In the legal histories of Reconstruction, the Fifteenth Amendment’s drafting and ratification is an afterthought compared to the Fourteenth Amendment. This oversight is perplexing given that the Fifteenth Amendment ushered in a brief period of multi-racial democracy and laid the constitutional foundation for the Voting Rights Act of 1965. This Article helps to complete the historical record and provides a thorough accounting of the Fifteenth Amendment’s text, history, and purpose.

This Article situates the Fifteenth Amendment within the broad array of constitutional provisions, federal statutes, fundamental conditions, and state laws that enfranchised—and disenfranchised—Black men during Reconstruction. This Article then performs a deep dive into the congressional debate, cataloguing every version of the Amendment that was voted on. It next turns to the ratification debate, an intense partisan affair that culminated in Congress compelling four Southern States’ ratification as part of their re-admission to the Union.

Rather than answer today’s doctrinal questions, this Article’s focus is on the issues debated by the ratifying generation. The Reconstruction Framers were united in their goal of enfranchising Black men nationwide, but they were deeply divided over how best to achieve that goal and whether other disenfranchised groups—such as women, Irish Americans, and Chinese immigrants—should be covered by the Amendment as well. In addition, the Reconstruction Framers debated whether and how the Amendment could be circumvented and whether officeholding should be explicitly protected.

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

Ratified in 1870, the Fifteenth Amendment established the world’s first multi-racial democracy. In guaranteeing that “[t]he right of citizens … to vote shall not by denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” the Fifteenth Amendment enfranchised Black men in seventeen Northern and Border States. Although Black men in the South had already obtained the right to vote via the First Reconstruction Act, the Fifteenth Amendment gave Congress novel enforcement authority to protect voting rights if—and indeed, when—the newly re-admitted Southern States started to backslide and disenfranchise Black men.

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

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

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2 U.S. Const. amend. XV, § 1.
3 See Foner, Second Founding, supra note 1, at 108.
5 See U.S. Const. amend XV, § 2 (granting Congress the power to pass “appropriate” enforcement legislation); Travis Crum, The Superfluous Fifteenth Amendment?, 114 Nw. U. L. Rev. 1549, 1620-21 (2020) [hereinafter Crum, Superfluous] (arguing that the Fortieth Congress viewed the Fifteenth Amendment as necessary to pass enforcement legislation protecting voting rights).
8 See infra note 266.
Fifteenth Amendment’s drafting and ratification—the historical event most salient for constitutional interpretation—can be summarized in a lengthy footnote. Indeed, most legal scholarship on the Fifteenth Amendment focuses on its enforcement during Reconstruction and its subsequent erasure during Jim Crow. For their part, historians have examined the Fifteenth Amendment’s adoption, but their inquiries concentrate on questions of motivation and causation rather than the Amendment’s original

10 See Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203, 222-41 (1995) [hereinafter Amar, Jury Service] (discussing the Fifteenth Amendment’s drafting and its relevance to the right to serve on a jury); Vikram David Amar & Alan Brownstein, The Hybrid Nature of Political Rights, 50 STAN. L. REV. 915, 928-55 (1998) (arguing that Shaw claims are inconsistent with the Fifteenth Amendment); Alfred Avins, Literacy Tests and the Fifteenth Amendment: The Original Understanding, 12 S. TEX. L.J. 24, 64-66 (1970) [hereinafter Avins, Literacy] (arguing that Congress could not ban literacy tests under its Fifteenth Amendment enforcement authority); Alfred Avins, The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding, 115 KAN. L. REV. 287, 304 (1967) [hereinafter Avins, Office] (arguing that the Fifteenth Amendment does not protect the right to hold office); Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397, 1425 (2002) (“The Fifteenth Amendment should not be viewed as merely adding the right to vote to the list of other rights protected under the Constitution and … the Fourteenth Amendment.”); Gabriel J. Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 GEO. L.J. 259, 263-64 (2004) (arguing that the Fifteenth Amendment effectively repealed Section Two of the Fourteenth Amendment); Travis Crum, The Lawfulness of the Fifteenth Amendment, 97 NOTRE DAME L. REV. 1543, 1573-97 (2022) [hereinafter Crum, Lawfulness] (discussing the irregularities in the Fifteenth Amendment’s adoption); Travis Crum, Reconstructing Racially Polarized Voting, 70 DUKE L.J. 261, 314-20 (2020) [hereinafter Crum, Reconstructing] (criticizing the Court’s treatment of racially polarized voting as inconsistent with the Fifteenth Amendment’s historical context); Crum, Superfluous, supra note 5, 1602-17 (discussing the Fortieth Congress’s decision to pass a constitutional amendment rather than a nationwide suffrage statute); David P. Currie, The Reconstruction Congress, 75 U. CHI. L. REV. 383, 452-57 (2008) (summarizing the Fifteenth Amendment’s adoption); 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter Lash] (compiling primary sources); Earl M. Mal tz, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 142-56 (1990) [hereinafter Maltz, Civil Rights] (claiming that the Fifteenth Amendment prohibits only facially discriminatory laws); Maltz, Fifteenth, supra note 9, at 418-43 (surveying the congressional debate over the Fifteenth Amendment).

understanding. To fully underscore the dearth of scholarship: the last full-length book on the Fifteenth Amendment was published in 1965. Suffice to say, our nation has dramatically changed since then—and in no small part due to the foundation laid by the Fifteenth Amendment for the constitutionality of the Voting Rights Act of 1965 (VRA).

In a similar vein, the Fifteenth Amendment is doctrinally underdeveloped. The Supreme Court has repeatedly refused to answer core questions about the Fifteenth Amendment, such as whether it applies to redistricting. In some ways, this doctrinal agnosticism is unsurprising, as the Fifteenth Amendment’s protections have been subsumed by the Equal Protection Clause and most cases are litigated under the VRA. However, the Court’s reliance on the Equal Protection Clause to protect against racial discrimination in voting is deeply ahistorical. After all, the Reconstruction

12 See, e.g., A. Caperton Braxton, The Fifteenth Amendment: An Account of Its Enactment 77-78 (1903) (arguing that the majority of White male voters opposed the Fifteenth Amendment’s ratification); Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869, at 335-36 (1974) (arguing that “the chaos of the third session of the Fortieth Congress … portended the rupture of the party and the collapse of the Republican Reconstruction policy”). LaWanda Cox & John H. Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, in Reconstruction: An Anthology of Revisionist Writings 156 (Kenneth M. Stamp & Leon F. Litwack, eds., 1969) (emphasizing the Radicals’ ideological motivations); Gregory P. Downs, After Appomattox: Military Occupation and the Ends of War 218 (2015) (arguing that “[r]atifying the Fifteenth Amendment depended upon the war powers”); Foner, Second Founding, supra note 1, at 115 (observing that the “ratification of the Fifteenth Amendment marked the completion of the second founding”); William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment 77 (2d ed. 1969) (arguing that the Fifteenth Amendment’s primary purpose was to enfranchise Black men in the North); John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment 21 (1909) (arguing that the “controlling motive” behind the Fifteenth Amendment was “supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States”); Xi Wang, The Trial of Democracy: Black Suffrage and Northern Republicans, 1860-1910, at 39-48 (1997) [hereinafter Wang, Trial] (discussing the Fifteenth Amendment’s passage as part a larger project focused on enforcement legislation); see also infra notes 37 (discussing historians of the women’s suffrage movement).

13 See Gillette, supra note 12, at 17-18 (discussing the book’s initial publication in 1965 against the backdrop of the VRA’s passage).

14 See Foner, Second Founding, supra note 1, at 170 (noting that “the Fifteenth Amendment] plays only a minor role in modern constitutional law”).

15 A mere plurality of the Court has concluded that redistricting falls outside the Fifteenth Amendment, see City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (plurality opinion), but subsequent majority opinions have observed that the question remains open, see, e.g., Voinovich v. Quilter, 507 U.S. 146, 159 (1993) (“This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.”).

16 See Crum, Superfluous, supra note 5, at 1557-67.

Framers added the Fifteenth Amendment to the Constitution because Section One of the Fourteenth Amendment was originally understood to encompass civil—but not political—rights.\textsuperscript{18}

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

Second, in the wake of the Court’s invalidation of the VRA’s coverage formula in \textit{Shelby County v. Holder},\textsuperscript{20} the constitutionality of Section 2 of the VRA remains hotly contested.\textsuperscript{21} Section 2 is a “permanent, nationwide ban on racial discrimination in voting”\textsuperscript{22} that mandates the consideration of race in the redistricting process and requires the creation of majority-minority districts in certain circumstances.\textsuperscript{23} But in the \textit{Shaw} line of cases, the Court held that the Equal Protection Clause subjects race-based redistricting to strict scrutiny.\textsuperscript{24} Thus, the Court’s colorblind vision of the Fourteenth Amendment


\textsuperscript{19} See \textit{Dobbs v. Jackson Women’s Health Org.}, 142 S. Ct. 2228, 2242 (2022) (holding that the Due Process Clause does not protect a woman’s right to choose an abortion and overturning \textit{Roe} and \textit{Casey}); \textit{N.Y. State Rifle & Pistol Ass’n v. Bruen}, 142 S. Ct. 2111, 2126 (2022) (eschewing a scrutiny-based standard in favor of one based on “this Nation’s historical tradition of firearm regulation”).

\textsuperscript{20} \textit{Shelby County}, 570 U.S. 529, 557 (2013).

\textsuperscript{21} See \textit{Holder v. Hall}, 512 U.S. 874, 905-06 (1994) (Thomas, J., concurring in the judgment) (“The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”); \textit{Travis Crum, Deregulated Redistricting}, 107 CORNELL L. REV. 359, 434-43 (2022) [hereinafter \textit{Crum, Deregulated}] (surveying emerging threats to Section 2’s constitutionality).

\textsuperscript{22} \textit{Shelby County}, 570 U.S. at 557.

\textsuperscript{23} See \textit{Bartlett v. Strickland}, 556 U.S. 1, 13 (2009) (plurality opinion).

\textsuperscript{24} See \textit{Shaw v. Reno}, 509 U.S. 630, 649 (1993) (recognizing the cause of action); \textit{Cooper v. Harris}, 137 S. Ct. 1455, 1463-64 (2017) (explaining that if “‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district,’ … the design of the district must withstand strict scrutiny” (quoting \textit{Miller v. Johnson}, 515 U.S. 900, 916 (1995))).
is on a collision course with the VRA.\textsuperscript{25}

The tension between the Court’s originalist impulses and its colorblind doctrine can be seen in a case being heard this Term. In \textit{Allen v. Milligan}, plaintiffs brought a Section 2 challenge against Alabama’s congressional redistricting plan, in which only one out of seven districts is majority Black notwithstanding a population that is twenty-seven percent Black. The three-judge district court enjoined the use of that map for the 2022 midterm election.\textsuperscript{26} The Supreme Court stayed that decision, signaling that it was likely to reverse.\textsuperscript{27} Now, Alabama is arguing, \textit{inter alia}, that constitutional avoidance necessitates that Section 2 should \textit{not} apply to single-member redistricting plans.\textsuperscript{28} In an illustrative example of how far afield contemporary doctrine has drifted from the original meaning of the Reconstruction Amendments, Alabama’s argument—which is pitched at the purportedly originalist Justices—focuses on the \textit{Shaw} line of cases and asserts that the Equal Protection Clause prohibits race-based districting,\textsuperscript{29} even though that clause was originally understood to not even apply to voting rights.\textsuperscript{30}

An unabridged account of the Fifteenth Amendment’s text, history, and purpose is therefore necessary not only to complete the historical narrative but also to critique the Court’s application of colorblind Fourteenth Amendment principles to what should be considered Fifteenth Amendment cases. This Article’s claims and contributions are primarily descriptive and, secondarily, normative. Instead of concentrating on today’s doctrinal disputes,\textsuperscript{31} this Article answers questions that were pressing during


\textsuperscript{26} See Singleton v. Merrill, 582 F. Supp. 3d 924, 935-36 (N.D. Ala. 2022). In the interest of full disclosure, I filed an amicus brief in support of the plaintiffs in this case. \textit{See Brief for Amicus Curiae Professor Travis Crum in Support of Respondents/Appellees, Merrill v. Milligan (Nos. 21-1086 & 21-1087)}, 2022 WL 2873374.

\textsuperscript{27} See Merrill v. Milligan, 142 S. Ct. 879 (2022).

\textsuperscript{28} See Brief for Appellants at 31, Merrill v. Milligan (Nos. 21-1086 & 21-1087), 2022 WL 1276146, at *29-31.

\textsuperscript{29} See \textit{id.} at 76 (arguing that Section 2 mandates the creation of racial gerrymanders in violation of the Equal Protection Clause). Alabama also argues that Section 2’s application to single-member redistricting schemes exceeds Congress’s Fifteenth Amendment enforcement authority. \textit{See id.} at 72-75.

\textsuperscript{30} During oral argument, Justice Ketanji Brown Jackson challenged whether the Fourteenth and Fifteenth Amendments were, in fact, colorblind as a matter of original understanding, but her comments still assumed that the Equal Protection Clause was the starting point for the analysis. \textit{See Transcript of Oral Argument at 57, Merrill v. Milligan (Nos. 21-1086 & 21-1087)} (“[T]he framers themselves adopted the equal protection clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race conscious way.”).

\textsuperscript{31} This Article leaves these disputes to future work. In addition to the doctrinal uncertainty over redistricting, open questions include whether the Fifteenth Amendment has
During the lame-duck Fortieth Congress, the Reconstruction Framers coalesced around the goal of mandating the enfranchisement of Black men nationwide. First and foremost, the Fifteenth Amendment was unambiguously intended to—and legally accomplished—that goal. But the Reconstruction Framers were deeply divided over subsidiary questions: whether the Amendment could be circumvented with facially neutral voting qualifications that were intended to disproportionately impacted Black men, whether it permitted the disenfranchisement of Irish Americans and Chinese immigrants, and whether the right to hold office was protected. Even after the Amendment passed Congress, the ratifying public continued to debate the metes and bounds of the Amendment’s language.

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

As this Article demonstrates, the Fifteenth Amendment was originally understood to apply to all races and to prohibit discriminatory schemes that relied on racial proxies. As the sole use of the word “race” in the Constitution, the debates over what qualifies as racial discrimination under the Fifteenth Amendment are instructive for the Fourteenth Amendment as well. Moreover, the Fifteenth Amendment’s historical context and purpose indicate that the right to hold federal office could not be contingent on a racial classification and, admittedly less clearly, that the right to hold state office

\[\text{an intent requirement and applies to private action. See Crum, Superfluous, supra note 5, at 1560-63.}\]

\[32 \text{ See infra Sections I.C, I.D, Appendix A.}\]

\[33 \text{ See infra Appendix B. Regarding my timeline of draft language and votes, I am aware of only one similar compilation, which dates back to Reconstruction. See Edward McPherson, The Political History of the United States of America during the Period of Reconstruction, 399-406 (1871). McPherson’s compilation omits the first two votes in the House, a proposal on Electoral College reform, and a proposal by Senator Vickers (D-MD) on February 17. In addition, my appendix makes this information more easily accessible to researchers who use modern electronic databases. And unlike McPherson’s compilation, my appendix provides cross-references to the Congressional Globe so that researchers may easily find the primary source.}\]
was encompassed within the Amendment’s protections for the right to vote. This Article briefly concludes by arguing that the Radical Republican ideas animating the Fifteenth Amendment transformed our Constitution’s conception of democratic governance.

A few clarifications about what is outside this Article’s scope. This Article does not dwell on the political—as opposed to legal—arguments made by Democrats against the Fifteenth Amendment, such as their racist attacks on Black Americans, their argument that suffrage was an unamendable state’s right, and their claim that Republicans had reneged on their 1868 party platform’s promise that “the question of suffrage in all the loyal States properly belongs to the people of those States.” Nor does this Article focus on the procedural obstacles that Democrats attempted to erect, such as a requirement that only state legislatures elected after the Fifteenth Amendment’s passage in Congress could ratify it. Relatedly, this Article does not discuss the various irregularities concerning the Fifteenth Amendment’s adoption and whether Article V’s requirements of passage by two-thirds of Congress and three-fourths of the States were, in fact, satisfied. Finally, as historians have amply covered this topic as a prelude to the Nineteenth Amendment, this Article only cursorily addresses the impact of the Fourteenth and Fifteenth Amendments on the women’s suffrage movement.

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35 See CONG. GLOBE, 40th Cong., 3d Sess. 1314 (1869). Democrats argued that, had Republicans been candid about their intent to pass nationwide Black male suffrage, the 1868 election would have turned out differently. Under the Democrats’ theory, only those state legislatures elected with knowledge of the Fifteenth Amendment’s potential existence should vote on its ratification—a rule that they believed would benefit them politically and help defeat the amendment. See Maltz, Fifteenth, supra note 9, at 425.

36 These irregularities include: the exclusion of Southern States from Congress; the use of fundamental conditions to compel ratification; the re-imposition of military rule in Georgia; New York’s attempted rescission of its ratification; and Indiana’s ratification by a rump state legislature. See Crum, Lawfulness, supra note 10, at 1571-91; see also CONG. GLOBE, 41st Cong., 2d Sess. 5441 (1870) (House resolution affirming the Fifteenth Amendment’s validity). Scholars have also canvassed the irregularities associated with the Thirteenth and Fourteenth Amendments’ adoptions. See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 100-252 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]; AMAR, AMERICA’S CONSTITUTION, supra note 17, at 364-80; Thomas B. Colby, Originalism and the Ratification of the Fourteenth Amendment, 107 NW. U. L. REV. 1627 (2013) [hereinafter Colby, Originalism]; Christopher R. Green, The History of the Loyal Denominator, 79 LA. L. REV. 47 (2018); John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. CHI. L. REV. 375, 404 (2001).

37 See, e.g., ELLEN CAROL DUBoIS, SUFFRAGE: WOMEN’S LONG BATTLE FOR THE VOTE 47-94 (2020); FAYE E. DUDDEN, FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA 161-88 (2011); LAURA E.
This Article proceeds as follows. Part I examines the status of Black men’s right to vote prior to the Fifteenth Amendment. Part II excavates the drafting of the Fifteenth Amendment in the Fortieth Congress. Part III canvases the ratification debate in the States. Part IV answers the Reconstruction-era debates over the Fifteenth Amendment’s scope and expounds on its normative implications for constitutional law.

**I. THE RIGHT TO VOTE BEFORE THE FIFTEENTH AMENDMENT**

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

**A. The Original Constitution**

At the Founding, the House was the only directly elected branch of the federal government. The original Constitution, moreover, did not establish a federal standard for who had the right to vote for representatives. The Founders failed to reach agreement on a nationwide standard—such as a property qualification—given the plethora of approaches followed by the States.

Instead, the original Constitution gave States control over who could vote for the federal House. Article I, Section Two provides that “Electors … shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” In practice, this was the lower state house, which had “the broadest franchise operating in the states, as opposed to more restricted electorates for various state upper houses and governorships.”

As a general matter, the franchise was limited to White men who owned
property or satisfied taxpaying requirements.\textsuperscript{42} Estimates vary but “[b]y 1790 … roughly 60 to 70 percent of adult white men (and very few others) could vote.”\textsuperscript{43} By relying on state suffrage qualifications, the original Constitution embraced discriminatory barriers to casting a ballot.

And yet, there were some surprising exceptions and even signs of progress. Because landownership was more common in the United States, a greater percentage of the White male population could vote than in England.\textsuperscript{44} Women could vote in New Jersey.\textsuperscript{45} Some States enfranchised aliens.\textsuperscript{46} Religious qualifications were abandoned in all but one State during the Founding.\textsuperscript{47} Most relevant for this Article, free Black men could vote in “most of the original States, including some in the South, … if they met … property or other qualifications.”\textsuperscript{48} But between the Founding and the Civil War, several States disenfranchised free Black men and all but one of the newly admitted States limited the franchise to White men.\textsuperscript{49}

The Founding-era electorate reflected colonial and contemporary political theory and prejudices. Many Founders harbored suspicions about widespread enfranchisement for both ideological reasons and out of fear that the it would endanger the elite’s interests.\textsuperscript{50} Property requirements embodied the notion that only those with a “stake in society” were “sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting.”\textsuperscript{51} Framed differently, property owners “were independent enough to act politically without being unduly influenced by others.”\textsuperscript{52} The belief that property conferred sufficient independence to vote helps explain why some Founding-era States adopted race-neutral voting qualifications, especially since few Black men owned enough property to qualify.\textsuperscript{53} Relatedly, the refusal to link citizenship with suffrage—which would have enfranchised women, racial minorities, and poor White men—

\textsuperscript{42} Keyssar, supra note 7, at 306-07 tbl. A.1 (cataloging these requirements).
\textsuperscript{43} See id. at 20-21.
\textsuperscript{44} See Amar, America’s Constitution, supra note 17, at 65.
\textsuperscript{45} See Keyssar, supra note 7, at 21.
\textsuperscript{47} The exception was South Carolina, which required voters to pledge that they believed in God. See Williamson, supra note 39, at 115. As discussed more below, New Hampshire technically permitted only Protestants to hold office, a requirement that was hotly debated during Reconstruction. See infra notes 250 & 278.
\textsuperscript{48} Foner, Second Founding, supra note 1, at 4.
\textsuperscript{49} See Kate Masur, Until Justice Be Done: America’s First Civil Rights Movement from the Revolution to Reconstruction 209 (2021).
\textsuperscript{50} See Williamson, supra note 39, at 125.
\textsuperscript{51} Keyssar, supra note 7, at 8.
\textsuperscript{52} Free, supra note 37, at 12.
\textsuperscript{53} See id.
helps explain why property-owning aliens were permitted to vote.  

Another prominent theory was virtual representation, under which the interests of non-voters were effectively represented by those who could vote. Virtual representation was frequently deployed by opponents of women’s suffrage, who argued that women “were already represented in the government by male heads of household.” As applied to race, this theory would ultimately be repudiated by the Fifteenth Amendment’s adoption.

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

B. The Fourteenth Amendment

Before delving into the Fourteenth Amendment, a primer on how the Reconstruction Framers categorized rights. The Reconstruction Framers believed in a hierarchy of rights. Civil rights were a much narrower category than that term connotes today. During Reconstruction, civil rights included, inter alia, the right to own property, to contract, and to sue and be sued. Civil rights were inherent in citizenship.

