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The Unabridged Fifteenth Amendment

ABSTRACT. In the legal histories of Reconstruction, the Fifteenth Amendment is usually an afterthought compared to the Fourteenth Amendment. This oversight is perplexing: the Fifteenth Amendment ushered in a brief period of multiracial democracy and laid the constitutional foundation for the Voting Rights Act of 1965. This Article helps to complete the historical record, providing a thorough accounting of the Fifteenth Amendment's text, history, and purpose.

This Article situates the Fifteenth Amendment within the broad array of constitutional provisions, federal statutes, fundamental conditions, and state laws that enfranchised—and disenfranchised—Black men during Reconstruction. It then dives into the congressional debate, cataloging every version of the Amendment that was voted on. Next, this Article turns to the ratification debate, an intense partisan affair that culminated in Congress compelling four Southern States' ratification as part of their readmission to the Union.

Uncovering the Fifteenth Amendment's past has important implications for today's doctrinal questions. This Article, however, does not focus on answering those questions, but instead centers on the issues debated by the ratifying generation. The Reconstruction Framers were united in their goal of enfranchising Black men nationwide, but they were deeply divided over how best to achieve that goal and whether other disenfranchised groups—women, Irish Americans, and Chinese immigrants—should be covered by the Amendment as well. In addition, the Reconstruction Framers debated whether and how the Amendment could be circumvented and whether officeholding should be explicitly protected.

This Article argues that the Fifteenth Amendment's original understanding went beyond forbidding facially discriminatory voting qualifications; the Fifteenth Amendment also prohibited the use of racial proxies and, albeit less clearly, protected the right to hold office. But more fundamentally, the Fifteenth Amendment rejected the original Constitution's theory of democracy, which delegated to States the authority to decide who deserved the franchise based on whether they had a sufficient stake in the community or their interests were virtually represented. In short, the Fifteenth Amendment is the first constitutional provision to embrace the idea that the right to vote is preservative of all other rights.

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INTRODUCTION

Ratified in 1870, the Fifteenth Amendment re-founded the United States as a multiracial democracy.¹ In guaranteeing that “[t]he right of citizens . . . 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 the Fifteenth Amendment enfranchised Black men in seventeen Northern and Border States.³ Although Black men in the South had already obtained the right to vote via the First Reconstruction Act,⁴ the Fifteenth Amendment gave Congress novel enforcement authority to protect voting rights if—and, indeed, when—the newly readmitted Southern States started to backslide and disenfranchise Black men.⁵

Notwithstanding these momentous changes, the Fifteenth Amendment’s most familiar legacy may be its flagrant disregard by the Southern States during Jim Crow.⁶ The standard narrative is that the Fifteenth Amendment’s narrow protections allowed Southern States to effectively nullify it with facially neutral—but discriminatory—schemes like grandfather clauses, literacy tests, and poll taxes.⁷ This view echoes the critiques of Radical Republicans who presciently warned that such nefarious devices would be used to disenfranchise virtually all Black men.⁸

In part because of this tragic history, the Fifteenth Amendment is a scholarly afterthought.⁹ The legal scholarship that substantially excavates the Fifteenth

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1. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 115 (2019) [hereinafter FONER, *SECOND FOUNDING*].
 2. U.S. CONST. amend. XV, § 1.
 3. See FONER, *SECOND FOUNDING*, *supra* note 1, at 108.
 4. See An Act to provide for the more efficient Government of the Rebel States (First Reconstruction Act), ch. 153, § 5, 14 Stat. 428, 429 (1867).
 5. See U.S. CONST. amend. XV, § 2 (granting Congress the power to pass “appropriate” enforcement legislation); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1620–21 (2020) [hereinafter Crum, *Superfluous*] (arguing that the Fortieth Congress viewed the Fifteenth Amendment as necessary to pass enforcement legislation protecting voting rights).
 6. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (describing “nearly a century of systematic resistance to the Fifteenth Amendment” by the Southern States).
 7. See, e.g., ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 88–92 (rev. ed. 2009).
 8. See *infra* note 283.
 9. See Kurt Lash, *The Fight for Black Suffrage: Documenting the History of the Fifteenth Amendment*, ELECTION L. BLOG (Aug. 11, 2021, 7:00 AM), <https://electionlawblog.org/?p=123855> [<https://perma.cc/R444-BCL3>] (“[S]cholarship on the history of the Fifteenth Amendment has been relatively rare.”); Earl Maltz, *The Coming of the Fifteenth Amendment: The Republican*

Amendment's drafting and ratification – the historical event most salient for constitutional interpretation – can be summarized in a lengthy footnote.¹⁰ Indeed, most legal scholarship on the Fifteenth Amendment focuses on its enforcement during Reconstruction and its subsequent erasure during Jim Crow.¹¹ For their

Party and the Right to Vote in the Early Reconstruction Era, 82 LA. L. REV. 395, 396 (2022) [hereinafter Maltz, *Fifteenth*] (“[U]nlike the Thirteenth and Fourteenth Amendments, legal scholars have shown relatively little interest in exploring the background of the Fifteenth Amendment.”).

10. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222-41 (1995) [hereinafter Amar, *Jury Service*] (discussing the Fifteenth Amendment's drafting and its relevance to the right to serve on a jury); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 928-56 (1998) (arguing that the Reconstruction Framers had a race-conscious approach to adopting the Fifteenth Amendment); Alfred Avins, *Literacy Tests and the Fifteenth Amendment: The Original Understanding*, 12 S. TEX. L.J. 24, 64-66 (1970) [hereinafter Avins, *Literacy*] (arguing that Congress could not ban literacy tests under its Fifteenth Amendment enforcement authority); Alfred Avins, *The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding*, 15 KAN. L. REV. 287, 304 (1967) [hereinafter Avins, *Office*] (arguing that the Fifteenth Amendment does not protect the right to hold office); 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.”); 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, 263-64 (2004) (arguing that the Fifteenth Amendment effectively repealed Section Two of the Fourteenth Amendment); Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1573-91 (2022) [hereinafter Crum, *Lawfulness*] (discussing the irregularities in the Fifteenth Amendment's adoption); 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 5, at 1602-17 (discussing the Fortieth Congress's decision to pass a constitutional amendment rather than a nationwide suffrage statute); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 452-56 (2008) (summarizing the history of the Fifteenth Amendment's adoption); 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 435-599 (Kurt T. Lash ed., 2021) [hereinafter THE ESSENTIAL DOCUMENTS] (compiling primary sources); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 142-56 (1990) [hereinafter MALTZ, CIVIL RIGHTS] (claiming that the Fifteenth Amendment prohibits only facially discriminatory laws); Maltz, *Fifteenth*, *supra* note 9, at 418-43 (surveying the congressional debate over the Fifteenth Amendment).
11. See, e.g., Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 393-408 (1985) (examining Fifteenth Amendment jurisprudence from Reconstruction through the civil-rights movement); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2348-60 (2003) (discussing Reconstruction Era decisions on Congress's Fifteenth Amendment enforcement authority); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 300-10 (2000)

part, historians have examined the Fifteenth Amendment's adoption, but their inquiries concentrate on questions of motivation and causation rather than the Amendment's original understanding.¹² To fully underscore the dearth of scholarship: the last full-length book on the Fifteenth Amendment was published in 1965.¹³ Suffice to say, our nation has dramatically changed since then – and in no small part, as this Article demonstrates, due to the foundation laid by the Fifteenth Amendment for the constitutionality of the Voting Rights Act of 1965 (VRA).

In a similar vein, the Fifteenth Amendment is doctrinally underdeveloped.¹⁴ The Supreme Court has repeatedly refused to answer core questions about the

(recounting the disenfranchisement of Southern Black men at the turn of the twentieth century and the Court's failure to intervene); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 836 (1982) (“The so-called ‘Grandfather Clause’ was the main contrivance for assuring distrustful poor whites that their rights would not be affected by the program of black disenfranchisement that swept through the South around the turn of the [twentieth] century.”).

12. See, e.g., A. CAPERTON BRAXTON, *THE FIFTEENTH AMENDMENT: AN ACCOUNT OF ITS ENACTMENT* 77-78 (1903) (arguing that the majority of White male voters opposed the Fifteenth Amendment's ratification); MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869*, at 335-36 (1974) (“[T]he chaos of the third session of the Fortieth Congress . . . portended the rupture of the party and the collapse of Republican Reconstruction policy.”); LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, in *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS* 156, 169-72 (Kenneth M. Stampp & Leon F. Litwack eds., 1969) (emphasizing the Radicals' ideological motivations); GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* 218 (2015) (“Ratifying the Fifteenth Amendment depended upon the war powers”); FONER, *SECOND FOUNDING*, *supra* note 1, at 115 (“[R]atification of the Fifteenth Amendment marked the completion of the second founding”); WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 77 (2d ed. 1969) (arguing that the Fifteenth Amendment's primary purpose was to enfranchise Black men in the North); JOHN MABRY MATHEWS, *LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT* 21 (1909) (arguing that the “controlling motive” behind the Fifteenth Amendment was “supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States”); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 39-48 (1997) [hereinafter WANG, TRIAL] (discussing the Fifteenth Amendment's passage as part of a larger project focused on enforcement legislation); see also *infra* note 47 (discussing historians of the women's suffrage movement).
13. See GILLETTE, *supra* note 12, at 17-18 (discussing the book's initial publication in 1965 against the backdrop of the civil-rights movement).
14. See FONER, *SECOND FOUNDING*, *supra* note 1, at 170 (noting that “the Fifteenth [Amendment] plays only a minor role in modern constitutional law”).

Fifteenth Amendment, such as whether it applies to racial vote dilution.¹⁵ In some ways, this doctrinal agnosticism is unsurprising, as the Fifteenth Amendment's protections have been subsumed by the Equal Protection Clause and most cases are now litigated under the VRA.¹⁶ However, the Court's reliance on the Equal Protection Clause to protect against racial discrimination in voting is deeply ahistorical.¹⁷ After all, the Reconstruction Framers added the Fifteenth Amendment to the Constitution because Section One of the Fourteenth Amendment was originally understood to encompass civil – but not political – rights.¹⁸

This historical amnesia and doctrinal uncertainty surrounding the Fifteenth Amendment are particularly problematic for two related reasons. First, given the disrespect for precedent and the ascendance of originalism on the Supreme Court, constitutional law is facing revolutionary changes based on what a constitutional provision was originally understood to mean.¹⁹ Originalist claims are contingent on the completeness of the historical record, and yet we know shockingly little about the Fifteenth Amendment's context and adoption.

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15. The Court's precedent on this question is muddled. See Crum, *Superfluous*, *supra* note 5, at 1560–61 (examining the Fifteenth Amendment's unclear scope). A mere plurality of the Court has concluded that racial vote dilution falls outside the Fifteenth Amendment, see *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion), and subsequent majority opinions have observed that the question remains open, see, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (“This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.”). Moreover, the Court's decision in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), could be analogized to a racial vote-dilution case. There, the Court held that the plaintiffs had stated a Fifteenth Amendment claim when challenging the State of Alabama's redrawing of the City of Tuskegee's boundaries from a square to “a strangely irregular twenty-eight-sided figure,” an act that removed virtually all Black voters from the municipality. *Id.* at 341. Later decisions have interpreted *Gomillion* in divergent ways. See, e.g., *Reno v. Bossier Par. Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 334 n.3 (2000) (rejecting claim that *Gomillion* is a racial vote-dilution case); *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (viewing *Gomillion* as support for *Shaw's* racial-gerrymandering cause of action under the Equal Protection Clause).
 16. See Crum, *Superfluous*, *supra* note 5, at 1557–67.
 17. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 391 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*] (“[T]he Fourteenth Amendment guaranteed civil rights but not political rights against each citizen's home state.”); LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 108 (2015) (“The Fourteenth Amendment also made clear that political rights were not fundamental rights of citizenship.”); *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting) (“[T]he Equal Protection Clause was not intended to touch state electoral matters.”).
 18. See *Oregon v. Mitchell*, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part); Crum, *Superfluous*, *supra* note 5, at 1553–54.
 19. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022) (holding that the Due Process Clause does not protect a woman's right to choose an abortion and overturning *Roe* and *Casey*); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022) (eschewing a scrutiny-based standard in favor of one based on “this Nation's historical tradition of firearm regulation”).

Second, the Supreme Court’s originalist impulses and its colorblind doctrine are in significant tension. Section 2 of the VRA is a “permanent, nationwide ban on racial discrimination in voting”²⁰ that mandates the consideration of race in the redistricting process and requires the creation of majority-minority districts in certain circumstances.²¹ But in the *Shaw* line of cases, the Court held that the Equal Protection Clause subjects race-based redistricting to strict scrutiny.²² Thus, the Court’s colorblind vision of the Fourteenth Amendment is on a collision course with the VRA.²³ Bringing these two threads together: if one starts from an originalist perspective, the Fifteenth Amendment – not the Equal Protection Clause – is the firmest constitutional foundation for the VRA’s constitutionality, and knowing more about the Fifteenth Amendment’s original understanding will help bolster the VRA’s constitutionality.

The Supreme Court’s recent decision in *Allen v. Milligan*²⁴ has ameliorated but not fully resolved the constitutional concerns surrounding the VRA. In *Milligan*, plaintiffs brought a Section 2 challenge against Alabama’s congressional redistricting plan, in which only one out of seven districts was majority Black notwithstanding a population that is twenty-seven percent Black. The three-judge district court enjoined the use of that map for the 2022 midterm election.²⁵ The Supreme Court stayed that decision – thereby signaling that it was likely to reverse – and put the case on its merits docket.²⁶ At the merits stage, Alabama argued, *inter alia*, that Section 2 should *not* apply to single-member redistricting plans due to constitutional-avoidance concerns.²⁷ In an illustrative example of how far afield contemporary doctrine has drifted from the original meaning of the Reconstruction Amendments, Alabama’s argument – which was pitched at the purportedly originalist Justices – focused on the *Shaw* line of cases and

20. *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

21. See *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality opinion).

22. See *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (recognizing the cause of action); *Cooper v. Harris*, 581 U.S. 285, 291–92 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (explaining that if “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district’ . . . the design of the district must withstand strict scrutiny”).

23. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–69 (2001).

24. 599 U.S. 1 (2023). In the interest of full disclosure, I filed an amicus brief in support of the plaintiffs in this case at the Supreme Court. See Brief for Professor Travis Crum as Amici Curiae Supporting Respondents, *Merrill v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086 & 21-1087).

25. See *Singleton v. Merrill*, 582 F. Supp. 3d 924, 935–36 (N.D. Ala. 2022).

26. See *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.).

27. See Brief for Appellants at 31, *Merrill v. Milligan*, 599 U.S. 1 (Nos. 21-1086 & 21-1087).

asserted that the Equal Protection Clause prohibits race-based districting,²⁸ even though that Clause was originally understood to not even apply to voting rights.²⁹

In a 5-4 decision, the *Milligan* Court rejected “Alabama’s attempt to remake . . . § 2 jurisprudence anew.”³⁰ In so holding, the Court made clear that, under existing precedent, Section 2 did not raise constitutional-avoidance concerns.³¹ But therein lies the rub: the *Milligan* Court’s analysis was tied to existing precedent, which Alabama, for all its bluster, did not seek to overturn outright.³² In addition, Justice Kavanaugh refused to join part of the Court’s opinion discussing the role of race in redistricting.³³ More ominously, Kavanaugh authored a separate concurrence in which he suggested he may agree with Justice Thomas’s claim that, “even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.”³⁴ As “Alabama did not raise that temporal argument,” Kavanaugh declined to “consider

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28. *See id.* at 76 (arguing that Section 2 mandates the creation of racial gerrymanders in violation of the Equal Protection Clause). Alabama also argued that Section 2’s application to single-member redistricting schemes exceeds Congress’s Fifteenth Amendment enforcement authority. *See id.* at 72-75.
 29. During oral argument, Justice Ketanji Brown Jackson challenged whether the Fourteenth and Fifteenth Amendments were, in fact, colorblind as a matter of original understanding, but her comments still assumed that the Equal Protection Clause was the starting point for the analysis. *See* Transcript of Oral Argument at 57, *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086 & 21-1087) (“[T]he framers themselves adopted the equal protection clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race conscious way.”).
 30. *Milligan*, 599 U.S. at 23.
 31. *See id.* at 41 (“We also reject Alabama’s argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment.”).
 32. *See id.* at 41-42 (“In light of that precedent, including *City of Rome*, we are not persuaded by Alabama’s arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress. . . . Our opinion today does not diminish or disregard those [constitutional] concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out here.”).
 33. *See id.* at 30-34 (plurality opinion) (discussing the difference between predominance and consciousness in redistricting). Justice Kavanaugh’s concurrence also emphasized that statutory *stare decisis* counseled against Alabama’s arguments. *See id.* at 42 (Kavanaugh, J., concurring).
 34. *Id.* at 45 (Kavanaugh, J., concurring); *see also id.* at 86-88 (Thomas, J., dissenting) (unpacking this argument).

it at this time.”³⁵ Unsurprisingly, that “temporal argument” is already being raised in ongoing Section 2 litigation.³⁶

An unabridged account of the Fifteenth Amendment’s text, history, and purpose is necessary not only to complete the historical narrative but also to critique the Court’s application of colorblind Fourteenth Amendment principles to what should be considered Fifteenth Amendment cases. This Article is part of a larger project that treats the Fifteenth Amendment as an independent constitutional provision. In previous work, I have examined why the Fifteenth Amendment was passed as a constitutional amendment rather than an ordinary statute and argued that the Reconstruction Era distinction between civil and political rights militates in favor of Congress having a broad and independent enforcement power under Section Two of the Fifteenth Amendment.³⁷ In addition, I have excavated the role of racially polarized voting in the Fifteenth Amendment’s adoption and claimed that this historical context undercuts the Court’s colorblind approach to voting-rights cases.³⁸ And finally, I have examined the procedural irregularities associated with the Fifteenth Amendment’s adoption, situating it within the broader scholarly debate about the constitutional significance and lawfulness of Reconstruction.³⁹ This Article continues along the same path and focuses on the substantive debates surrounding the Fifteenth Amendment’s drafting and ratification.

This Article’s claims and contributions are primarily descriptive and historical. Instead of concentrating on today’s doctrinal disputes,⁴⁰ this Article answers questions that were pressing during Reconstruction. During the lame-duck Fortieth Congress, the Reconstruction Framers coalesced around the goal of enfranchising Black men nationwide. First and foremost, the Fifteenth Amendment was unambiguously intended to accomplish that goal. But the Reconstruction Framers were deeply divided over subsidiary questions: whether the Amendment could be circumvented with facially neutral voting qualifications that were intended to disproportionately impact Black men, whether it mandated the enfranchisement of Irish Americans and Chinese immigrants, and whether the

35. *Id.* at 45 (Kavanaugh, J., concurring).

36. See Rick Hasen, *Louisiana Argues that the District Court Considering Voting Rights Challenge to Louisiana Congressional Redistricting Should Consider if Section 2 of the Voting Rights Act Is No Longer Constitutional*, ELECTION L. BLOG (July 7, 2023, 10:04 AM), <https://electionlawblog.org/?p=137307> [<https://perma.cc/Z6RZ-22LN>].

37. See Crum, *Superfluous*, *supra* note 5.

38. See Crum, *Reconstructing*, *supra* note 10.

39. See Crum, *Lawfulness*, *supra* note 10.

40. This Article leaves these disputes to future work. In addition to the doctrinal uncertainty over redistricting, open questions include whether the Fifteenth Amendment has an intent requirement and applies to private action. See Crum, *Superfluous*, *supra* note 5, at 1560–63, 1580.

right to hold office was protected. Even after the Amendment passed Congress, the ratifying public continued to debate the metes and bounds of the Amendment's language.

In answering these questions, this Article delves deeper into the history than prior scholarship. For instance, this Article contextualizes the Fifteenth Amendment's language within the broader constellation of state and federal laws that enfranchised—and disenfranchised—Black men during Reconstruction.⁴¹ I am aware of no other study of the Fifteenth Amendment that contrasts its text with the entire universe of state and federal suffrage laws. In addition, this Article provides a thorough timeline and draft language of every version of the Fifteenth Amendment voted on by the House or the Senate.⁴² This Article also uncovers debates indicating that the Reconstruction Framers understood that the right to vote was exercised not just individually but also collectively.⁴³

As this Article demonstrates, the Fifteenth Amendment was originally understood to apply to all races and to prohibit discriminatory schemes that relied on racial proxies—that is, employing a close stand-in for race, such as ancestry, rather than facially discriminating on the basis of race. The Fifteenth Amendment similarly forbids the discriminatory application of facially neutral laws. As the Amendment contains the sole use of the word “race” in the Constitution, the debates over what qualifies as racial discrimination under the Fifteenth Amendment are instructive for the Fourteenth Amendment as well. Moreover, the Fifteenth Amendment's historical context and purpose indicate that the right to hold federal office could *not* be contingent on a racial classification and, admittedly less clearly, that the right to hold state office was encompassed within the Amendment's protections for the right to vote. This Article briefly concludes by arguing that the Radical Republican ideas animating the Fifteenth Amendment transformed our Constitution's conception of democratic governance.

A few clarifications about what is outside this Article's scope. This Article does not dwell on the primarily political—as opposed to legal—arguments made by Democrats against the Fifteenth Amendment, such as their racist attacks on Black Americans and their claim that Republicans had reneged on their 1868

41. See *infra* Sections I.B-D, Appendix A.

42. See *infra* Appendix B. Regarding my timeline of draft language and votes, I am aware of only one similar compilation, which dates back to Reconstruction. See EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 399-406 (3d ed. 1871). McPherson's compilation omits the first two votes in the House, a proposal on Electoral College reform, and a proposal by Senator Vickers (D-MD) on February 17. In addition, Appendix B makes this information more easily accessible to researchers who use modern electronic databases. And unlike McPherson's compilation, Appendix B provides cross-references to the Congressional Globe so that researchers may easily find the primary source.

43. See *infra* notes 556-563 and accompanying text.

party platform's promise that "the question of suffrage in all the loyal States properly belongs to the people of those States."⁴⁴ Nor does this Article focus on the procedural obstacles that Democrats attempted to erect, such as a requirement that only state legislatures elected after the Fifteenth Amendment's passage in Congress could ratify it.⁴⁵ And as I have covered in detail elsewhere, this Article does not discuss the various irregularities concerning the Fifteenth Amendment's adoption and whether Article V's requirements of passage by two-thirds of Congress and ratification by three-fourths of the States were, in fact, satisfied.⁴⁶ Finally, this Article only cursorily addresses the impact of the Fourteenth and Fifteenth Amendments on the women's suffrage movement, as historians have amply covered this topic as a prelude to the Nineteenth Amendment.⁴⁷

In providing an unabridged account of the Fifteenth Amendment's adoption, this Article proceeds as follows. Part I examines the status of Black men's right to vote prior to the Fifteenth Amendment. Part II excavates the drafting of the

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44. REPUBLICAN PARTY PLATFORM OF 1868 (May 20, 1868), *reprinted by* THE AMERICAN PRESIDENCY PROJECT, U.C. SANTA BARBARA, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1868> [<https://perma.cc/WET5-LKUN>]. In a related vein, this Article does not grapple with the Democrats' argument that suffrage was an unamendable state's right.
45. See CONG. GLOBE, 40th Cong., 3d Sess. 1314 (1869). Democrats argued that, if Republicans had been candid about their intent to pass nationwide Black male suffrage, the 1868 election would have turned out differently. See Maltz, *Fifteenth*, *supra* note 9, at 424-25. Under the Democrats' theory, only those state legislatures elected with knowledge of the Fifteenth Amendment's potential existence should vote on its ratification—a rule that they believed would benefit them politically and help defeat the Amendment. See Maltz, *Fifteenth*, *supra* note 9, at 425.
46. These irregularities include: the exclusion of Southern States from Congress; the use of fundamental conditions to compel ratification; the reimposition of military rule in Georgia; New York's attempted rescission of its ratification; and Indiana's ratification by a rump state legislature. See Crum, *Lawfulness*, *supra* note 10, at 1571-91; see also CONG. GLOBE, 41st Cong., 2d Sess. 5441 (1870) (recording vote on and adoption of House resolution affirming the Fifteenth Amendment's validity). Scholars have also canvassed the irregularities associated with the Thirteenth and Fourteenth Amendments' adoptions. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 100-252 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; AMAR, *AMERICA'S CONSTITUTION*, *supra* note 17, at 364-80; Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1641-82 (2013) [hereinafter Colby, *Originalism*]; Christopher R. Green, *The History of the Loyal Denominator*, 79 LA. L. REV. 47, 52-56 (2018); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 380-419 (2001).
47. See, e.g., ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE* 47-129 (2020); FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* 161-88 (2011); LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* 111-32 (2015); Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office*, 33 YALE J.L. & FEM. 110, 125-36 (2022).

Fifteenth Amendment in the Fortieth Congress. Part III canvases the ratification debate in the States. Part IV answers the Reconstruction Era debates over the Fifteenth Amendment's scope and expounds on its normative implications for constitutional law.⁴⁸

I. THE RIGHT TO VOTE BEFORE THE FIFTEENTH AMENDMENT

There is no explicit, affirmative right to vote in the U.S. Constitution. As originally written, the Constitution delegated to the States the authority to set voting qualifications in federal elections. Although Jacksonian democracy helped eliminate property requirements at the state level,⁴⁹ the constitutional arrangement did not change until Reconstruction. Even then, the Fourteenth Amendment provided merely an inducement to enfranchise Black men. Prior to the Fifteenth Amendment, Black men were enfranchised through changes to federal legislation and state law.

This Part provides an overview of this history in an effort to understand the world before the Fifteenth Amendment. This history contextualizes the world that the Reconstruction Framers found themselves in and sought to change. Moreover, this Part provides a comprehensive and unique accounting of Black men's voting rights during Reconstruction.

A. *The Original Constitution*

At the Founding, the House was the only directly elected branch of the federal government. Because the Founders failed to reach agreement on a nationwide standard, the original Constitution did not establish federal criteria for who had the right to vote for representatives.⁵⁰

Instead, the original Constitution gave States control over who could vote for the Federal House. Article I, Section 2 provides that “[e]lectors . . . shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁵¹ In practice, this was the lower state house, which had “the

48. One final point about style. While linguistic norms are constantly changing, I have opted to capitalize both Black and White when used as racial identifiers. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159> [https://perma.cc/GK2Q-PFYJ].

49. See KEYSSAR, *supra* note 7, at 24-25.

50. See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860*, at 124-25 (1960).

51. U.S. CONST. art. I, § 2.

broadest franchise operating in the states, as opposed to more restricted electorates for various state upper houses and governorships.”⁵²

As a general matter, the franchise was limited to White men who owned property or satisfied taxpaying requirements.⁵³ Estimates vary but “[b]y 1790 . . . roughly 60 to 70 percent of adult white men (and very few others) could vote.”⁵⁴ By relying on state suffrage qualifications, the original Constitution embraced discriminatory barriers to casting a ballot.

The Founding Era electorate reflected colonial and contemporary political theory and prejudices. Many Founders harbored suspicions about widespread enfranchisement for ideological reasons and out of fear that it would endanger the elite’s interests.⁵⁵ Property requirements embodied the notion that only those with a “stake in society” were “sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting.”⁵⁶ Because voting was public, property owners were considered “independent enough to act politically without being unduly influenced by others . . .”⁵⁷ The belief that property conferred sufficient independence to vote helps explain why some Founding Era States adopted race-neutral voting qualifications, especially since few Black men owned enough property to qualify.⁵⁸ Relatedly, the refusal to link citizenship with suffrage – which would have enfranchised women, racial minorities, and poor White men – helps explain why property-owning aliens were permitted to vote.⁵⁹

Another prominent theory was virtual representation, under which the interests of nonvoters were effectively represented by those who could vote.⁶⁰ Virtual representation was frequently deployed by opponents of women’s suffrage, who argued that women “were already represented in the government by male

52. AMAR, *AMERICA’S CONSTITUTION*, *supra* note 17, at 65.

53. See KEYSSAR, *supra* note 7, at 306-07 tbl.A.1 (cataloging Founding Era suffrage requirements).

54. *Id.* at 21.

55. See WILLIAMSON, *supra* note 50, at 124-26.

56. KEYSSAR, *supra* note 7, at 8.

57. FREE, *supra* note 47, at 12.

58. See *id.*

59. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1401 (1993).

60. See KEYSSAR, *supra* note 7, at 8.

heads of household.”⁶¹ As applied to race, this theory would ultimately be repudiated by the Fifteenth Amendment’s adoption.⁶²

In sum, the original Constitution was simultaneously democratic for its time while also undemocratic, racist, misogynist, and classist by today’s standards.⁶³

B. *The Fourteenth Amendment*

Before delving into the Fourteenth Amendment, I begin with a primer on how the Reconstruction Framers conceived of rights: the Reconstruction Framers believed in a hierarchy of rights.⁶⁴ Civil rights were a much narrower category than that term connotes today.⁶⁵ During Reconstruction, civil rights included, *inter alia*, the right to own property, to contract, and to sue and be sued.⁶⁶ Civil rights were inherent in citizenship.⁶⁷

By contrast, political rights were conceptualized as a privilege conferred on a select few.⁶⁸ For instance, unmarried White women were citizens who could own property but could not vote.⁶⁹ Political rights were often viewed as a bundle of rights that included the right to vote, to hold office, and to serve on a jury.⁷⁰ As

61. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981 (2002).

62. See *infra* Section IV.C.

63. The Guarantee Clause is often cited as a potential source of a constitutional right to vote, but the Supreme Court long ago declared it a nonjusticiable political question. See *Luther v. Borden*, 48 U.S. 1, 39-42 (1849). And while the Reconstruction Framers justified the First Reconstruction Act using Guarantee Clause arguments, see *infra* note 101 and accompanying text, today’s voting rights legislation does not rely on it.

64. See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 70-71 (2011) (discussing the tripartite typology of rights—civil, political, and social); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995) [hereinafter McConnell, *Desegregation*].

65. See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 395 (1982).

66. See Civil Rights Act of 1866, Pub. L. 39-31, § 1, 14 Stat. 27 (1866).

67. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 17, at 382.

68. See, e.g., KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION*, at xviii (2021).

69. See JACK M. BALKIN, *LIVING ORIGINALISM* 223-24 (2011); CONG. GLOBE, 40th Cong., 3d Sess. 691 (1869) (remarks by Rep. James Beck (D-KY)).

70. See Amar, *Jury Service*, *supra* note 10, at 234-35.

discussed below, the Reconstruction Framers disagreed over whether the right to hold office was encompassed within the phrase “right to vote.”⁷¹

Scholars have written extensively on this topic, and the consensus view is that the Fourteenth Amendment, as originally understood, did *not* mandate the enfranchisement of Black men.⁷² I will not belabor the point here. The Reconstruction Framers repeatedly stated that the Fourteenth Amendment did not accomplish that result, as even the Radicals acknowledged that it was politically impossible. The Amendment’s Privileges or Immunities Clause was borrowed from Article IV’s Privileges and Immunities Clause, and the right to vote was not considered a privilege or immunity of citizenship.⁷³ As for the Equal Protection Clause, its language goes beyond the Privileges or Immunities Clause in protecting persons, not just citizens. If the Equal Protection Clause had been originally viewed as encompassing the right to vote, it would not only have enfranchised Black men but also women, children, and aliens.⁷⁴ Even after the Fourteenth Amendment was ratified in July 1868, half of the States barred Black men from voting.⁷⁵

71. For purposes of this Article, my focus is on political rights, and I therefore do not wade into the contentious debate over the divide between civil rights and social rights. For more on social rights, see BRANDWEIN, *supra* note 64, at 70-86; MALTZ, CIVIL RIGHTS, *supra* note 10, at 71-72; and McConnell, *Desegregation*, *supra* note 64, at 1018-21.

72. See, e.g., Amar & Brownstein, *supra* note 10, at 928; EDWARDS, *supra* note 17, at 108; ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 260 (1988) [hereinafter FONER, RECONSTRUCTION]; McConnell, *Desegregation*, *supra* note 64, at 1024; David A. Strauss, *Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 38 (2015). Some scholars have argued that Section One was capacious enough to eventually be read to encompass the right to vote. See William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 72 (1965) (“[T]he case can safely be made that there was an original understanding that § 1 of the proposed Fourteenth Amendment would not itself immediately invalidate state suffrage laws . . . [but] we cannot safely declare that there was also a clear, uniform understanding that the open ended phrases of § 1 . . . would foreclose a different interpretation in the future.”); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 367-68 (2021) (arguing that, in light of the other voting rights amendments, the Privileges or Immunities Clause should be read to protect a fundamental right to vote). Moreover, Franita Tolson has argued that Sections Two and Five of the Fourteenth Amendment should be read in tandem and as evidence of “the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage . . .” Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015) [hereinafter Tolson, *Abridgment*].

73. See AMAR, AMERICA’S CONSTITUTION, *supra* note 17, at 391-92.

74. See *id.*

75. See Crum, *Superfluous*, *supra* note 5, at 1602-04.

This brings us to Section Two of the Fourteenth Amendment, known as the Apportionment Clause.⁷⁶ Section Two was a response to an unintended consequence of abolition. With four million freedpersons, the South would actually *gain* representation in the House and the Electoral College, as the Three-Fifths Clause would no longer reduce its apportioned seats. And yet, the Southern States disenfranchised their Black population. The perverse result was that the political power of Southern White men would increase after the 1870 Census. The Reconstruction Framers recognized that this looming political storm threatened the Union's stability.⁷⁷

To counteract that problem, Section Two reduces a State's seats in the House and Electoral College if "the right to vote" of any adult "male" "citizen" is "denied . . . or in any way abridged . . ."⁷⁸ Interestingly, this language is closely linked to that of the Fifteenth Amendment. At the time, Section Two was viewed as a penalty for disenfranchisement; at most, it was an incentive for enfranchisement.⁷⁹ Section Two's apportionment penalty has never been enforced,⁸⁰ in part because the Fifteenth Amendment enfranchised Black men nationwide prior to the 1870 Census's reapportionment and also because Congress has struggled to implement and operationalize its standard.⁸¹

The Reconstruction Framers never "specifically discussed" the rationale behind choosing the words "den[y] or abridge[]" in Section Two.⁸² However,

76. The Apportionment Clause has received a recent outburst of scholarly attention. See generally Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774 (2018) (discussing the Apportionment Clause); Ethan Herenstein & Yuriy Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. REV. 1021 (2021) (same); Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149 (2015) (same); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279 (2015) [hereinafter Morley, *Remedial*] (same); Tolson, *Abridgment*, *supra* note 72 (same).

77. See Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 371 n.54 (2022) [hereinafter Crum, *Deregulated*].

78. U.S. CONST. amend. XIV, § 2.

79. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 46, at 107.

