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Escape from the “Devonian Amber”: A Reply to *Voting and Vice*

This Essay replies to Richard Re and Christopher Re’s Voting and Vice. That article, recently published in The Yale Law Journal, demonstrates that the inclusion of the phrase “other crime” in Section 2 of the Fourteenth Amendment was no accident, and the authors contend that widespread support for criminal disenfranchisement in the Reconstruction Congress should enhance the restriction’s status today. This Essay argues that those who wrote disenfranchisement into the U.S. Constitution did so from a context far removed from the views to which Americans adhere today when they talk about voting and political equality. Despite the fact that some Republicans made principled arguments contrasting criminal disenfranchisement with African-American enfranchisement, citizens and legislators who propose to abolish or restrict disenfranchisement neither dishonor nor render incoherent the Reconstruction Amendments.

INTRODUCTION

This Essay replies to Richard Re and Christopher Re’s *Voting and Vice*, published in May 2012 in *The Yale Law Journal*.¹ *Voting and Vice* makes a major

1. Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012).

Voting and Vice covers Reconstruction with depth and range. For example, the authors are among the first to show that Republicans knew as early as 1866 that Southern white officials were already manipulating criminal disenfranchisement law to exclude black people. See, e.g., *id.* at 1609 & n.122, 1626; see also Pippa Holloway, “A Chicken-Stealer Shall Lose His Vote”: *Disenfranchisement for Larceny in the South, 1874-1890*, 75 J. SO. HIST. 931, 933 (2009) (providing another account of this knowledge). *Voting and Vice* also documents the fact that Congress did consider enforcing the apportionment penalty in Section 2 of the Fourteenth Amendment, Re & Re, *supra*, at 1656-60, to choose just two of the article’s many contributions.

contribution to our understanding of the Reconstruction-era history of felon disenfranchisement in the United States. But by looking so deeply at this one episode, the authors may have mistaken its meaning in the broader sweep of the history of American voting rights, as well as its implications for the contemporary debate over felon disenfranchisement.

The article successfully demonstrates that many drafters of the Reconstruction Amendments—including some of the era’s most radical egalitarians—offered full-throated endorsements of criminal disenfranchisement. Moreover, some Republicans supported disenfranchisement in modern-sounding, antiracist, and occasionally even profeminist language. In many cases, these Republicans directly contrasted voting restrictions for convicted criminals (which they saw as legitimate) with disenfranchising laws based on race (which they condemned). *Voting and Vice* interprets those statements to mean that racial enfranchisement and criminal disenfranchisement were “two sides of the same philosophical coin,” expressions of the “same principle.”² And that principle is one familiar to twenty-first-century Americans across the ideological spectrum: it is proper to discriminate based on people’s conduct, but wrong to do so on the basis of their status. What we *do*, yes; who we *are*, no.³ The Fourteenth Amendment’s apparent endorsement of disenfranchisement for crime, then, supplied philosophical coherence to Reconstruction’s enfranchisement of African Americans and did so in a way consistent with contemporary ideas about equality and voting rights.

Those conclusions appear to have serious consequences for the present-day controversy over policies restricting the voting rights of people with criminal convictions. But I do not think the history recounted in *Voting and Vice* should deter contemporary critics of disenfranchisement law at all, even those who very much admire these radical Republicans and their vision of constitutional equality. Despite its many accomplishments, the article overreaches in its efforts to show that criminal disenfranchisement is an integral part of formal equality in the American constitutional order, and to identify “a new and stronger justification for criminal disenfranchisement’s lawfulness.”⁴

Voting and Vice focuses most of its attention on constitutional elements of the disenfranchisement debate. Given the strength of textual approaches in legal theory today, the fact that criminal disenfranchisement is “textually

2. Re & Re, *supra* note 1, at 1590.

3. See, e.g., *id.* at 1593.

4. *Id.* at 1641.

crystallized”⁵ in the second section of the Fourteenth Amendment makes a successful frontal constitutional challenge to disenfranchisement’s permissibility unlikely.⁶ But the fate of American disenfranchisement law now rests mostly in the hands of state and federal legislators, ordinary citizens, and advocates, and I am most interested in examining what *Voting and Vice* means for them. From that perspective, the ideas about equality and voting rights behind the text are what matter. And those ideas, I argue, were almost completely at odds with contemporary democratic values.

First, and critically, the notion of formal equality espoused by Reconstruction Republicans—the way they understood the line between “what we do” and “who we are,” and what that line meant for constitutional equality—was vastly different from ours. As Part I of this Essay shows, Reconstruction-era formal equality was, for most Republicans and many radicals, perfectly compatible with literacy tests, the exclusion of women from the polls, pauper exclusions, very long durational-residency requirements, and unevenly apportioned electoral districts.

Second, the authors refer to Republican support for black enfranchisement and felon disenfranchisement as “the irony of egalitarian disenfranchisement,”⁷ and the linkage is a crucial part of their argument that racial enfranchisement and criminal disenfranchisement are joined at the hip, constitutionally speaking. But as I demonstrate in Part II, arguing for the enfranchisement of one group while supporting the continued disqualification of another has been a common move. Americans are well accustomed to honoring suffrage-expanders while rejecting restrictive components of their agenda.

Finally, it is not at all clear that Reconstruction history contributes to the contemporary debate in the straightforward way the authors suggest—as supporting the conclusion that “felon disenfranchisement is a legitimate product of constitutional equality,”⁸ and as questioning current congressional efforts to alter disenfranchisement law. As I explain in Part III, by 1870 Republicans were attuned to the political construction of criminality, eager to

5. *Id.* at 1646. I am among those whose previous statements about the phrase “other crime” in Section 2 of the Fourteenth Amendment were “quite wrong,” *id.* at 1669, and I am now persuaded: the phrase does in fact stand as an “affirmative endorsement,” far more than we have understood, and was no “mere afterthought,” *id.* at 1589.

