THE LAWFULNESS OF THE FIFTEENTH AMENDMENT

*Travis Crum**

One of the most provocative debates in constitutional theory concerns the lawfulness of the Reconstruction Amendments' adoptions. Scholars have contested whether Article V permits amendments proposed by Congresses that excluded the Southern States and questioned whether those States' ratifications were obtained through unlawful coercion. Scholars have also teased out differences in how States were counted for purposes of ratifying the Thirteenth and Fourteenth Amendments. This debate has focused exclusively on the Thirteenth and Fourteenth Amendments, dismissing the Fifteenth Amendment as a mere sequel.

As this Essay demonstrates, the Fifteenth Amendment's ratification raises unique issues and adds important nuance to this debate. New York rescinded its ratification at a time that is difficult to ignore. The Indiana state legislature lacked a quorum when it approved the amendment. Georgia was expelled from the Union after Congress had readmitted it in July 1868. Georgia was then required to ratify the Fifteenth Amendment as a fundamental condition for its second readmission. Georgia's situation differs substantially from the Southern States that were consistently excluded from the Union. Under any theory—whether it endorses a loyal, reduced, or full denominator—at least one of these States' ratifications is necessary for the Fifteenth Amendment's validity.

Notwithstanding these issues, the Fifteenth Amendment's legality is on solid ground. Indeed, the Fifteenth Amendment showcases Reconstruction's success. The

* Associate Professor of Law, Washington University in St. Louis. For helpful comments and conversations, I would like to thank Bruce Ackerman, Akhil Amar, Vik Amar, Will Baude, Noah Bokat-Lindell, Tom Colby, Laura Edwards, Dan Epps, Cary Franklin, Chris Green, Craig Green, John Harrison, Andrea Katz, Elizabeth Katz, Kurt Lash, Greg Magarian, Gerard Magliocca, Kate Masur, Joshua Matz, Jason Mazzone, David Pozen, Brad Rebeiro, Chris Schmidt, Arin Smith, and Rebecca Zietlow, as well as participants at this Symposium, the National Conference of Constitutional Law Scholars at the University of Arizona James E. Rogers College of Law, the Conference on the Reconstruction Amendments at the University of Chicago Law School, and the faculty workshop at Washington University in St. Louis. I also thank Caitlin Hawkins and Julian Scott for excellent research assistance and the editors of the *Notre Dame Law Review* for their diligent work.

majority of Southern States were represented in the Congress that passed the Fifteenth Amendment and those States ratified it free of any fundamental conditions. Given the demographics and political realities of Reconstruction, the Fifteenth Amendment was the first constitutional provision whose ratification was clearly attributable to the votes of black men under a reduced- or full-denominator theory. More broadly, the fight to ratify the Reconstruction Amendments demonstrates that democracies must sometimes take extraordinary steps to protect themselves from secessionist, racist, and anti-democratic forces.

INTRODUCTION

The Fifteenth Amendment is the forgotten Reconstruction Amendment. Even though it prohibited racial discrimination in voting and enfranchised black men nationwide,[1] "the Fifteenth [Amendment] plays only a minor role in modern constitutional law."[2] The Fifteenth Amendment has receded from view because its constitutional protections have been usurped by the Fourteenth Amendment and because most voting rights litigation is brought under the Voting Rights Act (VRA).[3] As such, a host of doctrinal questions remain unanswered concerning the Fifteenth Amendment.[4] Although legal scholarship on the Fifteenth Amendment is by no means non-existent, it "has been relatively rare."[5]

---

1 U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

2 ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 170 (2019).

3 *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1564–65 (2020) [hereinafter Crum, *Superfluous*].

4 *See id.* at 1560–63 (discussing uncertainty over whether the Fifteenth Amendment has an intent requirement or encompasses vote-dilution claims); *see also id.* at 1623–26 (arguing that *Katzenbach*'s rationality standard governs Congress's Fifteenth Amendment enforcement authority).

5 Kurt Lash, *The Fight for Black Suffrage: Documenting the History of the Fifteenth Amendment*, ELECTION L. BLOG: ELB BOOK CORNER (Aug. 11, 2021), https://electionlawblog.org/?p=123855 [https://perma.cc/CV5U-TRNY].

Several scholars, myself included, have written on the Fifteenth Amendment. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 928–55 (1998) (arguing that *Shaw* claims are inconsistent with the Fifteenth Amendment); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1425 (2002) ("[T]he Fifteenth Amendment should not be viewed as merely adding the right to vote to the list of other rights to be protected under the Constitution and . . . the Fourteenth Amendment."); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 314–20 (2020) [hereinafter Crum, *Reconstructing*] (criticizing the Court's treatment of racially polarized voting as inconsistent with the Fifteenth Amendment's historical context); Crum, *Superfluous*, *supra* note 3, at 1602–17 (discussing the Fortieth Congress's decision to pass a constitutional amendment rather than a nationwide suffrage statute); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 78 (Johns Hopkins Paperbacks ed. 1969) (arguing that the Fifteenth Amendment's "primary objective [was] the enfranchisement of the northern Negro"); Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 440–42 (1985) (arguing that the Fifteenth Amendment encompasses racial vote dilution claims and permits race-conscious remedies); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 142–56

Kurt Lash's new collection of primary sources cataloguing the adoption of the Reconstruction Amendments puts the Fifteenth Amendment on more equal footing.[6] This comprehensive collection should encourage scholarly research and judicial inquiry into our nation's constitutional commitment to ending racial discrimination in voting. As part of this symposium honoring Lash's magisterial and thorough collection, this Essay uses sources highlighted in his collection to contribute to a long-standing debate in constitutional theory concerning the lawfulness of the Reconstruction Amendments' adoptions.

This debate stems from various irregularities associated with these Amendments' drafting and ratification and whether these deficiencies violated Article V's requirements that amendments pass Congress by a two-thirds vote of both houses and be ratified by three-fourths of the States. The Congresses that passed the Reconstruction Amendments excluded the Southern States. Moreover, the Southern States' ratifications were arguably coerced by these exclusions and by the imposition of fundamental conditions on their readmission to the Union. Congress also played fast-and-loose with how it counted States for purposes of Article V's denominator: the rump Thirty-Ninth Congress counted the Southern States for purposes of ratifying the Thirteenth Amendment while excluding those States from representation when it passed the Fourteenth Amendment. Finally, two Northern States rescinded their ratifications prior to the Fourteenth Amendment's addition to the Constitution.[7]

This Essay engages with the historical and scholarly theories developed to justify these irregularities. These theories can be divided into so-called loyal-denominator, reduced-denominator, and full-denominator theories—that is, they differ in how they treat the Southern States for purposes of Article V.

(1990) [hereinafter MALTZ, CIVIL RIGHTS] (claiming that the Fifteenth Amendment prohibits only facially discriminatory laws).

Recent scholarship on Section Two of the Fourteenth Amendment has also helped shed light on the similarly worded Fifteenth Amendment. *See generally* 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 (2004); Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774 (2018); Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149 (2015); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279; Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2015).

6 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 1]; and 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 2].

7 *See infra* Section I.A.

During Reconstruction, several Radical Republicans claimed that the Southern States should not be counted for Article V's "denominator" and therefore only the ratifications of loyal States mattered.[8] The Radicals' theory was never clearly endorsed by the Reconstruction Congress for purposes of Article V.[9] In modern times, Akhil Amar[10] and Christopher Green[11] have endorsed the Radicals' approach. Because the scholarly discussion has focused on the Thirteenth and Fourteenth Amendments, these theories have not grappled with how to count readmitted Southern States for purposes of the Fifteenth Amendment's ratification.[12] Accordingly, I clarify this debate by differentiating between a loyal-denominator theory, which looks only at those States that stayed in the Union, and a reduced-denominator theory, which incorporates readmitted States.

Turning to full-denominator theories, modern scholars have defended the Reconstruction Congress's actions.[13] Drawing on his dualist theory of constitutional change, Bruce Ackerman contends that the Thirteenth and Fourteenth Amendments violated Article V's requirements. But for Ackerman, this is a feature, not a bug: Ackerman argues that Congress's questionable compliance with Article V is evidence of higher lawmaking, akin to what occurred

---

8 *See infra* subsection I.B.1.

9 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 368 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION] (noting that the reduced-denominator theory "was never the official policy of the Reconstruction Congress").

10 *See id.* at 367 (calculating a "true-blue" ratification for the Thirteenth and Fourteenth Amendments).

11 *See* Christopher R. Green, *The History of the Loyal Denominator*, 79 LA. L. REV. 47, 50 (2018) [hereinafter Green, *Loyal Denominator*] ("The disloyal South was not entitled to resume its Article I and Article V powers . . . until Congress was satisfied with reestablished Southern loyalty.").

12 *See infra* notes 150–54 and accompanying text (discussing how Amar and Green treat Tennessee for purposes of the Fourteenth Amendment's ratification).

13 Since Ackerman reignited this debate, a considerable literature has developed on the irregular adoption of the Reconstruction Amendments. *See* Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 25–26 (2008); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1627 (2013); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 383–84 (2008); Green, *Loyal Denominator*, *supra* note 11, at 48; Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL'Y 167, 168 (2017) [hereinafter Green, *Normative Defenses*]; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 293 (2002); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015, at 154–87 (reprt. ed. 2016); Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1747–48 (2005); David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2347–51 (2021); Douglas H. Bryant, Comment, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 555–56 (2002).

during the New Deal.[14] For his part, Akhil Amar has also articulated a full-denominator theory that justifies Congress's exclusion of the South and its use of fundamental conditions by pointing to Article IV's Guarantee Clause.[15] Finally, John Harrison draws on international law principles to argue that de facto governments can make decisions that bind their successors.[16] Notwithstanding these scholars' lengthy discussions of this topic, their arguments virtually ignore the Fifteenth Amendment.[17]

Although the Reconstruction Amendments shared some irregularities,[18] the Fifteenth presents unique problems. Consider New York, which purported to rescind its ratification.[19] Although this problem emerged during the Fourteenth Amendment's ratification,[20] it was either tardy or mooted, depending on your theory.[21] Next up is Indiana, where the state legislature lacked a quorum when it ratified

14 *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 100–252 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]; *infra* subsection I.B.2.

15 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 364–80; *see also* Akhil Reed Amar, Essay, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 111–15 (2013) (analogizing the VRA's preclearance regime to the Fourteenth Amendment's ratification process); Akhil Reed Amar, Lindsey Ohlsson Worth & Joshua Alexander Geltzer, *Reconstructing the Republic: The Great Transition of the 1860s*, *in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 98, 98–123 (Austin Sarat ed., 2012) (defending the Fourteenth Amendment's ratification); *infra* subsection I.B.3.

16 *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 423–57 (2001); *infra* subsection I.B.4.

17 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 234–38 (characterizing the election of 1868 as a consolidating event even though the Fifteenth Amendment had not yet been proposed); *id.* at 475 n.15 ("There are problems with the Fifteenth Amendment as well, but an elaborate discussion will not advance my general argument."); AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367 (calculating a true-blue ratification for only the Thirteenth and Fourteenth Amendments); *id.* at 601 n.26 (asserting in passing that "all the Reconstruction Amendments" satisfy "a true-blue-only approach"); Harrison, *supra* note 16, at 378 n.12 ("Although this Article is about all three Reconstruction amendments, it will be necessary to discuss in detail only two, the Thirteenth and the Fourteenth. . . . The objections to the Fourteenth and Fifteenth Amendments are thus the same . . . ."); *see also* Colby, *supra* note 13, at 1664 n.218 ("Actually, the other Reconstruction Amendments may also be susceptible to some of the objections raised here, but this Article does not address them."); Green, *Loyal Denominator*, *supra* note 11, at 49 n.3 (mentioning the Fifteenth Amendment only once and in reference to the 1872 Democratic Party Platform's acquiescence in its ratification).

18 For example, the amendments were passed by rump Congresses. *See infra* subsection II.A.1.

19 *See Ratification of the Fifteenth Amendment Rescinded*, N.Y. TIMES, Jan. 6, 1870, at 1, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 585–86.

20 *See* S.J. Res. 4, 92d Leg. (N.J. 1868) (enacted), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 408–11 (discussing New Jersey's rescission in February and March 1868); *Legislature Rescinds Prior Ratification*, PLAIN DEALER, Jan. 12, 1868, at 1, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 404 (noting Ohio's rescission in January 1868).

21 *See infra* notes 120–21 and accompanying text.

the Fifteenth Amendment.[22] And then there's Georgia. After being readmitted to the Union in 1868, Georgia excluded black officeholders from its state legislature, admitted ex-rebels to the state legislature, and refused to ratify the Fifteenth Amendment. Congress, in turn, expelled Georgia and required the ratification of the Fifteenth Amendment as a new fundamental condition for its *second* readmission.[23] Given all of these uncertainties, Secretary of State Hamilton Fish delayed proclaiming the Fifteenth Amendment's ratification for several weeks, waiting until March 30, 1870, to do so.[24] These irregularities were raised—and rejected—during Reconstruction.[25]

Under any theory—whether loyal, reduced, or full denominator—at least one of these questions must be resolved: namely, whether rescissions are valid; whether a Northern rump state legislature's ratification is acceptable; and whether a Reconstructed Southern State can be kicked out of the Union and required to ratify an amendment for its second readmission. The addition of the Fifteenth Amendment to this debate poses the most serious problem for the loyal-denominator theory because *both* Indiana's and New York's ratifications are necessary. Overall, the Fifteenth Amendment's ratification is far trickier than the literature has assumed.

Turning to the contemporary academic theories, the Fifteenth Amendment significantly undermines Ackerman's dualist interpretation of Reconstruction, as his constitutional moment ends *before* Congress even passes the Fifteenth Amendment. By contrast, Amar's Guarantee Clause approach and Harrison's de facto government account are relatively unscathed by the Fifteenth Amendment.

Notwithstanding these irregularities, the Fifteenth Amendment is on solid constitutional ground. Because rescissions are invalid and

---

22 *See* 11 BREVIER LEGISLATIVE REPORTS OF THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, SPECIAL SESSION OF 1869, at 239–44 (1869), *as reprinted in* LASH VOL. 2, *supra* note 6, at 573–74.

23 *See* LASH VOL. 2, *supra* note 6, at 545.

24 *See* CONG. GLOBE, 41st Cong., 2d Sess. 2289–90 (1870), *as reprinted in* LASH VOL. 2, *supra* note 6, at 595–97 (proclamation); *see also The Amendment Complete*, BOS. DAILY J., Feb. 4, 1870, at 2, *as reprinted in* LASH VOL. 2, *supra* note 6, at 593–94 (arguing that the Fifteenth Amendment has been ratified); LASH VOL. 2, *supra* note 6, at 545 (focusing on New York and Indiana's problematic ratifications as cause of delay); GILLETTE, *supra* note 5, at 84–85 tbl.2 (focusing on New York and Georgia's problematic ratifications as reason for delay).

25 *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3480–85 (1870) (statement of Sen. Vickers (D-MD)) (providing a laundry list of objections); Wood v. Fitzgerald, 3 Or. 568, 578 (1870) (noting dispute over New York's rescission but stating that "for even if the state of New York has the power [to rescind its ratification], the necessary number of states ratifying the [Fifteenth] amendment still remains").

because Congress unequivocally counted Indiana's ratification, the Fifteenth Amendment satisfied Article V's three-fourths requirement. To be clear, no one seriously claims that the Reconstruction Amendments should be stricken from the Constitution.[26] Rather, this debate is a foil for broader interpretive conversations about the nature of constitutional change and popular sovereignty. On this front, the Fifteenth Amendment represents a crowning achievement: not only did it enfranchise black men nationwide, but it was also the first constitutional provision whose adoption is clearly attributable to black men under the reduced- and full-denominator theories. Furthermore, the adoption of the Reconstruction Amendments demonstrates that democracies must sometimes make hard decisions to protect themselves from secessionist, racist, and antidemocratic forces. The Reconstruction Framers' actions foreshadow modern theories for safeguarding democracy, such as militant democracy, political process theory, and constitutional hardball.

This Essay is organized as follows. Part I begins by discussing the history of the Thirteenth and Fourteenth Amendments' ratification processes and then outlines the theories of the Reconstruction Framers, Ackerman, Amar, and Harrison as they relate to those amendments. Part II excavates the unique problems associated with the Fifteenth Amendment's adoption. Part III discusses how the Fifteenth Amendment's irregular ratification complicates the leading theories. Part IV defends the Fifteenth Amendment's validity, both legally and normatively.

I. THE LAWFULNESS OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS

Civil wars are messy affairs—and the constitutional changes that frequently follow them are as well. Rather than adopt an entirely new

26 The Court has made clear that "[t]he suggestion that the Fifteenth [Amendment] was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained." Leser v. Garnett, 258 U.S. 130, 136 (1922); *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1872) (surveying the recent ratifications of the Reconstruction Amendments and not questioning their validity). Furthermore, numerous state laws have been invalidated under the Fifteenth Amendment and, conversely, several federal laws have been upheld as valid exercises of Congress's Fifteenth Amendment enforcement authority. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (invalidating Grandfather Clause); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the VRA's original coverage formula and preclearance regime). Finally, several voting rights amendments have been adopted that presume the Fifteenth's validity. *See* U.S. CONST. amend. XIX (sex discrimination); *id.* amend. XXIV (poll tax); *id.* amend. XXVI (age discrimination).

constitution,[27] the United States kept its founding document but radically altered it with three constitutional amendments. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment endorsed birthright citizenship, constitutionalized the Civil Rights Act of 1866, created an apportionment penalty for disenfranchising men, barred former Confederates from holding office, and repudiated the Confederate war debt. The Fifteenth Amendment granted black men the right to vote nationwide. All three amendments empowered Congress to enforce their provisions through appropriate legislation.

Article V provides that Congress may "propose Amendments" when "two thirds of both Houses shall deem it necessary" and those amendments "shall be valid . . . when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof."[28] Article V further provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[29] The irregularities concerning the Reconstruction Amendments' ratifications can be traced to the South's *voluntary* departure from Congress from 1861 through its defeat in early 1865 and its subsequent *involuntary* exclusion by the Reconstruction Congress seeking to preserve the spoils of war and advance the civil and political rights of blacks. Whether and how Congress complied with Article V when it passed and recognized the Thirteenth and Fourteenth Amendments has attracted significant scholarly attention.

This Part starts with a brief history of the ratifications of the Thirteenth and Fourteenth Amendments for those unfamiliar with the tumultuous events of the Civil War and Reconstruction. It then unpacks the theories of the Radical Republicans, Ackerman, Amar, and Harrison for why those amendments are constitutionally valid.

A. The Irregular Adoption of the Thirteenth and Fourteenth Amendments

In 1860, Abraham Lincoln was elected president without winning any Southern State. Representing the relatively new Republican Party, Lincoln advocated against the expansion of slavery into the territories, but he was not yet an abolitionist. Before Lincoln's inauguration in March 1861, seven States in the Lower South purported to secede from

27 Jason Mazzone has argued that the Reconstruction Amendments amount to "a re-founding, the result of a second revolution" that "ushered in a new regime, creating a new Constitution." Mazzone, *supra* note 13, at 1808 (footnotes omitted).

28 U.S. CONST. art. V. Article V also provides for a process by which two-thirds of the state legislatures "shall call a Convention," *id.*, but that method has never been used. *See* Pozen & Schmidt, *supra* note 13, at 2319 n.2. For a list of open questions concerning Article V, see *id.* at 2329–34.

29 U.S. CONST. art. V.

the Union and declared a Confederate States of America. Following the Confederacy's attack on Fort Sumter in April 1861, four Upper South States joined the rebellion.[30]

When the Southern States seceded, most of their Representatives and Senators left too, thereby substantially increasing the Republicans' majority in a rump Thirty-Seventh Congress.[31] When the Thirty-Eighth Congress convened on December 7, 1863, the South was largely absent once again.[32] Accordingly, during the war's early years, the South abandoned its right to representation in Congress.

Throughout the Civil War, Lincoln and the Republican Party claimed that secession was illegal and that the South had never left.[33] This position, however, created legal and political problems once the South was defeated and requested representation in Congress. Thus, the controversy surrounding the Reconstruction Amendments'

30 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 353–55. The Confederate States were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. 1 THE ENCYCLOPEDIA BRITANNICA 818 (11th ed. 1911).

31 *See* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 268 (2021). The sole Southern Senator to stay behind was Andrew Johnson. *See* Green, *Loyal Denominator*, *supra* note 11, at 69.

Some new members joined the Thirty-Seventh Congress from loyal or reconquered portions of the South. *See* Harrison, *supra* note 16, at 384–85 (discussing Louisiana's representatives from the reconquered First and Second congressional districts near New Orleans); David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1218 (2006) ("The Thirty-seventh Congress had seated representatives from Louisiana and Tennessee and both senators and representatives from Virginia."). Most importantly, a loyal convention of Virginians from the northwestern portion of the state appointed Waitman Willey and John Carlile as Virginia's Senators, and they were seated. *See id.* at 1202, 1210, 1218. Willey introduced the motion that ultimately authorized West Virginia to secede from Virginia and become its own State in 1863. *See id.* at 1201–03; Kesavan & Paulsen, *supra* note 13, at 297–301.

32 *See* LASH, VOL. 1, *supra* note 6, at 373; BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, at 166–69 (2005), *as reprinted in* LASH, VOL. 1, *supra* note 6, at 379–84. As in the previous Congress, a loyal "Virginia" government appointed Senators. *See id.* at 383. However, Congress rejected other "[c]laimants from Arkansas, Louisiana, and Virginia." Currie, *supra* note 31, at 1218.