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

54 See Raskin, supra note 46, at 1401.
55 See KEYSSAR, supra note 7, at 8.
57 See infra Section IV.C.
58 The Guarantee Clause is often cited as a potential source of a constitutional right to vote, but the Supreme Court long ago declared it a non-justiciable political question. See Luther v. Borden, 48 U.S. 1 (1848). And while the Reconstruction Framers justified the First Reconstruction Act using Guarantee Clause arguments, see infra note 95, today’s voting rights legislation does not rely on it.
61 See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
62 See AMAR, AMERICA’S CONSTITUTION, supra note 17, at 382.
63 See MASUR, supra note 49, at xvii.
64 See JACK M. BALKIN, LIVING ORIGINALISM 223-24 (2011); CONG. GLOBE, 40th Cong., 3d Sess. 691 (1869) (statement of Rep. Beck (D-KY)).
right to serve on a jury. As discussed below, the Reconstruction Framers disagreed over whether the right to hold office was encompassed within the phrase “right to vote.”

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

This, then, brings us to Section Two of the Fourteenth Amendment, which

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65 See Amar, Jury Service, supra note 10, at 234-35.
66 For purposes of this Article, my focus is on political rights, and therefore I do not wade into the contentious debate over the divide between civil rights and social rights. For more on social rights, see Brandwein, supra note 59, at 72-74, Maltz, Civil Rights, supra note 10, at 71-72, and McConnell, Desegregation, supra note 59, at 1018-21.

Some scholars have argued that Section One was capacious enough to eventually be read to encompass the right to vote. See William W. Van Alstyne, The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33, 47 (“[T]he case can safely be made that there was an original understanding that § 1 of the proposed Fourteenth Amendment would not itself immediately invalidate state suffrage laws … [but] we cannot safely declare that there was also a clear, uniform understanding that the open ended phrases of § 1 … would foreclose a different interpretation in the future.”); Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 367-68 (2021) (arguing that, in light of the other voting rights amendments, the Privileges or Immunities Clause should be read to protect a fundamental right to vote). Moreover, Franita Tolson has argued that Sections Two and Five should be read in tandem and as evidence of “the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislative universal suffrage.” Franita Tolson, What Is Abridgment?: A Critique of Two Section Twos, 67 Ala. L. Rev. 433, 458 (2015) [hereinafter Tolson, Abridgment].
68 See Amar, America’s Constitution, supra note 17, at 391-92.
69 See id.
70 See Crum, Superfluous, supra note 5, at 1602-04.
is known as the Apportionment Clause. Section Two was a response to an unintended consequence of abolition. With four million freedpersons, the South would actually gain representation in the House and the Electoral College, as the Three-Fifths Clause would no longer reduce its apportioned seats. And yet, the Southern States disenfranchised their Black population. The perverse result was that the political power of Southern White men would increase after the 1870 Census. The Reconstruction Framers recognized that this looming political storm threatened the Union’s stability.

To counteract that problem, Section Two reduces a State’s seats in the House and Electoral College if “the right to vote” of any adult “male” “citizen” is “denied … or in any way abridged.” At the time, Section Two was viewed as a penalty for disenfranchisement; at most, it was an incentive for enfranchisement. Section Two’s apportionment penalty has never been enforced, in part because the Fifteenth Amendment enfranchised Black men nationwide prior to the 1870 census’s re-apportionment and also because Congress has struggled to implement and operationalize its standard.

The Reconstruction Framers never “specifically discussed” the rationale behind choosing the words “deny or abridge” in Section Two. However, scholars have highlighted actual statutes or hypothetical scenarios that were mentioned at the time that shed light on its meaning. For instance, William Van Alstyne focused on a colloquy involving a State replacing its racially discriminatory ban with a property qualification and then passing a law that prohibited Black people from owning real estate. Additionally, Morgan Kousser has suggested that New York’s racially discriminatory residency-
property-, and tax-paying requirements were the motivating example for “abridge.”

Michael Morley has similarly argued that “the term ‘abridge’ … referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people.”

Drawing on the word’s plain meaning and post-ratification fights to impose Section Two’s penalty, Franita Tolson has claimed that “[a]bridgment does not mean purpose.” In any event, there is a clear “textual and historical link” between Section Two and the Fifteenth Amendment, even though the former is not limited to discrimination on the basis of race, color, or previous condition of servitude.

C. Federal Legislation

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

1. Enfranchisement Statutes

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

In January 1867, Congress passed two unprecedented statutes that barred racial discrimination in voting. In the DC statute, Congress adopted an affirmative right to vote coupled with an anti-discrimination provision. Specifically, Congress declared that “every male person … of the age of twenty-one years and upwards … shall be entitled to the elective franchise,

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79 See KOUSSER, supra note 77, at 17 (arguing that “congressmen probably had in mind the widely known example of New York”).

80 Morley, Remedial, supra note 71, at 310; see also MATHEWS, supra note 12, at 39 (stating, with regards to the Fifteenth Amendment, that “[t]he more usually accepted view … was that it was designed to prevent a State from imposing less easily attained qualifications for voting on one class of citizens than another”).

81 Tolson, Abridgment, supra note 71, at 438.


83 See ACKERMAN, TRANSFORMATION, supra note 36, at 178-82.
… without any distinction on account of color or race."  
84 An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, § 1, 14 Stat. 375, 375 (1867).
86 Congress may “exercise exclusive Legislation in all Cases whatsoever” in the “Seat of the Government of the United States.” See U.S. CONST. art I, § 8, cl. 17. And under the Territories Clause, Congress has the “Power to . . . make all needful Rules and Regulations respecting the Territor[ies] . . . [of] the United States.” Id. art. IV, § 3.
89 Id.
90 Id.
91 Id. This aspect of the First Reconstruction Act is a fundamental condition. See infra Section I.C.2.
in five of the Southern States.\textsuperscript{93} And as predicted by the Radical Republicans, Black men voted as a bloc for the Republican Party.\textsuperscript{94} In passing the First Reconstruction Act, Congress treated the South as a conquered territory, and many Radical Republicans argued that the Guarantee Clause justified their intervention.\textsuperscript{95}

Then, in July 1868, Congress created the Wyoming Territory.\textsuperscript{96} In so doing, Congress adopted a two-pronged approach reminiscent of the DC statute. Congress first specified that “every male citizen … above the age of twenty-one years … shall be entitled to vote … and shall be eligible to hold any office in said Territory.”\textsuperscript{97} Congress then separately provided that “the legislative assembly shall not at any time abridge the right of suffrage, or to hold office, on account of the race, color, or previous condition of servitude of any resident of the Territory.”\textsuperscript{98} The Wyoming Enabling Act marked the first time that Congress explicitly protected the right to hold office free of racial discrimination.

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

2. Fundamental Conditions

A “fundamental condition” is a requirement imposed by Congress on a State when it seeks admission to the Union.\textsuperscript{99} Whether fundamental

\textsuperscript{93} See Crum, Reconstructing, supra note 10, at 302-03.
\textsuperscript{94} See id. at 303-04; Amar & Brownstein, supra note 10, at 943.
\textsuperscript{95} See AMAR, AMERICA’S CONSTITUTION, 368-71.
\textsuperscript{96} The Wyoming Territory was created the same week that the Fourteenth Amendment was ratified, thus providing contemporaneous evidence that Congress believed that explicit statutory protections were necessary because Section One did not guarantee political rights in the federal territories. See 15 Stat. 706 (1868) (first proclamation on July 20, 1868); 15 Stat. 708 (1868) (second proclamation on July 28, 1868); see also Ryan C. Williams, Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 500 (2013) (arguing that the Citizenship Clause provides a plausible basis a prohibition against racial discrimination that applies to the federal government).
\textsuperscript{97} An Act to Provide a Temporary Government for the Territory of Wyoming, ch. 235, § 5, 15 Stat. 178, 179-80 (1868).
\textsuperscript{98} Id. at 180.
\textsuperscript{99} The first fundamental condition was imposed in 1802 when Congress mandated that Ohio relinquish claims to federal land within its borders—a requirement intended to avoid
conditions are enforceable after admission remains a contentious question.\(^{100}\)
Indeed, several prominent Republicans questioned their enforceability during Reconstruction.\(^{101}\) Nevertheless, the Reconstruction Congress would employ fundamental conditions to protect the voting rights of Black men.

In February 1867, Congress took the unprecedented step of imposing a suffrage-related fundamental condition on Nebraska, whose constitution enfranchised only White men.\(^{102}\) Congress included as a “fundamental condition that … there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.”\(^{105}\) Congress thereby directed Nebraska’s territorial governor to convene the legislature to enact legislation complying with the fundamental condition.\(^{104}\) In response, the Nebraska legislature declared that the fundamental condition would be “ratified and accept” and was “part of the organic law of the State of Nebraska.”\(^{105}\) Nebraska was then swiftly admitted to the Union.\(^{106}\)

In passing Nebraska’s fundamental condition, Congress overrode President Johnson’s veto. In his veto message, Johnson interpreted the fundamental condition to erase the Nebraska Constitution’s provisions that “expressly limited” “the elective franchise[] and the right to hold office … to

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\(^{100}\) See Coyle v. Smith, 221 U.S. 559, 579-80 (1911) (invalidating fundamental condition prohibiting Oklahoma from moving its state capital); Leah M. Litman, Inventing Equal Sovereignty, 114 Mich. L. Rev. 1207, 1220 (2016) (arguing that Congress’s consistent use of fundamental conditions undermines Shelby County’s equal sovereignty principle).

\(^{101}\) See Thomas B. Colby, In Defense of the Equal Sovereignty Principle, 65 Duke L.J. 1087, 1162-64 (2016) (discussing doubts about the enforceability of fundamental conditions and their role in the passage of the Fifteenth Amendment); Lash, supra note 10, at 545 (recounting Bingham’s objections to the stacking of fundamental conditions beyond the requirements of the First Reconstruction Act).

\(^{102}\) See Biber, supra note 99, at 142 (discussing novelty of this fundamental condition); Neb. Const. art. II, § 2 (1867) (limiting “elector[s]” to “White citizen[s]” and declarant aliens). In 1866, Nebraska had rejected Black male suffrage in a referenda. See Gillette, supra note 12, at 26.

\(^{103}\) An Act for Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 stat. 391, 392 (1867).

\(^{104}\) See An Act for Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 stat. 391, 392 (1867)

\(^{105}\) Brittle v. People, 2 Neb. 198, 208 (1873). The text of Nebraska’s constitution was not actually amended. See id.

\(^{106}\) 14 Stat. 820, 821 (1867).
white citizens.” Around the same time, Congress attempted to admit Colorado with an identically worded fundamental condition. Once again, Johnson vetoed the bill. This time, Johnson emphasized that the bill would overturn Colorado’s laws that “absolutely prohibited negroes and mulattoes from voting” and “exclud[ed] negroes and mulattoes from the right to sit as jurors.” Congress, however, was unable to override Johnson’s Colorado veto, and it would not become a State until 1876. As relevant here, Johnson viewed the language concerning the “elective franchise, or any other rights” as protecting a bundle of political rights. Indeed, in 1873, the Nebraska Supreme Court held that the fundamental condition protected not just the franchise but also the right to sit on a jury.

After Nebraska’s admission, Congress continued to impose fundamental conditions concerning Black male suffrage. In June 1868, Congress considered the re-admission of the first Reconstructed Southern State: Arkansas. Going beyond the requirements of the First Reconstruction Act, Congress mandated that “the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized.” Shortly thereafter, Congress imposed identical fundamental conditions on the re-admission of Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina. Congress would later impose fundamental conditions that separately protected the right to vote on Mississippi, Texas, and Virginia, as well as Georgia for its second re-admission.

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107 McPherson, supra note 33, at 164 (quoting Johnson’s veto message).
108 See id. at 163 (noting that “fundamental condition that a within the State of Colorado there shall be no denial of the elective franchise, or any other rights, to any person by reason of race or color, excepting Indians not taxed.”) (quoting vetoed Colorado admission bill).
109 Id. at 160-61 (quoting Johnson’s veto message).
110 See Brittle, 2 Neb. at 225 (concluding “that not only does the fundamental condition attached to the admission form a part of our organic law, but that the condition extends to the right to sit upon juries”).
111 See Maltz, Civil Rights, supra note 10, at 139-140.
112 An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (emphasis added).
113 See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868) (admitting these States on “the following fundamental conditions: That the constitutions … shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized.”). The fundamental conditions for these States and Arkansas expressly authorized disenfranchisement as “punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all inhabitants of said state” and also gave authority to modify residency requirements. Id.
114 See infra Section III.C.
Congress utilized distinct strategies for its fundamental conditions for Nebraska and the Reconstructed South. Nebraska’s fundamental condition actually enfranchised Black men and was worded to expressly prohibit racial discrimination in voting going forward. But in contradistinction to the requirements of the First Reconstruction Act, Nebraska was not required to ratify the Fourteenth Amendment. As for the Reconstructed South, the fundamental conditions were retrogression provisions. Moreover, they were not limited to disenfranchisement based on race and color. Put simply, the Southern States could not “deprive”—another synonym for denied—citizens of their “right to vote.”

D. State Voting Qualifications

Because the original Constitution entrusted States with the power to set voting qualifications for the federal electorate, state constitutions and laws were the battleground for expanding the franchise prior to the Fifteenth Amendment. In this Section, I map out where Black men gained the right to vote during the turbulent four years between Appomattox and the Fifteenth Amendment’s passage in Congress. I then delve into the actual text of state constitutions and laws pertaining to the right to vote free of racial discrimination—a topic that has been understudied in the literature.

1. Advances and Setbacks in the States

In 1865, Black men could vote free of racial discrimination in five New England States. Black men were technically enfranchised in New York, but racially discriminatory residency, property, and tax-paying requirements disenfranchised virtually all of them. The next few years witnessed modest

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

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

117 Those States were Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. See AMAR, AMERICA’S CONSTITUTION, supra note 17, at 610 n.88.

118 Given this reality, I categorize New York as a State that disenfranchised Black men. See N.Y. CONST. art. II, § 1 (1846) (requiring that “m[c]n of color … shall have been for three years a citizen of this state, and for one year next proceeding any election shall have been seized and possessed of a freehold estate of the value of [$250] … and shall have been actually rated and paid a tax thereon”); CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH 55 (2008) (“[I]n
expansion of Black male suffrage at the state level, along with tough loses.

Referenda were one tactic employed by Republicans to enfranchise Black men, albeit with mixed results. Between 1865 and 1868, reformers failed to pass referenda in the States of Connecticut, Kansas, Minnesota (twice), Missouri, Ohio, Wisconsin, as well as Washington, DC, the Colorado Territory, and the (then) Territory of Nebraska. In 1868, voters in Iowa and Minnesota endorsed Black male suffrage.

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

Meanwhile, in 1866, Tennessee ratified the Fourteenth Amendment and was re-admitted to the Union, escaping the First Reconstruction Act’s strictures. Then, in 1867, Tennessee enfranchised Black men via ordinary legislation. Tennessee, therefore, was the only Southern State to

1855, only 100 of the 11,840 black inhabitants [of New York City] could vote.”).
119 See Crum, Superfluous, supra note 5, at 1593.
120 See id.
121 Under Wisconsin’s 1848 Constitution, “elector[s]” were limited to “male person[s]” who were “White citizens,” White declarant aliens, “persons of Indian blood who have once been declared by law of Congress to be citizens of the United States,” and “[c]ivilized persons of Indian descent, not members of any tribe.” Wis. Const. art III, § 1 (1848). The Wisconsin Constitution further provided that the state legislature could “extend, by law, the right of suffrage” but that “no such law shall be in force” until “approved by a majority of all the votes cast” in a “vote by the people” at the next general election. Id. In 1849, the Wisconsin state legislature “conferring the right of suffrage on male colored inhabitants.” Gillespie v. Palmer, 20 Wis. 544, 557 (1866). At the general election that November, the proposal received 5,265 votes in favor and 4,075 votes against. Id. at 544. Although that was the majority of votes cast on that issue, the Wisconsin Secretary of State decided that the issue must receive a majority of votes from all voters at that election. Because many voters simply did not vote in that referendum, it failed to achieve that threshold and the Secretary of State declined to approve the law. See id. 556-57. In 1866, the Wisconsin Supreme Court overturned that decision, holding that only a majority of votes cast on the referendum were necessary, thereby enfranchising Black men. See id. at 557-58.
123 Under Tennessee’s 1834 Constitution, which was still in force during the early years of Reconstruction, the “entitle[ment] to vote” was limited to “free white m[e]n” who were “citizen[s].” Tenn. Const. art. IV, § 1 (1834). Following its readmission, the Tennessee state legislature passed a law that allowed Black men to vote by striking the word “White” from the requirements to register and vote. See State v. Staten, 46 Tenn. 233, 241 (1869) (describing the legislative scheme); McPherson, supra note 33, at 257 (showing roll call vote); W.E. Burghardt DuBois, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 575 (2d ed. 1962) (detailing the
enfranchise Black men voluntarily.

Thus, when the lame-duck Fortieth Congress convened to debate the Fifteenth Amendment in early 1869, the United States was evenly divided. Seventeen States had enfranchised Black men whereas seventeen States engaged in racial discrimination in voting. In addition, Black men could vote in Mississippi, Texas, and Virginia, but those States had not been re-admitted yet. Black male suffrage loosely followed regional patterns. Black men could vote in parts of the Midwest, most of New England, the entirety of the South, and federal domains. By contrast, Black men were disenfranchised in the Mid-Atlantic, the Borders States, and the West.

2. The Text of the Right to Vote

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

Every State that disenfranchised Black voters included the word “White”

124 See Crum, Superfluous, supra note 5, at 1602-03.
125 See Foner. RECONSTRUCTION, supra note 67, at 452 (discussing their re-admission in 1870). Moreover, following the expulsion of Black lawmakers from its state legislature, Georgia was in a state of limbo, with six of its seven representatives seated, its senator excluded, and its Electoral College votes counted in a contingent fashion. See Crum, Lawfulness, supra note 10, at 1580-86; Benedict, supra note 12, at 327-330. Given that all of these States were re-admitted as part of the Fifteenth Amendment’s ratification, I include their constitutions here.
126 See Crum, Superfluous, supra note 5, at 1603-04.
as a voting requirement. Indiana and Oregon used that strategy but went further, specifically excluding certain racial groups from voting. To employ modern doctrinal categories, these state laws were facially discriminatory.

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

In addition, several States distinguished on the basis of nativity. A dozen States extended the ballot to so-called declarant aliens—that is, foreigners who had declared their intention to naturalize and become U.S. citizens.

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129 Those States were California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, and West Virginia. See infra Appendix A.

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

130 See IND. CONST. art. VII, § 5 (1851) (“No Negro or Mulatto shall have the right of suffrage.”); OR. CONST. art. II, § 6 (1857) (“No Negro, Chinaman, or Mulatto shall have the right of suffrage”).


132 Those States were Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Vermont, and Virginia. See infra Appendix A.

133 See supra notes 102-106.

134 See supra notes 121-123.

135 See FLA. CONST. § XIV, § 1 (1868) (limiting “elector[s]” to “male” “citizen[s]” and certain inhabitants “of whatever race, color, nationality, or previous condition”); id. art. XVI, § 28 (“There shall be no civil or political distinction … on account of race, color, or previous condition of servitude, and the Legislature shall have no power to prohibit, by law, any class of persons on account of race, color, or previous condition of servitude, to vote or hold any office.”); S.C. CONST. art. VIII, § 2 (1868) (limiting the “entitle[ment] to vote” to “male citizen[s] … without distinction of race, color, or former condition”); TEX. CONST. art. VI, § 1 (1869) (limiting the “entitle[ment] to vote” to “male citizens[... without distinction of race, color, or former condition”); supra notes 102-106 (discussing Nebraska); see also ALA. CONST. art. VII, § 4 (1868) (requiring an oath to register to vote providing that the applicant “agree not to attempt to deprive any person or persons, on account of race, color, or previous condition, of any political or civil right, privilege, or immunity”);

136 See KEYSSAR, supra note 7, at 337-39 tbl.12 (cataloging declarant alien rules from
But there was a darker side to discriminating based on nativity. Some States continued to impose differential voting qualifications even after naturalization.137 Most infamously, Rhode Island required naturalized citizens to satisfy a property requirement that natural-born citizens were exempted from.138 Rhode Island’s policy—which was designed to disenfranchise a large Democratic voting bloc of Irish-Americans—would feature prominently in the debates over the Fifteenth Amendment.139

Many state constitutions specifically addressed the voting rights of Native American men. Notwithstanding the Fourteenth Amendment’s Citizenship Clause, few Native Americans were citizens at the time, as they were considered “members of distinct political communities” who “owed immediate allegiance to their several tribes, and were not part of the people of the United States.”140 A couple state constitutions explicitly excluded “Indians not taxed” from being electors.141 On the other hand, some state constitutions expressly enfranchised certain Native Americans, albeit in ways that reified discriminatory views of Native Americans as uncivilized.142

1870-1926); Raskin, supra note 46, at 1406-07 (discussing the 1848 Wisconsin Constitution as the origin of declarant alien rules).