6. *But see* Abigail M. Hinchcliff, Note, *The “Other” Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 *YALE L.J.* 194, 197-98 (2011) (developing a textual argument that Section 2 permits only disqualification for offenses that “relate in a meaningful way to the crime of rebellion”).

7. *E.g.*, Re & Re, *supra* note 1, at 1590.

8. *Id.* at 1646.

empower African Americans as a group, and zealous about increasing national legislative power—all things that suggest Republicans would be critical of contemporary disenfranchisement policies and interested in using congressional authority to limit their effects.

In 1972, the Ninth Circuit said that “constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.”⁹ The endorsement of criminal disenfranchisement in Section 2 of the Fourteenth Amendment is one such bug: best read as an act of lawmaking deeply embedded in and characteristic of nineteenth-century ideas about voting rights and political equality, and not as an egalitarian, forward-looking one. It may well be that felon disenfranchisement *was* a legitimate product of constitutional equality. But there is a chasm between our understanding of what equality means and the dominant view among those who wrote and ratified the Reconstruction Amendments.

I. LIMITED SUFFRAGE IN RECONSTRUCTION-ERA “FORMAL EQUALITY”

The argument of *Voting and Vice* is not merely that the Reconstruction Congress supported disenfranchisement for crime. Nor is it that a respectable handful of radical Republicans endorsed criminal disenfranchisement while proposing deeply egalitarian, even feminist language for the Fourteenth and Fifteenth Amendments—only to see those universalist views rejected when the Reconstruction Congress eventually passed those Amendments. Instead, the argument is that radicals led Congress through Reconstruction; that the radicals endorsed criminal disenfranchisement as part and parcel of their sweeping and idealistic commitment to formal equality, an ideology that animated all Reconstruction Constitution-making; and that the Reconstruction Amendments as a whole should therefore be read as ringing endorsements of both formal equality and criminal disenfranchisement.

Each claim is stated far more strongly than the historical record allows. Historians agree that radicals had neither the clout nor the coherence with which *Voting and Vice* credits them,¹⁰ and that to characterize all three Amendments as sharing a common core idea elides critical differences among

9. *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972).

10. Michael Les Benedict, for example, concludes that the radicals were never a majority of either house, only sometimes formed a majority among Republicans, and lacked disproportionate power among the congressional elite. MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869*, at 27, 29 (1974).

them. I want to focus here on the concept of formal equality, and specifically on what formal equality meant for the right to vote.

Voting and Vice argues that the “original justification for the constitutionality of felon disenfranchisement” emerged from “the philosophy of formal equality”—“the view that a legitimate political order distinguishes persons by their actions and not by their station.”¹¹ Drawing on the work of James Q. Whitman,¹² *Voting and Vice* describes formal equality as “the notion that what you do is more important than who you are, [and] that voluntary actions are morally significant and so should be prioritized over inherited statuses.”¹³ The legislators “most responsible for the Reconstruction Amendments,” the article says, were “profoundly influenced” by this philosophy.¹⁴ “Embracing formal equality,” those who led Congress through Reconstruction “challenged entrenched status-based legal classifications, including the dichotomies between slaves and freepersons, blacks and whites, women and men.”¹⁵ The Fourteenth Amendment’s endorsement of criminal disenfranchisement was thus “the textual expression of a deep political principle—indeed, the very same principle relied on by the drafters and supporters of the Thirteenth Amendment, the Equal Protection Clause, and the Fifteenth Amendment.”¹⁶

That account has a clarity and familiarity appealing to the modern eye. But in fact, Reconstruction Republicans (including radicals) worked from a vision of constitutional equality very different from our own, one that explicitly or tacitly embraced voting restrictions for women, illiterates, the poor, and those without long residency in a state. Section 2’s endorsement of criminal disenfranchisement emerged from this limited-suffrage understanding of political equality—and, critically, from a tumultuous time in which

11. Re & Re, *supra* note 1, at 1589-90.

12. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

13. Re & Re, *supra* note 1, at 1593.

14. *Id.* at 1590.

15. *Id.* at 1594-95; *see also id.* at 1638, 1665. In a few places, language about formal equality’s purchase is narrower—as where the article refers to “the new equality of suffrage envisioned by Congress’s most radical progressives.” *Id.* at 1641. But much more sweeping claims for the influence of a singular philosophy of formal equality predominate—speaking of “radicals” as a group, “Republicans,” “the Framers” of the Reconstruction Amendments, or, as above, the animating ideas of the Amendments themselves. *See, e.g., id.* at 1592, 1593, 1644, 1646, 1662, 1666, 1670.

16. *Id.* at 1590.

Republicans sought not philosophical consistency but language that would preserve their fragile political advantage by offending as few voters as possible.

Consider the treatment of race in the Fourteenth Amendment. Section 2's backhanded way of protecting black voters came about precisely because Republicans knew that enfranchising all black men would antagonize white Northerners: only a few New England states then allowed black men to vote.¹⁷ Next, Republicans adopted an 1868 party platform that said "the question of suffrage in loyal States properly belongs to the people of those states" – Northern states could continue to exclude black men, while Southern states would be forced to allow them to vote.¹⁸ As Xi Wang explains, that "obvious contradiction made the party's suffrage policy look ideologically inconsistent, politically expedient, and constitutionally awkward—and it was."¹⁹

Of course, the text of Section 2 endorsed criminal disenfranchisement and identified voters as "male" for the first time, and it also "strengthened the disfranchisement of women by making explicit their exclusion from its provisions."²⁰ *Voting and Vice* tackles this problem by arguing that, although Republicans' endorsements of racial enfranchisement and criminal disenfranchisement were "principled" – emerging directly from a philosophical commitment to accepting only conduct-based discrimination – their "accommodation of gendered voting distinctions" was a mere "concession to political necessity."²¹

But opposition to women's suffrage among Republicans was both broad and principled. For example, in the same 1866 remarks in which he purported to regret the political impossibility of women's enfranchisement, radical Senator Benjamin Wade – one of the article's sex-equality heroes – made the case for virtual representation.²² Some Republicans supported the addition of

17. WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 25 (1965).

18. XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 41 (1997).

19. *Id.*

20. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 60 (1978).