80. See Magliocca, *supra* note 76, at 783.

81. See Morley, *Remedial*, *supra* note 76, at 324-27 (discussing a congressional attempt to enforce Section Two in 1871); Tolson, *Abridgment*, *supra* note 72, at 474-77 (discussing a congressional attempt to invoke Section Two in 1901).

82. Van Alstyne, *supra* note 72, at 81; see also J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 17 (1999) ("[T]hey never specified in reports or floor debates from 1866 to 1869 exactly what practices 'abridgement' prohibited . . ."); cf. MATHEWS, *supra* note 12, at 38 ("The meaning of the term 'abridged,' as used in the Fifteenth Amendment, was not discussed at the time the measure was under consideration.").

scholars have highlighted actual statutes or hypothetical scenarios that were mentioned at the time that shed light on its meaning. For instance, William Van Alstyne focused on a colloquy involving a State replacing its racially discriminatory ban with a property qualification and then passing a law that prohibited Black people from owning real estate.⁸³ Additionally, J. Morgan Kousser has suggested that New York's racially discriminatory residency-, property-, and tax-paying requirements were the motivating example for "abridge."⁸⁴ Michael T. Morley has similarly argued that "the term 'abridge' . . . referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people."⁸⁵ Drawing on the word's plain meaning and poststratification fights to impose Section Two's penalty, Franita Tolson has claimed that "[a]bridgment does not mean purpose."⁸⁶

In any event, there is a clear "textual and historical link"⁸⁷ between Section Two and the Fifteenth Amendment given their close-in-time ratifications and their similar "deny or abridge" language protecting the "right to vote." Of course, there are important differences: the Apportionment Clause is merely a penalty, whereas the Fifteenth Amendment is a command. Furthermore, the Apportionment Clause is not limited to discrimination on the basis of race, color, or previous condition of servitude.

C. Federal Legislation

In the 1866 midterms, Republicans campaigned to ratify the Fourteenth Amendment—and they won in a landslide.⁸⁸ As the ratification battle raged in the States, Congress went beyond inducing the enfranchisement of Black men to mandating it in areas of federal control. This Section first examines federal enfranchisement statutes and then discusses the use of fundamental conditions to ensure that Black men would retain the right to vote in States. This Section demonstrates that the Reconstruction Congress was willing to aggressively expand the voting rights of Black men via statute in areas of federal control.

83. See Van Alstyne, *supra* note 72, at 81.

84. See KOUSSER, *supra* note 82, at 17 ("[C]ongressmen probably had in mind the widely known example of New York.").

85. Morley, *Remedial*, *supra* note 76, at 310; see also MATHEWS, *supra* note 12, at 39 (stating, with regards to the Fifteenth Amendment, that "[t]he more usually accepted view . . . was that it was designed to prevent a State from imposing less easily attained qualifications for voting on one class of citizens than another").

86. Tolson, *Abridgment*, *supra* note 72, at 438.

87. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 414 (2014) [hereinafter Tolson, *Structure*].

88. See ACKERMAN, *TRANSFORMATION*, *supra* note 46, at 178-82.

1. *Enfranchisement Statutes*

When the lame-duck session of the Thirty-Ninth Congress convened in early 1867, Radical Republicans moved to enfranchise Black men living in federal domains—namely, the District of Columbia, the territories, and the Reconstructed South. Notwithstanding Congress’s unambiguous goal of enfranchising Black men, the actual language of these suffrage statutes differed considerably.

In January 1867, Congress passed two unprecedented statutes that barred racial discrimination in voting. In the D.C. statute, Congress adopted an affirmative right to vote coupled with an anti-discrimination provision. Specifically, Congress declared that “every male person . . . of the age of twenty-one years and upwards . . . shall be entitled to the elective franchise, . . . without any distinction on account of color or race.”⁸⁹ In the federal territories bill, by contrast, Congress merely adopted an anti-discrimination provision: “there shall be no denial of the elective franchise . . . on account of race, color, or previous condition of servitude.”⁹⁰ In passing these statutes, Congress relied on its authority under Articles I and IV, respectively.⁹¹

In March 1867, Congress passed the First Reconstruction Act, which declared void the Southern States’ governments—with the exception of Tennessee—and placed them under military rule. In many ways, Congress sought to stop the Southern States from adopting additional “Black Codes” that recreated slavery in all but name.⁹² Thus, Congress recognized that a new electorate was needed to truly reconstruct the South and safeguard the civil rights of Black persons.⁹³ In establishing the procedures for the new constitutional conventions, Congress defined the electorate as “male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition.”⁹⁴ Congress further

89. An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, § 1, 14 Stat. 375, 375 (1867).

90. An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379, 379 (1867).

91. See U.S. CONST. art I, § 8, cl. 17 (providing that Congress may “exercise exclusive Legislation in all Cases whatsoever” in the “Seat of the Government of the United States”); *id.* art. IV, § 3, cl. 2 (granting Congress the “Power to . . . make all needful Rules and Regulations respecting the Territor[ies] . . . [of] the United States”).

92. The Black Codes were strict labor and vagrancy laws passed by the Southern States in the immediate wake of the Civil War. The Black Codes severely curtailed the liberty of freedpersons by limiting their right to contract and their freedom of movement. See FONER, RECONSTRUCTION, *supra* note 72, at 198–201.

93. See Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004).

94. First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

directed that the new Southern constitutions provide that the “elective franchise shall be enjoyed by all such persons.”⁹⁵ Conversely, Congress permitted States to disenfranchise voters based on “participation in the rebellion or for felony at common law” and further mandated that anyone disqualified by Section Three of the Fourteenth Amendment could not be a delegate to the constitutional convention or “vote for members of such convention.”⁹⁶ Finally, Congress required the Southern States to ratify the Fourteenth Amendment and delayed their re-admission until the Fourteenth Amendment had become part of the Constitution.⁹⁷

The changes wrought by the First Reconstruction Act were extraordinary. The Act enfranchised approximately eighty percent of the nation’s Black male population.⁹⁸ Given contemporary racial demographics and the disenfranchisement of ex-Confederates, Black men were electoral majorities in five of the Southern States.⁹⁹ And as predicted by the Radical Republicans, Black men voted as a bloc for the Republican Party.¹⁰⁰ In passing the First Reconstruction Act, Congress treated the South as a conquered territory, and many Radical Republicans argued that the Guarantee Clause justified their intervention.¹⁰¹

The Fortieth Congress continued the Thirty-Ninth Congress’s work but added explicit protections for officeholding. In July 1868, the Fortieth Congress created the Wyoming Territory.¹⁰² In so doing, Congress adopted a two-pronged approach reminiscent of the D.C. statute. Congress first specified that “every

95. *Id.*

96. *Id.*

97. *Id.* This aspect of the First Reconstruction Act is a fundamental condition. See *infra* Section I.C.2.

98. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 24 (2004).

99. See Crum, *Reconstructing*, *supra* note 10, at 302-03.

100. See *id.* at 303-04; Amar & Brownstein, *supra* note 10, at 943-44.

101. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 17, at 368-71.

102. The Wyoming Territory was created the same week that the Fourteenth Amendment was ratified, thus providing contemporaneous evidence that Congress believed that explicit statutory protections were necessary because Section One did not guarantee political rights in the federal territories. Proclamation No. 11, 15 Stat. app. at 706 (1868) (July 20, 1868); Proclamation No. 12, 15 Stat. app. at 708 (July 27, 1868); see also *United States v. Vaello Madero*, 596 U.S. 159, 167 (2022) (Thomas, J., concurring) (“Firmer ground for prohibiting the Federal Government from discriminating on the basis of race, at least with respect to civil rights, may well be found in the Fourteenth Amendment’s Citizenship Clause.”); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 499 (2013) (“[A] surprisingly strong originalist argument supporting . . . the broader unconstitutionality of most forms of invidious federal racial discrimination can be made by looking to the original public meaning of the Fourteenth Amendment’s Citizenship Clause.”).

male citizen . . . above the age of twenty-one years . . . shall be entitled to vote . . . and shall be eligible to hold any office in said Territory.”¹⁰³ Congress separately provided that “the legislative assembly shall not at any time abridge the right of suffrage, or to hold office, on account of the race, color, or previous condition of servitude of any resident of the Territory.”¹⁰⁴ The Wyoming Enabling Act marked the first time that Congress explicitly protected the right to hold office free of racial discrimination.

What is striking about these four statutes is the lack of consistent terminology. Congress referred to the “elective franchise” and “the right of suffrage” instead of a “right to vote.” The federal-territories bill used “denied,” the Wyoming Enabling Act employed “abridged,” and the D.C. suffrage statute and the First Reconstruction Act included neither. Moreover, in none of these statutes did Congress link the “right to vote” to the “denied or abridged” phrase that was found in the Apportionment Clause—or the soon to be drafted Fifteenth Amendment.

2. *Fundamental Conditions*

A “fundamental condition” is a requirement imposed by Congress on a State when it seeks admission to the Union.¹⁰⁵ Whether fundamental conditions are enforceable after admission remains a contentious question.¹⁰⁶ Indeed, several prominent Republicans questioned their enforceability during Reconstruction.¹⁰⁷ Nevertheless, the Reconstruction Congress would employ fundamental conditions to protect the voting rights of Black men.

103. An Act to Provide a Temporary Government for the Territory of Wyoming, ch. 235, § 5, 15 Stat. 178, 179-80 (1868).

104. *Id.* at 180.

105. The first fundamental condition was imposed in 1802 when Congress mandated that Ohio relinquish claims to federal land within its borders—a requirement intended to avoid disputes similar to those that arose after Tennessee’s admission. See GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 202, 226-27 (2021). Following Ohio’s admission, “Congress subsequently attached conditions every time it admitted a former territory to the union.” *Id.* at 234; see also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 130-31 (2004) (surveying the use of fundamental conditions).

106. See *Coyle v. Smith*, 221 U.S. 559, 579-80 (1911) (invalidating fundamental condition prohibiting Oklahoma from moving its state capital); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1216-20 (2016) (arguing that Congress’s consistent use of fundamental conditions undermines *Shelby County’s* equal-sovereignty principle).

107. See Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1162-64 (2016) (discussing doubts about the enforceability of fundamental conditions and their role

In February 1867, the Thirty-Ninth Congress took the unprecedented step of imposing a suffrage-related fundamental condition on Nebraska, whose constitution enfranchised only White men.¹⁰⁸ Congress included as a “fundamental condition that . . . there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.”¹⁰⁹ Congress thereby directed Nebraska’s territorial governor to convene the legislature to enact legislation complying with the fundamental condition.¹¹⁰ In response, the Nebraska legislature declared that the fundamental condition would be “ratified and accepted” and was “part of the organic law of the State of Nebraska.”¹¹¹ Nebraska was then swiftly admitted to the Union.¹¹²

In passing Nebraska’s fundamental condition, Congress overrode President Johnson’s veto. In his veto message, Johnson interpreted the fundamental condition to erase the Nebraska Constitution’s provision that “the elective franchise, and the right to hold office, [were] expressly limited to white citizens.”¹¹³ Around the same time, Congress attempted to admit Colorado with an identically worded fundamental condition.¹¹⁴ Once again, Johnson vetoed the bill. This time, Johnson emphasized that the bill would overturn Colorado’s laws that “absolutely prohibited negroes and mulattos from voting” and “exclud[ed] negroes and mulattoes from the right to sit as jurors.”¹¹⁵ Congress, however, was unable to override Johnson’s Colorado veto, and Colorado would not become a State until 1876.¹¹⁶ As relevant here, Johnson viewed the language concerning the

in the passage of the Fifteenth Amendment); THE ESSENTIAL DOCUMENTS, *supra* note 10, at 545 (recounting Bingham’s objections to the stacking of fundamental conditions beyond the requirements of the First Reconstruction Act).

108. See Biber, *supra* note 105, at 142 (discussing novelty of this fundamental condition); NEB. CONST. of 1867, art. II, § 2 (limiting “elector[s]” to “White citizen[s]” and declarant aliens). In 1866, Nebraska had rejected Black male suffrage in a referendum. See GILLETTE, *supra* note 12, at 26.
109. An Act for Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867).
110. See *id.*
111. *Brittle v. People*, 2 Neb. 198, 208 (1873). The text of Nebraska’s constitution was not actually amended. See *id.* at 208-10.
112. Proclamation No. 9, 14 Stat. 799 app. at 820-21 (1867).
113. MCPHERSON, *supra* note 42, at 164 (quoting Johnson’s veto message).
114. See *id.* at 163 (quoting vetoed Colorado admission bill) (noting the “fundamental condition that within the State of Colorado there shall be no denial of the elective franchise, or any other rights, to any person by reason of race or color, excepting Indians not taxed.”).
115. *Id.* at 160-61 (quoting Johnson’s veto message).
116. See An Act to Enable the People of Colorado to Form a Constitution and State Government and for the Admission of the Said State into the Union on an Equal Footing with the Original States, ch. 139, 18 Stat. 474, 474 (1875).

“elective franchise, or any other rights” as protecting a bundle of political rights. Indeed, in 1873, the Nebraska Supreme Court reached a similar conclusion, holding that the fundamental condition protected not just the franchise but also the right to sit on a jury.¹¹⁷

After Nebraska’s admission, Congress continued to impose fundamental conditions concerning Black male suffrage. In June 1868, the Fortieth Congress considered the readmission of the first Reconstructed Southern State: Arkansas.¹¹⁸ Going beyond the requirements of the First Reconstruction Act, Congress mandated “[t]hat the constitution of Arkansas shall never be so amended or changed as to *deprive* any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized.”¹¹⁹ Shortly thereafter, Congress imposed identical fundamental conditions on the readmission of Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina.¹²⁰ As explained below, Congress would later impose fundamental conditions that separately protected the right to vote and hold office on Mississippi, Texas, and Virginia, as well as Georgia for its second readmission.¹²¹

Congress utilized distinct strategies for its fundamental conditions for Nebraska and the Reconstructed South. Nebraska’s fundamental condition actually enfranchised Black men and was worded to expressly prohibit racial discrimination in voting going forward. But in contradistinction to the requirements of the First Reconstruction Act, Nebraska was *not* required to ratify the Fourteenth Amendment. As for the Reconstructed South—where Congress had already enfranchised Black men—the fundamental conditions were retrogression

117. *Brittle v. People*, 2 Neb. 198, 225 (1873) (concluding “that not only does the fundamental condition attached to the act of admission form a part of our organic law, but that the condition extends to the right to sit upon juries”).

118. See MALTZ, *CIVIL RIGHTS*, *supra* note 10, at 139-40.

119. An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (emphasis added).

120. See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868) (admitting these States on “the following fundamental conditions: That the constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized”). The fundamental conditions for these States and Arkansas expressly authorized disenfranchisement as “punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all inhabitants of said State” and also gave authority to modify residency requirements. *Id.*

121. See *infra* Section III.C.

provisions.¹²² Moreover, they were *not* limited to disenfranchisement based on race and color. Put simply, the Southern States could not deprive – another synonym for deny – citizens of their right to vote.¹²³

D. State Voting Qualifications

Because the original Constitution entrusted States with the power to set voting qualifications for the federal electorate, state constitutions and laws were the battleground for expanding the franchise prior to the Fifteenth Amendment. In this Section, I map out where Black men gained the right to vote during the turbulent four years between Appomattox and the Fifteenth Amendment’s passage in Congress. The Radical Republicans’ limited success at the state level helps explain their support for a nationwide solution in 1869. I then delve into the actual text of state constitutions and laws pertaining to the right to vote free of racial discrimination – a topic that has been understudied in the literature and that, surprisingly, the Reconstruction Framers did not rely heavily on in their drafting of the Fifteenth Amendment.

1. *Advances and Setbacks in the States*

In 1865, Black men could vote free of racial discrimination in five New England States.¹²⁴ Black men were technically enfranchised in New York, but facially discriminatory residency, property, and tax-paying requirements that applied only to “m[e]n of color” disenfranchised virtually all of them.¹²⁵ Accordingly, this Article classifies New York as a State that disenfranchised Black men.

122. In this way, the fundamental conditions were precursors to Section 5 of the Voting Right Act’s (VRA’s) retrogression principle. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (denying preclearance if the change “would lead to a retrogression in the position of racial minorities”).

123. See Franita Tolson, “*In Whom Is the Right of Suffrage?*”: *The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. ONLINE 211, 219 (2021) (arguing that the “new state constitutions . . . in the South served as a baseline for republican government, consistent with the Guarantee Clause”).

124. Those States were Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 17, at 610 n.88. For context, “[o]nly 6 percent of the northern black population lived in those states.” ALEXANDER TSEHIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 106 (2008) (emphasis added).

125. See N.Y. CONST. art. II, § 1 (1846) (requiring that “m[e]n of color . . . shall have been for three years a citizen of this State, and for one year next preceding any election shall have been seized and possessed of a freehold estate of the value of two hundred and fifty dollars . . . and shall have been actually rated and paid a tax thereon”); CHRISTOPHER MALONE, *BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH* 55 (2008) (“[I]n 1855, only 100 of the 11,840 black inhabitants [of New York City] cast a vote.”).

The next few years witnessed modest expansion of Black-male suffrage at the state level. Referenda were one tactic employed by Republicans to enfranchise Black men, albeit with mixed results. Between 1865 and 1868, reformers failed to pass referenda in the States of Connecticut, Kansas, Minnesota (twice), Missouri, Ohio, Wisconsin, as well as Washington, D.C., the (then) Territory of Colorado, and the (then) Territory of Nebraska.¹²⁶ In 1868, voters in Iowa and Minnesota endorsed Black male suffrage.¹²⁷

Wisconsin's path toward Black-male suffrage was long and winding. In 1866, the Wisconsin Supreme Court enfranchised Black men, concluding that an 1849 state law and a subsequent referendum had accomplished that result notwithstanding the Secretary of State's rejection of that change in the interim.¹²⁸

Meanwhile, in 1866, Tennessee ratified the Fourteenth Amendment and was readmitted to the Union, escaping the First Reconstruction Act's strictures.¹²⁹

126. See Crum, *Superfluous*, *supra* note 5, at 1593.

127. See *id.*

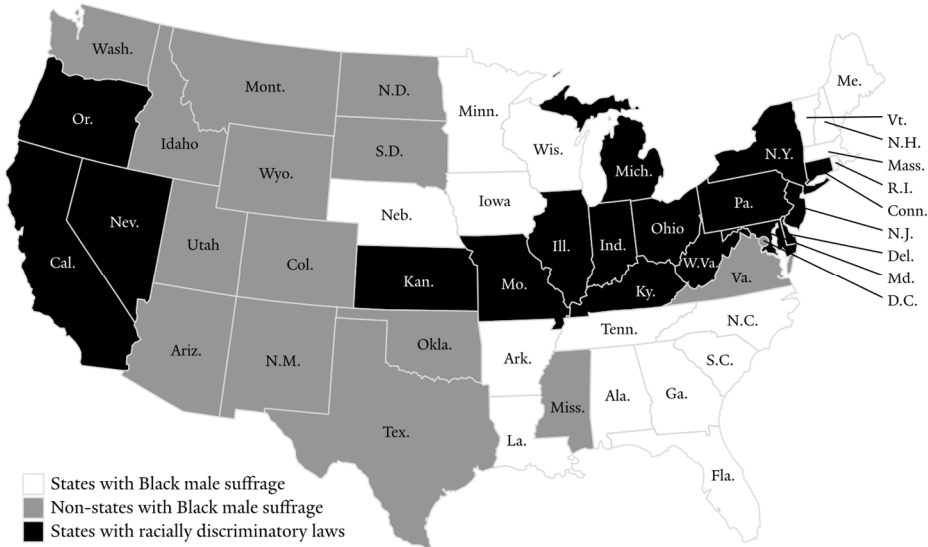
128. Under Wisconsin's 1848 Constitution, "elector[s]" were limited to "male person[s]" who were "White citizens," White declarant aliens, "[p]ersons of Indian blood who have once been declared by law of Congress to be citizens of the United States," and "[c]ivilized persons of Indian descent, not members of any tribe." WIS. CONST. art. III, § 1 (1848). The Wisconsin Constitution further provided that the state legislature could "extend, by law, the right of suffrage" but that "no such law shall be in force" until "approved by a majority of all the votes cast" in a "vote of the people" at the next general election. *Id.* In 1849, the Wisconsin state legislature "conferred the right of suffrage on male colored inhabitants." *Gillespie v. Palmer*, 20 Wis. 544, 557 (1866). At the general election that November, the proposal received 5,265 votes in favor and 4,075 votes against. *Id.* at 544. Although that was the majority of votes cast in that referendum, the Wisconsin Secretary of State decided that the issue must receive a majority of votes from all voters at that election. Because many voters simply did not vote on that referendum, the majority vote on the referendum failed to achieve that higher threshold, and the Secretary of State declined to approve the proposed law. See *id.* 556-57. In 1866, the Wisconsin Supreme Court overturned that decision, holding that only a majority of votes cast on the referendum were necessary, thereby enfranchising Black men. See *id.* at 557-58.

129. See Harrison, *supra* note 46, at 404. In a recent article, Craig Green critiques the commonly used "re-admitted to the Union" nomenclature on the grounds that it elides "the much narrower political decision to recognize and 'admit' state officials 'to Representation in Congress.'" Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813, 873 n.291 (2023). Although Green raises an intriguing point, I have opted to continue using this familiar terminology. Moreover, the Georgia controversy showcases that, even when States were "re-admitted to the Union," they were not necessarily fully restored to their representation in Congress. See Crum, *Lawfulness*, *supra* note 10, at 1580-89 (explaining that six of seven Georgia representatives were seated, its Senator excluded, and its Electoral College votes counted contingently).

Then, in 1867, Tennessee enfranchised Black men via ordinary legislation.¹³⁰ Tennessee was the only Southern State to enfranchise Black men voluntarily.¹³¹

Thus, when the lame-duck Fortieth Congress convened to debate the Fifteenth Amendment in early 1869, the United States was evenly divided. Map 1 displays the regional pattern behind Black men’s right to vote in January 1869.

MAP 1.



Seventeen States had enfranchised Black men, whereas seventeen States engaged in racial discrimination in voting.¹³² In addition, Black men could vote in

130. Under Tennessee’s 1834 Constitution, which was still in force during the early years of Reconstruction, the “entitle[ment] to vote” was limited to “free white m[e]n” who were “citizen[s].” TENN. CONST. art. IV, § 1 (1834). Following its readmission, the Tennessee state legislature passed a law that allowed Black men to vote by striking the word “White” from the requirements to register and vote. See *State v. Staten*, 46 Tenn. 233, 241 (1869) (describing the legislative scheme); MCPHERSON, *supra* note 42, at 257 (showing roll-call vote); W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 575 (2d ed. 1962) (detailing the historical context). In 1870, Tennessee adopted a new state constitution, which extended the “entitle[ment] to vote” to “male” “citizen[s].” TENN. CONST. art. IV, § 1 (1870).

131. Crum, *Superfluous*, *supra* note 5, at 1603.

132. See *id.*

Mississippi, Texas, and Virginia, but those States had not been readmitted yet.¹³³ Black male suffrage loosely followed regional patterns. Black men could vote in parts of the Midwest, most of New England, and the entirety of the South and federal domains. By contrast, Black men were disenfranchised in the Mid-Atlantic, the Border States, and the West.¹³⁴

2. *The Text of the Right to Vote*

As is true today,¹³⁵ state constitutions were the bedrock of the right to vote during Reconstruction. Beyond the raw numbers and regional variation, this Article turns to the plain language of these Reconstruction Era state constitutions and laws. A textual analysis of state constitutions has been overlooked by scholarship on the Fifteenth Amendment, even though similar studies have examined state-level analogues of other constitutional provisions.¹³⁶ Indeed, I am unaware of any other study of the Fifteenth Amendment that provides a comprehensive analysis of contemporary state analogues concerning racial discrimination in voting.

Except for New York, which effectively disenfranchised Black men with racially discriminatory residency, property, and tax-paying requirements,¹³⁷ every State that disenfranchised Black voters included the word “White” as a voting requirement.¹³⁸ In addition to employing this language, Indiana and Oregon

133. See FONER, RECONSTRUCTION, *supra* note 72, at 452 (discussing their readmission in 1870). Moreover, following the expulsion of Black lawmakers from its state legislature, Georgia was in a state of limbo, with six of its seven representatives seated, its Senator excluded, and its Electoral College votes counted in a contingent fashion. See Crum, *Lawfulness*, *supra* note 10, at 1580-86; BENEDICT, *supra* note 12, at 327-30. Given that all of these States were readmitted as part of the Fifteenth Amendment’s ratification, I include their constitutions here.

134. See Crum, *Superfluous*, *supra* note 5, at 1602-03.

135. See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) (arguing that state constitutions “furnish powerful resources for addressing antidemocratic behavior”); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144-49 (2019) (cataloging contemporary state constitutional provisions protecting the right to vote).

136. See, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 23-30 (2008); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1457 n.242 (1990).

137. See *supra* note 125 and accompanying text (explaining why this Article classifies New York as a State that bars Black men from the polls).

138. Those States were California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, and West

went further by specifically excluding certain racial groups from voting.¹³⁹ To borrow modern doctrinal categories, all of these state laws were facially discriminatory.¹⁴⁰

By contrast, in the States that had enfranchised Black men, the word “White” was simply deleted. Most of these protections were entrenched in state constitutions.¹⁴¹ However, there were exceptions. Nebraska passed legislation incorporating Congress’s fundamental condition into its organic law.¹⁴² Tennessee and Wisconsin enfranchised Black men via legislation—with the latter requiring a judicial decision to effectuate the results of that referendum.¹⁴³ Anti-discrimination provisions that explicitly protected against racial discrimination in voting appeared in only three Southern constitutions and in Nebraska’s adoption of the fundamental condition.¹⁴⁴

In addition, several States distinguished on the basis of nativity. A dozen States extended the ballot to so-called declarant aliens—that is, foreigners who

Virginia. *See infra* Appendix A. Of course, this begged the question of how to define “White.” *See, e.g.,* *Monroe v. Collins*, 17 Ohio St. 665, 685 (1868) (holding that “men having an admixture of African blood, with a preponderance of white blood” were “white male citizens” under the Ohio Constitution and entitled to vote).

139. *See* IND. CONST. art. II, § 5 (1851) (“No Negro or Mulatto shall have the right of suffrage.”); OR. CONST. art. II, § 6 (1857) (“No negro, Chinaman, or mulatto shall have the right of suffrage.”).
140. *See* *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000) (holding that the Hawaiian Constitution’s limitation of the right to vote to Native Hawaiians was a race-based classification violative of the Fifteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding that race-based classifications must pass strict scrutiny under the Fourteenth Amendment).
141. Those States were Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Vermont, and Virginia. *See infra* Appendix A.
142. *See supra* notes 108-112 and accompanying text.
143. *See supra* notes 128-130 and accompanying text.
144. *See* FLA. CONST. art. XV, § 1 (1868) (limiting “elector[s]” to “male” “citizen[s]” and certain inhabitants “of whatever race, color, nationality, or previous condition”); *id.* art. XVII, § 28 (“There shall be no civil or political distinction . . . on account of race, color, or previous condition of servitude, and the Legislature shall have no power to prohibit, by law, any class of persons on account of race, color, or previous condition of servitude, to vote or hold any office . . .”); S.C. CONST. art. VIII, § 2 (1868) (limiting the “entitle[ment] to vote” to “male citizen[s] . . . without distinction of race, color, or former condition”); TEX. CONST. art. VI, § 1 (1869) (limiting the “entitle[ment] to vote” to “male citizens[s] . . . without distinction of race, color or former condition”); *see supra* notes 108-112 (discussing Nebraska); *see also* ALA. CONST. art. VII, § 4 (1868) (requiring an oath to register to vote providing that the applicant “agree not to attempt to deprive any person or persons, on account of race, color, or previous condition, of any political or civil right, privilege, or immunity . . .”).

had declared their intention to naturalize and become U.S. citizens.¹⁴⁵ But there was a darker side to discriminating based on nativity. Some States continued to impose differential voting qualifications even *after* naturalization.¹⁴⁶ Most infamously, Rhode Island required only naturalized citizens to satisfy a property requirement.¹⁴⁷ Rhode Island's policy—which was designed to disenfranchise a large Democratic voting bloc of Irish Americans—would feature prominently in the debates over the Fifteenth Amendment.¹⁴⁸

Many state constitutions also separately addressed the voting rights of Native American men. Notwithstanding the Fourteenth Amendment's Citizenship Clause, few Native Americans were citizens at the time, as they were considered members of "distinct political communities" who "owed immediate allegiance to their several tribes, and were not part of the people of the United States."¹⁴⁹ A couple state constitutions explicitly excluded "Indians not taxed" from being electors.¹⁵⁰ By contrast, some state constitutions expressly enfranchised certain Native Americans, albeit in ways that reified discriminatory views of Native Americans as uncivilized.¹⁵¹ Although the precarity of voting rights of Native

145. See KEYSSAR, *supra* note 7, at 337-39 tbl.A.12 (cataloging declarant-alien rules from 1870 to 1926); Raskin, *supra* note 59, at 1406-07 (discussing the 1848 Wisconsin Constitution as the origin of declarant-alien rules).

146. See FLA. CONST. art. XIV, § 3 (1868) (requiring naturalized citizens to provide a "certificate of naturalization"); IND. CONST. art. II, § 2 (1851) (imposing a six-month residency requirement for natural-born citizens and one-year residency requirement for citizens of "foreign birth"); *cf.* OR. CONST. art. II, § 2 (1857) (imposing a six-month residency requirement for citizens and one-year residency requirement in the United States for "white male" declarant aliens).

147. See R.I. CONST. art. II, §§ 1-2 (1843) (imposing a \$134 property requirement on "male citizen[s]" but not on "male native citizen[s]").

148. See GILLETTE, *supra* note 12, at 151.

149. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *see also* FONER, *SECOND FOUNDING*, *supra* note 1, at 72 (arguing that, during Reconstruction, "most Indians did not want national citizenship if it meant dissolving tribal sovereignty and making their land available to encroachment by whites"); Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 *YALE L.J.* 1420, 1424-27 (2011) (discussing *Elk*'s relevance to the Citizenship Clause and the Fifteenth Amendment).

150. See ME. CONST. art. II, § 1 (1820) (excluding "Indians not taxed" from being "elector[s]"); MISS. CONST. art. VII, § 2 (1868) (same).

151. See MICH. CONST. art. VII, § 1 (1850) (defining "elector[s]" "entitled to vote" to include "civilized male inhabitant[s] of Indian descent, a native of the United States and not a member of any tribe"); MINN. CONST. art. VII, § 1 (1857) (extending the "entitle[ment] to vote" to male "[p]ersons of mixed, white and Indian blood, who have adopted the customs and habits of civilization" and male "[p]ersons of Indian blood . . . who have adopted the language, customs and habits of civilization . . . and shall have been pronounced by [a district] court capable of enjoying the rights of citizenship"); WIS. CONST. art III, § 1 (1848) (enfranchising male

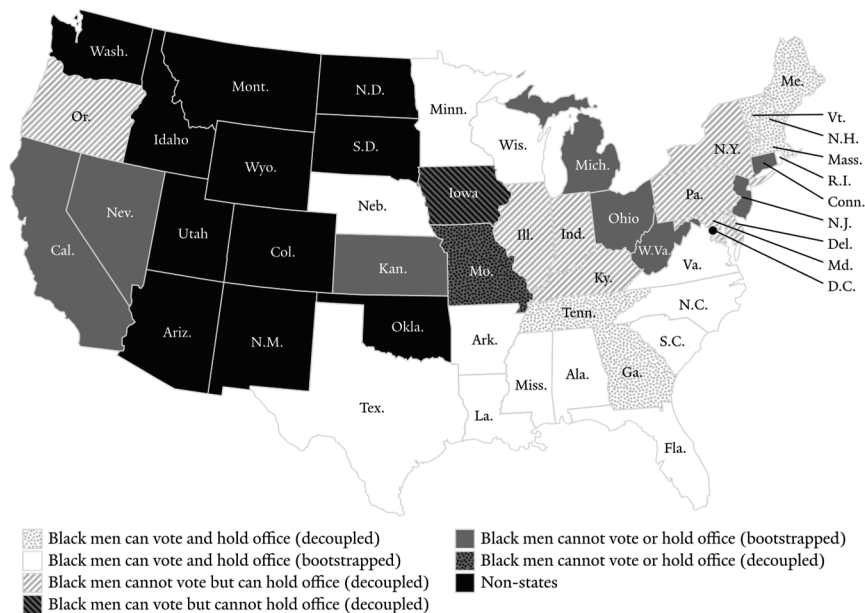
Americans is in some ways an example of racial discrimination, this phenomenon is also tied up with notions of citizenship and tribal sovereignty.¹⁵² Accordingly, for this Article’s classification of whether States engage in racial discrimination in voting, I bracket the status of Native Americans.

Turning to other political rights, the elective franchise was oftentimes—but not always—linked to the right to hold office. Consider officeholding requirements for state legislatures. Half of the States defined the right to hold office based on who was an elector; in other words, they bootstrapped their right to vote to the right to hold office. Eight of these States had racially discriminatory suffrage requirements.¹⁵³ Ten of these States plus the yet-to-be-readmitted Mississippi, Texas, and Virginia had enfranchised Black men.¹⁵⁴ Missouri’s suffrage qualifications and officeholding requirements were *both* facially limited to White men.¹⁵⁵ In the remaining States, the right to vote was decoupled from the right to hold office. Fourteen States permitted any citizen or inhabitant to hold office. Of those States, six had enfranchised Black men,¹⁵⁶ whereas eight had not.¹⁵⁷ Finally, Iowa explicitly limited the right to hold office to White male electors, even though it had enfranchised Black men in 1868.¹⁵⁸ Map 2 displays geographically the intersection of the rights to vote and hold office.

“[p]ersons of Indian blood” who were U.S. citizens and male “[c]ivilized persons of Indian descent, not members of any tribe”); *see also* CAL. CONST. art. II, § 1 (1849) (“[N]othing herein contained, shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting the right of suffrage, Indians or the descendants of Indians . . .”).

152. *Cf. Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that classifications based on tribal membership do not violate the equal-protection component of the Fifth Amendment’s Due Process Clause); *Haaland v. Brackeen*, 599 U.S. 255, 291-94 (2023) (holding that plaintiffs lacked Article III standing to bring an equal-protection challenge to the Indian Child Welfare Act).
153. Those States were California, Connecticut, Kansas, Michigan, Nevada, New Jersey, Ohio, and West Virginia. *See infra* Appendix A.
154. Those States, in addition to the yet-to-be-readmitted Mississippi, Texas, and Virginia, were Alabama, Arkansas, Florida, Louisiana, Minnesota, Nebraska, North Carolina, Rhode Island, South Carolina, and Wisconsin. *See id.*
155. *See id.*
156. Those States were Georgia, Maine, Massachusetts, New Hampshire, Tennessee, and Vermont. *See id.*
157. Those States were Delaware, Illinois, Indiana, Kentucky, Maryland, New York, Oregon, and Pennsylvania. *See id.*
158. *See id.*

MAP 2.