33 *See* Colby, *supra* note 13, at 1682 ("[T]he North's entire theory of the war had been that the South had never legally seceded at all . . . ."); Kesavan & Paulsen, *supra* note 13, at 311 ("Throughout the war, Lincoln remained remarkably consistent on his core constitutional theory of the unconstitutionality of secession . . . ."); *see also* Texas v. White, 74 U.S.(7 Wall.) 700, 725 (1869) ("The Constitution . . . looks to an indestructible Union, composed of indestructible States.").

ratification processes is intimately linked to theories of the Union advanced during the Civil War.[34]

1. The Thirteenth Amendment

Following years of debate over abolition and incremental steps toward that noble goal,[35] the Thirty-Eighth Congress passed the Thirteenth Amendment. The Senate did so in April 1864,[36] and a lame-duck House followed suit in January 1865.[37] Given that the South had not yet surrendered, it was not part of this vote.[38] As such, "the Thirteenth Amendment . . . won only the support of two-thirds of the voting members in each house, as distinct from two-thirds of the total membership, including absent and excluded members."[39] This threshold, however, had been deemed sufficient for previous constitutional amendments.[40] The Thirteenth Amendment was presented to and signed by President Lincoln, even though his signature was unnecessary under Article V.[41] A constitutional amendment was thus sent to the States in the midst of a civil war.[42]

---

34 *See* KYVIG, *supra* note 13, at 163 ("Lincoln's unwavering insistence from the moment of his inauguration that the Union remain unbroken, that states could not leave and had not left it, led directly to this problem of the ratification majority.").

35 *See id.* at 159 (discussing the Emancipation Proclamation); AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 356 (discussing Congress's compensated abolition of slavery in the District of Columbia); Kesavan & Paulsen, *supra* note 13, at 301 (observing that Congress conditioned West Virginia's admission to the Union on the abolition of slavery); MASUR, *supra* note 31, at 348 (reframing abolitionism as our nation's "first civil rights movement"); Crum, *Superfluous*, *supra* note 3, at 1581–82 (discussing constitutional two-steps and the Thirteenth Amendment).

36 CONG. GLOBE, 38th Cong. 1st Sess. 1479–83, 1483–90 (1864), *as reprinted in* LASH, VOL. 1, *supra* note 6, at 434–42.

37 *See* CONG. GLOBE, 38th Cong., 2d Sess. 478–84, 523–31 (1865), *as reprinted in* LASH, VOL. 1, *supra* note 6, at 485–95.

38 The Thirty-Eighth Congress still had a quorum even if the South was included in the denominator. *See* Harrison, *supra* note 16, at 378 n.11; *see also* U.S. CONST. art. I, § 5 (defining quorum as a majority).

39 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367.

40 *See id.* (explaining that similar thresholds were satisfactory for the Bill of Rights and the Twelfth Amendment). Vice President Hannibal Hamlin rejected a challenge to the Thirteenth Amendment's passage in the Senate on the grounds that two-thirds of voting members suffices under Article V. *See* CONG. GLOBE, 38th Cong. 1st Sess. 1479–83, 1487–90 (1864), *as reprinted in* LASH, VOL. 1, *supra* note 6, at 443; *see also* U.S. CONST. art I, § 5 (providing that "a Majority of each [house] shall constitute a Quorum to do Business").

41 *See* LASH, VOL. 1, *supra* note 6, at 378; *see also* Harrison, *supra* note 16, at 389 & n.79 (observing that the Thirteenth Amendment is the sole amendment to be presented to and signed by a president); Pozen & Schmidt, *supra* note 13, at 2348 (noting that President James Buchanan signed the unratified Corwin Amendment, which would have divested Congress of authority to regulate or abolish slavery within States).

42 *See* LASH, VOL. 1, *supra* note 6, at 378.

Shortly thereafter in February 1865, Congress counted the electoral votes from the 1864 presidential election.[43] Acting consistent with its position vis-à-vis the Thirteenth Amendment's passage, Congress rejected electors sent by Louisiana and Tennessee on the grounds that the South was not entitled to vote in the Electoral College.[44] From a practical standpoint, this action was a non-event, as Lincoln won the presidency regardless of the South's exclusion.[45]

As Southern States fell under Union control, reconstituted Southern governments sought to rejoin the Union, but Lincoln declined to recognize them.[46] Tragically, Lincoln was assassinated shortly after the Confederacy's formal surrender at Appomattox. Lincoln's death would have profound ramifications for Reconstruction and put Congress in the driver's seat.[47]

Although President Andrew Johnson's handling of Reconstruction would prove disastrous and ultimately end in his impeachment, he continued Lincoln's policy against recognizing the Southern governments. Johnson appointed governors who, in turn, called for loyalist conventions that barred slavery and rejected secession.[48] Johnson oversaw Reconstruction for seven months given the late starting date of the Thirty-Ninth Congress.[49] Johnson also pressured the Southern States to ratify the Thirteenth Amendment.[50]

---

43 Prior to the Twentieth Amendment, Presidential and Congressional terms ended in March instead of January. *See* U.S. CONST. amend. XX, § 1; BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 116–19 (2005).

44 *See* Joint Resolution Declaring Certain States Not Entitled to Representation in the Electoral College, no. 12, 13 Stat. 567, 567–68 (1865); Currie, *supra* note 31, at 1222–24.

Congress followed this precedent in the 1868 election when it excluded the electoral votes of Mississippi, Texas, and Virginia, as those States had not yet been readmitted. *See* Green, *Loyal Denominator*, *supra* note 11, at 83 n.118; *see also infra* subsection II.B.3. And in the 1872 election, Congress declined to count the electoral votes from Arkansas and Louisiana given Klan-related violence and other election irregularities. *See* EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 112–15 (2016).

45 *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 81 (2020) ("Those 212 electoral votes gave Lincoln a landslide in terms of the electoral votes actually cast that year: only 234, because the South did not participate. But even if all the Confederate states were counted against Lincoln, his 212 votes still would have been a strong Electoral College majority.").

46 Harrison, *supra* note 16, at 393–94.

47 *See id.* at 461.

48 *See* Colby, *supra* note 13, at 1642–43.

49 ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 138.

50 Although not a fundamental condition imposed by Congress, Johnson eventually made clear that he wanted the Southern States to ratify the Thirteenth Amendment before their readmission to the Union. *See id.* at 141–50 (discussing the evolution of Johnson's

On December 4, 1865, the Thirty-Ninth Congress opened its first session. By this point, twenty-five States had ratified the Thirteenth Amendment: nineteen Northern States and six Southern States.[51] Whether the Thirteenth Amendment had been ratified depended on the relevant denominator, as there were thirty-six total States in the Union but only twenty-five loyal States.[52] Indeed, Senator Charles Sumner (R-MA) introduced a resolution proclaiming that the Thirteenth Amendment had been ratified based on a loyal-denominator theory, asserting that "it belongs to the two Houses of Congress to determine when such ratification is complete . . . ."[53]

Rather than resolve that question, the Thirty-Ninth Congress confronted whether to seat Representatives and Senators from the South. It had quickly become apparent that the South's defeat did not mean its contrition. In fact, many Southern officials had simply changed out of their Confederate uniforms.[54] Starting in summer 1865, Southern States and localities enacted the notorious Black Codes, which were designed to establish a de facto system of slavery using strict vagrancy and labor laws.[55] Recognizing that the Union's victory on the battlefield was at risk, the Thirty-Ninth Congress excluded the South.[56] On this point, Congress relied on its Article I authority to "Judge . . . the . . . Qualifications of its own Members,"[57] and, in any event, the Thirty-Ninth Congress had a quorum in both houses notwithstanding the South's exclusion.[58]

---

pressure on the Southern States to ratify); LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 88 (2015) ("President Johnson made explicit assurances to the representatives of former Confederate states to obtain the required votes."); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 276 (1988) ("A precedent existed for requiring a state to ratify an amendment to gain representation in Congress, for Johnson had done precisely the same thing with regard to the Thirteenth.").

51 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 366.

52 *See id.*

53 CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865); *see also* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 150–51 (providing context for Sumner's argument).

54 *See* FONER, *supra* note 50, at 196–98 (observing that the South sent several former Confederates, including Vice President Alexander H. Stephens, to Congress).

55 *See id.* at 198–201.

56 *See* Harrison, *supra* note 16, at 399, 402.

57 U.S. CONST. art. I, § 5; *see also* Harrison, *supra* note 16, at 453 (discussing this provision's relevance to Reconstruction).

58 *See* Harrison, *supra* note 16, at 398 n.122; *see also* U.S. CONST. art. I, § 5 (providing that "a Majority of each [house] shall constitute a Quorum to do Business").

On the horizon loomed an even larger threat: once the Thirteenth Amendment was ratified, the Constitution's infamous Three-Fifths Clause was effectively null and void. The perverse consequence was that the political power of Southern whites would *increase* after the 1870 census, as freedpersons would count as full persons for purposes of apportionment even though they could *not* vote. *See* Crum, *Superfluous*, *supra* note 3, at 1587–88. At the

In the ensuing days, Georgia, North Carolina, and Oregon ratified the Thirteenth Amendment.[59] The two Southern States did so potentially in response to Congress's exclusion of Southern representatives.[60] These ratifications put the Thirteenth Amendment over the top.

On December 18, 1865, Secretary of State William Seward declared that the Thirteenth Amendment had been ratified. In his proclamation, Seward specifically stated that "the whole number of states of the United States is thirty-six."[61] Seward identified "twenty-seven states" as ratifying the Thirteenth Amendment.[62] Seward's list, therefore, included the Southern States as part of the Article V numerator and denominator, expressly rejecting the Radicals' loyal-denominator theory.[63] Notwithstanding an attempt by Radical Congressman Thaddeus Stevens (R-PA) to endorse Sumner's loyal-denominator theory in the House, Congress acquiesced to Seward's count.[64]

2. The Fourteenth Amendment

The Thirty-Ninth Congress was one of the most powerful and accomplished Congresses in our nation's history. Following the Thirteenth Amendment's ratification, Congress invoked its new enforcement authority to pass the Civil Rights Act of 1866.[65] Designed

---

time, it was estimated that the South would gain an additional fifteen seats in the House. *See id.* at 1588 & n.247. Although mid-decade redistricting was common at this time, *see* Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1392 (2020), congressional apportionment occurs only after each decennial census, *see* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1923 n.6 (2018). As such, the earliest that the South would have been entitled to more seats in Congress was after the 1872 election. *See* EDWARDS, *supra* note 50, at 104.

59 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 366–67.

60 *See id.* at 366 (noting this possibility but discounting it).

61 13 Stat. 774 (1865), *as reprinted in* LASH, Vol. 1, *supra* note 6, at 561.

62 *Id.* These States are Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. *Id.* I have reordered Seward's list to be alphabetical for ease of reading. California ratified the day *after* Seward's proclamation. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 366–67 (noting that California ratified on December 19).

63 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 153 (describing Seward's proclamation as "a remarkably provocative act" that "forthrightly reject[ed] the view of ratification as an exclusively Northern affair").

64 *See id.* at 155–57.

65 *See* Crum, *Superfluous*, *supra* note 3, at 1582.

to eliminate the Black Codes,[66] the Civil Rights Act stayed true to its name and protected civil—but not political—rights.[67] The Act's constitutionality, however, was hotly contested, including by leading Republicans like Representative John Bingham.[68] Congress, therefore, proceeded to pass the Fourteenth Amendment to "provide an incontrovertible constitutional foundation for the act."[69]

In June 1866, Congress approved the Fourteenth Amendment.[70] As relevant here, the Fourteenth Amendment received the requisite two-thirds vote of *present* members, but "only because the elected congressional contingents from the Southern states had not been permitted to vote."[71] It was also a partisan affair: no Democrat in either house of Congress voted for the Fourteenth Amendment.[72] The battle then shifted to the States.

The Southern States, with the exception of Tennessee, rejected it by wide margins.[73] The South's recalcitrance is unsurprising given that the Southern electorate remained entirely white.[74] For its part, the Tennessee state legislature obtained a quorum "only through the use of force against opposition legislators."[75] As a reward, Tennessee was swiftly readmitted to the Union in July 1866.[76]

---

66 *See* FONER, *supra* note 50, at 244.

67 The protected rights included "the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law." Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1027 (1995); *see also id.* at 1016 (explaining that the Reconstruction Framers believed in a "tripartite division of rights . . . between civil rights, political rights, and social rights").

68 *See* GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 120 (2013); *see also* Currie, *supra* note 13, at 396 (sharing Bingham's concerns).

69 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 362.

70 *See* CONG. GLOBE, 39th Cong., 1st Sess. 3026, 3031–42 (1866), *as reprinted in* LASH, Vol. 2, *supra* note 6, at 211 (Senate); CONG. GLOBE, 39th Cong., 1st Sess. 3148–49 (1866), *as reprinted in* LASH, Vol. 2, *supra* note 6, at 220 (House).

71 Colby, *supra* note 13, at 1643.

72 Crum, *Reconstructing*, *supra* note 5, at 301.

73 *Id.* at 300.

74 *Id.*

75 Colby, *supra* note 13, at 1644; *see also id.* at 1644 n.89 (noting that opposition legislators were "tracked down, arrested, and dragged to the legislative chamber"). Tennessee's Speaker of the House responded by "refus[ing] to sign a certificate of ratification . . . but Congress simply ignored his objections." *Id.* This spectacle "raise[d] legitimate doubts about whether [Tennessee's] people were really in favor" of ratification. *Id.* at 1644.

76 Harrison, *supra* note 16, at 404 (noting that Tennessee ratified within a month and Congress "[e]ven more promptly" readmitted it to the Union). The Joint Resolution readmitting Tennessee mentioned, *inter alia*, that the State had ratified the Thirteenth and

While the Fourteenth Amendment was met with near-uniform Southern resistance, it fared far better in the North. Connecticut, New Hampshire, New Jersey, Oregon, and Vermont quickly ratified.[77] Then came the November 1866 elections. Running on a platform to ratify the Fourteenth Amendment, the Republicans won in a landslide.[78] Shortly thereafter, fourteen Northern States ratified by "consistently wide margins."[79] Only the Border States with recent histories of slavery rejected the amendment.[80]

When the Thirty-Ninth Congress convened for its lame-duck session in early 1867, the Republicans' resounding victory in the 1866 election had "strengthened . . . the radical wing of the party."[81] For a mix of altruistic and partisan reasons, Congress moved to enfranchise black men living in areas under federal control.[82] Congress started by banning racial discrimination in voting in the District of Columbia and the federal territories.[83]

In addition, Congress required Nebraska to adopt black male suffrage as a so-called fundamental condition for statehood.[84] Although fundamental conditions had been used in the past,[85] this was the first time ever that Congress would tie the right to vote to admission.[86] The legality of these fundamental conditions was contested, and there were serious doubts in the Republican caucus

---

Fourteenth Amendments. *See* Joint Resolution Restoring Tennessee to her Relations to the Union, no. 73, 14 Stat. 364 (1866).

77 KYVIG, *supra* at 13, at 170–72.

78 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 178–82.

79 KYVIG, *supra* note 13, at 172. Massachusetts would ratify in March 1867, after the First Reconstruction Act's passage. *Id.*

80 *Id.* (discussing Delaware, Kentucky, and Maryland). Maryland's rejection occurred after the passage of the First Reconstruction Act. *See id.* at 172–73.

81 MALTZ, CIVIL RIGHTS, *supra* note 5, at 123.

82 *See* Crum, *Superfluous*, *supra* note 3, at 1597–1602 (discussing Republicans' motives for enfranchising black men).

83 *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867); An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867).

84 An Act for the Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867).

85 *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 226–27 (2021) (conditioning Ohio's admission in 1802 on its relinquishment of claims to federal land within its borders); Kesavan & Paulsen, *supra* note 13, at 301 (conditioning West Virginia's admission on the abolition of slavery).

86 *See* MALTZ, CIVIL RIGHTS, *supra* note 5, at 127.

about their long-term viability.[87] Furthermore, Congress did *not* mandate that Nebraska ratify the Fourteenth Amendment.[88]

Most importantly, Congress passed the First Reconstruction Act, which applied to the Southern States except Tennessee.[89] The Act imposed military rule and declared the existing governments to be null and void—the very Southern governments that had ratified the Thirteenth Amendment.[90]

To ensure the loyalty of the next governments, the First Reconstruction Act reshaped the Southern body politic. Congress mandated black male suffrage,[91] predicting that black voters would defend their own interests and overwhelmingly support the Republican Party.[92] Congress also disenfranchised former Confederates.[93] Congress, moreover, directed that new state constitutions have universal male suffrage.[94]

The First Reconstruction Act inaugurated "a stunning and unprecedented experiment in interracial democracy."[95] At the time,

87 *See id.* (explaining that Republican Senator Jacob Howard was "one of the most persistent critics of the idea that Congress could set suffrage-related conditions for admission to statehood that would bind erstwhile territories after the admission process was completed"); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1162–64 (2016) (discussing these doubts and their role in the passage of the Fifteenth Amendment).

88 *See* An Act for the Admission of the State of Nebraska into the Union, ch. 36, 14 Stat. 391 (1867).

89 *See* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, Preamble, 14 Stat. 428, 428 (1867). By this point, Tennessee had been readmitted to the Union and had already ratified the Fourteenth Amendment and enfranchised black men. *See* Crum, *Superfluous*, *supra* note 3, at 1595 n.300; *supra* notes 73–76 and accompanying text.

90 *See* Harrison, *supra* note 16, at 405 (describing the First Reconstruction Act); ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 113 (asking "why Seward was right to count these white governments when they said Yes on the Thirteenth Amendment but why Congress could destroy these governments in 1867 when they said No" to the Fourteenth Amendment).

91 An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867).

92 *See* Amar & Brownstein, *supra* note 5, at 939; Crum, *Reconstructing*, *supra* note 5, at 300–01.

93 *See* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867) (permitting "disfranchise[ment] for participation in the rebellion"); 1 HANES WALTON, JR., SHERMAN C. PUCKETT & DONALD R. DESKINS, JR., THE AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY 244 tbl.13.7 (2012) (showing that over 47,000 ex-Confederates were disenfranchised in Florida, Georgia, North Carolina, South Carolina, and Virginia).

94 *See* FONER, *supra* note 50, at 276.

95 *Id.* at 278.

the overwhelming majority of black Americans lived in the South.[96] Moreover, "Black voters . . . constituted effective voting majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South Carolina—given their high registration rates and the disenfranchisement of ex-Confederates pursuant to the First Reconstruction Act."[97] Robust black turnout ranging from 70% to 90% also helped reshape Southern politics.[98]

Finally, the First Reconstruction Act imposed the fundamental condition that the Southern States ratify the Fourteenth Amendment prior to their readmission to the Union.[99] Indeed, the Act delayed readmission until the Fourteenth Amendment "shall have become a part of the Constitution . . . ."[100]

Meanwhile, with nineteen Northern States having ratified by the end of February 1867, the question arose whether the Fourteenth Amendment had already become part of the Constitution.[101] After all, nineteen loyal States divided by twenty-five loyal States satisfies the three-fourths threshold. The House repeatedly requested updates from Seward in early 1867, but Seward's figures were artificially low because the official paperwork from several States had not yet arrived.[102] Congress, however, did not declare that the Fourteenth Amendment had been ratified based on a loyal-denominator theory.[103]

By spring 1868, "[w]ith every non-Confederate state except Democratically controlled California . . . having acted, the outcome depended upon the South."[104] Given the newly empowered black electorate, the Southern State legislatures had changed dramatically.

96 *See* Crum, *Reconstructing*, *supra* note 5, at 302 (showing that the First Reconstruction Act and the enfranchisement of black men in the federal territories and the District of Columbia expanded the right to vote to approximately 80% of black men).

97 *Id.* at 302–03.

98 *See id.* at 303–04.

99 *See* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867). Recall that Johnson also put pressure on Southern States to ratify the Thirteenth Amendment. *See supra* note 50 and accompanying text.

100 An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867). In 1868, Congress would impose the fundamental condition that the Southern States not backslide by disenfranchising black men. *See* MALTZ, CIVIL RIGHTS, *supra* note 5, at 140.

101 For a helpful table with ratifying dates, see Green, *Loyal Denominator*, *supra* note 11, at 55.

102 *See id.* at 91–92.

103 *See id.* at 92.

104 KYVIG, *supra* note 13, at 173.

Over the next few weeks, six Southern States ratified the Fourteenth Amendment.[105]

Around the same time, trouble was brewing in the North. In January 1868, Ohio purported to rescind its ratification.[106] The next month, New Jersey passed a law rescinding its ratification, but the governor vetoed that law on the grounds that rescission was unlawful. New Jersey's state legislature responded by overruling the veto.[107] Thus, the issue of rescission arose for the first time in the Reconstruction Amendments' ratification saga.

On July 20, 1868, Seward issued his first proclamation recognizing the Fourteenth Amendment's ratification. Seward's list proceeded in a piecemeal fashion. He began by identifying the twenty-two Northern States plus Tennessee that had ratified the Amendment.[108] Seward then separately listed the six Reconstructed Southern States.[109] Next, Seward flagged that Ohio and New Jersey had purported to rescind their ratifications and that it was "a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing . . . consent."[110] Once again, Seward rejected a reduced-denominator theory, stating that "the whole number of States in the United States is thirty-seven."[111] He concluded by stating that "twenty-three States," including New Jersey and Ohio, and "six [Reconstructed Southern] States" had ratified the Amendment.[112]

---

105 *See id.* at 174 (noting the ratifications of Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina). Georgia ratified on July 21, the day after Seward's first proclamation. *See id.*

106 *See id.*

107 *See id.*

108 Seward listed Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin. 15 Stat. 706 (1868), *as reprinted in* LASH, Vol. 2, *supra* note 6, at 422.