21. Re & Re, *supra* note 1, at 1616; *see also id.* at 1614 ("[R]adical Republican feminists . . . accepted Section 2's gendered language only because it was necessary to secure the measure's enactment and ratification.").

22. The "ladies of the land," said Wade, get along quite well with "those that do govern," for the latter "act as their agents, their friends, promoting their interests in every vote they give,

“male” to Section 2’s apportionment language specifically because they wanted to *discourage* states from enfranchising women.²³ And numerous leading Republicans forcefully articulated their hostility to women’s suffrage, advancing widely held ideas about women’s “gentler nature,” the importance of “family government,” and the wisdom of virtual representation.²⁴ As scholars such as Reva Siegel and Nancy Isenberg have shown, civic virtue and citizenship were understood in a deeply sexist way during Reconstruction, and a firm belief that women did not need or deserve the ballot was part of that worldview.²⁵ A very strong scholarly consensus flatly contradicts the claim that Republicans wanted to enfranchise women during Reconstruction.²⁶

If leading Republicans tried to enact women’s suffrage through the Fourteenth or Fifteenth Amendments, someone forgot to tell advocates for women. Reconstruction’s resounding rejection of sex equality was a turning point in the history of the American feminist movement.²⁷ Feminists aimed their ire directly at Republicans, because “the party so obviously refused to

and therefore communities get along very well without conferring this right upon the female.” CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866) (statement of Sen. Benjamin Wade).

23. One result of basing apportionment simply on the number of “voters” would have been to give states an incentive to enfranchise women as a way to boost their congressional clout. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 393 (2005).
24. Senator Lot Morrill of Maine argued that allowing women to vote would “put asunder husband and wife, and subvert the fundamental principles of family government, in which the husband is, by all usage and law, human and divine, the representative head.” WANG, *supra* note 18, at 31. Frederick Frelinghuysen of New Jersey said that God had stamped upon women “a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life.” *Id.*
25. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979, 981-83 (2002). Isenberg writes that “the polity—the fictive people—were embodied, or engendered, as male. Abstract rights were never understood to be abstract enough to include women.” NANCY ISENBERG, *SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA* 193 (1998).
26. See CHARLES W. CALHOUN, *CONCEIVING A NEW REPUBLIC: THE REPUBLICAN PARTY AND THE SOUTHERN QUESTION, 1869-1900*, at 16-17 (2006) (stating that, although “[a] handful” of Republicans advocated suffrage for women, “[m]ost Republicans” did not); DUBOIS, *supra* note 20, at 62 (“Without any help from Radicals or abolitionists, woman suffrage advocates were powerless to affect the formulation of the Fourteenth Amendment.”); FAYE E. DUDDEN, *FIGHTING CHANCE* 183 (2011) (noting that, by the time of the Fifteenth Amendment, the Northern Republican Party had “set its face against woman suffrage”); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 447 (1988) (“[O]f course, proponents of both a ‘strong’ and ‘weak’ Fifteenth Amendment ignored the claims of women.”).
27. See DUDDEN, *supra* note 26, at 8; FONER, *supra* note 26, at 255.

support woman suffrage”²⁸ and had demonstrated an “ability to ignore women’s rights at the national level as they rewrote the Constitution to protect the rights of African-American men.”²⁹ Elizabeth Cady Stanton, Susan B. Anthony, and others now sought allies in the Democratic Party, concluding that “the hypocrisy of Democrats serves us a better purpose . . . than does the treachery of Republicans.”³⁰

Although several radicals did make pleasing sounds about female suffrage, it is emphatically clear that most Republicans did not adhere to a theory of constitutional equality divided by “condition” and “conduct” as we understand those terms today. They acknowledged sex as an inherited trait, but forcefully rejected arguments for suffrage equality. Women were simply outside leading Republicans’ understanding of what “formal equality” consisted of and to whom it extended.

So too were those without sufficient formal education and the very poor. As *Voting and Vice* concedes, many Republicans supported educational qualifications for voters. The article refers to such restrictions as among a few “disputed marginal cases.”³¹ That is misleading. Republican support for literacy tests illustrates two critical pieces of the Republican worldview: their belief in limited suffrage,³² and how they drew the line between “status” and “conduct.” Radical icons like Senator Charles Sumner were among those supporting literacy tests (not surprisingly, given that his home state of Massachusetts had pioneered the requirement that voters be able to read the Constitution in English). Yet *Voting and Vice* credits Sumner with “elaborat[ing] a vision of suffrage predicated on act-egalitarianism.”³³

Indeed, many Republicans defined illiteracy as socially harmful *conduct*.³⁴ That helps explain the expansion of literacy tests nationwide in the decades after Reconstruction: those restrictive policies grew not only out of anti-immigrant and racist sentiment, but also from Reconstruction-era understandings of constitutional equality. Of course, literacy tests are now

28. DUBOIS, *supra* note 20, at 163.

29. MELANIE SUSAN GUSTAFSON, WOMEN AND THE REPUBLICAN PARTY, 1854-1924, at 37 (2001).

30. GARRETT EPPS, DEMOCRACY REBORN 219 (2006).

31. Re & Re, *supra* note 1, at 1596-97.

32. See, e.g., EPPS, *supra* note 30, at 116 (quoting Senator William Pitt Fessenden as saying that while the ballot “may receive the name of a right,” “most people call it a privilege”); FONER, *supra* note 26, at 231 (stating that generally “the vote was commonly considered a ‘privilege’ rather than a right”).

