274	117	683	5.84
Nevada	42,491	18,652	16	36	2.28

This disparity can be understood by the fact that voters in Nevada represent by proxy far fewer nonvoters than voters in Minnesota. And because voters can be understood as casting ballots on behalf of themselves and proximately situated nonvoters, each voter in Minnesota would on average represent the interests of more persons.¹³⁴ In recognition of this proxy representation, the Penalty Clause would impose a greater penalty on Minnesota than on Nevada. The disenfranchisement of a single voter in the two states has different representational consequences as a function of surrounding nonvoters. Functionally, the magnitude of the penalty reflects not the number of voters who lose their right to vote but the number of residents who lose their representation.

The Penalty Clause, by its plain terms and in operation, lends no support, then, to advocates of elector representation. The elector representation theory is based on the value that all votes should have an equal weight, such that all and only eligible voters are entitled to equal political representation. A Penalty Clause that incorporated elector representation would, per the Elimination Interpretation, simply subtract the wrongfully disenfranchised voters from the state’s apportionment basis. That way, the disenfranchisement of any voter, regardless of where he lived, would carry the same penalty. But that is

¹³⁴ One might object that we are reading too much theory into what is fundamentally a practical constitutional provision and that the Penalty Clause’s proportional feature, to paraphrase Justice Alito’s concurring opinion in *Evenwel*, was adopted “in service of the real goal: preventing southern States from acquiring too much power in the national government.” *Evenwel v. Abbott*, 136 S. Ct. 1120, 1148 (2016) (Alito, J., concurring). But the Supreme Court already responded to Justice Alito: “That politics played a part . . . does not warrant rejecting principled argument.” *Id.* at 1129 n.11.

not how the Penalty Clause works. The Penalty Clause does not treat every voter's vote as having an equal weight for the purposes of apportionment; in other words, it rejects the very premise of elector representation.

CONCLUSION

For a constitutional provision that had been declared "dead as long as it has been alive,"¹³⁵ the Penalty Clause keeps on kicking. The Clause has a knack for popping up during crucial constitutional moments—the movement for women's suffrage, debates over felony disenfranchisement—and wreaking havoc. As the next redistricting cycle approaches, the Penalty Clause is primed to play an important role in yet another constitutional debate: whether the Constitution represents everyone or just some subset of the people who are permitted to cast ballots.

As this debate has wound its way through courts and commentaries, the Penalty Clause has been tossed around as evidence of the Fourteenth Amendment's skepticism of universal representation. This Article has shown that such an understanding is the product of a misreading of the Clause: the erroneous Elimination Interpretation. In fact, the Penalty Clause reinforces the Fourteenth Amendment's broader commitment to universal representation. Everyone counts under our Constitution when representation is meted out.

¹³⁵ Tolson, *A Critique of Two Section Twos*, *supra* note 4, at 434.

APPENDIX. PROPOSED APPLICATION OF THE PENALTY CLAUSE IN THE 1871 CONGRESSIONAL APPOINTMENT

States.	Total population of the States.	Male citizens of the United States 21 years of age and upward.	Male citizens 21 years of age and upward whose right to vote is abridged for other cause than rebellion or other crime.	Representative population.	*No. of Representatives on even division.	Ratio: 1 to 135,458. Fractions.	Total number of Representatives.
Alabama.....	996,992	202,182	690	993,589	7	45,333	7
Arkansas.....	484,471	102,359	193	483,533	3	77,159	3
California.....	560,247	145,802	243	559,313	4	17,481	4
Connecticut.....	537,454	127,499	1,249	532,189	3	125,815	4
Delaware.....	125,015	28,207	234	123,766	1	-	1
Florida.....	187,748	38,871	41	187,549	1	52,001	1
Georgia.....	1,184,109	234,971	1,064	1,178,747	8	95,033	9
Illinois.....	2,539,891	542,833	600	2,537,041	18	93,797	10
Indiana.....	1,630,637	377,938	563	1,678,120	12	52,624	12
Iowa.....	1,191,792	255,471	283	1,180,471	8	106,897	9
Kansas.....	364,399	99,929	1,223	359,939	2	89,023	3
Kentucky.....	1,321,011	284,096	873	1,316,951	9	97,829	10
Louisiana.....	726,915	159,007	185	726,069	5	48,779	5
Maine.....	626,915	153,160	840	623,476	4	81,644	5
Maryland.....	780,894	169,846	533	778,443	5	101,153	6
Massachusetts.....	1,457,351	312,770	3,719	1,440,022	10	85,432	11
Michigan.....	1,184,059	274,459	1,318	1,178,372	8	94,708	9
Minnesota.....	439,706	75,274	117	439,022	3	32,648	3
Mississippi.....	827,322	169,551	342	826,252	6	13,594	6
Missouri.....	1,721,235	381,129	9,235	1,679,451	12	53,955	12
Nebraska.....	122,933	35,093	115	122,638	1	-	1
Nevada.....	42,491	18,652	16	42,454	1	-	1
New Hampshire.....	318,300	83,261	639	315,669	2	44,733	2
New Jersey.....	906,036	194,109	535	903,539	6	90,859	7
New York.....	4,382,759	834,255	469	4,380,670	32	46,014	32
North Carolina.....	1,071,361	214,142	674	1,067,933	7	119,782	8
Ohio.....	2,665,230	593,850	2,551	2,653,812	19	80,110	20
Oregon.....	90,323	24,608	123	90,468	1	-	1
Pennsylvania.....	3,521,791	776,627	2,345	3,511,157	25	124,707	26
Rhode Island.....	217,383	43,686	2,835	203,347	1	67,839	1
South Carolina.....	705,696	146,979	516	703,128	5	25,823	5
Tennessee.....	1,258,520	258,093	733	1,254,045	9	35,823	9
Texas.....	818,570	168,343	2,766	804,967	5	127,677	6
Vermont.....	330,551	74,867	107	330,078	2	59,162	2
Virginia.....	1,225,163	266,437	931	1,220,652	9	1,530	9
West Virginia.....	442,014	93,847	932	437,388	3	31,014	3
Wisconsin.....	1,054,670	204,177	301	1,053,115	7	104,909	8
Total United States.....	33,113,233	8,314,805	40,380	37,928,329	264	2,323,933	280

* Subject to constitutional provision assigning at least one Representative to each State, whatever its population.