109 These States were Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina. *Id.*

110 *Id.*

111 *Id.* Nebraska was admitted to the Union in 1867, thus increasing by one the total number of States from the time the Thirteenth Amendment was ratified. *See* An Act for the Admission of the State of Nebraska into the Union, ch. 36, 14 Stat. 391 (1867).

112 15 Stat. 706 (1868), *as reprinted in* LASH, Vol. 2, *supra* note 6, at 422. Seward also listed States that had first rejected the Fourteenth Amendment before later ratifying it. *See* KYVIG, *supra* note 13, at 174 (noting that Louisiana, North Carolina, and South Carolina had done this). Seward gave no indication that a prior rejection was problematic for ratification.

The very next day, both houses of Congress adopted resolutions declaring the Fourteenth Amendment's ratification.[113] Congress's list included New Jersey and Ohio, omitting any concerns about their purported rescissions.[114] Congress's list also included Tennessee and the Reconstructed Southern States that had ratified the Fourteenth Amendment.[115] In contrast to Seward, Congress did not expressly list the "whole number" of States.[116]

Then, on July 28, 1868, Seward issued a second proclamation recognizing the Fourteenth Amendment's ratification.[117] Seward's list now included Georgia given its recent ratification.[118] His tone had also shifted considerably. Seward mentioned the New Jersey and Ohio rescissions, but he did so matter of factly and without commentary.[119] Moreover, Seward was silent on the whole number of States necessary for ratification.

Here, it is important to clarify how the New Jersey and Ohio rescissions are treated under the various theories. Under a full-denominator theory, these rescissions were mooted by Alabama's and Georgia's ratifications in mid-July 1868.[120] By contrast, under the loyal- or reduced-denominator theories, these rescissions were tardy because the necessary nineteen Northern States had ratified by mid-February 1867.[121]

In sum, the rump Thirty-Ninth Congress counted the Southern States for purposes of ratifying the Thirteenth Amendment while excluding those States from representation when it passed the Fourteenth Amendment. It also declared void the state legislatures that had ratified the Thirteenth Amendment and completely reorganized those governments by enfranchising black men and requiring the approval of new constitutions. It further imposed various forms of pressure—military rule, fundamental conditions, and continued exclusion from Congress—as it sought to ensure the Fourteenth Amendment's ratification. For its part, the Fortieth Congress pushed back on Seward's initial proclamation and adopted resolutions that included both the rescinding States and the Reconstructed South.

---

113 *See* CONG. GLOBE, 40th Cong., 2d Sess. 4266 & 4295 (1868), *as reprinted in* LASH, Vol. 2, *supra* note 6, at 422–24.

114 *See id.*

115 *See id.*

116 *Cf. supra* note 111 and accompanying text.

117 15 Stat. 708 (1868), 708–11, *as reprinted in* LASH, Vol. 2, *supra* note 6, at 425–27.

118 *See id.*

119 *See id.* at 426.

120 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 601 n.19.

121 *See id.* at 367; *see also id.* at 601 n.22 (arguing that the rescissions "came too late").

B. The Great Debate

The story just told "bears virtually no resemblance to the idealized process of lawmaking by national supermajoritarian consensus" envisioned by Article V.[122] Throughout Reconstruction, leading Radicals acknowledged these ratification irregularities and developed legal theories to justify their actions and defend the new amendments' validities. In the modern era, Ackerman fired the first shot by excavating this debate and problematizing the Thirteenth and Fourteenth Amendments' ratifications in service of his dualist theory of constitutional change.[123] Amar and Harrison took up the charge and responded to Ackerman with their own theories for the Thirteenth and Fourteenth Amendments' compliance with Article V.[124]

In this Section, I begin with the Radicals' theory and its modern advocates. I then address Ackerman's dualist theory, Amar's Guarantee Clause theory, and Harrison's de facto government theory.

1. Loyal- and Reduced-Denominator Theories

Recall that during the Civil War, Lincoln repeatedly asserted that secession was illegal and void.[125] But as the war dragged on and the problem of obtaining Southern assent to constitutional amendments loomed on the horizon, several leading Radicals endorsed new theories that authorized Congressional action in the South.[126] Stevens advocated a "conquered provinces" theory, which claimed that the Southern States had indeed left the Union and had been defeated by the North in war.[127] Accordingly, the Southern States had ceased to exist "as political entities."[128] In a similar vein, Sumner argued that the

122 Colby, *supra* note 13, at 1655; *but see* Pozen & Schmidt, *supra* note 13, at 2339 ("Ever since the Founding, amendments of uncertain legal validity have been the norm in the United States, not the exception."). For his part, Colby "take[s] no position" on whether "the Fourteenth Amendment formally complied with the terms of Article V . . . ." Colby, *supra* note 13, at 1675.

123 *See* Green, *Loyal Denominator*, *supra* note 11, at 48–49 (crediting Ackerman with sparking this modern debate).

124 *See id.*

125 *See supra* notes 33–34 and accompanying text.

126 The high bar set by Article V was a foreseeable problem in the Reconstruction Congress and "one of the antislavery amendments offered at the start of the Thirty-eighth Congress proposed the lowering of Article V supermajority requirements." KYVIG, *supra* note 13, at 163; *see also* Jason Mazzone, *Amending the Amendment Procedures of Article V*, 13 DUKE J. CONST. L. & PUB. POL'Y 115, 121 (2018) (putting forth a proposal that would ask voters whether to call a convention on constitutional amendments every twenty years).

127 *See* Harrison, *supra* note 16, at 390 & n.83.

128 *Id.* at 390 (citing CONG. GLOBE, 39th Cong., 2d Sess. 251–53 (1867)).

Southern States had committed "suicide" and had reverted to territorial status.[129] The upshot was that Congress could regulate the States pursuant to Article IV.[130] Representative Samuel Shellabarger (R-OH) disputed that the South had actually seceded but acknowledged that attempted secession had abrogated the southern governments' political relations with the United States.[131]

These theories were also deployed in debates over the ratification process, and numerous Radical Republicans endorsed loyal- and reduced-denominator approaches.[132] Under this view, the States that left the Union simply did not matter for purposes of Article V. The ratifications of the Southern States were therefore excluded from the Article V numerator and denominator.[133]

However, the reduced-denominator theory "was never the official policy of the Reconstruction Congress."[134] Congress failed to expressly repudiate Seward's inclusion of the Southern States in the Thirteenth Amendments' ratification proclamation.[135] And when Congress rebuffed Seward's first proclamation of the Fourteenth Amendment, its list included the Southern States.[136] At the end of the day, Republicans recognized that using a full denominator would help bolster public perception about and avoid legal challenges to the legitimacy of the amendments.[137]

Modern scholars have revived this Radical theory. In addition to his theory premised on the Guarantee Clause,[138] Amar argues for a "true-blue" approach—i.e., a loyal-denominator theory—that includes only those States that stayed loyal to the Union and thereby excludes the eleven States that joined the Confederacy.[139] Christopher Green

---

129 *Id.* at 391 & n.84.

130 *See id.* at 390–91; Green, *Loyal Denominator*, *supra* note 11, at 71–72.

131 *See* Harrison, *supra* note 16, at 391–92.

132 For a lengthy list of sources, see Green, *Loyal Denominator*, *supra* note 11, at 99–146.

133 *See* Harrison, *supra* note 16, at 410.

134 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 368.

135 *See supra* notes 61–64 and accompanying text.

136 *See supra* notes 108–21 and accompanying text.

137 *See* Harrison, *supra* note 16, at 414 (citing CONG. GLOBE, 40th Cong., 2d Sess. 2860 (1868)) (observing that by 1868 "some [Republicans in Congress] said that it would be wise to have three-fourths of all the states to quell all doubts").

138 *See infra* subsection I.B.3.

139 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 366–68. Amar uses the term "true-blue" as an allusion to the color of Union soldiers' uniforms.

Green claims that "Amar briefly flirted with this view" but ultimately rejected it. Green, *Loyal Denominator*, *supra* note 11, at 50 n.11; *see also id.* at 63 (characterizing Amar's argument as premised on Article IV's Guarantee Clause). I interpret Amar's more recent writings as consistent with his original two-part argument. Namely, that Congress *could* have adopted a true-blue approach but instead pursued a Guarantee Clause strategy. *Compare* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367 ("[T]he Thirteenth Amendment

has also put forward lengthy defenses of the reduced-denominator theory.[140] According to Green, only States that are in Congress under Article I should count for ratification purposes under Article V.[141] In his view, there should be "parity between Articles I and V."[142]

One consequence of the loyal- and reduced-denominator theories is that the Thirteenth and Fourteenth Amendments' ratification dates move up substantially. Instead of being ratified in December 1865, the Thirteenth becomes part of the Constitution in June 1865.[143] The Fourteenth's adoption is even more rapid, as the requisite number of ratifications was achieved in mid-February 1867.[144]

The earlier ratification date matters because the Fourteenth Amendment would be considered part of the Constitution when Congress passed the First Reconstruction Act in March 1867.[145] Thus, concerns about illegal coercion and the use of fundamental conditions become a distraction, as the Southern States' ratifications were unnecessary.[146]

Furthermore, New Jersey's and Ohio's rescissions in early 1868 "came too late."[147] As such, loyal- and reduced-denominator theorists need not take a clear stance on the validity of rescission. Nevertheless,

---

would also be valid if we instead treated all eleven state governments . . . as having lapsed, and thus not properly included in either numerator or denominator. . . . As for the Fourteenth Amendment, the necessary nineteen true-blue states said yes as of mid-February 1867."), *and id.* at 368 ("Although several leading Republicans . . . endorsed a true-blue-only approach to Article V, this approach was never the official policy of the Reconstruction Congress."), *with* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 87 (2012) [hereinafter AMAR, UNWRITTEN CONSTITUTION] ("Although the Reconstruction Congress ultimately opted to include ex-Confederate states in the amendment process, *Congress need not have done so.*" (emphasis added)), *id.* ("Congress improvised a two-stage strategy that relied heavily on the verdict of true-blue states in the first stage of enactment, but then gave ex-gray states an important role during the final stage of enactment."), *and* Amar, Worth & Geltzer, *supra* note 15, at 118 (reiterating this two-part argument).

140 *See generally* Green, *Loyal Denominator*, *supra* note 11; Green, *Normative Defenses*, *supra* note 13.

141 *See* Green, *Loyal Denominator*, *supra* note 11, at 50–51.

142 *Id.* at 61.

143 *Id.* at 51.

144 *See id.* at 55; AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367.

145 *See* Green, *Loyal Denominator*, *supra* note 11, at 92 ("The Congress passing the Reconstruction Act knew that the loyal-denominator threshold had been passed; waiting for the paperwork could, however, justify the language of the statute."); *supra* notes 101–20 and accompanying text.

146 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 608 n.57 ("Congress formally required ex-gray states to ratify only after the Fourteenth Amendment had won ratification in more than three-fourths of the true-blue states.").

147 *Id.* at 601 n.22.

Amar has argued that States should be permitted to rescind ratifications.[148] By contrast, Green appears agnostic on this question.[149]

These theories, however, become increasingly complicated once Southern States are readmitted to the Union. Amar's true-blue count for the Fourteenth Amendment initially excludes Tennessee.[150] But in the endnotes, Amar hedges by including Tennessee in his true-blue accounting, on the grounds that Tennessee was readmitted to the Union without being subjected to the First Reconstruction Act.[151] Green clearly includes Tennessee in his count.[152] In some ways, this is an odd view of parity between Articles I and V. On the one hand, Tennessee was excluded from Congress when it passed the Fourteenth Amendment. But on the other hand, Tennessee was swiftly readmitted to the Union as a reward for its ratification and not included in the First Reconstruction Act.[153] Although not a reduced-denominator advocate, Harrison notes that including Tennessee in the numerator is problematic given its potentially coerced ratification.[154]

This raises the question: what about the readmitted Reconstructed States' ratifications of the *Fifteenth* Amendment? Are the Reconstructed Southern States—namely, Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina—re-added to the count for the Fifteenth just like Tennessee was for the Fourteenth?[155] Or should they continue to be excluded based on their lack of initial loyalty or because their rehabilitation was at gunpoint? By omitting any discussion of the Fifteenth Amendment, Amar and Green sidestep the hard question of how to count States following their readmission to the Union.[156]

Given this wrinkle, it is important to distinguish between loyal-denominator and reduced-denominator theories. A loyal-

148 *See id.* at 456 (arguing in favor of a "last-in-time" idea because any other rule would "feature a perverse ratchet"); *id.* at 601 n.19 (noting that there are "good reasons for permitting rescission until the three-quarters bar is cleared" and that "Ohio and New Jersey should not have been counted as yes votes" for the Fourteenth Amendment).

149 *See* Green, *Loyal Denominator*, *supra* note 11, at 55 n.20.

150 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367 (stating that the necessary nineteen Loyal States had ratified the Fourteenth Amendment).

151 *See id.* at 601 n.22 (including Tennessee in the count); *id.* at 603 n.35 (describing Tennessee's readmission).

152 *See* Green, *Loyal Denominator*, *supra* note 11 at 55.

153 *See id.* at 60–61.

154 *See* Harrison, *supra* note 16, at 412. This pushes the Fourteenth Amendment's ratification back to June 1867, several months after the passage of the First Reconstruction Act. *See id.*

155 *See* MALTZ, CIVIL RIGHTS, *supra* note 5, at 140 (discussing these States' readmissions).

156 Obviously, there is an outer limit here, both temporally and subject-matter-wise. The post-Reconstruction amendments are not subject to a reduced-denominator theory.

denominator theory would be akin to Amar's true-blue approach and include only those States that did *not* secede from the Union. To be explicit: I would exclude Tennessee from the loyal-denominator theory because it seceded from the Union. A reduced-denominator theory would include Southern States that have been readmitted to the Union.[157]

2. Ackerman's Dualist Theory

Ackerman developed the idea of "constitutional moments"[158] to describe situations when the "People" engage in "higher lawmaking" that amends the constitution outside of Article V's strictures.[159] To separate out normal politics from higher lawmaking, Ackerman asks whether a "five-stage process" occurred.[160] Specifically, Ackerman looks for a signaling event, the proposal of a transformative agenda, a period of intense deliberation, an acquiescence by dissenting institutions, and a consolidating event.[161] As part of his dualist theory, Ackerman has identified the New Deal and the civil rights movement as two examples of this process.[162]

Even though the actual text of the Constitution was changed, Ackerman argues that Reconstruction is an example of higher lawmaking outside of Article V's strictures. Ackerman focuses on the irregular ratifications of the Thirteenth and Fourteenth Amendments.[163] In light of the history recounted above, Ackerman bluntly states that "it [is] very hard to vindicate both" "the ratification of the Thirteenth [and] the proposal of the Fourteenth."[164] After all, the Thirty-Ninth Congress counted the Southern States as part of the Union when it recognized the Thirteenth Amendment's ratification but then excluded those States when it passed the Fourteenth Amendment and later declared those governments to be illegal in the

157 The loyal denominator would be set at either twenty-five or twenty-six, depending on whether Nebraska is part of the Union at the relevant time. By contrast, the reduced denominator would shift depending on how many Southern States have been readmitted.

158 Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

159 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991) [hereinafter ACKERMAN, FOUNDATIONS].

160 ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 20.

161 *See id.* (outlining this five-step process); *id.* at 126–27 (framing Lincoln's election as a signaling event); ACKERMAN, FOUNDATIONS, *supra* note 159, at 290–91 (outlining a similar four-part test).

162 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 279–311 (New Deal); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 3 (2014) (civil rights movement).

163 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 100–252.

164 *Id.* at 103.

First Reconstruction Act. Ackerman also characterizes the use of fundamental conditions as "flat-out inconsistent with the limited Congressional role described by Article Five."[165] Most relevant here, Ackerman identifies the election of 1868 as a consolidation of the Radical Republican agenda,[166] even though the Fifteenth Amendment had yet to be proposed in Congress. Ackerman describes the end of Reconstruction as the "Return of Normal Politics."[167]

In sum, Ackerman finds the problems associated with the Thirteenth and Fourteenth Amendments to support his argument for dualist constitutional change.[168]

3. Amar's Guarantee Clause Theory

Although Amar has endorsed a true-blue theory,[169] he has a backup, full-denominator plan that is equally—if not more—prominent. According to Amar, the Southern States remained within the "*geographic* contours of the Union" but had "lapse[d] into an unrepublican condition."[170] Analogizing to Sumner's theory, Amar argues that "the postwar Congress could treat the South much as the prewar Congress had treated the West[ern]" territories.[171] With the Southern States no longer truly "States," Congress could invoke Article IV's Guarantee Clause to transform the South.[172]

In Amar's view, the Southern States were unrepublican not only because of secession but also because they disenfranchised black men.[173] To be sure, only a handful of Northern States enfranchised black men at the start of Reconstruction. Anticipating this response, Amar distinguishes the South on the grounds that the North was overwhelmingly white whereas several Southern States had

---

165 *Id.* at 111.

166 *See id.* at 20–21 ("After the consolidating election of 1868, there was no longer a serious question whether the Civil War amendments were legal . . . ."); *id.* at 211 ("[T]he election of 1868 served a different constitutional function: consolidation."); *id.* at 234 (referring to the election of 1868 as the consolidation of the Reconstruction constitutional moment).

167 *Id.* at 247. Seeking to undermine Ackerman's dualist theory, Michael McConnell famously applied Ackerman's approach to Jim Crow, arguing that it constituted a period of higher lawmaking. *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 115–16 (1994).

168 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 14 (commenting that "[b]y breaking the law we will find higher law").

169 *See supra* subsection I.B.1.

170 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 379.

171 *Id.*

172 *See id.* at 370–71.

173 *See id.* at 368.

majorities—or near majorities—of black people.[174] Moreover, Amar reads the Guarantee Clause to contain an "unwritten non-retrogression principle" that barred "the *unprecedented* disenfranchisement of a *vast* number of *free* men."[175] With these moves, Amar narrows the Guarantee Clause's reach to capture only the South.

From a doctrinal perspective, Amar relies on *Luther v. Borden*,[176] where the Supreme Court held that the Guarantee Clause raises nonjusticiable political questions.[177] *Luther* stemmed from Dorr's Rebellion in 1840s Rhode Island.[178] In resolving a dispute over which of two governments was legitimate, the Court said it was up to Congress to decide and its "decision is binding on every other department of the government."[179] Applied to Reconstruction, Amar's argument goes, this meant that Congress's decision to exclude the South was both unreviewable and controlling for Article V.[180]

4. Harrison's De Facto Government Theory

Similar to this Essay, Harrison canvasses the various theories concerning the ratification of the Reconstruction Amendments. Harrison finds the reduced-denominator theory "plausible but

---

174 *See id.* at 374. Specifically, the North was under 2% black. *Id.* But this overall figure obscures differences in racial demography. The Border States had substantially higher black populations: Maryland (22.5%); Delaware (18.2%); Kentucky (16.8%); and Missouri (6.9%). *See* GILLETTE, *supra* note 5, at 82 tbl.1. This requires some difficult line-drawing, as some Southern States had black populations of just "more than a quarter." AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 374.

Amar also acknowledges that women were disenfranchised nationwide at the time. *See id.* at 376. Amar maintains that sex-based discrimination in voting did not violate the Guarantee Clause because "men . . . could in turn be relied on to virtually represent the interests of the women in their lives" whereas "Southern whites could not be trusted to represent the interests of those whom they had so recently and ruthlessly enslaved." *Id.*

175 Amar, Worth & Geltzer, *supra* note 15, at 117.

176 48 U.S. (7 How.) 1 (1849).

177 *See id.* at 42; AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 369–70 (discussing *Luther*).

178 *Luther*, 48 U.S. at 11.

179 *Id.* at 42.

180 Under a full-denominator theory, the problem of New Jersey's and Ohio's rescissions arises again. Recall that those States rescinded in early 1868, but Seward did not proclaim that amendment's ratification until July 1868. Amar, therefore, claims that the issue was "moot by July 28 . . . when Seward issued his final proclamation" due to Alabama's and Georgia's ratifications. AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 601 n.19. Amar focuses on Seward's *second* proclamation—not his first. Recall that Georgia ratified *after* the first proclamation. *See supra* note 105 and accompanying text. We thus have mootness stacked upon mootness: Seward's second proclamation mooted any problem with the first proclamation.

unpersuasive,"[181] explaining that the Radicals' positions "depended on the political situation" and that many recognized "it would be wise to have three-fourths of all the states to quell all doubts."[182] In addition, Harrison concludes that the recognition theory—which is analogous to Amar's Guarantee Clause argument—is "arguable but very difficult ultimately to assess."[183] On this point, Harrison emphasizes the lack of a "straight answer" from Republicans on how the Southern ratifications of the Thirteenth Amendment were valid when the Thirty-Ninth Congress would later declare those governments—except Tennessee's—to be invalid under the First Reconstruction Act.[184]

Harrison has proposed his own full-denominator theory.[185] Drawing from the "standard principle of international law . . . that a de facto government can bind a state internationally, even though that government's authority is usurped," Harrison argues that the provisional governments in the Southern States could legally ratify the amendments.[186] Harrison finds additional support for his theory in the Supreme Court's Reconstruction-era decision in *Texas v. White*,[187] where the Court famously stated that "[t]he Constitution . . . looks to an indestructible Union, composed of indestructible States."[188] According to Harrison, the Court's decision endorsed a de facto government approach, as "the Court's compromise position was that acts of the rebel government were effective insofar as they governed private rights, but acts in support of the rebellion were in general invalid and void."[189] In concluding that any coercion was permissible, Harrison once again analogizes to the international realm, pointing out that "[c]oerced peace treaties are binding."[190] As such, the amendments are valid if "de facto governments are legally effective and there is no duress exception."[191]

---

181 Harrison, *supra* note 16, at 379.

182 *Id.* at 414.