Although the category of political rights has been frequently described as encompassing both suffrage and officeholding,¹⁵⁹ only half the States adhered to that framework. For States that did not link suffrage and officeholding, the overwhelming majority permitted any citizen to hold office, even if Black men were denied the franchise. Moreover, some States had different rules for serving as governor or holding local office.¹⁶⁰ This nuance underscores how the right to hold office was frequently detached from the right to vote.

The political rights of ex-Confederates were also a hotly debated topic during Reconstruction. Recall that the First Reconstruction Act denied ex-Confederates the right to vote for or be a delegate at the new constitutional conventions.¹⁶¹ By 1869, that policy remained in half of the new Southern States' constitutions and had been replicated by two loyal States. Specifically, nine state

159. See, e.g., Amar, *Jury Service*, *supra* note 10, at 234-35.

160. See, e.g., DEL CONST. art. III, § 8 (1852) (“[N]o person shall be appointed to an office within a county, who shall not have a right to vote for representatives.”); MD. CONST. art. II, § 5 (1867) (requiring the governor to be “a qualified voter”); N.Y. CONST. art. IV, § 2 (1846) (limiting governorship to “citizen[s] of the United States”); OR. CONST. art. VI, § 8 (1857) (“No person shall be elected, or, appointed to a county office, who shall not be an elector of the county.”).

161. See Reconstruction Act of 1867, Pub. L. No. 39-153, § 5, 14 Stat. 428, 429. This has subsequently become known as the First Reconstruction Act.

constitutions disenfranchised certain ex-Confederates, and eight States disqualified them from holding office.¹⁶² Support for these provisions – which bear a striking resemblance to militant democracy¹⁶³ – helped to defeat some universal-right-to-vote proposals for the Fifteenth Amendment.¹⁶⁴

Taking a step back, state voting qualifications were worded quite differently from what would become the Fifteenth Amendment. The term “right to vote” is used in only three state constitutions, all from New England and relatively older.¹⁶⁵ The far more common phrase was “entitled to vote.”¹⁶⁶ Moreover, the term “elector” is used in nearly half of state constitutions,¹⁶⁷ whereas the term “voter” appears only in Kentucky’s Constitution.¹⁶⁸ In addition, state-suffrage

162. See ALA. CONST. art. VII, § 3 (1868) (specifying that persons disqualified by Section Three of the Fourteenth Amendment or disenfranchised by the First Reconstruction Act “shall not be permitted to register, vote or hold office”); ARK. CONST. art. VIII, § 3 (1868) (same); FLA. CONST. art. XVI, § 1 (1868) (“Any person debarred from holding office [under Section Three] . . . is hereby debarred from holding office in this State.”); LA. CONST. tit. VI, art. 99 (1868) (disenfranchising and disqualifying from office, *inter alia*, those who “held office, civil or military, for one year or more, under the organization styled ‘the Confederate States of America’” or who “acted as leaders of guerilla bands during the late rebellion”); MISS. CONST. art. VII, § 3 (1868) (requiring voters to swear an oath that they were not disenfranchised by the First Reconstruction Act); MISS. CONST. art. VII, § 5 (1868) (disqualifying from office anyone who signed an order of secession); MO. CONST. art. II, § 3 (1865) (“[N]o person shall be deemed a qualified voter, who has ever been in armed hostility to the United States . . . or been in the service of the so-called ‘Confederate States of America.’”); NEV. CONST. art. II, § 1 (1864) (disenfranchising persons who “held civil or military office under the so-called Confederate States”); S.C. CONST. art. VIII, § 2 (1868) (“That no person shall be allowed to vote or hold office who is now, or hereafter may be, disqualified therefor by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States.”); TEX. CONST. art. VI, § 1 (1869) (“[N]o person shall be allowed to vote, or hold office, who is now, or hereafter may be disqualified therefor, by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States.”).

163. See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 422–23 (1937) (arguing that democracies must sometimes take steps to protect themselves from antidemocratic forces); Crum, *Lawfulness*, *supra* note 10, at 1606–12 (applying militant democracy theory to Reconstruction).

164. See *infra* notes 254–261 and accompanying text.

165. Those States are Massachusetts, New Hampshire, and Rhode Island. See *infra* Appendix A; cf. DEL. CONST. art. IV, § 1 (1852) (referring to “the right of an elector”); VT. CONST. ch. 1, art. 8 (1793) (limiting the “right to elect” to “freemen”).

166. Those States were California, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Oregon, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See *infra* Appendix A.

167. Those States were Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Pennsylvania, and Wisconsin. See *id.*

168. See *id.*

provisions were framed in the affirmative, conferring the franchise on voters. As noted, only a handful of States had adopted anti-discrimination provisions similar to those found in the Fifteenth Amendment.¹⁶⁹ No State used the Fifteenth Amendment's "deny or abridge" term of art. Put simply, these state-level suffrage provisions do not mirror the Fifteenth Amendment's language or its anti-discrimination framework.

* * *

To recap, the world before the Fifteenth Amendment was one in which States had discretion to set voting qualifications. During Reconstruction, a handful of Northern States enfranchised Black men, but the most sweeping changes were initiated by Congress in areas of federal control. Contrary to today's doctrine, the Fourteenth Amendment's Equal Protection Clause did not mandate the enfranchisement of Black men. By early 1869, Black men could vote in only half of the States. This was the world that the Reconstruction Framers sought to change with the Fifteenth Amendment.

II. THE DRAFTING OF THE FIFTEENTH AMENDMENT

The Republicans had a crushing majority in the lame-duck Fortieth Congress: 173 out of 226 seated members in the House, and 57 out of 66 seated senators.¹⁷⁰ If the Republicans voted as a bloc, they would easily clear Article V's two-thirds hurdle for passage of a constitutional amendment. But things would not be so easy.

The Republican Party was riven by division. Radicals pushed for revolutionary changes: the abolition of property requirements and literacy tests, the enfranchisement of women, and the explicit protection of the right to hold office. Moderates advocated for a narrow anti-discrimination provision that accomplished the noble but far more limited goal of nationwide Black-male suffrage. Beyond this ideological divide, West Coast Republicans opposed language that could one day lead to Chinese suffrage.

Time was not on the Republicans' side.¹⁷¹ When the lame-duck Fortieth Congress began debating the Fifteenth Amendment in January 1869, there were

169. See *supra* note 144.

170. See Crum, *Lawfulness*, *supra* note 10, at 1574 n.213.

171. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 541 (1869) (remarks by Sen. Stewart (R-NV)) ("The session is drawing to a close, and if there is to be action on this subject at this session it is very important that it should be at an early day."); *id.* at 1639 (remarks by Sen. Morrill (R-VT)) (noting that there were only "four working days" left in the session).

only two months remaining in the term.¹⁷² Although Republicans still controlled the Forty-First Congress, their majority in the House was smaller,¹⁷³ and there was a concern amongst Republicans that an amendment would not pass the next Congress.¹⁷⁴ Furthermore, prompt congressional action would help in the ratification battle because “seventeen Republican state legislatures were still in session in March, and these legislatures could act on the Amendment before elections.”¹⁷⁵

While the Fifteenth Amendment was on its circuitous path through Congress, Senator Charles Buckalew (D-PA) sought to reform the Electoral College. Specifically, he wanted to provide for the direct election of presidential electors and give Congress authority to determine the manner of their appointment.¹⁷⁶ At one point, Buckalew’s proposal passed the Senate and was sent to the House alongside the Fifteenth Amendment.¹⁷⁷ Buckalew’s reform did not ultimately pass;¹⁷⁸ indeed, if it had, many of the current controversies over the Electoral College would look very different. This Article discusses Buckalew’s proposal only to the extent that it impacts the Fifteenth Amendment’s trajectory.

This Section starts by contextualizing the Fifteenth Amendment: what motivated the Reconstruction Framers to push for nationwide Black-male suffrage in early 1869 and what issues still divided them. Next, this Section outlines the five templates for the Fifteenth Amendment that were debated in Congress. This Section then dives deep into the congressional debate, tracing the Amendment’s long and winding path to ultimate passage.

A. *Contextualizing the Fifteenth Amendment*

In setting the stage, a word of caution about anachronism. Many of the central controversies of Reconstruction are no longer hot-button topics. Conversely, many of today’s open doctrinal questions – such as disputes over redistricting –

172. Prior to the Twentieth Amendment, presidential and congressional terms ended in March, not January. See U.S. CONST. amend. XX, § 1; Crum, *Lawfulness*, *supra* note 10, at 1554 n.43.

173. See Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2214 (1996) (“Democrats gained eleven seats in the House, but lost two senators [in the 1868 election].”).

174. See CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (remarks by Sen. Stewart (R-NV)) (“Send it to another conference and the whole thing is lost.”); *id.* (remarks by Sen. Frelinghuysen (R-NJ)) (“There will be no chance at the next session, because there will not be a two-thirds vote there for it.”).

175. GILLETTE, *supra* note 12, at 79.

176. See *infra* notes 326-329.

177. CONG. GLOBE, 40th Cong., 3d Sess. 1042 (1869).

178. *Id.* at 1226.

did not play a central role in the drafting and ratification debate. In this Section, I quickly address four topics that did play a central role: (1) the Reconstruction Framers' decision to support nationwide Black male suffrage in early 1869; (2) the debate over the status of Chinese immigrants, Irish Americans, and women; (3) the controversy in Georgia that sparked discussion about the right to hold office; and (4) the best means—constitutional or statutory—to enfranchise Black men nationwide.

1. *The Reconstruction Framers' Motives*

At the dawn of Reconstruction, “only ‘radicals’ merged civil and political rights.”¹⁷⁹ Abolitionists formed the core of the Radicals' ranks, and these politicians had long advocated not only for the civil rights but also the political rights of Black people. Moderates, however, were only willing to extend civil rights. For example, President Lincoln, a moderate Republican, endorsed limited enfranchisement of Black men for the first time in his last public speech before he was assassinated.¹⁸⁰ But over the years, moderate Republicans became more amenable to enfranchising Black men. While the Thirty-Ninth Congress declined to extend the ballot to Black men via the Fourteenth Amendment, it did so via statute in areas of federal control.¹⁸¹ Tellingly, the 1868 Republican Party platform endorsed a compromise position: Northern States would be allowed to set their own voting qualifications, but Black men would be guaranteed the franchise in the South.¹⁸²

The proximate cause of the Republicans' embrace of nationwide Black-male suffrage was the 1868 election. Civil War hero Ulysses S. Grant won by a far smaller margin than expected, and his victory in the popular vote was attributable to the votes of Southern Black men.¹⁸³ Based on the 1868 election as well as the Southern elections mandated by the First Reconstruction Act, it had become apparent that Black men would vote as a bloc overwhelmingly for the Republican Party.¹⁸⁴ With the Southern States' readmissions completed or pending, there was concern over the enforceability of the fundamental conditions. In

179. HYMAN & WIECEK, *supra* note 65, at 394.

180. See FONER, *RECONSTRUCTION*, *supra* note 72, at 74.

181. See *supra* Sections I.B-C.

182. See REPUBLICAN PARTY PLATFORM OF 1868, *supra* note 44 (“The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all the loyal States properly belongs to the people of those States.”).

183. See, e.g., ACKERMAN, *TRANSFORMATIONS*, *supra* note 46, at 236.

184. See Amar & Brownstein, *supra* note 10, at 943-46; Crum, *Reconstructing*, *supra* note 10, at 302-05.

addition, the Border States – which were swing states at the time – had sizeable numbers of Black men that might prove decisive in close elections.¹⁸⁵ Thus, Republicans’ ideological and partisan interests converged to support nationwide Black-male suffrage.¹⁸⁶

Historians have emphasized different interests and motives in their analysis of the Fifteenth Amendment. Writing at the dawn of the twentieth century, John Mabry Mathews claimed that, with the Southern States being readmitted to the Union, the power that “Congress had exercised over them was gradually slipping away.”¹⁸⁷ According to Mathews, the “controlling motive” behind the Fifteenth Amendment was “the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States.”¹⁸⁸ During the civil-rights movement, William Gillette argued that moderate Republicans had achieved their “limited object – first, to enfranchise the northern Negro, and second, to protect the southern Negro against disfranchisement.”¹⁸⁹ In so claiming, Gillette emphasized the widespread belief that Black men would vote as a bloc for the Republican Party.¹⁹⁰ Gillette’s claim about partisan self-interest, however, has been critiqued by LaWanda Cox and John Cox, who argued that ideological commitments motivated Republicans “despite [the] political risk . . . [of] White backlash.”¹⁹¹ More recently, Alexander Keyssar noted that “the narrow version of the Fifteenth Amendment probably represented the center point of American politics, the consensus view even within the Republican Party.”¹⁹² Keyssar observed that the opponents of broader versions of the Amendment “wanted to retain the power to limit the political participation of the Irish and Chinese, Native Americans, and the increasingly visible clusters of illiterate and semi-literate workers.”¹⁹³ Finally, Eric Foner has observed that the

185. See GILLETTE, *supra* note 12, at 80, 82.

186. Here, Republican support for the enfranchisement of Black men could be viewed through Derrick Bell’s famous interest-convergence theory. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); see also MARK A. GRABER, *PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR* 129-32 (2023) (raising a similar point about Bell’s interest-convergence thesis vis-à-vis the Fourteenth Amendment).

187. MATHEWS, *supra* note 12, at 20.

188. *Id.* at 21.

189. GILLETTE, *supra* note 12, at 77.

190. See *id.* at 46-47.

191. Cox & Cox, *supra* note 12, at 156-57 (emphasis omitted).

192. KEYSAR, *supra* note 7, at 81.

193. *Id.*

Fifteenth Amendment failed to “break decisively with the notion that the vote was a ‘privilege’ that states could regulate as they saw fit.”¹⁹⁴

At a minimum, the Reconstruction Framers’ goal was to enfranchise Black men nationwide and to ensure that Congress had authority to stop their disenfranchisement in the South—a power that was waning following the Southern States’ readmissions and the controversy over the enforceability of fundamental conditions. The debate thus centered on how to achieve that and whether to go even further.

2. *The Status of Other Disenfranchised Groups*

Although the Reconstruction Framers were united in their desire to enfranchise Black men nationwide, they were divided over the rights of three other disenfranchised groups.

First, the status of Chinese immigrants featured prominently in the debates over the Fifteenth Amendment in Congress and in the ratification battle. These debates were laced with xenophobic and Sinophobic remarks.¹⁹⁵ West Coast Republicans opposed language that could be interpreted to enfranchise Chinese American men.¹⁹⁶ What is particularly striking about these West Coast Republicans’ vehement opposition is that very few Chinese persons were U.S. citizens in the 1860s, as “nearly all of them [were] born abroad and [were] ineligible for naturalization.”¹⁹⁷ At the time, only “White” immigrants could be naturalized under federal law, and there were just a couple hundred native-born Chinese Americans on the West Coast.¹⁹⁸ Nevertheless, West Coast Republicans feared

194. FONER, RECONSTRUCTION, *supra* note 72, at 446; *see also* FONER, SECOND FOUNDING, *supra* note 1, at 105 (explaining that the Fifteenth Amendment adopted “impartial” as opposed to “universal” or “manhood” suffrage).

195. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 901 (1869) (remarks by Sen. Williams (R-OR)) (“I hope, sir, that this nation will not bind itself hand and foot for all coming time, and deliver itself up to the political filth and moral pollution that are flowing with a fearfully increasing tide into our country from the shores of Asia.”); *id.* at 939 (remarks by Sen. Corbett (R-OR)) (“Allow Chinese suffrage, and you may soon find established pagan institutions in our midst which may eventually supersede those Christian influences which have so long been the pride of our country.”).

196. *See infra* Sections II.B.3.d-e.

197. FONER, SECOND FOUNDING, *supra* note 1, at 108.

198. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1030 (1869) (remarks by Sen. Morton (R-IN)) (“[T]he Chinese are not citizens of the United States, and cannot be naturalized under the law as it now stands, because the naturalization laws contain the word ‘white.’”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13-15 (1998) (detailing the history of Sinophobic immigration laws);

that naturalization laws might be changed—something Senator Sumner was, characteristically, proposing to do.¹⁹⁹ In response, West Coast Republicans suggested modifying the Fifteenth Amendment to expressly bar Chinese immigrants and Native Americans from naturalizing.²⁰⁰

Second, the voting rights of naturalized Irish Americans in Rhode Island divided the Republican caucus. Irish and Chinese immigrants were not similarly situated because Irish immigrants were White and could naturalize. Since citizenship could not serve as a gatekeeper to the franchise, Rhode Island's property requirement targeted only *naturalized* citizens, most of whom were Irish Catholics. At the time, it was estimated that “only one in twelve or thirteen of the foreign-born of adult age was a voter.”²⁰¹

Third, activists were pushing for the expansion of voting rights to women.²⁰² This issue first came to a head during debates over the Apportionment Clause. The Reconstruction Framers inserted the word “male” into Section Two to avoid incentivizing the enfranchisement of women,²⁰³ especially given that Western migration had led to significant gender imbalances between the States.²⁰⁴ Although moderate Republicans' views on Black men's voting rights evolved over the years, support for women's right to vote remained a decisively radical position. Indeed, during debates over the Fifteenth Amendment, no proposal that

see also United States v. Wong Kim Ark, 169 U.S. 649, 704-05 (1898) (holding that the Citizenship Clause applied to native-born Chinese persons).

According to the 1870 census, California's total population was 560,247 people, and Oregon's was 90,923 people. There were 36,890 adult Chinese men in California and only 2,789 in Oregon. Finally, there were only 290 native-born Chinese American male citizens in California and three in Oregon. *See* FRANCIS A. WALKER, A COMPENDIUM OF THE NINTH CENSUS (JUNE 1, 1870): COMPILED PURSUANT TO A CONCURRENT RESOLUTION OF CONGRESS, AND UNDER THE DIRECTION OF THE SECRETARY OF THE INTERIOR 546, 551, 554 (Washington, Government Printing Office 1872).

199. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1034 (1869) (remarks by Sen. Sumner (R-MA)).
200. *See id.* at 939 (“But Chinamen not born in the United States and Indians not taxed shall not be deemed or made citizens.”).
201. Patrick T. Conley, *No Landless Irish Need Apply: Rhode Island's Role in the Framing and Fate of the Fifteenth Amendment*, 68 R.I. HIST. 79, 79 (2010) (internal quotation marks omitted); *see also* GILLETTE, *supra* note 12, at 151 & n.10 (observing that “[t]he Irish numbered 31,534 in total foreign-born population of 55,396 in Rhode Island” and that Rhode Island's law had the “practical effect . . . to bar most naturalized citizens from suffrage”).
202. Women won the right to vote in the Wyoming Territory in 1869. *See* DUDDEN, *supra* note 47, at 189.
203. *See id.* at 78-80.
204. *See* Van Alstyne, *supra* note 72, at 47 (“[B]ecause pioneer California had a far higher percentage of males over the age of twenty-one than did Vermont, 58 per cent of the California population consisted of voters as against only 19 per cent in Vermont.”).

would have mandated women's suffrage ever came to a vote in the House or Senate.²⁰⁵

Although the voting rights of women would dissipate quickly from the debates over the Fifteenth Amendment's meaning, the voting rights of Chinese immigrants and Irish Americans would feature prominently in the drafting and ratification battles.

3. *The Georgia Officeholding Controversy*

In July 1868, after its adoption of a constitution that protected Black men's right to vote and its ratification of the Fourteenth Amendment, Georgia was readmitted to the Union.²⁰⁶ But 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."²⁰⁷ Furthermore, the expelled Black state legislators were replaced by the White candidates they had defeated at the polls.²⁰⁸

The Georgia controversy continued to spiral. Separate concerns were raised about whether several Georgia state legislators were disqualified by Section Three of the Fourteenth Amendment, which barred ex-Confederates from holding office.²⁰⁹ In response to these developments, the lame-duck Fortieth Congress refused to seat Georgia's U.S. Senator and one of its representatives.²¹⁰ Georgia's contested status also prompted a vociferous debate during the February 1869 counting of the 1868 Electoral College votes that ended with the President Pro Tempore of the Senate ruling that a prior bicameral agreement

205. See *infra* Appendix B. The Reconstruction Framers' failure to prohibit sex-based discrimination in the Fifteenth Amendment led to a bitter splintering of the women's rights and former abolitionist movements, with prominent leaders Susan B. Anthony and Elizabeth Cady Stanton engaging in race-baiting rhetoric to help defeat the Amendment's ratification. See Stephen Foster, Elizabeth Cady Stanton & Frederick Douglass, Remarks at the Annual Meeting of the American Equal Rights Association, New York, NY (May 12-13, 1869), reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 570-73; Elizabeth Cady Stanton, *All Wise Women Should Oppose the Fifteenth Amendment*, REVOLUTION, Oct. 21, 1869, at 248, reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 577-78.

206. See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

207. THE ESSENTIAL DOCUMENTS, *supra* note 10, at 544-45.

208. See CONG. GLOBE, 41st Cong., 2d Sess. 176 (1869) (remarks by Sen. Edmunds (R-VT)).

209. See CONG. GLOBE, 40th Cong., 3d Sess. 5 (1868) (remarks by Sen. Thayer (R-NE)).

210. See Crum, *Lawfulness*, *supra* note 10, at 1582. Six of Georgia's representatives were seated in the summer of 1868, before this controversy erupted, and those representatives voted on the Fifteenth Amendment's passage. See *id.* at 1574, 1580-81.

controlled and rejecting the House's subsequent and unilateral attempt to exclude Georgia's Electoral College votes.²¹¹

For purposes of this Article, the expulsion of Black lawmakers is the most important controversy, as it was a contemporaneous event concerning the right to hold office and teed up questions about the link between the right to vote and the right to hold office. Furthermore, I explain the Georgia officeholding controversy in piecemeal fashion rather than all at once so that the reader is on the same page as the relevant historical actors during the congressional debate and the ratification battle.²¹²

4. *Statutory vs. Constitutional Change*

The first question decided by the Fortieth Congress was one of means: should nationwide Black male suffrage be achieved through a statute, a constitutional amendment, or both?²¹³ When Boutwell introduced the Fifteenth Amendment, he also submitted a bill that would have enfranchised Black men nationwide.²¹⁴ The bill resembled the Fifteenth Amendment in using “abridge or deny” and targeting discrimination based on race, color, or previous condition of slavery. Boutwell argued that Congress could pass this bill pursuant to its powers under the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment.²¹⁵

As I have explained in prior work, moderate Republicans rejected Boutwell's statute for both constitutional and political reasons.²¹⁶ On the constitutional front, the moderates rebuffed the Radicals' view that the original Constitution and the recently ratified Fourteenth Amendment gave Congress power to establish voting qualifications. And on the political front, the moderates feared voter backlash over the suffrage statute that might endanger not only their political

211. *See id.* at 1583-86.

212. For a full account, *see id.* at 1580-89.

213. *See* Crum, *Superfluous*, *supra* note 5, at 1604-22.

214. Section One of Boutwell's bill provided:

That no State shall abridge or deny the right of any citizen of the United States to vote for electors of President and Vice President of the United States, or for Representatives in Congress, or for members of the legislature of the State in which he may reside, by reason of race, color, or previous condition of slavery; and any provisions in the laws or constitution of any State inconsistent with this section are hereby declared to be null and void.

H.R. 1667, 40th Cong. § 1 (1869).

215. *See* Crum, *Superfluous*, *supra* note 5, at 1606-09; *see also id.* at 1614-16 (summarizing similar arguments made by Sumner in support of a suffrage statute in the Senate).

216. *See id.* at 1613.

fortunes but also the Amendment's chance at ratification. The debate about Boutwell's statute was the first postratification debate about the Fourteenth Amendment's scope, and it clarified that Section One did not apply to political rights. The upshot is that the Fifteenth Amendment should be treated as an independent source of individual rights and a novel source of congressional authority over the States.

B. The Congressional Debate

This Section tracks the evolution and ultimate passage of the Fifteenth Amendment in the lame-duck Fortieth Congress. Over the course of several weeks in early 1869, both chambers debated various "phraseolog[ies]"²¹⁷ for the Amendment. As one frustrated Republican senator remarked, the "two Houses [are] playing shuttlecock with the Constitution and its amendment."²¹⁸

Most of the substantive debate and votes occurred in the Senate, as its members struggled to satisfy Article V's two-thirds threshold and to reach a compromise with the more moderate House. Indeed, one session went through the night,²¹⁹ and the Senate held two marathon rounds of votes on competing versions.

1. Competing Versions of the Fifteenth Amendment

The Reconstruction Framers considered five templates for what would become the Fifteenth Amendment: a narrow anti-discrimination version; a broad anti-discrimination model; a universal-right-to-vote provision; a proposal that singled out persons of "African descent" for protection;²²⁰ and a non-self-executing amendment empowering Congress to regulate voting qualifications.

First, the narrow anti-discrimination version prohibited the denial or abridgment of the right to vote based on "race, color, or previous condition of servitude."²²¹ The initial proposals backed by the House and Senate Judiciary Committees and introduced by Representative George Boutwell (R-MA) and Senator William Stewart (R-NV) were narrow anti-discrimination models.²²² This model was viewed as enfranchising Black men nationwide, but the extent

217. CONG. GLOBE, 40th Cong., 3d Sess. 981 (1869) (remarks by Sen. Abbott (R-NC)).

218. *Id.* at 1301 (remarks by Sen. Nye (R-NV)).

219. *See id.* at 1003 (remarks by Sen. Sumner (R-MA)).

220. I have opted for this terminology because it uses Senator Howard's actual language. *See infra* note 230 and accompanying text.

221. CONG. GLOBE, 40th Cong., 3d Sess. 379 (1869).

222. *See id.* at 285-86, 379.

to which it could be circumvented was hotly contested.²²³ This model is what ultimately became the Fifteenth Amendment.

Second, numerous anti-discrimination proposals went well beyond the three previously enumerated criteria. Senator Henry Wilson (R-MA) introduced what is perhaps the most important example of this model, which would have prohibited “discrimination . . . in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or creed.”²²⁴ Even though many Radical Republicans were in favor of women’s enfranchisement,²²⁵ neither house of Congress voted on – much less passed – any version of the Fifteenth Amendment that included protections against sex-based discrimination.²²⁶

Third, Congress considered provisions that came tantalizingly close to a universal right to vote for male citizens. The most prominent examples were introduced by Representatives John Bingham (R-OH) and Samuel Shellabarger (R-OH).²²⁷ Although most were still framed in the negative, these proposals went well beyond racial discrimination and would have had the practical effect of enfranchising nearly all male citizens. Furthermore, these proposals resembled

223. See *id.* at 561 (remarks by Rep. Boutwell (R-MA)) (explaining that his proposed statute and constitutional amendment would “establish[] universal manhood suffrage for the whole country”); see also *id.* (remarks by Rep. Welker (R-OH)) (inquiring whether Boutwell’s bill would “prevent any of the States from requiring of voters a property or an educational qualification”).

224. *Id.* at 1036. The broad anti-discrimination provision that passed the House provided that “[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude.” *Id.* at 1428. Given the breadth of Wilson’s proposal, Maltz frames it as a “universal suffrage amendment.” Maltz, *Fifteenth*, *supra* note 9, at 434.

225. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 543 (1869) (remarks by Sen. Samuel Pomeroy (R-KS)) (“I am for the enfranchisement of every human being in this country who is an American citizen . . . without regard to sex or color.”).

226. See *infra* Appendix B.

227. See CONG. GLOBE, 40th Cong., 3d Sess. 638 (1869) (quoting the Bingham proposal) (“No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind, and over twenty-one years of age, the equal exercise of the elective franchise at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, except such of said citizens as shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law.”); *id.* at 639 (quoting the Shellabarger proposal) (“No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.”).

state suffrage laws in including residency and age requirements.²²⁸ These proposals also permitted disenfranchisement based on mental illness, felony conviction, or participation in rebellion.²²⁹

The fourth model would have singled out Black voters for protection. Senator Jacob Howard (R-MI) proposed that “[c]itizens of the United States, of African descent, shall have the same right to vote and hold office in States and Territories, as other citizens, electors of the most numerous branch of their respective Legislatures.”²³⁰ Howard stated that his goal was to ensure that Black voters were “upon precisely the same ground as other citizens”²³¹ and that he opposed the anti-discrimination models because they implied that Congress had the power to establish other discriminatory suffrage qualifications, such as a religious test or education requirement.²³² Unsurprisingly, Howard’s proposal attracted support from Western Senators who believed its targeted approach to Black voters would permit their States to disenfranchise Chinese Americans.²³³

All four of these templates had enforcement provisions in Section Two empowering Congress to enact “appropriate” legislation.²³⁴ The fifth model,

228. Bingham’s proposal would have set a one-year residency requirement whereas Shellabarger’s allowed States to set residency requirements. *Id.* at 638-39. Bingham defended his residency requirement with a xenophobic rationale: he stated that “each year there are landed upon our shores hundreds of thousands of adult persons who are aliens,” and that due to “the modern invention of forged naturalization papers, the Government . . . is not protected against the pollution of the ballot-box by thousands who are not entitled to vote.” *Id.* at 722 (remarks by Rep. Bingham (R-OH)).

229. *Id.* at 639 (describing the Shellabarger proposal).

230. *Id.* at 985 (remarks by Sen. Howard (R-MI)); *see also id.* at 828 (quoting the Howard proposal) (“Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens.”).

231. *Id.* at 1009 (remarks by Sen. Howard (R-MI)).

232. *See id.* at 985 (“[S]o plain to me is this implication that under such a clause Congress would have the right to deny or abridge the right of voting for some other causes than those mentioned in the article.”).

233. *See* MATHEWS, *supra* note 12, at 32-33. In some ways, Howard’s proposal resembles Reconstruction Era statutes that used the rights of White citizens as a baseline. *See* 42 U.S.C. § 1981(a) (2018) (“All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”); 42 U.S.C. § 1982 (2018) (“All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”); *see also* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1424-26 (2021) (discussing the historical role and contemporary significance of Sections 1981 and 1982).

234. U.S. CONST. amend. XV, § 2. Members of Congress consistently proposed to strike and replace only Section One of the Amendment. *See, e.g.,* CONG. GLOBE, 40th Cong., 3d Sess. 638 (1869) (remarks by Rep. Bingham (R-OH)); CONG. GLOBE, 40th Cong., 3d Sess. 638-39 (1869) (remarks by Rep. Shellabarger (R-OH)); CONG. GLOBE, 40th Cong., 3d Sess. 828

however, differs from the rest in that it is not self-executing. Senator George Williams (R-OR) proposed that “Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State.”²³⁵ According to Williams, his proposal was designed to adapt to the “possibilities of the boundless future.”²³⁶ But as discussed more below, Williams’s proposal was in fact tailored to permit the disenfranchisement of Chinese American men.²³⁷

2. *The House’s First Move*

The initial House and Senate versions of the Fifteenth Amendment were narrow anti-discrimination provisions. On January 11, Representative Boutwell introduced the version approved by the House Judiciary Committee.²³⁸ Section One provided that “[t]he right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of *any citizen or class of citizens of the United States*.”²³⁹ Then, on January 15, Senator Stewart introduced the Senate Judiciary

(1869) (remarks by Sen. Howard (R-MI)); CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (remarks by Sen. Wilson (R-MA)).

235. CONG. GLOBE, 40th Cong., 3d Sess. 864 (1869) (striking out both Sections One and Two). Williams’s proposal bears a striking resemblance to Bingham’s early draft of the Fourteenth Amendment that merely empowered Congress to protect civil rights and lacked a self-executing provision. See CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (“The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 176-79 (1997) [hereinafter McConnell, *Institutions*] (discussing Bingham’s early draft and the reasons for its rejection).
236. CONG. GLOBE, 40th Cong., 3d Sess. 899 (1869) (remarks by Sen. Williams (R-OR)).
237. See *infra* notes 321-325 and accompanying text.
238. CONG. GLOBE, 40th Cong., 3d Sess. 271, 285-86 (1869) (remarks by Rep. Boutwell (R-MA)).
239. *Id.* (emphasis added). Section Two provided that “[t]he Congress shall have the power to enforce by *proper* legislation the provisions of this article.” *Id.* (emphasis added). Boutwell’s initial draft used the word “proper” instead of “appropriate,” as had been used in the Thirteenth and Fourteenth Amendments’ enforcement provisions. Nevertheless, the term “proper” was intimately linked with “appropriate,” given *McCulloch*’s standard for the Necessary and Proper Clause. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” (emphasis added)); McConnell, *Institutions*, *supra* note 235, at 188 (noting that the term “appropriate” “has its origins in the latitudinarian construction of congressional power in *McCulloch*”).

Committee's proposal.²⁴⁰ It provided that "[t]he right of citizens of the United States to vote *and hold office* shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude."²⁴¹

Despite their similarities, the original versions' language differed in two key respects. First, the Senate's version explicitly protected the right to hold office — a major point of contention between the two chambers that would ultimately be resolved in the House's favor. Second, the Senate's language protected the "right of citizens" in the plural, whereas the House used more verbose language that protected the "right of any citizen" in the singular and then appended, somewhat awkwardly, at the end: "any citizen or class of citizens of the United States." But as unpacked below, Stewart explained that these differences were immaterial and that both chambers were seeking to protect the rights of classes of citizens.

When he introduced the Fifteenth Amendment, Boutwell explained that 150,000 Black men living in Northern and Border States would be enfranchised by his narrow anti-discrimination model.²⁴² Boutwell believed that his proposed amendment would be "the last as far as I can foresee of a series of great measures growing out of the rebellion" because "if we secure to all the people of the country, without distinction of race or color, the privilege of the elective franchise, we have then established upon the broadest possible basis of republican equality the institutions of the country, both state and national."²⁴³

On January 29, after Boutwell conceded defeat on his nationwide suffrage statute,²⁴⁴ the House debated the metes and bounds of the Amendment. Bingham and Shellabarger advocated for their universal-right-to-vote proposals. In so doing, Bingham criticized the narrowness of Boutwell's version. Bingham believed that "[t]hose three terms are the only terms of limitation" and would permit States to establish "an aristocracy of property, . . . intellect, . . . [and] sect."²⁴⁵ Bingham also raised the specter that States would enact religious tests

240. CONG. GLOBE, 40th Cong., 3d Sess. 377, 379 (1869).

241. *Id.* (emphasis added). The amendment, which in the pages of the *Congressional Globe* was not demarcated into separate sections, further provided: "And Congress shall have power to enforce the provisions of this article by appropriate legislation." *Id.*

242. *See id.* at 561 (remarks by Rep. Boutwell (R-MA)). Here, Boutwell is referring to his suffrage statute, but the demographic figures hold for the amendment given their similar scopes.