33. Re & Re, *supra* note 1, at 1607-08.

34. Intelligence tests, says *Voting and Vice*, “resembled criminal laws in that they rewarded achievement while punishing bad conduct.” *Id.* at 1640.

illegal, having been banned by the Voting Rights Act. The fact that many of those who wrote and ratified the Reconstruction Amendments either explicitly or tacitly endorsed such tests underscores again how dramatically different their notion of “formal equality” was from our own.

Similarly, it is not enough to say that Republicans viewed “property qualifications as illegitimate,”³⁵ because *pauper* exclusions were understood as completely different from property tests. As of 1855, nine states (five in the North) explicitly barred paupers from voting;³⁶ four others stipulated before Reconstruction that residents of almshouses could not acquire residency for voting purposes.³⁷ This was an important exclusion, because as of 1860, there were more than eighty thousand Americans living in almshouses—four times as many as were in prison that year, according to Census figures.³⁸ By 1880, the U.S. Census grouped “Defective, Dependent, and Delinquent Classes” together, tallying residents of almshouses with people in prisons and mental institutions.³⁹ To be jobless was not a status but a culpable action, even more so than illiteracy.

A small number of those who wrote and ratified the Reconstruction Amendments spoke sympathetically about women’s suffrage, but as a party and as Constitution-makers, Republicans resoundingly and repeatedly refused. For most Republicans, suffrage equality embraced exclusion based on illiteracy and poverty as well as sex; they were comfortable describing the ballot as a

35. *Id.* at 1597.

36. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 363 tbl.A.9 (2000) (“Summary of Suffrage Requirements in Force: 1855”).

37. *Id.* at 380 tbl.A.14 (“Residency Requirements for Suffrage: 1870-1923”). Six more states did the same by the dawn of the twentieth century. *Id.*

38. MARGARET WERNER CAHALAN WITH LEE ANNE PARSONS, U.S. DEP’T OF JUSTICE, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984*, at 208 tbl.A-1 (“Number and Rate of Institutionalized Persons as Counted by U.S. Census: 1850-1890”). There were 82,942 people living in almshouses for the poor in 1860, compared with 19,086 in jails and state and federal prisons. *Id.* Note that some of those living in almshouses were likely categorized as “insane” or “idiots” at the time, rather than “paupers.” *Id.* at 208 nn.c-d.

39. *Id.* at 1. As Amy Dru Stanley demonstrates, Northern reformers—including leading philanthropists and veterans of the abolition campaign—were in the vanguard of a movement beginning just after the Civil War *criminalizing* joblessness and vagrancy by imposing penal sanctions against idleness. See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 132-33 (1998).

“privilege.”⁴⁰ Their lines between “station” and “action,” between “who we are” and “what we do,” were worlds away from our own.

Voting and Vice refers to “the philosophy of formal equality,”⁴¹ but the worldview embraced by most Republicans was so far from the modern variety that it is better understood as a different idea altogether. Many Republicans, including some radicals, sought civil rights for former slaves while heartily endorsing social separation.⁴² This seeming contradiction made sense to them because they understood equality in terms of a tripartite system that carefully separated civil, political, and social rights.⁴³ They were more concerned with policing the boundaries between those spheres than with drawing the line between status and conduct. Thus their Reconstruction equality strongly supported African Americans’ right to property *and* laws preventing racial intermarriage. These Republicans believed in civil equality for black people *and* the supremacy of the white race. They thought women were the civil equals of men *and* endorsed common law coverture, by which women lost their property and much of their legal existence when they married. Many Republicans would change their views in the years ahead, but this was the ideological context in which the longstanding practice of felon disenfranchisement received its constitutional imprimatur.

There is one more vital piece of context. Nineteenth-century American prisoners commonly suffered “civil death”—the loss of some or all elements of legal personhood. As the Virginia Supreme Court said of a prisoner in 1871, “He is civiliter mortuus; and his estate, if he has any, is administered like that

40. Of course, they were also comfortable with two-year-residency requirements, voting being public, no registration rules at all, and inequitable apportionment of electoral districts.

41. *E.g.*, *Re & Re*, *supra* note 1, at 1590.

42. Analyzing President Johnson’s Confederate-Amnesty Proclamation, Michael Les Benedict says, “Andrew Johnson was a racist, but so were many radicals.” LES BENEDICT, *supra* note 10, at 107. Senator Benjamin Wade, whose egalitarian, protofeminist views are often cited in *Voting and Vice*, had an intense, visceral dislike of African Americans, at least before the war. HANS L. TREFOUSSE, *THE RADICAL REPUBLICANS: LINCOLN’S VANGUARD FOR RACIAL JUSTICE* 30-31 (1969).

Some Republicans insisted that the word “race” in the Fifteenth Amendment must not be understood to include the Chinese. California Republican Senator Cornelius Cole—a radical—said that if the Fifteenth Amendment allowed the Chinese to vote, it would “kill our party as dead as a stone.” FONER, *supra* note 26, at 447.

