

ARTICLE

The Reconstruction Congress*David P. Currie*†

The Editors of The University of Chicago Law Review wish to acknowledge the passing of Professor Currie while this Article was being prepared for press. We offer our condolences to his family, friends, and colleagues.

This article is a sequel to *The Civil War Congress*, which appeared not long ago in *The University of Chicago Law Review*.¹ Both are elements of a continuing study of extrajudicial interpretation of the Constitution, with an emphasis on the debates in Congress.² The present installment begins where the preceding one left off: with the accession of Andrew Johnson to the presidency upon the assassination of President Lincoln in April 1865.

The war was over. There was no peace treaty, of course. One makes treaties with foreign countries, not with rebels at home. The overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union.

Six years would pass before this goal was fully achieved. Three Congresses would sit during that period, and this article is correspondingly divided into three parts. The first two years were dominated by issues respecting Reconstruction itself, culminating in the famous Reconstruction Act of 1867,³ and by congressional efforts, first by statute and then by constitutional amendment, to guarantee the civil rights of the newly freed slaves. During the following two years, Reconstruction took something of a back seat to the impeachment of President John-

† Edward H. Levi Distinguished Service Professor of Law Emeritus, The University of Chicago.

¹ 73 U Chi L Rev 1131 (2006).

² For earlier fruits of this study, see generally David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago 1997); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago 2001); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago 2005); David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861* (Chicago 2005).

³ 14 Stat 428 (Mar 2, 1867); 15 Stat 2 (Mar 23, 1867); 15 Stat 14 (July 19, 1867); 15 Stat 25 (Mar 11, 1868).

son. The final two years witnessed, at last, the readmission to Congress of senators and representatives from the last four of the seceding states.

Not surprisingly, constitutional questions unconnected to either Reconstruction or impeachment kept cropping up during the period covered by the present study. They too will be discussed as we go along.

I. CONGRESS TAKES THE REINS

A. The Exclusion of Southern Members

President Lincoln, as I reported in the preceding article, had begun the reestablishment of state governments during the Civil War as the Union armies advanced, and for a time Congress had seated members from reconstructed states—Virginia, Louisiana, and Tennessee. This practice had ceased abruptly with the meeting of the Thirty-eighth Congress in December 1863.⁴

Presidential reconstruction, however, proceeded apace under Lincoln's successor.⁵ Six weeks after taking office—on May 29, 1865—President Johnson issued a proclamation appointing William W. Holden provisional Governor of North Carolina.⁶ The rebellion had left that state without civil government, the President wrote, and it was the responsibility of the United States to secure it one that was republican. Holden was specifically directed to call a constitutional convention to reestablish republican government and to restore normal relations between North Carolina and the Union.⁷ Within a few weeks, Johnson had appointed provisional governors for six other seceding states and recognized the governments set up under Lincoln's auspices in the other four.⁸

⁴ See Currie, 73 U Chi L Rev at 1210–24 (cited in note 1).

⁵ This story is told in detail in Eric L. McKittrick, *Andrew Johnson and Reconstruction* (Chicago 1960).

⁶ See Andrew Johnson, *Proclamation* (May 29, 1865), in James D. Richardson, ed, 6 *A Compilation of the Messages and Papers of the Presidents 1789–1897* (“Richardson”) 312, 312–14 (US Congress 1900).

⁷ See *id.* at 312.

⁸ See *id.* at 314–16 (June 13, 1865) (Mississippi), 318–20 (June 17, 1865) (Georgia), 321–23 (June 17, 1865) (Texas), 323–25 (June 21, 1865) (Alabama), 326–28 (June 30, 1865) (South Carolina), 329–31 (July 13, 1865) (Florida). For Johnson's earlier recognition of the preexisting governments of Virginia, Arkansas, Louisiana, and Tennessee, see *id.* at 337–38 (May 9, 1865) (Virginia); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* 182 (Harper & Row 1988) (“[In May 1865, Johnson] extended recognition to the Southern governments created under the Lincoln administration (Arkansas, Louisiana, Tennessee, and Virginia), none of which had enfranchised blacks.”). “In all of the States,” said the President in December 1866, “civil authority has superseded the coercion of arms.” Andrew Johnson, *Second Annual Message* (Dec 3, 1866), in 6 Richardson 445, 445 (cited in note 6).

Constitutional conventions were held. At the President's request they uniformly repudiated secession, slavery, and rebel debts.⁹ Elections were conducted. By the time the Thirty-ninth Congress convened in December 1865, reconstructed governments were functioning in eight of the eleven former Confederate states, seven of which had ratified the proposed Thirteenth Amendment and several of which had sent senators and representatives asking to be seated in Congress.¹⁰

By prearrangement, the Clerk of the House declined to call the names of representatives from the seceding states. New York Democrat James Brooks objected: "Is not the State of Tennessee in the Union?"¹¹ Thaddeus Stevens's answer was no: "The State of Tennessee is not known to this House nor to Congress."¹²

Congress itself was more circumspect, if little more accommodating. Virtually the first thing it did was to establish a joint committee to consider whether or not to seat members from states that had joined the insurrection:

*Resolved by the House of Representatives, (the Senate concurring,) That a joint committee of fifteen members shall be appointed, nine of whom shall be members of the House and six members of the Senate, who shall inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report at any time by bill or otherwise.*¹³

Two months later, on February 20, 1866, the Joint Committee reported a second resolution:

Be it resolved by the House of Representatives, (the Senate concurring,) That in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as

⁹ See Johnson, *Second Annual Message* (Dec 3, 1866), in 6 Richardson at 446 (cited in note 6).