183 *Id.* at 379.

184 *Id.* at 416.

185 *See id.* at 422–23.

186 *Id.* at 436.

187 74 U.S. (7 Wall.) 700 (1869).

188 Harrison, *supra* note 16, at 441–42 (quoting *White*, 74 U.S. at 725). The Court recognized the loyal government of Texas but concluded that the rebel government's sale of bonds in support of the Confederacy was illegal. *White*, 74 U.S. at 736.

189 Harrison, *supra* note 16, at 443.

190 *Id.* at 457; *see also* Mazzone, *supra* note 13, at 1805–06 ("[L]ike the imposition of a constitution on occupied Japan in 1946 by the Supreme Command for the Allied Powers, the Reconstruction Amendments were imposed by the northern victors on the defeated southern states." (footnote omitted)).

191 Harrison, *supra* note 16, at 458. Harrison also resolves the rescission issue on mootness grounds. *See id.* at 378 n.11.

II. THE IRREGULAR ADOPTION OF THE FIFTEENTH AMENDMENT

The scholarly narrative ends here. The conventional story omits the Fifteenth Amendment on the grounds that the salient problems were mere sequels.[192] And yet, the last ratification battle had not even started when the Fourteenth Amendment was proclaimed to be part of the Constitution. This Essay picks up where the traditional account leaves off.

As an initial matter, it is important to avoid anachronism about what the Fourteenth Amendment actually accomplished. Although the Equal Protection Clause is currently interpreted to protect the right to vote,[193] Section One of the Fourteenth Amendment was originally understood to exclude political rights.[194] This original understanding was premised on the Reconstruction-era distinction between civil and political rights,[195] as well as Section Two's apportionment penalty for States that denied or abridged the right to vote of male citizens.[196] To underscore my point: even after the Fourteenth Amendment's ratification, half of the States barred blacks from voting.[197] Further action was needed to prohibit racial discrimination in voting nationwide.

---

192 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 234 (characterizing the election of 1868 as a consolidating event); *id.* at 475 n.15 ("There are problems with the Fifteenth Amendment as well, but an elaborate discussion will not advance my general argument."); AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 367 (calculating a true-blue ratification for only the Thirteenth and Fourteenth Amendments); *id.* at 601 n.26 (asserting in passing that "all the Reconstruction Amendments" satisfy "a true-blue-only approach"); Harrison, *supra* note 16, at 378 n.12 ("Although this Article is about all three Reconstruction amendments, it will be necessary to discuss in detail only two, the Thirteenth and the Fourteenth. . . . The objections to the Fourteenth and Fifteenth Amendments are thus the same . . . ."); *see also* Colby, *supra* note 13, at 1664 n.218 ("Actually, the other Reconstruction Amendments may also be susceptible to some of the objections raised here, but this Article does not address them."); Green, *Loyal Denominator*, *supra* note 11, at 49 n.3 (mentioning the Fifteenth Amendment only once and in reference to the 1872 Democratic Party Platform's acquiescence in its ratification).

193 The Court has interpreted the Fourteenth Amendment's Equal Protection Clause to protect the right to vote in a myriad of ways. *See* Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017) (racial gerrymanders); Bush v. Gore, 531 U.S. 98, 109–10 (2000) (ballot recount standards); Burdick v. Takushi, 504 U.S. 428, 441–42 (1992) (fundamental right to vote); White v. Regester, 412 U.S. 755, 765–67 (1973) (racial vote dilution); Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (upholding Section 4(e) of the VRA); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (poll tax); Reynolds v. Sims, 377 U.S. 533, 583 (1964) (one-person, one-vote); Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (racial vote denial).

194 *See* Crum, *Superfluous*, *supra* note 3, at 1584–87.

195 *See id.* at 1579–81.

196 *See id.* at 1587–90.

197 *See id.* at 1602–04.

The spark was the 1868 presidential election. Despite being a hero from the recent war, Ulysses S. Grant won the presidency by a far smaller margin than anticipated. Indeed, his victory in the popular vote was attributable to black voters in the Reconstructed South.[198] The election result encouraged Radical Republicans to push for nationwide black male suffrage.[199]

When the lame-duck Fortieth Congress began debating nationwide suffrage for black men, the first question discussed was one of means: should Congress pass a statute, an amendment, or both? As I have catalogued elsewhere, the Radicals' statutory strategy failed because moderate Republicans believed that it was unconstitutional and politically risky.[200]

Once that question was decided, Congress considered numerous versions of the Fifteenth Amendment. Of particular relevance to the Georgia debate, draft versions explicitly protected the right to hold office. However, the final version omitted that language.[201] As passed by Congress, the Fifteenth Amendment provides that "[t]he right . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[202] It also empowers Congress to enact "appropriate" legislation to "enforce" its provisions.[203] Lash's superb collection sheds light on the drafting and ratification of the Fifteenth Amendment, but its precise metes and bounds are outside the scope of this Essay. Rather, the focus is on its irregular adoption.

The Fifteenth Amendment sailed through state legislatures in New England and the South. In many ways, this is unsurprising. New England had the longest experience with black male suffrage, and the Reconstructed South had a massive influx of black voters.[204]

The amendment, however, ran into trouble in the West and the Border States. Of those States, only Missouri and Nevada ratified—both States with relatively small black populations.[205] California rejected the Fifteenth Amendment for xenophobic reasons related to Chinese immigrants.[206] And in a fit of spite after the amendment's ratification, Oregon followed suit.[207] The remaining Border States—

198 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 236.

199 *See* Crum, *Superfluous*, *supra* note 3, at 1598–99.

200 *See id.* at 1604–16.

201 *See* LASH, VOL. 2, *supra* note 6, at 438–39.

202 U.S. CONST. amend. XV, § 1.

203 *Id.* § 2.

204 *See* GILLETTE, *supra* note 5, at 159.

205 *See id.* at 82 tbl.1 (showing that Missouri was 6.9% black and Nevada was 0.8% black in 1870).

206 *See* FONER, *supra* note 2, at 108.

207 *See* GILLETTE, *supra* note 5, at 156–57.

many of which were swing States controlled by Democrats—rejected the amendment.[208]

In this Part, I first address problems common to the Reconstruction Amendments: the Fifteenth's passage in a rump Congress and the use of fundamental conditions and military occupation. I then excavate three issues that did not squarely arise during the Thirteenth or Fourteenth Amendments' ratifications: a purported rescission that was neither tardy nor mooted; a Northern state legislature's ratification being called into question due to a lack of a quorum; and a readmitted Southern State's expulsion from Congress and the imposition of a fundamental condition for its *second* readmission. I conclude by examining Secretary of State Hamilton Fish's proclamation of the Fifteenth Amendment's ratification.[209]

A. Common Problems

Scholars have ignored the Fifteenth Amendment because they have assumed its irregular adoption raises the same problems as the Thirteenth and Fourteenth's ratifications. And in some ways, these scholars are correct that there are common irregularities. In this Section, I unpack the ways in which the Fifteenth Amendment's ratification shares those irregularities.

1. Rump Congress

The lame-duck Fortieth Congress differed from the Thirty-Eighth and Thirty-Ninth Congresses that passed the Thirteenth and Fourteenth Amendments in that it included several representatives and senators from readmitted Southern States. Tennessee reentered

208 *See id.* at 105.

209 A few irregularities can be dismissed as inconsequential. Lash's collection highlights that both Kansas and Missouri's initial ratifications based on a telegram were improper. Kansas law did not permit such notifications, and Missouri ratified only Section One of the Fifteenth Amendment, thereby omitting Section Two's enforcement clause. Both States fixed these imperfect ratifications. *See* LASH, VOL. 2, *supra* note 6, at 541. Unless a State ratifies a constitutional amendment based on a Tweet, one would hope that this fact pattern does not repeat itself.

In addition, Democrats argued that the Fifteenth Amendment was invalid because "[c]hanges of this magnitude . . . were beyond the amending power" and "[l]egislatures elected before the Amendment was proposed had no right to approve it." Currie, *supra* note 13, at 458. These arguments lack support in Article V's text or history; they are better characterized as political—rather than legal—objections. *See, e.g.*, Leser v. Garnett, 258 U.S. 130, 136 (1922) (rejecting the argument that extending suffrage is beyond Article V's amendment authority in the context of the Nineteenth Amendment and specifically analogizing to the Fifteenth).

Congress in July 1866.[210] Following their ratifications of the Fourteenth Amendment, Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina were readmitted to the Union in summer 1868.[211] Thus, a majority of the ex–Confederate States were back in Congress. And unlike the last time these States sought to enter Congress, the representatives reflected a changed electorate thanks to the First Reconstruction Act and the imposition of fundamental conditions. The Republican Party had moved South.[212]

Nevertheless, it was still a rump Congress.[213] Mississippi, Texas, and Virginia had not yet been readmitted to the Union and were therefore not entitled to seats in Congress.[214] Moreover, most of Georgia's representatives had been seated, but not its senators.[215] As unpacked more below, Congress backtracked on Georgia's readmission following the expulsion of black lawmakers from its General Assembly.[216]

In February 1869, the lame-duck Fortieth Congress passed the Fifteenth Amendment on a party-line vote.[217] In the House, the Fifteenth Amendment passed by an overwhelming margin of 145–44,

---

210 *See supra* note 151 and accompanying text.

211 *See* Provisional Proclamation of Ratification of the Fourteenth Amendment, 15 Stat. 706 (ratification), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 422; *see also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, at 174–77 (2005), *as reprinted in*, LASH, VOL. 2, *supra* note 6, at 439–44 (showing membership in Fortieth Congress); MALTZ, CIVIL RIGHTS, *supra* note 5, at 140 (discussing Southern States' readmission).

212 *See* MALTZ, CIVIL RIGHTS, *supra* note 5, at 142 ("Republican strength had been enhanced with the arrival of the senators and congressmen from the newly readmitted states.").

213 Once again, the Republicans' massive majorities gave the party a quorum even if the Southern States were included. *See* Harrison, *supra* note 16, at 398 n.122 (Thirty-Ninth Congress); *id.* at 378 n.11 (Thirty-Eighth Congress). In the House, there were 173 Republicans out of 226 seated members. *See Congress Profiles: 40th Congress (1867–1869)*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/40th/ [https://perma.cc/HXT3-N3NR]. Adding the eighteen excluded Representatives creates a new denominator of 244, meaning that the Republicans would have controlled over 70% of the full chamber. *See infra* note 221 (discussing excluded representatives). In the Senate, there were fifty-seven Republicans and nine Democrats. *See Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/KS7R-EB2S]. Even adding eight senators from the four excluded Southern States, the Republicans would have had fifty-seven of seventy-four seats.

214 *See* FONER, *supra* note 2, at 108.

215 *See* JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 174–77 (2d Sess. 2005), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 440 (listing Georgia's representatives); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 2 (1868) (declining to seat Georgia's Senator), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 445.

216 *See infra* subsection II.B.3.

217 *See* GILLETTE, *supra* note 5, at 73–75.

with thirty-five abstentions.[218] In the Senate, the vote was 39–13, with fourteen abstentions.[219] Several Radical Republicans—including Sumner—boycotted the vote on the grounds that the amendment's protections were too narrow.[220] For the first time during Reconstruction, Congress's exclusion of the remaining rebel States may not have been necessary for the passage of a constitutional amendment.[221]

2. Fundamental Conditions and Coercion

Pursuant to the First Reconstruction Act, the Southern States, with the exception of Tennessee, were placed under military occupation and required to ratify the Fourteenth Amendment. By 1869, only Mississippi, Texas, and Virginia had not ratified the Fourteenth Amendment and, accordingly, had not been readmitted to the Union.[222] At that point, the Fourteenth Amendment had already become part of the Constitution and thus this requirement was more akin to a loyalty oath than a ratification.[223]

In April 1869, the Forty-First Congress required Mississippi, Virginia, and Texas to ratify the Fifteenth Amendment as a

---

218 CONG. GLOBE, 40th Cong., 3d Sess. 1563–64 (1869), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 536.

219 CONG. GLOBE, 40th Cong., 3d Sess. 1623–41 (1869), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 539.

220 *See* FONER, *supra* note 2, at 104.

221 In the House, a vote of 145 out of 189 is 76.7%, well above the two-thirds threshold. At the time, the excluded Southern States would have been entitled to a total of eighteen representatives: Georgia (1), Mississippi (5), Texas (4), and Virginia (8). *See* JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 178–82 & n.93 (2d Sess. 2005) (showing the number of representatives for Mississippi, Texas, and Virginia in the Forty-First Congress); *infra* subsection II.B.3 (discussing Georgia's excluded representative John Christy). Assuming all of these excluded representatives would have voted against the Fifteenth Amendment, it would have still passed, as 145 out of 207 is 70%.

In the Senate, a vote of 39 out of 52 is 75%, also well above the two-thirds threshold. Assuming the eight Senators from Georgia, Mississippi, Texas, and Virginia would have all voted against the Fifteenth Amendment, it would have been 39 out of 60, which is 65% and just shy of the two-thirds threshold. However, the prospect that the amendment may not have passed would probably have convinced at least one Radical senator to not boycott. Indeed, contemporary press reports indicated that several Radical Senators were present for the final vote even though they were marked as absent. *See* GILLETTE, *supra* note 5, at 76; *see also* Pozen & Schmidt, *supra* note 13, at 2349 n.154 (noting that "[i]t is less clear that the Fifteenth Amendment would have been rejected if Congress were complete").

222 *See* FONER, *supra* note 2, at 108.

223 *Cf.* Harrison, *supra* note 16, at 413 (describing this view of loyal-denominator theorists).

fundamental condition of their readmission to the Union.[224] Congress, in other words, moved the goalposts in an effort to help get the Fifteenth Amendment over the three-fourths threshold.[225] Several prominent Republicans—including Senators Morton and Trumbull—expressed disagreement with this strategy.[226]

Even though Congress ratcheted up the coercive pressure, the scholarly debate has treated fundamental conditions interchangeably. Here, I do so as well. That is because the question whether Congress *can* impose fundamental conditions appears to be more salient than whether it can stack those conditions.[227]

B. Unique Problems

It has been assumed that "the objections to the Fourteenth and Fifteenth Amendments are . . . the same, and if those objections are not fatal to the Fourteenth they are not fatal to the Fifteenth either."[228] But there are three distinctive problems associated with the Fifteenth Amendment's adoption. First, a State rescinded its ratification at a time and in a context when it was not necessarily tardy nor moot. Thus, the issue of rescission is more squarely presented. Second, a *Northern* state legislature's irregular ratification was called into question. The dubious state ratifications for the Thirteenth and Fourteenth Amendments occurred in the South.[229] And third, Georgia was expelled from the Union after already being readmitted. Its Senators—but not its representatives—were excluded from the lame-duck Fortieth Congress when it voted on the Fifteenth Amendment. Moreover, the Forty-First Congress excluded Georgia's representatives, placed the State under military rule, and required ratification of the Fifteenth Amendment as a fundamental condition for its second readmission.

---

224 *See U.S. Congress, The Requirement Bill: Requiring Virginia, Mississippi, and Texas to Ratify the Fifteenth Amendment as a Condition of Readmission*, N.Y. HERALD, Apr. 10, 1869, at 3, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 559–60.

225 At the time, some Republicans believed that the fundamental conditions were unnecessary whereas Democrats claimed that Congress imposed them to help ensure the amendment's ratification. *See id.*

226 *See id.*

227 *See* Currie, *supra* note 13, at 488 ("But of course Congress in 1867 had made ratification of the Fourteenth Amendment a condition of restoration to representation; what it could do for one Amendment it could do for another as well." (footnote omitted)). As discussed below, Congress also imposed a fundamental condition on Georgia's *second* readmission to the Union. *See infra* subsection II.B.3.

228 Harrison, *supra* note 16, at 378 n.12.

229 To make explicit what should be apparent from my list: I treat rescissions as a distinct problem from an irregular adoption.

1. New York's Rescission

New York ratified the Fifteenth Amendment on April 14, 1869.[230] After Democrats won the 1869 election, New York purported to rescind its ratification on a party-line vote on January 5, 1870.[231]

New York's rescission was not unprecedented. Recall that New Jersey and Ohio purported to revoke their ratifications of the Fourteenth Amendment in early 1868.[232] But under the loyal- and reduced-denominator theories, the Fourteenth Amendment had become part of the Constitution several months earlier and thus the rescissions were too late.[233] By contrast, under a full-denominator theory, New Jersey's and Ohio's rescissions were mooted because a sufficiently high number of Southern States had ratified by Seward's second proclamation.[234] As such, the leading theories have not had to forthrightly address the rescission question under the Fourteenth Amendment.

Here, by contrast, rescission matters, depending on your preferred theory. In the Appendix, I have compiled a chronology of state ratifications and a running tally under the various theories. Under the loyal-denominator theory, mootness does *not* absolve New York's rescission, which occurred in January 1870, before the twenty out of twenty-seven loyal-denominator ratification threshold was reached. In fact, New York's ratification is *essential* to reach the three-fourths threshold under the loyal-denominator theory. Moreover, as unpacked below, a reduced-denominator theory that incorporates the Reconstructed South must decide between resolving the rescission question, the rump state legislature question, or the Georgia question.[235] Even under a full-denominator theory, one of these three questions must be resolved in favor of ratification.[236]

One last wrinkle: one could argue that New Jersey's ratification in February 1871 means that the Fifteenth Amendment would have eventually been ratified under a loyal-denominator theory.[237] That counterfactual is problematic for two reasons. First, some context about New Jersey. In 1869 and 1870, New Jersey was controlled by

---

230 *See* GILLETTE, *supra* note 5, at 84–85 tbl.2.

231 *See id.* at 115 n.18 (discussing Democratic victory in the 1869 election); *Ratification of the Fifteenth Amendment Rescinded*, N.Y. TIMES, Jan. 6, 1870, at 1 (reporting on New York's rescission), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 585–86.

232 *See supra* notes 106–10 and accompanying text.

233 *See supra* note 121 and accompanying text.

234 *See supra* note 120 and accompanying text.

235 *See infra* Section III.A.

236 *See infra* Map 3.

237 *See* GILLETTE, *supra* note 5, at 84–85 tbl.2.

Democrats, who twice rejected the Fifteenth Amendment.[238] When New Jersey did provide postproclamation approval in 1871, it was controlled by Republicans. It is possible that black voters, who overwhelmingly favored the Republican Party,[239] provided the margin of victory in what was then a swing state.[240] Moreover, this postproclamation approval was partially attributable to New Jersey's Democratic Governor, who urged acquiescence to nationwide black male suffrage in light of the Fifteenth Amendment's ratification.[241] Second, Congress passed the First Enforcement Act on May 31, 1870,[242] almost nine months *prior* to New Jersey's ratification. If the Fifteenth Amendment was not ratified in 1870, then this critical enforcement legislation was largely without constitutional basis and almost certainly would not have passed Congress.[243] Thus, New Jersey cannot be invoked to moot out New York's rescission.

2. Indiana's Rump Legislature

Although there were irregularities in the South for the ratifications of the Thirteenth and Fourteenth Amendments,[244]

238 *Gov. Theodore Randolph's Message to the Legislature, Note on Rejection of Amendment*, DAILY STATE GAZETTE, Mar. 25, 1869, at 3, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 558–59 (1869 rejection); *Legislative Debate, Rejection of the Fifteenth Amendment*, TRENTON STATE GAZETTE, Feb. 7, 1870, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 594–95 (1870 rejection).

239 *See* Amar & Brownstein, *supra* note 5, at 945; Crum, *Reconstructing*, *supra* note 5, at 307–08.

240 *See* GILLETTE, *supra* note 5, at 80 ("Th[e] Negro vote would be Republican, and it might cost the Democrats Maryland, Delaware, and New Jersey . . . ."); *id.* at 113 ("In New Jersey 4,200 potential Negro voters might well overturn an 1868 Democratic presidential majority of 2,800.").

241 *See id.* at 117; *see also* Green, *Loyal Denominator*, *supra* note 11, at 95–96 (noting that New Jersey overrode a Republican governor's veto of the rescission of the Fourteenth Amendment).

242 An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, ch. 114, 16 Stat. 140 (1870).

243 *See* Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT L. REV. 1013, 1031–34 (1995) (summarizing the First Enforcement Act). Given that the Fortieth Congress declined to pass a nationwide suffrage statute based on its Fourteenth Amendment enforcement authority, *see* Crum, *Superfluous*, *supra* note 3, at 1602–16, it seems unrealistic to assume that the Forty-First Congress would do so absent the Fifteenth Amendment's ratification. Indeed, the First Enforcement Act was controversial notwithstanding the Fifteenth Amendment. *See* Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. 1153, 1163–72 (2020); Wang, *supra*, at 1021–34; *but see* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 422–25 (2014) (arguing that Congress could have passed the First Enforcement Act pursuant to Sections Two and Five of the Fourteenth Amendment).

244 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 143 (discussing Johnson's pressuring of Southern States to ratify the Thirteenth Amendment); Colby, *supra* note 13,

Indiana presents a unique problem as a *Northern* State whose initial ratification is questionable.

