The Fourteenth Amendment's Initial Authority Based on Article V Processes: Thresholds and Partiality[*]

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The Fourteenth Amendment has been among the most transformative and controversial parts of the U.S. Constitution. Although contestation involving this amendment has primarily revolved around the U.S. Supreme Court's interpretation and enforcement of Section 1's limits on the states,[1] there has also been recurring concern about the amendment's validity.[2] Since the late-1980s, Bruce Ackerman has brought these issues of validity into the mainstream of constitutional scholarship.[3] But he has treated the amendment's validity as largely independent from contestation over problems of meaning. In addition, he has argued that even though this textual addition was (and remains) invalid based on the criteria for constitutional amending set forth in Article V of the Constitution, it nevertheless became fully valid as part of the Constitution during the reconstruction era based on processes of constitutional amending that were authoritative independently of Article V.[4]

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[1] Cite, e.g., Brandwein. Also refer to controversy, secondarily, about the scope of powers delegated to Congress by Section 5 (including WHO may interpret Section 1's limits for various purposes, and HOW they may do so).

[2] See Wayne D. Moore, "The Fourteenth Amendment's Initial Authority: Problems of Constitutional Coherence," *Temple Political & Civil Rights Law Review*, vol. 13 (2004), 515-45, esp. at 519-21 incl. the works cited at nn. 8-16.

[3] Cite Ackerman, "Constitutional Politics/Constitutional Law," Yale Law Journal (1989); We the People, 3 vols., cite.

[4] Cite Ack and explain his treatment of 14th amdt re Article V and his originalist premises.

I am not convinced that the Fourteenth Amendment was entirely invalid and unauthoritative based on Article V or that Ackerman has provided a satisfactory account of the amendment's initial and subsequent authority based on other relevant criteria. Instead of presuming that the only interesting and important questions are *whether or not* the Fourteenth Amendment and other parts of the Constitution were initially or subsequently valid, I seek to account for the variability and thus potential partiality of constitutional authority.[5] In addition, instead of relying only on one criterion to assess the authority of the Fourteenth Amendment, I seek to account for the authority of this text and other parts of the U.S. Constitution across multiple dimensions. Thus I seek to develop a multi-dimensional model of variable constitutional authority.

In prior work, I have relied on James Madison's arguments in *The Federalist* to identify five sets of criteria relevant to analysis of the U.S. Constitution's initial authority. Those criteria are:

(1F) the Articles of Confederation and other antecedent constitutional norms;

(2F) processes of formal constitutional ratification involving "the people" and those acting on their behalf;

(3F) principles of republican governance;

(4F) the Constitution's instantiation of the people's foundational political commitments; and

(5F) the people's affirmation of constitutional norms outside the channels of formal

[5] Throughout this paper, I shift between references to the Fourteenth Amendment's "validity," "legitimacy," and "authority." I use the first two terms primarily to refer to legal validity or legitimacy, which I regard as explicitly or implicitly involving claims of legal authority or authoritativeness. I also use the term "authority" more broadly to include extra-legal and non-legal authority which, when linked to principles of popular sovereignty, trace to the people's foundational political authority. For a fuller treatment of the concept of constitutional "authority" and its relationships to constitutional "validity" and "legitimacy," see Moore (2013).

ratification.[6]

Each of these criteria distinctively links the Constitution's authority to that of the purportedly sovereign "people." Madison drew on them to support categorical claims that the Constitution would be authoritative upon its approval in the manner contemplated by Article VII. But versions of each of these criteria equally support analysis of ways that the U.S. Constitution would have partial – or incomplete – authority based on principles and practices of popular sovereignty. In addition, together they support analysis of the Constitution's authority across multiple dimensions, not only one.[7]

Because of differences between the U.S. Constitution's founding and formal amending, it is necessary to adapt or modify some these criteria to address the Fourteenth Amendment's initial authority. Paralleling the criteria for constitutional amending set forth in the Articles of Confederation (conceived as antecedent constitutional norms) that were pertinent to analysis of the original U.S. Constitution's derivative authority, we may view the amending provisions in Article V of the Constitution as standards for assessing the derivative authority of amendments to that Constitution.[8] It also makes sense to regard those processes as vehicles through which representatives acting on behalf of "the people" may amend the Constitution in ways that parallel the modes of formal ratification set forth in Article VII. Thus Article V's criteria combine

[6] See APT (2013) and Handbook (forthcoming 2015). I am re-naming the criteria here to facilitate distinguishing them from those I use to analyze the Fourteenth Amendment's initial authority.

[7] See APT (2013) and Handbook (2015). I am not presuming or claiming these are the only relevant criteria for assessing the Con's auth or that of constitutional amendments. Also not claiming that subseq auth is entirely a function of initial auth. Nor is my focus only on the Con's auth as law – or on its relevance only to judl interp and enforcement. See APT for a treatment of some of these issues.

[8] Plus, many of the criteria for analyzing the Constitution's founding and amending may be conceived as antecedent norms. This is one among numerous ways that the criteria overlap.

elements of what I have identified as Madison's first and second criteria.

In addition to analyzing (1A) the Fourteenth Amendment's initial authority based on Article V, I initially planned to analyze in this paper that amendment's initial authority based on four additional sets of criteria:

> (2A) processes of formal constitutional amending, beyond those set forth in Article V, involving "the people" and those acting on their behalf;
>
> (3A) principles of republican governance;
>
> (4A) the amendment's instantiation of the people's foundational political commitments; and
>
> (5A) the people's affirmation of the amendment outside formal processes of constitutional amending.[9]

The second of these criteria (2A) is also a branch of Madison's second criterion (2F) for analyzing the Constitution's initial authority. Versions of Madison's third, fourth, and fifth criteria (3F, 4F, and 5F) apply relatively straightforwardly to the addition of formal amendments to the U.S. Constitution (as criteria 3A, 4A, and 5A, respectively).

Reliance on all five of these criteria would support a relatively robust, multi-dimensional understanding of the Fourteenth Amendment's initial authority. Among other things, such an approach would facilitate linking problems with the Fourteenth Amendment's initial authority to problems with the original Constitution's initial and subsequent authority. It would also contribute to linking the amendment's procedural pedigree to issues of substance that are equally pertinent to analyzing problems of constitutional authority. Going further, it would also provide bridges for exploring connections between processes of constitutional amending and processes of

[9] Part III of this paper provides a brief overview of the potential relevance of these four criteria to analysis of the Fourteenth Amendment' initial (and subsequent) authority.

constitutional interpretation, in each case taking into account the contributions of multiple political actors as with the normative and practical significance of political contestation. Instead of supporting a view that the Constitution's founding and formal amending have produced legally and politically decisive settlements, this approach may support a view of constitutional authority as incomplete across multiple dimensions. In other words, it would contribute to analyzing relationships among initial and subsequent authority and meaning involving the Fourteenth Amendment and the rest of the Constitution.

This paper does not go that far. It addresses almost exclusively the Fourteenth Amendment's initial authority based on (1A) the processes of constitutional amending set forth in Article V of the U.S. Constitution. Part I explores controversy over whether or not the Fourteenth Amendment was valid based on Article V's criteria. Part II offers a perspective toward the Fourteenth Amendment as having partial (or incomplete) authority based those processes. Part III indicates that this analysis, in turn, offers only a partial (or incomplete) account of the Fourteenth Amendment's initial authority and outlines how further analysis of problems of constitutional authority across other dimensions may proceed.

I. Article V Processes: Denominators, Numerators, and Thresholds

The processes involving the Fourteenth Amendment's addition to the U.S. Constitution were highly irregular, to the extent that no other formal amendment has such a problematic procedural pedigree based on Article V.[10] From the outset, the amendment's critics mounted serious criticisms of the processes involving its proposal and eventual ratification. The amendment's proponents, in turn, provided sophisticated defenses of those processes. Versions

[10] I do not take up here whether any other part/s of the Constitution, beyond the original text and formal

of the competing arguments have resurfaced from time to time; and how to account for the amendment's initial and ongoing legal validity and authority remain important and contested problems of constitutional history, law, politics, and theory.

Criticism of the Fourteenth Amendment's procedural pedigree based on Article V has focused on irregularities at both the proposal and ratification stages. The 39th Congress's exclusion of southern representatives from the House, along with the Senate, was relevant at the former stage. The amendment's critics have argued that the body that proposed it, on account of these exclusions, was not itself legitimate. Stated baldly, the amendment was proposed by "a rump" -- not a "Congress" as contemplated by Article V. Relatedly, the amendment was not approved by two-thirds of both houses of "Congress," if one counts representatives from the excluded southern states within the respective denominators. The Senate had also irregularly unseated John Stockton of New Jersey, apparently in part to ensure two-thirds approval of the constitutional amendment as required by Article V.[11]

At issue, among other things, were: first, whether it had been proper for the Republican leadership to refuse admission to the southern claimants in December of 1865 at the opening of the 39th Congress (and also subsequently to unseated John Stockton after previously seating him); second and relatedly, whether it had been permissible for that Congress to propose a constitutional amendment while eleven of the formerly rebellious states remained unrepresented; and, under these and other circumstances, whether approval of the proposed Fourteenth

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amendments, has/have a more problematic procedural pedigree/s.

[11]With Stockton's exclusion, the Republicans had a bare 2/3 majority, assuming every Senator seated. In actuality, however, five Senators were absent on 6/8/66, when the Senate voted 33:11 in favor of the proposed Fourteenth Amendment. The 2/3 Republican control of the Senate was also signif to ensure the potential to override a presidential veto of legislation.

Amendment by members of the U.S. House and Senate had satisfied Article V's proposing threshold. President Johnson, his supports, and prominent Democrats from the North and South argued: first, the southern claimants had been duly chosen and had been entitled to representation within the 39th Congress (in which case a central feature of the antebellum constitutional order would have been restored following the end of the war); second, that it had not been permissible for Congress to propose an amendment with eleven states absent (even if it might have been permissible, before the end of the war, for the prior Congress to propose the Thirteenth Amendment); the circumstances surrounding the Fourteenth Amendment's proposal had otherwise been irregular; and thus the Fourteenth Amendment was not approved in a manner satisfying Article V's initial necessary condition for constitutional amending.[12] Leading Republicans replied: first, that it had been permissible for both houses of Congress to exclude representatives from the southern states (in part because they were not sufficiently "republican" on account of their disqualification of black males from voting); second, it had likewise been permissible for the Senate to refuse admission to John Stockton; third, the 39th Congress had been properly constituted and was fully capable of proposing constitutional amendments; and fourth, the Fourteenth Amendment had been duly approved by two-thirds of the eligible voting members of both houses of Congress, thereby satisfying Article V's proposing threshold.[13] Commentators from the reconstruction era through contemporary times have embraced versions of these respective positions.[14]

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[12]see McD and Call and below for numbers and percentages. also for expl of irregularities incl exclusion of Stockton.

[13]cites. indicate that details of voting outcome are explained below.

[14]incl ack, amar, others, etc.

There were distinct but related issues at the ratification stage. As had been the case with the Thirteenth Amendment, Congress sent the proposed Fourteenth Amendment to representatives of all thirty-six states in the union, including the eleven southern states excluded from representation in Congress. The apparent premise was that it was proper (and perhaps necessary) for the formerly rebellious states to participate at the ratification stage even though they had not been represented in the proposing Congress. Although they had ratified the proposed Thirteenth Amendment, the legislatures representing all of the southern states except Tennessee refused to ratify the proposed Fourteenth Amendment. Unless they reversed course, and assuming they counted in the ratification denominator, the ten remaining states had effectively vetoed the proposal.[15]

Not willing to accept that outcome, Congress in 1867 resorted to military reconstruction. In addition to providing for continued military rule of the South and disenfranchising former Confederate leaders, Congress required the southern states: (1) to extend the franchise to black males, (2) to amend their state constitutions to guarantee that right as a matter of state law, and (3) to elect new state legislatures and members of Congress. Only upon (4) the Fourteenth Amendment's approval by the respective states' new legislatures would their representatives be readmitted to Congress. By July 16, 1868, new legislatures representing six of the southern states had ratified the proposed amendment and been readmitted to representation within Congress. On the other hand, the legislatures of New Jersey and Ohio, the control of which had shifted in 1867 to Democrats, had attempted in January and March of 1868 to rescind their

[15]with 36 states in the Union (37 upon the admission of Nebraska in 1867), approval by 27 (28 after 1867) was necessary to satisfy Article V's threshold of approval by three-fourths of the states.

respective prior ratifications.[16]

Taking into account these developments, Secretary of State William Seward issued a conditional certification of the Fourteenth Amendment on July 20, 1868, equivocating as to whether the proposal had been ratified by a sufficient number of states. Congress responded by passing a concurrent resolution on July 21 declaring the amendment "a part of the Constitution" and instructing the Secretary of State to promulgate it as such. Seward promptly complied by issuing a second certification on July 28, 1868, declaring the amendment valid.[17] He treated the ratifications following initial rejections as effective but the efforts to rescind prior ratifications as ineffective.