243. *Id.* at 555.

244. *See id.* at 686 (recognizing that there was "a general agreement that some amendment to the Constitution should be proposed"); *id.* at 725 (conceding that it was "desirable to submit an amendment"); *see also* Crum, *Superfluous*, *supra* note 5, at 1613-14 (discussing this timeline).

245. CONG. GLOBE, 40th Cong., 3d Sess. 722 (1869) (remarks by Rep. Bingham (R-OH)); *see also id.* at 726 ("[E]very other thing not included in this exception may be made a test, and that is the reason I object to it.").

for voting.²⁴⁶ Shellabarger echoed Bingham's concerns. Invoking the interpretive canon *expressio unius exclusio alterius*,²⁴⁷ Shellabarger argued that what "we have not prohibited to the States will be . . . added to the powers of the States" and will "enable them to disfranchise for every conceivable cause except only [these] three."²⁴⁸ Shellabarger specifically referenced Massachusetts's literacy test as one tool that Southern States could use to disenfranchise Black men.²⁴⁹

Critiques of Bingham's and Shellabarger's proposals came from multiple directions. In support of his initial proposal, Boutwell observed that the narrow anti-discrimination model was "all that is probably safe for us to undertake now," articulating the concern that a broader amendment could not pass the House or be ratified by the States.²⁵⁰ Representative Benjamin Butler (R-MA) argued that Bingham's and Shellabarger's proposals would endanger state registration laws, as they "would abridge the right of suffrage to whoever was deprived of his vote by non-registration."²⁵¹ In addition, Representative Thomas Jenckes (R-RI) pointed out that the universal-right-to-vote proposals were still framed in the negative and therefore "raise just as many new constitutional questions as there are States."²⁵² Jenckes believed that voting qualifications should be "uniform throughout the land and defined in clear and positive terms."²⁵³

Perhaps surprising to modern readers, the voting rights of ex-rebels featured prominently in the discussion. Bingham's version was more forgiving toward ex-rebels, as it permitted disenfranchisement only for *future* acts of insurrection. By contrast, Shellabarger's proposal would have permitted disenfranchisement for past insurrection.²⁵⁴ Boutwell remarked that, although he was sympathetic to Shellabarger's view, he did not think it prudent to entrench it into the constitutional text.²⁵⁵ As for Bingham's more forgiving proposal, Boutwell commented

246. *Id.* at 726.

247. *See, e.g.,* *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002) ("[E]xpressing one item of [an] associated group or series excludes another unmentioned . . .").

248. CONG. GLOBE, 40th Cong., 3d Sess. app. at 98 (1869) (remarks by Rep. Shellabarger (R-OH)).

249. *Id.*

250. *Id.* at 727 (remarks by Rep. Boutwell (R-MA)); *see also id.* at 726 ("[B]y arraying against this proposition all the peculiarities of the different States we put the proposition itself in danger. I think it better, therefore, as a matter of practical wisdom, to address ourselves exclusively to those great evils which have existed in the Government and the country.").

251. *Id.* at 725 (remarks by Rep. Butler (R-MA)).

252. *Id.* at 728 (remarks by Rep. Jenckes (R-RI)).

253. *Id.*

254. *See id.* at 722 (remarks by Rep. Bingham (R-OH)) (noting this distinction).

255. *See id.* at 726 (remarks by Rep. Boutwell (R-MA)).

that “it is not safe by one swoop . . . to relieve these men of their disabilities.”²⁵⁶ Other Republicans shared Boutwell’s opposition to the enfranchisement of ex-rebels.²⁵⁷

Nevertheless, to head off Bingham’s and Shellabarger’s arguments, Boutwell moved to add protections against education and property tests to his narrow anti-discrimination amendment.²⁵⁸ In direct response, Representative James Garfield—a future president and an influential moderate Republican from Ohio²⁵⁹—expressed his support for education tests.²⁶⁰ Boutwell’s compromise position failed 45-95.²⁶¹

On January 30, Bingham’s and Shellabarger’s universal-right-to-vote proposals fared no better.²⁶² With minimal discussion, Shellabarger’s version lost by a vote of 61 yeases, 126 noes, and 35 not-presents, while Bingham’s was defeated 24-160-38.²⁶³ Given the similarity in language, the thirty-seven-vote gap in support is likely attributable to Bingham’s support for the re-enfranchisement of ex-rebels.²⁶⁴

256. *Id.*

257. *See id.* at 725 (remarks by Rep. Butler (R-MA)) (stating that he would only support enfranchisement of ex-rebels after the right to vote free of racial discrimination was firmly established); *id.* (remarks by Rep. Scofield (R-PA)) (criticizing Bingham’s proposal for “an undeserved and almost unsolicited act of grace to the cruel men, who for four years drenched the land with blood”).

258. The following language would have been appended to the end of the Amendment: “nor shall educational attainments or the possession or ownership of property ever be made a test of the right of any citizen to vote.” *Id.* at 728 (remarks by Rep. Boutwell (R-MA)). Boutwell also suggested that a one-year residency requirement be added, *see id.* at 726, but the House did not vote on that language.

259. *See* GILLETTE, *supra* note 12, at 51 (discussing Garfield’s role in the debates over the Fifteenth Amendment).

260. *See* CONG. GLOBE, 40th Cong., 3d Sess. 728 (1869) (remarks by Rep. Garfield (R-OH)).

261. *Id.* (remarks by Rep. Robinson (D-NY)).

262. In addition to his views on the proposed Fifteenth Amendment, Boutwell asserted that an “educational test . . . made for some people, or a property test for some people, and not for others” would *already* be unconstitutional. *Id.* (remarks by Rep. Boutwell (R-MA)). This view accords with Boutwell’s interpretation of the Privileges or Immunities Clause and his definition of a voting “qualification.” For more on Boutwell’s views, *see* Crum, *Superfluous*, *supra* note 5, at 1606-09.

263. CONG. GLOBE, 40th Cong., 3d Sess. 744 (1869). Sometimes the *Congressional Globe* provides “yeas” and “nays” and sometimes it provides “yeas,” “nays,” and “not votings.” I provide the most complete vote.

264. Indeed, some Democrats, such as Representatives Samuel Axtell (D-CA) and Hiram McCullough (D-MD), supported Bingham’s version but not Shellabarger’s. *See id.* In other words, the gap within the Republican caucus was even wider than thirty-seven votes and demonstrates the deep discomfort with enfranchising ex-rebels.

Immediately thereafter, the House passed Boutwell's narrow anti-discrimination amendment by a margin of 150-42-31, thereby satisfying Article V's two-thirds requirement for a constitutional amendment.²⁶⁵ Thus, the House's first approved version stated: "The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States."²⁶⁶

3. *The Senate's First Move*

On January 18, Stewart introduced his narrow anti-discrimination version of the Fifteenth Amendment. There were brief debates in late January, but the Senate did not begin discussing the Amendment in earnest until February 5, well after the House passed its version. The Senate debate lasted several days, toggling back and forth between various proposals. The actual votes occurred on February 8 and 9, with Wilson's broad anti-discrimination provision securing two-thirds support for passage.

The Senate debate focused on the vices of Stewart's narrow anti-discrimination provision and the implications of Howard's African-descent proposal. Some senators also launched xenophobic attacks on Chinese immigrants. Unlike the House, the Senate spent little time on a universal-right-to-vote approach. In addition, the senators said almost nothing about office-holding at this stage, even though the House's amendment lacked explicit protection of that right.²⁶⁷

Rather than proceed in a purely chronological fashion, this subsection addresses each of the five templates. It then briefly covers the attempt to reform the Electoral College and concludes with the Senate's votes.

a. *The Narrow Anti-Discrimination Provision*

In his first extended remarks, Stewart admitted that "many eloquent speeches . . . have been made on this great question" and "[e]very person in the country has discussed it."²⁶⁸ Stewart focused on the amendment's broader purpose, rather than on its plain text. Stewart framed the Amendment as "a

265. *See id.* at 745.

266. *Id.* at 827-28. Boutwell had previously and successfully moved to delete the word "the" before "race" in the Amendment. *See id.* at 726.

267. In response to criticism that New Hampshire permitted only Protestants to hold office, New Hampshire Senator Patterson stated that the requirement "is now a dead letter" and that he had "sat in the Legislature with a Catholic." *Id.* at 1002 (remarks by Sen. Patterson (R-NH)).

268. *Id.* at 668 (remarks by Sen. Stewart (R-NV)).

declaration to make all men, without regard to race or color, equal before the law.”²⁶⁹ According to Stewart, the Amendment was “the logical result of the rebellion, of the abolition of slavery.”²⁷⁰ Articulating the underlying theory behind the Radicals’ conception of democracy, Stewart explained that “each man shall have a right to protect his own liberty,” since the ballot “is the only measure that will really abolish slavery” and “the only guarantee against peon laws and against oppression.”²⁷¹

During the Senate’s initial consideration of Stewart’s narrow anti-discrimination provision, surprisingly little was said in support. Senator Frelinghuysen defended the Amendment’s narrowness as a virtue, as it did not disturb pre-existing state law.²⁷²

In addition, an especially revealing colloquy occurred between Stewart and Senator Charles Drake (R-MO). In a friendly motion to streamline the Amendment’s language, Drake proposed: “No citizen of the United States shall, on account of his race, color, or previous condition of servitude, be by the United States or any State denied the right to vote or to hold office.”²⁷³

At first blush, Drake’s proposal appears to be an innocuous reordering of the sentence.²⁷⁴ But Stewart responded that Drake’s proposal “narrows the amendment and does not improve [it].”²⁷⁵ According to Stewart, the Amendment was framed in the plural—namely, the right of *citizens* to vote—because it was intended to protect “not only . . . the citizen himself, but the class to which he belonged.”²⁷⁶ Stewart referenced the House’s draft, which concluded with the phrase “‘class of citizens,’ for the reason that a person might be deprived of his right to vote on account of the servitude of his ancestors or on account of the servitude of his class.”²⁷⁷ Stewart explained that the Senate’s version

269. *Id.*

270. *Id.*

271. *Id.*

272. *See id.* at 979 (remarks by Sen. Frelinghuysen (R-NJ)) (stating that the Amendment permitted discrimination on the basis of sex, age, property, and education).

273. *Id.* at 999 (remarks by Sen. Drake (R-MO)).

274. Curiously, Drake’s proposal was limited to the “denial” of the right to vote and hold office and did *not* include the word “abridge.” This omission, however, was not commented upon by Stewart in his reasons for rejecting Drake’s language. Of course, it is possible that Stewart simply did not notice that omission. Indeed, Stewart remarked that “it is somewhat difficult to pass upon language of this kind readily.” *Id.* at 1000 (remarks by Sen. Stewart (R-NV)). But this is nevertheless an intriguing data point in trying to ascertain the meaning of “abridge” in the Fifteenth Amendment.

275. *Id.*

276. *Id.*

277. *Id.*

accomplished this goal with a plural phrasing that “is not so likely to be misunderstood.”²⁷⁸ Stewart held firm to his view that the Fifteenth Amendment protects voters *as a class* even after Drake retorted that “[t]he right to vote is an individual right; it does not belong to masses of people.”²⁷⁹

The debate between Stewart and Drake goes to a fundamental question of election law: whether the right to vote is purely individual or also encompasses aggregate rights.²⁸⁰ Given his role in introducing the Fifteenth Amendment in the Senate, Stewart’s statements about its specific wording and his equating the Senate’s plural language with the House’s “class of citizens” phrase are a persuasive endorsement of the idea that the Amendment’s anti-discrimination provisions should be conceptualized at the group level. In a related vein, Stewart’s example of discrimination based on one’s ancestors being enslaved is evidence that proxies for protected characteristics would fall under the Amendment’s scope.²⁸¹

Aside from the Stewart-Drake dialogue, there was intense criticism over the possibility that States could easily circumvent the Amendment’s ban on racial discrimination. For instance, Senator Oliver Morton (R-OH) objected that the Amendment “recognizes that the whole power over the question of suffrage is vested in the several States except as it shall be limited by this amendment.”²⁸² Multiple senators raised the specter that States could employ education tests or property requirements to disenfranchise over ninety percent of Black men.²⁸³ As

278. *Id.*

279. *Id.* (remarks by Sen. Drake (R-MO)).

280. Normally, this debate is fought on the terrain of redistricting disputes. See Crum, *Reconstructing*, *supra* note 10, at 311-12; Gerken, *supra* note 23, at 1681; Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1218 (1996). But, as I expand on below in Section IV.A.1, this debate is most relevant for present purposes to whether the Fifteenth Amendment prohibits the use of racial proxies.

281. See CONG. GLOBE, 40th Cong., 3d Sess. 1000 (1869) (remarks by Sen. Stewart (R-NV)) (“The only point is whether we have made an affirmative proposition sufficiently clear that it cannot be evaded.”).

282. *Id.* at 863 (remarks by Sen. Morton (R-OH)).

283. See *id.* (“They may be disenfranchised for want of education or want of intelligence. The States of Louisiana and Georgia may establish regulations upon the subject of suffrage that will cut out forty-nine out of every fifty colored men in those States from voting.”); *id.* at 862 (remarks by Sen. Willard Warner (R-AL)) (“[U]nder it and without any violation of its letter or spirit, nine tenths of them might be prevented from voting and holding office by the requirement . . . of an intelligence or property qualification.”); *id.* at 900 (remarks by Sen. Williams (R-OR)) (noting that a “freehold qualification . . . would operate equally upon all citizens, but it might practically operate to exclude nine tenths of the colored persons from the right of suffrage”); *id.* at 1011 (remarks by Sen. James Doolittle (R-WI)) (stating, as an opponent of the Amendment, that literacy tests would “exclude about nine tenths . . . of the negroes in their present condition”).

Senator John Sherman (R-OH) observed, the “proposition [was] on so narrow a ground that we are constantly apologizing for its weakness.”²⁸⁴ These concerns animated the desire for Wilson’s broad anti-discrimination version.

Finally, for his part, Howard went even further in advancing a somewhat strained reading of the Amendment. Howard highlighted the inclusion of “by the United States” in Section One, which he interpreted as giving “Congress . . . the right to deny or abridge the right of voting for some other causes than those mentioned in the article.”²⁸⁵ Not only could States disenfranchise Black men via literacy tests, Howard feared, *Congress* would be able to do so too.²⁸⁶

b. The Broad Anti-Discrimination Version

Early on in the debate, Senator Samuel Pomeroy (R-KS) spoke in favor of “the enfranchisement of every human being in this country who is an American citizen.”²⁸⁷ Pomeroy believed that the right to vote should be conferred “without regard to sex,”²⁸⁸ and that women deserved the ballot “because she is a citizen of the Republic, amenable to its laws, taxed for its support, and sharer in its destiny.”²⁸⁹ Pomeroy condemned the theory of virtual representation for ignoring the interests of distinct groups of people.²⁹⁰ Thus, Pomeroy introduced an amendment that would have prohibited the denial or abridgment of the right to vote or hold office “for any reasons not equally applicable to all citizens of the

284. *Id.* at 1039 (remarks by Sen. Sherman (R-OH)).

285. *Id.* at 985 (remarks by Sen. Howard (R-MI)); *see also id.* at 999 (reaffirming this view).

286. Howard conceded that the federal government “ha[d] not intermeddled” with the right to vote in States, but that was partly because it lacked that authority. *Id.* at 985.

287. *Id.* at 543 (remarks by Sen. Pomeroy (R-KS)).

288. *Id.*; *see also id.* at 710 (“There are no reasons for giving the ballot to a man that do not apply to a woman with equal force.”).

289. *Id.* at 710.

290. *See id.* (“Do not tell me that the rights of one class of citizens are safe in the hands of another, that the men will take care of the rights of the women. The rights of individuals allied to you may be or may not be safe, but of a class they never can be.”).

United States.”²⁹¹ Even though some Radical Republicans were sympathetic to Pomeroy’s position,²⁹² his proposal was never voted on.²⁹³

In response to the critiques leveled against Stewart’s proposal, Senator Wilson introduced a broad anti-discrimination provision that protected against discrimination in the right to vote and hold office on account of race, color, nativity, property, education, and religious belief.²⁹⁴ In defense of his broader amendment, Wilson specifically named some of the laws he was targeting: Rhode Island’s property qualification for naturalized citizens, New Hampshire’s constitutional ban on Catholics holding office, and Massachusetts’s literacy test.²⁹⁵ In addition, Wilson remarked that his proposal “allows any State to try, if it chooses, the experiment of woman suffrage.”²⁹⁶ As evidenced by its passage by the Senate, Wilson’s amendment allayed the Radicals’ concerns, though it was not uniformly well received.²⁹⁷

c. *The Universal-Right-to-Vote Approach*

Unlike the House, the Senate did not spend considerable time debating a universal-right-to-vote approach. At this juncture, the most significant proposal came from Republican Senator Willard Warner of Alabama.²⁹⁸

Warner adopted a hybrid approach. He used an anti-discrimination provision for the right to hold office while employing a universal-right-to-vote for

291. *Id.* at 708 (“The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State for any reason not equally applicable to all citizens of the United States.”).

292. *See, e.g., id.* at 862 (remarks by Sen. Warner (R-AL)) (“I would admit woman . . . to an equal voice with us in the Government. . . . But I know that woman’s suffrage is not now attainable.”). To be clear, many Republicans opposed women’s suffrage on ideological grounds and believed in virtual representation. *See id.* at 998 (remarks by Sen. Sawyer (R-SC)) (“Women are represented through their husbands or brothers.”).

293. *See* Maltz, *Fifteenth*, *supra* note 9, at 431; *infra* Appendix B. In 1866, an attempt to enfranchise women in Washington, D.C., was defeated in the Senate by a vote of 9-37; a similar effort in the House lost by a vote of 49-74. *See* MCPHERSON, *supra* note 42, at 184.

294. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1009 (1869).

295. *See id.* app. 154 (remarks by Sen. Wilson (R-MA)).

296. *Id.*

297. Senator Patterson (R-NH) opposed Wilson’s amendment because he was “in favor of an educational test as a restriction upon the right of suffrage.” *Id.* at 1037 (1869) (remarks by Sen. Patterson (R-NH)).

298. Warner was a so-called carpetbagger, an Ohioan who had moved South and had become a Senator. *See* JOHN F. KOWAL & WILFRED U. CODRINGTON III, *THE PEOPLE’S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION* 113 (2021).

suffrage.²⁹⁹ His officeholding criteria fell in between Stewart’s and Wilson’s protections. Warner did not include “sex” as a protected class for officeholding, and he would have permitted States to disenfranchise women by limiting suffrage rights to male citizens. That said, Warner’s proposal was truly affirmative in that it conferred the right to vote on male citizens and strongly resembled state constitutions. In addition, Warner’s stance on ex-Confederates mirrored Bingham’s more lenient policy of disenfranchisement only for future insurrections.³⁰⁰ Warner’s universal-right-to-vote proposal, however, attracted minimal support and little discussion.³⁰¹

d. Howard’s African-Descent Proposal

Recall that Howard interpreted the anti-discrimination proposals as opening the door to Congress imposing its own – potentially discriminatory – voting qualifications on the States. To address that concern, Howard introduced a proposal that had no counterpart in the House. It provided that “[c]itizens of the United States, of African descent, shall have the same right to vote and hold office in States and Territories, as other citizens, electors of the most numerous branch of their respective Legislatures.”³⁰²

Howard believed that his amendment accomplished “in direct and plain terms” the “sole object of this whole proceeding,” namely, “to impart by a constitutional amendment to the colored man . . . the ordinary right of citizens of the United States.”³⁰³ Howard argued that his proposal achieved this by singling

299. Warner’s proposal stated that:

The right of citizens of the United States to hold office shall not be denied or abridged by the United States or any State on account of property, race, color, or previous condition of servitude; and every male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, shall have an equal vote at all elections in the State in which he shall have actually resided for a period of one year next preceding such election, except such as may hereafter engage in insurrection or rebellion against the United States, and such as shall be duly convicted of treason, felony, or other infamous crime.

CONG. GLOBE, 40th Cong., 3d Sess. 861 (1869) (remarks by Sen. Warner (R-AL)).

300. Compare *id.* (outlining Sen. Warner’s proposal), with *id.* at 638 (outlining Rep. Bingham’s proposal). In a prediction that did not age well, Warner stated that giving States the authority to disenfranchise felons “is a very limited and possibly not dangerous concession.” *Id.* at 862 (remarks by Sen. Warner (R-AL)).

301. See *id.* at 1014 (reporting defeat of Warner’s proposal without a roll-call vote); *id.* at 1041 (reporting defeat of Warner’s proposal by a vote of 5-47-14).

302. *Id.* at 985 (remarks by Sen. Howard (R-MI)).

303. *Id.*

out Black persons for protection³⁰⁴ and “adopting the constitutional language of electors having the qualifications of electors.”³⁰⁵ Howard’s proposal, however, was not without its detractors.

Senators observed that it would be as easy to circumvent as the narrow anti-discrimination provision.³⁰⁶ Senator George Edmunds (R-VT) questioned how the amendment would operate in States like Rhode Island that discriminated among White citizens depending on whether they were natural-born or naturalized citizens.³⁰⁷ Stewart wondered whether a “literal construction [of Howard’s proposal would] confer suffrage on females and minors of African descent[,]” as there was no language limiting it to adult men.³⁰⁸

Howard’s proposal also sparked debates about the nature of race and citizenship. For starters, Howard’s proposal prompted a question from Senator Lyman Trumbull (R-IL) about how he would define persons of “African descent.”³⁰⁹ Howard replied that he meant “what is popularly known as such,” which he “understood [as] a person who has African blood in his veins.”³¹⁰ Trumbull pushed for a clarification, asking “[e]ver so little?”³¹¹ Howard then shifted his answer: he defined “African descent” as “what is commonly known as the negro, or some person having colored blood in his veins to the amount of at least one eighth. I believe it is settled by the courts of justice that when the quantity becomes less than one eighth . . . he is called a white man.”³¹²

This brief debate between Howard and Trumbull touches on the highly sensitive subject of how race is legally defined and to what extent it has social and

304. *See id.* (“Give us, then, the colored man, for that and that only is the object that is now before us. . . . I am in favor of extending to this class of men the right to vote and to hold office in the United States.”).

305. *Id.*

306. *See id.* at 863 (remarks by Sen. Morton (R-OH)) (stating that Howard’s version was preferable to the House’s amendment, but it would permit states to “require property or educational tests . . . that would cut off the great majority of colored men from voting in those States”); *id.* at 1009 (remarks by Sen. Stewart (R-NV)) (commenting that a property qualification that was applied uniformly and that disenfranchised most Black men would not violate Howard’s proposal); *id.* (remarks by Sen. Yates (R-IL)) (observing that States retained power to establish uniform voting qualifications).

307. *See id.* at 1009 (remarks by Sen. Edmunds (R-VT)). Howard would belatedly answer Edmunds’s question when he replied that “[t]hey would be put with the aliens, if they were aliens; but if they were not aliens, they would not be put with the aliens.” *Id.* at 1318 (remarks by Sen. Howard (R-MI)).

308. *Id.* at 1008 (remarks by Sen. Stewart (R-NV)).

309. *Id.* at 1009 (remarks by Sen. Trumbull (R-IL)).

310. *Id.* (remarks by Sen. Howard (R-MI)).

311. *Id.* (remarks by Sen. Trumbull (R-IL)).

312. *Id.* (remarks by Sen. Howard (R-MI)).

biological bases.³¹³ Tellingly, Howard's change in his position from "one-drop" to "one-eighth" is actually the reverse of the historical trend that was happening in the courts and in society at the time.³¹⁴ Similar debates over how to define "White" and "race" under state suffrage laws, federal naturalization laws, and the Fifteenth Amendment recurred throughout this period.³¹⁵

In addition, senators expressed apprehension about "singl[ing] out one race for protection."³¹⁶ Edmunds was perhaps the most blunt, stating that Howard's proposal "does not, as it seems to me, stand on any principle. . . . [T]here is nothing republican in that."³¹⁷ Although he opposed Howard's approach, Warner suggested that, if the Senate were to go down that path, it would be prudent to "insert the Irish and Germans" "to strengthen it and give it a chance of adoption."³¹⁸

Unsurprisingly, Howard's proposal garnered support from West Coast Republicans who opposed enfranchising Chinese American men. Some framed their support as protecting Black men's rights or, in practical terms, to increase

313. See, e.g., David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 183 (2021) (noting ongoing debates over "whether multi-racial individuals with a non-Black-identified parent should be included in the African American category"); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1001-04 (N.D. Ala. 2022) (holding that it was proper to lump together "single-race Black" and "Black and another race" for purposes of the first *Gingles* prong).

314. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 178 (1998) ("Whereas most states before the Civil War had defined 'negro' according to fractions of 'blood'—usually one-eighth or one-fourth—many moved to one-drop-of-blood rules.").

315. See *Monroe v. Collins*, 17 Ohio St. 666, 686 (1868) (holding that "men having an admixture of African blood, with a preponderance of white blood" were "white male citizens" under the Ohio Constitution and entitled to vote); CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (remarks by Sen. Corbett (R-OR)) ("[U]nder the naturalization laws as they now stand, that the word 'white' excludes [Chinese immigrants]."); FONER, *SECOND FOUNDING*, *supra* note 1, at 108 (noting the ratification debate in Rhode Island about whether the term "race" applied to naturalized Irish Americans).

316. CONG. GLOBE, 40th Cong., 3d Sess. 1009 (1869) (remarks by Sen. Warner (R-AL)); see also *id.* at 1008 (remarks by Sen. Stewart (R-NV)) ("Why a distinction against the descendants of other countries?").

317. *Id.* at 1008 (remarks by Sen. Edmunds (R-VT)).

318. *Id.* at 1009 (remarks by Sen. Warner (R-AL)).

the amendment's chance of ratification.³¹⁹ But these senators' Sinophobic remarks revealed their true motive.³²⁰

e. The Non-Self-Executing Amendment

The final template considered in the Senate – again with no analogue in the House – was Senator Williams's proposal that "Congress shall have the power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any state."³²¹ Unlike the prior templates, Williams's was not self-executing. That is, States would retain authority to set suffrage qualifications and officeholding requirements until Congress stepped in. Williams believed that Congress would quickly pass a law enfranchising Black men and that his amendment would thereafter empower Congress to combat discriminatory schemes – such as a freehold requirement – that could be employed to "exclude nine tenths of the colored persons from the right of suffrage."³²² Williams discounted the possibility that Congress would ever repeal a law that protected the right to vote.³²³

Williams's motives, however, were not pure. Williams feared that the anti-discrimination models would enfranchise Chinese American men in the event that naturalization laws were amended to permit non-White immigrants to

319. *See id.* at 1008 (remarks by Sen. Williams (R-OR)) (commenting that "the practical evil in this country at this time is that persons of African descent are disenfranchised"); *id.* (remarks by Sen. Corbett (R-OR)) (stating that he supported Howard's version because it "will give to the African race the right to vote, that they may protect themselves in the southern reconstructed States"); *id.* (remarks by Sen. Cole (R-CA)) (explaining that Howard's proposal "will effectually leave out of the question the subject of the Chinese immigration which has excited so much feeling on the part of Senators not from the Pacific coast").

320. *See supra* note 195.

321. CONG. GLOBE, 40th Cong., 3d Sess. 864 (1869) (remarks by Sen. Williams (R-OR)).

322. *Id.* at 900 (remarks by Sen. Williams (R-OR)).

323. *See id.* ("Sir, suffrage never takes any backward steps; and if Congress should once pass a law enfranchising the black people of this country there is no human possibility that the law would ever be repealed."). Unfortunately, Williams's prediction about the invulnerability of federal suffrage statutes proved overly optimistic. *See* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 36 (1894) (repealing many Reconstruction Era statutes protecting the right to vote); Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. 1153, 1173 (2020) (discussing this history).

become citizens.³²⁴ Williams's proposal received scant attention and was rejected decisively.³²⁵

f. Electoral College Reform

In the midst of this wrangling over the Fifteenth Amendment, Democratic Senator Buckalew introduced an amendment to reform the Electoral College.³²⁶ Buckalew's amendment would have guaranteed a popular vote of electors and empowered Congress to specify the manner of electors' appointment.³²⁷ Buckalew's goal in giving Congress the power over the manner of electors' appointment was to abolish the general ticket—that is, the winner-take-all method that most States currently use—and allow Congress to “prescribe the single district system, or any other improved mode,” as Maine and Nebraska do today.³²⁸ Buckalew's amendment was referred to a committee and, in a rare moment of bipartisan cooperation during Reconstruction, Ohio Republican Senator Morton successfully moved to add Buckalew's proposal to the Fifteenth Amendment.³²⁹

324. See CONG. GLOBE, 40th Cong., 3d Sess. 901 (1869) (remarks by Sen. Williams (R-OR)) (critiquing the anti-discrimination models because “the Chinese who are coming here by thousands every year will find no constitutional obstacle to the exercise by them of the elective franchise and to the right to hold office” in the event that naturalization laws are changed).

325. *Id.* at 999.

326. Buckalew would have amended Article II, Section One, Clause Two to read:

Each State shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust and profit under the United States, shall be appointed an elector; and the Congress shall have the power to prescribe the manner in which such electors shall be chosen by the people.

Id. at 668 (remarks by Sen. Buckalew (D-PA)).

327. See *id.* at 668-69 (remarks by Sen. Buckalew (D-PA)).

328. *Id.* at 669 (remarks by Sen. Buckalew (D-PA)); see also *Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 & n.1 (2020) (discussing both the statewide model and Maine and Nebraska's systems).

329. See CONG. GLOBE, 40th Cong., 3d Sess. 1041-42 (1869). Here, it should be noted that Buckalew was also trying to sabotage the ratification of the Fifteenth Amendment, as he proposed that the Amendment could only be ratified by state legislators elected after its passage by Congress. See *id.* at 828.

g. Initial Passage

As detailed in Appendix B, the Senate held a marathon round of votes on February 8 and 9. Rather than go even deeper into this thicket by providing a blow-by-blow account, a few major takeaways.

The Senate easily rejected attempts to replace Stewart's narrow anti-discrimination provision with Warner's universal-right-to-vote proposals,³³⁰ Howard's African-descent amendment,³³¹ and Williams's non-self-executing amendment.³³² After an early loss,³³³ Wilson succeeded in replacing Stewart's proposal with his own broad anti-discrimination provision.³³⁴ At this juncture, Wilson's draft provided that: "No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed."³³⁵

Meanwhile, Buckalew's Electoral College reform proposal, also after an initial setback,³³⁶ was appended to the Fifteenth Amendment.³³⁷ The Senate then voted on both provisions as a package, clearing the two-thirds hurdle by a vote of 39-16-11.³³⁸

4. The House Doubles Down

On February 15, the House held a brief debate over the Senate's broad anti-discrimination version and its Electoral College reform proposal. Once again, Boutwell and Bingham differed on strategy. Boutwell opposed the Senate's version whereas Bingham supported it.

Boutwell faulted Wilson's broad anti-discrimination provision for omitting protections against discrimination "on account of previous condition of slavery."³³⁹ Without that language, Boutwell believed that States would be free to disenfranchise "persons who have been held in slavery, or whose mothers were

330. *See id.* at 1014 (no recorded vote); *id.* at 1029 (rejecting it 9-35).

331. *Id.* at 1012 (rejecting it 16-35).

332. *Id.* at 999 (rejecting it 6-38).

333. *Id.* at 1029 (rejecting it 19-24).

334. *Id.* at 1040 (modifying it 31-27).

335. *Id.* at 1035. Oddly, the version that was sent to the House omitted the word "religious." *See id.* at 1224.

336. *Id.* at 1041 (rejecting it 27-29).

337. *Id.* at 1042 (appending it 37-19).

338. *Id.* at 1044.

339. *Id.* at 1225 (remarks by Rep. Boutwell (R-MA)).

slaves.”³⁴⁰ Boutwell denied that this “evil could be remedied” because, as he inexplicably put it, “the slave class, as is well known, are of no specific color and are of no particular race”³⁴¹

In response, Bingham made several points. Bingham argued that the Thirteenth and Fourteenth Amendments made Black persons into “free citizens without disability as any other citizens in the Republic”³⁴² In other words, those amendments by their own force prohibited discrimination based on previous condition of servitude.³⁴³ Bingham also observed that Boutwell’s fears were unfounded because States had not employed the “previous condition of servitude” formulation to deny the franchise or restrict the right to hold office.³⁴⁴

Perhaps most importantly for modern doctrine, Bingham stated that, “[a]s to servitude, that is embraced in the words color, race, and nativity.”³⁴⁵ Thus, Bingham argued that *proxies* for race would be considered racial discrimination under the Fifteenth Amendment. These views provide support for the Supreme Court’s decisions striking down grandfather clauses and other schemes that relied on close proxies for race—such as ancestry—on Fifteenth Amendment grounds.³⁴⁶ Bingham further claimed that Congress could exercise its Fifteenth Amendment enforcement authority to pass a statute banning discrimination on the basis of previous condition of servitude.³⁴⁷ Once again, this is historical

340. *Id.*

341. *Id.*

342. *Id.* (remarks by Rep. Bingham (R-OH)).

343. This position is somewhat hard to square with Bingham’s view that the Fourteenth Amendment did not even apply to voting rights. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (remarks by Rep. Bingham (R-OH)) (stating that the Joint Committee on Reconstruction believed that “the exercise of the elective franchise . . . is exclusively under the control of the States.”).

344. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869) (remarks by Rep. Bingham (R-OH)). (“I ask [Boutwell] to consider that there is not a State constitution in America which disqualifies from office any human being on account of previous condition of servitude.”); *id.* (“It will be in vain to look into any of the State constitutions for any such disability, for they never undertook to discriminate against any man on account of previous condition of servitude.”).

345. *Id.*; see also *id.* (arguing that the omission of the “previous condition of servitude” language would “not change the legal effect of it at all”).

346. See *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating Oklahoma’s grandfather clause); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (invalidating Oklahoma’s registration scheme that attempted to evade *Guinn* and perpetuate the grandfather clause); *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (invalidating Hawaii’s constitutional provision that limited the right to vote for trustees of the Office of Hawaiian Affairs to “native Hawaiians”).

347. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869) (remarks by Rep. Bingham (R-OH)) (stating that if the amendment were ratified, Congress could “pass a law . . . against any such despotism being attempted by any State in the Union”).

evidence that Congress has robust enforcement authority to abrogate discriminatory voting qualifications.³⁴⁸

As for Bingham's affirmative case, he praised the breadth of Wilson's amendment: "it disposes of the discriminations made on account of faith in the laws of New Hampshire; it disposes of the discrimination on account of nativity in the constitution in Rhode Island, and of New York on account of property."³⁴⁹ Although Bingham had previously supported a universal-right-to-vote approach, Wilson's language got most of the way there – and far closer than Boutwell's version.

Curiously, neither Bingham nor Boutwell remarked on several other differences between the amendments. For instance, Wilson's version replaced the "denied or abridged" phrase with "no discrimination" and swapped "right to vote" with "elective franchise." Nothing was said about Wilson's version being silent as to the actions of the federal government. And neither representative said anything about its inclusion of a right to hold office, a protection that the House had not approved in its initial version.

Regarding Buckalew's Electoral College reform, Boutwell and Bingham continued to clash. Boutwell criticized Buckalew's proposal for lacking a uniformity requirement, lest Congress mandate that some States appoint electors via a "general ticket" whereas in others the "election should be by districts."³⁵⁰ This would, according to Boutwell, occur "where the majority in Congress could have the advantage."³⁵¹ For his part, Bingham noted that there was no uniformity requirement in the Constitution for congressional districts and nevertheless Congress had not "attempt[ed] to set up one law for Ohio and another law for Massachusetts."³⁵² Bingham also applauded Buckalew's proposal for ensuring that Electoral College votes would be determined by popular vote.³⁵³

After a short debate on whether the two amendments should be considered together or separately,³⁵⁴ Speaker Colfax ordered separate votes.³⁵⁵ Agreeing with Boutwell, the House decisively rejected the Senate's broad anti-

348. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966) (upholding the VRA's geographically targeted and temporary ban on literacy tests).

349. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869) (remarks by Rep. Bingham (R-OH)).

350. *Id.* (remarks by Rep. Boutwell (R-MA)).

351. *Id.*

352. *Id.* (remarks by Rep. Bingham (R-OH)).

353. See *id.* at 1224.

354. See *id.* at 1225 (remarks by Rep. Boutwell (R-MA)) ("What I say is that this House is in a position where it must vote to concur or non-concur, and there can be but one question upon these propositions.").

355. See *id.* at 1226 (remarks by Speaker Colfax (R-IN)).

discrimination provision in a 37-133-52 vote.³⁵⁶ The House defeated Buckalew's Electoral College reform without a roll call vote.³⁵⁷ Thereafter, the House asked for a conference committee.³⁵⁸

5. *The Senate Narrows the Amendment*

On February 17, the Senate reconvened and considered the House's actions. Instead of agreeing to the House's request for a conference committee, the Senate rescinded its prior approval of the amendment by a simple majority vote.³⁵⁹ Following this move, Buckalew's Electoral College reform disappeared into the ether.

Tempers then began to flare. Stewart accused Wilson of being "as much responsible as any other person for the condition in which we are placed."³⁶⁰ He urged the Senate to endorse the House's version to avoid it being "again loaded down" and risk it not passing during the lame-duck session.³⁶¹ Senator Charles Sumner (R-MA) advocated a different strategy, though even he understood the time pressures. He repeatedly recommended that the Senate simply vote down the House's version and move expeditiously to a conference committee to sort out a compromise.³⁶² Despite these warnings, the Senate proceeded to reconsider the form its amendment should take, albeit in a more abbreviated session than its initial foray.

Given the House's failure to explicitly protect the right to hold office, the Senate debated the officeholding question in earnest for the first time. Wilson argued in favor of explicitly protecting the right to hold office, pointing to the ongoing controversy in Georgia as evidence that the Southern States would seek to exclude Black lawmakers from office.³⁶³ Wilson claimed that the House's version "leaves th[e] inference" that the right to hold office is not protected.³⁶⁴

356. *See id.* at 1226.

357. *See id.*

358. *See id.* The members would have been Boutwell (R-MA), Shellabarger (R-OH), and Charles Eldredge (D-WI). *See id.* at 1284. The *Congressional Globe* misspelled Eldredge's name as "Eldridge." *See Currie, supra* note 10, at 453 n.403.

359. CONG. GLOBE, 40th Cong., 3d Sess. 1295 (1869).

360. *Id.* at 1296 (remarks by Sen. Stewart (R-NV)).

361. *Id.* at 1298; *see also id.* at 1299 ("The Senator will have it fail until there is not a two-thirds majority in the other House to pass it").

362. *See id.* at 1296, 1298, 1299 (remarks by Sen. Sumner (R-MA)).

363. *See id.* at 1296 (remarks by Sen. Wilson (R-MA)).

364. *Id.*; *see also id.* ("[S]uppose we submit this imperfect proposition[,] which says to seven hundred and fifty thousand colored men in this country, 'You shall have the right to vote, but you shall not have the right to sit upon a jury or the right to hold office'").

Other Radicals concurred with Wilson's assessment, including Senator Edmunds, who would later be on the conference committee.³⁶⁵ Another prevalent view was that the right to vote either did include the right to hold office or would, as a practical matter, ensure that Black men were able to do so.³⁶⁶ The pragmatic position was that the Senate should simply accept defeat in light of the House's stance, the time pressures of the lame-duck session, and the looming ratification battle ahead.³⁶⁷

In addition to this heated debate about strategy and the right to hold office, two other exchanges are worth highlighting. First, Senator Roscoe Conkling (R-NY) rehashed the debate between Drake and Stewart.³⁶⁸ Conkling asked whether Stewart's version of the amendment would prevent discrimination against "person[s] descended from slaves."³⁶⁹ And here, Conkling referred to the House's rejection of Wilson's version on that ground.³⁷⁰ Several senators disagreed vehemently with Conkling's—and by implication, the House's—interpretation of the amendment.³⁷¹

365. See *id.* at 1298 (remarks by Sen. Edmunds (R-VT)) (interpreting the House's version to mean that "while you give every citizen of a State a right to vote[,] you leave it to the majority of that State to determine whether he shall have any right to be voted for"); *id.* at 1300 (arguing that the House's version would create a "white aristocracy"); *id.* at 1298 (remarks by Sen. Sumner (R-MA)) (commenting that the House's version risked condoning Georgia's actions); *id.* at 1301 (remarks by Sen. Welch (R-FL)) ("By implication it deprives him of the right to hold office.").

366. See *id.* at 1296 (remarks by Sen. Ferry (R-CT)) (disagreeing with Wilson's view and stating that "it says no such thing"); *id.* at 1300 (remarks by Sen. Frelinghuysen (R-NJ)) ("I will only say that if you give seven hundred and fifty thousand men the right to the ballot they will look out for their own rights as to office."); *id.* at 1302 (remarks by Sen. Howard (R-MI)) ("There is no danger that in the densely populated regions of the South, where the black population is so numerous, they will be deprived of the right of holding office though they may be voters.").

367. See *id.* at 1299 (remarks by Sen. Stewart (R-NV)) ("You can carry the question of suffrage easier [in the States], and then after that you can carry the question of holding office easier than you can carry both together."); *id.* (remarks by Sen. Sawyer (R-SC)) ("If the country is not ready for that proposition [i.e., officeholding] now, then let us wait."); *id.* at 1300 (remarks by Sen. Frelinghuysen (R-NJ)) ("If we adopt that [i.e., the House's version], [then] we have a constitutional amendment.").

368. See *supra* notes 273-281 and accompanying text. Conkling's speech is, admittedly, difficult to follow. He moves between criticizing Stewart's, Wilson's, and Howard's drafts.

369. CONG. GLOBE, 40th Cong., 3d Sess. 1316 (1869) (remarks by Sen. Conkling (R-NY)).

370. See *id.* ("The House of Representatives, after a long debate, declared by a large majority that this form of the amendment would not prevent what I speak of.").

371. The *Congressional Globe* notes that "Edmunds and others" responded, "Certainly it would." *Id.*; see also *id.* (remarks by Sen. Stewart (R-NV)) (disagreeing with a similar Conkling hypothetical).

Stewart then defended his draft. Emphasizing the same points he made against Drake, Stewart referenced its plain text: “The right of citizens of the United States – [t]hat is, all classes of citizens of the United States”³⁷² Stewart went on to say: “If there is anything growing out of that person’s condition of servitude, such as disingenuousness of birth, or such as former slavery of this class of persons, the States are prohibited from disfranchising in consequence of it. This amendment would receive judicial construction, and there would be no doubt about it.”³⁷³ Once again, the author of the Fifteenth Amendment clearly stated that the amendment protects against discrimination using close proxies for a protected class and should be construed to protect the rights of classes of citizens, not merely individual rights.

Second, Howard repeated his view about including references to the United States in Section One. But this time he focused on the right to hold office.³⁷⁴ In rebuttal, Stewart pointed out that “the United States” was included in the amendment because it regulated suffrage “in the Territories and in the District of Columbia.”³⁷⁵ And Senator Edmunds explained that “[t]he object of this amendment is not to confer jurisdiction, but to deny to the United States and the States the right to exercise that jurisdiction in the way of limitation and exclusion.”³⁷⁶

When it came time to vote, the Senate failed to pass the House’s version by a two-thirds majority, as several Radicals refused to vote for an amendment that lacked express protections for the right to hold office.³⁷⁷ And because the Senate had receded from its prior passage of the Fifteenth Amendment, the default reverted back to Stewart’s narrow anti-discrimination provision. The Senate then began voting on various proposals, many of which had been rejected previously.³⁷⁸ Howard’s African-descent proposal was defeated not just once, but

372. *Id.* at 1317 (remarks by Sen. Stewart (R-NV)).

373. *Id.* Here, it is helpful context to explain that “slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary.” Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 JOHN MARSHALL L. REV. 299, 307 (2006).

374. See CONG. GLOBE, 40th Cong., 3d Sess. 1304 (1869) (remarks by Sen. Howard (R-MI)) (“[I]t is an irresistible inference from the very language we use, that in respect to all other qualifications the power is given to Congress to restrict voting and office holding . . . that shall take effect not merely in the District of Columbia or in the Territories, but in any and all of the United States.”).

375. *Id.* (remarks by Sen. Stewart (R-NV)).

376. *Id.* (remarks by Sen. Edmunds (R-VT)).

377. *Id.* at 1300 (failing by a vote of 31-27); see also *id.* at 1307 (remarks by Sen. Wilson (R-MA)) (“I voted, therefore, against the House amendment . . . that did not secure to colored citizens the right to hold office . . .”).

378. See *infra* Appendix B.

twice, in this round. Intriguingly, the only reason it failed the first time was because Democratic senators provided the margin of victory, as they “were no doubt anxious to keep the issue of the status of Chinese immigrants alive in any potential dispute over ratification”³⁷⁹

Ultimately, the Senate passed Stewart’s draft by a vote of 35-11-20.³⁸⁰ The Senate’s version provided that: “The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.”³⁸¹ With both initial versions passed by two-thirds majorities, the two chambers were back to their original disputes: a substantive disagreement over the right to hold office and a stylistic disagreement over how to protect the rights of classes of citizens.

6. *The House Does an About-Face*

On February 20, the House turned back to the Fifteenth Amendment. Boutwell recognized that the sole contentious issue was whether to protect the right to hold office, and he suggested that the House focus on that issue alone.³⁸² But it was not to be. After a short debate, the House performed a total about-face from its prior position.

Following Boutwell’s lead, Representative John Logan (R-IL) moved to delete the officeholding protections from the Senate’s version. Logan stated that “the right to vote of [Black men] will take care of the right to hold office.”³⁸³ Logan further explained that the “Constitution . . . does not prohibit the right to hold office except . . . where it provides that the President and Vice President . . . shall be native-born citizens.”³⁸⁴ According to Logan, the right to hold office had not been contested prior to Georgia’s expulsion of Black lawmakers and “[t]here is no law for it whatever.”³⁸⁵ Representative Benjamin Butler chimed in to argue that “the right to elect to office carries with it the inalienable and indissoluble and infeasible right to be elected to office.”³⁸⁶ Butler expressed the concern that the Senate’s language implied that “there are other classes which may be deprived of the right to hold office” and would suggest that

379. Maltz, *Fifteenth*, *supra* note 9, at 433.

380. CONG. GLOBE, 40th Cong., 3d Sess. 1318 (1869).

381. *Id.* at 1425.

382. *Id.* at 1426 (remarks by Rep. Boutwell (R-MA)).

383. *Id.* (remarks by Rep. Logan (R-IL)).

384. *Id.*

385. *Id.*

386. *Id.* (remarks by Rep. Butler (R-MA)).

Georgia's actions were legal, since it took "a constitutional provision to prevent a man from being deprived of holding office because of race or color."³⁸⁷

But before Logan's motion could be voted on, Bingham took the floor. Bingham moved to add nativity, property, and creed to the Senate's list of protected criteria.³⁸⁸ In so doing, he specifically referenced Rhode Island's property qualification for naturalized citizens as one of the reasons for his amendment.³⁸⁹ Bingham admitted that he would prefer to protect education as well, but "the general sense of the American people is so much for education . . . that if they will not take care of that interest they will take care of nothing."³⁹⁰ Bingham also sought deletion of "the United States" from the Senate's version—that is, the Federal government would not be covered by the amendment's substantive scope. Echoing some of Howard's concerns, Bingham explained that the inclusion of *both* "the United States" and a right to hold office "seems to intimate . . . that the Constitution . . . discriminated among natural-born citizens as to their eligibility to the office of President, and among other citizens as to their eligibility to other offices under the Constitution."³⁹¹ In other words, if the amendment expressly included the right to hold office, then Congress could be viewed as having authority to impose *additional* qualifications for Federal office.

The House then voted. It first rejected Logan's motion to delete the explicit officeholding protection by a 70-95-57 margin.³⁹² Next, Bingham moved to substitute the Senate's amendment with his broad anti-discrimination version. Although the House had previously rejected the substantially similar Wilson amendment from the Senate,³⁹³ Bingham prevailed by a 92-70-60 vote.³⁹⁴ Bingham's victory depended on several Radical Republicans from the Midwest and Mid-Atlantic switching their votes as well as nineteen Democrats backing the amendment, presumably out of a belief that the broader amendment would go down in flames either in Congress or during the ratification struggle.³⁹⁵

387. *Id.*

388. *Id.* (remarks by Rep. Bingham (R-OH)).

389. *See id.* at 1427.

390. *Id.*

391. *Id.*

392. *Id.* at 1428.

393. *See id.* at 1226.

394. *Id.* at 1428.

395. *See* GILLETTE, *supra* note 12, at 68-69 n.92 (compiling switched votes); Maltz, *Fifteenth*, *supra* note 9, at 441 (focusing on the Democrats' tactics). Shellabarger had also sought a vote on his revised universal-right-to-vote amendment, but he withdrew it after Bingham's version prevailed. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1428 (1869) (remarks by Rep. Shellabarger (R-OH)).

The House then passed Bingham's version by the requisite two-thirds threshold: 140-37-46.³⁹⁶ Bingham's version provided that "[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude."³⁹⁷ For the first time, the House not only added an explicit right to hold office but also endorsed far greater anti-discrimination protections. And yet, the House had waited too long, as the Senate had significantly narrowed its amendment in response to the House's initial stubbornness.

7. *The Conference Committee and Final Passage*

On February 23, the two chambers acknowledged that they were at an impasse and agreed to a conference committee.³⁹⁸ The House chose Boutwell, Bingham, and Logan.³⁹⁹ The Senate selected Stewart, Conkling, and Edmunds.⁴⁰⁰ In the Republican press, the committee was viewed as "chosen to favor a moderate measure."⁴⁰¹ That prediction proved prescient.

On February 25, and after meeting for only three hours the day prior,⁴⁰² the conference committee submitted its proposed amendment: a narrow anti-discrimination provision with no explicit protection for the right to hold office.⁴⁰³ Boutwell noted that the final version was essentially the Senate's initial draft with the right to hold office deleted.⁴⁰⁴ Edmunds refused to sign onto the report.⁴⁰⁵

³⁹⁶. CONG. GLOBE, 40th Cong., 3d Sess. 1428 (1869).

³⁹⁷. *Id.*

³⁹⁸. *See id.* at 1481 (Senate voting 32-17-17 for a conference committee); and *id.* at 1470 (House voting 117-37-68 for a conference committee). The Senate held a brief discussion before so agreeing. Obviously exasperated by the back-and-forth between the two chambers, Democratic Senator Buckalew provided a concise synopsis of the legislative history. *See id.* at 1440. During that session, the senators observed that the House had removed the prohibitions against the United States. Republican Senator Frelinghuysen found this change "very important" whereas Buckalew disagreed on the grounds that "[q]ualifications for holding office in this Government are fixed now by the Constitution." *Id.*

³⁹⁹. *Id.* at 1470.

⁴⁰⁰. *Id.* at 1466. Bingham, Boutwell, and Conkling were previously members of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment. *See THE ESSENTIAL DOCUMENTS*, *supra* note 10, at 24.

⁴⁰¹. GILLETTE, *supra* note 12, at 70.

⁴⁰². *See id.* at 71.

⁴⁰³. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1563 (1869).

⁴⁰⁴. *See id.* (remarks by Rep. Boutwell (R-MA)).

⁴⁰⁵. *See id.*

That same day and without further debate,⁴⁰⁶ the House passed the conference committee's report in a 144-44-35 vote.⁴⁰⁷

On February 26, the Senate yet again proved itself to be the world's greatest deliberative body. After some squabbling over the conference committee's authority to rewrite the Amendment,⁴⁰⁸ the senators focused on the right to hold office and practical politics. Senator Edmunds explained his opposition to the conference committee's report on the grounds that, even though both chambers had agreed on the subjects, it had deleted the right to hold office and protections against discrimination on the basis of nativity, property, and creed.⁴⁰⁹ Edmunds denied that the right to vote subsumed the right to hold office and predicted that other States would follow Georgia's example.⁴¹⁰

Edmunds's views on officeholding, however, were not universally shared. Although he believed that the right to vote and hold office were distinct rights,⁴¹¹ Wilson argued that "if the black men have the right to vote they and their friends in the struggle of the future will achieve the rest."⁴¹² Still others believed that the right to vote subsumed the right to hold office.⁴¹³

The debate over officeholding did not doom the amendment. The Senate passed it by a vote of 39-13-14.⁴¹⁴ Senator Morton probably captured the mood

406. See GILLETTE, *supra* note 12, at 73 (noting that House rules prohibited debate on the conference report).

407. CONG. GLOBE, 40th Cong., 3d Sess. 1563 (1869). The final vote is sometimes reported as having 145 "yesses." That is because Speaker Colfax announced that as the total, stating that he was adding his vote to the roll call. However, his vote already appeared on the roll call vote, which is listed as 144. Thus, Colfax's statement double-counts his own vote. See *id.* at 1563-64.

408. See *id.* at 1623-24.

409. See *id.* at 1625-26 (remarks by Sen. Edmunds (R-VT)).

410. See *id.* at 1626; see also *id.* at 1638 (remarks by Sen. Fowler (R-TN)) ("[A]s it stands it will deny to those citizens specified in the amendment the right to hold office.").

411. See *id.* at 1627 (remarks by Sen. Wilson (R-MA)) ("Do not tell me, sir, that the right to vote carries with it the right to hold office. It does no such thing.").

412. *Id.*; see also *id.* at 1629 (remarks by Sen. Stewart (R-NV)) ("If they can retain the ballot in Georgia they will force the power that exists there to give the right to hold office."); WILLIAM M. STEWART, REMINISCENCES OF WILLIAM M. STEWART 236 (1908) ("I was willing to strike out [the words 'to hold office'] because I thought the right to vote carried with it the right to hold office . . . Mr. Conkling agreed with me, making the majority of the committee.").

413. See CONG. GLOBE, 40th Cong., 3d Sess. 1625 (1869) (remarks by Sen. Howard (R-MI)) ("[A] person possessing the right of voting at the polls is inevitably in the end invested with the right to hold office."). In yet another example of how Republicans and Democrats could agree on the same topic but for very different reasons, Democratic Senator Davis of Kentucky stated that "the power to vote in my judgment implies the power to hold office." *Id.* at 1630.

414. *Id.* at 1641.

of several Senators voting in the affirmative: “I will take what I can get and even be thankful for that.”⁴¹⁵ Nonetheless, some Radicals abstained from the vote because of the narrowness of the Amendment, though newspapers reported that they were present.⁴¹⁶ At the end of the day, the Fifteenth Amendment was a partisan affair: no Democrat in the Senate voted for it, and only three in the House did. Conversely, 38 out of 54 Republicans voted for it in the Senate, and 140 out of 169 did so in the House.⁴¹⁷

III. THE RATIFICATION OF THE FIFTEENTH AMENDMENT

With the ink dry on the Fifteenth Amendment’s text, the ratification debate began in the States. Instead of congressmen fighting over how to word the Fifteenth Amendment, the country debated what those words meant. It was apparent that the Fifteenth Amendment would enfranchise Black men nationwide and that women would not yet receive the ballot.⁴¹⁸ But questions about its applicability to Irish Americans, to Chinese immigrants, and to officeholding persisted, albeit in a less prominent role than in the halls of Congress.

The political dynamics also shifted dramatically. President Grant entered of office a week into the ratification debate, and he endorsed the Amendment in his inaugural address.⁴¹⁹ Although Grant could rally public support for a constitutional amendment, he had no formal role under Article V. Instead, what mattered was whether three-fourths of the state legislatures ratified the Amendment. While Democrats were unable to block action in the Fortieth Congress, they controlled a handful of state legislatures. Moreover, several Republican-controlled States that had *not* enfranchised Black men would have to ratify the Fifteenth Amendment to reach the three-fourths threshold. What was largely an intra-party congressional fight shifted to a much more contested political environment. Put differently, congressional Republicans’ relative unity over the question of nationwide Black suffrage should not be interpreted as similarly broad support for that measure nationwide. Indeed, the Fifteenth Amendment barely got over Article V’s three-fourths threshold: when Secretary of State Hamilton Fish

415. *Id.* at 1628 (remarks by Sen. Morton (R-IN)); *see also id.* at 1641 (remarks by Sen. Warner (R-AL)) (noting both his support and his disappointment in the failure to protect the right to hold office).

416. *See* GILLETTE, *supra* note 12, at 75-76.

417. WANG, TRIAL, *supra* note 12, at 46 tbl.1.7, 47 tbl.1.8.

418. The omission of women from the Amendment’s protections would have profound consequences for the women’s suffrage movement. Prominent leaders like Elizabeth Cady Stanton and Susan B. Anthony employed racist arguments in opposing the Fifteenth Amendment’s ratification. *See* FREE, *supra* note 47, at 165.

419. *See* THE ESSENTIAL DOCUMENTS, *supra* note 10, at 548.

listed the twenty-nine ratifying States, this was only 78.4% of thirty-seven States.⁴²⁰

This Section starts with the major issues discussed nationwide during the ratification battle. It then canvasses the political fights in different regions of the country. It concludes by showing how Congress attempted to insert itself into the ratification debate over the Fifteenth Amendment's language.

A. *The Nationwide Debate*

Predictably, the most prominent issue concerning the Fifteenth Amendment's ratification was whether Black men should be enfranchised nationwide. After all, that was the Fifteenth Amendment's immediate and unambiguous effect.⁴²¹

Supporters of ratification had multiple motives. Many Republicans had started their careers in the abolitionist movement, and the right to vote was considered the next step in that struggle.⁴²² Indeed, "for many Republicans the essence of the party lay in its devotion to equal rights."⁴²³ Other Republicans had been influenced by the bravery and sacrifice of Black soldiers fighting in the Union army.⁴²⁴

There was also a significant partisan angle. Given the recent elections in the Reconstructed South and the partisan environment, Black men were widely predicted to vote as a near-unanimous bloc. The immediate upshot was that Republicans could count on a new influx of voters in the Border States.⁴²⁵ In the longer term, the ballot was viewed as the most effective means for Black voters to protect their civil rights.⁴²⁶

The *New York Times* captured a cynical motive for ratification: "The adoption of this amendment will put an end to further agitation of the subject . . . and thus leave the Government of the country free to deal with its material

420. See CONG. GLOBE, 41st Cong., 2d Sess. 2289-90 (1870) (listing ratifying States); Crum, *Lawfulness*, *supra* note 10, at 1589-91 (explaining that thirty-seven was the highest possible denominator of the number of States).

421. See Maltz, *Fifteenth*, *supra* note 9, at 443-44.

422. See FONER, *RECONSTRUCTION*, *supra* note 72, at 448-49.

423. BENEDICT, *supra* note 12, at 326.

424. See, e.g., MICHAEL WALDMAN, *THE FIGHT TO VOTE* 61 (2016).

425. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (remarks by Rep. Boutwell (R-MA)) (predicting the number of enfranchised Black voters in the Border States who would vote Republican).

426. See Amar & Brownstein, *supra* note 10, at 939; Crum, *Reconstructing*, *supra* note 10, at 306-09; MALTZ, *CIVIL RIGHTS*, *supra* note 10, at 132.

interests.”⁴²⁷ For their part, Democrats leveled racist attacks, harped on the Amendment’s procedural irregularities, asserted that a constitutional amendment could not compel States to expand their electorate, and claimed that the Republican Party had betrayed its 1868 platform in pushing nationwide Black male suffrage.⁴²⁸

The Fifteenth Amendment’s ratification battle would be fought mostly over these issues, with Republicans supporting ratification and Democrats opposing it. The major exceptions were the status of Chinese immigrants on the West Coast and Irish Americans in Rhode Island. Nevertheless, there were contested issues, and their resolution or nonresolution would have consequences for the Amendment’s scope.

In addition, the potential application of Section Two of the Fourteenth Amendment’s apportionment penalty was openly discussed. Commentators pointed out that, if the Fifteenth Amendment were *not* ratified and Border States continued to disenfranchise Black men, then these States would likely lose representation in the House and the Electoral College following the 1870 Census. Republican state legislators in Kentucky, for example, claimed that the State would “be reduced in her representation to *seven* Representatives in Congress, instead of *nine*, the present number.”⁴²⁹ In a similar vein, one newspaper predicted that, with ratification, “Missouri might gain one member” and that, without ratification, “Kentucky and Maryland will certainly lose” seats.⁴³⁰

The Section Two calculus, however, was different on the West Coast. Because Section Two penalized only the disenfranchisement of citizens,⁴³¹ the

427. Editorial, *The Amendment of the Constitution Regarding Suffrage*, N.Y. TIMES, Mar. 8, 1869, at 4, reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 551; see also California Republican Party Platform of 1869, July 22, 1869, reprinted in MCPHERSON, *supra* note 42, at 478 (stating that “the negro question has ceased to be an element in American politics”). This sentiment foreshadowed a coming fracture within the Republican Party, as it “divid[ed] into Liberal and Radical branches. The Liberals supported reconciliation, while the Radicals continued to press for complete equality.” TESIS, *supra* note 124, at 106.

428. See THE ESSENTIAL DOCUMENTS, *supra* note 10, at 559.

429. Kentucky Gov. John Stevenson’s Message to the Legislature, Majority and Minority Reports, Rejection of the Fifteenth Amendment, KY. S. JOURNAL 623 (1869), reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 553 (quoting only the minority report).

430. *The Next Census*, MO. DEMOCRAT, Mar. 23, 1869, at 3; see also *Census Committee Alarmed*, WEEKLY PATRIOT, June 24, 1869, at 2 (“Pennsylvania loses nothing by the failure of the Fifteenth Amendment, for she could not gain a single member of Congress by its ratification.”).

431. See U.S. CONST. amend. XIV, § 2 (limiting apportionment penalty to disenfranchisement of “male inhabitants of such State[s], being twenty-one years of age, and citizens of the United States”) (emphasis added).

continued disenfranchisement of Chinese immigrants would not be penalized.⁴³² Put differently, the Western States would continue to benefit in the House for their noncitizen population, but they would not be penalized for disenfranchising them.

As a general matter, it was expected that the Amendment's plain text would not invalidate other voting qualifications, such as literacy tests. Indeed, the Amendment's narrowness was frequently invoked as a virtue during the ratification battle. For example, newspapers that supported ratification heralded that nativity-based discrimination and literacy tests could stop the enfranchisement of Chinese Americans in the event the naturalization laws were changed.⁴³³

On questions surrounding officeholding, the commentary was scattershot and not necessarily related to whether the speaker supported or opposed ratification. The Virginia Republican Party's 1869 platform supported the Fifteenth Amendment's ratification so that States could not "deny to him who has the right to vote the twin privilege, the right to be voted for."⁴³⁴ In arguing for ratification, one San Francisco newspaper noted that "[t]he right of any State to say who shall not be eligible to office is left just as it was before. Some will voluntarily establish an impartial rule in this matter, and others will long refuse to admit any to the privilege but white men."⁴³⁵ By contrast, the California Democratic Party's 1869 Platform invoked the prospect of Black and Chinese officeholding to oppose ratification.⁴³⁶ In short, the officeholding question produced strange bedfellows and, even after explicit protections were removed, was not easily answered.

432. See *Apportionment of Representation*, DAILY EVENING BULL., Mar. 26, 1869, at 2 ("The Chinese are not citizens, and are therefore debarred from voting irrespective of race or color. Hence, they will not be deducted from the basis of representation, and the predicted loss . . . will not be realized."). Whether California's representation would be affected by its continued disenfranchisement of Black men was less clear. See *id.* ("The deduction of the [5,000 or 6,000] colored citizens might or might not cause us the loss of one representative. . .").

433. See *Ratifying the Amendment*, DAILY EVENING BULL., Mar. 4, 1869, at 2, reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 548 (arguing that there was a "double check" against Chinese American voting given that the naturalization law "prevents Chinese from becoming citizens" and the Fifteenth Amendment permits "a test that would exclude them on account of inability to read, write and speak our language"); *Needless Alarm*, DAILY EVENING BULL., June 17, 1869, at 2 (stating that, if Chinese persons could naturalize, "they could still be excluded from voting and holding office. The Fifteenth Amendment permits the adoption of a property or educational test; it also permits exclusion from the ballot box on account of nativity. . ."); *Illogical*, DAILY EVENING BULL., June 18, 1869, at 2 ("[The Fifteenth Amendment] does not prevent the requirement of qualifications that would exclude [Chinese Americans] from the ballot if the [naturalization] law were repealed.").

434. MCPHERSON, *supra* note 42, at 485.

435. *Ratifying the Amendment*, *supra* note 433, at 2.

436. MCPHERSON, *supra* note 42, at 479.

B. *The Debate in the States*

In March 1869, Republicans controlled seventeen out of twenty-two state legislatures that were in session.⁴³⁷ Republicans also controlled the state legislatures in Alabama, Arkansas, Iowa, Nebraska, New Hampshire, Rhode Island, Tennessee, and Vermont.⁴³⁸ Republicans were expected to maintain control of the Connecticut state legislature and retake the Ohio state legislature in the next election.⁴³⁹ Democrats would win upcoming elections in California and Oregon, running on the question of Chinese suffrage.⁴⁴⁰ Meanwhile, Mississippi, Texas, and Virginia remained under military control.⁴⁴¹

Given this political climate, how did the Fifteenth Amendment satisfy Article V's three-fourths threshold? As this subsection demonstrates, 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. However, some moderate Republicans in Rhode Island voted against the Amendment out of concern that it would invalidate the property qualification used to disenfranchise Irish Americans. In the Reconstructed South, the massive influx of Black voters helped secure ratification. Moreover, four of the Southern States were required to ratify it as a fundamental condition for their readmission – or, in Georgia's case, its *second* readmission.

The Amendment, however, ran into trouble in the West and the Border States. Of those States, only Missouri, Nevada, and West Virginia ratified. California rejected the Fifteenth Amendment for xenophobic reasons related to Chinese immigrants. And in a fit of spite after the Amendment's adoption, Oregon followed suit. The remaining Border States – many of which were swing States controlled by Democrats – rejected the Amendment because they opposed the enfranchisement of Black men.

437. The following Republican state legislatures were in session: Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Missouri, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Pennsylvania, South Carolina, West Virginia, and Wisconsin. The other state legislatures were Delaware, Georgia, Kentucky, Maryland, and New Jersey. See GILLETTE, *supra* note 12, at 79-80 (providing ratio); *The Fifteenth Amendment*, DAILY EVENING BULL., Mar. 1, 1869 (listing States).

438. *The Fifteenth Amendment*, DAILY EVENING BULL., Mar. 1, 1869, at 2; *Letter from "Occasional,"* PHILA. PRESS, Mar. 15, 1869, at 4.

439. See *supra* note 438.

440. See GILLETTE, *supra* note 12, at 154-57.

441. See *infra* Section III.B.4.

1. *New England*

By 1869, Black men were enfranchised in all of the New England States except Connecticut.⁴⁴² Accordingly, the States of Maine,⁴⁴³ Massachusetts,⁴⁴⁴ New Hampshire,⁴⁴⁵ and Vermont⁴⁴⁶ ratified in 1869, often with crushing majorities. And despite not having enfranchised Black men, Connecticut ratified in 1870, albeit by a far narrower margin.⁴⁴⁷

Unsurprisingly, given its role in the congressional deliberations, Rhode Island's nativity-based property qualification featured prominently in the debate over the State's ratification. In May 1869, Wendell Phillips, an influential abolitionist leader, gave a famous speech in Newport, Rhode Island, to the members of the state legislature.⁴⁴⁸ Reprinted in the *New York Times*, Phillips implored the legislators to ratify the Amendment. In so doing, he specifically addressed concerns that it would apply to naturalized Irish Americans. Phillips stated that he "d[id]n't believe a word of it, that this Fifteenth Amendment touches you as to your admitting foreigners to vote."⁴⁴⁹ Phillips continued: "That little word 'race'—you think you will be obliged to change your law in regard to foreigners voting. I wish it did, but I don't believe it does. You don't exclude a man because he belongs to the Latin or Celtic race. You do it on the ground of the locality of his birth-place. Nativity is not race."⁴⁵⁰ Perhaps persuaded by Phillips' speech, Rhode Island's state senate ratified the next day.⁴⁵¹

442. See *supra* note 124 and accompanying text.

443. MCPHERSON, *supra* note 42, at 492 (unanimous in the House of Representatives and 25-1 in the Senate).

444. *Id.* at 492-93 (192-15-33 in the House of Representatives and 36-2 in the Senate).

445. *Id.* at 494-95 (187-131 in the House of Representatives); GILLETTE, *supra* note 12, at 86 tbl.3 (unanimous in the Senate).

446. MCPHERSON, *supra* note 42, at 560-61 (196-12 in the House of Representatives and unanimous in the Senate).

447. *Id.* at 488-89 (125-105-6 in the House of Representatives and 13-6-2 in the Senate). The political fight in Connecticut centered on the issue of Black male suffrage. See GILLETTE, *supra* note 12, at 119-29.