43. In the Reconstruction Congress, “constitutionally protected equality was limited by the distinction between civil, political, and social rights.” JACK M. BALKIN, *LIVING ORIGINALISM* 228 (2011); *see also id.* at 416 n.16 (listing primary and secondary sources on the tripartite theory).

of a dead man.”⁴⁴ At least twenty states adopted various types of civil-death laws in the early nineteenth century.⁴⁵ Congressmen surely would have known that many of the men to whom the phrase “or other crime” referred were already “dead” in the eyes of the law, and it should not surprise us that lawmakers were comfortable endorsing their continued disenfranchisement.⁴⁶

Describing the difficulty of interpreting historical texts, Quentin Skinner warns of “the danger that the historian may conceptualise an argument in such a way that its alien elements dissolve into a misleading familiarity.”⁴⁷ I worry that *Voting and Vice* falls into this trap. With its emphasis on the familiar-sounding elements of “formal equality,” the article devotes insufficient attention to the “alien” pieces of Reconstruction-era equality thinking. This is critical to understanding Republicans’ endorsement of disenfranchisement. Considering disenfranchisement today in light of our venerated Constitution, we should know whether those who put the phrase “other crime” in the Fourteenth Amendment shared our most basic assumptions about equality and the right to vote. They did not.

II. EGALITARIAN DISENFRANCHISEMENT

Voting and Vice heavily emphasizes “the tendency of radical egalitarians in the Reconstruction era to justify the enfranchisement of black Americans by simultaneously defending the disenfranchisement of criminals.”⁴⁸ Racial enfranchisement and felon disenfranchisement were “of a piece,” “two sides of the same philosophical coin.”⁴⁹ Radicals believed former slaves “should be included in the body politic for the same reason that criminals were to be excluded from it”—the radicals blended “exaltation and degradation,”

44. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

45. Rebecca McLennan, *The Convict’s Two Lives: Civil and Natural Death in the American Prison*, in *AMERICA’S DEATH PENALTY: BETWEEN PAST AND PRESENT* 191, 195-96 (David Garland, Randall McGowen & Michael Meranze eds., 2011). State laws differed, but the ability to pass property to heirs, to sue and be sued, and to make contracts were commonly suspended, and marriages were routinely dissolved automatically. Note, *Legislation: Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 971-75 (1937).

46. McLennan, *supra* note 45, at 198 (“[B]y 1865, to be a convict was to occupy a different, unchanging legal status to which certain disabilities and exclusions were attached in perpetuity.”).

47. 1 QUENTIN SKINNER, *VISIONS OF POLITICS* 76 (2002).

48. Re & Re, *supra* note 1, at 1589-90.

49. *Id.* at 1590, 1669.

“sometimes in the very same breath.”⁵⁰ “Counterintuitively,” the article contends, “the constitutional entrenchment of criminal disenfranchisement facilitated the enfranchisement of black Americans.”⁵¹

But this phenomenon has been a common feature of American suffrage-expanding episodes. Proposing the inclusion of a new group, voting-rights reformers endorse the continued or intensified exclusion of another group. This pattern was integral to two other major formal expansions of the American franchise: the elimination of stiff property tests in the early nineteenth century and the enfranchisement of women in the early twentieth.

Jacksonian reformers articulated some of the most radically egalitarian arguments in American political history. Yet they made clear that in denouncing the freehold requirement for suffrage, they were *supporting* the premises that voters needed to be independent, demonstrate virtuous good judgment, and support the civil and economic community; they believed voting was a right that had to be earned,⁵² and they used the exclusion of black people, women, and the poor to illustrate those beliefs. In New York’s 1821 reform convention, for example, “[s]ome of the fiercest democrats in the convention defended the color bar.”⁵³ “But why,” asked one New Yorker rhetorically, “are blacks to be excluded? I answer, because they are seldom, if ever, required to share in the common burthens or defence of the state.”⁵⁴ New York’s new constitution imposed new property and residency requirements on black men—and only black men. Prior to Pennsylvania’s reform constitution of 1838, free black men had been allowed to vote in some districts; the new constitution got rid of both the taxpayer test and its “every freeman” voter language, requiring voters to be white.⁵⁵ Virginians, meanwhile, sought to democratize the franchise, in part for help in defending slavery. “Is it not wise now,” asked one Virginian, “to call together at least every free white human

50. *Id.* at 1630, 1635.

51. *Id.* at 1584; *see also id.* at 1590, 1592, 1595, 1629, 1641.

52. KEYSSAR, *supra* note 36, at 44.

53. DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S, at 137 (Merrill D. Peterson ed., 1966).

54. *Id.* at 215 (statement of John Z. Ross). Black people, Ross argued, were “incapable, in my judgment, of exercising that privilege with any sort of discretion, prudence, or independence.” *Id.* Another radical argued that black people were “too much degraded to estimate the value [of the vote], or exercise with fidelity and discretion that important right.” *Id.* at 228 (statement of Samuel Young).

55. Julie Winch, *Free Men and “Freemen”: Black Voting Rights in Pennsylvania, 1790-1870*, PA. LEGACIES, Nov. 2008, at 16, 18.

being, and unite them in the same common interest and Government?”⁵⁶ It was also suggested, “We ought . . . to spread wide the foundation of our government, that all white men have a direct interest in its protection.”⁵⁷ This was “the union of pro-slavery and suffrage democracy as a deliberate policy”⁵⁸—an ironic combination to be sure, but a pattern that has recurred in American history.

Most women were socially, legally, and economically dependent on men, so it was common sense to Jacksonian men that women should not vote. But maleness was not the only restriction implied by those who spoke of “manhood suffrage.” The term connoted a particular vision of independence and masculinity, and for this reason several states put new restrictions on paupers even as they enfranchised poor white men. Between 1819 and 1847, eight states enacted rules barring from the polls those who received public assistance.⁵⁹ As Robert Steinfeld writes, “the new political-cultural categories of independent wage earner and dependent pauper emerged together, defining each other by mutual contrast.”⁶⁰ It is an elegant statement of the simultaneously egalitarian and restrictive character of Jacksonian suffrage laws.