There have been serious arguments that these processes did not qualify as "ratification" of the proposed amendment by the legislatures of three-fourths of the states as contemplated by Article V.[18] The leading critiques included the following arguments. First, the presidentially reconstructed southern state legislatures were valid; and it was within their constitutional prerogative to refuse to ratify the proposed amendment. Second, military reconstruction (including its extension of the franchise to black men) was invalid, and the resulting congressionally reconstructed state legislatures did not properly represent the people of their respective states (especially considering that many adult white male citizens had been disqualified by Congress from participating in processes of congressional reconstruction). Third, the rump Congress impermissibly coerced the rump state legislatures to ratify the proposed

[16]Jan 15 (OH) and March 24 (NJ). See McElwee.

[17]See *United States Statutes at Large*, Vol. 15 (1869), pp. 706-11.

[18]Check: Did SOn states act to reject; or did they more simply not act. If former, decisive rejection? If latter, left the door open for subseq ratif?

amendment in a manner at odds with Article V's premise of state legislative autonomy in the ratification processes. Versions of these arguments were pressed during the reconstruction era and have found support from time to time since then. Going further, over the past thirty years Bruce Ackerman has expanded upon versions of these critiques and elevated them to prominence within mainstream constitutional scholarship.[19]

Those defending the Fourteenth Amendment as valid based on Article V have countered these critiques as follows. First, even if the presidentially reconstructed state legislatures had legitimately represented the states for purposes of *ratifying* the *Thirteenth Amendment*, Congress was not obliged to treat their *rejections* of the proposed *Fourteenth Amendment* as final. Second, military reconstruction was a valid means of restoring the union, including through ensuring that southern states would satisfy (or more fully satisfy) standards of "republican" governance. Third, approvals of the proposed amendment by the congressionally reconstructed state legislators were not coerced. On the contrary, those legislatures voluntarily and effectively represented the entire "people" of their respective states (including black persons), in the process contributing to satisfaction of Article V's ratification threshold. It was within Congress' prerogative, moreover, to decide when and how that threshold had been satisfied; and courts (including the U.S. Supreme Court) subsequently accepted that determination as final.[20] Fourth, even if the Fourteenth Amendment was irregularly passed, the mode of its addition to the

[19]cites. also args that states could effectively withdraw prior approvals? and issues of pol power: NOn and SOn Dems hoped upon readmission to regain control over natl instits. These hopes/expectations were threatened by 14th amdt, esp. sec. 2.

[20] See Coleman v. Miller.

Constitution was justified by political and moral imperatives of the time.[21]

What is one to make of the opposing arguments? A conventional move is to assume, as a matter of constitutional logic or political morality, that one side or the other must have been correct, defensible, or otherwise privileged. Political practices either satisfied Article V's requirements or they did not. Similarly, one may treat only predominant or victorious positions as normatively and/or practically significant. These forms of inquiry typically focus on what positions, among the mutually exclusive options, were correct or significant.

There have been good reasons for this type of categorical analysis. Among other things, the text of Article V has supported treating the options as dichotomous: Either political practices satisfied its thresholds, or they did not. Either particular text has been both proposed and ratified in accordance with its requirements, or it has not. That text either has become "valid to all intents and purposes, as part of the Constitution," or it has not.

Despite the historical and potentially ongoing legal and political significance of these issues, my aims here do not include advocating for one position or another on whether the Fourteenth Amendment was initially valid based on the criteria of Article V. But I will provide a close account of an aspect of the political history of central relevance to this issue: the official votes at both the proposing and ratification stages. I have three main reasons for doing so. First, to underscore the importance of the southern states' exclusion from the denominator at the proposing stage and their inclusion in the numerator at the ratification stage. Second, to provide

[21]alt: w/in prerog of Cong along with Sec of State. fall-back pos: ratif by states repd in Congress was sufficient. also issues of pol power: Rep's were concerned that they might lose control over natl instits upon readmission of SO. Among the initial aims of the Fourteenth Amendment was to reduce that chance (esp through sec. 2's change in rules of apportionment) and to embed constitutional guarantees that would be less vulnerable to reversal than ordinary legislation should Dems regain control over natl instits).

some of the historical details relevant to analysis of issues of variable authority based on Article V. Third, to frame consideration of the amendment's authority across other criteria.

A. The Proposing Stage

Table 1 shows the official voting results in the U.S. House and Senate at the proposing stage, along with several projected alternatives.[22] The actual vote in the House as reported in the *Congressional Globe* was 120 in favor, 32 against, and 32 not voting. The *Globe* also reports that a number of representatives were paired with one another on the resolution while also indicating how several representatives commented on how various absent members (including the excluded southern representatives and even Jefferson Davis!) would have voted if present.[23] In any event, 78.9% of those reportedly voting (120/152) approved the proposed Fourteenth Amendment, well above Article V's two-thirds threshold. But if one counts in the denominator the full admitted membership of the House, the denominator becomes 184; and the percentage of that number voting in favor of the proposed amendment drops to 65.2% (120/184). Significantly, that percentage is just below Article V's two-thirds threshold. This calculation underscores the significance of whether or not to include non-voting members in the denominator for purposes of ascertaining whether or not political practices have satisfied Article

[22] I have included Table 1 following the main text of this paper. I have also included copies from the accounts of the votes in the House and Senate, as officially reported in the *Congressional Globe* and as separately reported by Edward McPherson in his 1866 *Political Manual* and *Political History of Reconstruction* (as explained below).

[23] Roll calls were not taken at that time. Those not voting in the Senate were reported as "absent." But we cannot be certain which members of the House were absent, other than those identified as absent by their colleagues. Pairing was a means of reducing the significance of absences. For example, two Republicans were paired with one Democrat. But some of the pairing seems to have been 1:1, which would have affected the voting percentages.

V's threshold.[24]

There were parallel results and issues in the Senate. The *Congressional Globe* reports 33 votes in favor of the proposed amendment, 11 against, and 5 absent. Thus 75 percent of the senators who voted (33/44) approved the proposal, again well above Article V's threshold. If one counts the five absent members in the denominator, the percentage drops to 67.3% (33/49), just *above* two-thirds. However, if one also includes Stockton in the denominator while assuming that he would have voted against the proposal, the projected vote is 33/50, or 66 percent, just *below* Article V's threshold. This projection underscores the significance of the Senate's unseating of Stockton. With him excluded from both the numerator and denominator, Article V's threshold was satisfied even if one counted the full membership in the Senate in the denominator. On the other hand, if he had not been excluded and had been present and had voted against the amendment, Article V's threshold would have been satisfied only if one counted in the denominator only those who voted (not those absent, assuming the same absences).

Based on the 1860 census, the 11 southern states excluded from representation had a combined apportionment of 58 representatives in the House. Table 1 also projects the results of including the presumed votes of those representatives, along with 22 senators representing those states. In these projections, the excluded 58 representatives and 22 senators are included in the applicable numerators and assumed to have been present and voted against the proposed

[24] See McDonald, pp. 5-6 and notes 10-11, on relevant precedents involving the denominator issue in this and other contexts. Also cite works criticizing and defending the exclusion of the southern reps as relevant to this issue.

amendment.[25]

The projected votes in the House, assuming that the same 32 representatives who had not voted still would not vote in the counter-factual circumstances, would be 120:90:32. The percentages would fall short of two-thirds, whether one treated the denominator as those who voted (120/210, or 57.1 percent) or those eligible to vote (120/242, or 49.6 percent). In the Senate, the projected votes without Stockton would be 33:33:5, or 33:34:5 with him included and presumably voting against the proposal. All four percentages – 33/36 voting excluding Stockton (50 percent), 33/71 eligible excluding Stockton (46.5 percent), 34/67 voting excluding Stockton (49.3 percent), or 34/72 eligible including Stockton (45.8 percent) – would fall below Article V's two-thirds (66.7 percent) threshold.

These projections and calculations underscore, among other things, the importance of the South's exclusion from the 39th Congress and from the relevant proposing denominators. If the southern states had been admitted to the U.S. Congress and if their representatives had voted against the proposed amendment (as one may reasonably assume they would have done), it almost certainly would not have been approved by two-thirds of those voting in either house.

Anxiety or insecurity about this sort of issue among Republicans apparently led Edward McPherson, clerk of the House of Representatives, to alter the results of the voting in the House. In his 1866 *Political Manual*, which he later included in his *Political History of Reconstruction*, McPherson reported the results of the vote in the House: "The Amendment passed – yeas 138, nays 36, as follows." His revised list of "yeas" includes, in addition to the 120 names included

[25] An alternative that I have not shown on table 1 would be to assume that the excluded representatives would have voted in the same percentages as those who had actually been admitted (not all of whom voted).

in the *Globe's* list of "yea" votes, 18 representatives who had been reported in the *Globe* under the category of "Not voting." McPherson's revised list of "Nays" likewise includes, in addition to the 32 persons reported by the *Globe* as being in that category, four representatives who had been included in the *Globe* under "Not voting." Those 22 persons (18+4) were removed from McPherson's revised list of those "Not voting," and he showed the revised total for that category as 10.[26]

Remarkably, there is no indication in McPherson's publications that the reported results of the voting in the House on the proposed amendment (138:36:10, compared to 120:32:32 in the *Globe*) are not the official results, or that his account includes projected or otherwise altered results rather than the actual vote counts. Nor do the vote pairings and comments on the floor fully account for McPherson's projections.[27] McPherson was the clerk of the House of Representatives and in that capacity was responsible for the official records of House proceedings as reported in the *Congressional Globe*. Thus we may reasonably presume that he deliberately published altered results rather than made a mistake. In addition, his *Political Manual* and *Political History of Reconstruction* gave indications of being official, since the latter was "entered according to an Act of Congress, in the year 1871, by Edward McPherson, in the Clerk's Office of the District Court of the United States for the District of Columbia." In

[26] Edward McPherson, *Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870)* (Washington, D.C.: Philp & Solomons, 1871), p. 102 (a copy is attached at the appendix to this article, along with a copy of the corresponding passages from the *Congressional Globe*).

[27] Vote pairings recorded in the *Congressional Globe* account for a few of the projected votes (e.g., by Broomall, Washburne, and Shanklin). But McPherson did not transfer all paired vote to actual votes (e.g., he transferred VanHorn (Republican) to "yea" but left Goodyear (Democrat) as "not voting." McPherson also attributed votes to some identified as absent (e.g., Ingersoll and Hubbard) but not others (e.g., Humphreys and McIndoe).

addition, this account purported to be an fair and impartial report of the "facts," and it included "revisions and corrections" to the Political Manuals "to date" (through 1871). If I am correct that McPherson's *Political Manual* for 1866 and his *Political History* contain a deliberately altered account of the voting results the U.S. House of Representatives which are presented as "the facts," these publications were potentially misleading at the time. In any case, they have been misleading to subsequent generations of scholars.[28]

Table 1 indicates one way that McPherson's revised vote tally was significant. Unlike the number of votes in the House for the proposed amendment (120 in favor) as officially reported by the *Congressional Globe*, McPherson's revised figure (138 in favor) is over two-thirds (138/184, or 75 percent) of the total membership in the House (compared to 120/184, or 65.2 percent, as reported in the *Globe*). McPherson was apparently responding to criticism that the proposed amendment had not been approved by over two-thirds of the House, as a branch of the "Congress," conceived for purposes of satisfying Article V's threshold as including all of its admitted members. We may infer that McPherson responded to this criticism by projecting how twenty-two of those who had not voted *would have voted* if they had been present and voted. More specifically, he projected that 18 of the 22 House members reported as "not voting" would have voted "yea" and that four of them would have voted "nay." This made sense, considering that more than 18 of the absent representatives were Republicans, taking into account some of the vote pairings and off-the-record communications, and also taking into account that Republicans had voted as a cohesive block in favor of the proposed amendment. McPherson did not, however, project votes for all of the House members who had not voted. He left six

[28] Cite works that have relied on McPh's unofficial tallies rather than the official results as reported in the

Republicans (60 percent) and four Democrats (40 percent) in the category of "not voting."

Even this adjustment was not enough to ensure satisfaction of Article V's proposing threshold if the South was included in the denominator. Using McPherson's revised figures and also adding the 58 vacant seats to the denominator, 138 in favor is still only 57 percent of the House's full membership (242). The percent increases to 59.5 (132/232) if one uses McPherson's projected total of Republican votes while also projecting 58 Democratic votes against the amendment (all those unseated) and also using as the denominator the total of actual votes plus projected Democratic votes. The percentage remains 59.5 (144/242) even if one adds to McPherson's total the six remaining Republican votes that he left as "not voting" and uses the total in Congress, including the southern representatives, as the denominator. These projections and calculations again underscore the significance of the South's exclusion from Congress.

The fact that McPherson projected the votes of the non-voting members of the House indicates some measure of uncertainty and perhaps insecurity among Republicans about what the appropriate proposing numerators and denominators were for various legal and/or extra-legal purposes – including whether political practices had satisfied Article V's proposing thresholds. He apparently took a position, along with fellow Republicans, that it was appropriate for Article V purposes to exclude non-voting members from the Article V denominator. His summarizing the results as "yeas 138, nays 36," without including those "not voting," is in accord with that position.[29] Presumably in response to arguments that "the Congress" included for purposes of

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Congressional Globe.