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

139 See Gillette, supra note 12, at 151.

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

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

142 See Mich. CONST. art. VII, § 1 (1850) (defining “elector[s]” “entitled to vote” to include “civilized male inhabitant[s] of Indian descent, a native of the United States and not a member of any tribe”); MINN. CONST. art. VII, § 1 (1868) (extending the “entitle[ment] to vote” to male “[p]ersons of mixed white and Indian blood who have adopted the customs and habits of civilization” and male “[p]ersons of Indian blood … who have adopted the language, customs and habits of civilization … and shall have been pronounced by said court capable of exercising the rights of citizenship”); Wis. CONST. art III, § 1 (1848) (enfranchising male “[p]ersons of Indian blood” who were U.S. citizens and male “[c]ivilized persons of Indian descent, not members of any tribe”); see also Cal. CONST. art. II, § 1 (1849) (“[N]othing herein contained, the Legislature, by two-thirds concurrent vote, from admitting the right of suffrage, Indians or the descendants of Indians.”).
Although the precarious voting rights of Native Americans is in some ways an example of racial discrimination, this phenomenon is also tied up with notions of citizenship and tribal sovereignty.\footnote{Cf. Morton v. Mancari, 417 U.S. 535, 555 (1974) (holding that classifications based on tribal membership do not violate the equal protection component of the Fifth Amendment’s Due Process Clause). Accordingly, for this Article’s classification of whether States engage in racial discrimination in voting, I bracket the status of Native Americans.}

Turning to other political rights, the elective franchise was oftentimes—but not always—linked to the right to hold office. Consider officeholding requirements for state legislatures. Half of the States defined the right to hold office based on who was an elector; in other words, they bootstrapped their right to vote to the right to hold office. Eight of these States had racially discriminatory suffrage requirements.\footnote{Those States were California, Connecticut, Kansas, Michigan, Nevada, New Jersey, Ohio, and West Virginia. See infra Appendix A.} Ten of these States plus the yet-to-be readmitted Mississippi, Texas, and Virginia had enfranchised Black men.\footnote{Those States were Alabama, Arkansas, Florida, Louisiana, Minnesota, Mississippi, Nebraska, North Carolina, Rhode Island, South Carolina, Texas, Virginia, and Wisconsin. See id.} Missouri’s suffrage qualifications and officeholding requirements were both facially limited to White men.\footnote{See id.} In the remaining States, the right to vote was decoupled from the right to hold office. Fourteen States permitted any citizen or inhabitant to hold office. Of those States, six had enfranchised Black men,\footnote{Those States were Georgia, Maine, Massachusetts, New Hampshire, Tennessee, and Vermont. See id.} whereas eight had not.\footnote{Those States were Delaware, Illinois, Indiana, Kentucky, Maryland, New York, Oregon, and Pennsylvania. See id.}

Finally, Iowa explicitly limited the right to hold office to White male electors, even though it had enfranchised Black men in 1868.\footnote{See id.}

Although the category of political rights was frequently invoked as encompassing both suffrage and officeholding, only half the States adhered to that framework. For States that did not link suffrage and officeholding, the overwhelming majority permitted any citizen to hold office, even if Black men were denied the franchise. Moreover, some States had different rules for serving as governor or holding local office.\footnote{See, e.g., DEL CONST. art. III, § 1 (1852) (“[N]o person shall be eligible to an office within a county, who shall not have a right to vote for Representatives”); MD CONST. art. II, § 5 (1867) (governors must be “a qualified voter”); N.Y. CONST. art. IV, § 2 (1846) (limiting governorship to “citizen[s] of the United States”); OR CONST. art. 6, § 8 (1857) (“No person shall be elected, appointed to a county office, who shall not be an elector of the county”).} This nuance underscores how the right to hold office was frequently detached from the right to vote.

In light of the horrors of the Civil War, the political rights of ex-
Confederates was a hotly debated topic during Reconstruction. Recall that the First Reconstruction Act denied ex-Confederates the right to vote or be a delegate at the new constitutional conventions.151 By 1869, that policy remained in half of the new Southern States’ constitutions and replicated by two loyal States. Specifically, nine state constitutions disenfranchised certain ex-Confederates, and eight States disqualified them from holding office.152 Support for these provisions—which bear a striking resemblance to militant democracy153—helped to defeat some universal-right-to-vote proposals for the Fifteenth Amendment.154

Taking a step back, state voting qualifications were worded quite differently from what would become the Fifteenth Amendment. The term “right to vote” is used in only four state constitutions, all from New England and relatively older.155 The far more common phrase was “entitled to vote.”156 Moreover, the term “elector” is used in nearly half of state

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

153 See Karl Loewenstein, Militant Democracy and Fundamental Rights, I, 31 AM. POL. SCI. REV. 417, 422-23 (1937) (arguing that democracies must sometimes take steps to protect themselves from anti-democratic forces); Crum, Lawfulness, supra note 10, at 1607-12 (applying militant democracy theory to Reconstruction).

154 See infra notes 237-244.

155 Those States were Massachusetts, New Hampshire, Rhode Island, and Vermont. See infra Appendix A; cf. DEL. CONST. art. V, § 1 (1852) (referring to “the right of an elector”).

156 Those States were California, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Oregon, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See infra Appendix A
constitutions, whereas the term “voter” appears only in Kentucky’s Constitution. In addition, state suffrage provisions were framed in the affirmative, conferring the franchise on voters. As noted, only a handful of States had adopted anti-discrimination provisions similar to that found in the Fifteenth Amendment. No State used the Fifteenth Amendment’s “deny or abridge” term of art.

II. THE DRAFTING OF THE FIFTEENTH AMENDMENT

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

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

Time was not on the Republicans’ side. When the lame-duck Fortieth Congress began debating the Fifteenth Amendment in January 1869, there was only two months remaining in the term. Although Republicans still controlled the Forty-First Congress, their majority in the House was smaller, and there was a concern amongst Republicans that an amendment would not pass the next Congress. Furthermore, prompt congressional

157 Those States were Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Pennsylvania, and Wisconsin. See id.
158 See id.
159 See supra note 135.
160 See Crum, Lawfulness, supra note 10, at 1574 n.213.
161 See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 541 (1869) (statement of Sen. Stewart) (“The session is drawing to a close, and if there is to be action on this subject at this session, it is very important that I should be at an early day.”); id. at 1639 (statement of Sen. Morrill) (noting that there were only “four working days” left in the session).
162 Prior to the Twentieth Amendment, presidential and congressional terms ended in March, not January. See U.S. CONST. XX.
164 See CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart) (“Send it to another conference and the whole thing is lost.”); id. (statement of Sen.
action would help in the ratification battle because “seventeen Republican state legislatures were still in session in March, and these legislatures could act on the Amendment before elections.”

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

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

A. Contextualizing the Fifteenth Amendment

In setting the stage, a word of caution about anachronism. Many of the central controversies of Reconstruction are no longer hot-button topics. Conversely, many of today’s open doctrinal questions did not play a central role in the drafting and ratification debate. In this Section, I quickly address four topics: (1) why the Reconstruction Framers decided to support nationwide Black male suffrage in early 1869; (2) the debate over the status of Chinese immigrants and women; (3) the controversy in Georgia that sparked discussion about the right to hold office; and (4) the best means to enfranchise Black men nationwide.

1. The Reconstruction Framers’ Motives

At the dawn of Reconstruction, “only radicals merged civil and political rights.” Abolitionists formed the core of the Radicals’ ranks, and these politicians had long advocated not only for the civil rights but also the

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165 GILLETTE, supra note 12, at 79.
166 See infra notes 309-312.
167 HYMAN & WIECEK, supra note 60, at 397-98.
political rights of Black people. Moderates, however, were only willing to extend civil rights. For example, President Lincoln, a moderate Republican, endorsed limited enfranchisement of Black men for the first time in his last public speech before his assassination. But over the years, moderate Republicans became more amenable to enfranchising Black men. While the Thirty-Ninth Congress declined to extend the ballot to Black men via the Fourteenth Amendment, it did so in areas of federal control. Tellingly, the 1868 Republican Party platform endorsed a compromise position: Northern States would be allowed to set their own voting qualifications but Black men would be guaranteed the franchise in the South.

The proximate cause of the Republicans’ embrace of nationwide Black male suffrage was the 1868 election. Civil War hero Ulysses S. Grant won by a far smaller margin than expected, and his victory in the popular vote was attributable to the votes of Southern Black men. Based on the 1868 election as well as the Southern elections mandated by the First Reconstruction Act, it had become apparent that Black men would vote as a bloc overwhelmingly for the Republican Party. With the Southern States’ re-admissions completed or pending, there was concern over the enforceability of the fundamental conditions. In addition, the Border States—which were swing states at the time—had sizeable numbers of Black men that might prove decisive in close elections. Thus, Republicans’ ideological and partisan interests converged to support nationwide Black male suffrage.

Historians have emphasized different interests and motives in their analysis of the Fifteenth Amendment. Writing at the dawn of the twentieth century, John Mabry Mathews claimed that, with the Southern States being re-admitted to the Union, the power that “Congress had exercised over them was gradually slipping away.” According to Mathews, the “controlling motive” behind the Fifteenth Amendment was “the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States.” During the civil rights movement, William Gillette argued that moderate Republicans had achieved their “limited object—first, to enfranchise the northern Negro, and second, to protect the southern Negro against disfranchisement.”

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168 See Foner, Reconstruction, supra note 67, at 74.
170 See, e.g., Ackerman, Transformations, supra note 36, at 236.
171 See Amar & Brownstein, supra note 10, at 943–46; Crum, Reconstructing, supra note 10, at 302-05.
172 See Gillette, supra note 12, at 80.
173 Mathews, supra note 12, at 20.
174 Id. at 21.
175 Gillette, supra note 12, at 77.
Gillette emphasized the widespread belief that Black men would vote as a bloc for the Republican Party. Gillette’s claim about partisan motivation, however, has been critiqued by LaWanda Cox and John Cox, who argued that ideological commitments motivated Republicans “despite [the] political risk … [of] White backlash.” More recently, Alex Keyssar noted that “the narrow version of the Fifteenth Amendment probably represented the center point of American politics, the consensus view even within the Republican Party.” Keyssar observed that the opponents of broader versions of the amendment “wanted to retain the power to limit the political participation of the Irish and Chinese, Native Americans, and the increasingly visible clusters of illiterate and semi-literate workers.” Eric Foner has observed that the Fifteenth Amendment “failed to break decisively with the notion that the vote was a ‘privilege’ that states could regulate as they see fit.”

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

2. The Status of Other Disenfranchised Groups

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

First, the status of Chinese immigrants featured prominently in the debates over the Fifteenth Amendment in Congress and in the ratification battle. These debates are laced with xenophobic and Sinophobic remarks. West Coast Republicans opposed language that could be interpreted to

176 See id. at 46-47.
177 Cox & Cox, supra note 12, at 156-57 (emphasis deleted).
178 KEYSSAR, supra note 7, at 81.
179 Id.
180 FONER, RECONSTRUCTION, supra note 67, at 446; see also FONER, SECOND FOUNDERING, supra note 1, at 105 (explaining that the Fifteenth Amendment adopted impartial as opposed to universal manhood suffrage).
181 See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 901 (1869) (statement of Sen. Williams) (“I hope, sir, that this nation will not bind itself hand and foot for all coming time, and deliver itself up to the political filth and moral pollution that are flowing with a fearfully rising tide into our country from the shores of Asia.”); id. at 939 (statement of Sen. Corbett) (“Allow Chinese suffrage, and you may soon find established pagan institutions in our midst which may eventually supersede those Christian influences which have so long been the pride of our country.”).
enfranchise Chinese American men.\textsuperscript{182} What is particularly striking about these West Coast Republicans’ vehement opposition is that very few Chinese immigrants in the 1860s were citizens, as “nearly all of them [were] born abroad and [they] were ineligible for naturalization.”\textsuperscript{183} At the time, only “White” immigrants could be naturalized under federal law, and there were only a couple hundred native-born Chinese Americans on the West Coast.\textsuperscript{184} Nevertheless, West Coast Republicans feared that the naturalization laws might be changed—something Senator Sumner was, characteristically, proposing to do.\textsuperscript{185} In response, West Coast Republicans suggested modifying the Fifteenth Amendment to expressly bar Chinese immigrants and Native Americans from naturalizing.\textsuperscript{186}

Second, the voting rights of naturalized Irish-Americans in Rhode Island divided the Republican caucus. Irish and Chinese immigrants were not similarly situated because Irish immigrants were White and could naturalize. Since citizenship could not serve as a gatekeeper to the franchise, Rhode Island’s property requirement targeted only naturalized citizens, most of whom were Irish Catholics. At the time, it was estimated that less than ten percent of naturalized citizens could vote in Rhode Island.\textsuperscript{187}

Third, suffragettes were advocating for the expansion of voting rights to women.\textsuperscript{188} This issue first came to a head during debates over the Apportionment Clause. The Reconstruction Framers inserted the word “male” into Section Two to avoid incentivizing the enfranchisement of

\textsuperscript{182} See infra Subsection II.C.2.d-e.

\textsuperscript{183} Foner, Second Founding, supra note 1, at 108.


\textsuperscript{186} See id. at 939 (statement of Sen. Corbett) (“But Chinamen not born in the United States and Indians not taxed shall not be deemed or made citizens.”).

\textsuperscript{187} See Patrick T. Conley, No Landless Irish Need Apply: Rhode Island’s Role in the Framing and Fate of the Fifteenth Amendment, 68 R.I. Hist. 79, 79 (2010).

\textsuperscript{188} In fact, women won the right to vote in the Wyoming Territory in 1869. See Dudden, supra note 37, at 189.
women,\textsuperscript{189} especially given that Western migration had led to significant gender imbalances between the States.\textsuperscript{190} Although moderate Republicans’ views on Black men’s voting rights evolved over the years, support for women’s right to vote remained a decisively radical position. Indeed, during debates over the Fifteenth Amendment, no proposal that would have mandated women’s suffrage ever came to a vote in the House or Senate.\textsuperscript{191}

3. \textit{The Georgia Officeholding Controversy}

In July 1868, after its adoption of a constitution that protected Black men’s right to vote and its ratification of the Fourteenth Amendment, Georgia was re-admitted to the Union.\textsuperscript{192} But in September 1868, the situation changed dramatically when “a coalition of white Republicans and Democrats voted to expel newly elected black officials from the [Georgia] House and Senate.”\textsuperscript{193} Furthermore, the Black state legislators were replaced by the White candidates they had defeated at the polls.\textsuperscript{194}

The Georgia controversy continued to spiral. Separate concerns were raised about whether several Georgia state legislators were disqualified by Section Three of the Fourteenth Amendment, which barred ex-Confederates from holding office.\textsuperscript{195} In response to these developments, the lame-duck Fortieth Congress refused to seat Georgia’s senator and one of its representatives.\textsuperscript{196} Georgia’s contested status also prompted a vociferous debate during the February 1869 counting of the 1868 Electoral College votes that concluded with the President Pro Tempore of the Senate overruling the House’s attempt to exclude Georgia’s Electoral College votes.\textsuperscript{197} For

\textsuperscript{189} See id. at 78-80.

\textsuperscript{190} See Van Alstyne, \textit{supra} note 67, at 47 (“[B]ecause pioneer California had a far higher percentage of males over the age of twenty-one than did Vermont, 58 per cent of the California population consisted of voters as against only 19 per cent in Vermont.”).

\textsuperscript{191} See \textit{infra} Appendix B. The Reconstruction Framers’ failure to prohibit sex-based discrimination in the Fifteenth Amendment led to a bitter splintering of the suffragettes and former abolitionist communities, with prominent leaders Susan B. Anthony and Elizabeth Cady Stanton engaging in race-baiting rhetoric to help defeat the amendment’s ratification. See \textit{LASH}, \textit{supra} note 10, at 570-73 & 577-78 (reprinting speeches).

\textsuperscript{192} See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

\textsuperscript{193} \textit{LASH}, \textit{supra} note 10, at 544-45.

\textsuperscript{194} See \textit{CONG. GLOBE}, 41st Cong., 2d Sess. 176 (1869) (statement of Sen. Edmunds (R-VT)).

\textsuperscript{195} See \textit{CONG. GLOBE}, 40th Cong., 3d Sess. 5 (statement of Sen. Thayer).

\textsuperscript{196} See Crum, \textit{Lawfulness}, \textit{supra} note 10, at 1582. Six of Georgia’s representatives were seated in the summer of 1868, before this controversy erupted, and those representatives voted on the Fifteenth Amendment’s passage. See \textit{id.} at 1574 & 1580-81.

\textsuperscript{197} See \textit{id.} at 1583-86.
purposes of this Article, the expulsion of Black lawmakers is the most important controversy, as it was a contemporaneous event concerning the right to hold office.

4. Statutory vs. Constitutional Change

The first question decided by the Fortieth Congress was one of means: should nationwide Black male suffrage be achieved through a statute, a constitutional amendment, or both? 198 When Boutwell introduced the Fifteenth Amendment, he also submitted a bill that would have enfranchised Black men nationwide. 199 The bill resembled the Fifteenth Amendment in using “abridge or deny” and targeting discrimination based on race, color, or previous condition of slavery. Boutwell argued that Congress could pass this bill pursuant to its powers under the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment. 200

For both constitutional and political reasons, moderate Republicans rejected Boutwell’s statute. On the constitutional front, the moderates rebuffed the Radicals’ view that the original Constitution and the recently ratified Fourteenth Amendment gave Congress power to establish voting qualifications. And on the political front, the moderates feared voter backlash over the suffrage statute that might endanger not only their political fortunes but also the amendment’s chance at ratification. 201

B. The Congressional Debate

This Section tracks the evolution and ultimate passage of the Fifteenth Amendment in the lame-duck Fortieth Congress. Over the course of several weeks in early 1869, both chambers debated “various phraseolog[ies]” 202 for

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198 See generally Crum, Superfluous, supra note 5.
199 Section One of Boutwell’s bill provided:

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

H.R. 1667, 40th Cong. (1869).
200 See Crum, Superfluous, supra note 5, at 1606-09; see also id. at 1614-16 (summarizing similar arguments made by Sumner in support of a suffrage statute in the Senate).
201 See id. at 1613.
202 CONG. GLOBE, 40th Cong., 3d Sess. 981 (1869) (statement of Sen. Welch (R-FL)).
the amendment. As one frustrated Republican senator remarked, the “two Houses [are] playing shuttlecock with the Constitution and its amendments.”

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

1. **Competing Versions of the Fifteenth Amendment**

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

First, the narrow anti-discrimination version prohibited the denial or abridgment of the right to vote based on “race, color, and previous condition of servitude.” The initial proposals backed by the House and Senate Judiciary Committees and introduced by Representative George Boutwell (R-MA) and Senator William Stewart (R-NV) were narrow anti-discrimination models. This model was viewed as enfranchising Black men nationwide, but the extent to which it could be circumvented was hotly contested. This model is what ultimately became the Fifteenth Amendment.

Second, numerous anti-discrimination proposals went well beyond the three previously enumerated criteria. Senator Henry Wilson (R-MA) introduced what is perhaps the most important example of this model, which would have prohibited “discrimination … in the exercise of the elective franchise or in the right to hold office on account of race, color, nativity, property, education, or creed.” Even though many Radical Republicans were in favor of women’s enfranchisement, neither house of Congress

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203 Id. at 1301 (statement of Sen. Nye (R-NV)).
204 See id. at 1003 (statement of Sen. Sumner).
205 I have opted for this terminology because it uses Senator Howard’s actual language.
206 U.S. CONST. amend. XV, § 1.
207 See CONG. GLOBE, 40th Cong., 3d Sess. 285-86 (1869) (House); id. at 379 (Senate).
208 Id. at 1036. The broad anti-discrimination provision that passed the House provided that “[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude.” Id. at 1428. Given the breadth of Wilson’s proposal, Maltz frames it as “universal suffrage amendment.” Maltz, Fifteenth, supra note 9, at 434.
209 See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 543 (1869) (statement of Sen.
passed any version of the Fifteenth Amendment that included protections against sex-based discrimination.\footnote{210}{See infra Appendix B.}

Third, Congress considered provisions that came tantalizingly close to a universal right to vote for male citizens. The most prominent examples were introduced by Representatives John Bingham (R-OH) and Samuel Shellabarger (R-OH).\footnote{211}{See Cong. Globe, 40th Cong., 3d Sess. 638 (1869) (Bingham proposal) (“No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind, and over twenty-one years of age, the equal exercise of the electoral franchise at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, except such of said citizens as shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law.”); id. at 639 (Shellabarger proposal) (“No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.”).}

Although most were still framed in the negative, these proposals went well beyond racial discrimination and would have had the practical effect of enfranchising nearly all male citizens.\footnote{212}{Senator Warner introduced an universal-right-to-vote amendment that received minimal support. See infra Appendix B.}

Furthermore, these proposals resembled state suffrage laws in including residency requirements and a minimum age.\footnote{213}{Bingham’s proposal would have set a one-year residency requirement whereas Shellabarger allowed States to set residency requirements. Bingham defended his residency requirement with a xenophobic rationale: he stated that “each year there are landed upon our shores hundreds of thousands of adult persons who are aliens” and that due to “the modern invention of forged naturalization papers, the Government … is not protected against the pollution of the ballot-box by thousands who are not entitled to vote.” Id. at 722 (statement of Rep. Bingham).}

These proposals also permitted disenfranchisement based on mental illness, felony conviction, or participation in rebellion.\footnote{214}{Bingham’s version was more forgiving toward ex-rebels, as it permitted disenfranchisement only for future acts of insurrection. By contrast, Shellabarger’s proposal would have permitted disenfranchisement for past insurrection. See id. (statement of Rep. Bingham) (noting this distinction).}

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

For all of these four templates, some versions explicitly protected the right to hold office, while others did not. Moreover, these four templates all had enforcement provisions in Section Two empowering Congress to enact “appropriate” legislation. The fifth model, however, differs from the rest in that it is not self-executing.