The reformers who brought about women’s suffrage in the early twentieth century enacted the single greatest expansion in the history of American voting rights: the electorate nearly doubled from 1910 to 1920.⁶¹ Like their Jacksonian predecessors, advocates for women’s voting rights endorsed specific suffrage restrictions in ways deeply linked to their egalitarian theory of why they should be allowed to vote. In large part, the doors of suffrage equality were pried open by white-supremacist, anti-immigrant, and class-biased arguments.

Suffrage advocates often argued that women’s votes would balance out those of the ignorant. Some went further: addressing a U.S. Senate committee in 1898, Elizabeth Cady Stanton called for Congress to “abolish the ignorant vote.”⁶² An 1877 convention called on Congress to enact two constitutional amendments: one to enfranchise women, and the other “to make intelligence a

56. DEMOCRACY, LIBERTY, AND PROPERTY, *supra* note 53, at 409 (statement of Charles Morgan).

57. CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 232 (1960) (quoting Charles Morgan).

58. *Id.*

59. KEYSSAR, *supra* note 36, at 355 tbl.A.6 (“Pauper Exclusions: 1790-1920”); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 353 n.58 (1989) (noting that, in some states, “the disfranchisement of paupers was integral to the process which broadened the suffrage”).

60. Steinfeld, *supra* note 59, at 338.

61. KEYSSAR, *supra* note 36, at 218.

62. *Id.* at 199.

qualification for citizenship and suffrage in the United States.”⁶³ In 1885, U.S. Senator Thomas Palmer of Michigan told Congress that a proposed amendment enfranchising women would protect the “integrity of the nation” against the perils posed by “a vast army of untrained voters, without restrictions as to the intelligence, character or patriotism”—a prospect threatening to bring about “anarchy and public demoralization.”⁶⁴ Southerners, meanwhile, promised that “the white women’s vote would give the supremacy to the white race.”⁶⁵

American suffrage-expanders have regularly contrasted the virtues of those they seek to add to the sovereign people with the shortcomings of those properly excluded. In working to build a political coalition for change while alienating as few people as possible, these advocates have appealed to prejudice against another group. This move has helped them fight off charges of radicalism, lay claim to the mantle of common sense, and clarify their principles. And yet we can properly admire their democratizing work: doing so creates no obligation that we adopt any restriction they insisted ought to accompany suffrage expansion. We agree with the Jacksonians that a property test is unfounded, but disagree that dark skin, female sex, or the receipt of public assistance renders a voter incapable of independence. But for them, these concepts were inseparably linked. We applaud the victorious suffragettes for boldly arguing that women deserve equality, but reject their harsh exclusionary definitions of “intelligence.” For us, these two principles are deeply inconsistent, but for them the latter was essential to understanding *why* women should vote. And today, we can embrace the Reconstruction Republicans’ vision of constitutional equality for African Americans while disagreeing with their support for criminal disenfranchisement. Resolving the riddle this way would be a familiar step in the development of the American right to vote.

63. 3 HISTORY OF WOMAN SUFFRAGE, 1876-1885, at 61-62 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1886). Like others, Stanton argued that a robust literacy restriction was not really a deprivation of rights: “With free schools and compulsory education, no one has an excuse for not understanding the language of the country.” 4 HISTORY OF WOMAN SUFFRAGE, 1883-1900, at 316 (Susan B. Anthony & Ida Husted Harper eds., 1902).

64. 16 CONG. REC. 1325 (1885) (statement of Sen. Thomas W. Palmer).

65. AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 138 (1965).

III. CRIMINAL DISENFRANCHISEMENT LAW NOW

Although it may be fair to say that criminal disenfranchisement *was* “a legitimate product of constitutional equality”⁶⁶ during Reconstruction, it does not at all follow that it *is still* such a thing. State lawmakers proposing modification or elimination of disenfranchisement laws need lose no sleep worrying about dishonoring Reconstruction Republicans and their acts of racial enfranchisement.

What about Congress? *Voting and Vice* offers some careful contributions to the ongoing debate about the scope of congressional authority to determine the voting rights of people with criminal convictions. Much of this attention focuses on the application of the Voting Rights Act; the article concludes that although the Act should not be read as imposing a “blanket ban on criminal disenfranchisement,” courts should carefully consider the possibility that specific state disenfranchisement laws may in fact disqualify voters “on account of race” in violation of that statute.⁶⁷ The article also suggests that frequent references to “felonies” by disenfranchisement’s Reconstruction supporters might mean surviving state laws disqualifying misdemeanants are unconstitutional.⁶⁸ But the article is decidedly cool to the idea of a fresh federal statute: disenfranchisement is “specially protected from federal regulation.”⁶⁹

Reconstruction history, however, does not weaken the case for new federal legislation. Consider one point emphasizing things Reconstruction lawmakers did not discuss much, and a second focusing on things they did say.

A. Disenfranchisement’s Duration

Voting and Vice features scores of quotations about the propriety of disqualifying felons from the franchise. But one thing Reconstruction legislators do not appear to have discussed was how long ineligibility was to last. Congress heard, and *rejected*, proposals to bar former Confederates from voting permanently.⁷⁰ But with regard to those convicted of more mundane crimes, Reconstruction Republicans do not seem to have said much of any specificity about postincarceration disenfranchisement.

66. Re & Re, *supra* note 1, at 1646. In fact, disenfranchisement was not a “product” of Section 2, but an existing restriction that was permitted to continue by Section 2.

67. *Id.* at 1667-68.

68. *Id.* at 1655.

69. *Id.* at 1591; *see also id.* at 1665-67.

70. *Id.* at 1621-22.