[29] The *Globe* likewise reports the results in the Senate initially as "yeas 33, nays 11," with those "absent" listed below (following those listed under "yeas" and "nays"). In contrast, the *Globe* reports the results in the House as "yeas 120, nays 32, not voting 32," with the names in all three categories listed below. See McDonald, pp. 5-6 and notes 10-11, on relevant precedents involving the denominator issue in this and

Article V all admitted members, he projected the votes of the non-voting members to support a fallback position that Article V's thresholds *could have been satisfied* if it was necessary to include all admitted members of Congress in the ratifying denominator. But a claim that Article V's threshold *could have been satisfied* – or *was constructively satisfied* – still would not be persuasive to those insisting that Article V's threshold *had not been satisfied* through *actual political practices*.

It is also possible that McPherson projected the votes of non-voting members because he thought they were potentially significant in other ways – beyond their relevance to satisfying Article V's threshold of legal validity. I return to that issue below.

B. The Ratification Stage

There were corresponding issues at the ratification stage. But instead of excluding representatives from the South as had the Republican leadership of Congress during the proposing stage, the Republican-controlled Congress included the southern states in the ratifying numerator and denominator.

In June of 1866, when two-thirds of the admitted and voting members of the 39th Congress approved the proposed Fourteenth Amendment, there were 36 states in the Union, counting the 11 southern states excluded from representation in Congress. Secretary of State William Seward sent the proposed Fourteenth Amendment to all 36 states [and indicated that approval by the legislatures of 28 of them was necessary for the amendment to take effect.][30]

By the end of January 1867, 17 states had ratified the proposed Fourteenth Amendment,

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other contexts.

[30] See Call (1961), at p. 12 note 43. Check Sec State's communication or whatever. Note that ¾ of 36 would be 27 (not 28). But became 27 in 1867 with the admissions of Neb.

while 10 had repudiated it.[31] Thus the proposal had already been defeated, unless at least two of the states that had repudiated it switched their positions.[32] By the end of February 1867, three more states had voted to ratify the proposal while two more had repudiated it, thereby raising to four the minimum number of reversals necessary to reach Article V's three-fourths threshold.[33]

It was in this context that Congress passed the first Reconstruction Act on March 2, 1867. Among its primary aims was to secure the Fourteenth Amendment's ratification by at least four of the southern states that had previously repudiated it.[34] That number increased to five by the end of March, when Maryland voted to reject the proposal.[35]

Military reconstruction was eventually successful on this score, but at a substantial cost. Critics argued that much of military reconstruction was unconstitutional, including the continued exclusion of southern representatives from Congress, the extension of military government after the war had formally ended, the disqualification of former Confederate leaders, the compulsory extension of franchise to black males, the requirement to guarantee black voting in amended state constitutions, and making readmission to Congress of the excluded southern states

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[31] Raftif's included Tenn (7/19/66), which was promptly readmitted at that time, thereby reducing to 10 the number of states excluded from rep in Congress. Check on number of rejections v. no action. Call (p. 12 n. 45) includes (along with TEX, GA, NC, SC, KY [admitted/border], and VA) also FL, ALA, ARK, Miss – but these states are not included in offl lists.

[32] At most 8 could reject. Here referring to switches in position rather than votes. Check on whether there were votes in rejecting states (even if not formal rejections). If so, change to "votes."

[33] Adding ratif by RI, PA, WI; rejection by LA and DE. From Call and ALR etc. (but with different pds). Check on Mich (Jan accd to Call and McElwee, Feb accd to ALR and Seward's proclamation). Also check dates of rejections. Nebraska's entering the Union on March 1, 1867, changing the threshold to 28.

[34] The reconstruction acts targeted ratification by the excluded southern states, even though (as indicated) two states represented in Congress (KY and Delaware) had already rejected the proposed amendment by the end of Feb 1867; and a third (MD) would do so in March of 1867.

[35] Six if one counts CA, as McElwee did, though it decided not to act on March 4, 1866 (and later formally rejected the proposal on March 17, 1868).

conditional on ratification of the proposed Fourteenth Amendment by reconstructed state legislatures. Many of these policies were unpopular in the North, not only the South – as indicated by the Ohio and New Jersey legislatures' attempts in early 1868 to rescind their prior ratifications.

Even so, by July 9, 1868, the proposed amendment had been formally ratified by 36 states – including five of reconstructed southern state legislatures (Arkansas, Florida, North Carolina, Louisiana, and South Carolina) but not subtracting Ohio and New Jersey. This was the context of Secretary of State Seward's conditional certification and Congress's concurrent resolution on July 21. By the end of July, the amendment had been ratified by two additional southern states legislatures (Alabama and Georgia), thereby satisfying Article V's threshold even if Ohio and New Jersey were subtracted from the ratifying numerator. Seward was apparently aware of Georgia's approval, but not Alabama's, when he issues his second certification on July 27, 1868. Reconstructed legislatures in the remaining three southern states later ratified the amendment (Virginia in 1869, Mississippi and Texas in 1870).

It is instructive to consider how the ratification processes might have played out if Congress had decided to proceed without including the southern states in the Article V denominator. In June of 1866, there were 25 states represented in Congress. By February 12, 1867, the proposed amendment had been ratified by 19 of those states, or 76 percent of them.[36] If Tennessee had still been allowed to rejoin the Union in July of 1866, that addition would have increased the denominator to 26, thereby raising Article V's threshold to 20. This threshold also

[36] Here I am excluding Tenn. See below.

would have been satisfied on February 12.[37] Either way, the amendment could have been certified at that point.[38]

That date was just before the Senate and House initially passed the first reconstruction bill – on February 17 and 20, respectively. Johnson vetoed the bill on March 3, and Congress overrode his veto the same day. All three of these acts might have occurred even if securing the Fourteenth Amendment's ratification had not been among Congress's primary aims. Or things might have played out differently. We cannot be certain.

But we can be confident of four things. First, Congress chose to treat the southern states in the ratifying denominator even though it had the option of excluding them. Second, once Congress included the southern states, it would be impossible to satisfy Article V's ratifying threshold unless at least two southern states ratified (even assuming that all 25 states represented in Congress would approve the proposal).[39] Third, instead of abandoning the proposed amendment, the Republican-controlled Congress found a way to secure its ratification by a sufficient number of southern states. Fourth, there were few if any indications that the Republican leadership in Congress thought the Fourteenth Amendment could legitimately be added to the Constitution without satisfaction of Article V's thresholds. In other words, they did not rely on a theory of non-Article V amending as sufficient to legitimate adding this text to the U.S. Constitution.[40]

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[37] This time including Tenn's ratif on July 19, 1866.

[38] Followed by Nebraska's admission to the Union on March 1, which would have increased the Article V ratifying threshold to 21 out of 27. Mass ratified on March 20, satisfying that threshold.

[39] This assumption was not borne out in practice.

[40] Explain contra ACK here? Also, considering the controversiality of claims of validity based on Article V, it would be important to consider alternative sources/bases of authority/validity such as those [to be]

C. Congress and the States Together = "The People"?

The Constitution as a whole supports viewing the combined actions of the U.S. Congress and the states in proposing and ratifying the Fourteenth Amendment as the authoritative voice of "the people." According to one formulation, once Article V's thresholds had been satisfied, "the people" had authoritatively amended the Constitution. According to another formulation, the U.S. Congress and the state legislatures had acted in their respective representative capacities on behalf of "the people of the United States" in authoritatively amending the U.S. Constitution. Joining these perspectives, the U.S. Congress and the legislatures of three-fourths of the states had acted as or on behalf of "the people" through Article V processes.[41]

These are categorical claims. They treat constitutional authority like a light bulb: it is either on or off. Before both of Article V's thresholds were satisfied, the light was off. Once both were satisfied, the light went on. The Fourteenth Amendment then became "valid to all intents and purposes, as part of th[e] Constitution." The amendment became legally authoritative.

It also became authoritative in other ways. The U.S. Constitution purports to speak on behalf of – and thereby represent politically in a variety of ways (including but not limited to binding and representing them legally) – "the people" upon whose authority it presumes to rest. Once added to the Constitution, the Fourteenth Amendment gained that status: It has rested on the authority of "the people" and purported to speak on their behalf.

The same is doubly or triply true of Article V processes. Article V has been part of the

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examined below/elsewhere.

[41] More options, below.

Constitution all of which has represented the constitutional identities and commitments of "the people." It also has provided processes through which "the people" may authoritatively amend that Constitution; and it has provided criteria for ascertaining whether/when "the people" or those acting on their behalf have legitimately amended the Constitution. In other words, Article V has provided criteria, internal to the Constitution itself, for ascertaining whether/when text is lit up by principles and practices of popular sovereignty.

II. Variable Constitutional Authority Based on Article V Processes

Despite Article V's invocation of thresholds, there are a number of good reasons to move beyond categorical analysis of the Fourteenth Amendment's validity or invalidity based on the processes of constitutional proposal and ratification treated as authoritative by that article. In this connection, we may explore the variability of the amendment's authority at the levels of the U.S. congressional and state legislative action contemplated by Article V. We may also assess the authority of those processes – and the authority of the amendment itself – in relation to that of the people whom those institutions purportedly represented in processes of constitutional amending.

Levels of support for the amendment by governmental institutions, not only satisfaction or not of thresholds, were politically and legally significant both during the reconstruction era and subsequently. In this connection, Article V processes authoritatively registered – at least momentarily or sequentially – levels of support for the proposed amendment within the U.S. Congress and state legislatures. By doing so, those processes served important functions beyond supporting controversial categorical claims of constitutional legitimacy.

In assessing the broader normative and practical significance of those processes (beyond

whether they categorically satisfied Article V's thresholds), it is again important to distinguish actual votes and other forms of political participation from potential or projected political involvement. Types and levels of participation and non-participation were equally if not more important in this context. Thus it is critical to take into account relevant nominators, denominators, qualifications, disqualifications, quorums, absences, abstentions, non-votes, projected votes, and other factors – including controversies surrounding these variables.

A. Congressional Action

The votes in the U.S. Senate (33:11:5) and House of Representatives (120:32:32) in June of 1866 showed strong support for the proposed amendment within the national legislature. More specifically, since the voting split along party lines, the results indicated that the Republican Party was united in supporting this proposal, as part of a broader plan of congressional reconstruction. In the case of the Republicans, the unified voting on the proposed amendment bridged important differences among radicals, moderates, and conservatives. Those within each camp had different but overlapping reasons to support the proposal, a range of hopes and expectations relating to it, and various reservations. The fact that they united to vote for it, and that Northern Democrats united to oppose it, indicated a lot about the political landscape at the time.

Types and levels of support for the proposal, although strong among the Republicans in Congress, were not as strong within national institutions as they might have been across a number of dimensions. First and most obviously, the Democrats in Congress united to oppose the amendment. That included the Democratic Senators and House members who voted against the proposal. Second, not everyone in these two chambers voted at all, presumably on account

of absences. Third, the southern states were excluded at the time from representation within Congress. Fourth, President Andrew Johnson strongly opposed the proposal. Fifth, it was difficult to predict how the U.S. Supreme Court and other federal courts would eventually deal with the amendment (assuming eventual ratification, though many Democrats argued that many Republicans never expected it ratified), legislation based on it, or related legislation such as the Civil Rights Act of 1866.

There are good reasons to be attentive to ways that various categories and levels of support for the proposed amendment, along with opposition to it, implicated its authority. Governmental institutions not only confer authority, they do so in varying degrees. For example, a statute carries greater congressional authority if passed unanimously with bipartisan support by both houses than if approved by a bare partisan majority. Congress would have greater authority to enact statutes once it included representatives of the southern states. The same was true of the authority conferred by Congress on the proposed Fourteenth Amendment. Even if its approval by both houses of Congress in June of 1866 was sufficient to satisfy Article V's thresholds, the proposal's process-based authority, based on those approvals, was weaker than it might have been. In this sense, the amendment had only partial congressional authority.

Going further, the authority conferred by Congress was partial in a second sense: as a function of the potential authority of U.S. governmental institutions as a whole. The authority conferred on the amendment by Congress was that of only one branch out of three within the U.S. government – even if, significantly, that one branch had preeminent law-making authority. The amendment's authority in a fuller sense would also be a function of the authority conferred on it by the coordinate constitution- and ordinary law-enforcing institutions: the national

executive and judicial branches.

Addressing for now only the authority conferred by the 39th Congress on the proposed constitutional amendment, the categories and levels of support and opposition within that branch would have ongoing significance beyond the vote formally proposing it. If and when it was ratified by three-fourths of the states and formally added to the Constitution, the amendment would depend on implementing legislation. Whether the Republicans continued to hold control of both houses of Congress and if so in what percentages, whether they had a united legislative agenda, whether Democrats at that time challenged the amendment's validity and/or opposed implementation of its guarantees, whether the president signed or vetoed such legislation and in the latter case whether Congress would be able to override that veto, and similar issues would determine the prospects for legislative outputs linked to the amendment. In other words, the greater the amendment's authority within Congress following its formal ratification, the more likely its guarantees would be secured in practice through follow-up legislation. On the other hand, the greater the opposition to the amendment, the less likely its provisions would be effectively implemented in practice by national legislation.