Last but not least, Senator George Williams (R-OR) proposed that “Congress shall have the power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any state.” According to Williams, his proposal was designed to adapt to the

215 Id. at 985; see also id. at 828 (“Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens.”).
216 Id. at 1009 (statement of Sen. Howard).
217 See id. at 985 (“[S]o plain to me is this implication that under such a clause Congress would have the right to deny or abridge the right of voting for some other causes than those mentioned in the article.”).
218 See MATHEWS, supra note 12, at 32-33. In some ways, Howard’s proposal resembles Reconstruction-era statutes that used the rights of White citizens as a baseline. 42 U.S.C. § 1981 (“All persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens.”); id. § 1982 (“All citizens ... shall have the same right ... as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.”); see also Nancy Leong, Enjoyed by White Citizens, 109 GEO. L.J. 1421, 1424-26 (2021) (discussing the historical role and contemporary significance of Sections 1981 and 1982).
219 U.S. CONST. amend. XV, § 2; see also CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (Wilson proposal striking out just Section One); id. at 638 (Bingham and Shellabarger proposals striking out just Section One); id. at 828 (Howard proposal striking out just Section One).
220 CONG. GLOBE, 40th Cong., 3d Sess. 864 (1869) (striking out both Sections One and Two). William’s proposal bears a striking resemblance to Bingham’s early draft of the Fourteenth Amendment that merely empowered Congress to protect civil rights and lacked a self-executing provision. See CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (“The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”); Michael W. McConnel, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 177-79 (1997) [hereinafter McConnell, Institutions] (discussing this draft and the reasons for its rejection).
“possibilities of the boundless future.”221 But as discussed more below, Williams’s proposal was tailored to permit the disenfranchisement of Chinese-American men.222

2. The House’s First Move

The initial House and Senate versions of the Fifteenth Amendment were narrow anti-discrimination provisions. On January 11, Representative Boutwell introduced the version approved by the House Judiciary Committee. Section One provided that “[t]he right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States.”223 Then, on January 18, Senator Stewart introduced the Senate Judiciary Committee’s proposal. It provided that “[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude.”224

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

222 See infra notes 304-308.
223 Cong. Globe, 40th Cong., 3d Sess. 286 (1869) (statement of Rep. Boutwell) (emphasis added). Section Two provided that “[t]he Congress shall have the power to enforce by proper legislation the provisions of this article.” (emphasis added)). Boutwell’s initial draft used the word “proper” instead of “appropriate,” as had been used in the Thirteenth and Fourteenth Amendments’ enforcement provisions. Nevertheless, the term “proper” was intimately linked with “appropriate,” given McCulloch’s standard for the Necessary and Proper Clause. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” (emphasis added)); McConnell, Institutions, supra note 220, at 188 (noting that the term “appropriate” “has its origins in the latitudinarian construction of congressional power in McCulloch”).
224 Cong. Globe, 40th Cong., 3d Sess. 379 (1869) (statement of Sen. Stewart) (emphasis added). The amendment, which in the pages of the Congressional Globe was not demarcated into separate sections, further provided: “[a]nd Congress shall have power to enforce the provisions of this article by appropriate legislation.” Id.
protect the rights of classes of citizens.

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

On January 29, after Boutwell conceded defeat on his nationwide suffrage statute, the House debated the metes and bounds of the amendment. Bingham and Shellabarger advocated for their universal-right-to-vote proposals. In so doing, Bingham criticized the narrowness of Boutwell’s version. Bingham believed that “[t]hose three terms are the only terms of limitation” and would permit States to establish “an aristocracy of property, … intellect, … [and] sect.” Bingham also raised the specter that States would enact religious tests for voting. Shellabarger echoed Bingham’s concerns. Invoking the interpretive canon expressio unius exclusio alterius, Shellabarger argued that what “we have not prohibited to the States will be … added to the powers of the States” and will “enable them to disfranchise for every conceivable cause except only [these] three.” Shellabarger specifically referenced Massachusetts’s literacy test as one tool that Southern States could use to disenfranchise Black men.

Critiques of Bingham’s and Shellabarger’s proposals came from multiple directions. In support of his initial proposal, Boutwell observed that the narrow anti-discrimination model was “all that is probably safe for us to undertake now,” articulating the concern that a broader amendment could not

\[225 \text{ See id. at 561 (statement of Rep. Boutwell). Here, Boutwell is referring to his suffrage statute, but the demographic figures hold for the amendment given their similar scopes.} \]

\[226 \text{ Id. at 555 (statement of Rep. Boutwell).} \]

\[227 \text{ See id. at 686 (statement of Rep. Boutwell) (recognizing that there was “a general agreement that some amendment to the Constitution should be proposed”); id. at 725 (conceding that it was “desirable to submit an amendment”); see also Crum, Superfluous, supra note 5, at 1613-14 (discussing this timeline).} \]

\[228 \text{ Id. at 722 (statement of Rep. Bingham); see also id. at 726 (“[E]very other thing not included in this exception may be made a test, and that is the reason I object to it.”).} \]

\[229 \text{ See id. at 726.} \]

\[230 \text{ See, e.g., Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (“[E]xpressing one item of [an] associated group or series excludes another unmentioned.” (alteration in original)).} \]

\[231 \text{ CONG. GLOBE, 40th Cong., 3d Sess. app. 98 (1869) (statement of Rep. Shellabarger).} \]

\[232 \text{ See id.} \]
pass the House or be ratified by the States. Representative Benjamin Butler (R-MA) argued that Bingham’s and Shellabarger’s proposals would endanger state registration laws, as it “would abridge the right of suffrage to whoever was deprived of his vote by non-registration.” In addition, Representative Thomas Jencks (R-RI) pointed out that the universal-right-to-vote proposals were still framed in the negative and therefore “raise just as many new constitutional questions as there are States.” Jencks believed that voting qualifications should be “uniform throughout the land and defined in clear and positive terms.”

Perhaps surprising to modern readers, the voting rights of ex-rebels featured prominently in the discussion. Bingham’s version was more forgiving toward ex-rebels, as it permitted disenfranchisement only for future acts of insurrection. By contrast, Shellabarger’s proposal would have permitted disenfranchisement for past insurrection. Boutwell remarked that, although he was sympathetic to Shellabarger’s view, he did not think it prudent to entrench it into the constitutional text. As for Bingham’s more forgiving proposal, Boutwell commented that “it is not safe by one swoop … to relieve these men of their disabilities.” Other Republicans shared Boutwell’s opposition to the enfranchisement of ex-rebels.

Nevertheless, in response to Bingham’s and Shellabarger’s arguments, Boutwell moved to add protections against education or property tests to his narrow anti-discrimination amendment. In direct response, Representative James Garfield—a future president and an influential moderate Republican

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233 See id. at 727 (statement of Rep. Boutwell); see also id. at 726 (“[B]y arraying against this proposition all the peculiarities of the different States we put the proposition itself in danger. I think it better, therefore, as a matter of practical wisdom, to address ourselves exclusively to those great evils which have existed in the Government and the country.”).
234 Id. at 725 (statement of Rep. Butler (R-MA)).
235 Id. at 728 (statement of Rep. Jencks (R-RI)).
236 Id.
237 See id. at 722 (statement of Rep. Bingham) (noting this distinction).
238 See id. at 726 (statement of Rep. Boutwell).
239 Id.
240 See id. at 725 (statement of Rep. Butler) (stating that he would only support enfranchisement of ex-rebels after the right to vote free of racial discrimination was firmly established); id. (statement of Rep. Scofield (R-PA)) (criticizing Bingham’s proposal for “an undeserved and almost unsolicited act of grace to the cruel men, who for four years drenched the land with blood”).
241 The following language would have been appended to the end of the amendment: “nor shall educational attainments or the possession or ownership of property ever be made a test of the right of any citizen to vote.” Id. at 728 (statement of Rep. Boutwell). Boutwell also suggested that a one-year residency requirement be added, see id. at 726, but the House did not vote on that language.
from Ohio—expressed his support for education tests. Boutwell’s compromise position failed 45-95.

On January 30, Bingham’s and Shellabarger’s universal-right-to-vote proposals fared no better. With minimal discussion, Shellabarger’s version lost by a vote of 61 yeses, 126 noes, and 35 not presents, while Bingham’s was defeated 24-160-38. Given the similarity in language, the thirty-seven vote gap in support is likely attributable to Bingham’s support for the re-enfranchisement of ex-rebels.

Immediately thereafter, the House passed Boutwell’s narrow anti-discrimination amendment by a margin of 150-42-31. Thus, the House’s approved version stated: “The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States.”

3. The Senate’s First Move

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

The Senate debate focused on the vices of Stewart’s narrow anti-
discrimination provision, the implications of Howard’s African-descent proposal, and xenophobic attacks on Chinese immigrants. Unlike the House, the Senate spent little time on a universal-right-to-vote approach. In addition, the senators said almost nothing about officeholding at this stage, even though the House’s amendment lacked an explicit protection for that right.\textsuperscript{250}

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

a. The Narrow Anti-Discrimination Provision

In his first extended remarks, Stewart admitted that “many eloquent speeches had been made on this great topic” and “[e]very person in the country has discussed it.”\textsuperscript{251} Stewart focused on the amendment’s broader purpose, rather than its plain text. Stewart framed the “amendment [a]s a declaration to make all men, without regard to race or color, equal before the law.”\textsuperscript{252} According to Stewart, the amendment was “the logical result of the rebellion, of the abolition of slavery.”\textsuperscript{253} Articulating the underlying theory behind the Radicals’ conception of democracy, Stewart explained that “each man shall have a right to protect his own liberty” for the ballot “is the only measure that will really abolish slavery” and “the only guarantee against peon laws and against oppression.”\textsuperscript{254}

During the Senate’s initial consideration of Stewart’s narrow anti-discrimination provision, surprisingly little was said in support. Senator Frelinghuysen defended the amendment’s narrowness as a virtue, as it did not disturb pre-existing state law.\textsuperscript{255} In addition, an especially revealing colloquy occurred between Stewart and Senator Drake (R-MO).

In a friendly motion to streamline the amendment’s language, Drake proposed that: “No citizen of the United States shall on account of his race, color, or previous condition of servitude, be by the United States or any State denied the right to vote or hold office.”\textsuperscript{256} At first blush, Drake’s proposal

\textsuperscript{250} In response to criticism that New Hampshire permitted only Protestants to hold office, New Hampshire Senator Patterson stated that the requirement “is now a dead letter” and that he had “sat in the Legislature with a Catholic.” \textit{Id.} at 1002 (statement of Sen. Patterson (R-NH)).
\textsuperscript{251} \textit{Id.} at 668 (statement of Sen. Stewart).
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} See \textit{id.} at 979 (statement of Sen. Frelinghuysen (R-NJ)) (stating that the amendment permitted discrimination on the basis of sex, age, property, and education).
\textsuperscript{256} \textit{Id.} (statement of Sen. Drake).
appears to be an innocuous re-ordering of the sentence. But Stewart responded that Drake’s proposal “narrows the amendment and does not improve [it].” According to Stewart, the amendment was framed in the plural—namely, the right of citizens to vote—because it was intended to protect “not only the citizen himself, but the class to which he belonged.” Stewart referenced the House’s draft, which concluded with the phrase “‘class of citizens,’ for the reason that a person might be deprived of his right to vote on account of the servitude of his ancestors or on account of the servitude of his class.” Stewart explained that the Senate’s version accomplished this goal with its plural phrasing that “is not so likely to be misunderstood.” Stewart held firm to his view that the Fifteenth Amendment protects voters as a class even after Drake retorted that “[t]he right to vote is an individual right; it does not belong to masses of people.”

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

Aside from the Stewart-Drake dialogue, there was intense criticism over the possibility that States could easily circumvent the amendment’s ban on racial discrimination. For instance, Senator Morton (R-OH) objected that the

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

258 Id.
259 Id.
260 Id.
261 Id.
262 Id. (statement of Sen. Drake).
264 See CONG. GLOBE, 40th Cong., 3d Sess. 1000 (1869) (statement of Sen. Stewart) (‘‘The only point is whether we have made an affirmative proposition sufficiently clear that it cannot be evaded.’’).
amendment “recognized that the whole power over the question of suffrage is vested in the several States, except as it shall be limited by this amendment.”

Multiple senators raised the specter that States could employ education tests or property requirements to disenfranchise over ninety percent of Black men. As Senator Sherman observed, the “proposition [was] on so narrow a ground that we are constantly apologizing for its weakness.”

These concerns animated the desire for Wilson’s broad anti-discrimination version.

Finally, for his part, Howard went even further in advancing a somewhat strained reading of the amendment. Howard highlighted the inclusion of “by the United States” in Section One, which he interpreted as giving “Congress … the right to deny or abridge the right to vote for some other causes than those mentioned in the article.”

Not only could States disenfranchise Black men via literacy tests, Howard feared that Congress would be able to do so too.

b. The Broad Anti-Discrimination Version

Early on in the debate, Senator Pomeroy (R-KS) spoke in favor of “the enfranchisement of every human being in this country who is an American citizen.”

Pomeroy believed that the right to vote should be conferred “without regard to sex,” and that women deserved the ballot “because she is a citizen of the Republic, amendable to its laws, taxed for its support, and sharer in its destiny.”

Pomeroy condemned the theory of virtual representation for ignoring the interests of distinct groups of people. Thus,
Pomeroy introduced an amendment that would have prohibited the denial or abridgment of the right to vote or hold office “for any reason not equally applicable to all citizens of the United States.”\textsuperscript{274} Even though some Radical Republicans were sympathetic to Pomeroy’s position,\textsuperscript{275} his proposal was never voted on.\textsuperscript{276}

In response to the critiques leveled against Stewart’s proposal, Senator Wilson introduced a broad anti-discrimination provision that protected against discrimination in the right to vote and hold office on account of race, color, nativity, property, education, and religious creed.\textsuperscript{277} In defense of his broader amendment, Wilson specifically named some of the laws he was targeting: Rhode Island’s property qualification for naturalized citizens; New Hampshire’s ban on Catholics holding office; and Massachusetts’ literacy test.\textsuperscript{278} In addition, Stewart remarked that his proposal “allows any State to try, if it chooses, the experiment of woman suffrage.”\textsuperscript{279} As evidenced by its passage by the Senate, Wilson’s amendment allayed the Radicals’ concerns, though it was not uniformly well received.\textsuperscript{280}

c. The Universal-Right-to-Vote Approach

Unlike in the House, the Senate did not spend considerable time debating a universal-right-to-vote approach. At this juncture, the most significant proposal came from Republican Senator Warner of Alabama.\textsuperscript{281}

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\textsuperscript{274} \textit{Id.} at 708 (“The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State for any reason not equally applicable to all citizens of the United States.”).
\textsuperscript{275} \textit{See}, e.g., \textit{id.} at 862 (statement of Sen. Warner (R-AL)) (“I would admit woman … to an equal voice with us in the Government. … But I know that woman’s suffrage is not now attainable.”). To be clear, many Republicans opposed women’s suffrage on ideological grounds and believed in virtual representation. \textit{See id.} at 998 (statement of Sen. Sawyer (R-SC)) (“Women are represented through their husbands or brothers.”).
\textsuperscript{276} \textit{See} Maltz, \textit{Fifteenth}, \textit{supra} note 9, at 431; \textit{infra} Appendix B. In 1866, an attempt to enfranchise women in Washington, DC, was defeated in the Senate by a vote of 9-37. A similar effort in the House lost by a vote of 49-74. \textit{See McPherson, supra} note 33, at 185.
\textsuperscript{277} \textit{See CONG. GLOBE}, 40th Cong., 3d Sess. 1009 (1869).
\textsuperscript{278} \textit{See id.} at app. 154 (statement of Sen. Wilson).
\textsuperscript{279} \textit{Id.}
\textsuperscript{280} Senator Patterson (R-NH) opposed Wilson’s amendment because he was “in favor of an educational test as a restriction upon the right of suffrage.” \textit{Id.} at 1037 (statement of Sen. Patterson).
\textsuperscript{281} Warner was a so-called carpetbagger, an Ohioan who had moved South and had quickly become a Senator. \textit{See} JOHN F. KOWAL & WILFRED U. CODRINGTON III, \textit{THE PEOPLE’S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION} 113 (2021).
\end{flushright}
Warner adopted a hybrid approach. He used an anti-discrimination provision for the right to hold office while employing a universal-right-to-vote for suffrage. His officeholding criteria fell in between Stewart’s and Wilson’s protections. Warner did not include “sex” as a protected class for officeholding, and he would have permitted States to disenfranchise women by limiting suffrage rights to male citizens. That said, Warner’s proposal was truly affirmative in that it conferred the right to vote on male citizens and strongly resembled state constitutions. In addition, Warner’s stance on ex-Confederates mirrored Bingham’s more lenient policy of disenfranchisement for prospective insurrection. Warner’s universal-right-to-vote proposal attracted minimal support and little discussion.

d. Howard’s African-descent Proposal

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

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

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282 Warner’s proposal stated that:

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


283 In a prediction that did not age well, Warner stated that giving States the authority to disenfranchise felons “is a very limited and possibly not dangerous concession.” Id. at 862.

284 See id. at 1014 (defeating it without a roll call vote); id. at 1041 (defeating it 5-47-14).

285 Id. at 985 (statement of Sen. Howard).

286 Id. at 985.
singling out Black persons for protection and “adopting the constitutional language of electors having the qualifications of electors.” Howard’s proposal, however, was not without its detractors.

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

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

This brief debate between Howard and Trumbull touches on the highly sensitive subject of how race is legally defined and to what extent it has social and biological bases. Tellingly, Howard’s change in his position from...
“one-drop” to “one-eighth” is actually the reverse of the historical trend that was happening in the courts and in society at the time.\textsuperscript{297} Similar debates over how to define “White” and “race” under state suffrage laws, federal naturalization laws, and the Fifteenth Amendment recurred throughout this period.\textsuperscript{298}

In addition, senators expressed apprehension about “singl[ing] out one race for protection.”\textsuperscript{299} Edmunds was perhaps the most blunt, stating that Howard’s proposal “does not, as it seems to me, stand on any principle … there is nothing republican in that.”\textsuperscript{300} Although he opposed Howard’s approach, Warner suggested that, if the Senate were to go down that path, it would be prudent to “insert the Irish and Germans” “to strengthen it and give it a chance of adoption.”\textsuperscript{301}

Unsurprisingly, Howard’s proposal garnered support from West Coast Republicans who opposed extending the right to vote to Chinese-American men. Some framed their support as protecting Black men’s rights or, on practical terms, to increase the amendment’s chance of ratification.\textsuperscript{302} But these senators’ xenophobic and Sinophobic remarks revealed their true
e. The Non-Self-Executing Amendment

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

Williams’s motives, however, were not pure. Williams feared that the anti-discrimination models would enfranchise Chinese-American men in the event that naturalization laws were amended to permit non-White immigrants to become citizens. Williams’s proposal received scant attention and was rejected decisively.

f. Electoral College Reform

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

g. Initial Passage

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

The Senate easily rejected attempts to replace Stewart’s narrow anti-discrimination provision with Warner’s universal-right-to-vote proposals, Howard’s African-descent amendment, and Williams’s non-self-executing amendment. After an early loss, Wilson succeeded in replacing Stewart’s proposal with his own broad anti-discrimination provision. At this juncture, Stewart’s draft provided that: “No discrimination shall be made

Id. at 668 (italics in original).

See id. at 668-69.

Id. at 669; see also Chiafalo v. Washington, 140 S. Ct. 2316, 3432 n.1 (2020) (discussing Maine and Nebraska’s systems).

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

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

Id. at 1012 (rejecting it 16-35-15).

See id. at 999 (rejecting it 6-38).

Id. at 1029 (rejecting it 19-24-23).

Id. at 1040 (modifying it by a 31-27 vote).
in any State among the citizens of the United States in the exercise of the
elective franchise or in the right to hold office in any State on account of race,
color, nativity, property, education, or religious creed.”

Meanwhile, Buckalew’s Electoral College reform proposal, also after an
initial setback, was appended to the Fifteenth Amendment. The Senate
then voted on both provisions as a package, clearing the two-thirds hurdle by
a vote of 39-16-11.

4. The House Doubles Down

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

Boutwell faulted Wilson’s broad anti-discrimination provision for
omitting protections against discrimination “on account of previous condition
of slavery.” Without that language, Boutwell believed that States would be
free to disenfranchise “those who have been held in slavery, or whose
mothers were slaves.” Boutwell denied that this “evil could be remedied”
because, as he inexplicably put it, “the slave class, as is well known, are of
no specific color and are of no particular race.”

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

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318 Id. at 1035. Oddly, the version that was sent to the House omitted the word
“religious.” See id. at 1224.
319 Id. at 1041 (rejecting it 27-29).
320 Id. at 1042 (append ing it 37-19).
321 Id. at 1044.
323 Id.
324 Id.
325 Id. (statement of Rep. Bingham).
326 This position is somewhat hard to square with Bingham’s view that the Fourteenth
Amendment did not even apply to voting rights. See CONG. GLOBE, 39th Cong., 1st Sess.
2542 (1866) (statement of Rep. Bingham) (stating that the Joint Committee on
Reconstruction believed that “the exercise of the elective franchise … is exclusively under
the control of the States”).
Perhaps most importantly for modern doctrine, Bingham stated that, “[a]s to servitude, that is embraced in the words color, race, and nativity.” Thus, Bingham argued that proxies for race would be considered racial discrimination under the Fifteenth Amendment. These views provide support for the Supreme Court’s decisions striking down grandfather clauses and other schemes that relied on close proxies for race—such as ancestry—on Fifteenth Amendment grounds. Bingham further claimed that Congress could exercise its Fifteenth Amendment enforcement authority to pass a statute banning discrimination on the basis of previous condition of servitude. Once again, this is historical evidence that Congress has robust enforcement authority to abrogate discriminatory voting qualifications.

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

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

Regarding Buckalew’s Electoral College reform, Boutwell and Bingham continued to clash. Boutwell criticized Buckalew’s proposal for lacking a
uniformity requirement, lest Congress mandate that some States appoint electors via a “general ticket” whereas in others the “election would be by districts.” 333 This would, according to Boutwell, occur “where the majority in Congress could have the advantage.” 334 For his part, Bingham noted that there was no uniformity requirement in the Constitution for congressional districts and nevertheless Congress had not “attempt[ed] to set one law for Ohio and another law for Massachusetts.” 335 Bingham also applauded Buckalew’s proposal for ensuring that Electoral College votes would be determined by popular vote. 336

After a short debate on whether the two amendments should be considered together or separately, 337 Speaker Colfax ordered separate votes. 338 Agreeing with Boutwell, the House decisively rejected the Senate’s broad anti-discrimination provision in a 37-133-52 vote. 339 The House defeated Buckalew’s Electoral College reform without a roll call vote. 340 Thereafter, the House asked for a conference committee. 341

5. The Senate Narrows the Amendment

On February 17, the Senate reconvened and considered the House’s actions. Instead of agreeing to the House’s request for a conference committee, the Senate rescinded its prior approval of the amendment by a simple majority vote. 342 Following this move, Buckalew’s Electoral College reform disappeared into the ether.