Of course, modern practices of probation and parole were unknown to the Reconstruction Congress, but today many states disenfranchise people under community supervision, and some disqualify some or all felons whose sentences are complete. Among recent bills placed in the congressional hopper, some would enfranchise (in federal elections) only those who have completed their sentences entirely.⁷¹ Others would provide that anyone not currently serving a term of incarceration may vote.⁷² The evidence collected in *Voting and Vice* suggests that those who put “crime” into the Fourteenth Amendment simply did not engage with the question of whether these groups of people should recover the vote. (Not to mention what kind of documentation proves eligibility, and the fact that people with criminal convictions can lose or gain voting rights by moving from one state to another—two other current problems noted in recent federal legislation.) The result is that we cannot say with any certainty what the writers of the Amendment might have thought about federal legislation that effectively *allows* states to continue to disqualify people convicted of crime if they choose, while regulating the *duration* of disenfranchisement.

B. Radical Reenfranchisement

There is a tension within *Voting and Vice*. On one hand, the article doubts Congress has the power to override state felon-disenfranchisement laws and depicts disenfranchisement as built on deeply egalitarian principles. Yet the article offers substantial support for critics of such restrictions today.

Not surprisingly, the article suggests that would-be reformers turn to history—for example, to draw parallels with Reconstruction lawmakers’ worries about the political effects of disqualifying former Confederates. As *Voting and Vice* illustrates, many Republicans thought mass disenfranchisement of Southerners would deprive the region of “the consent of the governed.”⁷³ Given “the pervasiveness of modern criminalization,” reformers today could argue that “widespread criminal disenfranchisement might undermine

71. See, e.g., Count Every Vote Act of 2007, S. 804, 110th Cong. (2007).

72. See, e.g., Democracy Restoration Act of 2009, S. 1516, 111th Cong. (2009); Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999). There is a robust debate over the constitutionality of these measures, focusing on the Elections Clause, the Fourteenth and Fifteenth Amendments, and Supreme Court jurisprudence. For a summary and citations, see Alec C. Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 PUBLIUS 527, 545-46 (2009).

73. Re & Re, *supra* note 1, at 1654.

republicanism and rule by the consent of the governed.”⁷⁴ More generally, the article advises reformers to connect “modern changes in the nature and perception of criminality to the ideology underlying the ‘other crime’ exception.”⁷⁵ Courts might accept the principled nature of disenfranchisement but simultaneously reject contemporary laws disqualifying drug addicts, for example, among others convicted of offenses lacking sufficient “moral gravity.”⁷⁶

Many reformers do indeed focus on the racial impact of disenfranchisement law,⁷⁷ and will find antecedents in the pages of *Voting and Vice*. The radicals clearly understood that terms such as “criminal” and “felon” are political, constructed, complex, and subject to manipulation.⁷⁸ In their time, that meant the “Black Codes” and convict leasing; today, one might fairly argue, it is racial profiling, disparate sentences for crack and powder cocaine, and state statutes classifying narcotics possession as a felony but driving under the influence as a mere misdemeanor.

Surely, Reconstruction radicals would be stunned and alarmed by the extraordinary expansion of criminal punishment in the United States, and particularly by its racial dimension. The U.S. incarceration rate in 1860 was about 61 people per 100,000.⁷⁹ That is the context in which the Reconstruction Congress endorsed criminal disenfranchisement. As of 2010, the U.S. incarceration rate stood at 500 per 100,000.⁸⁰ (That figure considerably understates the scope of the modern American penal state, because while about 1.6 million Americans were in prison at year’s end in 2010, three times that number were on probation or parole.⁸¹) And among black males—the people

74. *Id.*

75. *Id.* at 1655.

76. *Id.*

77. See *The Democracy Restoration Act: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 17–23 (2010) (testimony and prepared statements of Hilary O. Shelton, Senior Vice President, NAACP); JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 8, 12–14 (1998).

78. Re & Re, *supra* note 1, at 1651; see also *id.* at 1626.

79. CAHALAN, *supra* note 38, at 208 tbl.A-1. In 1870, the figure increased to about 85 per 100,000. *Id.*

80. Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, U.S. DEP’T OF JUSTICE 1 (Dec. 2011, rev. Feb. 9, 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

81. Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2010*, U.S. DEP’T OF JUSTICE 1 (Nov. 2011), <http://www.bjs.gov/content/pub/pdf/ppus10.pdf>. There

Reconstruction Republicans worked so hard to liberate and enfranchise—the 2010 incarceration rate was 3,074 per 100,000,⁸² almost *fifty times* the general rate of imprisonment on the eve of the Civil War.

Particularly in heavily affected communities where people with criminal records are often subject to other civil penalties, there is some evidence today that “the consent of the governed” is slipping.⁸³ Surely the radicals would have hoped that future Congresses would be sensitive to that phenomenon, and to the danger that criminal disenfranchisement may be “shifting racial inequality from the surrounding social circumstances into the political process.”⁸⁴ As Vikram Amar and Alan Brownstein have shown, sponsors of the Reconstruction Amendments grounded their arguments “on the perceived need for and anticipated benefits of blacks voting as a coherent force.”⁸⁵ Those factors recommend changes to disenfranchisement law that push well beyond the elimination of misdemeanor disqualification, and past a case-by-case judicial narrowing of disenfranchisement’s application.

In its emphasis on the radical roots of the Reconstruction Amendments, *Voting and Vice* participates in the broad movement toward what might be called “abolitionist originalism.”⁸⁶ Here it seems like something of an odd fit. Most of those who read Reconstruction history this way interpret the Reconstruction Amendments’ equality commitments as open ended and its prohibitory clauses broadly;⁸⁷ they tend to advocate using national legislative

were 4,887,900 people on probation or parole at year’s end in 2010, according to the Bureau of Justice Statistics. *Id.*

82. Guerino et al., *supra* note 80, at 27.

83. See, e.g., SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE 162 (2006) (relating an example of a politician who no longer campaigns in some precincts because disenfranchisement and alienation have removed so many residents from political life); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED COMMUNITIES WORSE (2007) (showing that concentrated incarceration leads to political alienation and reduced trust and social capital in certain U.S. neighborhoods); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 824 (2010) (finding declining political participation, civic engagement, and trust in government among those who have experienced criminal justice contact).