Although we cannot be certain of his motives, it is possible that Edward McPherson was explicitly or implicitly engaging some of these issues by altering the results of the voting for the proposed constitutional amendment in the House of Representatives. Among other things, he may have been projecting how at least one branch of Congress – the House – might subsequently vote on issues involving the proposed constitutional amendment. Stated differently, he was mapping configurations of national legislative power relevant to the Fourteenth Amendment's longer-term viability and vitality. Except to the extent that his alterations involved distortions of

the historical record, his being concerned with issues of practical politics would not have been peculiar or anomalous. After all, those concerns were at the heart of Section 2 of the proposal – which many at the time treated as its most important section. Those issues would also have central relevance to Congress's debating, passing, and enforcing its policies of Military Reconstruction.

B. State Legislative Action

Categories and levels of approval, disapproval, and non-involvement by state legislatures at the ratifying stage were likewise inherently significant at the time and would have continuing significance beyond whether or not the approvals satisfied Article V's threshold for constitutional validity. Unlike the proceedings in Congress which culminated in decisive votes in both chambers, however, there was not unified voting on the proposal at the state level. State legislatures act independently of one another, and typically the formal ratification processes are substantially complete once a proposed constitutional amendment has been approved by a sufficient number of states to satisfy Article V's threshold.

The peculiarities in the ratification processes involving the proposed Fourteenth Amendment resulted in more than a typical number of state legislatures' positions being transparent. Initially, all of the southern states except Tennessee formally or informally rejected the proposal, the two border states of Delaware and Maryland also formally rejected the proposal, and the Ohio and New Jersey legislatures attempted to rescind their respective predecessors' prior ratifications. Conversely, under congressional supervision the legislatures representing all ten congressionally reconstructed southern states eventually ratified the proposal, even though at least four of those approvals (six, according to Congress) were beyond Article

V's threshold.

This last fact indicates that members of Congress viewed the ratification processes as serving important functions beyond satisfying Article V's threshold of legal validity. As indicated above, ensuring satisfaction of that threshold was doubtless among Congress's primary reasons for requiring the excluded states to ratify the proposal prior to their readmission to representation in Congress. But members of Congress must have had other aims, or they would have lifted that requirement once the amendment had been officially added to the Constitution.

Acceptance of the amendment by state legislatures and other institutions of state government was critical to its efficacy. Many of the amendment's provisions, especially the bans on state action in Section 1, targeted the states. It would be important for state officials to accept the amendment's authority as a basis for action, not only to treat it as formally valid. Thus the presidentially reconstructed state legislatures' refusal to ratify the proposal not only blocked the formal amending processes. They also foreshadowed problems with the amendment's efficaciousness.

For this and other reasons that became increasingly apparent during the second half of 1866 and early in 1867, it is not surprising that the Republican leadership in Congress considered it politically necessary to replace the existing southern state legislatures with ones more willing to comply with both the letter and the spirit of the proposed Fourteenth Amendment. Congress was not simply trying to "force" the existing state legislatures to ratify the amendment.[42] On the contrary, one of the primary aims of congressional reconstruction was to put in place *new* legislatures that would *voluntarily* affirm the amendment. Only in that case would those

[42] Compare ACK on this issue.

legislatures, along with other new institutions of state governance, be likely to comply with the amendment's guarantees and otherwise promote the realization in practice of its principles and ideals. As we now know, and as was well understood at the time, there would be formidable obstacles to accomplishing that objective – and commitments to do so were qualified and competed with other aims.

In any case, there are good reasons to map types and levels of support for the amendment by and within the states across a number of dimensions that parallel those by and within Congress. First, for reasons already indicted, it was significant what numbers and percentages of state legislatures ratified, rejected, and abstained from the formal ratification processes. By 1870, 33 states (including Ohio and New Jersey) out of 37 in the Union had formally ratified the proposed amendment. Only Delaware, Maryland, and Kentucky's formal rejections remained outstanding at that time; the legislatures representing those three states formally ratified the amendment in 1901, 1959, and 1976, respectively. California's legislature had not formally approved or disapproved the proposed amendment during the reconstruction era; its legislature ratified the amendment in 1959. Thus there were very high levels of approval during the reconstruction era, and eventually unanimous support at the state level – though never expressed at a single moment in time.

Second, the votes within the various state legislative bodies were significant in ways that paralleled their importance within Congress. The votes again split largely along party lines. That was one of the reasons each cycle of state elections was so important. The elections of 1866 and 1867 in particular affected the prospects for the Fourteenth Amendment's formal ratification. Republican victories in a majority of the northern states translated into ratification

of the amendment within those states; whereas the Democrat's gaining control of the Maryland, Delaware, Kentucky, Ohio, and New Jersey legislatures led to formal repudiations or efforts to rescind prior ratifications.[43]

As the categories and levels of approval and disapproval within Congress implicated the Fourteenth Amendment's authority at the proposing stage, categories and levels of approval and disapproval within state legislatures likewise implicated the amendment's authority at the ratifying stage. Within the states that ratified the amendment, the legislatures conferred varying levels of authority, not only contributed to meeting Article V's threshold. Approval of the proposal by higher numbers and percentages of legislators conferred greater authority than approval by bare majorities. In each case, however, the amendment's process-based authority as a result of the proceedings in state legislatures was weaker than it might have been. No legislature unanimously approved the proposal.[44] In this sense, the amendment gained only partial authority, based on the ratification processes, even within the states that formally ratified it.[45] Even less authority, in this relative sense, was conferred on the amendment by the legislatures in which a majority of the members voted to repudiate the proposal. Those votes were legally and politically significant even though a combination of legislatures representing other states and successor legislatures for the same states eventually ratified the amendment in sufficient numbers to satisfy Article V's threshold for legal validity.

Third, the authority conferred by each state legislature was also partial in relation to the

[43] Check on KY (shift or not).

[44] Check on this.

[45] Explain here or elsewhere (paralleling arg in APT): not just issue of numbers and percentages, but of depth and breadth of authority generated by legislative processes.

authority of state governmental institutions as a whole. Again paralleling the national level, the authority conferred on the amendment by state legislatures was that of only one branch out of three within each state – even if, again significantly, that one branch had preeminent law-making authority within the state. The amendment's authority in a fuller sense at the state level would be a function of the authority conferred on it not only by state legislatures but also by the state executive and judicial branches.[46]

Addressing here the authority conferred on the amendment by the state legislatures through their involvement in processes of constitutional ratification, the categories and levels of support and opposition across the dimensions just identified would have ongoing significance beyond their contributing or not to satisfaction of Article V's threshold for adding the proposed text to the Constitution. As indicated above, the Fourteenth Amendment's efficacy following its addition to the U.S. Constitution would depend in substantial measure on the states' accepting its limits on them as authoritative in practice, not only on their treating it as formally legitimate. The same would apply to implementing legislation passed by Congress as with the enforcement of the amendment and related legislation by the national executive and judicial branches. State legislatures would be key players in this connection. Through their roles in selecting members of the U.S. Senate and through other structures and processes of federalism, state legislators would also play central roles in influencing the course of legislation and other governmental action at the national level. The contours of the political construction of the Fourteenth Amendment's authority and authoritative meaning following its addition to the U.S. Constitution would depend on a number of factors, including: the partisan control of state legislatures, as with control of

[46] Here or somewhere (below?): combine US and state govtl auth?

Congress, especially following the readmission of the southern states; whether the Republicans would continue to support the Fourteenth Amendment's principles and related policies; whether the Democrats would continue to oppose the amendment and its implementation; the interpretive positions advocated and given effect authoritatively by courts and others; and a wide range of other actions and reactions at the state level. The bottom line was this: The greater the amendment's authority within the states in general, and within state legislatures in particular, the more likely its guarantees would be legally and politically efficacious.

C. Representation of "the People"

A claim that the U.S. Congress and state legislatures, acting together through Article V processes, may authoritatively amend the U.S. Constitution on behalf of "the people" can accommodate a range of perspectives toward the identities of "the people" and toward the roles separately and jointly played by Congress and state legislatures. For example, it makes sense to view members of Congress separately as representatives of "the people" of the respective states (in the case of senators) or districts (in the case of House members). Likewise it makes sense to view state legislatures separately as representatives of "the people" of the respective states. It also makes sense to regard Congress as a whole as an institution established to represent "the people of the United States" as a single collectivity. More specifically, it makes sense to view the approval of a proposed constitutional amendment by two-thirds of the members of both houses of Congress as a constitutionally authoritative action on behalf of the whole "people of the United States." More controversially, one may coherently view ratification of a proposed constitutional amendment by the legislatures of three-fourths of the states as joint action by representatives of "the people" of the respective states and/or as coordinated action by

representatives of a single "people of the United States."

There is no need for present purposes to address fully the advantages and disadvantages of these various conceptualizations and what hinges on affirming or rejecting one or another.[47] The key point for present purposes is that it makes sense to regard the U.S. Congress and state legislatures as representatives of "the people" (of the states and/or United States) in the formal processes of authoritative constitutional amending set forth in Article V of the U.S. Constitution.[48] Going further, in relation to the Fourteenth Amendment in particular there are good reasons to be attentive to ways that Congress and state legislatures only partially represented "the people" across a number of important dimensions in ways that resulted in the amendment have incomplete authority based on principles and practices of popular sovereignty, even assuming satisfaction of Article V's thresholds.

It is noteworthy in this context that Article V along with other parts of the U.S. Constitution support a view that Congress and state legislatures have each had partial rather than complete authority within processes of constitutional amending. Most simply: Congress alone may not authoritatively amend the Constitution on behalf of "the people." Nor may the states. Article V does not set forth a "Congress only" or "state legislatures only" track for formally

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[47] Options: the people have dual identities: orgd and capable of acting -- or being repd as -- "the people" of the respective states and "the people of the United States." Alt view: congress proposes, not auth. People act auth at ratifying stage, though joint action of state legs, acting on behalf of the people of the states, combined to constitute the people of the US. Comparable to viewing ratif of orig con via art VII processes as the voice of "the people" but not viewing the Phila conv as such a voice/representation. Tho coherent, there are problems with the latte view (treating only states as auth voice of the people for purposes of con amending). Also goes other direction: problems with viewing only congress as auth voice of the people. There are good reasons to view Article V as requiring a coincidence of super-maj actions at both levels, national and state.

[48] Likewise for the states calling a convention, a national convention, and state conventions. But it is not necessary to address those issues here, considering the route of formally amending followed for the Fourteenth Amendment.

amending the U.S. Constitution. In order to gain the authority of "the people," Article V requires authoritative action at the national and state levels. Thus, by extension, it treats Congress and state legislatures, on their own, as capable at best of partially representing "the people."

We may identify here at least five dimensions across which Congress and state legislatures provided the Fourteenth Amendment with partial or incomplete authority compared to that of the people as a whole. First, there were significant geographic dimensions to Congress and state legislatures' representations of "the people." The states represented by U.S. Senators were of course territorially distinct, House members likewise represented districts organized territorially, and state legislators similarly represented various geographically organized groups of persons. Assuming for now that the respective legislators represented all of the persons within their respective jurisdictions, the fact remains that not all such legislators approved the proposed Fourteenth Amendment on behalf of their respective constituents. That was most significantly the case at the proposing stage with respect to the southern states excluded from representation in the 39th Congress. It was also true of the senators and representatives who voted against the amendment or were absent or abstained from the formal ratification processes. Nor was the amendment ratified by legislatures representing all of the states during the reconstruction era, even after the congressionally reconstructed southern state legislatures approved it.

Second, it is problematic to assume that the members of Congress and state legislators who approved the Fourteenth Amendment separately represented all of their constituents and collectively represented all of "the people." At issue, among other things, are questions about who was included in "the people." Issues of race, gender, legal status (e.g., married or single), wealth, and voting qualifications and disqualifications were especially pertinent across this

dimension. The Thirteenth Amendment had formally freed the former slaves. Before the Fourteenth Amendment's addition to the Constitution, however, the legal status of free African-American person remained unclear – especially in light of the U.S. Supreme Court's pronouncement in *Dred Scott v. Sandford* (1857) that a black person could not be a "citizen" of a state or of the United States under the U.S. Constitution. In any case, black males throughout the South were disqualified from voting for the presidentially reconstructed state legislatures that rejected the proposed Fourteenth Amendment. The reconstruction acts of 1867 and 1868 required the southern states to extend the franchise to black males, but they also disqualified former Confederate leaders from voting. Throughout the proposal and ratification stages, moreover, women were not allowed to vote for state legislators, members of Congress, or other government officials. To the extent that expansion of the franchise broadened actual representation whereas restrictions on the franchise restricted it, the representational authority of the congressionally reconstructed state legislatures was greater in some respects than that of the presidentially reconstructed legislatures, weaker in others, and in any case far from fully inclusive.