Temper then began to flare. Stewart accused Wilson of being “as much responsible as any other person for the condition in which we are placed.” 343 He urged the Senate to endorse the House’s version to avoid it being “again loaded down” and risk the amendment not passing during the lame-duck session. 344 Sumner advocated a different strategy, though even he understood

334 Id.
335 Id. (statement of Rep. Bingham).
336 See id. at 1224.
337 See id. at 1225 (statement of Rep. Boutwell) (“What I say is that this House is in a position where it must vote to concur or non-concur, and there can be but one question upon these propositions.”).
338 See id. at 1226 (statement of Speaker Colfax).
339 See id. at 1226.
340 See id.
341 See id. The members would have been Boutwell, Shellabarger, and Charles Eldredge (D-WI). See id. at 1284. The Congressional Globe misspelled Eldredge’s name as “Eldridge.” See Currie, supra note 10, at 453 & n.403.
342 CONG. GLOBE, 40th Cong., 3d Sess. 1295 (1869).
343 Id. at 1296 (statement of Sen. Stewart).
344 Id. at 1298; see also id. at 1299 (“The Senator will have it fail until there is not a two-
the time pressures. He repeatedly recommended that the Senate simply vote down the House’s version and move expeditiously to a conference committee to sort out a compromise.\(^{345}\) Despite these warnings, the Senate proceeded to reconsider the form its amendment should take, albeit in a more abbreviated session than its initial foray.

Given the House’s failure to explicitly protect the right to hold office, the Senate debated the officeholding question in earnest for the first time. Wilson argued in favor of explicitly protecting the right to hold office, pointing to the ongoing controversy in Georgia as evidence that the Southern States would seek to exclude Black lawmakers from office.\(^{346}\) Wilson argued that the House’s version “leaves th[e] inference” that the right to hold office is not protected.\(^{347}\) Other Radicals concurred with Wilson’s assessment, including Senator Edmunds, who would later be on the conference committee.\(^{348}\) Another prevalent view was that the right to vote either did include the right to hold office or would, as a practical matter, ensure that Black men were able to do so.\(^{349}\) The pragmatic position was that the Senate should simply accept defeat in light of the House’s stance, the time pressures of the lame-duck session, and the looming ratification battle ahead.\(^{350}\)

In addition to this heated debate about strategy and the right to hold office, two other exchanges are worth flagging. First, Senator Roscoe Conkling (R-

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\(^{345}\) See id. at 1296 & 1298 & 1299 (statement of Sen. Sumner).

\(^{346}\) See id. at 1296 (statement of Sen. Wilson).

\(^{347}\) Id.; see also id. (“[S]uppose we submit this imperfect proposition, which says to seven hundred and fifty thousand colored men in this country, ‘You shall have the right to vote, but you shall not have the right to sit upon a jury or the right to hold office.’”).

\(^{348}\) See id. at 1298 (statement of Sen. Edmunds) (interpreting the House’s version to mean that “you give every citizen of a State a right to vote you leave it to the majority of that State to determine whether he shall have any right to be voted for’’); id. (arguing that the House’s version would create a “white aristocracy’’); id. at 1298 (statement of Sen. Sumner) (commenting that the House’s version risked approving of Georgia’s actions); id. at 1301 (statement of Sen. Welch (R-FL)) (“By implication it deprives him of the right to hold office.”).

\(^{349}\) See id. at 1296 (statement of Sen. Ferry (R-CT)) (disagreeing with Wilson’s view and stating that “it says no such thing’’); id. at 1300 (statement of Sen. Frelinghuysen) (“I will only say that if you give seven hundred and fifty thousand men the right to the ballot they will look out for their own rights as to office.’’); id. at 1302 (statement of Sen. Howard) (“There is no danger that in the densely populated regions of the South, where the black population is so numerous, they will be deprived of the right of holding office though they may be voters.’’).

\(^{350}\) See id. at 1299 (statement of Sen. Stewart) (“You can carry the question of suffrage easier [in the States], and then after you can carry the question of holding office easier than you can carry both together.’’); id. (statement of Sen. Sawyer) (saying that “[i]f the country is not ready for that proposition [i.e., officeholding] now, then let us wait’’); id. at 1300 (statement of Sen. Frelinghuysen) (“If we adopt that [i.e., the House’s version], then we have a constitutional amendment.’’).
NY) rehashed the debate between Drake and Stewart.\textsuperscript{351} Conkling asked whether Stewart’s version of the amendment would protect against discrimination of “person[s] descended from slaves.”\textsuperscript{352} And here, Conkling referred to the House’s rejection of Wilson’s version on that ground.\textsuperscript{353} Several senators disagreed vehemently with Conkling’s—and by implication, the House’s—interpretation of the amendment.\textsuperscript{354}

Stewart then defended his draft. Emphasizing the same points he made against Drake, Stewart referenced its plain text: “‘The right of citizens of the United States’—that is, all classes of citizens of the United States.”\textsuperscript{355} Stewart went on to say that: “If there is anything growing out of that person’s condition of servitude, such as disingenuousness of birth, or such as former slavery of this class of persons, the States are prohibited from disenfranchising in consequence of it. This amendment would receive judicial construction, and there would be no doubt about it.”\textsuperscript{356} Once again, the author of the Fifteenth Amendment clearly stated that the amendment protects against discrimination using close proxies for a protected class and should be construed to protect the rights of classes of citizens, not merely individual rights.

Second, Howard repeated his view about including references to the United States in Section One. But this time he focused on the right to hold office.\textsuperscript{357} In rebuttal, Stewart pointed out that “the United States” was included in the amendment because it regulated suffrage “in the Territories and in the District of Columbia.”\textsuperscript{358} And Senator Edmunds explained that “[t]he object of the amendment is not to confer jurisdiction but to deny to the United States and the States the right to exercise that jurisdiction in the way of limitation and exclusion.”\textsuperscript{359}

When it came time to vote, the Senate failed to pass the House’s version by a two-thirds majority, as several Radicals refused to vote for an

\textsuperscript{351} See supra notes 255-264. Conkling’s speech is, admittedly, difficult to follow. He moves between criticizing Stewart’s, Wilson’s, and Howard’s drafts.

\textsuperscript{352} CONG. GLOBE, 40th Cong., 3d Sess. 1316 (1869) (statement of Sen. Conkling).

\textsuperscript{353} See id. (The House of Representatives after a long debate, declared by a large majority that this form of the amendment would not prevent what I speak of.”).

\textsuperscript{354} The Congressional Globe notes that “Edmunds and others” responded “[c]ertainly it would.” Id.; see also id. (statement of Sen. Stewart) (disagreeing with a similar Conkling hypothetical).

\textsuperscript{355} Id. at 1317 (statement of Sen. Stewart).

\textsuperscript{356} Id.

\textsuperscript{357} See id. at 1304 (statement of Sen. Howard) (“[I]t is an irresistible inference from the very language we use, that in respect to all other qualifications the power is given to Congress to restrict voting and office holding … that shall take effect not merely in the District of Columbia or in the Territories, but in any and all of the United States.”).

\textsuperscript{358} Id. (statement of Sen. Stewart).

\textsuperscript{359} Id. (statement of Sen. Edmunds).
amendment that lacked protections for the right to hold office.\footnote{Id. at 1300 (failing by a vote of 31-27); see also id. at 1307 (statement of Sen. Wilson) ("I voted, therefore, against the House amendment … that did not secure to colored citizens the right to hold office.").} And because the Senate had receded from its prior passage of the Fifteenth Amendment, the default reverted back to Stewart’s narrow anti-discrimination provision. The Senate then began voting on various proposals, many of which had been rejected previously.\footnote{See infra Appendix B.} Howard’s African-descent proposal was defeated not just once, but twice, in this round. Intriguingly, the only reason it failed the first time was because Democratic senators provided the margin of victory, as they “were no doubt anxious to keep the issue of the status of Chinese immigrants alive in any potential dispute over ratification.”\footnote{Maltz, Fifteenth, supra note 9, at 433.}

Ultimately, the Senate passed Stewart’s draft by a vote of 35-11-20.\footnote{\textsc{Cong. Globe}, 40th Cong., 3d Sess. 1318 (1869).} The Senate’s version now read: “The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.”\footnote{Id. at 1425.}

With both initial versions passed by two-thirds majorities, the two chambers were back to their original disputes: a substantive disagreement over the right to hold office and a stylistic disagreement over how to protect the rights of classes of citizens.

6. \textit{The House Does an About-Face}

On February 20, the House turned back to the Fifteenth Amendment. Boutwell recognized that the sole contentious issue was whether to protect the right to hold office, and he suggested that the House focus on that issue alone.\footnote{Id. at 1426 (statement of Rep. Boutwell).} But it was not to be. After a short debate, the House performed a total about-face from its prior position.

Following Boutwell’s lead, Representative John Logan (R-IL) moved to delete the officeholding protections from the Senate’s version. Logan stated that with “the right to vote [Black men] will take care of the right to hold office.”\footnote{Id. (statement of Rep. Logan).} Logan further explained that the “Constitution … does not prohibit the right to hold office except … where it provides that the President and Vice President … shall be native-born citizens.”\footnote{Id.} According to Logan, the right to hold office had not been contested prior to Georgia’s expulsion of Black
lawmakers and “[t]here is no law for it whatever.” Representative Benjamin Butler (R-MA) then chimed in to argue that “the right to elect to office carries with it the inalienable and indissoluble and indefeasible right to be elected to office.” Butler expressed concern that the Senate’s language implied that “there are other classes which may be deprived of the right to hold office” and would imply that Georgia’s actions were legal, since it took “a constitutional provision to prevent a man from being deprived of holding office because of race or color.”

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

The House then voted. It first rejected Logan’s motion to delete officeholding protections by a 70-95-57 margin. Next, Bingham moved to substitute the Senate’s amendment with his broad anti-discrimination version. Although the House had previously rejected the substantially similar Wilson amendment from the Senate, Bingham prevailed by a 92-70-60 vote. Bingham’s victory depended on several Radical Republicans from the Midwest and Mid-Atlantic switching their votes as well as nineteen Democrats backing the amendment, presumably out of a belief that the

368 Id.
370 Id.
372 See id.
373 Id. at 1427.
374 Id.
375 Id. at 1428.
376 See id. at 1226.
377 Id. at 1428.
broader amendment would go down in flames either in Congress or during the ratification struggle. 378

The House then passed Bingham’s version by the requisite two-thirds threshold: 140-37-46. 379 Bingham’s version provided that: “The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude.” 380 For the first time, the House not only added an explicit right to hold office but also endorsed far greater anti-discrimination protections. And yet, the House had waited too long, as the Senate had significantly narrowed its amendment in response to the House’s initial stubbornness.

7. The Conference Committee and Final Passage

On February 23, the two chambers acknowledged that they were at an impasse and agreed to a conference committee. 381 The House chose Boutwell, Bingham, and Logan. 382 The Senate selected Stewart, Conkling, and Edmunds. 383 In the Republican press, the committee was viewed as “chosen to favor a moderate measure.” 384 That prediction proved prescient.

On February 25, and after meeting for only three hours, 385 the conference committee submitted its proposed amendment: a narrow anti-discrimination provision with no explicit protection for the right to hold office. 386 Boutwell

378 See Gillette, supra note 12, at 68-69 & n.92 (compiling switched votes); Maltz, Fifteenth, supra note 9, at 441 (focusing on the Democrats’ tactics). Shellabarger had also sought a vote on his revised universal-right-to-vote amendment, but he withdrew it after Bingham’s version prevailed. See Cong. Globe, 40th Cong., 3d Sess. 1428 (1869) (statement of Rep. Shellabarger).
380 Id.
381 See id. at 1481 (Senate voting 32-17-17 for a conference committee); id. at 1470 (House voting 117-37-68 for a conference committee).
382 Id. at 1470.
383 Id. at 1466. Bingham, Boutwell, and Conkling were previously members of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment. See Lash, supra note 10, at 24.
384 Gillette, supra note 12, at 70.
385 See id. at 71.
noted that the final version was essentially the Senate’s initial draft with the right to hold office deleted. That same day and without debate, the House passed the conference committee’s report in a 144-44-35 vote.

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

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

The debate over officeholding did not doom the amendment. The Senate passed it by a vote of 39-13-14. Senator Morton probably captured the mood of several Senators voting in the affirmative: “I will take what I can get

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388 See id.
390 Cong. Globe, 40th Cong., 3d Sess. 1563 (1869). The final vote is sometimes reported as having 145 “yeses.” That is because Speaker Colfax announced that as the total, stating that he was adding his vote to the roll call. However, his vote already appeared on the roll call vote, which is listed as 144. Thus, Colfax’s statement double-counts his own vote. See id. at 1563-64.
391 See id. at 1623-24.
392 See id. at 1625 (statement of Sen. Edmunds).
393 See id. at 1626; see also id. at 1638 (statement of Sen. Fowler (R-TN) (“[A]s it stands it will deny to those citizens specified in the amendment the right to hold office.”). In yet another example of how Radicals and Democrats could agree on the same topic but for very different reasons, Democratic Senator Davis of Kentucky stated that “the power to vote in my judgment implies the power to hold office.” Id. at 1630.
394 See id. at 1627 (statement of Sen. Wilson) (“Do not tell me, sir, that the right to vote carries with it the right to hold office. It does no such thing.”).
395 Id.; see id. at 1629 (statement of Sen. Stewart) (“If they can retain the ballot in Georgia they will force the power that exists there to give the right to hold office.”).
396 See id. at 1625 (statement of Sen. Howard) (“[A] person possessing the right of voting at the polls is inevitably in the end invested with the right to hold office.”).
397 Id. at 1641.
and even be thankful for that." Nonetheless, some Radicals abstained from the vote because of the narrowness of the amendment, though newspapers reported that they were present. At the end of the day, the Fifteenth Amendment was a partisan affair: no Democrat in the Senate voted for it, and only three in the House did. Conversely, 38 out of 54 Republicans voted for it in the Senate, and 140 out of 169 did so in the House.

III. THE RATIFICATION OF THE FIFTEENTH AMENDMENT

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

The political dynamics also shifted dramatically. President Grant entered office a week into the ratification debate, and he endorsed the amendment in his inaugural address. More importantly, while Democrats were a tiny minority in the Fortieth Congress, they controlled several state legislatures. What was largely an intra-party congressional fight shifted to a much more contested and closely divided political environment. Put differently, Congressional Republicans’ relative unity over the question of nationwide Black suffrage should not be interpreted as broad support for that measure nationwide. Indeed, the Fifteenth Amendment barely got over Article V’s three-fourths threshold: when Secretary of State Hamilton Fish listed the twenty-nine ratifying States, this was only 78.4% of the States.

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

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398 Id. at 1628 (statement of Sen. Morton)); see also id. at 1641 (statement of Sen. Warner) (noting but his support and his disappointment in the failure to protect the right to hold office).
399 See GILLETTE, supra note 12, at 76.
400 WANG, TRIAL, supra note 12, at 46-47 tbl 1.7 & 1.8.
401 The omission of women from the Amendment’s protections would have profound consequences for the suffragette movement. Prominent leaders like Elizabeth Cady Stanton and Susan B. Anthony employed racist arguments in opposing the Fifteenth Amendment’s ratification. See FREE, supra note 37, at 165.
402 See LASH, supra note 10, at 548.
403 See GILLETTE, supra note 12, at 80.
404 See Crum, Lawfulness, supra note 10, at 1589-91.
A. The Debate in the States

Unsurprisingly, the most prominent issue concerning the Fifteenth Amendment’s ratification was whether Black men should be enfranchised nationwide. After all, that was clearly the Reconstruction Framers’ principal goal and the Amendment’s unambiguous effect.\textsuperscript{405}

Supporters of ratification had multiple motives. Many Republicans had started their careers in the abolitionist movement, and the right to vote was considered the next step in that struggle.\textsuperscript{406} Indeed, “for many Republicans the essence of the party lay in its devotion to equal rights.”\textsuperscript{407} Other Republicans had been influenced by the bravery and sacrifice of Black soldiers fighting in the Union army.\textsuperscript{408}

There was also a significant partisan angle.\textsuperscript{409} Given the elections in the Reconstructed South and the partisan environment, Black men were widely predicted to vote as a near-unanimous bloc. The immediate upshot was that Republicans could count on a new influx of voters in the Border States.\textsuperscript{410} In the longer term, the ballot was viewed as the most effective means for Black voters to protect their civil rights.\textsuperscript{411}

The conservative \textit{New York Times} captured a cynical motive for ratification: “The adoption of this amendment will put an end to further agitation of the subject … and thus leave the Government of the country free to deal with its material interests.”\textsuperscript{412} For their part, Democrats leveled racist attacks, harped on the Amendment’s procedural irregularities, asserted that a constitutional amendment could not compel States to expand their electorate, and claimed that the Republican Party had betrayed its 1868 platform in

\begin{itemize}
    \item \textsuperscript{405} See Maltz, \textit{Fifteenth, supra} note 9, at 443-44.
    \item \textsuperscript{406} See Foner, \textit{RECONSTRUCTION, supra} note 67, at 448.
    \item \textsuperscript{407} Benedict, \textit{supra} note 12, at 326.
    \item \textsuperscript{408} See Michael Waldman, \textit{The Fight to Vote 61} (2016).
    \item \textsuperscript{409} Here, Republican support for the enfranchisement of Black men could be viewed through Derrick Bell’s famous interest-convergence theory. \textit{See} Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated \textit{only} when it converges with the interests of whites.”).
    \item \textsuperscript{411} \textit{See} Amar & Brownstein, \textit{supra} note 10, at 939; Crum, \textit{Reconstructing, supra} note 10, at 306-09; Maltz, \textit{Civil Rights, supra} note 10, at 132.
    \item \textsuperscript{412} Lash, \textit{supra} note 10, at 551 (reprinting \textit{New York Times} editorial); see also McPherson, \textit{supra} note 33, at 478 (stating that “the negro question has ceased to be an element in American politics”) (reprinting California Republican Party Platform of 1869).
\end{itemize}
pushing nationwide Black male suffrage.\textsuperscript{413}

The Fifteenth Amendment’s ratification battle would be fought mostly on this terrain, and the main front fell along partisan lines. The major exceptions were the status of Chinese immigrants on the West Coast and Irish Americans in Rhode Island. Nevertheless, there were contested issues, and their resolution or non-resolution would have consequences for the Amendment’s scope.

As a general matter, it was expected that the Amendment’s plain text would not invalidate other voting qualifications, such as literacy tests. Indeed, the Amendment’s narrowness was frequently invoked as a virtue during the ratification battle. For example, newspapers that supported ratification heralded that nativity-based discrimination could stop the enfranchisement of Chinese-Americans in the event the naturalization laws were changed.\textsuperscript{414}

On questions surrounding officeholding, a noteworthy aspect of the nationwide debate is that proponents and opponents of ratification were often in agreement, albeit for different reasons. The Virginia Republican Party’s 1869 platform stated that the Fifteenth Amendment encompassed the “twin privilege” of the “right to be voted for.”\textsuperscript{415} By contrast, the California Democratic Party’s 1869 Platform invoked the prospect of Black and Chinese officeholding to oppose ratification.\textsuperscript{416} Just as in Congress, the officeholding question was not easily answered even absent explicit protection.

So how did the Fifteenth Amendment satisfy Article V’s three-fourths threshold? It sailed through state legislatures in New England and the South. In many ways, this is unsurprising. New England had the longest experience with Black male suffrage. However, some moderate Republicans in Rhode Island voted against the amendment out of concern that it would invalidate the property qualification used to disenfranchise Irish Americans. In the Reconstructed South, the massive influx of Black voters helped secure ratification. Moreover, four of the Southern States were required to ratify it as a fundamental condition for their re-admission—or, in Georgia’s case, its second re-admission.

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

\begin{footnotes}
\textsuperscript{413} See \textit{Lash}, supra note 10, at 559.
\textsuperscript{414} See \textit{Lash}, supra note 10, at 547 (reprinting California editorial)
\textsuperscript{415} \textit{McPherson}, supra note 33, at 485.
\textsuperscript{416} See \textit{id.} at 479 (stating that the amendment would “give the negro and Chinaman the right to vote and hold office”).
\end{footnotes}
they opposed the enfranchisement of Black men.

1. **New England**

By 1869, Black men were enfranchised in all of the New England States except Connecticut. Accordingly, the States of Maine,\(^\text{417}\) Massachusetts,\(^\text{418}\) New Hampshire,\(^\text{419}\) and Vermont\(^\text{420}\) ratified in 1869, often with crushing majorities. And despite not having enfranchised Black men, Connecticut ratified in 1870, albeit with far narrower margins.\(^\text{421}\)

Given its role in the drafting of the Amendment, it is fitting that Rhode Island’s nativity-based property qualification would feature prominently in the debate over the State’s ratification. In May 1869, Wendell Phillips, an influential abolitionist leader, gave a famous speech in Newport, Rhode Island, to the members of the state legislature.\(^\text{422}\) Reprinted in the *New York Times*, Phillips implored the legislators to ratify the Amendment. In so doing, he specifically addressed concerns that it would apply to naturalized Irish Americans. Phillips stated that he “d[id]n’t believe a word of it, that this Fifteenth Amendment touches you as to your admitting foreigners to vote.”\(^\text{423}\) Phillips continued: “That little word ‘race’—you think you will be obliged to change your law in regard to foreigners voting. I wish it did, but I don’t believe it does. You don’t exclude a man because he belongs to the Latin or Celtic race. You do it on the ground of the locality of his birth-place. Nativity is not race.”\(^\text{424}\) Perhaps persuaded by Phillips’ speech, Rhode Island’s state senate ratified the next day.\(^\text{425}\)

But its state house voted to postpone consideration until January 1870.\(^\text{426}\) By then, it was apparent that Rhode Island’s rejection “might jeopardize success.”\(^\text{427}\) Proponents of ratification in the state house assured doubters that the Amendment did not touch nativity, and that if it did, then “a literacy test

\(^{417}\) McPherson, *supra* note 33, at 492 (unanimous in house and 25-1 in senate).

\(^{418}\) Id. at 492-93 (192-15-33 in house and 36-2 in senate).

\(^{419}\) Id. at 494-95 (187-131 in house); Gillette, note 12, 86 tbl.3 (unanimous in senate).

\(^{420}\) McPherson, *supra* note 33, at 560-61 (196-12 in house and unanimous in senate).

\(^{421}\) Id. at 488-89 (125-105-6 in house and 13-6-2 in senate). The political fight in Connecticut centered on the issue of Black male suffrage. See Gillette, *supra* note 12, at 119-29.