Indiana's ratification involved a series of political machinations. During the 1868 campaign, Republicans nationwide and in Indiana adopted a compromise position that advocated for black male suffrage in the South but not the North.[245] After the Fifteenth Amendment's passage by Congress, Democrats cried foul. State Representative John Coffroth, a leading Indiana Democrat, proposed that Democrats could delay the Fifteenth Amendment's ratification by resigning en masse to deny the state legislature a quorum.[246] On March 5, 1869, thirty-eight Democratic representatives and seventeen Democratic state senators did just that, plunging the state legislature into chaos.[247] Under Indiana's Constitution, a quorum of two-thirds of *total* members was required for each house.[248]

In response, the Republican governor called for special elections to be held on April 8, 1869, to fill the seats.[249] The Democrats promptly won back their seats and returned to Indianapolis following an agreement to help pass a budget and that a vote on the Fifteenth Amendment would not occur until the end of the session.[250]

On May 13, 1869, the Democrats once again decided to resign en masse. This time, however, their plan failed. In the state senate, "the doors were ordered locked and the roll was called."[251] Although sixteen state senators had sent letters of resignation to the governor, many of them were still present in the chamber.[252] The senate's presiding officer ruled that, because those senators had not submitted resignation letters *to the senate*, they had not yet resigned.[253] A quorum was declared and the Fifteenth Amendment passed 27–1, with eleven senators marked present but not voting.[254] That same afternoon, Speaker of the Indiana House George Buskirk determined that the

---

at 1644 (describing Tennessee's questionable ratification of the Fourteenth Amendment); *supra* notes 38–50, 84–90 and accompanying text.

245 *See* Crum, *Superfluous*, *supra* note 3, at 1600–01 (discussing the 1868 Republican Party platform); GILLETTE, *supra* note 5, at 131 (discussing Indiana politics).

246 *See* GILLETTE, *supra* note 5, at 131.

247 *See id.* at 131–32; *Democrats Resign to Prevent Vote*, IND. HOUSE J. 883–94 (1869), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 548–49.

248 *See* GILLETTE, *supra* note 5, at 131; IND. CONST. art. IV, § 11.

249 GILLETTE, *supra* note 5, at 132.

250 *See id.* at 135–36.

251 *Id.* at 137.

252 *Id.*

253 *Id.*

254 *See id.* An additional eleven senators were actually absent. *See id.* Assuming the senate's presiding officer's ruling was correct concerning the resignation letters, thirty-nine present senators constitutes a two-thirds quorum of fifty total members.

house lacked a quorum due, in part, to the resignation of twenty-seven Democratic representatives.[255]

But the next day, Buskirk changed his mind following pressure from Indiana's U.S. Senator, Oliver Morton.[256] Buskirk decreed that a vote could proceed even though only fifty-seven members were present.[257] When pressed by Coffroth to justify this ruling, Buskirk stated that Indiana's Constitution required a quorum "for legislative business of any ordinary character" but not to ratify a constitutional amendment.[258] In other words, the ratification process, as an act of federal lawmaking, need not follow the particularities of state law. The Indiana House then voted 54–3 to ratify the Fifteenth Amendment.[259]

As such, Indiana's state legislature was arguably a rump legislature when it adopted the Fifteenth Amendment. Nevertheless, Secretary Fish ignored the quorum issue and counted Indiana as a ratifying State. Indeed, unlike his discussion of New York and Georgia, Fish gave no indication that anything untoward happened in Indiana.[260]

3. Georgia's Expulsion and Second Readmission

Georgia was on Congress's mind throughout the Fifteenth Amendment's ratification process. In June 1868, Congress passed a bill stating that six Southern States—Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina—had satisfied the First Reconstruction Act and would be admitted upon their ratification of the Fourteenth Amendment.[261] In late July 1868, Georgia ratified the Fourteenth Amendment.[262] Within days, the Fortieth Congress seated

255 *See id.*

256 *See id.* at 136; *The Amendment in Indiana*, BOS. DAILY J., May 20, 1869, at 4, *as reprinted in* LASH, VOL. 2, *supra* note 6, at 574.

257 *See* 11 BREVIER LEGISLATIVE REPORTS OF THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, SPECIAL SESSION OF 1869, at 239–44 (1869), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 573. The Indiana House had 100 members and with only fifty-seven members present, there was no finagling about the formalities of resignation to call a quorum. *See* 10 BREVIER LEGISLATIVE REPORTS OF THE GENERAL ASSEMBLY 6 (1869).

258 1 BREVIER LEGISLATIVE REPORTS OF THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, SPECIAL SESSION OF 1869, at 239–44 (1869), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 573.

259 *See id.*

260 *See infra* Section II.C.

261 *See* An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, 15 Stat. 73 (1868), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 417–18. Congress had already passed a similar statute admitting Arkansas. *See* MALTZ, *supra* note 5, at 139–40.

262 *See* LASH, VOL. 2, *supra* note 6, at 544.

six of Georgia's seven representatives.[263] Georgia's state legislature selected Joshua Hill as Senator, but that selection occurred after Congress had adjourned and therefore Hill was not seated.[264] Georgia's military commander also handed back control to the civilian government.[265]

In September 1868, the situation changed dramatically when "a coalition of white Republicans and Democrats voted to expel newly elected black officials from the [Georgia] House and Senate."[266] Specifically, three black state senators and twenty-five black representatives were expelled.[267] Adding insult to injury, the black state legislators were replaced by the white candidates they had defeated at the polls.[268] Around this time, separate concerns were raised about whether several white state legislators were disqualified by Section Three of the Fourteenth Amendment, which prohibited rebels who had previously sworn an oath to defend the Constitution from holding federal or state office absent a two-thirds congressional amnesty.[269]

This development raised serious questions about whether Georgia had backslid into rebel control and violated the fundamental condition pertaining to black suffrage, notwithstanding that the relevant text failed to unambiguously specify the right to hold office.[270] Although the Georgia Supreme Court would eventually rule in June 1869 that black persons had the right to hold office under the Georgia Constitution,[271] the black officeholding debate sparked considerable conflict between Georgia and Congress.

When the Fortieth Congress's Third Session convened on December 7, 1868, the Georgia question was front and center. In the Senate, Hill was denied a seat and the matter was referred to

263 *See* JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 174–77 (2d Sess. 2005), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 440 (listing Georgia's representatives); CONG. GLOBE, 40th Cong., 2d Sess. 1471–72, 4499–500 (1868) (showing admissions of Georgia's representatives).

264 *See* EDWIN C. WOOLLEY, THE RECONSTRUCTION OF GEORGIA 55, 63 (1901).

265 *See* LASH, VOL. 2, *supra* note 6, at 544.

266 *Id.* at 544–45.

267 *See* WOOLLEY, *supra* note 264, at 56–58. The Georgia Senate and House had 44 and 175 members, respectively. *See* S. REP. NO. 40-192, at 36 (1869).

268 *See* CONG. GLOBE, 41st Cong., 2d Sess. 176 (1869) (statement of Sen. Edmunds (R-VT)).

269 *See infra* notes 401–02 and accompanying text. For a recent academic examination of Section Three, see Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. 87 (2021).

270 *See* LASH, VOL. 2, *supra* note 6, at 544.

271 *See* White v. Clements, 39 Ga. 232, 266–68 (1869).

committee.[272] Although Hill was "a Union man throughout the war,"[273] Radical Republicans raised two objections. First, Senator Charles Drake (R-MO) invoked the Georgia state legislature's expulsion of its black members, an act that "place[d] that body under rebel control."[274] Second, Senator John Thayer (R-NE) raised concerns about whether Georgia's state legislature was in compliance with Section Three of the Fourteenth Amendment.[275] In response, Senator John Sherman (R-OH) pointed out that Hill's selection occurred *prior* to the black officeholding controversy.[276] Sherman further observed that the Reconstruction Committee had informed the Union Army that it could not enforce Section Three against Georgia and that the issue should be left to the respective house of the state legislature. Sherman believed that precedent should be followed.[277] Ultimately, Hill was not seated by the Fortieth Congress.[278]

That same day, the Fortieth House refused to seat Georgia's seventh representative on the grounds that he was disqualified under Section Three of the Fourteenth Amendment.[279] Indeed, the losing candidate sought to be seated in his place, citing a provision of Georgia law that permitted the winner's replacement in such circumstances.[280] Notwithstanding the contemporaneous Senate controversy over Hill's seating, Georgia's status as a State was *not* mentioned during this debate, which focused solely on the Section Three issue. The matter was referred to the Committee of Elections, and neither man became

272 *See* CONG. GLOBE, 40th Cong., 3d Sess. 2 (1868), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 445.

273 CONG. GLOBE, 40th Cong., 3d Sess. 2 (1868) (statement of Sen. Sherman).

274 *Id.* (statement of Sen. Drake).

275 *See id.* at 5 (statement of Sen. Thayer).

276 *See id.* at 3 (statement of Sen. Sherman).

277 *See id.* at 4–5.

278 The Senate Judiciary Committee produced a divided report recommending against seating Hill. The majority report, written by Senator Stewart (R-NV) and joined by Senators Conkling (R-NY) and Frelinghuysen (R-NJ), reiterated the points made by Drake and Thayer, though it put greater emphasis on the Section Three issue. *See* S. REP. NO. 40-192, at 3–5 (1869). In a minority report, Senator Trumbull (R-IL) argued that Georgia had been readmitted by Congress and further noted that the House had seated representatives from Georgia. *See id.* at 33–35. Regarding the Section Three issue, Trumbull claimed that "[t]he Senate has no jurisdiction to inquire whether the members of a State legislature are properly elected and qualified," *id.* at 37, and that, in any event, the worst case scenario was that only "four senators out of forty-four . . . and three representatives, out of one hundred and seventy-five, were disqualified by the 14th amendment." *Id.* at 36 (emphasis omitted).

279 *See* CONG. GLOBE, 40th Cong., 3d Sess. 6–7 (1868) (discussing John Christy's disqualification under the Fourteenth Amendment).

280 *See id.* (showing that John Wimpy claimed the seat).

a representative in the Fortieth Congress.[281] Georgia's six previously admitted representatives remained in the Fortieth House and voted on the Fifteenth Amendment's final passage on February 25, 1869.[282]

Georgia's anomalous status was also debated during the counting of the Electoral College votes for the 1868 election. Recall that in 1865, Congress resolved to not count the electoral votes of the excluded Southern States.[283] To effectuate that policy, Congress adopted the 22nd Joint Rule, which provided that "no [electoral] vote objected to shall be counted except by the concurrent votes of the two Houses" voting separately.[284] Given the "political climate" in 1865, "there was little prospect of disagreement over which votes to reject," and the 22nd Joint Rule was "used by Republican majorities of both Houses to assure control over the votes of the recently rebellious southern states."[285]

The 22nd Joint Rule remained in place for the 1868 election.[286] In addition, Congress passed a resolution in July 1868 specifying that it would *not* count the Electoral College votes of the excluded Southern

---

281 *See id.*; *see also* JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, (2d Sess. 2005), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 440 (listing neither Christy nor Wimpy as representatives).

282 Representatives Clift, Gove, and Prince voted "yes," Representative Young voted "no," and Representatives Edwards and Tift were marked as "not voting." CONG. GLOBE, 40th Cong., 3d Sess. 1563–64 (1869). Although each house of Congress polices its own membership, *see* U.S. CONST. art. I, § 5, Georgia's exclusion from the Senate but not the House raises difficult questions given Article V's requirement that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." *Id.* art. V.

283 *See supra* notes 43–45 and accompanying text.

284 CONG. GLOBE, 40th Cong., 3d Sess. 1064 (1869); *see also* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 552–53 (2004) (discussing the Civil War origins of the 22nd Joint Rule). The 22nd Joint Rule reflected "the theory that Congress, organized as two independent houses, had ultimate vote counting authority." *Id.* at 552. The 22nd Joint Rule differs from the Electoral Count Act of 1887, which, *inter alia*, flips the presumption in favor of counting electoral votes when a State sends one slate of Electors. 3 U.S.C. § 15 (providing that "the two Houses concurrently may reject the [electoral] vote or votes when they agree that such vote or votes have not been so regularly given").

Unsurprisingly, close and disputed elections have sparked scholarly and public interest in the Electoral Count Act of 1887. *See* Siegel, *supra*; Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 (1961); JOSHUA MATZ, NORMAN EISEN & HARMANN SINGH, STATES UNITED DEMOCRACY CENTER, GUIDE TO COUNTING ELECTORAL COLLEGE VOTES AND THE JANUARY 6, 2021 MEETING OF CONGRESS (2021). This scholarship has largely overlooked the 1869 dispute, its relevance to the Electoral Count Act of 1887, and how it supplies a compromise position for how to count electoral votes when a State will not change the result.

285 Wroth, *supra* note 284, at 328.

286 *See* Siegel, *supra* note 284, at 554 (noting that the Senate abrogated the rule in 1876).

States.[287] That resolution, however, did not foresee the Georgia problem.

Grant's victory was clear by early November 1868.[288] Even though Georgia voted for Horatio Seymour,[289] its nine electoral votes were insufficient to change the result.[290] Recognizing the potential for an intraparty dispute over Georgia, a compromise was brokered and passed on February 8, 1869, two days prior to the counting of the electoral votes.[291] In short, both houses passed a concurrent resolution: assuming Georgia's electoral votes did not change the outcome, the result would be reported in a contingent fashion and with the final tally showing different figures depending on whether Georgia was or was not a State.[292]

---

287 *See* A Resolution Excluding from the Electoral College Votes of States Lately in Rebellion, Which Shall Not Have Been Reorganized, 15 Stat. 257, 257–58 (1868); *see also* Currie, *supra* note 13, at 430 (observing that Congress passed this resolution over President Johnson's veto).

288 *See* RON CHERNOW, GRANT 622–23 (2017).

289 *See id.* at 623 (noting that "Klan violence was rife" in Georgia).

290 Counting Georgia, Grant won 214-80. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1063 (1869). Even with a full-denominator of 317 electoral votes that included Mississippi, Texas, and Virginia, Grant secured a clear majority. *See United States Presidential Election of 1868*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/print/article/1776253 [https://perma.cc/7KCL-CPAP].

291 *See* CONG. GLOBE, 40th Cong., 3d Sess. 972 (1869) (House passage); *id.* at 978 (Senate passage).

292 The concurrent resolution provided in full:

> Whereas the question whether the State of Georgia has become and is entitled to representation in the two Houses of Congress is now pending and undetermined; and whereas by the joint resolution of Congress passed July 20, 1868, entitled "A resolution excluding from the Electoral College votes of States lately in rebellion which shall not have been reorganized," it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to acts of Congress in that behalf: Therefore,
>
> *Resolved by the Senate*, (the House of Representatives concurring,) That on the assembling of the two Houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted, the result would be, for —— for President of the United States, —— votes; if not counted, for —— for President of the United States, —— votes; but in either case —— is elected President of the United States; and in the same manner for Vice President.

Id. at 978. The compromise was based on a "similar resolution" brokered in 1821 to deal with Missouri's electoral votes. *Id.* at 976 (statement of Sen. Edmunds); *see also* Kesavan, *supra* note 284, at 1681–83 (surveying the 1821 dispute); Currie, *supra* note 13, at 431 n.292

This compromise, however, was short-lived. During the joint session of Congress on February 10, 1869, Congressman Benjamin Butler (R-MA) sparked a constitutional crisis by demanding that Georgia's electoral votes be excluded.[293] Butler argued that Georgia "had not been admitted to representation as a State in Congress," had failed to comply with the Constitution and the Reconstruction Acts, and held elections that were not "free, just, equal, and fair" due to "force and fraud."[294] Pursuant to the 22nd Joint Rule, the Senate retired and the two houses considered the objection separately.

In the Senate, Butler's objection was determined to be out of order given the February 8th concurrent resolution.[295] In other words, the two houses had already jointly decided how to report Georgia's electoral votes in a contingent fashion. Nevertheless, at the insistence of Senator Howard (R-MI), the Senate held a vote and determined *against* excluding Georgia's electoral votes.[296]

By contrast, the House voted to exclude Georgia's electoral votes.[297] Apparently acting as if the 22nd Joint Rule governed, Speaker of the House Schulyer Colfax (R-IN)[298] announced that "the House of Representatives have decided that the vote of Georgia shall not be

---

(claiming that the 1857 dispute over Wisconsin's electoral votes was resolved in a similar fashion).

293 During that same joint session, a different dispute arose concerning whether Louisiana's electoral votes in favor of Seymour should excluded given widespread violence at the polls. That effort was soundly rejected by both Houses. *See* CHERNOW, *supra* note 288, at 623 (discussing violence and Seymour's victory in Louisiana); CONG. GLOBE, 40th Cong., 3d Sess. 1050 (1869) (Senate agreeing to count Louisiana's electoral votes by a 51-7 margin, with 8 not voting); *id.* at 1057 (House agreeing to count Louisiana's electoral votes by a 137-63 margin, with 22 not voting).

It appears that congressional leaders foresaw the fight over Georgia. Breaking with prior tradition of listing the States either alphabetically or in the order of their admission to the Union, the President Pro Tempore read the States in seemingly random order and with Georgia last. *See id.* at 1066 (statement of Rep. Butler).

294 *See* CONG. GLOBE, 40th Cong., 3d Sess. 1058 (1869) (statement of Rep. Butler). Butler also claimed that Georgia's electors failed to vote on the requisite day. *See id.* The Senate briefly debated this point and examined how a similar situation from 1857 involving a snowstorm in Wisconsin had been handled. *See id.* at 1050–51; *see also* Kesavan, *supra* note 284, at 1685–87 (discussing the Wisconsin incident).

295 *See* CONG. GLOBE, 40th Cong., 3d Sess. 1054 (1869) (passing by a vote of 32-27, with 7 not voting).

296 Howard's resolution was framed in the negative, namely "[t]hat the electoral vote of Georgia ought not to be counted." *Id.* at 1054. That resolution failed with 25 yeses, 34 noes, and 7 not voting. *See id.* at 1055.

297 In the House, the resolution was worded as follows: "Shall the vote of the State of Georgia be counted . . . ?" *Id.* at 1059. That resolution failed by a vote of 41 yeses, 150 noes, and 31 not voting. *Id.*; *see also id.* at 1062 (reaffirming this result).

298 JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 174 (2d Sess. 2005).

counted."[299] At this juncture, the Senate returned to the House chambers.

In the joint session, President Pro Tempore of the Senate Benjamin Wade (R-OH)[300] declared that Butler's objections were "overruled by the Senate" and that Georgia's electoral votes would be reported consistent with the February 8th concurrent resolution.[301] Over Butler's continued objections and "great uproar," the final tally was listed in a contingent fashion, with different numerators and denominators depending on whether Georgia was "include[d]" or "exclude[d]" as a State.[302] Grant was thereafter declared President.[303]

Immediately afterward, Speaker Colfax—who had just been declared Grant's first Vice President—responded to Butler's concerns. Colfax argued that the concurrent resolution should trump the 22nd Joint Rule because it was both later in time and more specific.[304] In rebuttal, Butler defended the House's autonomy and, with ominous rhetoric to a contemporary reader, warned against the specter of a Vice President or President Pro Tempore using their authority to declare a losing candidate to be President.[305] Curiously absent from this debate about the powers of Congress to count electoral votes was the underlying status of Georgia.[306]

The situation further deteriorated when the Forty-First Congress convened in early March 1869. The House declined to seat the six

299 CONG. GLOBE, 40th Cong., 3d Sess. at 1059.

300 JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 174 (2d Sess. 2005). There was no vice president at the time, as Johnson had taken over after Lincoln's assassination and, prior to the Twenty-Fifth Amendment, there was no constitutional mechanism to appoint a new vice president. *See Vice Presidents of the United States*, U.S. SENATE, n.15, https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm.

301 CONG. GLOBE, 40th Cong., 3d Sess. at 1062.

302 *Id.* at 1063.

303 *See id.* at 1063–64.

304 *See id.* at 1064 (statement of Speaker Colfax) (arguing that the "later statute must have prevailing force"); *id.* ("The Chair thinks it was intended to be taken out, that intelligent gentlemen in voting for it intended to withdraw the State of Georgia from the operation of the twenty-second joint rule . . . ."); *id.* at 1067 ("But the two Houses, with the full knowledge of that rule, by a deliberate vote took the case of Georgia outside of that joint rule and laid down a specific rule for that case . . . .").

305 *See id.* at 1064 (arguing that the proceedings were the "greatest outrage upon the rights and privileges of this House"); *id.* at 1065 (discussing potential for abuse of power); *id.* at 1066 (claiming that Colfax's argument implies that the House can never unilaterally "reverse our former action").

306 Over the next two days, the House would debate whether to pass a censure motion and whether to revoke the 22nd Joint Rule. *See id.* at 1094–1107 & 1144–48. Attempts to reform the process failed and "thus Congress would be caught without a plan [in 1877] when the crisis finally occurred." Currie, *supra* note 13, at 432.

Georgia representatives who had been seated by the Fortieth House.[307] Referencing the "revolutionary proceedings which have occurred" in Georgia and the Senate's prior decision, Representative Ward (R-NY) moved to exclude them.[308] Other members, however, noted that these same representatives had already been seated by the previous Congress.[309] And therein lied the rub: the House decided against seating Georgia's representatives on the grounds that they had been elected in April 1868 for *both* the Fortieth and Forty-First Congresses.[310] Meanwhile, without fanfare, the Forty-First Senate excluded Georgia's Senators.[311]

Then, on March 17, 1869, Georgia's all-white state legislature voted against ratifying the Fifteenth Amendment—the first Reconstructed State to do so.[312] In a strange turn of events, the tie-breaking vote in the Georgia Senate came from the Republican Senate president. This action "may have been intended to get Congress's attention" about the ongoing black officeholding dispute.[313]

In December 1869, the Forty-First Congress responded to Georgia's recalcitrance.[314] Like the debate over the ratcheting up of fundamental conditions, moderate Republicans sounded the alarm over this development and Radicals defended the tactic.[315] Moreover,

307 *See* WOOLLEY, *supra* note 264, at 67.