Third, the U.S. Constitution's division of governing powers vertically, across the dimension of federalism, limited the scope of the authority that either Congress or state legislators could confer on the Amendment in their representative capacities. These institutions had different institutional capacities, not only different territorial jurisdictions. As James Wilson had explained during the founding period, the people had delegated some powers to U.S. governing institutions and reserved others to the states; and this structural premise has been reflected in the Tenth Amendment to the U.S. Constitution. Accordingly, Congress and state

legislatures have each held only a portion of the total sum of all legislative powers delegated and reserved by the U.S. Constitution and state constitutions. These allocations of legislative powers translated into differing institutional capacities in ways that extended to Congress and state legislatures having distinct and in each case limited roles in formal amending processes.

Fourth, the Constitution's horizontal division of powers likewise limited the scope of authority that Congress and state legislatures could confer on the Fourteenth Amendment. I have already explained how Congress's authority was partial in relation to that of the U.S. government as a whole; and how state legislatures had only a portion of state governing powers. For a similar reason, these legislatures had institutionally limited capacities to represent "the people" – based on divisions of legislative, executive, and judicial powers (along with divisions of power vertically). Stated differently, Congress and the state legislatures were limited to representing "the people" in their legislative capacities. Formally adding the Fourteenth Amendment to the text would carry with it little by way of the representation of the people's executive and judicial capacities.

Fifth, the U.S. Constitution and state constitutions have not purported to entrust all of the people's self-governing capacities to governmental institutions – even taking into account their delegations of power to legislative, executive, and judicial institutions at the U.S. and state levels. The U.S. Constitution and state constitutions treat at least some rights as beyond the reach of at least some categories of governmental power – especially legislative power. There are good reasons to regard at least some of those rights – such as rights of free speech and free press – as prerogatives of popular self-governance. To the extent such a perspective toward rights and their relationships to governmental powers remained coherent during the

Reconstruction era – and I would suggest they very much did – then it makes sense to regard the processes of constitutional amending as not designed to represent fully the people's self-governing capacities and prerogatives. On the contrary, there were good reasons to regard the Constitution as a whole – and Article V in particular – as a partial rather than complete representation of the people's capacities to establish and amend constitutional norms and otherwise exercise constitutional rights and powers.[49]

In each of these ways, there are good reasons to regard the authority conferred on the Fourteenth Amendment by the U.S. Congress and state legislatures via Article V processes as partial rather than complete based on principles and practices of popular sovereignty. In sum, the Fourteenth Amendment's authority was incomplete across multiple dimensions, compared to the actual and potential authority of "the people," taking into account only the processes involving its formal proposal and ratification.

III. Additional Dimensions of Constitutional Authority

The analysis in this paper – including its tentative conclusion that the Fourteenth Amendment's initial authority was incomplete based on the processes of its formal proposal and ratification – offers an admittedly incomplete account of this amendment's initial authority. A fuller account of that amendment's authority based on principles and practices of popular sovereignty would also take into account its authority based on at least the four additional criteria identified in the introduction to this paper:

(2A) processes of formal constitutional amending, beyond those set forth in Article V, involving "the people" and those acting on their behalf;

[49] For a fuller treatment of this issue, see Moore (1996).

(3A) principles of republican governance;

(4A) the amendment's instantiation of the people's foundational political commitments; and

(5A) the people's affirmation of the amendment outside formal processes of constitutional amending.

There is no need to assume, moreover, that this is an exhaustive list of relevant criteria of constitutional authority – especially if one seeks to move beyond accounting for authority based on principles and practices of popular sovereignty. Nor have I begun to address questions about relationships between the amendment's initial authority (and authoritative meaning) and its subsequent authority and meaning.

I will close by suggesting how some of that analysis may proceed (although many of the details remain to be worked out).

Across the second dimension, there remains a need to examine more fully the normative significance of direct action by the people along with representative actions on their behalf. Bruce Ackerman has argued that "the People" approved the Fourteenth Amendment through non-Article V processes of constitutional amending and that the amendment gained legal legitimacy from the outcomes of those processes rather than from Article V. In that connection, he has relied heavily on the results of the 1866 midterm congressional and state elections. He has claimed, more specifically, that those elections provided a popular "mandate" in support of the amendment. When pressed, however, he has denied that "the People" spoke decisively at a single moment – instead emphasizing extended processes of constitutional representation by national institutions.[50] Both branches of this argument have already been subjected to much

[50] Ackerman, *We the People: Transformations* (1998), p. 187.

critical analysis. But Ackerman and others have treated the options as dichotomous: either the Fourteenth Amendment became fully legitimate as part of the Constitution through non-Article V processes, or it did not. I plan to reexamine those arguments while also seeking to account for the potential variability of authority across the various branches of this criterion (as with the two main branches of Article V examined in this paper).[51]

I have already begun to analyze the Fourteenth Amendment's authority based on principles of republican governance, variously conceived.[52] Madison relied primarily on a procedural model of republican governance that essentially equated it with representative governance. That perspective has significant implications in relation to the Fourteenth Amendment and the processes of its proposal and ratification (especially taking into account restrictions on and expansions of the franchise). I would also like to explore the relevance of more substantive notions of "republican governance" as committed to securing the "res publica" (public good, or public welfare).

The fourth criterion – instantiation of the people's fundamental political commitments – is less conventional. It proceeds from the idea that the U.S. Constitution and its norms and structures purport to represent "the people" upon whose authority it presumably rests. To that extent that this representation has procedural dimensions, the fourth criterion overlaps the first

[51] That includes at least the 1866 elections, probably elections in the presidentially reconstructed SO, and almost certainly the state elections in the congressionally reconstructed SO. Instead of assuming that any of these elections could provide a mandate for the proposed Fourteenth Amendment, I will examine that issue critically taking into account problems of political inclusion and exclusion including those relevant to assessing the Fourteenth Amendment's initial authority based on Article V processes. I will also consider the problems associated with attributing position-taking to electoral results, considering the multiplicity of issues at stake. For representative actions, I will review Ackerman's claims of popular representation by national institutions exclusively, along with dual/hybrid national-state models of representation paralleling Article V processes.

and second. But the Constitution has also purported to represent "the people" and their constitutional identities and commitments substantively (not only procedurally). In relation to the founding, I have explored the Constitution's representation of the people's rights – which in turn have both procedural and substantive dimensions. I have also suggested that understandings of principles of republican governance have had substantive as well as procedural dimensions. These issues warrant further examination – including in the relation to the initial (and subsequent) authority (and meaning) of the Fourteenth Amendment. At issue, among other things, is the extent to which that amendment, variously interpreted, has been consistent (or inconsistent) both with the people's fundamental constitutional identities and commitments as authoritatively represented by other parts of the U.S. Constitution and also with constitutional identities and commitments not (yet) so represented.

The fifth criterion also flows from Madison's analysis of problems of constitutional founding. He treated this criterion as more forward-looking than the other four by suggesting that the Constitution would remain dependent on popular acceptance of its norms and institutions following its formal ratification.[53] But I have suggested that this criterion may also inform analysis of problems of initial authority.[54] Going further, I would like to draw on a version of that criterion to analyze distinct problems involving the Fourteenth Amendment's initial authority. Among the distinctive contributions of this criterion is that it may pick up contributions to constitutional development by those excluded from formal processes of constitutional founding and amending. More specifically, it may pick up unofficial along with

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[52] See, e.g., Moore, Temple (2004) and Moore, Slaughter-House (2006).

[53] See Madison, Federalist cite; Moore (2003), details.

official contributions to the creation and revision of norms by a full range of political participants (not only government officials, and not only those eligible to vote) through a variety of political processes (e.g., newspapers, public speeches and correspondence, and perhaps even private correspondence) and potentially even through politically significant forms of inaction and/or non-participation. These issues likewise warrant further analysis.

Beyond all this are questions about whether and how constitutional norms may gain and/or lose authority (and retain and/or change authoritative meanings) informally – such as through official interpretive and enforcement processes, by the people's reliance on them to construct and reconstruct constitutional norms unofficially, and the like. These questions are also central to an adequate account of the Fourteenth Amendment's authority and meaning across time.

In conclusion, much remains to be done.

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[54] Moore, Handbook (forthcoming OUP 2015).

Table 1: Actual and Projected Votes in the 39th Congress For/Against Proposed Fourteenth Amendment (June 1866)

	F= For	A= Against	Absent	Vacant	D1= voting	D2= mbrshp	F/D1 (voting)	F/D2 (mbrshp)
Actual Votes:								
House (Globe)	120	32	32	58	152	184	78.9% (Y)	65.2% (N)
Senate (Globe)	33	11	5	23	44	49	75.0% (Y)	67.3% (Y)
Projected Votes:								
Senate + Stockton (+1A)	33	12	5	22	45	50	73.3% (y)	66.0% (N)
House + SO (+58A)	120	90	32		210	242	57.1% (N)	49.6% (N)
Senate + SO (+22A)	33	33	5		66	71	50.0% (N)	46.5% (N)
Senate + SO + Stockton (+23A)	33	34	5		67	72	49.3% (N)	45.8% (N)
McPherson's House (+18F +4A)	138	36	10	58	174	184	79.3% (Y)	75.0% (Y)
McPherson's House + SO (+58A)	138	94	10		232	242	59.5% (N)	57.0% (N)

Y = above Article V's 2/3 threshold for proposing a constitutional amendment.
N = below Article V's 2/3 threshold for proposing a constitutional amendment.

THE CONGRESSIONAL GLOBE:

CONTAINING

THE DEBATES AND PROCEEDINGS

OF

THE FIRST SESSION

OF

THE THIRTY-NINTH CONGRESS.

BY F. & J. RIVES.

CITY OF WASHINGTON:
PRINTED AT THE CONGRESSIONAL GLOBE OFFICE.
1866.

Several SENATORS. Now let us vote on all the other amendments together.

The PRESIDING OFFICER. If such be the pleasure of the Senate, the question will be taken collectively on all the other amendments.

Mr. JOHNSON. I hope not. I want a separate vote on the third section.

The PRESIDING OFFICER. That is the next section.

Mr. HENDRICKS. I do not understand this. Can this resolution be adopted by voting on sections separately?

Mr. FESSENDEN. No.

The PRESIDING OFFICER. The Senate is now concurring in amendments made as in Committee of the Whole.

Mr. SHERMAN. No amendment was made to the third section.

Mr. HENDRICKS. That is what I want to understand. I understand that there is no amendment from the Committee of the Whole to the third section.

Mr. FESSENDEN. Yes, we struck out the third section as reported and inserted a substitute for it.

The PRESIDING OFFICER. The question is on the amendment made as in Committee of the Whole to the third section.

Mr. JOHNSON. I ask for the yeas and nays on that.

The yeas and nays were ordered.

Mr. SHERMAN. The third section was the original section that came from the House disfranchising the southern people from voting. That has been stricken out.

Mr. HOWARD. The question is on concurring in the amendment we made to the third section.

Mr. SHERMAN. That was to strike out the third section which came from the House and insert another.

The question was taken by yeas and nays, with the following result:

YEAS—Messrs. Anthony, Chandler, Clark, Conness, Cowan, Cragin, Creswell, Davis, Doolittle, Edmunds, Fessenden, Foster, Grimes, Guthrie, Harris, Henderson, Hendricks, Howard, Howe, Kirkwood, Lane of Indiana, Lane of Kansas, McDougall, Morgan, Morrill, Norton, Nye, Poland, Pomeroy, Ramsey, Saulsbury, Sherman, Sprague, Stewart, Sumner, Trumbull, Van Winkle, Wade, Willey, Williams, Wilson, and Yates—42.

NAY—Mr. Johnson—1.

ABSENT—Messrs. Brown, Buckalew, Dixon, Nesmith, Riddle, and Wright—6.

Mr. HENDRICKS, (before the result was announced.) I think the vote just taken is not correctly understood.

The PRESIDING OFFICER. No discussion is in order; the vote has not been announced.

Mr. HENDRICKS. I am not going into any discussion, but I have a right to ask of the Chair the precise question, in time to let any gentleman change his vote if he desires to do so. The motion was not originally to strike out the third section as it came from the House and to insert another. They were separate motions. Then ought there not to be two votes upon this section now?

Mr. SHERMAN. I suppose any Senator can call for a division.

Mr. HENDRICKS. There is no need to call for a division because there were two distinct motions. There was first a motion to strike out and afterward a motion to insert something else. Now, the precise question before the Senate is whether the third section as it came from the House shall be stricken out, and then there will be another question not yet voted upon by the Senate, whether we shall insert the third section which was agreed to as in Committee of the Whole. That is the way it stands.

Several SENATORS. Oh, no.

Mr. JOHNSON. Mr. President——

Mr. CONNESS. I object to discussion at this time.

The PRESIDING OFFICER. The discussion is not in order; the vote has not been announced.

Mr. JOHNSON. I am not about to discuss the question. The Senator from California need not suppose that I propose to occupy the time of the Senate unnecessarily. I proposed to strike out the original third section as it came from the House.

Mr. CONNESS. I rise to a question of order. It is not in order to discuss a question after the call of the roll has been commenced.

The PRESIDING OFFICER. The result of the vote has not been announced, but the roll has been called.

Mr. JOHNSON. If I am not in order I will take my seat; but it is barely possible that the Senator from California may not be in order.