\(^{422}\) See Foner, Second Founding, *supra* note 1, at 108.

\(^{423}\) Lash, *supra* note 10, at 575 (reprinting Phillips’ speech).

\(^{424}\) Id. Perplexingly, Phillips misquotes the Amendment as saying “men” rather than “citizens” even though the latter, accurate word would have bolstered his argument. Phillips also uses the term “foreigners” rather than distinguishing between native-born and naturalized citizens. *Id.*

\(^{425}\) McPherson, *supra* note 33 at 497 (23-12 in senate).

\(^{426}\) Id. (35-29 vote in house in favor of postponement).

\(^{427}\) Gillette, *supra* note 12, at 152.
would be imposed.”

Rhode Island’s house ultimately ratified by a 59-10. In a rarity, the vote was not along partisan lines. Three Democrats voted for ratification, and four Republicans opposed it. Rhode Island would keep its nativity-based property qualification until 1888.

2. The Mid-Atlantic

Recall that New York had enfranchised Black men, but it also imposed racially discriminatory residency-, property-, and tax-paying requirements. Moreover, New York’s law has often been cited as an exemplar of what an abridgment of the right to vote might be. Nevertheless, New York ratified the Amendment in spring 1869, with an exceptionally close margin in the state senate. But after Democrats won the 1869 election, New York purported to rescind its ratification on a party-line vote in January 1870. The legality of New York’s attempted rescission was hotly debated during Reconstruction.

New Jersey rejected ratification in February 1870. After the Amendment’s adoption and a Republican victory in the 1870 election, New Jersey changed course and ratified in February 1871. Here, the enfranchisement of Black men may have changed the election results; New Jersey’s Democratic Governor also acquiesced to ratification in light of the Amendment’s proclamation as part of the Constitution.

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

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428 Id. at 153.
429 McPherson, supra note 33, at 560.
430 See Conley, supra note 187, at 87.
432 Id. at 1562 (69-56 in the house and 16-13 in the senate).
433 See Crum, Lawfulness, supra note 10, at 1577-1589.
434 McPherson, supra note 33, at 559-60 (27-32 in house and 8-13 in senate).
435 See Crum, Lawfulness, supra note 10, at 1577-78 (discussing historical context); Gillette, supra note 12, at 113 (observing that the Fifteenth Amendment enfranchised approximately 4,200 Black men and that the 1868 election had a margin of 2,800 votes).
436 McPherson, supra note 33, at 497 (62-38 in house and 18-15 in the senate).
3. The Border States

Of the loyal States that had slavery at the start of the Civil War, only Missouri ratified the Fifteenth Amendment.438 West Virginia, which seceded from Virginia during the war, also adopted it.439 By contrast, Delaware,440 Kentucky,441 and Maryland442 all rejected ratification with near unanimity in their state legislatures. Indeed, not a single state legislator in Maryland voted for ratification.

Here, it is notable that Missouri and West Virginia had far smaller proportions of Black voters than the other Border States. Thus, the potential political stakes and concomitant White backlash were diminished.443 Democrats also had overwhelming majorities in the state legislatures that rejected ratification, but even some Republicans opposed ratification in these States.444 Thus, in the region of the country where the Fifteenth Amendment would have its biggest political impact given state suffrage laws and demography, Democrats successfully defeated ratification.

4. The South

By 1869, the majority of the former Confederate States had been re-admitted to the Union. And in a remarkable turnaround and testament to the importance of Black men’s ballots, the Reconstructed Southern States overwhelmingly supported ratification.445 In fact, without these Southern States’ votes for ratification, the Fifteenth Amendment would not have cleared Article V’s three-fourths threshold.446

As elaborated on below, Mississippi, Texas, and Virginia remained outside the Union. Furthermore, Georgia would be put back under military

438 Missouri actually ratified twice because it omitted Section Two’s enforcement clause. See LASH, supra note 10, at 541; see also MCPHERSON, supra note 33, at 494 (23-9 in senate); Id. at 559 (86-34 in the house).
439 MCPHERSON, supra note 33, at 498 (22-19 in house and 10-6 in senate).
440 Id. at 557 (0-19 in house and 2-7 in senate).
441 Id. at 491 (5-80 in house and 6-27 in senate).
442 Id. at 558 (0-87 in house and 0-25 in senate).
443 The Black population in these States: Delaware (18.2%); Kentucky (16.8%); Maryland (22.5%); Missouri (6.9%); and West Virginia (4.1%). GILLETTE, supra note 12, at 82 tbl.1.
444 See MCPHERSON, supra note 33, at 491 (showing Kentucky Republicans voting no).
445 See id at 557 (Alabama) (71-16 in house and 30-1 in senate); id. at 488 (Arkansas) (53-0 in house and 19-2 in senate); id. at 489 (Florida) (26-13 in house and 13-8 in senate); id. at 492 (Louisiana) (55-9-36 in house and 18-3 in senate); id. at 496 (North Carolina) (87-20 in house and 40-6 in senate); id. at 497-98 (South Carolina) (88-3-29 in house and 18-1 in senate).
446 See Crum, Lawfulness, supra note 10, at 1606-07.
rule and excluded from Congress. These four States would be required to ratify the Fifteenth Amendment as a fundamental condition for their re-admissions.447

In an ironic twist, Tennessee was both the only Southern State to enfranchise Black men voluntarily and the sole one to ultimately reject the Fifteenth Amendment’s ratification.448

5. The Midwest

Prior to the Fifteenth Amendment’s passage by Congress, the issue of Black male suffrage had made some inroads in the Midwest. Referenda in Iowa and Minnesota had enfranchised Black men in 1868. Black men in Wisconsin gained the right to vote thanks to a judicial decision. And Congress enfranchised Black men in Nebraska using a fundamental condition. But Black men remained disenfranchised in Illinois, Indiana, Kansas, Michigan, and Ohio.449 Nevertheless, the region unanimously backed the Fifteenth Amendment,450 with some hardball tactics taken in Indiana to sidestep Democrats’ attempts to deny the state legislature a quorum.451 In many ways, this unanimity is attributable to the Republican Party’s ability to pressure state parties to adopt its new national platform.452

6. The West

Of the three Western States, only Nevada ratified the Amendment.453 Here, Senator Stewart, a primary author and floor manager, employed party pressure to secure ratification.454 Stewart also sent a telegram to a local federal judge—which was soon published—stating that the “word ‘nativity’

447 See infra Section III.B.
448 McPherson, supra note 33, at 560 (12-57 in the senate).
449 See supra Section I.D.
450 See McPherson, supra note 33, at 490 (Illinois) (55-28-2 in the house and 17-7 in the senate); id. at 490-91 (Indiana) (54-3 in the house and 27-11-11 the senate); id. at 558 (Iowa) (84-12 in the house and 42-7 in the senate); id. at 491 (Kansas) (73-7-10 in the house and 25-0 in the senate); id. at 493-94 (Michigan) (68-24 in the house and 25-5 in the senate); id. at 558 (Minnesota) (28-15 in the house and 13-8 in the senate); id. at 559 (Nebraska) (31-4 in the house and 12-1 in the senate); id. at 562 (Ohio) (57-55 in the house and 19-18 in the senate); id. at 498 (Wisconsin) (62-29-9 in the house and 15-11-7 in the senate); see also id. at 497 (showing prior Ohio rejection).
451 See Crum, Lawfulness, supra note 10, at 1578-80 (discussing Indiana’s rump legislature).
452 See Gillette, supra note 12, at 146 (“Ratification was not popular but it was a party measure; its adoption was interpreted as a party victory.”).
453 McPherson, supra note 33, at 494 (23-16 in the house and 14-6 in the senate).
454 Gillette, supra note 12, at 157.
was stricken from the original draft of the Constitutional Amendment so as to allow the exclusion of Chinese from its benefits.\footnote{455}{Id. (quoting telegram).}

In California, the voting rights of Chinese immigrants dominated the 1869 election. Republicans attempted to deflect the question by pointing out that Chinese immigrants could not become citizens. Nonetheless, the issue helped Democrats secure victory and, once in office in January 1870, the legislature rejected the Amendment on a party-line vote.\footnote{456}{See id. at 154-56; McPherson, supra note 33, at 557.}

Finally, in a fit of spite, Oregon rejected the Fifteenth Amendment \emph{after} its ratification had been proclaimed by Secretary of State Hamilton Fish.\footnote{457}{See Gillette, supra note 12, at 156-57.}

### B. Congressional Action

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

Congress pressured the Southern States to ratify the Reconstruction Amendments: it excluded their representatives and senators, imposed military rule, and made ratification of the Fourteenth and (for some) the Fifteenth Amendments a fundamental condition for re-admission. These procedural irregularities are usually viewed as just that—pertaining only to these amendments’ adoption but not their content.\footnote{458}{Cf. Colby, Originalism, supra note 36, at 1629 (arguing that the Reconstruction Amendments’ irregular adoptions pose a “fundamental challenge … to originalism—a challenge that originalists have ignored”).}

But Congress’s actions during the Fifteenth Amendment’s ratification debate could potentially implicate its substantive scope.

That is because Congress rejected an attempt to opine on the applicability of the Fifteenth Amendment to Chinese persons and because Congress began expressly protecting the right to hold office in fundamental conditions. To be sure, these actions were all taken by the Forty-First Congress—critically, not the Fortyeth Congress that actually passed the Fifteenth Amendment. This new Congress was viewed as more moderate than its predecessor and the Republican’s majority was smaller in the House.\footnote{459}{See supra notes 163-164.}

Because post-ratification evidence is frequently probative of original intent, this Article investigates the relevance of this \emph{extra}-ratification evidence.\footnote{460}{See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 171, 184-85 (2012) (looking to events in the early 1800s in interpreting the Religion Clauses); William Baude, Constitutional Liquidation, 71 STAN. L. REV. 1, 4 (2019) (defending “James Madison’s theory of postenactment historical practice, sometimes called ‘liquidation’”).}
In late March 1869, when the ratification battle was just beginning, Representative James Johnson (D-CA) introduced the following motion: “That in passing the resolution for the fifteenth amendment to the Constitution of the United States this House never intended that Chinese or Mongolians should become voters.”461 After a very brief debate about the procedural propriety of the resolution, the House defeated a motion to suspend the rules with 42 yeses, 106 noes, and 48 not voting.462 The overwhelming majority of “yes” votes were Democrats.463

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

What is striking about Johnson’s motion is its rarity. I have been unable to find any other example of Congress holding a vote on an amendment’s substantive content while its ratification was pending before the States.464 One can imagine various motives for members of Congress to pursue this strategy: to assuage concerns in favor of ratification, to sabotage ratification, to re-litigate old battles, or an attempt to narrow (or broaden) an amendment once ratification appears inevitable. The interpretive puzzles nested in this fact pattern are thorny and fascinating.465

462 Id.
463 See McPherson, supra note 33, at 415 (showing party affiliation).
464 A close analogy may be a bill introduced in 1867 by Senator Wilson while the Fourteenth Amendment was pending before the States. Wilson’s bill would have enfranchised Black men upon the Fourteenth Amendment’s ratification. See S. 111, 40th Cong. (1867); Cong. Globe, 40th Cong., 1st Sess. 292 (1867). That bill was not voted on.

Here, I do not count Congress’s votes to extend the deadline for the Equal Rights Amendment’s (ERA) ratification, as those were procedural moves rather than attempts to define the amendment’s substantive content. See Kowal & Codrington, supra note 281, at 219-30 (chronicling the ERA’s history); David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2368-70 (2021) (detailing the legal questions surrounding the ERA’s ratification).

465 A comparator could be drawn from the statutory context. Imagine that both houses have passed a bill, but the President is mulling a veto. The Senate quickly passes a resolution that assuages the President’s concerns, and the President signs the bill into law. It is entirely unclear how a court would approach this far-fetched hypothetical. A less analogous situation is how to construe failed attempts to amend legislation, but on this front, the Court “ha[s] not been consistent.” Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994). In any event, here the “legislation” is not final.
Next, the situation in Georgia continued to deteriorate, and Congress eventually intervened. Recall that, following its readmission to the Union in July 1868, Georgia expelled Black lawmakers from the General Assembly in September 1868 and replaced them with the White candidates they had defeated at the polls, some of whom were alleged to be disqualified by Section Three of the Fourteenth Amendment. Congress initially responded by declining to seat one of Georgia’s seven representatives and its senators.\footnote{See supra Section II.A.C.}

The Georgia officeholding controversy loomed large while Congress debated the wording of the Fifteenth Amendment.

After Congress proposed the Fifteenth Amendment, the controversy in Georgia did not end. In March 1869, Georgia’s all-White state legislature started debating the Fifteenth Amendment. Republican Governor Rufus Bullock sent a message to the legislature declaring that the Fifteenth Amendment included the right to vote and hold office.\footnote{See LASH, supra note 10, at 555 (“[T]he right to vote carries with it, by necessary implication, every other political privilege. … [A]ll State laws or Constitutions making class qualifications for offices, based upon birth, race or color, become void.”) (quoting Bullock’s message).} Since Bullock opposed the General Assembly’s expulsion of Black lawmakers, his message could be viewed as “baiting the legislature to reject the amendment (an act that would likely trigger federal intervention).”\footnote{Id. at 545; see also GILLETTE, supra note 12, at 101 (“Republicans reasoned that if the Fifteenth Amendment were rejected … then Congress would become so infuriated as to restore the provisional government … . Under the leadership of Governor Rufus B. Bullock, Republicans tried to sabotage ratification.”).} When the Georgia House nevertheless voted to ratify, it attached a proviso stating: “The colored man, having heretofore had no political rights, they must be granted to him by express statute, and not by implication. Therefore, the proposed amendment does not confer upon him the right to hold office.”\footnote{LASH, supra note 10, at 556.} Days later, the Georgia State Senate deadlocked on ratification, and the Senate President, a Bullock ally, cast his vote against ratification. Georgia thus became the first Reconstructed Southern State to reject the Fifteenth Amendment.\footnote{See id. at 545.}

Then, in June 1869, the Georgia Supreme Court ruled that Black persons had the right to hold office under the Georgia Constitution, which only required that state legislators be citizens.\footnote{See White v. Clements, 39 Ga. 232, 266-68 (1869); GA. CONST. art. III, §§ 2-3 (1868) (members of General Assembly “shall be citizens of the United States”).} And throughout 1869, the Ku Klux Klan and other white supremacist terrorist groups launched a wave of attacks and assassinations across Georgia.\footnote{See DOWNS, supra note 12, at 219-20.}
military rule in Georgia. In considering the propriety of such tactics, members of Congress debated the enforceability of fundamental conditions and whether the original fundamental conditions had, in fact, mandated Black officeholding.\textsuperscript{473} In the Georgia Reorganization Bill, Congress declared that “exclusion” of state legislators “upon the ground of race, color, or previous condition of servitude, would be illegal, and revolutionary, and is hereby prohibited.”\textsuperscript{474} Congress further required that Georgia ratify “the fifteenth amendment … before [its] senators and representatives … are readmitted to seats in Congress.”\textsuperscript{475} Georgia ultimately complied with these new fundamental conditions, and was re-admitted for a second time in July 1870.\textsuperscript{476}

Meanwhile, the Georgia controversy impacted the fundamental conditions imposed on Mississippi, Texas, and Virginia in early 1870.\textsuperscript{477} To recap, the previous fundamental conditions were universalist anti-retrogression provisions that prevented the States from “depriv[ing] any citizen or class of citizens of the United States of the right to vote.”\textsuperscript{478} In other words, the wrongful deprivation of the right to vote need not be tied to racial discrimination. Congress imposed the same fundamental condition as to the “right to vote” when it readmitted Mississippi, Texas, and Virginia notwithstanding the Fifteenth Amendment’s distinctive language and its anti-

\textsuperscript{473} See CONG. GLOBE, 41st Cong., 2d Sess. 171 (1869) (statement of Sen. Bayard (D-DE)) (arguing that “the right to hold office was not included under the same qualification as the right to vote”); id. at 174 (statement of Sen. Howard) (“[Georgia] ha[s] not kept their faith with the reconstruction acts. . . . The right to be elected to the Legislature was as plainly provided for in the reconstruction acts as was the right to vote.”); id. at 176 (statement of Sen. Edmunds) (arguing that Georgia backslid after its readmission when it expelled black lawmakers and refused to follow Section Three); id. at 257 (statement of Rep. Fitch (R-NV)) (“[I]f any State violates the conditions upon which it was permitted to become a State we have the power to take away the corporate political existence we gave and remit the community attempting such a fraud to the condition of political pupilage from which we suffered it to emerge.”); id. at 257–58 (statement of Rep. Axtell (D-CA)) (arguing that this debate was precipitated by Georgia’s rejection of the Fifteenth Amendment and the perceived necessity of its endorsement for ratification).

\textsuperscript{474} An Act to Promote the Reconstruction of the State of Georgia, ch. 3, § 6, 16 Stat. 59, 60 (1869).

\textsuperscript{475} Id. at § 8.

\textsuperscript{476} See An Act Relating to the State of Georgia, ch. 299, §1, 16 Stat. 363. 363-64 (1870) (noting that Georgia had ratified the Fifteenth Amendment).

\textsuperscript{477} Virginia and Mississippi were re-admitted in January and February, respectively, before the Fifteenth Amendment’s ratification. Texas was re-admitted on the same day that Secretary of State Hamilton Fish proclaimed the Fifteenth Amendment’s ratification.

\textsuperscript{478} An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868); see also An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (same); supra Section I.C.2.
discrimination framework. Congress also contained a novel fundamental condition: “That it shall never be lawful … to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office.”\footnote{An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); see also An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870) (same); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870) (same);} Thus, the Forty-First Congress, mindful of its fight with Georgia over officeholding, decided to expressly protect the right to hold office \textit{and} use an anti-discrimination provision to accomplish that goal.\footnote{Republicans divided over whether Congress could impose these \textit{new} fundamental conditions. See \textsc{Lash}, supra note 10, at 559-60 (noting that Morton supported the plan but Trumbull and Conkling opposed it); Currie, supra note 10, at 488 (“Congress in 1867 had made ratification of the Fourteenth Amendment a condition of restoration to representation; what it could do for one Amendment it could do for another as well.”) (footnote omitted).}

On March 30, 1870, Secretary of State Hamilton Fish proclaimed the Fifteenth Amendment’s ratification. In what he admitted was an “unusual … message” to include with a constitutional amendment’s proclamation, President Grant stated that “the adoption of the fifteenth amendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life.”\footnote{\textsc{Lash}, supra note 10, at 596 (reprinting Grant’s message).}\footnote{\textsc{Gillette}, supra note 12, at 161 n.1 (emphasis added).} Intriguingly, Grant’s original handwritten message mentioned both “the right to vote \textit{and be voted for},” but the reference to officeholding was deleted from the final, published version.\footnote{\textsc{See, e.g.}, Travis Crum, \textit{Race-Based Redistricting during Reconstruction and Redemption} (work in progress).}

Although post-ratification legislation and actions can inform original meaning and can sometimes liquidate ambiguous terms, this Article ends its comprehensive historical analysis at Fish’s proclamation. In future work, I will examine the Fifteenth Amendment’s early years and seek to fully answer today’s open doctrinal questions surrounding redistricting, discriminatory intent, and private action.\footnote{See Lawrence B. Solum, \textit{Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record}, 2017 BYU L. Rev. 1621, 1626-27.}

\section*{IV. \textbf{Originalism and the Fifteenth Amendment}}

With the story complete on how the Fifteenth Amendment became part of the Constitution, we can turn to ascertaining its original meaning. For the uninitiated, there are a variety of originalist theories.\footnote{See Lawrence B. Solum, \textit{Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record}, 2017 BYU L. Rev. 1621, 1626-27.} Original intent
examines the Framers’ and ratifiers’ intent to divine the meaning of the Constitution.  

485 By contrast, original expected application looks to “how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).” 486 “[O]riginal expected application includes not only specific results, but also the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied.” 487 Finally, original public meaning interprets “the words of the Constitution … according to the meaning they had at the time they were enacted.” 488 To be sure, these methodologies frequently overlap, as “originalists often look to the statements of the framers as a proxy for the views and understandings of the ratifiers and the general public.” 489 This Article does not take sides in this internecine debate among originalists, and it uses the phase “original understanding” as an umbrella term. 490 Instead, this Article uses these different schools of originalism to demonstrate how certain issues concerning the Fifteenth Amendment were either crystal clear or frustratingly opaque.

The unambiguous original understanding of the Fifteenth Amendment was that it would enfranchise Black men nationwide. All of the proposed versions would have accomplished that goal one way or another. 491 Moreover, it was the key battle line in the ratification debate, with the national

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486 BALKIN, supra 64, at 7.

487 Id.; see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 93 (2004) (“[S]ome originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases.”).

488 BARNETT, supra note 487, at 89; see also Kesavan & Paulsen, supra note 485, at 1132 (defining original meaning as how the Constitution’s “words and phrases, and structure … would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”).

489 BALKIN, supra 64, at 227 (emphasis added); see also Solum, supra note 484, at 1637-38 (“Although original expected applications do no constitute the original meaning of the constitutional text, they are nonetheless relevant to constitutional interpretation because they can provide evidence of the original public meaning.”).

490 Cf. Kesavan & Paulsen, supra note 485, at 1127 (defining “originalists” as “those who maintain that constitutional interpretation should be constrained by the ‘original intent’ of the Framers, the ‘original understanding of the Ratifiers, or the hypothesized, objective ‘original meaning’ of the Constitution’s text”).

491 Senator Williams’ non-self-executing amendment would not have done so immediately, but his goal was to find a means of enfranchising Black men but not Chinese immigrants. See supra Section II.B.1.
Republican Party putting pressure on state legislatures to ratify the amendment. Whether Congress’s primary goal was to enfranchise Black men in the North or to ensure that it could protect Black men’s voting rights in the South has been debated by historians.\textsuperscript{492} In my view, the best answer is to focus on the relevant time horizon. In the short run, Congress was concerned with Black men living in the North and the Border States. But in the mid- to long-term, Congress was worried about its waning authority over voting rights in the South as those States were being re-admitted to the Union.

But after that point of agreement, the situation gets much murkier. The secondary issues about circumvention, the voting rights of other groups, and officeholding were far more contested and their answers depend on how one frames the question and what originalist methodology one employs.