448. See FONER, *SECOND FOUNDING*, *supra* note 1, at 108; THE ESSENTIAL DOCUMENTS, *supra* note 10, at 574.

449. THE ESSENTIAL DOCUMENTS, *supra* note 10, at 575 (reprinting Phillips's speech).

450. *Id.* Perplexingly, Phillips misquotes the Amendment as saying "men" rather than "citizens" even though the latter, accurate word would have bolstered his argument that Rhode Island need not enfranchise "foreigners." Similarly, Phillips uses the term "foreigners" rather than distinguishing between native-born and naturalized citizens. *Id.*

451. MCPHERSON, *supra* note 42, at 497 (23-12 in the Senate).

But Rhode Island's state house voted to postpone consideration until January 1870.⁴⁵² By then, it was apparent that Rhode Island's rejection "might jeopardize success."⁴⁵³ Proponents of ratification in the state house assured doubters that the Amendment did not touch nativity, and that "if it did, then a literacy test would be imposed."⁴⁵⁴ Rhode Island's house ultimately ratified by a 59-10. In a rarity, the vote was *not* along partisan lines. Four Democrats voted for ratification, and four Republicans opposed it.⁴⁵⁵ Rhode Island would keep its nativity-based property qualification until 1888, notwithstanding intense efforts to nullify it in the meantime.⁴⁵⁶

2. *The Mid-Atlantic*

Recall that New York had enfranchised Black men, but it also imposed racially discriminatory residency-, property-, and tax-paying requirements. Moreover, New York's law has often been cited as an exemplar of what an abridgment of the right to vote might be.⁴⁵⁷ Nevertheless, New York ratified the Amendment in spring 1869, with an exceptionally close margin in the state senate.⁴⁵⁸ But after Democrats won the 1869 election, New York purported to rescind its ratification on a party-line vote in January 1870.⁴⁵⁹ The legality of New York's attempted rescission was hotly debated during Reconstruction.⁴⁶⁰

New Jersey rejected ratification in February 1870.⁴⁶¹ After the Amendment's adoption and a Republican victory in the 1870 election, New Jersey changed course and ratified in February 1871.⁴⁶² Here, the enfranchisement of Black men

452. *Id.* (35-29 in the House of Representatives in favor of postponement).

453. GILLETTE, *supra* note 12, at 152.

454. *Id.* at 153.

455. MCPHERSON, *supra* note 42, at 560.

456. See Conley, *supra* note 201, at 87; see also *infra* note 592 (detailing postratification history).

457. See *supra* notes 82-87. In 1874, New York voters approved changes to their state constitution's suffrage provisions, including the removal of the racially discriminatory residency-, property-, and tax-paying requirements. See THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HEREAFTER FORMING THE UNITED STATES OF AMERICA 2675-77 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

458. MCPHERSON, *supra* note 42, at 495-96 (72-47-9 in the House of Representatives and 17-15 in the Senate).

459. *Id.* at 562 (69-56 in the House of Representatives and 16-13 in the Senate).

460. See Crum, *Lawfulness*, *supra* note 10, at 1577, 1589-90.

461. MCPHERSON, *supra* note 42, at 559-60 (27-32 in the House of Assembly and 8-13 in the Senate).

462. See Crum, *Lawfulness*, *supra* note 10, at 1577-78.

may have changed the election results; New Jersey's Democratic governor also acquiesced to ratification in light of the Amendment's proclamation as part of the Constitution.⁴⁶³

Finally, following the usual pattern, Pennsylvania ratified in March 1869 on a party-line vote.⁴⁶⁴

3. *The Border States*

Of the loyal States that had slavery at the start of the Civil War, only Missouri ratified the Fifteenth Amendment.⁴⁶⁵ West Virginia, which seceded from Virginia during the war, also adopted it.⁴⁶⁶ By contrast, Delaware,⁴⁶⁷ Kentucky,⁴⁶⁸ and Maryland⁴⁶⁹ rejected ratification with near unanimity in their state legislatures. Indeed, not a single state legislator in Maryland voted for ratification.⁴⁷⁰

Here, it is notable that Missouri and West Virginia had far smaller proportions of Black voters than the other Border States.⁴⁷¹ Thus, the potential political stakes and concomitant White backlash were diminished. Democrats also had overwhelming majorities in the state legislatures that rejected ratification, but even some Republicans opposed ratification in these States.⁴⁷² Thus, in the region of the country where the Fifteenth Amendment would have its biggest political impact given state suffrage laws and demography, Democrats successfully defeated ratification.

463. See *id.* (discussing the historical context); GILLETTE, *supra* note 12, at 113 (observing that the Fifteenth Amendment enfranchised approximately 4,200 Black men in New Jersey and that the 1868 election had a margin of 2,800 votes).

464. See MCPHERSON, *supra* note 42, at 497 (62-38 in the House of Representatives and 18-15 in the Senate).

465. Missouri actually ratified twice because it omitted Section Two's enforcement clause. See THE ESSENTIAL DOCUMENTS, *supra* note 10, at 541; see also MCPHERSON, *supra* note 42, at 494 (23-9 in the Senate and 79-30 in the House of Representatives; the House vote "was void through informality"); MCPHERSON, *supra* note 42, at 559 (86-34 in the House following the original vote being "void through informality").

466. MCPHERSON, *supra* note 42, at 498 (22-19 in the House and 10-6 in the Senate).

467. *Id.* at 557 (0-19 in the House of Representatives and 2-7 in the Senate).

468. *Id.* at 491-92 (5-80 in the House of Representatives and 6-27 in the Senate).

469. *Id.* at 558 (0-87 in the House of Delegates and 0-25 in the Senate).

470. *Id.*

471. The percentage of each State's population that was Black in 1870 was as follows: Delaware (18.2%); Kentucky (16.8%); Maryland (22.5%); Missouri (6.9%); and West Virginia (4.1%). GILLETTE, *supra* note 12, at 82 tbl.1.

472. See MCPHERSON, *supra* note 42, at 491 (showing Kentucky Republicans voting no).

4. *The South*

By 1869, the majority of the former Confederate States had been readmitted to the Union. And in a remarkable turnaround and testament to the importance of Black men's ballots, the Reconstructed Southern States overwhelmingly supported ratification.⁴⁷³ In fact, without these Southern States' votes for ratification, the Fifteenth Amendment would not have cleared Article V's three-fourths threshold.⁴⁷⁴

As elaborated on below, Mississippi, Texas, and Virginia remained outside the Union.⁴⁷⁵ Furthermore, Georgia would be put back under military rule and excluded from Congress.⁴⁷⁶ These four States would be required to ratify the Fifteenth Amendment as a fundamental condition for their readmissions.⁴⁷⁷

In an ironic twist, Tennessee was both the only Southern State to enfranchise Black men voluntarily and the sole one not to ratify the Fifteenth Amendment.⁴⁷⁸ That is because Tennessee's pro-Union government had already been "redeemed" by Confederate sympathizers in 1869.⁴⁷⁹

5. *The Midwest*

Prior to the Fifteenth Amendment's passage by Congress, the issue of Black male suffrage made some inroads in the Midwest. Referenda in Iowa and Minnesota enfranchised Black men in 1868.⁴⁸⁰ Black men in Wisconsin gained the right to vote thanks to a judicial decision that resuscitated a decades-old referenda.⁴⁸¹ And Congress enfranchised Black men in Nebraska using a fundamental condition.⁴⁸² But Black men remained disenfranchised in Illinois, Indiana,

473. See *id.* at 557 (Alabama) (71-16 in the House of Representatives and 30-1 in the Senate); *id.* at 488 (Arkansas) (53-0 in the House of Representatives and 19-2 in the Senate); *id.* at 489 (Florida) (26-13 in the House and 13-8 in the Senate); *id.* at 492 (Louisiana) (55-9 in the House of Representatives – with 36 not voting – and 18-3 in the Senate); *id.* at 496 (North Carolina) (87-20 in the House and 40-6 in the Senate); *id.* at 497-98 (South Carolina) (88-3 in the House of Representatives – with 29 not voting – and 18-1 in the Senate).

474. See Crum, *Lawfulness*, *supra* note 10, at 1606-07.

475. See *infra* Section III.C.

476. See *infra* text accompanying note 513.

477. See *infra* Section III.C.

478. See MCPHERSON, *supra* note 42, at 560 (12-57 in the House of Representatives).

479. See FONER, RECONSTRUCTION, *supra* note 72, at 412-25.

480. See *supra* text accompanying note 127.

481. See *supra* text accompanying note 128.

482. See *supra* text accompanying notes 108-113.

Kansas, Michigan, and Ohio.⁴⁸³ Nevertheless, the region unanimously backed the Fifteenth Amendment,⁴⁸⁴ with some hardball tactics taken in Indiana to sidestep Democrats' attempts to deny the state legislature a quorum.⁴⁸⁵ In many ways, this unanimity is attributable to the Republican Party's ability to pressure state parties to adopt its new national platform.⁴⁸⁶

6. *The West*

Of the three Western States, only Nevada ratified the Amendment.⁴⁸⁷ Here, Senator Stewart, a primary author and floor manager, employed party pressure to secure ratification.⁴⁸⁸ Stewart also sent a telegram to a local federal judge — which was soon published — stating that the “word ‘nativity’ was stricken from the original draft of the Constitutional Amendment so as to allow the exclusion of Chinese from its benefits.”⁴⁸⁹

In California, the voting rights of Chinese immigrants dominated the 1869 election.⁴⁹⁰ Republicans attempted to deflect the question by pointing out that Chinese immigrants could not become citizens.⁴⁹¹ Nonetheless, the issue helped

483. See *supra* Section I.D.

484. See MCPHERSON, *supra* note 42, at 490 (Illinois) (55-28 in the House of Representatives — with 2 not voting — and 18-7 in the Senate); *id.* at 490-91 (Indiana) (54 “yeas” and 3 “present but not voting” in the House of Representatives; and 27 “yeas,” 11 “present but not voting,” and 11 “absent” in the Senate); *id.* at 558 (Iowa) (84-12 in the House of Representatives and 42-7 in the Senate); *id.* at 491 (Kansas) (73-7 in the House of Representatives — with 10 not voting — and 25-0 in the Senate); *id.* at 493-94 (Michigan) (68-24 in the House of Representatives and 25-5 in the Senate); *id.* at 558 (Minnesota) (28-15 in the House of Representatives and 13-8 in the Senate); *id.* at 559 (Nebraska) (31-4 in the House of Representatives and 12-1 in the Senate); *id.* at 562 (Ohio) (57-55 in the House of Representatives and 19-18 in the Senate); *id.* at 498 (Wisconsin) (62-29 in the House of Representatives — with 9 not voting — and 15-11 in the Senate — with 7 absent and not voting); see also *id.* at 496-97 (showing prior Ohio rejection, 36-47 in the House and 14-19 in the Senate).

485. See Crum, *Lawfulness*, *supra* note 10, at 1578-80 (discussing Indiana's rump legislature).

486. See GILLETTE, *supra* note 12, at 146 (“Ratification was not popular but it was a party measure; its adoption was interpreted as a party victory.”).

487. See MCPHERSON, *supra* note 42, at 494 (23-16 in the House of Representatives and 14-6 in the Senate).

488. GILLETTE, *supra* note 12, at 157.

489. *Id.* (quoting telegram published in *COURANT* (Chico), Mar. 19, 1869; and *DAILY APPEAL* (Carson City), Mar. 3, 1869).

490. See *id.* at 154.

491. See *id.* at 156.

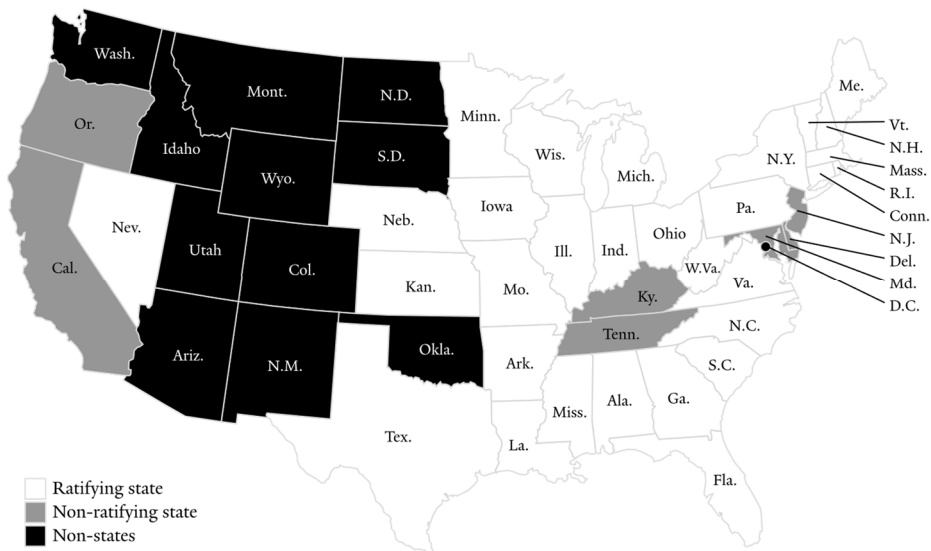
Democrats secure victory and, once in office in January 1870, the legislature rejected the Amendment on a party-line vote.⁴⁹²

Finally, in a fit of spite, Oregon rejected the Fifteenth Amendment *after* its ratification had been proclaimed by Secretary of State Hamilton Fish.⁴⁹³

7. *The Ratifying Public*

To sum up, the Fifteenth Amendment barely crossed Article V’s three-fourths threshold for ratification.⁴⁹⁴ Map 3 displays the States that ratified and those that did not.⁴⁹⁵

MAP 3.



In Map 3, the pockets of opposition are revealing. The rejections by Delaware, Kentucky, Maryland, New Jersey, and Tennessee are attributable to racist

492. See *id.* at 154-56; MCPHERSON, *supra* note 42, at 557.

493. GILLETTE, *supra* note 12, at 156-57.

494. See Crum, *Lawfulness*, *supra* note 10, at 1589-97 (showing various counts of ratifying States to achieve three-fourths of the States).

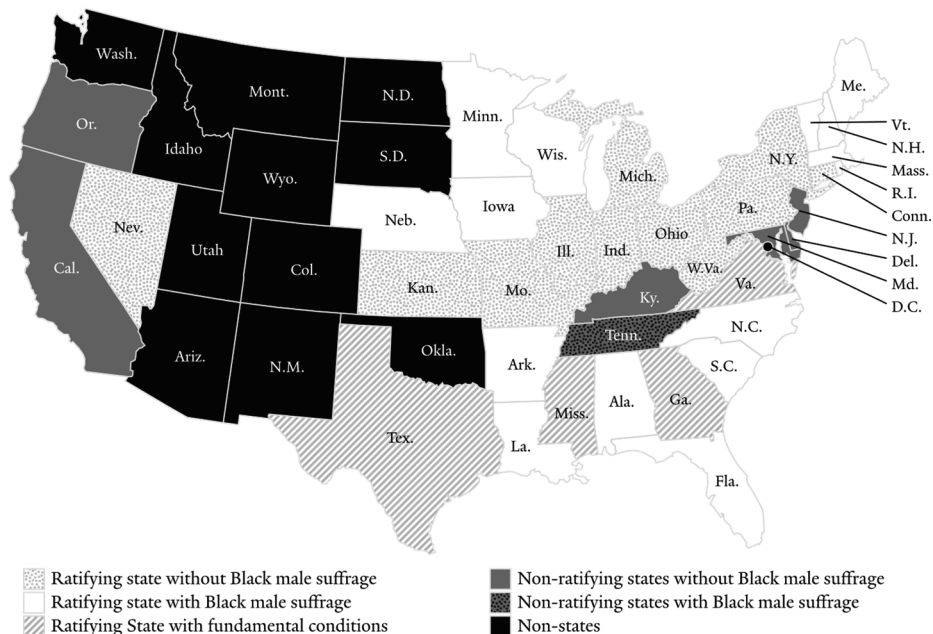
495. This map also obscures the problematic ratifications of Georgia, Indiana, Mississippi, New York, Texas, and Virginia – a topic I have covered extensively elsewhere. See Crum, *Lawfulness*, *supra* note 10, at 1592-97.

opposition to Black male suffrage. This accords with the principal fault line over the Amendment’s ratification.

Nevertheless, the fact that two of the three Western States rejected the Fifteenth Amendment out of fear that it would, at some future and indeterminate date, lead to Chinese American suffrage signals that this question remained contested at the time. Relatedly, Rhode Island’s ratification process stands out for a State that had already enfranchised Black men. Indeed, the Rhode Island debate over Irish American voting rights involved a long delay, a close vote, and rare cross-party voting in the North.

Map 3, however, overlooks the Fifteenth Amendment’s impact. Map 4 contrasts support or opposition with the voting rights of Black men. In other words, Map 4 takes into account the States’ voting qualifications and, therefore, the immediate impact of the Fifteenth Amendment.

MAP 4.



As Map 4 illustrates, eleven States—specifically, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia—ratified the Fifteenth Amendment *even though they continued to disenfranchise Black men*. In other words, these eleven States, whose support was necessary for ratification, were willing to enfranchise Black men nationwide

before they did so at home. By contrast, Tennessee was the only State that had enfranchised Black men that rejected the Fifteenth Amendment.

Furthermore, Map 4 showcases the critical role of Black male voters in the Reconstructed South in securing the voting rights of their Northern brethren. Map 4 also demonstrates the critical role of the four fundamental conditions in the Amendment’s ratification, as the next Section explains in more detail.

C. Congressional Action

Ordinarily, when Congress sends an amendment to the States, it recedes from the ratification process until the Secretary of State proclaims the amendment’s adoption.⁴⁹⁶ But Reconstruction was an extraordinary time.

Congress pressured the Southern States to ratify the Reconstruction Amendments: it excluded their representatives and senators, imposed military rule, and made ratification of the Fourteenth and (for some) the Fifteenth Amendments a fundamental condition for readmission. These procedural irregularities are usually viewed as just that – pertaining only to these amendments’ adoption but not their content.⁴⁹⁷ But Congress’s actions during the Fifteenth Amendment’s ratification debate could potentially implicate its substantive scope.

That is because Congress rejected an attempt to opine on the applicability of the Fifteenth Amendment to Chinese persons and because Congress began expressly protecting the right to hold office in fundamental conditions. To be sure, these actions were all taken by the Forty-First Congress – critically, *not* the Fortieth Congress that actually passed the Fifteenth Amendment. This new Congress was viewed as more moderate than its predecessor and the Republican’s majority was smaller in the House.⁴⁹⁸ Because postratification evidence is frequently probative of original intent,⁴⁹⁹ this Article investigates the relevance of this *extra*-ratification evidence.

In late March 1869, when the ratification battle was just beginning, Representative James Johnson (D-CA) introduced the following motion: “That in

496. Cf. David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2339–65 (2021) (canvassing the history of irregularities in the adoption of constitutional amendments and Congress’s general approach during the ratification battle).

497. Cf. Colby, *Originalism*, *supra* note 46, at 1629 (arguing that the Reconstruction Amendments’ irregular adoptions pose a “fundamental challenge . . . to originalism—a challenge that originalists have ignored”).

498. See *supra* notes 173–174 and accompanying text.

499. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184–85 (2012) (looking to events in the early 1800s in interpreting the Religion Clauses); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (defending “James Madison’s theory of post-enactment historical practice, sometimes called ‘liquidation’ . . .”).

passing the resolution for the fifteenth amendment to the Constitution of the United States this House never intended that Chinese or Mongolians should become voters.”⁵⁰⁰ After a very brief debate about the procedural propriety of the resolution, the House defeated a motion to suspend the rules in order to introduce the resolution with 42 yeases, 106 noes, and 48 not voting.⁵⁰¹ The overwhelming majority of “yes” votes were Democrats.⁵⁰²

Given the intense resistance to Chinese suffrage on the West Coast, it seems apparent that Representative Johnson was setting a trap: either the House would clarify that it did not intend for the Fifteenth Amendment to enfranchise Chinese men *or* use a “no” vote to help defeat its ratification. For a California Democrat, that was a win-win scenario. And given that many Republicans were opposed to Chinese suffrage or were more concerned with the Fifteenth Amendment’s ultimate ratification, it is somewhat surprising that the partisan lineup was so lopsided. Perhaps the result is best viewed as the Republican Caucus refusing to open the proverbial can of worms.⁵⁰³

What is striking about Representative Johnson’s motion is its rarity. I have been unable to find any other example of Congress holding a vote on an amendment’s *substantive* content while its ratification was *pending* before the States.⁵⁰⁴ One can imagine various motives for members of Congress to pursue this strategy: to assuage concerns in favor of ratification, to sabotage ratification, to relitigate old battles, or to attempt to narrow – or broaden – an amendment once ratification appears inevitable. The interpretive puzzles nested in this fact pattern

500. CONG. GLOBE, 41st Cong., 1st Sess. 202 (1869).

501. *Id.*

502. See MCPHERSON, *supra* note 42, at 415 (showing party affiliation by italicizing names of Democratic representatives).

503. Indeed, one San Francisco newspaper viewed Representative Johnson’s proposal along these lines. See *A Demagogue Trick*, DAILY EVENING BULL. (S.F.), Mar. 25, 1869 (“Johnson’s resolution . . . was meant to serve a purely partizan and demagogue purpose. Its author knew it would be rejected, and counted upon its rejection to make a little cheap political notoriety for himself in California and to furnish his party here with a weapon of attack in the coming State election.”).

504. A close analogy may be a bill introduced in 1867 by Senator Wilson while the Fourteenth Amendment was pending before the States. Wilson’s bill would have enfranchised Black men *upon* the Fourteenth Amendment’s ratification. See S. 111, 40th Cong. (1867); CONG. GLOBE, 40th Cong., 1st Sess. 292 (1867). That bill was not voted on. See Crum, *Superfluous*, *supra* note 5, at 1597.

Here, I do not count Congress’s votes to extend the deadline for the Equal Rights Amendment’s (ERA) ratification, as those were procedural moves rather than attempts to define the amendment’s substantive content. See KOWAL & CODRINGTON, *supra* note 298, at 219–30 (chronicling the ERA’s history); Pozen & Schmidt, *supra* note 496, at 2368–70 (detailing the legal questions surrounding the ERA’s ratification).

are thorny and fascinating, but a systematic resolution is outside the scope of this Article.⁵⁰⁵

Next, the situation in Georgia continued to deteriorate after Congress proposed the Fifteenth Amendment.⁵⁰⁶ In March 1869, Georgia's all-White state legislature started debating the Fifteenth Amendment. Republican Governor Rufus Bullock sent a message to the legislature declaring that the Fifteenth Amendment included the right to vote *and* hold office.⁵⁰⁷ Since Bullock opposed the General Assembly's expulsion of Black lawmakers, his message could be viewed as "baiting the legislature to reject the amendment (an act that would likely trigger federal intervention)."⁵⁰⁸ When the Georgia House nevertheless voted to ratify, it attached a proviso stating: "The colored man, having heretofore had no political rights, they must be granted to him by express statute, and not by implication. Therefore, the proposed amendment does not confer upon him the right to hold office."⁵⁰⁹ Days later, the Georgia State Senate deadlocked on ratification, and the Senate President, a Bullock ally, cast his vote *against* ratification. Georgia thus became the first Reconstructed Southern State to reject the Fifteenth Amendment.⁵¹⁰

Then, in June 1869, the Georgia Supreme Court ruled that Black persons had the right to hold office under the Georgia Constitution, which required only that state legislators be citizens.⁵¹¹ Throughout 1869, the Ku Klux Klan and other

505. A comparator could be drawn from the statutory context. Imagine that both houses have passed a bill, but the President is mulling a veto. The Senate quickly passes a resolution that assuages the President's concerns, and the President signs the bill into law. It is entirely unclear how a court would approach this farfetched hypothetical. A less analogous situation is how to construe failed attempts to amend legislation, but on this front, the Court "ha[s] not been consistent." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

506. See *supra* Section II.A.3.

507. See THE ESSENTIAL DOCUMENTS, *supra* note 10, at 555 (quoting Bullock's message) ("[T]he right to vote carries with it, by necessary implication, every other political privilege . . . and all State laws or Constitutions making class qualifications for offices, based upon birth, race or color, become void.").

508. *Id.* at 545; see also GILLETTE, *supra* note 12, at 101 ("Republicans reasoned that if the Fifteenth Amendment were rejected . . . then Congress would become so infuriated as to restore the provisional government . . . Under the leadership of Governor Rufus B. Bullock, Republicans tried to sabotage ratification.").

509. THE ESSENTIAL DOCUMENTS, *supra* note 10, at 556.

510. See *id.* at 545 (describing Georgia's rejection of the Fifteenth Amendment); see also *Adjournment of the Georgia Legislature—The Vote on the Fifteenth Amendment*, BALT. SUN, Mar. 20, 1869 ("Thus the fifteenth amendment was slaughtered in a republican Senate after its passage by a democratic House of Representatives.").

511. See *White v. Clements*, 39 Ga. 232, 266–68 (1869); GA. CONST. art. III, §§ 2–3 (1868) (requiring that state Senators and Representatives "shall be citizens of the United States").

White supremacist terrorist groups launched a wave of attacks and assassinations across Georgia.⁵¹²

In December 1869, these events came to a head and Congress reimposed military rule in Georgia, notwithstanding the Georgia Supreme Court's ruling on officeholding.⁵¹³ In considering the propriety of such tactics, members of Congress debated the enforceability of fundamental conditions and whether the original fundamental conditions had, in fact, mandated Black officeholding.⁵¹⁴ In the Georgia Reorganization Bill, Congress declared that "exclusion" of state legislators "upon the ground of race, color, or previous condition of servitude, would be illegal, and revolutionary, and is hereby prohibited."⁵¹⁵ Congress further required that Georgia ratify "the fifteenth amendment . . . before [its] senators and representatives . . . are admitted to seats in Congress."⁵¹⁶ Georgia ultimately complied with these new fundamental conditions and was readmitted for a second time in July 1870.⁵¹⁷

Meanwhile, the Georgia controversy impacted the fundamental conditions imposed on Mississippi, Texas, and Virginia in early 1870.⁵¹⁸ To recap, the previous fundamental conditions were universalist antiregression provisions that prevented the States from "depriv[ing] any citizen or class of citizens of the

512. See DOWNS, *supra* note 12, at 219.

513. See Amar, *Jury Service*, *supra* note 10, at 231 (observing that Congress declined to "wait for the Georgia courts to execute their own judgments").

514. See CONG. GLOBE, 41st Cong., 2d Sess. 171 (1869) (remarks by 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 (remarks by Sen. Howard (R-MI)) ("[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 (remarks by Sen. Edmunds (R-VT)) (arguing that Georgia backslid after its readmission when it expelled Black lawmakers and refused to follow Section Three); *id.* at 257 (remarks by Rep. Fitch (D-NY)) ("[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 pupillage from which we suffered it to emerge."); *id.* at 257-58 (remarks by 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).

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

516. *Id.* at § 8.

517. See An Act Relating to the State of Georgia, ch. 299, § 1, 16 Stat. 363, 363-64 (1870) (noting that Georgia had ratified the Fifteenth Amendment).

518. Virginia and Mississippi were readmitted in January and February, respectively, before the Fifteenth Amendment's ratification. Texas was readmitted on the same day that Secretary of State Hamilton Fish proclaimed the Fifteenth Amendment's ratification. See *infra* note 520.

United States of the right to vote.”⁵¹⁹ In other words, the wrongful deprivation of the right to vote need not be tied to racial discrimination. Congress imposed the same fundamental condition on the “right to vote” when it readmitted Mississippi, Texas, and Virginia notwithstanding the Fifteenth Amendment’s distinctive language and its anti-discrimination framework. But critically, Congress also employed a novel fundamental condition: “That it shall never be lawful . . . to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office.”⁵²⁰ Thus, the Forty-First Congress, mindful of its fight with Georgia over officeholding, decided to expressly protect the right to hold office *and* use an anti-discrimination provision to accomplish that goal.⁵²¹

Finally, on March 30, 1870, Secretary of State Hamilton Fish proclaimed the Fifteenth Amendment’s ratification. In what he admitted was an “unusual . . . message” to include with a constitutional amendment’s proclamation, President Grant stated that “the adoption of the fifteenth amendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life.”⁵²² Intriguingly, Grant’s original handwritten message mentioned both “the right to vote *and be voted*,” but the reference to officeholding was deleted from the final version.⁵²³

Although postratification legislation and actions can inform original meaning and can sometimes liquidate ambiguous terms, this Article ends its comprehensive historical analysis at Fish’s proclamation. In future work, I will examine the Fifteenth Amendment’s early years and seek to fully answer today’s open doctrinal questions, such as whether the Amendment applies to redistricting and private action. Nevertheless, the next Section does address some postratification

519. An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, § 1, 15 Stat. 73, 73 (1868); see An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868); *supra* Section I.C.2 (discussing Congress’s use of fundamental conditions to protect the voting rights of Black men).

520. An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); see An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870).

521. Republicans were divided over whether Congress could impose these *new* fundamental conditions. See THE ESSENTIAL DOCUMENTS, *supra* note 10, at 559–60 (noting that Morton supported the plan but Trumbull and Conkling opposed it); Currie, *supra* note 10, at 488 (“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)).

522. THE ESSENTIAL DOCUMENTS, *supra* note 10, at 596 (reprinting Grant’s message).

523. GILLETTE, *supra* note 12, at 161 n.1 (emphasis added).

practices in ascertaining the original understanding of the Fifteenth Amendment's applicability to voting qualifications and officeholding requirements.

IV. THE ORIGINAL UNDERSTANDING OF THE FIFTEENTH AMENDMENT

With the story complete on how the Fifteenth Amendment became part of the Constitution, I turn to ascertaining its original meaning. For the uninitiated, there are a variety of originalist theories.⁵²⁴ Original intent examines the Framers' and ratifiers' intent to divine the meaning of the Constitution.⁵²⁵ By contrast, original expected application looks to "how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."⁵²⁶ "[O]riginal expected application includes not only specific results, but also the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied."⁵²⁷ Another variant is original-methods originalism, under which "the Constitution is interpreted using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted."⁵²⁸ Yet another school is "inclusive originalism," which posits that "the original meaning of the Constitution is the ultimate criterion for constitutional law" and that "judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them."⁵²⁹ An even more recent variant of originalism emerged in *New York State Rifle & Pistol Ass'n v. Bruen*,⁵³⁰ where the Court adopted a novel standard for Second Amendment claims based on "analogical reasoning"⁵³¹ to "this Nation's historical tradition of

524. See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1626-27.

525. See Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1135-38 (2003) (discussing the intellectual history of original intent).

526. BALKIN, *supra* note 69, at 7.

527. *Id.*; see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 95 (2004) ("[S]ome originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases.").

528. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

529. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (emphasis omitted).

530. 597 U.S. 1, 8-11 (2022).

531. *Id.* at 28.

firearm regulation.”⁵³² Last but not least, today’s dominant theory is original public meaning, which interprets “the words of the Constitution . . . according to the meaning they had at the time they were enacted.”⁵³³

Further complicating matters, many – but not all – originalists also differentiate between interpretation and construction. As Larry Solum has explained, “interpretation . . . recognizes or discovers the linguistic meaning of an authoritative legal text” whereas “construction gives legal effect to the semantic content of a legal text.”⁵³⁴ Put differently, “[o]nce we understand the language aright, a separate layer of ‘construction’ then converts the language to a legal rule” or doctrine.⁵³⁵ Within the so-called construction zone, arguments based on the modalities of constitutional interpretation – that is, text, history, structure, precedent, prudence, and ethos – can help form the legal rule.⁵³⁶ Or as Randy Barnett and Evan Bernick have argued, originalist interpretation within the construction zone should be “committed to the Constitution’s original spirit as well – the functions, purposes, goals, or aims implicit in its individual clauses and structural design.”⁵³⁷

As I am not an originalist, I do not take sides in this internecine debate among the various schools of originalism. But given that historical understanding is important under any theory of constitutional interpretation and given the prominence of originalist methodology at the Supreme Court, this Article seeks

532. *Id.* at 17, 28; see also Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 111–36 (2023) (explaining *Bruen*’s methodology). As of the time of writing, the Court appears poised to clarify that standard in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), cert granted 143 S. Ct. 2688 (mem.) (2023).

533. BARNETT, *supra* note 527, at 89; see also Kesavan & Paulsen, *supra* note 525, at 1132 (defining original meaning as how the Constitution’s “words and phrases, and structure . . . would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”).

534. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100, 103 (2010).

535. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 816 (2022).

536. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 482 (2013) (making a similar point but arguing that text, history, and structure are best viewed as influencing interpretation); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7, 94 (1982) (listing these six modalities); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1768 (1994) (“The pluralism that characterizes the Supreme Court’s jurisprudence has deep roots in the nature of American constitutionalism.”).

537. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3 (2018); see also *id.* at 31 (defining the Constitution’s “letter” and “spirit” as “the distinction between the linguistic meaning of a provision of a legal instrument and that instrument’s fundamental purpose(s) or function(s)”).

to ascertain the original understanding of the Fifteenth Amendment. Critically, this Article uses the phrase “original understanding” as an umbrella term.⁵³⁸ After all, the schools of originalism frequently overlap, as “originalists often look to the statements of the framers as a *proxy* for the views and understandings of the ratifiers and the general public.”⁵³⁹ Indeed, this Article leverages the different schools of originalism to demonstrate how certain issues concerning the Fifteenth Amendment were either crystal clear or frustratingly opaque.

Although the Court has occasionally—and famously—stated that Reconstruction’s legal history was inconclusive,⁵⁴⁰ there is certainly risk in today’s age of originalism in acknowledging historical ambiguity. For originalists, constitutional law needs a historical answer to resolve a case. A problematized and nuanced past is fine until one needs to decide whether a law is constitutional or not.⁵⁴¹

But “[w]hen history runs out, we have to use other methods of interpretation.”⁵⁴² Thus, an upshot to any historical indeterminacy surrounding the Fifteenth Amendment’s adoption is that the modalities of constitutional interpretation should be employed. Moreover, to the extent an issue was contested during the Fifteenth Amendment’s drafting and ratification, the question could be liquidated in the future—that is, postratification practice can clarify any textual ambiguities.⁵⁴³ And as I have argued elsewhere, Congress is well within its enforcement authority to answer questions about the Fifteenth Amendment’s

538. Cf. Kesavan & Paulsen, *supra* note 525, at 1127 (defining “originalists” as “those who maintain that constitutional interpretation should be constrained by the ‘original intent’ of the Framers, the ‘original understanding’ of the Ratifiers, or the hypothesized, objective ‘original meaning’ of the Constitution’s text”).