Mr. CONNESS. I am quite aware of that; but I believe I have a right to raise the question of order.

Mr. JOHNSON. I do not object to that.

Mr. CONNESS. Very well; then let the Chair decide.

The PRESIDING OFFICER. No discussion is in order until after the vote is announced; but, by common consent, Senators may be allowed to explain their own votes, but no extended remarks can be allowed.

Mr. CONNESS. There is no right to explain a vote.

Mr. JOHNSON. I moved to strike out the third section as it came from the other House. That motion was carried, and afterward what now appears upon the face of the resolution as the third section was proposed and adopted as a separate amendment. I voted just this moment to strike out what was adopted. The effect of that would have been to restore the original third section, perhaps, but I meant when that was done to move to strike out the third section so as to leave no such section.

The PRESIDING OFFICER. On this question——

Mr. HENDRICKS. What question?

The PRESIDING OFFICER. The question was on concurring in the amendment made as in Committee of the Whole, which was to strike out the third section and insert other words in lieu of it. The result of that vote is 42 in the affirmative and 1 in the negative. So the amendment is concurred in. The Secretary will read the next amendment.

The Secretary read the next amendment, which was to strike out the fourth and fifth sections, and to insert the following section in lieu of them:

SEC. —. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

The amendment was concurred in.

The amendments were ordered to be engrossed and the joint resolution to be read a third time. The joint resolution was read the third time.

The PRESIDING OFFICER. This joint resolution having been read three times, the question is on its passage.

Mr. JOHNSON. I ask for the yeas and nays.

Several SENATORS. The yeas and nays must be taken, of course.

The yeas and nays were ordered; and being taken, resulted—yeas 33, nays 11; as follows:

YEAS—Messrs. Anthony, Chandler, Clark, Conness, Cragin, Creswell, Edmunds, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Lane of Kansas, Morgan, Morrill, Nye, Poland, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Trumbull, Wade, Willey, Williams, Wilson, and Yates—33.

NAYS—Messrs. Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Norton, Riddle, Saulsbury, and Van Winkle—11.

ABSENT—Messrs. Brown, Buckalew, Dixon, Nesmith, and Wright—5.

The PRESIDING OFFICER. The joint resolution is passed, having received the votes of two thirds of the Senate.

ADJOURNMENT TO MONDAY.

Mr. HARRIS. I move that when the Senate adjourn to-day, it be to meet on Monday next.

The motion was agreed to.

FORTIFICATION BILL.

Mr. MORGAN. I submit the following report from the committee of conference on the fortification bill, and I move that the Senate concur in the report:

The committee of conference on the disagreeing votes of the two Houses on the amendment to the bill (H. R. No. 255) making appropriations for the construction, preservation, and repairs of certain fortifications and other works of defense for the year ending June 30, 1867, having met, after full and free conference have agreed to recommend, and do recommend, to their respective Houses as follows:

That the House of Representatives recede from their disagreement to the amendment of the Senate to said bill and agree to the same.

E. D. MORGAN,
L. M. MORRILL,
W. SAULSBURY,
Managers on the part of the Senate.
H. J. RAYMOND,
W. E. NIBLACK,
S. PERHAM,
Managers on the part of the House.

The report was concurred in.

ENROLLED BILLS SIGNED.

A message from the House of Representatives, by Mr. MCPHERSON, its Clerk, announced that the Speaker of the House of Representatives had signed the following enrolled bills; which were thereupon signed by the President *pro tempore* of the Senate:

A bill (H. R. No. 15) authorizing documentary evidence of title to be furnished to the owners of certain lands in the city of St. Louis; and

A bill (H. R. No. 281) to amend the postal laws.

REPORT FROM A COMMITTEE.

Mr. HOWE, from the Committee on Claims, to whom was referred the petition of George W. Tarlton, praying for the restoration of his property confiscated under proceedings instituted in the United States district court for the northern district of New York, submitted a written report and asked to be discharged from the further consideration of the subject. The committee was discharged and the report was ordered to be printed.

Mr. HENDERSON. I move that the Senate adjourn.

The motion was agreed to; and the Senate adjourned.

HOUSE OF REPRESENTATIVES.

FRIDAY, *June* 8, 1866.

The House met at twelve o'clock m. Prayer by the Chaplain, Rev. C. B. BOYNTON.

The Journal of yesterday was read and approved.

MUTILATED NOTES OF NATIONAL BANKS.

Mr. HUBBARD, of West Virginia, by unanimous consent submitted the following resolution; which was read, considered, and agreed to:

Resolved, That the Committee on Banking and Currency be instructed to inquire into the expediency of providing by law, either by the establishment of a Bureau of Redemption in connection with the Treasury Department, or such other mode as may be deemed most advisable, for the redemption of the worn-out, mutilated, altered, or disfigured bank notes issued under the national currency act, so as to obviate the necessity of sending such notes to each particular bank of issue for redemption; and that the committee have leave to report by bill or otherwise.

Mr. HUBBARD, of West Virginia, moved to reconsider the vote by which the resolution was agreed to; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

MONUMENT TO LIEUTENANT GENERAL SCOTT.

Mr. HALE, by unanimous consent, submitted the following resolution; which was read, considered, and agreed to:

Resolved, That the Committee on Military Affairs be instructed to inquire into the expediency of providing by law for the erection of a monument at West Point to the memory of Lieutenant General Winfield Scott, and to report by bill or otherwise.

both branches of it, yet as we were compelled to unite on some measure—and we must all yield some of our opinions upon various questions involved—there are five sections in this proposed article—I feel bound to vote against this amendment offered by the Senator from Wisconsin, though in my judgment it would do more than any other to heal the difficulties by which we are surrounded."

There is an open confession that he is about to vote against an amendment which he entertains no doubt would do more to heal our difficulties than anything else!

Now, sir, no man can excuse himself for a thing of that kind; and while I admire the honesty of his confession, that he is doing it for party and political purposes, yet I utterly detest the odious principle that he avows for mere party purposes.

I ask the attention of the House to an extract from another speech, and, mark you, I am not now offering you "copperhead" testimony. The extract is from a speech made by one of your great northern lights, the celebrated Wendell Phillips. I ask the Clerk to read it.

The Clerk read as follows:

"Mr. Phillips hoped the Senate's amendment of the reconstruction plan would meet with an ignominious defeat, and that Massachusetts would reject it. He would welcome every Democrat and copperhead vote to help its defeat. He would go a step further and said, I hope that the Republican party, if it goes to the polls next fall on this basis, will be defeated. If this is the only thing that the party has to offer, it deserves defeat. The Republican party to-day seeks only to save its life. God grant that it may lose it!"

* * * * * * * * *

"The Republicans go to the people in deceit and hypocrisy, with their faces masked and their convictions hid; I hope to God they will be defeated! I want another serenade, not only to uncover the hidden sentiments of a Cabinet, but to smoke out the United States Senate, that we may see how many of them range by the side of Sumner, Ben. Wade, Judge Kelley, and Thad. Stevens."

Mr. HARDING, of Kentucky. Ay, sir, some of the men named there have since given way and fallen, and are no longer on Phillips's loyal list. As I said, sir, I am not reading southern testimony, or the testimony of copperheads; but from this great northern light, the man who has done more for the Republican party than any other man in the country. He was raised among them; he has affiliated with them; and he cannot be deceived as to their purposes. He charges that this Republican party is going before the country wearing a mask of hypocrisy, with its visage masked, and that its object is not to amend the Constitution, but, as Senator SHERMAN says, to save the life of the Republican party; and he says, "God grant they may lose it!" Now, sir, I cannot call in question such authority as this. He must know what he is talking about, and I have had read to you what he says.

[Here the hammer fell.]

Mr. STEVENS. I now, sir, move the previous question.

The previous question was seconded and the main question ordered.

ENROLLED BILL AND RESOLUTION SIGNED.

Mr. TROWBRIDGE, from the Committee on Enrolled Bills, reported that the committee had examined and found truly enrolled an act (S. No. 328) for the relief of Mrs. Abigail Ryan, and joint resolution (S. R. No. 51) respecting bounties to colored soldiers, and the pensions, bounties, and allowances to their heirs; when the Speaker signed the same.

RECONSTRUCTION—AGAIN.

Mr. STEVENS. Mr. Speaker, I do not intend to detain the House long. A few words will suffice.

We may, perhaps, congratulate the House and the country on the near approach to completion of a proposition to be submitted to the people for the admission of an outlawed community into the privileges and advantages of a civilized and free Government.

When I say that we should rejoice at such completion, I do not thereby intend so much to express joy at the superior excellence of the scheme, as that there is to be a scheme—a scheme containing much positive good, as well, I am bound to admit, as the omission of many better things.

In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.

Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels; among men as intelligent, as determined, and as independent as myself, who, not agreeing with me, do not choose to yield their opinions to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.

We might well have been justified in making renewed and more strenuous efforts for a better plan could we have had the coöperation of the Executive. With his cordial assistance the rebel States might have been made model republics, and this nation an empire of universal freedom. But he preferred "restoration" to "reconstruction." He chooses that the slave States should remain as nearly as possible in their ancient condition, with such small modifications as he and his prime minister should suggest, without any impertinent interference from Congress. He anticipated the legitimate action of the national Legislature, and by rank usurpation erected governments in the conquered provinces; imposed upon them institutions in the most arbitrary and unconstitutional manner; and now maintains them as legitimate governments, and insolently demands that they shall be represented in Congress on equal terms with loyal and regular States.

To repress this tyranny and at the same time to do some justice to conquered rebels requires caution. The great danger is that the seceders may soon overwhelm the loyal men in Congress. The haste urged upon us by some loyal but impetuous men; their anxiety to embrace the representatives of rebels; their ambition to display their dexterity in the use of the broad mantle of charity; and especially the danger arising from the unscrupulous use of patronage and from the oily orations of false prophets, famous for sixty-day obligations and for protested political promises, admonish us to make no further delay.

A few words will suffice to explain the changes made by the Senate in the proposition which we sent them.

The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States.

The second section has received but slight alteration. I wish it had received more. It contains much less power than I could wish; it has not half the vigor of the amendment which was lost in the Senate. It or the proposition offered by Senator WADE would have worked the enfranchisement of the colored man in half the time.

The third section has been wholly changed by substituting the ineligibility of certain high offenders for the disfranchisement of all rebels until 1870.

This I cannot look upon as an improvement. It opens the elective franchise to such as the States choose to admit. In my judgment it endangers the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels. With their enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent.

The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors.

The fifth section is unaltered.

You perceive that while I see much good in the proposition I do not pretend to be satisfied with it. And yet I am anxious for its speedy adoption, for I dread delay. The danger is that before any constitutional guards shall have been adopted Congress will be flooded by rebels and rebel sympathizers. Whoever has mingled much in deliberative bodies must have observed the mental as well as physical nervousness of many members, impelling them too often to injudicious action. Whoever has watched the feelings of this House during the tedious months of this session, listened to the impatient whispering of some and the open declarations of others; especially when able and sincere men propose to gratify personal predilections by breaking the ranks of the Union forces and presenting to the enemy a ragged front of stragglers, must be anxious to hasten the result and prevent the demoralization of our friends. Hence, I say, let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions.

I now, sir, ask for the question.

The SPEAKER The question before the House is on concurring in the amendments of the Senate; and as it requires by the Constitution a two-thirds vote, the vote will be taken by yeas and nays.

Mr. DEFREES. I ask the consent of the House to print some remarks upon this question, which I have not had an opportunity of delivering.

No objection was made, and leave was granted. [The speech will be found in the Appendix.]

Mr. WRIGHT. I ask the same privilege.

No objection was made, and leave was granted. [The speech will be found in the Appendix.]

The joint resolution as amended by the Senate is as follows:

Joint resolution proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two thirds of both Houses concurring,) That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said Legislatures, shall be valid as part of the Constitution, namely:

ARTICLE —.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution

of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The question was put on concurring with the amendments of the Senate; and there were—yeas 120, nays 32, not voting 32; as follows:

YEAS—Messrs. Alley, Allison, Ames, Delos R. Ashley, James M. Ashley, Baker, Baldwin, Banks, Barker, Baxter, Beaman, Bidwell, Bingham, Blaine, Boutwell, Bromwell, Buckland, Bundy, Reader W. Clarke, Sidney Clarke, Cobb, Conkling, Cook, Cullom, Darling, Davis, Dawes, Defrees, Delano, Dodge, Donnelly, Driggs, Dumont, Eckley, Eggleston, Eliot, Farnsworth, Farquhar, Ferry, Garfield, Grinnell, Griswold, Hale, Abner C. Harding, Hart, Hayes, Henderson, Higby, Holmes, Hooper, Hotchkiss, Asahel W. Hubbard, Chester D. Hubbard, John H. Hubbard, James R. Hubbell, Jenckes, Julian, Kelley, Kelso, Ketcham, Kuykendall, Laflin, Latham, George V. Lawrence, Loan, Longyear, Lynch, Marvin, McClurg, McKee, McRuer, Mercur, Miller, Moorhead, Morrill, Morris, Moulton, Myers, Newell, O'Neill, Orth, Paine, Perham, Phelps, Pike, Plants, Pomeroy, Price, William H. Randall, Raymond, Alexander H. Rice, John H. Rice, Sawyer, Schenck, Scofield, Shellabarger, Sloan, Smith, Spalding, Stevens, Stilwell, Thayer, Francis Thomas, John L. Thomas, Trowbridge, Upson, Van Aernam, Robert T. Van Horn, Ward, Warner, Henry D. Washburn, William B. Washburn, Welker, Wentworth, Whaley, Williams, James F. Wilson, Stephen F. Wilson, Windom, and the Speaker—120.