Consider the Fifteenth Amendment’s key phrases: “right … to vote,” “denied or abridged,” “on account of” and “race, color, or previous condition of servitude.” What is striking about the congressional debate is that the available analogues for how to draft the Fifteenth Amendment were barely referenced for support. The Framers did not borrow from Article I’s template by using words like “Electors” and “Qualifications.”\textsuperscript{493} Moreover, the obvious textual, teleological, and temporal connection between the Apportionment Clause and the Fifteenth Amendment was not harped on. Nor was the close linkage with the subset of enfranchisement statutes and Southern State constitutions that specifically mentioned race, color, and previous condition of servitude. Put differently, there is no deep reservoir of state-level analogues that shed light on the Fifteenth Amendment’s meaning.

To the extent that any draft version of the Fifteenth Amendment resembled state-level constitutional provisions, it was Senator Warner’s universal-right-to-vote approach, which garnered minimal support. The Reconstruction Framers were far more focused on big picture questions about who to enfranchise and how to protect their rights than the nitty-gritty of specific text.

Even though the Court has occasionally stated that Reconstruction’s legal history may be “inconclusive,”\textsuperscript{494} acknowledging historical ambiguity is risky in today’s age of originalism. After all, constitutional law needs an answer to resolve a case. A problematized and nuanced past is all fine and

\textsuperscript{492} See supra Section II.A.1.
\textsuperscript{493} U.S. CONST. art. I, § 2 ("Electors [for the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the state legislature.").
\textsuperscript{494} See Brown v. Board of Educ., 347 U.S. 483, 489 (1954) (concluding that the history surrounding the Fourteenth Amendment’s application to segregation generally and to public education was “inconclusive”); Loving v. Virginia, 388 U.S. 1, 9 (1967) (observing that the historical record was “not sufficient to resolve” whether the Fourteenth Amendment was originally understood to prohibit bans on interracial marriage).
good until one needs to decide whether a law is unconstitutional or not.\footnote{See Jack M. Balkin, Lawyers and Historians Argue about the Constitution, 35 CONST. COMM. 345, 347-48 (2020).} But there could be an upshot to this historical indeterminacy. To the extent an issue was contested during the Fifteenth Amendment’s drafting and ratification, the question could be liquidated in the future,\footnote{See Baude, supra note 460, at 4 (discussing “Madison’s theory of postenactment historical practice … to settle constitutional disputes”).} and Congress is well within its enforcement authority to answer it.\footnote{This assumes that Katzenbach’s rational standard governs disputes under the Fifteenth Amendment or in racial discrimination cases under the Fourteenth Amendment. This standard accords with the original understanding of the term “appropriate” in the Reconstruction Amendments’ enforcement sections. See Tennessee v. Lane, 541 U.S. 509, 556-58 (2004) (Scalia, J., dissenting); McConnell, Institutions, supra note 220, at 172-73. For a lengthy defense of Katzenbach as the governing standard, see Crum, Superfluous, supra note 5, at 1623-26.}

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

\section{A. Voting Qualifications}

Under current doctrine, the Supreme Court construes the Fifteenth Amendment to apply not only to all races but also to close proxies for race, such as ancestry.\footnote{See Guinn v. United States, 238 U.S. 347, 365 (1915) (invalidating Oklahoma’s grandfather clause); Lane v. Wilson, 307 U.S. 268, 275 (1939) (invalidating Oklahoma’s registration scheme that attempted to evade Guinn and perpetuate the grandfather clause); Rice v. Cayetano, 528 U.S. 495, 499 (2000) (invalidating constitutional provision that limited the right to vote for trustees of the Office of Hawaiian Affairs to “native Hawaiians”).} As the Court once put it, the Fifteenth Amendment “nullifies sophisticated as well as simple-minded modes of discrimination.”\footnote{Lane, 307 U.S. at 275.} However, the scholarship on the Fifteenth Amendment is not so capacious.

Most forthrightly, Earl Maltz has argued that the Fifteenth Amendment’s protections were originally “understood to be even narrower than the most conservative modern justices have believed.”\footnote{MALTZ, CIVIL RIGHTS, supra note 10, at 156.} According to Maltz, “[n]ot only did the drafters intend to leave untouched those qualifications that have a racially disproportionate impact; even those qualifications that are intended to disfranchise blacks were purposefully left intact.”\footnote{Id.} The Fifteenth Amendment...
Amendment, in Maltz’s view, applies only to *facially* discriminatory laws and does not prohibit property qualifications or poll taxes. Similarly, Alfred Avins, writing in response to the VRA’s passage, argued that literacy tests were not prohibited by the Fifteenth Amendment. One could easily imagine the laments in the literature about the Fifteenth Amendment’s narrowness and ineffectiveness against Jim Crow tactics being flipped on their head to support Maltz’s and Avins’s positions.

This, then, brings us to the core contested point: how broadly did the Fifteenth Amendment’s protections sweep? Or to frame it negatively: how easily could States circumvent the Fifteenth Amendment’s prohibition of racial discrimination in voting? For example, were States able to impose obviously discriminatory schemes like poll taxes, property qualifications, and literacy tests? During Reconstruction, these facially neutral devices would almost certainly have been motivated by invidious intent and have foreseeable disparate impacts. The answer to this broad question also implicates the voting rights of Chinese immigrants and Irish Americans. As such, the major Reconstruction-era issues concerning voting qualifications overlap significantly.

Before delving into these issues, I highlight some findings that other scholars have underappreciated. These findings provide evidence that the Reconstruction Framers viewed the right to vote as attaching not just to individuals but to classes of citizens and, relatedly, that the use of *proxies* to achieve a discriminatory end was itself discriminatory.

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

Stewart made an analogous point in his debate with Conkling over discrimination based on being “descended from slaves.” Because the “right of citizens of the United States—that is, all classes of citizens of the United

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502 See Avins, *Literacy*, *supra* note 10, at 64.
504 *Id.* (statement of Sen. Stewart); see also *supra* notes 256-264.
505 See *infra* Section IV.C.
States” were covered by the Amendment, Stewart reasoned, “[i]f there is anything growing out of that person’s condition of servitude, such as disingenuousness of birth, … States are prohibited from disenfranchising in consequence of it.”

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

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

Turning back to the core question, several Radicals argued for a broader anti-discrimination provision out of concern that facially neutral schemes could disenfranchise nearly ninety percent of Black men. On this score, the Reconstruction Congress fell short, compromising on a narrow amendment after a whirlwind debate. But in many ways, this compromise was pragmatic. After all, the narrow version of the Fifteenth Amendment barely made it through the state legislatures—and that’s factoring in a lot of procedural irregularities. Moreover, many States had voting and officeholding requirements that were clearly targeted by the Radicals’ more expansive amendments. If the Fifteenth Amendment had explicitly banned nativity- or education-based discrimination, it raises the question whether Rhode Island or Massachusetts would have ratified given that even those relatively liberal States employed those discriminatory tools. And that’s to say nothing of the remaining States that had not even enfranchised Black men. Here, Nevada looms large as the sole Western State to ratify based on Senator Stewart’s assurances that nativity was omitted to avoid the prospect of Chinese suffrage.

Although the Reconstruction generation did not intend to and were not

507 Id. at 1317 (statement of Sen. Stewart); see also supra notes 351-356
508 See supra notes 322-331.
510 Of course, given that this is a debate between Bingham and Boutwell and that Boutwell’s recommendation about rejecting the Senate’s version prevailed, this vignette illustrates how contested this claim was at the time, and one should not over read it. On the other hand, Boutwell could have prevailed for reasons that did not have to do with this issue, such as the breadth of Wilson’s amendment.
511 See supra note 266.
expecting to invalidate facially neutral schemes with a clear disparate impact or discriminatory purpose, there was a crucial caveat contained in the congressional debates. Namely, the Reconstruction Framers assumed that these schemes would be enacted and enforced in an evenhanded manner.\textsuperscript{512} Thus, if a law applied to or was enforced against only one racial group, it would raise constitutional concerns. This caveat has important ramifications for the constitutionality of poll taxes, literacy tests, and grandfather clauses that would be employed during Jim Crow.

The textual foundation for this caveat can be seen in the use of the word “abridge” in the phrase “denied or abridged.”\textsuperscript{513} Indeed, several scholars have suggested that New York’s racially discriminatory taxpaying, residency, and property qualifications were targeted by “abridge.”\textsuperscript{514} But might abridge apply to more than facially discriminatory laws that target only a subset of particular race?

Frustratingly, “[t]he meaning of the term ‘abridged,’ as used in the Fifteenth Amendment, was not discussed at the time the measure was under consideration.”\textsuperscript{515} During Reconstruction, dictionaries defined “abridge” as “to contract,” “to diminish,” or “[t]o deprive of.”\textsuperscript{516} “And since the term ‘denied’ adequately captures the scenario where a voter is prevented from casting their ballot based on their race, the term “abridge” presumably carries [a] broader meaning.”\textsuperscript{517}

In a related vein, to consign no meaning to the word “abridge” would

\textsuperscript{512} See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 900 (1869) (statement of Sen. Williams) (noting that a “freehold qualification … would operate equally upon all citizens, but it might practically operate to exclude nine tenths of the colored persons from the right of suffrage” (emphasis added)); id. at 1010 (statement of Sen. Howard) (“[W]hatever regulation or restriction may be established in this regard by a State, it must operate with equal severity upon the white and the black races.”).

\textsuperscript{513} To avoid a series of messy brackets and alterations depending on tense and syntax, I use “abridge,” “deny,” etc. as shorthand for the next few paragraphs.

\textsuperscript{514} See supra notes 77-82.

\textsuperscript{515} MATHEWS, supra note 12, at 38; but see William Baude, Jud Campbell, and Stephen E. Sachs, General Law and the Fourteenth Amendment (manuscript at 61-65) (on file with author) (discussing debate over Boutwell’s suffrage statute and the meaning of “abridge” in the Privileges or Immunities Clause and distinguishing between the regulation of rights and their abridgment). When proposals lacked the word abridged, those omissions were not commented upon. See supra note 257; Section II.B.4.

\textsuperscript{516} JOHNSON’S ENGLISH DICTIONARY 58 (J.R. Worcester, ed., Phila., JAS B. Smith & Co. 1859); see also JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 6 (Bos., Swan, Brewer & Tileston 1860) (“To curtail; to reduce; to contract; to diminish.”); WILLIAM G. WEBSTER & WILLIAM A. WHEELER, A DICTIONARY OF THE ENGLISH LANGUAGE 2 (N.Y. & Chi., Ivison, Blakeman, Taylor & Co. 1878) (“To deprive; to cut off.”). Here, I avoid citing the definitions that clearly reference the abridged version of a published work and focus instead on the more generic definitions.

\textsuperscript{517} Crum, Reconstructing, supra note 10, at 323.
violate the rule against superfluity, a canon that applies to constitutions as well as statutes.\textsuperscript{518} As Justice Thurgood Marshall once explained, “[b]y providing that the right to vote cannot be discriminatory ‘denied or abridged,’” the Fifteenth Amendment “assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise.”\textsuperscript{519} Although Marshall’s argument concerned redistricting, his broader point about the necessity of giving meaning to the word “abridge” still stands.

In fact, the word “abridge” was always additive to protections for the right to vote. Congress used various formulations—be it “deprive,” “deny” or “denied or abridged”—when it drafted voting rights laws during Reconstruction.\textsuperscript{520} Tellingly, the sole time that “abridge” appears unaccompanied by “deny” is in the Wyoming Enabling Act, but even then Congress had affirmatively granted the right to vote to all male citizens and declarant aliens in the preceding sentence.\textsuperscript{521}

To employ an intratextual argument,\textsuperscript{522} the most important comparator is the Apportionment Clause, which also uses “denied or abridge.” Crucially, the Apportionment Clause’s linkage of “the right to vote and a reduction in House seats underscores the Reconstruction Framers’ understanding that political rights were exercised collectively.”\textsuperscript{523} Stewart’s views on the class-based nature of the right to vote further supports this insight.

Moving beyond the word “abridge,” the Fifteenth Amendment’s use of “race” also plays a role in ascertaining its original public meaning. In other words, what is racial discrimination under the Fifteenth Amendment? As an initial matter, Stewart’s and Bingham’s claims that the amendment would prohibit discrimination involving close proxies for race—such as having ancestors who were slaves—provides additional support for an anti-circumvention rule that broadly defined discrimination “on account of race.”

Moreover, speakers repeatedly referred to the “Chinese,” the “Irish,” and the “Germans” as races, signaling that the original understanding of race

\textsuperscript{518} See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”).


\textsuperscript{520} See supra Section I.C.

\textsuperscript{521} See supra notes 96-98.

\textsuperscript{522} See Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (“When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 748 (1999) (defining intratextualism as “read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase”).

\textsuperscript{523} Crum, Reconstructing, supra note 10, at 325; see also Tolson, Structure, supra note 82, at 414 (emphasizing the “textual and historical link” between these constitutional provisions).
encompasses what today would be considered nationality or ethnicity. For example, in his famous speech in Rhode Island, Phillips mentioned the “Latin or Celtic race” as distinct categories. And the fact that Stewart thought it necessary to clarify that the word “nativity” was excluded from the Fifteenth Amendment to permit the disenfranchisement of Chinese immigrants reinforces the notion that race was conceptualized in ethnic and national terms. So what does this mean for Chinese immigrants and Irish Americans?

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

The situation of Irish Americans and Rhode Island’s nativity-based discrimination is far murkier. The removal of “nativity” as a protected category is strong evidence of the Framers’ original intent to leave Rhode Island’s policy intact. And yet, that removal was insufficient to quell concerns about the future of Rhode Island’s law, prompting one of the more contested ratification battles in a Northern State that had enfranchised Black men. Rhode Island’s law was nativity-neutral: a naturalized German American had to pay the same tax as a naturalized Irish American. However, it was openly admitted that the law had a discriminatory intent and had its harshest impact was on Irish Americans. The post-ratification history reveals continued uncertainty surrounding Rhode Island’s law. The

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525 LASH, supra note 10, at 575; supra Section III.A.1.

526 Crucially, the Reconstruction Framers were not focusing on the long-term prospect that native-born Chinese male citizens would become voters. See supra note 307 (focusing on naturalization laws). This makes sense given the racial demographics of Reconstruction: according to the 1870 census, there were only 200 native-born Chinese-American male citizens in California and four in Oregon. See supra note 184.

527 Whether discrimination between natural-born or naturalized citizens was compatible with the Fourteenth Amendment’s Citizenship Clause or otherwise prohibited by the Constitution is beyond this Article’s scope.

528 Within two months of the Fifteenth Amendment’s ratification, Congress received a petition asking whether Rhode Island’s nativity-based property qualification violated the Fourteenth Amendment’s Privileges or Immunities Clause and the Fifteenth Amendment. See Conley, supra note 187, at 84. The Senate Judiciary Committee issued a unanimous report answering in the negative. As to the former question, the Committee stated that the
constitutionality of Rhode Island’s nativity-based discrimination, therefore, presents a situation in which the history may be characterized as inconclusive. To the extent Rhode Island’s law could be viewed as a racial proxy targeting the Irish, it raises Fifteenth Amendment concerns, but the use of nativity-based tests *per se* do not fall under the Amendment’s scope.

To sum up, my claim is *not* that the original intent or original expected application of the Fifteenth Amendment was to invalidate facially non-discriminatory schemes. Rather, my argument is that the Reconstruction Framers’ understanding of the group-based nature of the right to vote *and* the meaning of terms like “abridge” and “race” prohibit schemes that are facially neutral as to race but nonetheless employ racial *proxies*. As such, the original public meaning of the Fifteenth Amendment is broad enough to capture facially non-discriminatory schemes that are intended to discriminate using racial proxies. Thus, the original public meaning of the Fifteenth Amendment is more capacious than the Framers’ narrow goal of enfranchising Black men nationwide.

**B. Officeholding Requirements**

Thankfully, the right to hold office regardless of race is no longer a controversial issue. Scholars have nevertheless debated whether the Fifteenth Amendment encompasses the right to hold office. In his examination of both the Fourteenth and Fifteenth Amendment’s drafting, Avins concluded that “neither was intended to cover the right to hold public office in the states.”

Maltz has argued that the conference committee’s deletion of an explicit right to hold office was done to ensure the amendment’s ratification and therefore the amendment is limited to the franchise. By contrast, Vikram Amar has contended that the Reconstruction-era “political rights package” included the right to vote was not a privilege or immunity of citizenship, as otherwise it would have enfranchised “males and females, infants, lunatics, and criminals.”

Regarding the Fifteenth Amendment, the Committee explained that Rhode Island did not disenfranchise citizens on the grounds of race, color, or previous condition of servitude, and that these criteria do not “depend[,] in any degree upon the place of his nativity.” Id. (emphasis in original). The Committee further observed that Congress considered adding the term “nativity” but “this proposition was not agreed to.” Id. Then, in October 1871, a referenda was held to remove the nativity-based property qualification from the constitution, but it failed by a 2-1 margin. See Conley, *supra* note 187, at 80. Shortly thereafter, a prominent Rhode Island Democrat filed a lawsuit challenging the law on Privileges or Immunities and Fifteenth Amendment grounds. See *id.* at 85-86. The relevant historical archive contains only the case’s summons and no opinion or other findings. The nativity requirement was finally removed in 1888. See *id.* at 87.

530 See MALTZ, CIVIL RIGHTS, *supra* note 10, at 154-56.
right to vote, to hold office, and to serve on a jury.\textsuperscript{531} According to Vikram Amar, the last-minute deletion does not excise that right from the amendment.\textsuperscript{532} His brother, Akhil Amar, agrees with him.\textsuperscript{533} In addition, Foner has claimed that “the amendment would soon be understood to carry with it the right to hold office.”\textsuperscript{534} And although her primary focus is on women’s right to hold office, Elizabeth Katz argues that contemporary state law and the history surrounding the Reconstruction Amendments and the Nineteenth Amendment “debunks the common expectation that suffrage plainly encompasses officeholding.”\textsuperscript{535} The officeholding question is the closest and most contested issue addressed in this Article.

With the ongoing Georgia controversy, the Reconstruction Framers were on notice that Southern States might try to replicate that strategy for maintaining White supremacy. Both before and after the conference committee’s deletion of explicit officeholding protections, Republican Senators debated whether such language was necessary, superfluous, or too politically risky.\textsuperscript{536} And during the ratification debate, the predominant focus was on the franchise, but the right to hold office was also discussed, with voices on both sides of the issue. In other words, the Conference Committee’s removal of the phrase “right to hold office” did not end debate on the subject in either Congress or in the States.

Moreover, the Reorganization Bill and Georgia’s exclusion from the Forty-First Congress rested, in part, on the enforceability of the original fundamental condition. That question squarely presented whether “the right to vote” was “deprived” when Georgia expelled Black lawmakers.\textsuperscript{537} To the extent one views Congress’s actions as lawful, this militates in favor of a broadly worded political rights package.\textsuperscript{538}

Congress’s decision to modify the fundamental conditions for the last three re-admissions and Georgia’s second re-admission raises related concerns. On the one hand, it signals Congress’s uncertainty about the scope of the original fundamental conditions and the Fifteenth Amendment. On the other hand, Congress could have wanted to send an unambiguous message that officeholding was protected or hedge its bets in the event that the Fifteenth Amendment was not successfully adopted.

\textsuperscript{531} Amar, \textit{Jury Service}, supra note 10, at 234-35.
\textsuperscript{532} See id. at 228-35.
\textsuperscript{533} See \textsc{Amar, America’s Constitution}, supra note 17, at 400 n.*.
\textsuperscript{534} Foner, \textit{Second Founding}, supra note 1, at 109.
\textsuperscript{535} Katz, \textit{supra} note 37, at 118.
\textsuperscript{536} See supra notes 346-350, 357-359, 366-374, 393-398 and accompanying text.
\textsuperscript{537} An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).
\textsuperscript{538} To be sure, one could also defend Congress’s actions vis-à-vis Georgia as based on the Disqualification Clause and widespread violence.
Beyond these considerations, scholars have underappreciated the distinction between federal and state officeholding. Recall that both Senator Howard and Representative Bingham raised concerns that the inclusion of both “the United States” and “the right to hold office” in the amendment’s text implied that Congress would be empowered to pass non-racially discriminatory requirements for federal office. With all due respect to Howard and Bingham, this argument is perplexing. An anti-discrimination rule does not grant novel and broad authority over federal officeholding requirements that never existed before. And as Stewart pointed out, the United States was included in the draft because it governed the territories.

Alternatively, if the Fifteenth Amendment does not apply to officeholding at all, then it did not change the federal requirements for office, as Articles I and II set the qualifications to be a representative, senator, and president. Race is not mentioned in these provisions. Thus, even on a narrow view of the Fifteenth Amendment’s scope, there are no racially discriminatory qualifications for federal office.

Scholars have also overlooked the disenfranchisement and disqualification of ex-Confederates, and how the two were often but not always linked. Section Three of the Fourteenth Amendment merely disqualified certain ex-Confederates; it did not disenfranchise them. Section Two permitted their disenfranchisement without suffering the apportionment penalty. The First Reconstruction Act permitted States to disenfranchise ex-Confederates and further mandated that anyone disqualified by Section Three of the Fourteenth Amendment could not vote for or be a delegate to the state constitutional conventions. Several States disenfranchised ex-Confederates and a slightly different subset of States disqualified them too. Just as with the rights of Black men, state and federal law frequently sliced and diced the rights of ex-Confederates to vote and hold office.

Turning to racially discriminatory state officeholding requirements, half of the States bootstrapped suffrage to the right to hold office. As a practical matter, the Fifteenth Amendment eliminated racial qualifications for officeholding in eight States that barred Black men from voting and therefore from office. In all but two other States, suffrage and officeholding were decoupled and there were fewer requirements to hold office than to be

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539 See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that States cannot add qualifications for federal office); see also Richard A. Primus, The Riddle of Hiram Revels, 119 HARV. L. REV. 1681 (2006) (discussing the debate in the Forty-First Congress over seating the first Black senator and Democrats’ claims that he had not been a citizen for the requisite number of years).