539. BALKIN, *supra* note 69, at 226–27 (emphasis added); see also Solum, *supra* note 524, at 1637–38 (“Although original expected applications do not *constitute* the original meaning of the constitutional text, they are nonetheless relevant to constitutional interpretation because they can provide *evidence* of the original public meaning.”).

540. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (concluding that the history surrounding the Fourteenth Amendment’s application to segregation generally and to public education was “inconclusive”); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (observing that the historical record was “not sufficient to resolve” whether the Fourteenth Amendment was originally understood to prohibit bans on interracial marriage).

541. See Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 347–48 (2020) (discussing how the contrasting methodologies and aims of historians and lawyers affect their interpretation of the Constitution).

542. Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1761 (2015).

543. See Baude, *supra* note 499, at 4 (discussing “Madison’s theory of postenactment historical practice . . . to settle constitutional disputes”).

scope and enact rational prophylactic legislation.⁵⁴⁴ Indeed, the Court’s recent decision in *Milligan* relied on *Katzenbach*’s rationality standard in “reject[ing] Alabama’s argument that § 2 [of the VRA] as applied to redistricting is unconstitutional under the Fifteenth Amendment.”⁵⁴⁵

In seeking to ascertain the original understanding of the Fifteenth Amendment, this Article strives for historical determinacy when it is discernable and employs the modalities of constitutional interpretation in the so-called construction zone. This Article also gestures toward liquidation and postratification history to help clarify historical indeterminacy, but this already lengthy piece does not provide an extensive history of Reconstruction after 1870. Finally, this Article flags enforcement-authority arguments, but it leaves a full exploration of the symbiotic relationship between the Fifteenth Amendment and the VRA to future work that answers questions about the VRA’s application to redistricting, laws with discriminatory results, and private action.

This Part draws conclusions from the history recounted above about how the Fifteenth Amendment applies to voting qualifications and officeholding requirements. This Part concludes by underscoring the transformational role of the Fifteenth Amendment in redefining our democracy.

A. Voting Qualifications

The unambiguous original understanding of the Fifteenth Amendment was that it would enfranchise Black men nationwide. All of the proposed versions

544. For a lengthy defense of *Katzenbach*’s rationality standard as the governing standard under the Fifteenth Amendment, see Crum, *Superfluous*, *supra* note 5, at 1567–78 & 1623–26, and Crum, *Deregulated*, *supra* note 77, at 410–12 & 435–36. This standard accords with the original understanding of the term “appropriate” in the Reconstruction Amendments’ enforcement sections. See *Tennessee v. Lane*, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) (disavowing *Boerne*’s congruence and proportionality test); McConnell, *Institutions*, *supra* note 235, at 172–74 (critiquing *Boerne* from an originalist perspective).

545. *Allen v. Milligan*, 599 U.S. 1, 41 (2023). This decision cites *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980). *Milligan*, 599 U.S. at 41. Unlike Justice Thomas’s dissenting opinion, the *Milligan* Court relied solely on precedents employing *Katzenbach*’s rationality standard and failed to cite either *Shelby County v. Holder*, 570 U.S. 529 (2013), or *City of Boerne v. Flores*, 521 U.S. 507 (1997), for the governing constitutional test. *Milligan*, 599 U.S. at 80 (Thomas, J., dissenting). The *Milligan* Court’s parsing of *Katzenbach*, *Boerne*, and *Shelby County* aligns with my prior scholarship, which argued that the standards are distinct and that *Katzenbach* still controls for Congress’s Fifteenth Amendment enforcement authority. See Crum, *Superfluous*, *supra* note 544, at 1627–30 and accompanying text.

would have accomplished that goal one way or another.⁵⁴⁶ The narrow anti-discrimination provision was adopted to accomplish that goal. Moreover, nationwide Black male suffrage was the key battle line in the ratification debate, with the national Republican Party putting pressure on state legislatures to ratify the amendment. Once the Fifteenth Amendment was ratified, the facially discriminatory laws in seventeen States that “limited voting to white men were swept away.”⁵⁴⁷

Historians have debated whether the Reconstruction Framers’ *primary* goal was to enfranchise Black men in the North or to ensure that Congress could protect Black men’s voting rights in the South.⁵⁴⁸ In my view, the best answer is to focus on the relevant time horizon. In the short run, the Reconstruction Framers were concerned with Black men living in the North and the Border States. But in the mid- to long-term, the Reconstruction Framers were worried about Congress’s waning authority over voting rights in the South as those States were being readmitted to the Union. Finally, as for the historians’ debate over the Reconstruction Framers’ motive, my reading of the historical record is that their ideological and partisan interests converged and that they understood that the ballot would enable Black men to defend their interests by voting as a bloc.

Within the legal scholarship, the inquiry has centered not so much on motives but on original understanding. And that is my focus here as well. To the extent that scholars have squarely addressed the question, a narrow view of the Fifteenth Amendment’s scope is the conventional wisdom. Most forthrightly, Earl Maltz has argued that the Fifteenth Amendment’s protections were originally “understood to be even narrower than the most conservative modern justices have believed.”⁵⁴⁹ According to Maltz, “[n]ot only did the drafters intend to leave untouched those qualifications that have a racially disproportionate *impact*; even those qualifications that are *intended* to disfranchise blacks were purposefully left intact.”⁵⁵⁰ The Fifteenth Amendment, in Maltz’s view, applies only to *facially* discriminatory laws. Similarly, Alfred Avins, writing in response to the VRA’s passage, argued that literacy tests were not prohibited by the Fifteenth Amendment.⁵⁵¹ Moreover, the general literature on race and voting rights is

546. Senator Williams’ non-self-executing amendment would not have done so immediately, but his goal was to find a means of enfranchising Black men but not Chinese immigrants. See *supra* Section II.B.1.

547. FONER, *SECOND FOUNDING*, *supra* note 1, at 108.

548. See *supra* Section II.A.1.

549. MALTZ, *CIVIL RIGHTS*, *supra* note 10, at 156.

550. *Id.*

551. See Avins, *Literacy*, *supra* note 10, at 64. Avins argued before the Supreme Court against the constitutionality of Section 4(e) of the VRA in the landmark decision of *Katzenbach v. Morgan*, 384 U.S. 641, 642 (1966).

filled with laments about the Fifteenth Amendment's narrowness and ineffectiveness against Jim Crow.⁵⁵²

Beyond enfranchising Black men nationwide, the Fifteenth Amendment's original understanding becomes harder to discern. The secondary issues about circumvention and the voting rights of Irish Americans and Chinese immigrants were far more contested and their answers depend on how one frames the question and what methodology one employs. This Section seeks to resolve these debates and concludes with a brief discussion of how Supreme Court precedent reflects the original understanding of the Fifteenth Amendment's prohibition on racial proxies.

1. *Racial Proxies and Circumvention*

This, then, brings us to a key contested question: how broadly did the Fifteenth Amendment's protections sweep? Or stated differently: how easily could States circumvent the Fifteenth Amendment's prohibition of racial discrimination in voting? For example, were States able to impose obviously discriminatory schemes like grandfather clauses, poll taxes, property qualifications, and literacy tests? At the time, these facially neutral devices would almost certainly have been motivated by invidious intent *and* have foreseeable disparate impacts.

At the outset, I emphasize findings that other scholars have underappreciated. First, building off this Article's excavation of the broader constellation of state and federal laws that enfranchised – and disenfranchised – Black men during Reconstruction,⁵⁵³ it is striking that the congressional debate barely referenced the available analogues for how to draft the Fifteenth Amendment. The Reconstruction Framers did not borrow from Article I's template by using words like "Electors" and "Qualifications."⁵⁵⁴ The Reconstruction Framers did not harp on the obvious connection between the Apportionment Clause and the Fifteenth Amendment. Nor did they focus on the close linkage with the subset of

552. See, e.g., AMAR, *AMERICA'S CONSTITUTION*, *supra* note 17, at 399 ("[The Fifteenth Amendment] merely prohibited race-based disenfranchisements. In later decades, the narrow draftsmanship would prompt countless shams and subterfuges . . ."); KEYSSAR, *supra* note 7, at 88 ("Democrats chose to solidify their hold on the South by modifying the voting laws in ways that would exclude African Americans without overtly violating the Fifteenth Amendment."); TSEGIS, *supra* note 124, at 108 ("Had Congress enacted a more inclusive version of the [Fifteenth] [A]mendment, states might have been unable to use arbitrary characteristics to deny adult citizens the right to vote. As it stood, states could disqualify persons for any characteristics except the three specified.").

553. See *supra* Section I.B-D; *infra* Appendix A.

554. U.S. CONST. art. I, § 2 ("Electors [for the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the state legislature.").

enfranchisement statutes and Southern State constitutions that specifically mentioned race, color, and previous condition of servitude. Put differently, there is no deep reservoir of state-level analogues that shed light on the Fifteenth Amendment's meaning. To the extent that any draft versions of the Fifteenth Amendment resembled state-level constitutional provisions, it was the universal-right-to-vote approach advocated by Representatives Bingham and Shellabarger and Senator Warner, but none of those proposals ever passed either chamber of Congress.⁵⁵⁵

Second, this Article has highlighted that the Reconstruction Framers viewed the right to vote as attaching not just to individuals but to classes of citizens. Building off this finding, this Article claims that the use of racial *proxies* was verboten under the original understanding of the Fifteenth Amendment. And to be crystal clear, racial proxies—such as ancestry—are close stand-ins for race that are racial classifications in all but name. Here, a few colloquies are especially salient.

Stewart's dialogue with Drake about the Amendment's singular versus plural wording—namely, whether it was the right of a citizen or citizens that was being protected—is particularly enlightening given that Stewart was the floor manager in the Senate. In defending his singular phrasing, Drake adamantly stated that “[t]he right to vote is an individual right; it does not belong to masses of people”⁵⁵⁶ Stewart, however, rejected Drake's wording because it “narrows the amendment” and explained that both Boutwell's version and his draft were designed to protect “not only . . . the citizen himself but the class to which he belonged.”⁵⁵⁷ Stewart's conception of Black voters having group interests dovetails with the Reconstruction Framers' views about racial bloc voting and how the ballot was the best means of safeguarding civil rights.⁵⁵⁸

Stewart made an analogous point in his debate with Conkling over discrimination on account of being “descended from slaves.”⁵⁵⁹ Because the “right of citizens of the United States—that is, all classes of citizens of the United States” was covered by the Amendment, Stewart reasoned, “If there is anything growing out of that person's condition of servitude, such as disingenuousness of birth, . . . the States are prohibited from disenfranchising in consequence of

555. See *supra* notes 227 & 299 and accompanying text; *infra* Appendix B.

556. CONG. GLOBE, 40th Cong., 3d Sess. 1000 (1869) (remarks by Sen. Drake (R-MO)).

557. *Id.* (remarks by Sen. Stewart (R-NV)); see also *supra* text accompanying notes 273-281 (relating the debates over the implications of the singular/plural wording).

558. See Crum, *Reconstructing*, *supra* note 10, at 303-04; Amar & Brownstein, *supra* note 10, at 943-44; *infra* Section IV.C.

559. CONG. GLOBE, 40th Cong., 3d Sess. 1316 (1869) (remarks by Sen. Conkling (R-NY)).

it.”⁵⁶⁰ Although Stewart’s example focused on “previous condition of servitude,”⁵⁶¹ his claim demonstrates both that the Amendment was viewed as protecting the rights of a class of voters *and* that proxies for the anti-discrimination categories were covered too.

Over in the House, Bingham made a similar point. Recall that Senator Wilson’s broad anti-discrimination amendment lacked protections against discrimination based on “previous condition of servitude.”⁵⁶² Responding to Boutwell’s claim that States would discriminate on that basis, Bingham remarked: “As to servitude, that is embraced in the words color, race, and nativity Every man knows that it would be a violation of the letter and spirit of the proposed amendment”⁵⁶³ Once again, a major Republican leader put forward a credible—yet contested—claim that the Fifteenth Amendment applied to racial proxies.⁵⁶⁴

Third, the Reconstruction Framers assumed that voting qualifications would be imposed *in an evenhanded manner*.⁵⁶⁵ Thus, if a law applied to or was enforced against only one racial group, it would raise constitutional concerns. On this front, New York’s racially discriminatory taxpaying, residency, and property qualifications have often been identified as within the Fifteenth Amendment’s scope.⁵⁶⁶ This example provides a response to the Radicals who argued for a broader anti-discrimination provision out of concern that facially neutral schemes could disenfranchise nearly ninety percent of Black men.⁵⁶⁷ Although the Reconstruction Framers did not intend to and were not expecting to invalidate facially neutral schemes with a clear disparate impact or discriminatory purpose, the equal-treatment requirement indicates that a law that was

560. *Id.* at 1317 (remarks by Sen. Stewart (R-NV)). It should also be noted that Edmunds and other senators agreed with Stewart in this debate. *See supra* notes 368-373 and accompanying text (giving further details on the debate between Stewart and Conkling).

561. *See supra* notes 559-560.

562. *See supra* notes 339-348.

563. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869) (remarks by Rep. Bingham (R-OH)).

564. Of course, given that this was a debate between Bingham and Boutwell and that Boutwell’s recommendation about rejecting the Senate’s version prevailed, this vignette illustrates that Bingham’s claim was contested at the time, and one should not overread it. On the other hand, Boutwell could have prevailed for reasons that did not have to do with this issue, such as the breadth of Wilson’s amendment.

565. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 900 (1869) (remarks by Sen. Williams (R-OR)) (noting that a “freehold qualification . . . would *operate equally upon all citizens*, but it might practically operate to exclude nine tenths of the colored persons from the right of suffrage” (emphasis added)); *id.* at 1010 (remarks by Sen. Howard (R-MI)) (“[W]hatever regulation or restriction may be established in this regard by a State, it must operate with equal severity upon the white and the black races.”).

566. *See supra* notes 82-87 and accompanying text.

567. *See supra* note 283.

discriminatorily applied would risk running afoul of the Fifteenth Amendment. Put differently, if New York's laws were prohibited as written, then it should make no difference if Alabama achieved the same result with a facially neutral law that was *enforced* in a discriminatory fashion. This insight has important ramifications for the constitutionality of poll taxes, literacy tests, and grandfather clauses that would be discriminatorily applied during Jim Crow.⁵⁶⁸

These latter two points – namely, the racial proxy and discriminatory application points – find a textual hook in the use of the word “abridge” in the phrase “denied or abridged.”⁵⁶⁹ Indeed, several scholars have suggested that New York's racially discriminatory taxpaying, residency, and property qualifications were targeted by the word “abridge.”⁵⁷⁰ Frustratingly, “[t]he meaning of the term ‘abridged,’ as used in the Fifteenth Amendment, was not discussed at the time that measure was under consideration.”⁵⁷¹ During Reconstruction, dictionaries defined “abridge” as “to contract,” “to diminish,” or “[t]o deprive of.”⁵⁷² Moreover, “since the term ‘denied’ adequately captures the scenario where a voter is prevented from casting their ballot, the term ‘abridge’ presumably carries [a] broader meaning.”⁵⁷³

Relatedly, to assign no meaning to the word “abridge” would violate the rule against superfluity, a canon that applies to constitutions as well as statutes.⁵⁷⁴ As Justice Thurgood Marshall once explained, “[b]y providing that the right to vote cannot be discriminatorily ‘denied or abridged,’ the Fifteenth Amendment

568. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966) (describing the “[d]iscriminatory administration of voting qualifications” in the Jim Crow South).

569. To avoid a series of messy brackets and alterations depending on tense and syntax, I use “abridge,” “deny,” etc. as shorthand in the next few paragraphs.

570. See *supra* notes 82–87.

571. MATHEWS, *supra* note 12, at 38. But see William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 50–54), <https://ssrn.com/abstract=4604902> [<https://perma.cc/9JPL-7PAR>] (discussing debate over Boutwell's suffrage statute and the meaning of “abridge” in the Privileges or Immunities Clause and distinguishing between the regulation of rights and their abridgment). When proposals lacked the word abridged, those omissions were not commented upon. See *supra* note 274; Section II.B.4.

572. JOHNSON'S ENGLISH DICTIONARY 58 (J.R. Worcester, ed., Philadelphia, JAS B. Smith & Co. 1859); see also JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 6 (Boston, Hickling, Swan & Brewer 1860) (“To curtail; to reduce; to contract; to diminish.”); WILLIAM G. WEBSTER & WILLIAM A. WHEELER, A DICTIONARY OF THE ENGLISH LANGUAGE 2 (New York & Chicago, Ivison, Blakeman, Taylor & Co. 1878) (“To deprive; to cut off.”). Here, I avoid citing the definitions that clearly reference the abridged version of a published work and focus instead on the more generic definitions.

573. Crum, *Reconstructing*, *supra* note 10, at 323.

574. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

“assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise.”⁵⁷⁵ Although Marshall’s argument concerned redistricting, his broader point about the necessity of giving meaning to the word “abridge” still stands.

In fact, the word “abridge” was always *additive* to protections for the right to vote. Congress used various formulations – be it “deprive,” “deny,” or “denied or abridged” – when it drafted voting-rights laws during Reconstruction.⁵⁷⁶ Tellingly, the sole time that “abridge” appears unaccompanied by “deny” is in the Wyoming Enabling Act, but even then Congress had affirmatively granted the right to vote to all male citizens and declarant aliens in the preceding sentence.⁵⁷⁷

To employ an intratextual argument,⁵⁷⁸ the most important comparator is the Apportionment Clause, which also uses “denied or abridge.” Crucially, the Apportionment Clause’s linkage of “the right to vote and a reduction in House seats underscores the Reconstruction Framers’ understanding that political rights were exercised collectively.”⁵⁷⁹ Stewart’s views on the class-based nature of the right to vote buttress this insight.⁵⁸⁰

Moving beyond the word “abridge,” the Fifteenth Amendment’s use of “race” also plays a role in ascertaining its original public meaning. In other words, what is *racial* discrimination under the Fifteenth Amendment? Here, Stewart’s and Bingham’s claims that the Amendment would prohibit discrimination involving close proxies for race – such as having enslaved ancestors – provides additional support for an anticircumvention rule that broadly defined discrimination “on account of race.”⁵⁸¹

Turning to other modalities of constitutional interpretation,⁵⁸² the Supreme Court, as explained below, now endorses a proxy theory of racial discrimination

575. *City of Mobile v. Bolden*, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting).

576. See *supra* Section I.C.

577. See *supra* notes 102-104 and accompanying text.

578. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (“When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (defining intratextualism as “read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”).

579. Crum, *Reconstructing*, *supra* note 10, at 325; see also Tolson, *Structure*, *supra* note 87, at 414 (emphasizing the “textual and historical link” between these constitutional provisions).

580. See *supra* notes 556-561 and accompanying text.

581. See *supra* notes 559-564 and accompanying text.

582. To acknowledge the proverbial elephant in the room, the postratification history of circumvention is problematic for the Fifteenth Amendment. On this point, two brief responses. First,

under the Fifteenth Amendment.⁵⁸³ Furthermore, prudential concerns strongly militate in favor of a broad definition of proxies in light of the “unremitting and ingenious defiance of the Constitution” by the Jim Crow South.⁵⁸⁴ And, thankfully, the American ethos today now embodies a commitment to multiracial democracy and a belief that the ballot is the best means to safeguard other rights.⁵⁸⁵

2. *The Voting Rights of Chinese Immigrants and Irish Americans*

Building off the above discussion, I now turn to the voting rights of Chinese immigrants and Irish Americans. Throughout the ratification debate, speakers repeatedly referred to the “Chinese,” the “Irish,” and the “Germans” as distinct racialized groups, signaling that the original understanding of “race or color” was closer to what today would be considered nationality or ethnicity.⁵⁸⁶ For example, in his famous speech in Rhode Island, Phillips mentioned the “Latin or Celtic race”⁵⁸⁷ as distinct categories. And the fact that Stewart thought it

“to the extent later history contradicts what the text says, the text controls.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 36 (2022). Second, in future work, I will address how to deal with postratification laws that were enacted in bad faith and with flagrant disregard of the Reconstruction Amendments, as was frequently the case in the late 1800s. See Travis Crum, *Liquidating Reconstruction* (unpublished manuscript) (on file with author).

583. See *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating Oklahoma’s grandfather clause); *Lane v. Wilson*, 307 U.S. 268, 277 (1939) (invalidating Oklahoma’s registration scheme that attempted to evade *Guinn* and perpetuate the grandfather clause); *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (invalidating Hawaii’s state constitutional provision that limited the right to vote for trustees of the Office of Hawaiian Affairs to “native Hawaiians”); *infra* Section IV.A.3.

584. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); see also *id.* at 328 (describing “nearly a century of systematic resistance to the Fifteenth Amendment”).

585. See *infra* Section IV.C.

586. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 645 (1869) (remarks by Rep. Eldredge (D-WI)) (referring to “the Irishman, the German, and the Scandinavian”); *id.* at 1009 (remarks by Sen. Warner (R-AL)) (referring to “the Irish and Germans”); *id.* at 1011 (remarks by Sen. Doolittle (R-WI)) (“[W]e should give to the negro just as much protection as we give to an Englishman or to an Irishman or to a German . . .”); *id.* at 1036 (remarks by Sen. Cameron (R-PA)) (referring to “the negro, the Irishman, the German, the Frenchman, the Scotchman, the Englishman, and the Chinaman”).

To be sure, in debates over nativity, some speakers recognized that the White race was composed of persons of English and German heritage. See *id.* at 938 (remarks by Sen. Williams (R-OR)) (“No distinction can be made against an Englishman or a German on account of race or color by the people of the United States. No constitutional amendment could be adopted in a State declaring that a German should be excluded from the elective franchise or the right to hold office on account of race, for they belong to the same race that we do.”).

587. *Wendell Phillips Advocates It—Ratification by Rhode Island*, N.Y. TIMES, May 30, 1869, at 3, reprinted in THE ESSENTIAL DOCUMENTS, *supra* note 10, at 575; *supra* Section III.B.1.

necessary to clarify that the word “nativity” was excluded from the Fifteenth Amendment to permit the disenfranchisement of Chinese immigrants reinforces the notion that race was conceptualized in ethnic or national terms.

The original intent and original expected application of the Fifteenth Amendment was to keep Chinese immigrants disenfranchised. But that is based on a *legal* fact of Reconstruction: the naturalization laws were limited to White persons and therefore Chinese immigrants could not become citizens.⁵⁸⁸ If that legal fact changed, then it was acknowledged – and feared on the West Coast – that the term race would mandate enfranchisement of Chinese American men, as the Amendment prohibited racial discrimination against citizens. Indeed, California and Oregon rejected the Fifteenth Amendment because of this broad scope.⁵⁸⁹

The resolution of Rhode Island’s nativity-based discrimination against Irish Americans is far murkier.⁵⁹⁰ The removal of “nativity” as a protected category is strong evidence of the Framers’ original intent to leave Rhode Island’s policy intact. And yet, that removal was insufficient to quell concerns about the future of Rhode Island’s law, prompting one of the more contested ratification battles in a Northern State that had enfranchised Black men. On the one hand, Rhode Island’s law applied to naturalized German Americans as well as to naturalized Irish Americans. On the other hand, it was openly admitted that the law had a discriminatory intent and had its harshest impact on Irish Americans.⁵⁹¹ The poststratification history reveals continued uncertainty surrounding Rhode Island’s law, with the Senate Judiciary Committee’s report on the question constituting persuasive evidence in favor of its continued validity.⁵⁹²

588. See *supra* note 198.

589. See *supra* notes 490-493 and accompanying text. Crucially, the Reconstruction Framers were *not* focusing on the long-term prospect that *native-born* Chinese male citizens would become voters. See *supra* note 324 (focusing on naturalization laws). This makes sense given the racial demographics of Reconstruction: according to the 1870 census, there were only 290 native-born Chinese American male citizens in California and three in Oregon. See *supra* note 198.

590. The question of whether discrimination between natural-born or naturalized citizens is compatible with the Fourteenth Amendment’s Citizenship Clause or otherwise prohibited by the Constitution is beyond this Article’s scope.

591. See, e.g., Conley, *supra* note 201, at 79.

592. Within two months of the Fifteenth Amendment’s ratification, Congress received a petition asking whether Rhode Island’s nativity-based property qualification violated the Fourteenth Amendment’s Privileges or Immunities Clause and the Fifteenth Amendment. See *id.* at 84. The Senate Judiciary Committee issued a unanimous report answering in the negative. As to the former question, the Committee stated that the right to vote was not a privilege or immunity of citizenship, as otherwise it would have enfranchised “males and females, infants, lunatics, and criminals.” S. REP. NO. 41-187, at 2 (1870). Regarding the Fifteenth Amendment,

The constitutionality of Rhode Island's nativity-based discrimination, therefore, presents a situation in which the history may be characterized as inconclusive. If one believes, as many originalists do, that in cases of ambiguity the tie goes to the status quo, then nativity-based voting discrimination may well remain constitutional. But to the extent Rhode Island's law could be viewed as a racial proxy targeting Irish Americans, it raises grave Fifteenth Amendment concerns. But to be clear, this does not mean that the use of nativity-based tests per se falls under the Fifteenth Amendment's scope.

3. *Post-Reconstruction Applications*

To help contextualize these points, some post-Reconstruction examples may prove useful. Under current doctrine, the Supreme Court construes the Fifteenth Amendment to capture close proxies for race, such as ancestry. As the Court once put it, the Fifteenth Amendment “nullifies sophisticated as well as simple-minded modes of discrimination.”⁵⁹³

During Jim Crow, the Court invalidated so-called grandfather clauses. For instance, shortly after it was admitted to the Union, Oklahoma adopted a literacy test but then exempted from that test any “person who was, on January 1, 1866, or any time prior thereto, entitled to vote” or a “lineal descendant of such person.”⁵⁹⁴ In selecting 1866 as the key date, Oklahoma clearly intended to exempt White voters from the literacy test but not Black voters. As the Court explained in striking down the grandfather clause on Fifteenth Amendment grounds in *Guinn v. United States*, the 1866 date was “the controlling and dominant test of the right of suffrage.”⁵⁹⁵ The Court's decision in *Guinn* is intriguing because it involved not only a racial proxy—namely, the grandfather clause—but also imposed a literacy test based on that racial proxy, thus resembling New York's

the Committee explained that Rhode Island did not disenfranchise citizens on the grounds of race, color, or previous condition of servitude, and that these criteria do not “depend[] in any degree upon the *place* of his *nativity*.” *Id.* The Committee further observed that Congress considered adding the term “nativity” but “this proposition was not agreed to.” *Id.*

Then, in October 1871, a referendum was held to remove the nativity-based property qualification from the constitution, but it failed with over two-thirds of voters voting in opposition of it. *See Conley, supra* note 201, at 80. Shortly thereafter, a prominent Rhode Island Democrat filed a lawsuit challenging the law on Privileges or Immunities and Fifteenth Amendment grounds. *See id.* at 85-86. According to my own research, aided by librarians, the relevant historical archive contains only the case's summons and no opinion or other findings. The nativity requirement was finally removed in 1888 via a referendum. *See id.* at 87.

593. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

594. *Guinn v. United States*, 238 U.S. 347, 357 (1915).

595. *Id.* at 365.

Reconstruction Era law that many scholars have identified as being the target of the word “abridge.”⁵⁹⁶

Fast forward nearly a century. In *Rice v. Cayetano*,⁵⁹⁷ plaintiffs challenged a voting qualification in Hawaii that limited the franchise in certain elections to persons who could trace their ancestry to “the races inhabiting the Hawaiian Islands prior to 1778,” that is, prior to Western colonization.⁵⁹⁸ The right to vote was therefore limited to “native Hawaiians.”⁵⁹⁹ Analogizing Hawaii’s law to the Jim Crow South’s grandfather clauses,⁶⁰⁰ the Court viewed them as a “proxy for race”⁶⁰¹ and invalidated them.⁶⁰² Thus, the Court correctly applied the original understanding of the Fifteenth Amendment. Indeed, the Court did so in a context outside the Black/White binary in the South, confirming the fears of West Coast Republicans that the Fifteenth Amendment would apply to all races.

Here, my goal is to establish that the Fifteenth Amendment was originally understood to forbid racial proxies and that the Supreme Court’s precedent reflects that fact. In future work, I will unpack how the original understanding of racial proxies interacts with current debates over invidious intent and discriminatory results. Critically, wherever one would draw the precise line as to racial proxies as originally understood during Reconstruction, Congress has stepped in to clarify that discriminatory results are sufficient to establish a violation of Section 2 of the VRA—a prophylactic standard the Court recently affirmed as valid Fifteenth Amendment enforcement legislation in *Allen v. Milligan*.⁶⁰³

* * *

In sum, the Fifteenth Amendment does more than merely prohibit facially discriminatory voting qualifications. Contrary to the conventional wisdom, the Fifteenth Amendment prohibits some facially neutral voting qualifications.

596. Following *Guinn*, grandfather clauses in Alabama, Georgia, Louisiana, North Carolina, and Virginia were also invalidated. See VALELLY, *supra* note 98, at 141. However, Oklahoma quickly enacted a new registration system that sought to perpetuate the effects of the grandfather clause. Once again, the Court would invalidate that scheme, albeit a generation later. See *Lane*, 307 U.S. at 277.

597. 528 U.S. 495, 499 (2000) (invalidating Hawaii’s constitutional provision that limited the right to vote for trustees of the Office of Hawaiian Affairs to “native Hawaiians”). The Ninth Circuit recently decided a similar case out of Guam. See *Davis v. Guam*, 932 F.3d 822, 843 (9th Cir. 2019) (holding that “Guam’s limitation on the right to vote in its political status plebiscite to ‘Native Inhabitants of Guam’ violates the Fifteenth Amendment”).

598. *Rice*, 528 U.S. at 499.

599. *Id.*

600. See *id.* at 512-15 (citing *Guinn*, 238 U.S. at 357-63).

601. *Id.* at 514.

602. See *id.* at 524.

603. 599 U.S. 1, 41 (2023).

Moreover, the Supreme Court's decisions in the grandfather clause cases and, more recently, in *Rice v. Cayetano* accord with the original understanding of the Fifteenth Amendment in prohibiting racial proxies as voting qualifications. But to be clear, my claim is *not* that the original intent or original expected application of the Fifteenth Amendment was to invalidate *all* facially neutral schemes. Rather, my argument is that the Reconstruction Framers' understanding of the group-based nature of the right to vote *and* the meaning of terms like "abridge" and "race" prohibit schemes that are facially neutral as to race but nonetheless employ racial *proxies*. As such, the original public meaning of the Fifteenth Amendment is broad enough to capture facially neutral schemes that are intended to discriminate using racial proxies or that are discriminatorily applied. Thus, the original public meaning of the Fifteenth Amendment is more capacious than the Framers' immediate goal of enfranchising Black men nationwide.

B. *Officeholding Requirements*

The right to hold office regardless of race is no longer a controversial issue. Nevertheless, scholars have debated whether the Fifteenth Amendment encompasses the right to hold office. Vikram David Amar has contended that the Reconstruction Era "political rights package" included the right to vote, to hold office, and to serve on a jury.⁶⁰⁴ Under that view, the Conference Committee's last-minute deletion does not excise that right from the Amendment.⁶⁰⁵ His brother, Akhil Reed Amar, agrees with him.⁶⁰⁶ In addition, Foner has claimed that "the amendment would soon be understood to carry with it the right to hold office."⁶⁰⁷ By contrast, Avins concluded that "neither [the Fourteenth nor the Fifteenth Amendment] was intended to cover the right to hold public office in the states."⁶⁰⁸ Maltz has argued that the Conference Committee's deletion of an explicit right to hold office was done to ensure the Amendment's ratification and therefore the Amendment is limited to the franchise.⁶⁰⁹ And although her primary focus is on women's right to hold office, Elizabeth Katz has claimed that contemporary state law and the history surrounding the Reconstruction Amendments and the Nineteenth Amendment "debunks the common expectation that

604. Amar, *Jury Service*, *supra* note 10, at 234-35.

605. *See id.* at 228-35.

606. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 17, at 400 n.*.

607. FONER, SECOND FOUNDING, *supra* note 1, at 109.

608. Avins, *Office*, *supra* note 10, at 304.

609. *See* MALTZ, CIVIL RIGHTS, *supra* note 10, at 154-56.

suffrage plainly encompasses officeholding.”⁶¹⁰ The officeholding question is the closest and most contested issue addressed in this Article.

With the ongoing Georgia controversy over the expulsion of Black state legislators, the Reconstruction Framers were on notice that Southern States might try to replicate that strategy for maintaining White supremacy. Both before and after the Conference Committee’s deletion of explicit officeholding protections, Republican Senators debated whether such language was necessary, superfluous, or too politically risky.⁶¹¹ During the ratification debate, the predominant focus was on the franchise, but the right to hold office was also discussed, with voices on both sides of the issue. In other words, the Conference Committee’s removal of the phrase “right to hold office” did not end debate on the subject in either Congress or in the States.

Moreover, Georgia’s exclusion from the Forty-First Congress and the Georgia Reorganization Bill rested, in part, on the enforceability of the original fundamental condition, which squarely presented the question of whether “the right to vote” was “deprive[d]” when Georgia expelled Black lawmakers.⁶¹² To the extent one views Congress’s actions as lawful, this militates in favor of a broadly worded political-rights package.⁶¹³

Congress’s decision to modify the fundamental conditions for the last three readmissions and Georgia’s second readmission raises related concerns. On the one hand, it signals Congress’s uncertainty about the scope of the original fundamental conditions and the Fifteenth Amendment. On the other hand, Congress could have wanted to send a message that officeholding was protected while hedging its bets in the event that the Fifteenth Amendment was not successfully adopted.

Beyond these considerations, scholars have underappreciated the distinction between federal and state officeholding. Recall that both Howard and Bingham raised concerns that the inclusion of both “the United States” and “the right to hold office” in the Amendment’s text implied that Congress would be empowered to pass non-racially discriminatory requirements for federal office. But this argument is perplexing. An anti-discrimination rule does not grant novel and broad authority over federal officeholding requirements that never existed before. And as Stewart pointed out, the United States was included in the draft because it governed the territories.

610. Katz, *supra* note 47, at 118.

611. See *supra* notes 363-367, 374-376, 383-391, 410-415 and accompanying text.

612. An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

613. To be sure, one could also defend Congress’s actions vis-à-vis Georgia based on Section Three of the Fourteenth Amendment and as an appropriate response to widespread violence.

Until recently, legal scholars overlooked the disenfranchisement and disqualification of ex-Confederates,⁶¹⁴ and how the two were often but not always linked. Section Three of the Fourteenth Amendment merely disqualified certain ex-Confederates; it did not disenfranchise them. Section Two permitted their disenfranchisement without suffering the apportionment penalty. The First Reconstruction Act allowed States to disenfranchise ex-Confederates and further mandated that anyone disqualified by Section Three of the Fourteenth Amendment could not vote for or be a delegate to the state constitutional conventions. Several States disenfranchised ex-Confederates, and a slightly different subset of States disqualified them too. Just as with the rights of Black men, state and federal law frequently differentiated between the rights of ex-Confederates to vote and hold office.