NAYS—Messrs. Ancona, Bergen, Boyer, Chanler, Coffroth, Dawson, Denison, Eldridge, Finck, Glossbrenner, Grider, Aaron Harding, Hogan, Edwin N. Hubbell, James M. Humphrey, Kerr, Le Blond, Marshall, Niblack, Nicholson, Samuel J. Randall, Ritter, Rogers, Ross, Sitgreaves, Strouse, Taber, Taylor, Thornton, Trimble, Winfield, and Wright—32.

NOT VOTING—Messrs. Anderson, Benjamin, Blow, Brandegee, Broomall, Culver, Deming, Dixon, Goodyear, Harris, Hill, Demas Hubbard, Hulburd, James Humphrey, Ingersoll, Johnson, Jones, Kasson, William Lawrence, Marston, McCullough, McIndoe, Noell, Patterson, Radford, Rollins, Rousseau, Shanklin, Starr, Burt Van Horn, Elihu B. Washburne, and Woodbridge—32.

The SPEAKER. Two thirds of both Houses having concurred in the joint resolution (H. R. No. 127) proposing an amendment to the Constitution of the United States, the joint resolution has passed.

During the roll-call on the foregoing vote,

Mr. KELLEY said: I desire to announce that Mr. BROOMALL, and Mr. WASHBURNE of Illinois, are paired with Mr. SHANKLIN upon this question.

Mr. LAFLIN said: I wish to announce that my colleague, Mr. VAN HORN, is paired upon this question with Mr. GOODYEAR.

Mr. ANCONA said: My colleague, Mr. JOHNSON, is absent on account of sickness, and is paired upon this question with Mr. ROLLINS and Mr. MARSTON, of New Hampshire.

Mr. DARLING said: I desire to state that my colleague, Mr. JAMES HUMPHREY, is detained at home by sickness. If present he would have voted in the affirmative.

Mr. WINFIELD said: My colleague, Mr. RADFORD, is unavoidably detained from his seat. If here he would have voted against the Senate amendment.

Mr. ASHLEY, of Ohio, said: My colleague, Mr. LAWRENCE, has been called home in consequence of the death of his father. If present he would have voted "ay."

Mr. COBB said: Mr. MCINDOE is detained from his seat by illness. If here he would vote in the affirmative.

Mr. MOULTON said: My colleague, Mr. INGERSOLL, has gone home under leave of absence from the House.

Mr. HART said: Mr. HUBBARD, of New York, is absent on account of death in his family. If he had been here he would have voted "ay."

Mr. WASHBURN, of Indiana, said: My colleague Mr. HILL, is absent by leave of the House. If here he would have voted in the affirmative.

Mr. ELDRIDGE. I desire to state that if Messrs. Brooks and Voorhees had not been expelled, they would have voted against this proposition. [Great laughter.]

Mr. SCHENCK. And I desire to say that if Jeff. Davis were here, he would probably also have voted the same way. [Renewed laughter.]

Mr. WENTWORTH. And so would Jake Thompson.

The result of the vote having been announced as above recorded,

Mr. STEVENS moved to reconsider the vote by which the amendments of the Senate were concurred in; and also moved to lay the motion to reconsider on the table.

The latter motion was agreed to.

The SPEAKER. The House is now engaged in executing the order of the House to proceed to business upon the Speaker's table.

RIVER AND HARBOR BILL.

The next business upon the Speaker's table was the amendments of the Senate to House bill No. 492, making appropriations for the repair, preservation, and completion of certain public works heretofore commenced under authority of law, and for other purposes.

Mr. ELIOT. I move that the House nonconcur in the amendments of the Senate, and ask for a committee of conference on the disagreeing votes of the two Houses.

The motion was agreed to.

Mr. ELIOT moved to reconsider the vote just taken; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

STEAMBOAT INSPECTION LAW.

The next business upon the Speaker's table was the amendments of the Senate to House bill No. 477, further to provide for the safety of the lives of passengers on board of vessels propelled in whole or in part by steam, to regulate the salaries of steamboat inspectors, and for other purposes.

Mr. ELIOT. I move that the bill and amendments be referred to the Committee on Commerce.

The motion was agreed to.

EXAMINERS OF PATENTS.

The next business upon the Speaker's table was Senate bill No. 350, to authorize the Commissioner of Patents to pay those employed as examiners and assistant examiners the salary fixed by law for the duties performed by them; which was read a first and second time.

Mr. JENCKES. I ask that this bill be put upon its passage now.

Mr. RANDALL, of Pennsylvania. Let the bill be read. I want to know what it is.

The bill was read at length. It authorizes the Commissioner of Patents to pay those employed in the Patent Office from April 1, 1861, until August 1, 1865, as examiners and assistant examiners of patents, at the rate fixed by law for those respective grades, provided that the same be paid out of the Patent Office fund, the compensation thus to be paid not to exceed that paid to those duly enrolled as examiners and assistant examiners for the same period.

Mr. JENCKES. This matter has been considered by the House Committee on Patents, who have recommended it once during the last Congress and once during the present Congress. I call the previous question upon the passage of the bill.

Mr. HARDING, of Illinois. I move that the bill be laid upon the table.

Mr. RANDALL, of Pennsylvania. I suggest that this bill better be referred to the Committee on Patents.

Mr. FARNSWORTH. I understand that the Committee on Patents of this House have examined this bill and decided to report unanimously in its favor.

Mr. ROSS. Is a motion to refer the bill now in order?

The SPEAKER. That motion is not now in order, pending the motion to lay upon the table and the demand for the previous question.

Mr. STEVENS. I move that the House adjourn.

The SPEAKER. Will the gentleman from Pennsylvania [Mr. STEVENS] withdraw the motion to allow the Chair to lay before the House several executive communications?

Mr. STEVENS. I will withdraw the motion for that purpose.

DIRECT TAXES IN GEORGIA.

The SPEAKER laid before the House the following message from the President of the United States:

To the Senate and House of Representatives:

I communicate, and invite the attention of Congress to, a copy of joint resolutions of the Senate and House of Representatives of the State of Georgia, requesting the suspension of the collection of the internal revenue tax due from that State pursuant to an act of Congress of 5th of August, 1861.

ANDREW JOHNSON.

WASHINGTON, D. C., *June* 11, 1866.

The message, with accompanying documents, was referred to the Committee of Ways and Means and ordered to be printed.

AGRICULTURAL COLLEGE—GEORGIA.

The SPEAKER also laid before the House the following message from the President of the United States:

To the Senate and House of Representatives:

It is proper that I should inform Congress that a copy of an act of the Legislature of Georgia of the 10th of March last has been officially communicated to me, by which that State accepts the donation of land for the benefit of colleges for agriculture and the mechanic arts, which donation was provided for by the acts of Congress of 2d July and 14th April, 1864.

ANDREW JOHNSON.

WASHINGTON, D. C., *June* 11, 1866.

The message was laid upon the table and ordered to be printed.

DRAFT IN PENNSYLVANIA.

The SPEAKER also laid before the House a communication from the Secretary of War, in answer to a resolution of the House of Representatives of the 11th instant, in regard to the draft in the eighth congressional district of Pennsylvania.

Mr. ANCONA. I move that this communication be printed and referred to the Committee on Military Affairs.

The motion was agreed to.

BRITISH AMERICAN TRADE.

The SPEAKER also laid before the House a communication from the Secretary of the Treasury in answer to a resolution of the House of Representatives of March 28, 1866, calling for information in regard to commercial relations with British America.

The question was upon ordering the communication to be printed.

Mr. DAVIS. Can an objection be made at this time to the printing of this communication?

The SPEAKER. It is customary to order the printing of all executive communications without putting the question to the House, unless objections be made to the printing.

Mr. DAVIS. I object to the printing of this communication.

The SPEAKER. Objection being made, the question of printing will be submitted to the House.

Mr. DAVIS. Before the question is taken I desire to say a single word upon it. If I understand this communication——

Mr. WENTWORTH. What is the question before the House?

The SPEAKER. It is whether the communication from the Secretary of the Treasury in regard to commercial relations with British America shall be printed.

Mr. WENTWORTH. Before that question is voted upon, or even debated, I insist that the communication shall be read. I object to one

THE POLITICAL HISTORY

OF THE

UNITED STATES OF AMERICA

DURING THE

PERIOD OF RECONSTRUCTION,

(From April 15, 1865, to July 15, 1870,)

INCLUDING A

CLASSIFIED SUMMARY OF THE LEGISLATION OF THE THIRTY-NINTH, FORTIETH, AND FORTY-FIRST CONGRESSES, WITH THE VOTES THEREON;

TOGETHER WITH THE

ACTION, CONGRESSIONAL AND STATE, ON THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES,

AND THE OTHER

IMPORTANT EXECUTIVE, LEGISLATIVE, POLITICO-MILITARY, AND JUDICIAL FACTS OF THAT PERIOD.

By Hon. EDWARD McPHERSON, LL.D.,
CLERK OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

WASHINGTON, D. C.:
PHILP & SOLOMONS.
1871.

STEREOTYPED BY
McGILL & WITHEROW,
WASHINGTON, D. C.

PREFACE.

This volume is a reprint of my Political Manuals, issued in 1866, 1867, 1868, 1869, and 1870, with revision and corrections to date and with some additions, and includes the political facts of the most momentous legislative period in the history of our country—that between April 15, 1865, and July 15, 1870. During it occurred the great controversy between President JOHNSON and the Thirty-ninth and Fortieth Congresses, which resulted, among many minor features of significance and importance, in the enactment of the Civil Rights act and the Tenure-of-Office act; the overthrow of the Presidential plan of Reconstruction; the remission to military rule of the lately insurrectionary States, except Tennessee; the prescription by Congress of the terms of their restoration; and the adoption, by Congress and the requisite number of State Legislatures, of the Fourteenth Amendment to the Constitution of the United States, which distinctly defines citizenship and places it under constitutional protection, and of the Fifteenth Amendment, which settles upon a new basis the question of suffrage in the United States, and modifies the relations of the States to it—all which measures indicate the era referred to as unquestionably the most remarkable in our legislative history.

It has been my effort to preserve in these pages the record of the various steps by which these ends have been reached, so that it may be entirely practicable for the student of them to trace their development from the first suggestion to the final shape.

A glance at the Table of Contents and the Index will indicate the scope of the work, and the thoroughness and detail which characterize it; and a close examination of its pages will, I trust, leave no room to doubt that it has been prepared in a spirit of fairness and impartiality, and that it may be accepted as an actual contribution to the political history of our times.

The general plan of the work is the same as that of the Political History of the United States during the Rebellion, but differs from it chiefly in its having been arranged in annual parts. The advantage in this is, that it exhibits more clearly the growth of legislation and of public sentiment on each question, year by year. The disadvantage is, a small increase in the labor of investigation.

It is hoped, however, that the completeness of the Index, both as to subjects, persons, and parties, will enable all, without difficulty, to command ready access to the multitude of facts which will be found in these pages.

Part I contains a full statement of the Orders and Proclamations and the general action of President JOHNSON, in the development of his policy of restoring the insurrectionary States to their places in the Union, by calling constitutional conventions in each, on an indicated basis, and by suggesting certain action therein as preliminary to restoration. It also contains the legislation of those organizations respecting the colored population recently freed, and the various Messages, Speeches, Letters, and Proclamations of the PRESIDENT in vindication of his policy and in resistance to that of Congress. This part will also be found to contain the full text of the majority and minority reports of the Joint Congressional Committee on Reconstruction, with the text of the Fourteenth Amendment, as finally adopted by Congress and submitted to the Legislatures for their action. This amendment having been rejected by the Legislatures in the insurrectionary States, chosen under the action of President JOHNSON, Congress subsequently adopted the decisive measure of dividing those States into five Military Districts, providing for their re-organization on the basis of, substantially, Universal Manhood Suffrage, and prescribing the conditions on which they would be entitled to representation in Congress.

Part II contains the texts of these various measures, the Veto Messages of the PRESIDENT in disapproval of them, and the various Votes by which they were passed over the veto by two-thirds of each House.

Part III contains all the proceedings connected with the proposed impeachment of President JOHNSON by the Fortieth Congress, with the Articles of Impeachment in full, the answer of President JOHNSON, the Replication of the House, and the Judgment of the Senate thereon. It also contains a digest of the Orders of the Military Commanders and their general action under the various Reconstruction acts, with an abstract of the Constitutions prepared by the Conventions called under them.