308 *See* CONG. GLOBE, 41st Cong., 1st Sess. 16 (1869) (statement of Rep. Ward).

309 *See id.* at 16 (statement of Rep. Farnsworth (R-IL)) ("[A]fter we have admitted Representatives from that State to the Fortieth Congress, I think we should not stultify ourselves by excluding the Georgia Representatives from the present Congress."); *id.* at 17 (statement of Rep. Jenckes (R-RI)) ("The embarrassment in the case is this: that persons have been admitted to seats in the Fortieth Congress from Georgia, and they are the same persons who are now claiming seats in the Forty-First Congress.").

310 *See id.* at 17 (statement of Rep. Schenck (R-OH)) (asking whether the representatives should "lap over and take seats also in the Forty-First Congress"); *id.* (statement of Rep. Farnsworth) (noting that members "often" serve in two Congresses "whe[n] a man is elected to fill a vacancy and also for the succeeding Congress"); *id.* at 18 (referring the matter to the Committee on Elections); WOOLLEY, *supra* note 264, at 67 n.3 (noting that the Committee determined in January 1870 that Georgia's representatives were not qualified).

311 *See* CONG. GLOBE, 41st Cong., 1st Sess. 1 (1869) (listing Senators but omitting Georgia).

312 *See* LASH, VOL. 2, *supra* note 6, at 545.

313 *Id.*

314 *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 219–20 (2015) (discussing a series of Klan attacks that prompted Congress's involvement).

315 *See* LASH, VOL. 2, *supra* note 6, at 545 (discussing Bingham's objections); CONG. GLOBE, 41st Cong., 2d Sess. 166 (1869) (statement of Sen. Morton) (citing as favorable precedent the fundamental conditions imposed to ratify the Fourteenth Amendment and the fundamental conditions on Mississippi, Texas, and Virginia to ratify the Fifteenth Amendment).

it was hotly contested whether Georgia had violated its terms of readmission when it expelled black lawmakers and seated former rebels disqualified by the Fourteenth Amendment, as well as Congress's authority to respond to those developments.[316] In the Reorganization Bill, Congress reimposed military oversight in Georgia and clarified that the right to hold office could not be denied "upon the ground of race, color, or previous condition of servitude."[317] Congress also required Georgia to ratify the Fifteenth Amendment as a fundamental condition of statehood.[318]

When the Georgia state legislature reconvened, the Union Army helped reseat the black lawmakers and enforce Section Three.[319] And in February 1870, Georgia complied with the Reorganization Act and ratified the Fifteenth Amendment.[320] Georgia also *re*-ratified the Fourteenth Amendment out of an abundance of caution.[321] In July 1870, Congress approved Georgia's second readmission to the

316 *See* CONG. GLOBE, 41st Cong., 2d Sess. 171 (1869) (statement of Sen. Bayard (D-DE)) (arguing that "the right to hold office was not included under the same qualification as the right to vote"); *id.* at 174 (statement of Sen. Howard) ("[Georgia] ha[s] not kept their faith with the reconstruction acts. . . . The right to be elected to the Legislature was as plainly provided for in the reconstruction acts as was the right to vote."); *id.* at 176 (statement of Sen. Edmunds) (arguing that Georgia backslid after its readmission when it expelled black lawmakers and refused to follow Section Three); *id.* at 253 (statement of Rep. Winans (R-NV)) (arguing that the Fortieth and Forty-First Congress could each judge the qualifications of its members); *id.* at 257 (statement of Rep. Fitch) ("[I]f any State violates the conditions upon which it was permitted to become a State we have the power to take away the corporate political existence we gave and remit the community attempting such a fraud to the condition of political pupilage from which we suffered it to emerge."); *id.* at 257–58 (statement of Rep. Axtell (D-CA)) (arguing that this debate was precipitated by Georgia's rejection of the Fifteenth Amendment and the perceived necessity of its endorsement for ratification).

317 An Act to Promote the Reconstruction of the State of Georgia, ch. 3, § 6, 16 Stat. 59, 60 (1869).

318 *See* LASH, VOL. 2, *supra* note 6, at 545.

319 *See* Magliocca, *supra* note 269, at 99 n.62.

320 *See* GILLETTE, *supra* note 5, at 84–85 tbl.2.

321 *See* KYVIG, *supra* note 13, at 182. The Reconstruction Bill did not explicitly state that Georgia had to ratify the Fourteenth Amendment. Indeed, the Senate considered a proposal that would have expressly provided so, but that language did not make it into the final bill. *Compare* CONG. GLOBE, 41st Cong., 2d Sess. 165 (1869) (proposed revision that would have required ratification of the "fourteenth and fifteenth amendments"), *with* An Act to Promote the Reconstruction of the State of Georgia, ch. 3, § 8, 16 Stat. 59, 60 (1869) (requiring only ratification of the Fifteenth Amendment). Nevertheless, at Georgia governor's urging, the state legislature reratified the Fourteenth Amendment. *See* WOOLLEY, *supra* note 264, at 79.

Union.[322] Finally, in February 1871, the Senate seated Hill, and the South was fully readmitted to Congress.[323]

C. Fish's Proclamation

On March 30, 1870, Secretary of State Hamilton Fish proclaimed the Fifteenth Amendment's ratification. In his message to Congress, Fish identified "twenty-nine States" as ratifying the Amendment: Alabama, Arkansas, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin.[324]

Fish declared that these twenty-nine States qualified as "three fourths of the whole number of States in the United States."[325] Unlike Seward's Thirteenth Amendment proclamation and his *initial* Fourteenth Amendment proclamation,[326] Fish was silent on what the "whole number of States in the United States" actually was. In 1870, the highest possible number of States was thirty-seven.[327] Thus, using Fish's numerator of twenty-nine and the highest possible denominator of thirty-seven, the Fifteenth Amendment was adopted with 78.4% of the States' backing.

Fish, however, included some asterisks to his count. Fish observed without commentary that he had received "an official document . . . [from] the State of New York . . . claiming to withdraw the said ratification."[328] Fish further noted—again without commentary—that Georgia had ratified the amendment. Tellingly, Fish included New York but *not* Georgia in his list of twenty-nine States.[329]

---

322 An Act Relating to the State of Georgia, ch. 299, 16 Stat. 363, 363–64 (1870). In so doing, Congress expressly referenced Georgia's ratification of the Fourteenth and Fifteenth Amendments. *See id.*

323 *See* DOWNS, *supra* note 314, at 236.

324 *See* CONG. GLOBE, 41st Cong., 2d Sess. 2289–90 (1870), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 595–96. I have reordered Fish's list to be alphabetical for ease of reading.

325 *Id.* at 596.

326 *See* 13 Stat. 774–75 (1865) (Thirteenth), *as reprinted in* LASH, VOL. 1, *supra* note 6, at 561; 15 Stat. 706 (1868) (Fourteenth), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 422. Seward, however, was silent on the whole number of States in his *second* proclamation concerning the Fourteenth Amendment. *See* 15 Stat. 708, 708–11 (1868), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 425–27.

327 JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. Doc. No. 108-222, at 178–82 (2d Sess. 2005).

328 CONG. GLOBE, 41st Cong., 2d Sess. 2289–90 (1870), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 595.

329 *Id.* If one disagrees with Fish and counts Georgia, then his list includes 30 ratifying States. That would be well above the three-fourths threshold, as 30 divided by 37 is 81%.

What does this imply about what Fish thought about the count? On the one hand, it is evidence that Fish considered New York's ratification to be valid, because otherwise he would not have included it in his list of twenty-nine. Viewed from this perspective, Fish believed that rescissions were improper. But on the other hand, even if New York's ratification was taken out of the numerator, the Fifteenth Amendment still—barely—crossed the highest possible three-fourths hurdle: twenty-eight out of thirty-seven is 75.7%. Thus, even in Fish's count, New York's ratification was unnecessary.

Fish's list also implies that he viewed Georgia's ratification as even more suspect than New York's. After all, New York is listed in his twenty-nine States, but Georgia is not. Fish's list could be interpreted to mean that Georgia is neither part of the numerator nor the denominator. Given Georgia's unique status and the recent intra–Republican Party fight over its electoral votes, Fish may have adopted a policy of strategic ambiguity toward Georgia. The fact that Fish delayed proclaiming the Fifteenth Amendment's ratification for several weeks only adds to the speculation.[330]

Fish's proclamation was followed by a message from President Grant. Acknowledging that such a message was "unusual," Grant declared that the Fifteenth Amendment's ratification "completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."[331] Poignantly, Grant's message on the Fifteenth Amendment's ratification closed the loop with Lincoln's symbolic signature on the Thirteenth Amendment after it passed Congress.[332] Of critical importance here, the fact that Grant took this "departure from the usual custom"[333] indicates that Fish's list of ratifying States reflected the administration's official position.[334] Grant's message is also silent on the whole number of States in the Union. Perhaps this was evidence of a reduced-denominator theory finding a more receptive audience in the Grant administration. Or perhaps Georgia's unique position counseled caution.

---

330 *See id.* at 595–97; *see also id.* at 545 (focusing on New York and Indiana's problematic ratifications as cause of delay); *The Amendment Complete*, BOS. DAILY J., Feb. 4, 1870, at 2, *as reprinted in* LASH VOL. 2, *supra* note 6, at 593–94 (arguing that the Fifteenth Amendment has been ratified); GILLETTE, *supra* note 5, at 84–85 tbl.2 (focusing on New York and Georgia's problematic ratifications as reason for delay).

331 CONG. GLOBE, 41st Cong., 2d Sess. 2289–90 (1870), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 596.

332 *See* LASH, VOL. 1, *supra* note 6, at 378.

333 *See* CONG. GLOBE, 41st Cong., 2d Sess. 2289–90 (1870), *as reprinted in* LASH, VOL. 2, *supra* note 6, at 596.

334 Grant had previously endorsed the Fifteenth Amendment's ratification in his inaugural address, and he had recommended against the Radicals' plan to pass a nationwide suffrage statute. *See* Crum, *Superfluous*, *supra* note 3, at 1613 & n.436.

Although the above-recounted objections have been overlooked by modern scholars, they were vigorously debated at the time. Senator Vickers, for example, disputed the Fifteenth Amendment's ratification shortly after Fish's proclamation.[335] By 1872, however, the controversy simmered down, as the Democratic Party acquiesced to all three amendments' ratifications.[336]

III. PROBLEMATIZING THE LEADING THEORIES

How do the theories of the lawfulness of the Reconstruction Amendments fare after the inclusion of the Fifteenth Amendment? In this Section, I examine each theory *ad seriatim*. I conclude that the Fifteenth Amendment is most problematic for the loyal- and reduced-denominator theories because it requires (1) a fleshed-out account of when to start readding States to the denominator and (2) addressing questions not raised during the Thirteenth and Fourteenth Amendments' adoptions. Regarding Ackerman's dualist theory, the Fifteenth Amendment's inclusion requires pushing back the consolidating event for the Reconstruction constitutional moment by two years. As for Amar's Guarantee Clause and Harrison's de facto government theories, the Fifteenth Amendment is relatively easy to incorporate.

335 *See* CONG. GLOBE, 41st Cong., 2d Sess. 3480–85 (1870) (statement of Sen. Vickers) (providing a laundry list of objections); Currie, *supra* note 13, at 458 (noting prevalence of doubts about Fifteenth Amendment's validity).

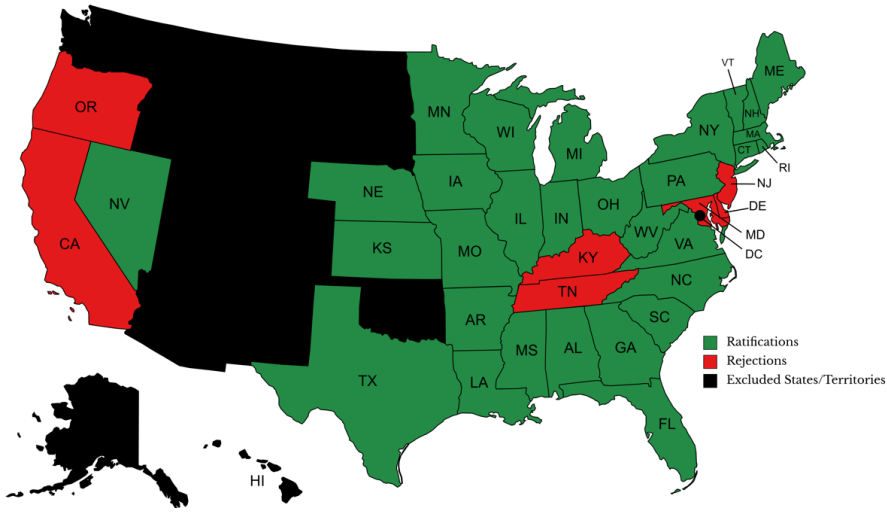
336 *See* Green, *Loyal Denominator*, *supra* note 11, at 48–49.

A. Loyal- and Reduced-Denominator Theories

As with the Thirteenth and Fourteenth Amendments, the conventional view of the Fifteenth Amendment's ratification eschews ambiguity. States either voted to ratify or not. The conventional map of the Fifteenth Amendment's ratification appears below, with ratifying States in green, nonratifying States in red, and territories in black.[337]

MAP 1[338]

Total Ratifications: 30 Total States: 37 Ratification Rate: 81%



This map has thirty-seven States, meaning that twenty-eight ratifications are necessary. Here, there are thirty ratifications, easily clearing the three-fourths threshold.

---

337 By non-ratifying, I mean that the State had either rejected or failed to act on the Fifteenth Amendment when Fish made his proclamation. As such, this is a snapshot in time.

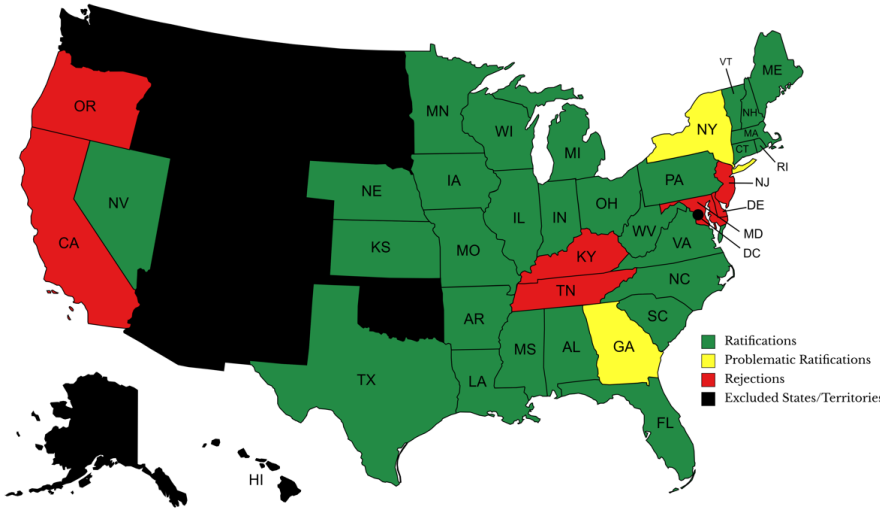
In 1869, the federal territories were Arizona, Colorado, Idaho, Montana, New Mexico, Oklahoma, Utah, Washington, Wyoming, and (the unified) Dakota. Even though DC is not a territory, I have included it with this group. As a recent acquisition from Russia, Alaska was considered a military district, not a territory. Hawaii had not been annexed yet. *See* Crum, *Superfluous*, *supra* note 3, at 1603 n.364. Although I have used a so-called logo map of our nation, the United States had not acquired its overseas empire by 1869. *Cf.* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 8–9 (2019) (critiquing the logo map's omission of overseas territories).

338 Maps created using MAPCHART, https://www.mapchart.net/.

Moving past the conventional map, Fish's proclamation map looks different. Given Fish's asterisks, I have marked Georgia and New York as problematic States by coloring them yellow:

MAP 2

Clear Ratifications: 28 Problem States: GA & NY
Total States: Unstated Ratification Rate: > 75%



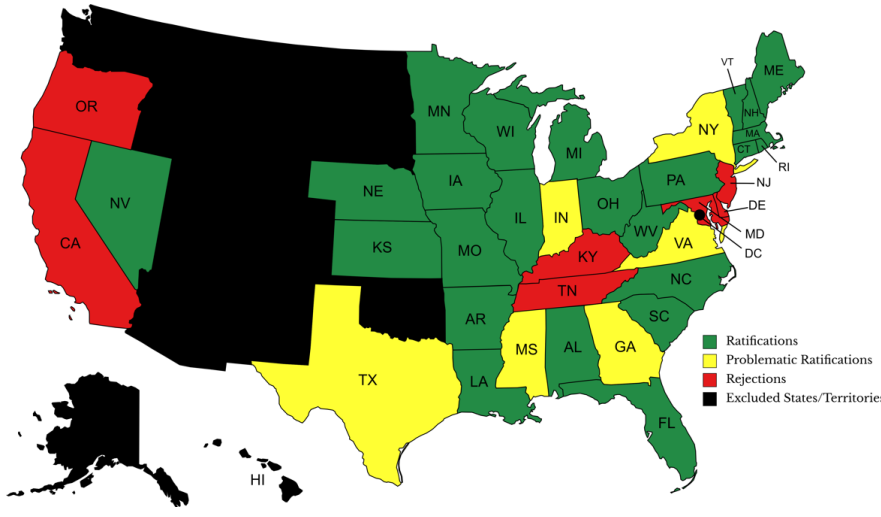
As noted above, it is unclear how Fish counted Georgia, meaning this map could be interpreted as having either thirty-six or thirty-seven States. Regardless, the Fifteenth Amendment passes muster using Fish's list.[339]

339 *See supra* notes 328–30 and accompanying text.

Fish's list, however, obscures how many problematic States there really were. Fish's map ignores Indiana's rump legislature and the fundamental conditions imposed on Mississippi, Texas, and Virginia. With these changes made, here's a new map:

MAP 3

Clear Ratifications: 24 Problem States: GA, IN, MS, NY, TX & VA
Total States: 37 Ratification Threshold: 4 More States



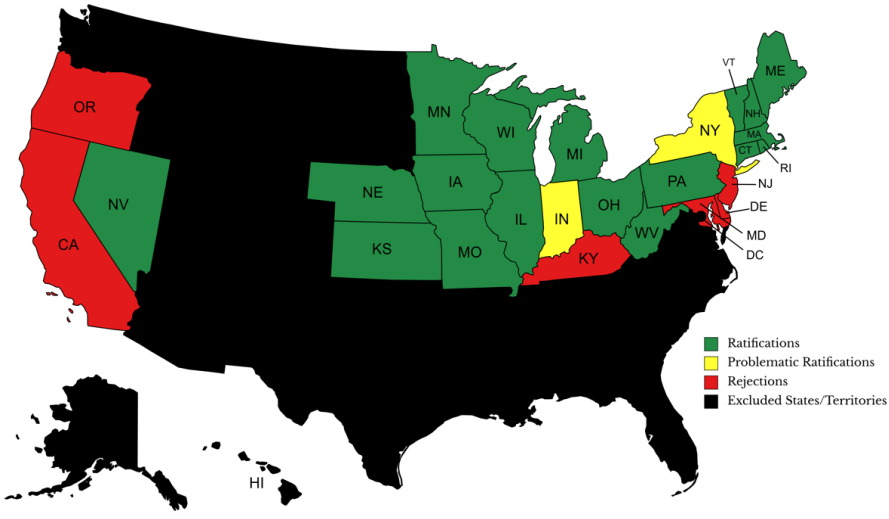
Based on a full-denominator theory, this map has thirty-seven States, meaning that twenty-eight ratifications are necessary. This map shows that only twenty-four States have clear ratifications and that six States' ratifications are problematic. As such, you need a theory—or theories—that gets you to four. The quickest route to ratification is to build off the precedent set by the Fourteenth Amendment and to count the Reconstructed Southern States' ratifications notwithstanding the fundamental conditions. That gets you three States: Mississippi, Texas, and Virginia. Thus, you need one more State. If you assume Georgia's second fundamental condition is valid, then you can forget about Indiana or New York. But if Georgia is out, then you must approve Indiana's rump legislature's ratification or view New York's rescission as invalid.

Alternatively, if you consider fundamental conditions (or their stacking) to be unduly coercive and you include those States in the denominator, then there's no way to reach the three-fourths threshold.

Turning away from the full-denominator theories, does a loyal-denominator map solve this problem? I have blacked out the States that purportedly seceded, in addition to the territories.

MAP 4

Clear Ratifications: 18 Problem States: IN & NY Total States: 26
Ratification Threshold: IN *and* NY



This map has twenty-six States, meaning that twenty States are needed for ratification. Thus, you need to count *both* Indiana and New York as ratifications under a loyal-denominator theory. This is troubling for Amar's true-blue theory because he has argued that States have a right to rescind prior to ratification.[340] To be valid as to the Fifteenth Amendment, Amar's true-blue theory needs to be classified as a reduced-denominator theory, a point that he gestures toward in his book's endnotes when he includes Tennessee in the Fourteenth Amendment's denominator given its voluntary ratification.[341]

340 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 456 (arguing in favor of a "last-in-time" idea because any other rule would "feature a perverse ratchet"); *id.* at 601 n.19 (noting that there are "good reasons for permitting rescission until the three-quarters bar is cleared" and that "Ohio and New Jersey should not have been counted as yes votes" for the Fourteenth Amendment).