540 See supra note 152. In Neal v. Delaware, 103 U.S. 370 (1880), the Supreme Court confronted a similar bootstrapping arrangement involving jury service being linked to suffrage. Once the Fifteenth Amendment eliminated “White” from Delaware’s suffrage restrictions, Black men became eligible to be jurors. See id. at 389-90.
electors or voters. As such, assuming arguendo that the Fifteenth Amendment did not directly reach officeholding, only Iowa and Missouri would have maintained racially discriminatory officeholding requirements.

Of course, this does not fully answer the question of whether States could have enacted new racially discriminatory officeholding requirements. But the trend went in the opposite direction. Iowa and Missouri eliminated their racially discriminatory officeholding requirements in 1880 and 1875, respectively.541 Tellingly, notwithstanding the Southern States’ relentless efforts to subvert the Fifteenth Amendment during Jim Crow, no Southern State re-imposed a racial officeholding requirement. This uniform post-ratification legal landscape provides support the notion that the officeholding question had been liquidated.542

Finally, Congress could be viewed as having spoken on this subject. In a world with racially polarized voting, the right to hold office can be nullified by gerrymandering. Put differently, just as the Fifteenth Amendment’s protections for the right to vote can be circumvented by grandfather clauses, the right to hold office can be erased by drawing lines on a map. One could view Section 2 of the VRA as helping to safeguard the right to hold office as a practical matter. While Section 2 does not guarantee a right to proportional representation, it does confer a right to have equally open avenues of electing candidates of choice.543

C. Reconstructing Democracy

The Fifteenth Amendment transformed our democracy. The original Constitution entrusted States with authority to set voting qualifications for federal elections.544 At the Founding, the ballot was largely limited to property-owning White men.545 Many of the Founders were skeptical of full-fledged democracy and thought that citizens needed to have a sufficient stake in society to be entrusted with the franchise.546 Even at the dawn of Reconstruction, moderate Republicans believed in a hierarchy of rights: citizenship conferred civil rights, but political rights were a privilege reserved

541 See THORPE, supra note 431, at 1157; MO. CONST. art. IV § 4 (1875).
542 Another political right is the right to serve on a jury. In Brittle v. People, 2 Neb. 198 (1873), the Nebraska Supreme Court held that the fundamental condition included not just the right to vote but also the right serve on a jury. Id. at 225. Intriguingly, the Court did not rely on the Fifteenth Amendment in so holding.
543 This argument will be unpacked more in Travis Crum, Race-Based Redistricting during Reconstruction and Redemption (work in progress).
545 See KEYSSAR, supra note 7, at 20-21.
546 See WILLIAMSON, supra note 39, at 124-27.
for a select few.\textsuperscript{547}

Today, the Radical Republicans’ belief that “[t]he ballot is the bulwark of liberty”\textsuperscript{548} is commonplace. The Court has often remarked that the right to vote is “‘a fundamental political right, because [it is] preservative of all rights.’”\textsuperscript{549} Put simply, citizens will exercise their vote to protect their own interests. Political process theory—which justifies judicial review in situations where politicians have entrenched themselves and seeks to bolster representative democracy by opening up the channels of political change—is premised on a similar insight about the responsiveness of politicians to electoral pressure.\textsuperscript{550}

But this theory of democracy stands in stark contrast to the original Constitution and much of American history. The Fifteenth Amendment, therefore, rejected the Founders’ conception of democracy in two distinct ways. First, the Fifteenth Amendment imposed federal baselines for voting qualifications and empowered Congress to protect the right to vote against state interference. Like the other Reconstruction Amendments, the Fifteenth Amendment recalibrated the federalism balance. Second, the Fifteenth Amendment flipped the pre-existing hierarchy of rights on its head and embraced a more modern theory of democracy: the right to vote is necessary to protect civil rights. As Pamela Brandwein has observed, “[a]fter the passage of the Fifteenth Amendment, the right to vote began a slow and uneven migration into the category of civil rights.”\textsuperscript{551}

Although the Radicals did not prevail in their broader effort to achieve universal suffrage, their ideology was a motivating factor in the Fifteenth Amendment’s adoption. The Radicals recognized that Black and White people living in the South had divergent interests and voted in racial blocs. The Radicals understood that a South without Black voters was a South with the Black Codes. This insight repudiated the original constitution’s theory of democracy, and moved our constitutional system closer to one that acknowledged that the right to vote is preservative of all other rights, rather

\textsuperscript{547} See Brandwein, supra note 59, at 70-71; see also William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 127 (1988) (explaining that many Radical Republicans refused to distinguish between civil and political rights).

\textsuperscript{548} Cong. Globe, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross (R-KS)).

\textsuperscript{549} Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

\textsuperscript{550} See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 103 (1980); see also Nicholas O. Stephanopoulos, The Anti-Carolene Court, 2019 Sup. Ct. Rev. 111, 113-14 (arguing that the Roberts Court has rejected political process theory).

\textsuperscript{551} Brandwein, supra note 59, at 71; see also McConnell, Desegregation, supra note 59, at 1025 (observing that the Reconstruction Framers’ “categorization of rights plays no part in current interpretations of the Fourteenth Amendment”).
than just being a privilege for a select few. As Senator Warner and many others explained, citizens “need the ballot for their protection.”

To be clear, the Fifteenth Amendment did not usher in a democracy with universal suffrage. Even at the time, the Reconstruction Framers failed to extend the right to vote to women notwithstanding widespread mobilization by suffragettes. And the subsequent rise of Jim Crow erased many of their accomplishments in the South. Nevertheless, the Reconstruction Framers’ theory of democracy was a decisive break with the past and ultimately became the model for future voting rights amendments, including the Nineteenth Amendment’s prohibition of sex-based discrimination in voting.

CONCLUSION

In his comprehensive history of the right to vote throughout American history, historian Alex Keyssar remarked: “Why Congress failed to pass a broader version of the Fifteenth Amendment is a question that might well take a book to answer satisfactorily.”

Despite its length, this law review article is not a book. But it is a significant step toward the goal of recovering the Fifteenth Amendment’s forgotten history and treating it as an independent constitutional provision.

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552 CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (statement of Sen. Warner); see also id. at 709-10 (statement of Sen. Pomeroy) (rejecting the theory of virtual representation); id. at 982-83 (statement of Sen. Ross) (describing the ballot as the “bulwark of liberty”); id. at 1629 (statement of Sen. Stewart) (“The ballot is the mainspring; the ballot is power; the ballot is the dispenser of office.”); id. at app. 99 (statement of Rep. Shellabarger) (“The ballot being both the highest franchise and highest defense of a freeman.”).

553 KEYSSAR, supra note 7, at 81.
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<td>Indiana</td>
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<td>Iowa</td>
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<td>La. Const. tit. VI, art. 98 (1868) (limiting “elector[s]” to “male person[s]” . . born or naturalized in the United States”)</td>
<td>La. Const. tit. 2, art. 18 (1868) (“That no person shall be a Representative or Senator unless at the time of his election he be a qualified elector.”)</td>
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<td>Maine</td>
<td>Me. Const. art. II, § 1 (1820) (limiting “elector[s]” to “male citizen[s]”)</td>
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<td>Maryland</td>
<td>Md. Const. art. I, § 1 (1867) (limiting the “entitle[ment] to vote” to “free white male citizen[s]”)</td>
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<td>Mass. Const. art. III (1780) (limiting the “right to vote” to “male citizen[s]”)</td>
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<td>Minnesota</td>
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<tr>
<td>Mississippi</td>
<td>Miss. Const. art. VII, § 2 (1868) (limiting “elector[s]” to “male” “citizens”)</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Mo. Const. art. II, § 18 (1865) (limiting the “entitle[ment] to vote” to “white male citizen[s]” and declarant aliens)</td>
<td>Mo. Const. art. IV, §§ 3, 5 (1865) (members of the state legislature must be “white male citizen[s] of the United States)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Act for Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 stat. 391, 392 (1867) (“no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.”)</td>
<td>Neb. Const. art. II, § 8 (1867) (“No person shall be eligible to the office of Senator, or member of the House of Representatives, who shall not be an elector.”)</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Const. art. II, § 1 (1864) (limiting the “entitle[ment] to vote” to “white male citizen[s]”)</td>
<td>Nev. Const. art. IV, § 5 (1864) (“Senators and members of the Assembly shall be duly qualified electors”)</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>N.H. Const. art. 28 (1784) (limiting “right … to vote” to “male inhabitant[s]”);</td>
<td>N.H. Const. part. II, art. 14, 29 (1784) (representatives and senators “shall have been an inhabitant of this state” for specified time)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. Const. art. II, § 1 (1844) (limiting the “entitle[ment] to vote” to “white male citizen[s]”)</td>
<td>N.J. Const. art. IV, § 2 (1844) (“[N]o person shall be eligible as a member of either house of the legislature, who shall not be entitled to the right of suffrage.”)</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. Const. art. II, § 1 (1846) (limiting the “entitle[ment] to vote” to “male citizen[s]” and further requiring that “m[e]n of color … shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seized and possessed of a freehold estate of the value of [$250] … and shall have been actually rated and paid a tax thereon”)</td>
<td>N.Y. Const. art. III (1846) (listing no citizenship or elector requirement for the state legislature)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. Const. art. VI, § 1 (1868) (limiting “elector[s]” to “male person[s] born in the United States … [or] naturalized”)</td>
<td>N.C. Const. art. II, § 10 (1868) (“Each member of the House of Representatives shall be a qualified elector of the State”)</td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio Const. art. V, § 1 (1851) (limiting “elector[s]” to “white male citizen[s]”)</td>
<td>Ohio Const. Art. XV, § 4 (1851) (“No person shall be elected or appointed to any office in this state unless he possesses the qualification of an elector.”)</td>
</tr>
<tr>
<td>State</td>
<td>Voting Qualifications</td>
<td>State Legislature Officeholding Requirements</td>
</tr>
<tr>
<td>------------</td>
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<td>-------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Oregon</td>
<td>Or. Const. art. II, § 2 (1857) (limiting the “entitle[ment] to vote” to “white male citizen[s]” and certain inhabitants); <em>id.</em> art. II, § 6 (“No Negro, Chinaman, or Mulatto shall have the right of suffrage”).</td>
<td>Or. Const. art. IV, § 8 (1857) (“No person shall be a Senator, or Representative who at the time of his election is not a citizen of the United States”)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pa. Const. art. III, § 1 (1838) (limiting “elector[s]” to “white freem[e]n”)</td>
<td>Pa. Const. art. I, §§ 3, 8 (1838) (no one may serve in the legislature who is not “a citizen and inhabitant of the State”)</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. Const. art. II, § 1-2 (1843) (limiting the “right to vote” to male “citizen[s]” and exempting “native born citizen[s]” from $134 property qualification)</td>
<td>R.I. Const. art. IX, § 1 (1842) (“No person shall be eligible to any civil office . . . unless he be a qualified elector for such office”)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>S.C. Const. art. VIII, § 2 (1868) (limiting the “entitle[ment] to vote” to “male citizen[s] … without distinction of race, color, or former condition”)</td>
<td>S.C. Const. of 1868, art. XIV, § 1 (“No person shall be elected or appointed to any officer in this State, unless he possess the qualifications of an elector”)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Tenn. Const. art. IV, § 1 (1834) (“entitle[ment] to vote” was limited to “free white m[e]n” who were “citizen[s]”); *State v. Staten, 46 Tenn. 233, 241 (1869) (following readmission to the Union, the state legislature struck the word “White” from the requirements to register and vote)</td>
<td>Tenn. Const. art. 2, §§ 9, 10 (1834) (no one may serve in legislature unless “he shall be a citizen of the United States”)</td>
</tr>
<tr>
<td>Texas</td>
<td>Tex. Const. art. VI, § 1 (1869) (limiting the “entitle[ment] to vote” to “male citizens[s] … without distinction of race, color, or former condition”)</td>
<td>Tex. Const. art. III, § 14 (1869) (“No person shall be eligible to any office, State, county or municipal, who is not a registered voter in this State.”)</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vt. Const. chap. 1, art. 8 (1793) (limiting the “right to elect” to “freemen”)</td>
<td>Vt. Const. chap. II, § 18 (1793) (“No person shall be elected a Representative, until he has resided two years in this State.”)</td>
</tr>
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<td>Virginia</td>
<td>Va. Const. art. III, § 1 (1870) (limiting the “entitle[ment] to vote” to “male citizen[s]”)</td>
<td>Va. Const. art. 5, § 5 (1870) (no one may serve in General Assembly unless “qualified to vote for members of the general assembly”)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W.V. Const. art. III, § 1 (1863) (limiting the “entitle[ment] to vote” to “white male citizens”)</td>
<td>W. Va. Const. art. 4, § 4 (1863) (“No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office”)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Gillespie v. Palmer, 20 Wis. 544, 557 (1866) (referenda approving the state legislature's “conferr[al of] the right of suffrage on male colored inhabitants” was valid)</td>
<td>Wis. Const. art. 4, § 6 (1848) (“No person shall be eligible to the legislature who shall not . . . be a qualified elector in the district in which he may be chosen to represent.”)</td>
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<td>Date</td>
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<tr>
<td>1/29</td>
<td>House</td>
<td>726</td>
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<tr>
<td>1/29</td>
<td>House</td>
<td>728</td>
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<tr>
<td>1/30</td>
<td>House</td>
<td>722, 744</td>
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<td>1/30</td>
<td>House</td>
<td>744</td>
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<td>1/30</td>
<td>House</td>
<td>726, 745</td>
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<tr>
<td>2/8</td>
<td>Senate</td>
<td>899, 999</td>
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<td>Senate</td>
<td>999, 1008</td>
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<td>2/8</td>
<td>Senate</td>
<td>1008, 1012</td>
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<tr>
<td>2/8</td>
<td>Senate</td>
<td>1012-13</td>
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<tr>
<td>2/9</td>
<td>Senate</td>
<td>1014, 1029</td>
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<th>Vote (yes-no) or (yes-no-absent)</th>
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<tr>
<td>2/9</td>
<td>Senate</td>
<td>1029</td>
<td>Sawyer (R-SC)</td>
<td>The right to vote and hold office in the United States and the several States and Territories shall belong to all male citizens of the United States who are twenty-one years old, and who have not been or shall not be duly convicted of treason or other infamous crime. Provided, That nothing herein contained shall deprive the several States of the right to make such registration laws as shall be deemed necessary to guard the purity of elections and to fix the terms of residence which shall precede the exercise of the right to vote: And provided, That the United States and the several States shall have the right to fix the age and other qualifications for office under their respective jurisdictions, which said registration laws, terms of residence, age, and other qualifications shall be uniformly applicable to all male citizens of the United States.</td>
<td>Failed</td>
<td>No record</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1029</td>
<td>Henderson (R-MO)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude. Nor shall such right to vote after the 1st day of January, 1872, be denied or abridged for offenses now committed, unless the party to be affected shall have been duly convicted thereof.</td>
<td>Failed</td>
<td>No record</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1029</td>
<td>Fowler (R-TN)</td>
<td>All the male citizens of the United States residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside; the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion or insurrection, or shall be duly convicted of treason or other infamous crime.</td>
<td>Failed</td>
<td>9-35</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1029</td>
<td>Connness (R-CA)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude.</td>
<td>Modified</td>
<td>No record</td>
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<tr>
<td>2/9</td>
<td>Senate</td>
<td>1029</td>
<td>Vickers (D-MD)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude. Nor shall the right to vote be denied or abridged because of participation in the recent rebellion.</td>
<td>Failed</td>
<td>21-32</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1030</td>
<td>Bayard (D-DE)</td>
<td>The right of citizens of the United States to vote for electors of President and Vice President and members of the House of Representatives of the United States, and hold office under the United States, shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>12-42</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1035-36</td>
<td>Corbett (R-OR)</td>
<td>No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or creed. But Chinamen not born in the United States and Indians not taxed shall not be deemed or made citizens.</td>
<td>Failed</td>
<td>No record</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1035, 1040</td>
<td>Wilson (R-MA)</td>
<td>No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed.</td>
<td>Passed</td>
<td>31-27</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1040</td>
<td>Buckalew (D-PA)</td>
<td>That the foregoing amendment shall be submitted for ratification to the Legislatures of the several States the most numerous branches of which shall be chosen next after the passage of this resolution.</td>
<td>Failed</td>
<td>13-43</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1041</td>
<td>Dixon (D-CN)</td>
<td>That the following article be proposed to conventions in the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said conventions, shall be held a part of said Constitution.</td>
<td>Failed</td>
<td>11-45</td>
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<tr>
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<tr>
<td>2/9</td>
<td>Senate</td>
<td>1040-41</td>
<td>Buckalew (D-PA) and Morton (R-IN)</td>
<td>The second clause, first section, article two of the Constitution of the United States shall be amended to read as follows: each State shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust and profit under the United States, shall be appointed an elector; and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people.</td>
<td>Failed</td>
<td>27-29</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1041</td>
<td>Sumner (R-MA)</td>
<td>Sumer's Suffrage Statute (not a constitutional amendment)</td>
<td>Failed</td>
<td>9-47</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1041</td>
<td>Warner (R-AL)</td>
<td>No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind and over twenty-one years of age, the equal exercise of the elective franchise at all elections in the State wherein he shall have such actual residence as shall be prescribed by law, except to such of said citizens as have engaged or shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law; nor shall the right to hold office be denied or abridged on account of race, color, nativity, property, religious belief, or previous condition of servitude.</td>
<td>Failed</td>
<td>5-47</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1042</td>
<td>Buckalew (D-PA) and Morton (R-IN)</td>
<td>The second clause, first section, second article of the Constitution of the United States shall be amended to read as follows: each State shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust and profit under the United States, shall be appointed an elector;</td>
<td>Modified</td>
<td>37-19</td>
</tr>
<tr>
<td>2/9</td>
<td>Senate</td>
<td>1044</td>
<td>Wilson (R-MA)</td>
<td>No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed. [Plus Buckalew/Morton's Electoral College Reform]</td>
<td>Passed by 2/3rds vote</td>
<td>39-16-11</td>
</tr>
<tr>
<td>2/15</td>
<td>House</td>
<td>1226</td>
<td>Senate Version</td>
<td>No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed.</td>
<td>Failed</td>
<td>37-133-52</td>
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<tr>
<td>2/15</td>
<td>House</td>
<td>1226</td>
<td>Senate Version</td>
<td>Buckalew and Morton's EC Reform</td>
<td>Failed</td>
<td>No record</td>
</tr>
<tr>
<td>2/15</td>
<td>House</td>
<td>1226</td>
<td>Boutwell (R-MA)</td>
<td>Request for Conference Committee</td>
<td>Passed</td>
<td>No record</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1295</td>
<td>First Senate Version</td>
<td>Motion to Recede from Prior Senate Version</td>
<td>Passed</td>
<td>33-24-9</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1300</td>
<td>House Version</td>
<td>The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States.</td>
<td>Failed to cross 2/3rds threshold</td>
<td>31-27-8</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1300</td>
<td>Stewart (R-NV)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.</td>
<td>Passed</td>
<td>No vote</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1302, 1304</td>
<td>Drake (R-MO)</td>
<td>No citizen of the United States shall, on account of race, color, or previous condition of servitude, be by the United States or any State denied the right to vote or hold office.</td>
<td>Failed</td>
<td>No record</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1304</td>
<td>Bayard (D-DE)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>6-29-31</td>
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<th>Vote (yes-no) or (yes-no-absent)</th>
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<tr>
<td>2/17</td>
<td>Senate</td>
<td>1304-05</td>
<td>Howard (R-MI)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>18-22-26</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1305</td>
<td>Doolittle (D-WI)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. Nor shall any citizen be so denied by reason of any alleged crime, unless duly convicted thereof according to law.</td>
<td>Failed</td>
<td>13-30-23</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1306</td>
<td>Fowler (R-TN)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>5-30-31</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1311</td>
<td>Howard (R-MI)</td>
<td>Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other electors.</td>
<td>Failed</td>
<td>22-27-17</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1314</td>
<td>Henricks (D-IN)</td>
<td>That the foregoing amendment shall be submitted for ratification to the Legislatures of the several States the most numerous branches of which shall be chosen next after the passage of this resolution.</td>
<td>Failed</td>
<td>12-40-14</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1314-15</td>
<td>Dixon (D-CN)</td>
<td>The following article be proposed to the Legislatures Conventions of the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said Legislatures Conventions, shall be valid as part of the Constitution.</td>
<td>Failed</td>
<td>10-39-17</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1315-18</td>
<td>Davis (D-KY)</td>
<td>Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other electors.</td>
<td>Failed</td>
<td>16-29-21</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1318</td>
<td>Vickers (D-MD)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>No Roll Call</td>
</tr>
<tr>
<td>2/17</td>
<td>Senate</td>
<td>1318</td>
<td>Stewart (R-NV)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Passed</td>
<td>35-11-20</td>
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<tr>
<td>2/20</td>
<td>House</td>
<td>1428</td>
<td>Logan (R-IL)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Failed</td>
<td>70-95-57</td>
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<tr>
<td>2/20</td>
<td>House</td>
<td>1428</td>
<td>Bingham (R-OH)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, nativity, property, creed, or previous condition of servitude.</td>
<td>Modified</td>
<td>92-70-60</td>
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<tr>
<td>2/20</td>
<td>House</td>
<td>1428</td>
<td>Bingham (R-OH)</td>
<td>The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude.</td>
<td>Passed</td>
<td>140-37-46</td>
</tr>
<tr>
<td>2/23</td>
<td>House</td>
<td>1470</td>
<td>Boutwell (R-MA)</td>
<td>Request for Conference Committee</td>
<td>Passed</td>
<td>117-37-68</td>
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<tr>
<td>2/23</td>
<td>Senate</td>
<td>1481</td>
<td>Stewart (R-NV)</td>
<td>Request for Conference Committee</td>
<td>Passed</td>
<td>32-17-17</td>
</tr>
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<td>2/25</td>
<td>House</td>
<td>1564</td>
<td>Boutwell (R-MA)</td>
<td>The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Passed</td>
<td>144-44-35</td>
</tr>
<tr>
<td>2/26</td>
<td>Senate</td>
<td>1641</td>
<td>Stewart (R-NV)</td>
<td>The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.</td>
<td>Passed</td>
<td>39-13-14</td>
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