Parts IV and V contain the remaining record of Reconstruction, the final votes in Congress upon the adoption of the Fifteenth Constitutional Amendment, President GRANT'S action thereon, the votes of the various State Legislatures, and the final certificate of the Secretary of State announcing its ratification as an amendment to the Constitution. Besides these great measures, the interest in which will scarcely abate as long as our present system of government remains, in this volume will be found all the Decisions of the Supreme Court of the United States during this period, on the more important public questions which came before it, such as the *Habeas Corpus*, the Legal-Tender, and the Test-Oath cases; the right of States to tax National Banks; the right of the United

States to tax State Banks; the right of a State to tax persons passing through it; the validity of contracts in confederate money, and the effect of express contracts to pay coined dollars; and sundry opinions in United States Circuit and State courts. Besides, in it will be found all the votes in Congress upon general questions, such as the Public Credit act, Banking and Currency legislation, the Tenure-of-Office act, the Civil Rights act, Internal Revenue, Tariff, and Land-grant legislation; the various Messages, Proclamations, and Orders of Presidents JOHNSON and GRANT; the votes of Congress on political declaratory resolutions; the platforms of parties, both State and National, from 1866 to 1870; the returns of State and Presidential elections; Tables of Population, Public Debt, Land-grants, Taxation, Registration, Disfranchisement, Expenditures and Appropriations, Revenue receipts and reductions, Lists of the Cabinets of Presidents JOHNSON and GRANT, and of the Members of the Thirty-ninth, Fortieth, and Forty-first Congresses; and an extended political and military miscellany, which will be found to include almost every thing of permanent interest connected with national politics during the period referred to.

This volume takes up the thread where it was dropped by that on the Rebellion, and it is naturally a companion to it. That gives the record of the steps by which Secession was accomplished and Disunion attempted, as well as of those by which Secession was resisted and Disunion defeated. This gives the equally portentous record of the means by which, the War over, the Government and people of the United States reaped its fruits, and especially the memorable steps by which four millions of slaves, formerly knows as chattels, became incorporated, first into the civil, and next into the political, body.

In the various votes given, the names of Republicans are printed in Roman, of Democrats, and of those who generally co-operated with them, in *italic*.

EDWARD McPHERSON.

WASHINGTON, D. C., *April* 20, 1871.

TABLE OF CONTENTS.

PART I—1866.

PART II—1867.

PART III—1868.

VIII.

VOTES ON PROPOSED CONSTITUTIONAL AMENDMENTS.

The Constitutional Amendment, as Finally Adopted and Submitted to the Legislatures of the States.

IN SENATE.

1866, June 8—The Amendment in these words, as finally amended, was brought to a vote:

Joint resolution proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring,) That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

ARTICLE 14.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

It passed—yeas 33, nays 11, as follow:

YEAS—Messrs. Anthony, Chandler, Clark, Conness, Cragin, Creswell, Edmunds, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Kansas, Lane of Indiana, Morgan, Morrill, Nye, Poland, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Trumbull, Wade, Willey, Williams, Wilson, Yates—33.

NAYS—Messrs. Cowan, *Davis*, Doolittle, *Guthrie*, *Hendricks*, *Johnson*, *McDougall*, Norton, *Riddle*, *Saulsbury*, Van Winkle—11.

ABSENT—Messrs. Brown, *Buckalew*, Dixon, *Nesmith*, *Wright*—5.

IN HOUSE.

June 13—The Amendment passed—yeas 138, nays 36, as follow:

YEAS—Messrs. Alley, Allison, Ames, Anderson, Delos R. Ashley, James M. Ashley, Baker, Baldwin, Banks, Barker, Baxter, Beaman, Benjamin, Bidwell, Bingham, Blaine, Blow, Boutwell, Brandegee, Bromwell, Broomall, Buckland, Bundy, Reader W. Clarke, Sidney Clarke, Cobb, Conkling, Cook, Cullom, Darling, Davis, Dawes, Defrees, Delano, Deming, Dixon, Dodge, Donnelly, Driggs, Dumont, Eckley, Eggleston, Eliot, Farnsworth, Farquhar, Ferry, Garfield, Grinnell, Griswold, Hale, Abner C. Harding, Hart, Hayes, Henderson, Higby, Holmes, Hooper, Hotchkiss, Asahel W. Hubbard, Chester D. Hubbard, Demas Hubbard, jr., John H. Hubbard, James R. Hubbell, Hulburd, Ingersoll, Jenckes, Julian, Kasson, Kelley, Kelso, Ketcham, Kuykendall, Laflin, Latham, George V. Lawrence, William Lawrence, Loan, Longyear, Lynch, Marston, Marvin, McClurg, McKee, McRuer, Mercur, Miller, Moorhead, Morrill, Morris, Moulton, Myers, Newell, O'Neill, Orth, Paine, Patterson, Perham, Phelps, Pike, Plants, Pomeroy, Price, William H. Randall, Raymond, Alexander H. Rice, John H. Rice, Rollins, Sawyer, Schenck, Scofield, Shellabarger, Sloan, Smith, Spalding, Stevens, Stillwell, Thayer, Francis Thomas, John L. Thomas, Trowbridge, Upson, Van Aernam, Burt Van Horn, Robert T. Van Horn, Ward, Warner, Elihu B. Washburne, Henry D. Washburn, William B. Washburn, Welker, Wentworth, Whaley, Williams, James F. Wilson, Stephen F. Wilson, Windom, Woodbridge, the Speaker—138.

NAYS—Messrs. *Ancona*, *Bergen*, *Boyer*, *Chanler*, *Coffroth*, *Dawson*, *Denison*, *Eldridge*, *Finck*, *Glossbrenner*, *Grider*, *Aaron Harding*, *Hogan*, *Edwin N. Hubbell*, *James M. Humphrey*, *Johnson*, *Kerr*, *Le Blond*, *Marshall*, *McCullough*, *Niblack*, *Nicholson*, *Radford*, *Samuel J. Randall*, *Ritter*, *Rogers*, *Ross*, *Shanklin*, *Sitgreaves*, *Strouse*, *Taber*, *Taylor*, *Thornton*, *Trimble*, *Winfield*, *Wright*—36.

NOT VOTING—Messrs. Culver, *Goodyear*, *Harris*, Hill, James Humphrey, *Jones*, McIndoe, *Noell*, Rousseau, Starr—10.

Preliminary Proceedings.

Prior to the adoption of the joint resolution in the form above stated, these reports were made from the Joint Committee, and these votes were taken in the two Houses:

IN HOUSE.

April 30—Mr. Stevens, from the Joint Select Committee on Reconstruction reported a joint resolution, as follows:

A joint resolution proposing an amendment to the Constitution of the United States.

Be it resolved, &c., (two-thirds of both Houses concurring,) That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

ARTICLE —.

SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

SEC. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for representatives in Congress and for electors for President and Vice-President of the United States.

SEC. 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Objection having been made to its being a special order for Tuesday, May 8, and every day thereafter until disposed of, Mr. Stevens moved a suspension of the rules to enable him to make that motion; which was agreed to—yeas 107, nays 20.

The NAYS were: Messrs. *Ancona*, *Bergen*, *Boyer*, *Coffroth*, *Dawson*, *Eldridge*, *Finck*, *Grider*, *Aaron Harding*, *James M. Humphrey*, Latham, *Marshall*, *Niblack*, *Nicholson*, *Ritter*, *Ross*, *Strouse*, *Taylor*, *Thornton*, *Winfield*—20.

May 10—Mr. Stevens demanded the previous question; which was seconded, on a count, 85 to 57; and the main question was ordered—yeas 84, nays 79, as follow:

YEAS—Messrs. Allison, Ames, Anderson, Banks, Baxter, Bidwell, Boutwell, Bromwell, Broomall, *Chanler*, Reader W. Clarke, Sidney Clarke, Cobb, Conkling, Cook, Defrees, Dixon, Driggs, Dumont, Eckley, Eggleston, *Eldridge*, Eliot, *Grider*, Grinnell, *Aaron Harding*, Abner C. Harding, *Harris*, Hart, Higby, Holmes, Hooper, Hotchkiss, Asahel W. Hubbard, Demas Hubbard, Ingersoll, Julian, Kelley, Kelso, *Kerr*, William Lawrence, *Le Blond*, Loan, Lynch, Marston, McClurg, *McCullough*, McIndoe, Mercur, Morrill, Moulton, *Niblack*, O'Neill, Orth, Paine, Patterson, Perham, Pike, Price, John H. Rice, *Ritter*, *Rogers*, Rollins, *Ross*, Rousseau, Sawyer, Schenck, Scofield, *Shanklin*, Shellabarger, Spalding, Stevens, Francis Thomas, John L. Thomas, *Thornton*, Trowbridge, Upson, Ward, Elihu B. Washburne, Welker, James F. Wilson, Stephen F. Wilson, Windom, Woodbridge—84.

NAYS—Messrs. Alley, *Ancona*, Delos R. Ashley, James M. Ashley, Baker, Baldwin, Barker, Beaman, Benjamin, *Bergen*, Bingham, Blaine, Blow, *Boyer*, Buckland, Bundy, *Coffroth*, Cullom, Darling, Davis, Dawes, *Dawson*, Delano, Deming, Dodge, Donnelly, Farnsworth, Ferry, Finck, Garfield, *Glossbrenner*, Goodyear, Griswold, Hayes, Henderson, Chester D. Hubbard, James R. Hubbell, Hulburd, James Humphrey, Jenckes, Kasson, Ketcham, Kuykendall, Laflin, Latham, George V. Lawrence, Longyear, *Marshall*, McKee, McRuer, Miller, Moorhead, Morris, Myers, Newell, Phelps, Plants, *Radford*, *Samuel J. Randall*, William H. Randall, Raymond, Alexander H. Rice, *Sitgreaves*, Smith, Stillwell, *Strouse*, *Taber*, *Taylor*, Thayer, *Trimble*, Burt Van Horn, Robert T. Van Horn, Warner, Henry D. Washburn, William B. Washburn, Whaley, Williams, *Winfield*, *Wright*—79.

The joint resolution, as above printed, then passed—yeas 128, nays 37, as follow:

YEAS—Messrs. Alley, Allison, Ames, Anderson, Delos R. Ashley, James M. Ashley, Baker, Baldwin, Banks, Barker, Baxter, Beaman, Benjamin, Bidwell, Bingham, Blaine, Blow, Boutwell, Bromwell, Broomall, Buckland, Bundy, Reader W. Clarke, Sidney Clarke, Cobb, Conkling, Cook, Cullom, Darling, Davis, Dawes, Defrees, Delano, Deming, Dixon, Dodge, Donnelly, Driggs, Dumont, Eckley, Eggleston, Eliot, Farnsworth, Ferry, Garfield, Grinnell, Griswold, Abner C. Harding, Hart, Hayes, Henderson, Higby, Holmes, Hooper, Hotchkiss, Asahel W. Hubbard, Chester D. Hubbard, Demas Hubbard, James R. Hubbell, Hulburd, James Humphrey, Ingersoll, Jenckes, Julian, Kasson, Kelley, Kelso, Ketcham, Kuykendall, Laflin, George V. Lawrence, William Lawrence, Loan, Longyear, Lynch, Marston, McClurg, McIndoe, McKee, McRuer, Mercur, Miller, Moorhead, Morrill, Morris, Moulton, Myers, Newell, O'Neill, Orth, Paine, Patterson, Perham, Pike, Plants, Price, William H. Randall, Raymond, Alexander H. Rice, John H. Rice, Rollins, Sawyer, Schenck, Scofield, Shellabarger, Spalding, Stevens, Stillwell, Thayer, Francis Thomas, John L. Thomas, Trowbridge, Upson, Van Aernam, Burt Van Horn, Robert T. Van Horn, Ward, Warner, Elihu B. Washburne, Henry D. Washburn, William B. Washburn, Welker, Williams, James F. Wilson, Stephen F. Wilson, Windom, Woodbridge, the Speaker—128.

NAYS—Messrs. *Ancona*, *Bergen*, *Boyer*, *Chanler*, *Coffroth*, *Dawson*, *Eldridge*, *Finck*, *Glossbrenner*, *Goodyear*, *Grider*, *Aaron Harding*, *Harris*, *Kerr*, Latham, *Le Blond*, *Marshall*, *McCullough*, *Niblack*, Phelps, *Radford*, *Samuel J. Randall*, *Ritter*, *Rogers*, *Ross*, Rousseau, *Shanklin*, *Sitgreaves*, Smith, *Strouse*, *Taber*, *Taylor*, *Thornton*, *Trimble*, Whaley, *Winfield*, *Wright*—37.

The amendments of the Senate were made to this proposition, when it was finally adopted by each House, in the form first stated.

The Accompanying Bills.

April 30—Mr. Stevens, from the same committee, also reported this bill:

A Bill to provide for restoring the States lately in insurrection to their full political rights.

Whereas it is expedient that the States lately in insurrection should, at the earliest day consistent with the future peace and safety of the Union, be restored to full participation in all political rights; and whereas the Congress did, by joint resolution, propose for ratification to the legislatures of the several States, as an amendment to the Constitution of the United States, an article in the following words, to wit:

[For article, see page 102.]

Now, therefore,

Be it enacted, &c., That whenever the above-recited amendment shall have become part of the