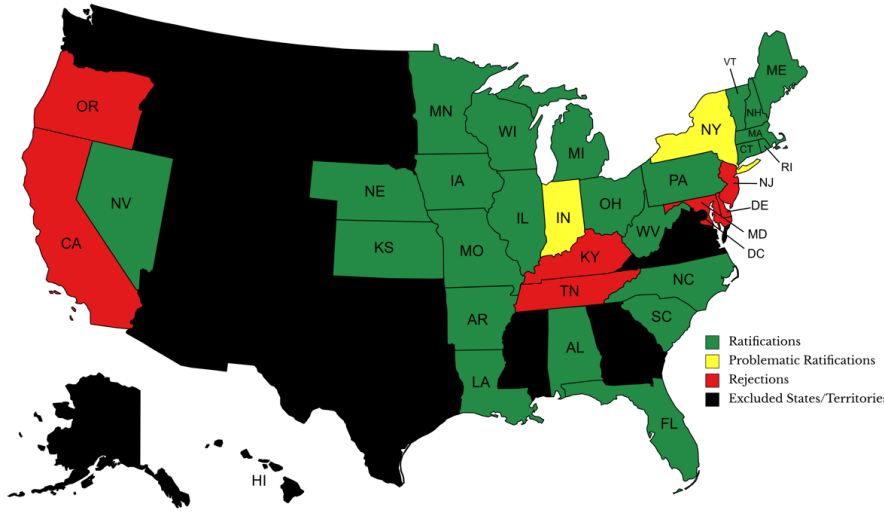
341 *See id.* at 601 n.22 (including Tennessee in the count); *id.* at 603 n.35 (describing Tennessee's readmission).

Now, maybe your view of loyalty includes States that have been Reconstructed. Amar hedged by counting Tennessee in his endnote's count of true-blue States.[342] Green counts Tennessee's ratification of the Fourteenth Amendment as a loyal state. More significantly, Green considers Articles I and V's definitions of "States" to be coextensive, meaning that the six fully Reconstructed Southern States should be counted.

Here's a reduced-denominator map that includes States that have been *fully and unquestionably* admitted to the Union. Mississippi, Texas, and Virginia are excluded, as is Georgia:

MAP 5

Clear Ratifications: 24 Problem States: IN & NY Total States: 33
Ratification Threshold: IN *or* NY



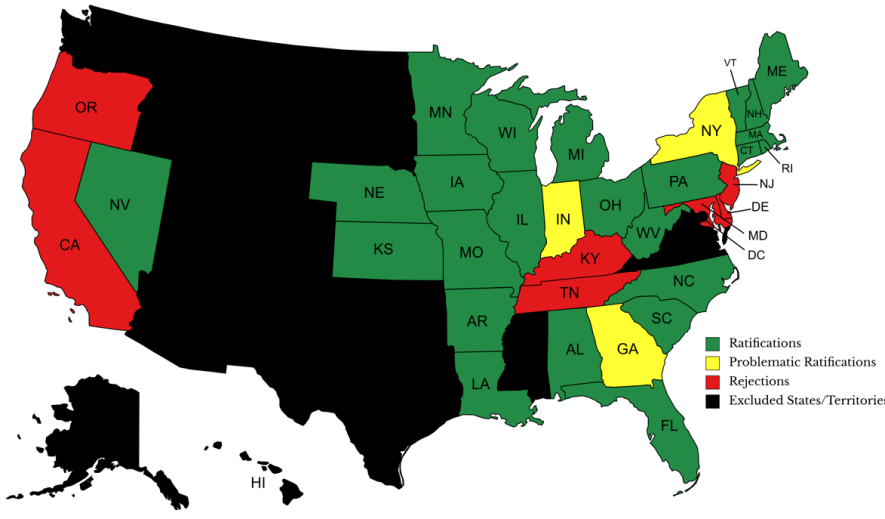
In this map, there are thirty-three States, meaning that twenty-five States must ratify. This requires counting *either* Indiana or New York's ratifications.

342 *See id.* at 601 n.22

Suppose you want a reduced dominator but you're queasy about what happened to Georgia.[343] Out of an abundance of caution, you include Georgia in the denominator. Here's your map:

MAP 6

Clear Ratifications: 24 Problem States: GA, IN & NY
Total States: 34 Ratification Threshold: 2 of 3 Problem States



This map has thirty-four States, meaning you need twenty-six ratifications. Accordingly, you need to count two of the three yellow States: Georgia, Indiana, and New York.

What these permutations of maps demonstrate is that, for the Fifteenth Amendment, any theory—whether loyal, reduced, or full-denominator—requires answering at least one question left unresolved by the Thirteenth and Fourteenth Amendments: namely, whether rescissions are valid; whether a Northern rump state legislature's ratification is acceptable; and whether a Reconstructed Southern State can be kicked out of the Union and required to ratify an amendment for its second readmission.

343 For Green, this map is potentially necessary, as Georgia was readmitted to the House but not the Senate. *See* GILLETTE, *supra* note 5, at 85. In other words, Georgia was not treated consistently for Article I purposes.

B. Ackerman's Dualist Theory

According to Ackerman, the Constitution can be amended outside of Article V's strictures during periods of higher lawmaking. Ackerman viewed the constitutional moment of Reconstruction as consolidating with the 1868 election.[344] Accordingly, he focused on the Thirteenth and Fourteenth Amendments.[345] As to the final Reconstruction Amendment, he recognized that "[t]here are problems with the Fifteenth Amendment as well, but an elaborate discussion will not advance my general argument."[346]

Incorporating the Fifteenth Amendment into Ackerman's narrative is deeply problematic. Indeed, the 1868 election cannot properly be viewed as the consolidating event of a constitutional moment. As this Essay has shown, the case for the Fifteenth Amendment's ratification is more complicated than traditionally assumed. The problem of rescission and the imposition of fundamental conditions—especially as to Georgia—would counsel against counting the Fifteenth Amendment's ratification as normal politics under Ackerman's framework.[347]

This pushes Ackerman's timeline back by—at least—two years. At that point, what is the consolidating event? Some possibilities include: the Enforcement Acts; Grant's reelection; and Congress's passage of the Civil Rights Act of 1875. But by then, the Compromise of 1877 and Redemption loom large.[348]

Indeed, in his prominent critique of Ackerman's dualist theory, McConnell argues that Redemption satisfies the criteria for being a constitutional moment. McConnell's analysis, however, assumes

---

344 *See* ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 234.

345 *See id.* at 100–09.

346 *Id.* at 475 n.15. If he had ended his Reconstruction story with the Fifteenth Amendment, Ackerman could have highlighted the Radical Republicans' final constitutional victory: the nationwide enfranchisement of black men and the creation of the world's first multi-racial democracy.

347 *See id.* at 111 (criticizing fundamental conditions); *id.* at 112 (highlighting the rescission issue). Although there's no directly analogous situation to the Indiana problem, Ackerman's skepticism of the rump Congress indicates that he would find a rump state legislature to also be problematic. *See id.* at 104.

348 In his response to McConnell, Ackerman argues that neither the midterm election of 1874 nor the 1876 presidential election were signals of the start of a new Jim Crow constitutional moment. *See id.* at 472 n.126 ("Nothing happened between 1874 and 1876 that remotely qualifies" as a "signal[]."). Ackerman further notes that the Hayes Administration's policies vis-à-vis the South "represent[] a return to normal politics." *Id.* at 473 n.126. Given this latter comment, it seems difficult to push back Ackerman's constitutional moment to the end of Reconstruction and remain consistent with his original position.

Ackerman's end date.[349] If one were to include the Fifteenth Amendment as part of Ackerman's story, then McConnell's critique might shift from a separate constitutional moment to questioning whether Ackerman's moment ever did, in fact, consolidate.

C. Amar's Guarantee Clause Theory

Amar's Guarantee Clause theory seeks to justify excluding the Southern States and administering the strong medicine of fundamental conditions. In other words, Amar is primarily concerned with the legitimacy of the First Reconstruction Act. The inclusion of the Fifteenth Amendment helps underscore that Congress's power under the Guarantee Clause is strongest in the territories, rather than in the States themselves.[350] After all, the Fortieth Congress rejected the Radicals' attempt to use the Guarantee Clause to enfranchise black men in the States.[351]

Given that, for this theory, Amar uses a full denominator and is comfortable with fundamental conditions, he only needs to get one State out of the New York, Indiana, and Georgia triumvirate.[352] New York is out, in light of Amar's views on rescission and the timing of New York's rescission.[353]

Indiana is unlikely to raise red flags for Amar, as he defers to Congress's judgment on the Guarantee Clause. Although Amar's focus is on the Reconstructed South rather than the North, it would appear that Amar would view Indiana's rump legislature as satisfying the republicanism threshold.

Finally, given Amar's aggressive view on republicanism and congressional authority, the Georgia situation does not seem like a line he would mind crossing.[354] To be sure, Amar would have to explain why Georgia's postadmission expulsion can legitimately revert it back to a de facto territory. But in any event, Georgia is not necessary under Amar's full-denominator theory if Indiana's ratification counts.

---

349 *See* McConnell, *supra* note 167, at 122.

350 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 379 (analogizing the Reconstructed South to the western territories).

351 *See* Crum, *Superfluous*, *supra* note 3, at 1607, 1614–15.

352 *See supra* Map 3.

353 *See supra* notes 231–43 and accompanying text.

354 Indeed, in discussing Georgia, Amar does not seem bothered by Congress's actions. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 400 n.*.

D. Harrison's De Facto Government Theory

Overall, Harrison's theory is not too impacted by the Fifteenth Amendment's ratification.[355] Harrison is primarily concerned with legitimating the actions of the provisional Southern governments. In his view, these governments had authority to do a myriad of legal actions with constitutional significance, from issuing marriage licenses to ratifying an amendment. Because Harrison adopts a full-denominator theory and he approves of the use of fundamental conditions, there's a fair amount of play in the joints.[356] Harrison needs to answer only one of the three unique questions.

On rescission, Harrison resolved that question in the Fourteenth Amendment context on mootness grounds.[357] As that question can again be dodged here, I bracket it under Harrison's approach.

On Indiana, Harrison's approach would appear to recognize the actions of Indiana's rump state legislature. After all, if the dubiously established and later voided southern legislatures could bind their States,[358] then what occurred in Indiana is small potatoes. A questionable quorum in the state senate and a clear lack of a quorum in the state house are "defects in their claim to sovereign power," but those institutions can nonetheless bind Indiana.[359]

Then there's Georgia. In dismissing the problematic aspects of fundamental conditions and other forms of coercion, Harrison analogizes to peace treaties, pointing out that involuntary consent does not void such treaties.[360] That comparison may be persuasive for the South's initial readmission to the Union, but it is not as convincing as to Georgia's second readmission. It is, at best, analogized to a renegotiated peace treaty. In any event, Harrison's theory would probably recognize Indiana's ratification and thus Georgia is unnecessary.

IV. JUSTIFYING THE FIFTEENTH AMENDMENT

No one seriously contends that the Reconstruction Amendments should be stricken from the Constitution. Nevertheless, to put any doubts to rest, I address each of the three unique problems raised by the Fifteenth Amendment's irregular adoption. Furthermore,

355 For a discussion of how the Supreme Court's recent decisions in the two *Zivotofsky* cases may complicate Harrison's theory, see *infra* Section IV.A.

356 *See supra* Map 3.

357 *See* Harrison, *supra* note 16, at 378 n.11.

358 *See id.* at 422–23 (arguing that "de facto state governments may take legally effective action on behalf of the states they govern").

359 *See id.* at 423.

360 *See id.* at 457.

although the thrust of this Essay has been to focus on flaws, there is a sunnier side to the Fifteenth Amendment's ratification.

A. Legal Justifications

In my view, New York and Indiana should count as ratifying the Fifteenth Amendment. That is because rescissions are improper and Congress's recognition of Indiana's ratification is conclusive and binding under the Supreme Court's decision in *Coleman v. Miller*.[361] With those two States in the "yes" column, the Fifteenth Amendment is valid under any denominator. To be sure, Georgia's ratification is particularly dubious but, thankfully, it does not matter.

For the sake of brevity and because others have dealt with the common problems, I focus on the unique problems associated with the Fifteenth Amendment's ratification.[362]

1. Rescission

On the rescission question, there are three potential bright-line rules: first-in-time, last-in-time, and antirescission. Here, I endorse an antirescission rule: once a State ratifies an amendment, that action is a one-way ratchet.

An antirescission rule is best justified based on past practice and prudential considerations. Article V references only Congress and the state legislatures/conventions as having any role to play in the amendment process—the president and the judiciary are not mentioned. To be sure, Article V's text leaves out who the "decider" is for when an amendment becomes "[p]art of this Constitution,"[363] but the federal Congress makes sense over the state legislatures. And as David Pozen and Tom Schmidt recently explained, "As the most geographically representative, deliberatively transparent, and electorally accountable branch, Congress will in general be best

361 *See* 307 U.S. 433, 456 (1939). I do not consider *Coleman* to be dispositive for New York and Georgia given the proverbial asterisks on those States' ratification on Fish's list.

362 On the rump Congress issue, I agree that the conventional justifications are sufficient: namely, that a quorum existed notwithstanding the South's exclusion and that each house can determine the qualifications of its members. On the permissibility of fundamental conditions, I find both Amar's and Harrison's accounts to be plausible. In my view, these theories are not mutually exclusive and operate from a premise not dissimilar from the Radicals' theory that the Southern States forfeited their rights *as States* when they seceded. In justifying how Congress treated these new quasi-territories, Amar relies on the Guarantee Clause whereas Harrison borrows from international law principles. AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 374; Harrison, *supra* note 16, at 436.

363 U.S. CONST. art. V; *see also* Pozen & Schmidt, *supra* note 13, at 2378 (noting this problem).

positioned to determine whether an amendment has gained broad social acceptance and to generate additional political support once such a determination has been made."[364]

Turning from who decides to what bright-line rule to adopt, there is historical precedent for an antirescission rule. Indeed, both Congress and the relevant Secretary of State counted States that had purportedly rescinded when proclaiming the ratifications of the Fourteenth and Fifteenth Amendments.[365] Since then, several voting rights amendments have been adopted that clearly presume the Fifteenth's validity.[366] Furthermore, the Court approvingly cited the Fourteenth Amendment "precedent" of Congress's refusal to recognize either "previous rejection or attempted withdrawal" in concluding that it is a nonjusticiable political question whether a constitutional amendment has been ratified.[367] This historical gloss should be followed here.[368]

Turning to prudential concerns, an antirescission rule would put state legislatures on notice that ratifications are final. Indeed, one could analogize ratification to the decision to join the Union—and the Civil War clearly established that secession is unconstitutional. And rather than creating a "perverse ratchet,"[369] an antirescission rule would eliminate the incentive for a State to sow chaos by attempting to revoke a ratification.

---

364 Pozen & Schmidt, *supra* note 13, at 2381.

365 *See supra* subsection I.A.2, Section II.C. Indeed, the House passed a resolution following the Fifteenth Amendment's ratification stating that States cannot rescind their ratifications. *See* CONG. GLOBE, 41st Cong., 1st Sess. 5356–57 (1870). And during the Progressive era, an attempt to expressly permit rescissions went nowhere. *See* KYVIG, *supra* note 13, at 251–53.

366 *See* U.S. CONST. amend. XIX (sex discrimination); *id.* amend. XXIV (poll tax); *id.* amend. XXVI (age discrimination); *see also* Leser v. Garnett, 258 U.S. 130, 136 (1922) (rejecting challenge to Nineteenth Amendment's validity and noting that the Fifteenth Amendment had been "recognized and acted on for half a century").

367 Coleman v. Miller, 307 U.S. 433, 450 (1939). For more on *Coleman*, see *infra* subsection IV.A.2.

368 *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012) (canvassing the "role of historical practice in the separation of powers context"). Post-ratification practice has spawned considerable academic interest in recent years. My argument for historical gloss based on the Reconstruction Amendments would differ from a liquidation approach, which focuses on events more proximate to the relevant ratifying date. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (advocating for "James Madison's theory of postenactment historical practice, sometimes called 'liquidation'"); Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1233 (2014) (arguing that "historical practice ought to matter if it emerged in the first few decades of constitutional history, but perhaps less so otherwise").

369 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 456.

By contrast, neither the "first-in-time" nor the "last-in-time" rules have been followed by Congress.[370] And the specter that rescissions are valid has not reduced confusion—a typical justification of rules over standards.[371] For proof, just look at the lengthy discussion in this Essay and other academic articles on this question.[372]

2. Recognizing Rump State Legislatures

Next up is Indiana's rump state legislature. No other Northern State had a comparable problem during the ratification process of the Thirteenth and Fourteenth Amendments. As such, Indiana presents a unique problem for the Fifteenth Amendment.[373]

Under current doctrine, this is a relatively straightforward question. Put simply, it is up to Congress to decide whether Indiana's ratification is valid. And here, neither Congress nor Fish raised any such objections.

In *Coleman v. Miller*,[374] half of the members of the Kansas state senate challenged Kansas's ratification of the Child Labor Amendment, which was obtained after Kansas's Lieutenant Governor cast the tie-breaking vote in the state senate.[375] The senators made two arguments. First, they claimed that the ratification was invalid based on the Lieutenant Governor's involvement. The Court divided equally on this point.[376] Second, they argued that the ratification was invalid because of Kansas's previous rejection of the amendment and the lapse of time between Congress's submission and Kansas's purported adoption. On this point, a deeply fractured Court concluded that

---

370 *See id.* (collecting examples); *id.* at 626 n.46 (same).

371 *See, e.g.*, Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 820 (2002) ("Rules are generally more predictable and easier to enforce than standards.").

372 Indeed, the ongoing litigation over the Equal Rights Amendment involves a rescission issue. *See* Virginia v. Ferriero, 525 F. Supp. 3d 36, 61 (D.D.C. 2021) (declining to resolve "whether states can validly rescind prior ratifications"); *see also* Pozen & Schmidt, *supra* note 13, at 2378–80 (discussing the confusion wrought by this litigation).

373 Recall that Indiana House Speaker Buskirk determined that the Indiana Constitution's heightened quorum requirement applied solely to normal legislative business rather than the ratification of a federal constitutional amendment. *See supra* subection II.B.2. Buskirk's position finds some support in *Hawke v. Smith*, 253 U.S. 221 (1920). There, the Supreme Court held that Ohio could *not* use a referendum to ratify a federal constitutional amendment. In so holding, the Court opined that "the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution." *Id.* at 230. Because I find Congress's recognition power under Article V to be the stronger—and sufficient—argument, I merely flag *Hawke*'s potential relevance, rather than rely on it.

374 307 U.S. 433 (1939).

375 *See id.* at 435–37.

376 *See id.* at 446–47.

whether a constitutional amendment has been ratified presents a nonjusticiable political question.[377]

Sometimes, law is just politics by other means. But here, politics *is* law. Congress's recognition decisions under Article V are unreviewable by courts and political considerations can be paramount. As such, Congress can make difficult judgment calls that need not conform with established practice.[378]

---

377 *See id.* at 450; *id.* at 459 (Black, J., concurring) ("Congress has sole and complete control over the amending process, subject to no judicial review . . . ."). Intriguingly, Amar does *not* rely on *Coleman* in support of his Guarantee Clause argument. According to Amar, some Justices in *Coleman* "appeared to think that the Reconstruction Amendment process had established in practice that Congress would be the *sole* ex post judge of ratification timing issues." AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 626 n.49 (emphasis added). Amar thinks this reading goes too far and that the "narrower and sounder reading of the Reconstruction precedent is that Congress is properly the judge of state republicanism, insofar as that issue bears on Article V" and that "Congress is not necessarily the judge of all other Article V issues." *Id.* For more on *Coleman*, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 707–21 (1993).

Coincidentally, the Indiana Supreme Court adopted a similar approach to *Coleman* in *Evans v. Browne*, 30 Ind. 514 (1869), which involved the same mass resignation of Democratic state legislators. In *Evans*, an attorney sought payment of $1500 based on a bill that the rump Indiana state legislature had enacted. *Id.* at 514–15. In upholding the attorney's right to payment, the Indiana Supreme Court determined that "courts cannot look beyond the enrolled act and its authentication." *Id.* at 527. Thus, even at the state level, separation-of-powers concerns counsel against judicial second-guessing of a law's compliance with legislative procedure.

378 In a pair of decisions in the 2010s, the Court addressed whether Congress could dictate that the passport of a child born in Jerusalem have his place of birth listed as "Israel." In *Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189 (2012), the Court held that cases involving the *foreign* recognition power were *not* political questions. In other words, the Court could adjudicate the dispute. *See id.* at 191, 201. Then, in *Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076 (2015), the Court invalidated the relevant passport statute on the grounds that it usurped the president's foreign recognition power. *See id.* at 2096.

The *Zivotofsky* cases are problematic for three reasons. First, *Zivotofsky I* displays a willingness by the Court to intervene in recognition decisions in the international realm, where the political branches have historically been given wide leeway. Second, *Zivotofsky II* signaled the Court's willingness to invalidate congressional oversight of the executive branch. Last but not least, these decisions appear at odds with the Court's rationale in *Coleman*, which declared that recognition of constitutional amendments was a nonjusticiable political question. *Coleman*'s upshot is that Congress gets to decide such matters.

At the end of the day, the foreign recognition power was deemed to belong to the president. *Zivotofsky II*, 135 S. Ct. at 2096. The same cannot be said for the Article V recognition power, which does not expressly include the president at all. Indeed, other than Lincoln's symbolic signature on the Thirteenth Amendment, presidents have been largely excluded from the constitutional amendment process. Given that constitutional amendments must satisfy a two-thirds threshold—the same as a veto override—it makes sense that the president is excluded.