Turning to racially discriminatory state officeholding requirements, half of the States bootstrapped suffrage to the right to hold office. As a practical matter, the Fifteenth Amendment eliminated racial qualifications for officeholding in eight States that barred Black men from voting and therefore from office.⁶¹⁵ In all but two other States, suffrage and officeholding were decoupled and there were fewer requirements to hold office than to be electors or voters. As such, assuming *arguendo* that the Fifteenth Amendment did not directly reach officeholding, only Iowa and Missouri would have maintained racially discriminatory officeholding requirements.

Of course, this does not fully answer the question of whether States could have enacted *new* racially discriminatory officeholding requirements. But the trend went in the opposite direction. Iowa and Missouri eliminated their racially discriminatory officeholding requirements in 1880 and 1875, respectively.⁶¹⁶

614. Recent scholarship on Section Three of the Fourteenth Amendment and former President Trump's disqualification from office has started to examine the latter topic. See, e.g., William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024); Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1 (2021); GRABER, *supra* note 186; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021).

615. See *supra* note 162. In *Neal v. Delaware*, 103 U.S. 370 (1881), the Supreme Court confronted a similar bootstrapping arrangement involving jury service being linked to suffrage. Once the Fifteenth Amendment eliminated "White" from Delaware's suffrage restrictions, the Court explained, Black men became eligible to be jurors. See *Neal*, 103 U.S. at 389-90.

Three years after the Fifteenth Amendment's ratification, the Nebraska Supreme Court, in *Brittle v. People*, 2 Neb. 198 (1873), held that the fundamental condition included not just the right to vote but also the right to serve on a jury. 2 Neb. at 225. Intriguingly, the Nebraska Supreme Court did not rely on the Fifteenth Amendment in so holding. See *Brittle*, 2 Neb. at 199.

616. See FEDERAL AND STATE CONSTITUTIONS, *supra* note 457, at 1157 (Iowa); MO. CONST. art. IV § 4 (1875).

Tellingly, notwithstanding the Southern States' relentless efforts to subvert the Fifteenth Amendment during Jim Crow, no Southern State reimposed an explicit racial officeholding requirement. This postratification legal landscape provides support for the notion that the officeholding question had been liquidated.⁶¹⁷

In my view, there are three main takeaways about the Fifteenth Amendment and the right to hold office. First, the historical record is susceptible to competing good-faith interpretations. But the historical record is not legal doctrine. Within the so-called construction zone,⁶¹⁸ the modalities of constitutional interpretation can help clarify historical ambiguity and operationalize original understanding into a workable legal test.

Textual ambiguities abound in the Fifteenth Amendment. As this Article demonstrates, whether the "right to vote" encompasses the "right to hold office" was robustly debated during Reconstruction. But, as with the debate over voting qualifications,⁶¹⁹ it is also possible to look at the meaning of the phrase "deny or abridge" for guidance. Just as the Forty-First Congress concluded that Georgia deprived its Black citizens of the right to vote by expelling Black lawmakers from its General Assembly, so too could the phrase "deny or abridge" be read to cover officeholding. One should read these ambiguities in light of the Fifteenth Amendment's "letter" and "spirit"⁶²⁰ to empower Black men to protect their own interests — a goal that would clearly encompass electing Black men to do so.⁶²¹

In addition, the postratification practice looms large. During Reconstruction, over 1,500 Black men held office in the South.⁶²² Furthermore, Black men continued to hold office in the South even after the withdrawal of federal troops in 1877, albeit to a reduced degree.⁶²³ Recall that Iowa and Missouri repealed their explicit bans on Black officeholding after the Fifteenth Amendment's adoption.⁶²⁴

Moving to other modalities of constitutional interpretation, Black politicians have held office across the South and the country following the demise of Jim

617. Cf. FONER, *SECOND FOUNDING*, *supra* note 1, at 109 ("[T]he [Fifteenth] [A]mendment would soon be understood to carry with it the right to hold office.").

618. See *supra* notes 534-537 and accompanying text.

619. See *supra* Section IV.A.

620. Barnett & Bernick, *supra* note 537, at 31.

621. See Crum, *Reconstructing*, *supra* note 10, at 262, 321.

622. See ERIC FONER, *FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION*, at xiii (rev. ed. 1996).

623. See KOUSSER, *supra* note 82, at 19 fig.1.1 (depicting Black officeholders in Southern legislatures from 1868 to 1900).

624. See *supra* note 616 and accompanying text.

Crow.⁶²⁵ From a structural perspective, the Fifteenth Amendment—like the other Reconstruction Amendments—radically altered the federalism balance. The Fifteenth Amendment clearly took away States’ authorities not only to establish federal voting qualifications but also state voting qualifications. Viewed from this perspective, it is a small infringement on state autonomy to also include officeholding requirements in that dramatic change. And today, prudence counsels in favor of finding a right to hold office in the Fifteenth Amendment as no State has a racially discriminatory officeholding requirement. Finally, the American ethos now embodies a commitment to holding political office regardless of the color of one’s skin.

Second, to the extent the original understanding cannot be ascertained, Congress could be viewed as having spoken on this subject in recent decades. In a world with racially polarized voting, the right to hold office can be nullified by gerrymandering. Put differently, just as the Fifteenth Amendment’s protections for the right to vote can be circumvented by grandfather clauses, the right to hold office can be erased by drawing lines on a map. One could view Section 2 of the VRA as helping to safeguard the right to hold office as a practical matter. Although Section 2 does not guarantee a right to proportional representation, it does confer a right to have equally open avenues of electing candidates of choice.⁶²⁶

One last point: Even if the Fifteenth Amendment does *not* apply to officeholding at all, the upshot is that it did not change the federal requirements for office. In other words, Articles I and II set the qualifications to be a Representative, Senator, and President,⁶²⁷ whereas Section Three of the Fourteenth Amendment disqualifies insurrectionists who had previously taken an oath of office. Race is not mentioned in these provisions. Thus, even on a narrow view of the Fifteenth Amendment’s scope, there are no racially discriminatory qualifications for *federal* office.

C. *Reconstructing Democracy*

So far, this Article has excavated the Fifteenth Amendment’s adoption and sought to resolve the historical debate about the Amendment’s original

625. See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1369 fig.4(a) (2016) (showing Black officeholders in state legislatures from 1970 to 2014).

626. This argument will be unpacked more in future work.

627. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that States cannot add qualifications for federal office); see also Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1682-83 (2006) (discussing the debate in the Forty-First Congress over seating the first Black senator and Democrats’ claims that he had not been a citizen for the requisite number of years).

understanding. In this final Section, this Article briefly sketches out a normative takeaway about how the Fifteenth Amendment rejected the original Constitution's theory of democracy. I will return to these themes in future work.

The Fifteenth Amendment transformed our democracy. The original Constitution entrusted States with authority to set voting qualifications for federal elections.⁶²⁸ At the Founding, the ballot was largely limited to property-owning White men.⁶²⁹ Many of the Founders were skeptical of full-fledged democracy and thought that citizens needed to have a sufficient stake in society to be entrusted with the franchise.⁶³⁰ Even at the dawn of Reconstruction, moderate Republicans believed in a hierarchy of rights: citizenship conferred civil rights, but political rights were a privilege reserved for a select few.⁶³¹

Today, the Radical Republicans' belief that "[t]he ballot is . . . the bulwark of liberty"⁶³² is commonplace. The Court has often remarked that the right to vote is "a fundamental political right, because [it is] preservative of all rights."⁶³³ Put simply, citizens will exercise their vote to protect their own interests. Political process theory—which justifies judicial review in situations where politicians have entrenched themselves and seeks to bolster representative democracy by opening up the channels of political change—is premised on a similar insight about the responsiveness of politicians to electoral pressure.⁶³⁴

But this theory of democracy stands in stark contrast to the original Constitution and much of American history. The Fifteenth Amendment, therefore, rejected the Founders' conception of democracy in two distinct ways. First, the Fifteenth Amendment imposed federal baselines for voting qualifications and empowered Congress to protect the right to vote against state interference.⁶³⁵ Like the other Reconstruction Amendments, the Fifteenth Amendment recalibrated the federalism balance. Second, the Fifteenth Amendment flipped the pre-existing hierarchy of rights on its head and embraced a more modern theory of democracy: the right to vote is necessary to protect civil rights. As Pamela

628. See U.S. CONST. art. I, § 2.

629. See KEYSSAR, *supra* note 7, at 21.

630. See WILLIAMSON, *supra* note 50, at 124-27.

631. See BRANDWEIN, *supra* note 64, at 70-71; see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 127 (1988) (explaining that some Radical Republicans refused to distinguish between civil and political rights).

632. CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (remarks by Sen. Ross (R-KS)).

633. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (internal quotation marks omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

634. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980); see also Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 113-14 (arguing that the Roberts Court has rejected political process theory).

635. See Crum, *Superfluous*, *supra* note 5, at 1620-21.

Brandwein has observed: “After the passage of the Fifteenth Amendment, the right to vote began a slow and uneven migration into the category of civil rights.”⁶³⁶

Although the Radicals did not prevail in their broader effort to achieve universal suffrage, their ideology was a motivating factor in the Fifteenth Amendment’s adoption. The Radicals recognized that Black and White people living in the South had divergent interests and voted in racial blocs. The Radicals understood that a South without Black voters was a South with the Black Codes.⁶³⁷ This insight repudiated the original Constitution’s theory of democracy and moved our constitutional system closer to one that acknowledged that the right to vote is preservative of all other rights, rather than just being a privilege for a select few. As Senator Warner aptly explained, citizens “need the ballot for their protection.”⁶³⁸

This rejection of virtual representation accords with the conventional view that the Reconstruction Framers were primarily concerned with expanding the civil rights of Black people and the voting rights of Black men.⁶³⁹ And rightly so. But as this Article highlighted, the rights of other racial groups—specifically, Irish Americans and Chinese immigrants—were part of the debate over the wording and meaning of the Amendment. Thus, as the United States becomes more racially diverse over the twenty-first century, it should be observed that the concerns animating the Fifteenth Amendment were not limited to Black-White race relations in the Southern States.

And to be clear, the Fifteenth Amendment did not usher in a democracy with universal suffrage. Even at the time, the Reconstruction Framers failed to extend

636. BRANDWEIN, *supra* note 64, at 71; *see also* McConnell, *Desegregation*, *supra* note 64, at 1025 (observing that the Reconstruction Framers’ “categorization of rights plays no part in current interpretations of the Fourteenth Amendment”).

637. *See* Crum, *Reconstructing*, *supra* note 10, at 303-04; Amar & Brownstein, *supra* note 10, at 943-44.

638. CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (remarks by Sen. Warner (R-AL)); *see also id.* at 709-10 (remarks by Sen. Pomeroy (R-KS)) (rejecting the theory of virtual representation); *id.* at 983 (remarks by Sen. Ross (R-KS)) (describing the ballot as the “bulwark of liberty”); *id.* at 1629 (remarks by Sen. Stewart (R-NV)) (“The ballot is the mainspring; the ballot is power; the ballot is the dispenser of office.”); *id.* app. at 99 (remarks by Rep. Shellabarger (R-OH)) (“The ballot being both the highest franchise and highest defense of a free-man.”).

639. *See, e.g.,* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023) (Thomas, J., concurring) (“In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves.”); *id.* at 320-26 (Sotomayor, J., dissenting) (canvassing the prominent role of the civil rights of Black people during Reconstruction); The Slaughter-House Cases, 83 U.S. 36, 71 (1872) (noting that the “pervading purpose” of the Reconstruction Amendments included “the freedom of the slave race”).

the right to vote to women notwithstanding popular mobilization in support of that goal. Discriminatory naturalization laws barred Chinese immigrants from becoming citizens and thereby receiving the Fifteenth Amendment's protections. And the subsequent rise of Jim Crow erased many of the Reconstruction Framers' accomplishments in the South. Nevertheless, the Reconstruction Framers' theory of democracy was a decisive break with the past and ultimately became the model for future voting-rights amendments and how we conceptualize the right to vote today.

CONCLUSION

In his comprehensive history of the right to vote throughout American history, Alexander Keyssar remarked: "Why Congress failed to pass a broader version of the Fifteenth Amendment is a question that might well take a book to answer satisfactorily."⁶⁴⁰ Despite its length, this law-review Article is not a book. However, this Article takes the significant step of recovering the Fifteenth Amendment's forgotten history and treating it as an independent constitutional provision.

This Article has shown that the Fifteenth Amendment's original understanding went beyond forbidding facially discriminatory voting qualifications; the Fifteenth Amendment also prohibited the use of racial proxies and, albeit less clearly, protected the right to hold office. In future work, I will demonstrate why this broader conception of the Fifteenth Amendment is critical to safeguarding the constitutionality of the VRA's discriminatory-results standard and its application to redistricting.

640. KEYSSAR, *supra* note 7, at 81.

APPENDIX A

State	Voting Qualifications	State Legislature Officeholding Requirements
<i>Alabama</i>	ALA. CONST. art. VII, § 2 (1868) (limiting “elector[s]” to “male person[s]” who were born in the United States, had been naturalized, or were declarant aliens)	ALA. CONST. art. IV, § 4-5 (1868) (limiting seats in General Assembly to “elector[s]”)
<i>Arkansas</i>	ARK. CONST. art. VIII, § 2 (1868) (limiting “elector[s]” to “male person[s]” who were born in the United States, had been naturalized, or were declarant aliens)	ARK. CONST. art. V, §§ 4, 6 (1868) (indicating that no one may serve in the General Assembly “who shall not be a qualified elector”)
<i>California</i>	CAL. CONST. art. II, § 1 (1849) (limiting the “entitle[ment] to vote” to “white male citizen[s]”)	CAL. CONST. art. IV, § 4 (1849) (“Senators and Members of Assembly shall be duly qualified electors in the respective counties and districts which they represent.”)
<i>Connecticut</i>	CONN. CONST. art. VIII (1845) (limiting “elector[s]” to “white male citizen[s]”)	CONN. CONST. art. III, § 3 (1818) (“The House of Representatives shall consist of electors . . .”)
<i>Delaware</i>	DEL. CONST. art. IV, § 1 (1831) (limiting the “right of an elector” to “free white male citizen[s]”)	DEL. CONST. art. II, § 2 (1831) (“No person shall be a representative who shall not . . . have been a citizen and inhabitant of the State.”)
<i>Florida</i>	FLA. CONST. art. XIV, § 1 (1868) (limiting “elector[s]” to “male” “citizen[s]” and certain inhabitants “of whatever race, color, nationality, or previous condition”)	FLA. CONST. art. IV, § 5 (1868) (“Senators and members of the Assembly shall be duly qualified electors . . .”)
<i>Georgia</i>	GA. CONST. art. II, § 2 (1868) (limiting “elector[s]” to “male person[s]” who were born in the United States, had been naturalized, or were declarant aliens)	GA. CONST. art. III, §§ 2-3 (1868) (indicating that members of General Assembly “shall be citizens of the United States”)
<i>Illinois</i>	ILL. CONST. art. VI, § 1 (1848) (limiting the “entitle[ment] to vote” to “white male citizen[s]” and certain “inhabitants”)	ILL. CONST. art. III, §§ 3-4 (1848) (indicating that members of the General Assembly shall be “citizen[s] of the United States” and “inhabitants of this State”)
<i>Indiana</i>	IND. CONST. art. II, § 2 (1851) (limiting the “entitle[ment] to vote” to “white male citizen[s]”); <i>id.</i> at art. II, § 5 (1851) (“No Negro or Mulatto shall have the right of suffrage.”)	IND. CONST. art. IV, § 7 (1851) (“No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States . . .”)

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State	Voting Qualifications	State Legislature Officeholding Requirements
<i>Iowa</i>	IOWA CONST. art. II, § 1 (1868) (extending the “entitle[ment] to vote” to “male citizens”)	IOWA CONST. art. III, § 4 (1868) (“No person shall be a member of the House of Representatives who shall not . . . be a free white male citizen of the United States.”)
<i>Kansas</i>	KAN. CONST. art. V, § 1 (1859) (limiting “elector[s]” to “white male person[s]”)	KAN. CONST. art. II, § 4 (1859) (“No person shall be a member of the Legislature who is not at the time of his election a qualified voter . . .”)
<i>Kentucky</i>	Ky. Const. art. II, § 8 (1850) (limiting “voter[s]” to “free white male citizen[s]”)	KY. CONST. art. II, §§ 4, 16 (1850) (indicating that no one can serve in legislature who “is not a citizen of the United States”)
<i>Louisiana</i>	LA. CONST. tit. VI, art. 98 (1868) (limiting “elector[s]” to “male person[s] . . . born or naturalized in the United States”)	LA. CONST. tit. 2, art. 18 (1868) (“That no person shall be a representative or senator unless at the time of his election he be a qualified elector.”)
<i>Maine</i>	ME. CONST. art. II, § 1 (1820) (limiting “elector[s]” to “male citizen[s]”)	ME. CONST. art. IV, pt. 1 § 4, pt. 2, § 6 (1820) (indicating that members of the legislature must be “a citizen of the United States”)
<i>Maryland</i>	MD. CONST. art. I, § 1 (1867) (limiting the “entitle[ment] to vote” to “free white male citizen[s]”)	MD. CONST. art. III, § 9 (1867) (“No person shall be eligible as a Senator or Delegate, who at the time of his election is not a citizen of the State of Maryland . . .”)
<i>Massachusetts</i>	MASS. CONST. amend. art. III (1780) (limiting the “right to vote” to “male citizen[s]”)	MASS. CONST. pt. II, ch. I, § 2, art. V (1780) (“[N]o person shall be capable of being elected as a senator . . . who has not been an inhabitant of this commonwealth for the space of five years.”)
<i>Michigan</i>	MICH. CONST. art. VII, § 1 (1850) (limiting “elector[s]” “entitled to vote” to “white male citizen[s],” certain “white male inhabitant[s]” and “civilized male inhabitant[s] of Indian descent, a native of the United States and not a member of any tribe”)	MICH. CONST. art. IV, § 5 (1850) (“Senators and Representatives shall be citizens of the United States, and qualified electors.”)

State	Voting Qualifications	State Legislature Officeholding Requirements
<i>Minnesota</i>	MINN. CONST. art. VII, § 1 (1868) (limiting the “entitle[ment] to vote” to “male person[s]” who were U.S. citizens, declarant aliens, “[p]ersons of mixed white and Indian blood who have adopted the customs and habits of civilization” and “[p]ersons of Indian blood . . . who have adopted the language, customs and habits of civilization . . . and shall have been pronounced by said Court capable of enjoying the rights of citizenship”)	MINN. CONST. art. IV, § 25 (1868) (“Senators and Representatives shall be qualified voters of the State.”)
<i>Mississippi</i>	MISS. CONST. art. VII, § 2 (1868) (limiting “elector[s]” to “male” “citizens”)	MISS. CONST. art. 7, § 4 (1868) (“No person shall be eligible to any office of profit or trust, or to any office in the militia of this State, who is not a qualified elector.”)
<i>Missouri</i>	MO. CONST. art. II, § 18 (1865) (limiting the “entitle[ment] to vote” to “white male citizen[s]” and declarant aliens)	MO. CONST. art. IV, §§ 3, 5 (1865) (indicating that members of the state legislature must be “white male citizen[s] of the United States”)
<i>Nebraska</i>	Act for Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867) (“[N]o denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.”); NEB. CONST. art. II, § 2 (1867) (limiting “elector[s]” to “White citizen[s]” and declarant aliens).	NEB. CONST. art. II, § 8 (1867) (“No person shall be eligible to the office of Senator, or member of the House of Representatives, who shall not be an elector.”)
<i>Nevada</i>	NEV. CONST. art. II, § 1 (1864) (limiting the “entitle[ment] to vote” to “white male citizen[s]”)	NEV. CONST. art. IV, § 5 (1864) (“Senators and members of the Assembly shall be duly qualified electors . . .”)
<i>New Hampshire</i>	N.H. CONST. pt. II, art. 28 (1784) (limiting “right . . . to vote” to “male inhabitant[s]”);	N.H. CONST. pt. II, art. 14, 29 (1784) (indicating that representatives and senators “shall have been an inhabitant of this state” for specified time)
<i>New Jersey</i>	N.J. CONST. art. II, § 1 (1844) (limiting the “entitle[ment] to vote” to “white male citizen[s]”)	N.J. CONST. art. IV, § 2 (1844) (“[N]o person shall be eligible as a member of either house of the legislature, who shall not be entitled to the right of suffrage.”)

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State	Voting Qualifications	State Legislature Officeholding Requirements
<i>New York</i>	N.Y. CONST. art. II, § 1 (1846) (limiting the “entitle[ment] to vote” to “male citizen[s]” and further requiring that “m[e]n of color . . . shall have been for three years a citizen of this state, and for one year next proceeding any election shall have been seized and possessed of a freehold estate of the value of [\$250] . . . and shall have been actually rated and paid a tax thereon”)	N.Y. CONST. art. III (1846) (listing no citizenship or elector requirement for the state legislature)
<i>North Carolina</i>	N.C. CONST. art. VI, § 1 (1868) (limiting “elector[s]” to “male person[s] born in the United States . . . [or] naturalized”)	N.C. CONST. art. II, § 10 (1868) (“Each member of the House of Representatives shall be a qualified elector of the State . . .”)
<i>Ohio</i>	OHIO CONST. art. V, § 1 (1851) (limiting “elector[s]” to “white male citizen[s]”)	OHIO CONST. art. XV, § 4 (1851) (“No person shall be elected or appointed to any office in this state, unless he possesses the qualification of an elector.”)
<i>Oregon</i>	OR. CONST. art. II, § 2 (1857) (limiting the “entitle[ment] to vote” to “white male citizen[s]” and certain inhabitants); <i>id.</i> art. II, § 6 (“No negro, Chinaman, or mulatto shall have the right of suffrage”).	OR. CONST. art. IV, § 8 (1857) (“No person shall be a Senator, or Representative who, at the time of his election, is not a citizen of the United States . . .”)
<i>Pennsylvania</i>	PA. CONST. art. III, § 1 (1838) (limiting “elector[s]” to “white freem[e]n”)	PA. CONST. art. I, §§ 3, 8 (1838) (no one may serve in the legislature who is not “a citizen and inhabitant of the State”)
<i>Rhode Island</i>	R.I. CONST. art. II, § 1-2 (1842) (limiting the “right to vote” to male “citizen[s]” and exempting “native born citizen[s]” from \$134 property qualification)	R.I. CONST. art. IX, § 1 (1842) (“No person shall be eligible to any civil office . . . unless he be a qualified elector for such office.”)
<i>South Carolina</i>	S.C. CONST. art. VIII, § 2 (1868) (limiting the “entitle[ment] to vote” to “male citizen[s] . . . without distinction of race, color, or former condition”)	S.C. CONST. art. XIV, § 1 (1868) (“No person shall be elected or appointed to any officer in this State, unless he possess the qualifications of an elector . . .”)

State	Voting Qualifications	State Legislature Officeholding Requirements
<i>Tennessee</i>	TENN. CONST. art. IV, § 1 (1834) (indicating that “entitle[ment] to vote” was limited to “free white m[e]n” who were “citizen[s]”); <i>State v. Staten</i> , 46 Tenn. 233, 241 (1869) (following readmission to the Union, the state legislature struck the word “white” from the requirements to register and vote)	TENN. CONST. art. 2, §§ 9, 10 (1834) (indicating that no one may serve in the legislature unless “he shall be a citizen of the United States”)
<i>Texas</i>	TEX. CONST. art. VI, § 1 (1869) (limiting the “entitle[ment] to vote” to “male citizens[s] . . . without distinction of race, color, or former condition”)	TEX. CONST. art. III, § 14 (1869) (“No person shall be eligible to any office, State, county or municipal, who is not a registered voter in the State.”)
<i>Vermont</i>	VT. CONST. ch. I, art. 8 (1793) (limiting the “right to elect” to “freemen”)	VT. CONST. ch. II, § 18 (1793) (“No person shall be elected a Representative, until he has resided two years in this State.”)
<i>Virginia</i>	VA. CONST. art. III, § 1 (1870) (limiting the “entitle[ment] to vote” to “male citizen[s]”)	VA. CONST. art. 5, § 5 (1870) (indicating that no one may serve in General Assembly unless “qualified to vote for members of the general assembly”)
<i>West Virginia</i>	W. VA CONST. art. III, § 1 (1863) (limiting the “entitle[ment] to vote” to “white male citizens”)	W. VA. CONST. art. III, § 4 (1863) (“No persons, except citizens entitled to vote, shall be elected or appointed to any State, county or municipal office.”)
<i>Wisconsin</i>	Gillespie v. Palmer, 20 Wis. 544, 557 (1866) (referenda approving the state legislature’s “conferr[al of] the right of suffrage on male colored inhabitants” was valid)	WIS. CONST. art. 4, § 6 (1848) (“No person shall be eligible to the Legislature, who shall not . . . be a qualified elector in the district in which he may be chosen to represent.”)

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
1/29	House	726	Boutwell (R-MA)	The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States.	Modified	No record
1/29	House	728	Boutwell (R-MA)	The right of any citizen of the United States to vote at any election in the State in which he shall have actually resided for a period of one year next preceding said election shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens in the United States, <i>nor shall educational attainments or the possession or ownership of property ever be made a test of the right of any citizen to vote.</i>	Failed	45-95
1/30	House	744	Shellabarger (R-OH)	No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have his actual residence, such right to vote to be under such regulations as shall be prescribed by law, except to such as have engaged, or may hereafter engage, insurrection or rebellion against the United States, and to such as shall be duly convicted of infamous crime.	Failed	61-126-35

Note: Appendix B focuses only on Section One of the Fifteenth Amendment. Italicized language indicates new language that was being voted on, and the strikethroughs indicates language that was being deleted. Bolded rows indicate votes where an iteration of the Fifteenth Amendment passed one of the houses of Congress.

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
1/30	House	722, 744	Bingham (R-OH)	No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of sound mind and twenty-one years of age or upward the equal exercise of the elective franchise at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, subject to such registration laws and laws prescribing local residence as the State may enact, except such of said citizens as shall engage in rebellion or insurrection, or who may have been, or shall be, duly convicted of treason or other infamous crime.	Failed	24-160-38
1/30	House	726, 745	Boutwell (R-MA)	The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States.	Passed by 2/3rds vote	150-42-31
2/8	Senate	899, 999	Williams (R-OR)	Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State.	Failed	6-38
2/8	Senate	999, 1008	Drake (R-MO)	No citizen of the United States shall, on account of his race, color, or previous condition of servitude, be by the United States or any State denied the right to vote or to hold office.	Failed	No record
2/8	Senate	1008, 1012	Howard (R-MI)	Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other citizens, electors of the most numerous branch of their respective Legislatures.	Failed	16-35

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/8	Senate	1012-13	Warner (R-AL)	The right of citizens of the United States to hold office shall not be denied or abridged by the United States or any State on account of property, race, color, or previous condition of servitude; and every male citizen of the United States of the age of twenty-one years, or over, and who is of sound mind, shall have an equal vote at all elections in the State in which he shall have actually resided for a period of one year next preceding such election, except such as may hereinafter engage in insurrection or rebellion against the United States, and such as shall be duly convicted of treason, felony, or other infamous crimes.	Failed	No record
2/9	Senate	1014, 1029	Wilson (R-MA)	There shall be no discrimination in any State among the citizens of the United States in the exercise of the elective franchise in any election therein, or in the qualifications of office in any State, on account of race, color, nativity, property, education, or religious belief.	Failed	19-24
2/9	Senate	1029	Sawyer (R-SC)	The right to vote and hold office in the United States and the several States and Territories shall belong to all male citizens of the United States who are twenty-one years old, and who have not been or shall not be duly convicted of treason or other infamous crime: <i>Provided</i> , That nothing herein contained shall deprive the several States of the right to make such registration laws as shall be deemed necessary to guard the purity of elections and to fix the terms of residence which shall precede the exercise of the right to vote: <i>And provided</i> , That the United States and the several States shall have the right to fix the age and other qualifications for office under their respective jurisdictions, which said registration laws, terms of residence, age, and other qualifications shall be uniformly applicable to all male citizens of the United States.	Failed	No record

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/9	Senate	1029	Henderson (R-MO)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude. <i>Nor shall such right to vote after the 1st day of January, 1872, be denied or abridged for offenses now committed, unless the party to be affected shall have been duly convicted thereof.</i>	Failed	No record
2/9	Senate	1029	Fowler (R-TN)	All the male citizens of the United States residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside; the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion or insurrection, or shall be duly convicted of treason or other infamous crime.	Failed	9-35-22
2/9	Senate	1029	Conness (R-CA)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or <i>nor</i> by any State on account of race, color, or previous condition of servitude.	Modified	No record
2/9	Senate	1029	Vickers (D-MD)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude. <i>Nor shall the right to vote be denied or abridged because of participation in the recent rebellion.</i>	Failed	21-32-13

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/9	Senate	1030	Bayard (D-DE)	The right of citizens of the United States to vote <i>for electors of President and Vice President and members of the House of Representatives of the United States</i> , and hold office under the United States, shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude.	Failed	12-42
2/9	Senate	1035- 36	Corbett (R-OR)	No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or creed. <i>But Chinamen not born in the United States and Indians not taxed shall not be deemed or made citizens.</i>	Failed	No record
2/9	Senate	1035, 1040	Wilson (R-MA)	No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed.	Passed	31-27
2/9	Senate	1040	Buckalew (D-PA)	That the foregoing amendment shall be submitted for ratification to the Legislatures of the several States the most numerous branches of which shall be chosen next after the passage of this resolution.	Failed	13-43
2/9	Senate	1041	Dixon (D-CT)	That the following article be proposed to conventions in the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said conventions, shall be held a part of said Constitution.	Failed	11-45

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/9	Senate	1040- 41	Buckalew (D-PA) and Morton (R-IN)	The second clause, first section, article two of the Constitution of the United States shall be amended to read as follows: each State shall appoint, <i>by a vote of the people thereof qualified to vote for Representatives in Congress</i> , a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust and profit under the United States, shall be appointed an elector; <i>and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people.</i>	Failed	27-29
2/9	Senate	1041	Sumner (R-MA)	Sumner's Suffrage Statute (not a constitutional amendment)	Failed	9-47-10
2/9	Senate	1041	Warner (R-AL)	No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind and over twenty-one years of age, the equal exercise of the elective franchise at all elections in the State wherein he shall have such actual residence as shall be prescribed by law, except to such of said citizens as have engaged or shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law; nor shall the right to hold office be denied or abridged on account of race, color, nativity, property, religious belief, or previous condition of servitude.	Failed	5-47-14

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/9	Senate	1042	Buckalew (D-PA) and Morton (R-IN)	The second clause, first section, second article of the Constitution of the United States shall be amended to read as follows: each State shall appoint, <i>by a vote of the people thereof qualified to vote for Representatives in Congress</i> , a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust and profit under the United States, shall be appointed an elector; <i>and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people.</i>	Modified	37-19-10
2/9	Senate	1044	Wilson (R-MA)	No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed. [Plus Buckalew/Morton's Electoral College Reform]	Passed by 2/3rds vote	39-16-11
2/15	House	1226	Senate Version	No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed.	Failed	37-133-52
2/15	House	1226	Senate Version	Buckalew and Morton's Electoral College Reform	Failed	No record
2/15	House	1226	Boutwell (R-MA)	Request for Conference Committee	Passed	No record
2/17	Senate	1295	First Senate Version	Motion to Recede from Prior Senate Version	Passed	33-24-9

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/17	Senate	1300	House Version	The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States.	Failed to cross 2/3rds threshold	31-27-8
2/17	Senate	1300	Stewart (R-NV)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or <i>by</i> any State on account of race, color, or previous condition of servitude.	Passed	No vote
2/17	Senate	1302, 1304	Drake (R-MO)	No citizen of the United States shall, on account of race, color, or previous condition of servitude, be by the United States or any state denied the right to vote or hold office.	Failed	No record
2/17	Senate	1304	Bayard (D-DE)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Failed	6-29-31
2/17	Senate	1304- 05	Howard (R-MI)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Failed	18-22-26
2/17	Senate	1305	Doolittle (R-WI)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; <i>nor shall any citizen be so denied by reason of any alleged crime, unless duly convicted thereof by the verdict of an impartial jury.</i>	Failed	13-30-23
2/17	Senate	1306	Fowler (R-TN)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Failed	5-30-31

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/17	Senate	1311	Howard (R-MI)	Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other electors.	Failed	22-27-17
2/17	Senate	1314	Henricks (D-IN)	That the foregoing amendment shall be submitted for ratification to the Legislatures of the several States the most numerous branches of which shall be chosen next after the passage of this resolution.	Failed	12-40-14
2/17	Senate	1314-15	Dixon (D-CT)	The following article be proposed to the Legislatures <i>conventions</i> of the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said Legislatures <i>Legislatures conventions</i> , shall be valid as part of the Constitution.	Failed	10-39-17
2/17	Senate	1315-18	Davis (D-KY)	Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other electors.	Failed	16-29-21
2/17	Senate	1318	Vickers (D-MD)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. <i>No citizen of the United States shall be deprived of the right of suffrage by any State by reason of having participated in the late insurrection against the United States, and who has not been convicted of or indicted for treason against the United States, but that such person before being entitled to vote shall make oath or affirmation to support the Constitution of the United States and all laws made in pursuance thereof.</i>	Failed	No roll call

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/17	Senate	1318	Stewart (R-NV)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Passed by 2/3rds vote	35-11-20
2/20	House	1428	Logan (R-IL)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Failed	70-95-57
2/20	House	1428	Bingham (R-OH)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, <i>nativity, property, creed</i> , or previous condition of servitude.	Modified	92-70-60
2/20	House	1428	Bingham (R-OH)	The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, <i>nativity, property, creed</i> , or previous condition of servitude.	Passed by 2/3rds vote	140-37-46
2/23	House	1470	Boutwell (R-MA)	Request for Conference Committee	Passed	117-37-68
2/23	Senate	1481	Stewart (R-NV)	Request for Conference Committee	Passed	32-17-17

Date	Chamber	CONG. GLOBE Page	Sponsor	Text	Result	Vote (yes-no or yes-no-absent)
2/25	House	1563- 64	Boutwell (R-MA)	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.	Passed by 2/3rds vote	145-44-35
2/26	Senate	1641	Stewart (R-NV)	The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.	Passed by 2/3rds vote	39-13-14