84. *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003).

85. Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 929 (1998).

86. This phrase emerged from a conversation with historian Felicia Kornbluh.

87. See, e.g., ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 5 (2004) (concluding that the Thirteenth Amendment is “both deontological, because it protects individual autonomy, and consequentialist, because it aims to achieve a better society”); David A.J. Richards, *Abolitionist Political and Constitutional*

power in the interest of expanded equality.⁸⁸ Moreover, as David A.J. Richards writes, respecting abolitionist constitutional theory means committing to an “evolving and self-corrective interpretive” approach.⁸⁹ Scornful of those who appeal to “the concrete intentions of the founders,”⁹⁰ Richards says we only preserve the integrity of the Constitution and do justice to those who wrote the Reconstruction Amendments when our interpretations are “based today on our best deliberative normative judgments about the principled protection of human rights in our circumstances.”⁹¹ Many of disenfranchisement’s critics would heartily agree, concluding that disenfranchisement violates our widely shared commitment to universal suffrage and the protection of fundamental rights against unnecessary restriction.

Certainly the radicals’ descendants would expect us to place a very different “irony” at center stage in this tale: that the very constitutional texts meant to bring black people into American political life have contributed to the disenfranchisement of vast numbers of African Americans.

CONCLUSION

Section 2’s “other crime” referred to a voting restriction that was almost universal among the states. By the eve of the Civil War, twenty-four state constitutions or statutes barred convicts from voting.⁹² As Rebecca McLennan writes, the Fourteenth Amendment’s authors “were *careful not to interfere* with another constitutive characteristic of the prevailing systems of penal

Theory and the Reconstruction Amendments, 25 LOY. L.A. L. REV. 1187, 1200 (1992) (concluding that the political theory of the Reconstruction Amendments was that of pre-war “radical antislavery,” in which political power was only legitimate if based on egalitarian respect for the “inalienable human rights” of all persons).

88. See, e.g., TESIS, *supra* note 87, at 161 (stating that the Thirteenth Amendment grants Congress a “virtually plenary” power to pass “any necessary and proper laws to end all remaining vestiges of subservience”); David H. Gans & Douglas T. Kendall, *The Shield of National Power: The Text and History of Section Five of the Fourteenth Amendment*, CONST. ACCOUNTABILITY CENTER 6 (2009), http://www.theusconstitution.org/sites/default/files/briefs/Shield_of_National_Protection.pdf (“[T]he Enforcement Clauses were written to give Congress a broad power to secure the constitutional rights guaranteed by the three Amendments.”).
89. Richards, *supra* note 87, at 1188.
90. *Id.* at 1202. Richards rejects interpretive approaches that emphasize “a prior concrete historical understanding.” *Id.* at 1188.
91. *Id.* at 1202.
92. See KEYSSAR, *supra* note 36, at 360 tbl.A.7 (“Suffrage Exclusions for Criminal Offenses: 1790-1857”); *id.* at 363 tbl.A.9.

involuntary servitude: state laws that stripped prisoners of voting and various civil rights.”⁹³ That is the proper language: Congress was leaving in place a restriction most states already employed. *Voting and Vice* seems to lose sight of this fact occasionally, as in the statement that “[c]riminal disenfranchisement was the logical consequence of the new equality of suffrage envisioned by Congress’s most radical progressives.”⁹⁴ But disenfranchisement was not the “consequence” of their views at all: it already existed. Those who defended disenfranchisement in the Reconstruction Congress were layering a somewhat new understanding onto an old restriction.

The exclusion of felons from the polls made sense to Reconstruction politicians. It was a longstanding policy, built on a combination of cultural practices and ideas related to punishment, republican virtue, the social contract, the need to prevent fraud, and socioeconomic class,⁹⁵ and it was imposed on only a very small number of people. It made sense to them because they understood voting as a privilege, one properly limited to the deserving. Enfranchising another long-excluded group, Reconstruction Framers discussed disenfranchisement in a language of disqualification by conduct, within a context of equality. But they deployed that language only in a partial, highly circumscribed, sexist notion of “formal equality.”

This story is an object lesson in the dangers of formal-equality thinking. As Professor Whitman says, formal-equality ideas can become *harmful* when paired with political inequality.⁹⁶ Writing of the criminal law, Whitman describes what he calls a “painful American irony”:

When formal equality in sentencing is married to . . . mass politics, the consequences are explosive. It is simply too easy for politicians to

93. Rebecca M. McLennan, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1841*, at 86 (2008) (emphasis added).

94. Re & Re, *supra* note 1, at 1641.

95. See, e.g., John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL’Y HIST. 282, 302 (2007) (showing that state constitution-makers have long been “engaged in continuous debate about the merits of these provisions,” and demonstrating the presence of various punishment-oriented, character-based, and fraud-prevention arguments for disenfranchisement law before Reconstruction); Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (describing social-contract, civic-virtue, and racial-discrimination ideological origins of American disenfranchisement law).

96. WHITMAN, *supra* note 12, at 55.

mobilize support by advocating harsh punishment for abstractly conceived “criminals.”⁹⁷

Voting and Vice considerably advances our understanding of the intellectual and legal history of disenfranchisement in the United States. But to refrain from critical evaluation of disenfranchisement’s wisdom today because it fit the equality notions of another era’s Constitution-writers would be a serious mistake – one the radicals would never have wanted us to make.

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97. *Id.* at 55-56 (footnote omitted).