3. The Georgia Problem

Georgia presents the hardest question. It is one thing to exclude the South from Congress when it initially requests readmission after the Civil War. It is another thing entirely to readmit Georgia and seat its representatives, exclude its senator in response to the black office-holding dispute and Section Three controversy, have its representatives vote on the Fifteenth Amendment, and then kick it out of the Union entirely and require it to ratify the Fifteenth Amendment. Although each house of Congress polices its own membership,[379] Georgia's exclusion from the Senate but not the House raises difficult questions given Article V's requirement that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[380]

To the extent that Georgia's expulsion was in response to its exclusion of black lawmakers, it is important to note that Congress was *itself* debating similar questions around the same time. Various drafts of the Fifteenth Amendment explicitly protected a right to hold office, but the version that ultimately passed Congress did not.[381] To be sure, one could view political rights as an indivisible bundle,[382] but there are numerous examples of the Reconstruction Congress differentiating between the franchise and office-holding.[383]

---

379 *See* U.S. CONST. art. I, § 5.

380 *Id.* art. V.

381 *See* LASH, VOL. 2, *supra* note 6, at 438–39. Moreover, in February 1870, Senate Democrats tried and failed to exclude the first black Senator, Hiram Revels, on the grounds that he had not been a citizen for the requisite number of years. The Democrats based their argument on *Dred Scott*'s holding that black persons could not be citizens of the United States. And because *Dred Scott* was only abrogated by the Fourteenth Amendment in 1868, their argument went, Revels had not been a citizen for the requisite nine years. *See* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1682 (2006).

382 *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 227–29 (1995).

383 In imposing fundamental conditions, the readmission statutes for Mississippi, Texas, and Virginia all differentiate between the right to vote and hold office. *See* An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870) (protecting separately the "right to vote" and the "right to hold office"); *see also* An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870) (same); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870) (same).

Indeed, following Georgia's expulsion of black lawmakers, Congress began distinguishing between the right to vote and hold office. *Compare* FONER, *supra* note 2, at 108 (describing the fundamental conditions imposed on Mississippi, Texas, and Virginia), *and* An Act to Promote the Reconstruction of the State of Georgia, ch. 3, § 6, 16 Stat. 59, 60 (1869) (protecting the right to hold office), *with* MALTZ, CIVIL RIGHTS, *supra* note 5, at 138–40 (discussing early fundamental conditions limited to the right to vote).

Georgia's situation, moreover, cannot be viewed in isolation. As David Kyvig explained, "[t]he [readmitted Southern] states, observing how Georgia had regained self-government, then lost it a second time by ignoring Reconstruction mandates, no doubt felt pressure to ratify."[384] If Georgia could be reexpelled from the Union for failing to accept black lawmakers and for rejecting the Fifteenth Amendment, then what would stop the Reconstruction Congress from doing the same thing to another recalcitrant State?

Thankfully, as the Fifteenth Amendment's validity does not hinge on Georgia, I need not resolve the Georgia enigma.[385]

B. Normative Takeaways

The Fifteenth Amendment complied with Article V's strictures under a variety of theories. Before this Essay concludes, I want to briefly highlight two normative points. First, the Fifteenth Amendment was the first constitutional provision whose existence is clearly attributable to the votes of black men under the reduced- or full-denominator theories.[386] Second, the fight to ratify the Fifteenth Amendment—indeed, *all* of the Reconstruction Amendments—bears a striking resemblance to numerous *en vogue* theories of constitutional law, such as militant democracy, political process theory, and constitutional hardball.

1. The Importance of Black Ballots

As Eric Foner has observed, "the biracial governments in the South, elected in large measure by black voters, proved crucial to [the Fifteenth Amendment's] ratification."[387] When the Thirteenth Amendment was ratified, only five New England States with miniscule

384 KYVIG, *supra* note 13, at 182.

385 *See supra* Section III.A (showing which States' ratifications are necessary under each theory).

One final point about Georgia. This fact pattern raises concerns about the validity and timing of Georgia's ratification of the *Fourteenth* Amendment. After all, the state legislature that ratified the Fourteenth Amendment was the one who's actions precipitated the exclusion of Georgia's senator and the reimposition of military rule. In many ways, this is a redux of how the Thirty-Ninth Congress treated the South for purposes of the Thirteenth's ratification and the Fourteenth's passage. And under the full-denominator theory, Georgia's valid ratification in July 1868 is necessary to avoid deciding the rescission question. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 601 n.19.

386 I do not make this claim for the loyal-denominator theory because black voters were such a small percentage of the electorate in the Northern States that had enfranchised black men. *See* GILLETTE, *supra* note 5, at 27 ("By the end of 1868, . . . no northern state with a relatively large Negro population had voluntarily accepted full Negro suffrage.").

387 FONER, *supra* note 2, at 108.

black populations had enfranchised black men. The same was true for when Congress passed the Fourteenth Amendment in 1866.[388] Although black men voted in large numbers for the Southern State legislatures that ultimately ratified the Fourteenth Amendment, those assents were obtained through fundamental conditions, and thus a cloud hangs over them.[389]

By contrast, that concern does not exist for six of the Southern States that ratified the Fifteenth Amendment. The governments of Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina had been fully reconstructed.[390] In addition, the lame-duck Fortieth Congress had several Republican members elected with the support of black voters.[391]

The narrative that the North compelled the South to ratify *all* of the Reconstruction Amendments is an oversimplification that erases the role of black voters in the Fifteenth Amendment's adoption. After the North transformed the South via the First Reconstruction Act, "Northern white Republicans . . . linked arms with new Southern black voters and black lawmakers to reform the North and also cement voting rights in the South."[392] The Fifteenth Amendment not only protected black men's right to vote, but its existence was also attributable to those black men who could already vote.

2. Reconstructing Democracy

Following the Civil War, the Reconstruction Framers were confronted with an unprecedented task: transforming a former slave society into a multiracial democracy.[393] To accomplish their admirable and ambitious goal, the Framers employed a variety of stratagems that bear a striking similarity to contemporary theories about preserving and strengthening democracy. In this final subsection, I provide a brief sketch of these similarities; a more thorough account is for a future piece. And to be clear, by mapping out the similarities between Reconstruction and contemporary theories, I do not claim that the

388 *See* Crum, *Superfluous*, *supra* note 3, at 1593.

389 *See, e.g.*, Colby, *supra* note 13, at 1668 (arguing that the Reconstructed Southern governments "acted at gunpoint" and "had been given no choice but to ratify, and it is impossible to say with any confidence that their ratification votes were voluntary").

390 *See* MALTZ, CIVIL RIGHTS, *supra* note 5, at 140 (discussing these States' readmissions); *infra* Appendix (noting these States' ratifications of the Fifteenth Amendment).

391 *See Congress Profiles: 40th Congress (1867–1869)*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/40th/ [https://perma.cc/HXT3-N3NR]

392 AMAR, AMERICA'S CONSTITUTION, *supra* note 9, at 397.

393 *See* FONER, *supra* note 50, at xx.

threats facing democracy today—although very dire and significant by recent standards—are comparable to the widespread violence and chaos that characterized the post–Civil War South.

In many ways, the Reconstruction Framers' behavior resembles the tactics of militant democracy. Here, I do not mean the literal military occupation of the South.[394] Rather, the term "militant democracy" was coined by Karl Loewenstein as fascist and communist governments gained power in Europe in the l930s. According to Loewenstein, liberal democracies must sometimes take steps to protect themselves from antidemocratic forces that participate in the political process.[395] Loewenstein's theory has received renewed scholarly attention in response to recent threats to both established and emerging democracies.[396] Militant democracy adopts an array of tactics, but a common one is banning political parties that endorse secessionist, racist, or antidemocratic ideas.[397] For its part, the United States adopted a militant-democracy strategy in its de-Nazification and de-Baathification campaigns in Germany and Iraq, respectively.[398]

During Reconstruction, the Democratic Party endorsed secessionist, racist, and antidemocratic ideas and actions. Although the Reconstruction Congress, where Republicans held massive majorities, did not outright ban the Democratic Party, it took several analogous actions to weaken it.

For starters, the Reconstruction Congress excluded the Southern States that had sent slates of traitors to Washington, DC. Although the

394 Of course, the military and Congress's war powers were essential in implementing congressional reconstruction. *See* DOWNS, *supra* note 314, at 218 (arguing that "[r]atifying the Fifteenth Amendment depended upon the war powers" given the fundamental conditions placed on Virginia, Mississippi, Texas, and Georgia); *id.* at 202–03 (making a similar argument for the Fourteenth Amendment).

395 *See* Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 422–23 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638, 656–58 (1937).

396 *See, e.g.*, Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 59 (1995) (arguing that a democracy "may defend itself against anti-democratic actors"); Tom Ginsburg, Aziz Z. Huq & David Landau, *The Law of Democratic Disqualification*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 50–51), https://ssrn.com/abstract=3938600 (discussing the pros and cons of employing militant democracy as a response to the 2020 election); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1467 (2007) ("Virtually all democratic societies define some extremist elements as beyond the bounds of democratic tolerance.")

397 *See, e.g.*, Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905, 938–43 (2018) (discussing bans on secessionist parties).

398 *See* FREDERICK TAYLOR, EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY 253–54 (2011); Shane Harris, *The Re-Baathification of Iraq*, FOREIGN POL'Y (Aug. 21, 2014), https://foreignpolicy.com/2014/08/21/the-re-baathification-of-iraq/ [https://perma.cc/F9L4-MS5H].

Republican Party constituted a quorum notwithstanding this action, the exclusion was essential for the passage of the Thirteenth and Fourteenth Amendments, though not necessarily the Fifteenth. And as I have flagged previously, the First Reconstruction Act and the Fourteenth Amendment both contain seeds of militant democracy.[399] The First Reconstruction Act disenfranchised ex-rebels, a move that helped create black electoral majorities in some Southern States.[400] In addition, Section Three of the Fourteenth Amendment prohibited rebels who had previously sworn an oath to defend the Constitution from holding federal or state office—a paradigmatic political right—absent a two-thirds congressional amnesty.[401] The impact was purposefully decapitating: "the Amendment made virtually the entire political leadership of the South ineligible for office."[402] The use of fundamental conditions regarding black male suffrage and the Fourteenth and Fifteenth Amendments could further be viewed as attempts to preserve the gains of the war and prevent backsliding.

The Reconstruction Congress was not merely interested in punishing the former rebels—it also enfranchised black voters. In this way, the Reconstruction Congress's actions are less similar to militant democracy and are more comparable to political process theory, albeit with a twist.

In footnote four of *Carolene Products*, the Court questioned laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[403] Building off this insight, John Hart Ely argued that courts should step in to keep the "channels of political change" open.[404] He pointed to the Court's one-person, one-vote cases as prime examples of his theory in

399 *See* Crum, *Superfluous*, *supra* note 3, at 1590 n.260.

400 *See supra* notes 89–100 and accompanying text.

401 *See* U.S. CONST. amend. XIV, § 3. Indeed, Section Three became a flashpoint in Georgia's readmission saga. *See supra* subsection II.B.3.

402 FONER, *supra* note 50, at 259.

403 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

404 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

Ely's scholarship has spawned a vast academic literature. *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. (forthcoming 2022), https://ssrn.com/abstract=3970932; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329 (2005); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991); Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111; Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427 (2017).

practice.[405] In addition, he argued for an antidiscrimination justification for judicial review, with protections for blacks as his "core case."[406] Ely's goal was to resolve the countermajoritarian difficulty—that is, how to reconcile judicial review with democratic principles—with a "participation-oriented, representation-reinforcing approach."[407] Accordingly, Ely's account is court centric.[408]

Like political process theory, the Reconstruction Framers had anti-entrenchment and antidiscrimination motivations. However, the Reconstruction Framers operated through the political branches—not the courts.[409] By enfranchising black men in the South, Congress made the Southern States more republican than they had ever been before. By ensuring that the Confederate leadership would not return to power either in state capitols or in Washington, Congress helped preserve the Union and democracy against antidemocratic forces. And it was Congress that understood that the ballot would empower black voters to defend their civil rights and advocate for their interests. Once Grant won the presidency, the executive branch helped combat the Klan and protect black voters in the South.[410] And, of course, the Reconstruction Amendments would not have been ratified but for the actions of dozens of state legislatures.

Reconstruction might also appear like an extreme example of constitutional hardball.[411] As defined by Mark Tushnet, constitutional hardball includes "political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension" with

405 ELY, *supra* note 404, at 120–24. For a recent discussion of one-person, one-vote cases and how that doctrine's open questions may impact the 2020 redistricting cycle, see Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 374–80, 399–400, 428–34 (2022).

406 ELY, *supra* note 404, at 148.

407 *See id.* at 87.

408 *See id.* at 103–04. In focusing on the countermajoritarian difficulty, Ely was responding to Alexander Bickel's work. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962).

409 By contrast, Ely believed that "[o]bviously our elected representatives are the last persons we should trust" with deciding whether "the political market[] is systemically malfunctioning." ELY, *supra* note 404, at 103.

410 *See* Travis Crum, *Federalizing the Voting Rights Act*, 74 VAND. L. REV. EN BANC 323, 326 (2021) (discussing the Grant Administration's role in Reconstruction); *see also generally* Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385 (2021) (arguing that presidential involvement in elections raises serious legitimacy questions).

411 *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); *see also* JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION 117 (2021) ("It is clear that the South's recalcitrance justified the Radical Republicans' exercise in 'constitutional hardball.'").

preexisting constitutional norms.[412] Hardball arguments, in other words, push the legal envelope.[413] To play hardball is to "play[] for keeps."[414] Politicians playing hardball are seeking to entrench themselves in "power [through] new institutional arrangements."[415] In this way, constitutional hardball is "associated with constitutional transformation."[416]

At first glance, Reconstruction resembles constitutional hardball. The Radical Republicans were certainly playing for keeps, pushing the legal envelope, and creating a new constitutional order. But in my view, Reconstruction differs from constitutional hardball in three key ways. First, although constitutional hardball is associated with constitutional change, that transformation occurs *within* the existing document.[417] Politicians playing constitutional hardball are not seeking to change the Constitution through the Article V process. Second, Reconstruction went well beyond hardball given the sheer amount of violence in the Deep South and the use of the Union Army. Finally, democracy-enhancing reforms may not be characterized as hardball at all, but rather as antihardball.[418] Radical Republicans openly recognized that extending—and safeguarding—the franchise to black men would empower them and help protect their civil rights.[419] Put differently, constitutional hardball is normally a vice, not a virtue.

In sum, the Reconstruction Framers' tactics bear a strong—but not perfect—similarity to contemporary constitutional theories such as

412 Tushnet, *supra* note 411, at 523; *see also* Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–21 (2018) ("A political maneuver can amount to constitutional hardball when it violates or strains conventions for partisan ends." (emphasis omitted)).

413 *See* Tushnet, *supra* note 411, at 531 (noting that "hardball arguments are not frivolous").

414 *Id.* at 523.

415 *Id.* at 533.

416 *Id.* at 532.

417 *See id.* at 526–28 (discussing examples such as mid-decade redistricting, aggressive use of the filibuster, and impeachment).

418 *See* David E. Pozen, Essay, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEG. & PUB. POL'Y 949, 953 (2019) (arguing that "[v]oting rights reforms would serve an anti-hardball function"). Alternatively, one could frame such actions as a justifiable or beneficial form of constitutional hardball. *See* Joseph Fishkin & David E. Pozen, Reply, *Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda*, 119 COLUM. L. REV. ONLINE 158, 171 (2019) ("[C]onstitutional hardball that operates by improving the system of democratic representation, such as by enfranchising people who ought to be enfranchised but have not been, may be especially defensible."); *see also* Tushnet, *supra* note 411, at 536 (arguing that the VRA qualifies as an example of constitutional hardball).

419 *See* CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross) ("The ballot is as much the bulwark of liberty to the black man as it is to the white."); *see also* Crum, *Reconstructing*, *supra* note 5, at 306–09 (collecting additional sources).

militant democracy, political process theory, and constitutional hardball.

CONCLUSION

Consistent with its broader erasure from constitutional law, the Fifteenth Amendment has been virtually absent from the great debate over the lawfulness of the Reconstruction Amendments. This Essay has filled this gap in the literature and, in so doing, has problematized some of the leading theories concerning the Reconstruction Amendments' ratifications. In particular, this Essay has shown that at least one question left unanswered about the Thirteenth and Fourteenth Amendments must be resolved: namely, whether rescissions are valid; whether a Northern rump state legislature's ratification is acceptable; and whether a Reconstructed Southern State can be kicked out of the Union and required to ratify an amendment for its second readmission. Given the political math, it is more difficult for the loyal- and reduced-denominator theories to sidestep these questions. Furthermore, this Essay has argued that Ackerman's constitutional-moment theory cannot treat the election of 1868 as its consolidating event.

Stepping back from the legalistic debate, this Essay has argued that extraordinary measures were both necessary and justified for the Reconstruction Amendments' ratifications. This lesson reverberates today as our democracy is under attack from forces that deny the results of elections and disregard the peaceful transition of power. It is therefore appropriate to look to our own past to understand what was required to achieve a true democracy. After all, democracy is a fine form of government and worth fighting for.[420]

420 *Cf.* ERNEST HEMINGWAY, FOR WHOM THE BELL TOLLS 467 (1940) ("The world is a fine place and worth fighting for . . . .").

APPENDIX

Below I have constructed a timeline of the Fifteenth Amendment's ratification, which keeps a running count of ratifications under the various theories. The necessary numerators are twenty for the loyal-denominator theory, twenty-five or twenty-six for the reduced-denominator theory (depending on Georgia), and twenty-eight for the full-denominator theory. The numbers in the parentheses show the count if New York's rescission is valid.[421]

421 For the dates, see GILLETTE, *supra* note 5, at 84–85 tbl.2. For States that rejected the amendment on multiple occasions, I have opted to include only the first rejection. For States that rejected the amendment and then ratified the amendment, I have included only the acceptance.

TABLE 1

State	Status	Ratify?	Date	Loyal Count	Reduced Count	Full Count	Irregularities
Nevada	Loyal	Yes	3/1/69	1	1	1	
Louisiana	Readmitted	Yes	3/1/69	1	2	2	
West Virginia	Loyal	Yes	3/3/69	2	3	3	
North Carolina	Readmitted	Yes	3/4/69	2	4	4	
Illinois	Loyal	Yes	3/5/69	3	5	5	
Michigan	Loyal	Yes	3/5/69	4	6	6	
Wisconsin	Loyal	Yes	3/5/69	5	7	7	
Maine	Loyal	Yes	3/11/69	6	8	8	
South Carolina	Readmitted	Yes	3/11/69	6	9	9	

TABLE 1 (CONT.)

State	Status	Ratify?	Date	Loyal Count	Reduced Count	Full Count	Irregularities
Kentucky	Loyal	No	03/12/69	6	9	9	
Massachusetts	Loyal	Yes	03/12/69	7	10	10	
Arkansas	Readmitted	Yes	03/15/69	7	11	11	
Delaware	Loyal	No	03/18/69	7	11	11	
Pennsylvania	Loyal	Yes	03/25/69	8	12	12	
New York	Loyal	Yes	04/14/69	9	13	13	Later Rescinded
Connecticut	Loyal	Yes	05/13/69	10	14	14	
Indiana	Loyal	Yes	05/14/69	11	15	15	Rump state legislature
Florida	Readmitted	Yes	06/14/69	11	16	16	

TABLE 1 (CONT.)

State	Status	Ratify?	Date	Loyal Count	Reduced Count	Full Count	Irregularities
New Hampshire	Loyal	Yes	07/01/69	12	17	17	
Virginia	Rebel	Yes	10/08/69	12	17	18	Fundamental Condition
Vermont	Loyal	Yes	10/20/69	13	18	19	
Alabama	Readmitted	Yes	11/16/69	13	19	20	
Tennessee	Readmitted	No	11/16/69	13	19	20	
New York	Loyal	Rescind	01/05/70	13 (12)	19 (18)	20 (19)	Rescission
Missouri	Loyal	Yes	01/07/70	14 (13)	20 (19)	21 (20)	
Minnesota	Loyal	Yes	01/13/70	15 (14)	21 (20)	22 (21)	
Mississippi	Rebel	Yes	01/17/70	15 (14)	21 (20)	23 (22)	Fundamental Condition

TABLE 1 (CONT.)

State	Status	Ratify?	Date	Loyal Count	Reduced Count	Full Count	Irregularities
Rhode Island	Loyal	Yes	01/18/70	16 (15)	22 (21)	24 (23)	
Kansas	Loyal	Yes	01/19/70	17 (16)	23 (22)	25 (24)	
Ohio	Loyal	Yes	01/20/70	18 (17)	24 (23)	26 (25)	
Iowa	Loyal	Yes	01/27/70	19 (18)	25 (24)	27 (26)	
California	Loyal	No	01/28/70	19 (18)	25 (24)	27 (26)	
Texas	Rebel	Yes	02/01/70	19 (18)	25 (24)	28 (27)	Fundamental Condition
Georgia	Rebel	Yes	02/02/70	19 (18)	25 (24)	29 (28)	2nd Readmission
Nebraska	Loyal	Yes	02/17/70	20 (19)	26 (25)	30 (29)	
Maryland	Loyal	No	02/25/70	20 (19)	26 (25)	30 (29)	

TABLE 1 (CONT.)

State	Status	Ratify?	Date	Loyal Count	Reduced Count	Full Count	Irregularities
Oregon	Loyal	No	10/26/70	20 (19)	26 (25)	30 (29)	Post-proclamation
New Jersey	Loyal	Yes	02/15/71	21 (20)	27 (26)	31 (30)	Post-proclamation