¹⁰ See President Johnson's December 18, 1865 reply to a Senate inquiry, in 6 Richardson 372, 372-73 (cited in note 6) (reporting that North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Arkansas, and Tennessee had functioning governments and that each of these states except Mississippi had ratified the Thirteenth Amendment). See also Johnson, *Second Annual Message* (Dec 3, 1866), in 6 Richardson at 445-46 (cited in note 6).

¹¹ Cong Globe, 39th Cong, 1st Sess 3 (Dec 4, 1865).

¹² Id at 31 (Dec 12, 1865).

¹³ Id at 30, 46 (Dec 12 and 13, 1865, respectively). As passed by the House, this was a joint resolution. The Senate amended it to make it concurrent instead, "inasmuch as a joint resolution goes to the President for his signature." Id at 24 (Dec 12, 1865) (Sen Anthony). Responding to Representative Raymond's query why calling a resolution concurrent would obviate presentation to the President under Article I, § 7, Thaddeus Stevens said it was a matter of tradition, which he traced to the express authority of each House to determine its own rules. See id at 47 (Dec 13, 1865). See also US Const Art I, § 5.

to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States until Congress shall have declared such State entitled to such representation.¹⁴

The House passed this resolution on the spot.¹⁵ In the Senate, it took a little longer. But, by March 2, eleven states had been formally excluded from Congress.¹⁶

There was no debate in the House. Two objections were made in the Senate, one procedural and one substantive.

The first was that Article I, § 5 of the Constitution made each House sole judge of the elections of its members: the decision whether to seat an aspiring claimant was a responsibility the Senate could not share with the House.¹⁷ Defenders of the resolution had two responses to this argument. In the first place, said Illinois Senator Lyman Trumbull, it was not the task of either House in judging the “elections, returns and qualifications” of its members to pass on the legitimacy of state government.¹⁸ Yes, it was, said Senator James Doolittle of Wisconsin: “We have a right to inquire whether there was a Legislature to elect them, whether the people were in a condition to choose a Legislature to elect them . . . the Senate is to judge for itself whether members have been elected to this body.”¹⁹ That seems right as a matter of principle: surely it would be the Senate’s duty to reject a claimant from New Zealand on the ground that New Zealand was not a state.²⁰ Indeed, the Supreme Court had said as much in the famous case of *Luther v Borden*.²¹

¹⁴ Cong Globe, 39th Cong, 1st Sess 943 (Feb 20, 1866).

¹⁵ See id at 950.

¹⁶ See id at 1146–47 (Mar 2, 1866).

¹⁷ Four senators had made this point when creation of the Joint Committee was initially proposed. See id at 24 (Dec 12, 1865) (Sen Anthony), 25 (Sen Doolittle), 28 (Sens Saulsbury and Hendricks). Others repeated it when the Committee made its recommendation. See, for example, id at 982 (Feb 23, 1866) (Sen Sherman), 989–90 (Sen Cowan) (“I have contended that their credentials should be received and their cases examined by each House for itself”), 1041 (Feb 27, 1866) (Sen Dixon), 1146 (Mar 2, 1866) (Sen McDougall).

¹⁸ Id at 1050 (Feb 27, 1866) (“[I]t is a usurpation if the Senate attempts to determine what the State government of Tennessee is.”). Senator Fessenden made the same argument but then took it back. See id at 1042–43 (Mar 2, 1866).

¹⁹ Id at 989 (Feb 23, 1866).

²⁰ In 1850, for example, the Senate passed on the question whether California had the right to elect its future senators before it became a state and concluded that it did. See Currie, *Democrats and Whigs* at 249–50 (cited in note 2).

²¹ 48 US (7 How) 1 (1849). This case arose out of Dorr’s Rebellion, a popular uprising in Rhode Island in 1841–42. Proponents of broader suffrage, unhappy with the state’s 1663 charter, convened a popular constitutional convention to replace it. Martin Luther, a Dorrite, brought an

And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.²²

Trumbull's other point was more persuasive: on a matter of such import the House and Senate would be well advised to act in tandem.²³

The second objection to the committee's proposed resolution was that the Southern states had a right to representation in Congress. Maryland Democrat Reverdy Johnson put it succinctly in the Senate. The Constitution was clear: every state was entitled to two senators. Since secession was illegal, states that had attempted to secede were still in the Union; "does it not also follow that they are entitled to representation in this Chamber?"²⁴ The proposed resolution, Pennsylvania Senator Edgar Cowan explained, would deprive Southern states of the representation to which the Constitution entitled them.²⁵

The plain text of the Constitution certainly seemed to support this conclusion.²⁶ Senator Trumbull suggested, however, that the text did not tell the whole story. During the war, he said, no one would have dreamed of seating a senator chosen by a state legislature in active rebellion; now that the insurrection was over, it was appropriate to ask whether a state government had since been established that was entitled to representation.²⁷ That, said Trumbull, was largely a question of loyalty, to be answered state by state after the resolution was approved.²⁸

Delaware Senator Willard Saulsbury, who opposed the resolution, conceded the premise of Trumbull's argument: he too would have voted not to seat senators from states actually in rebellion. Now that peace was restored, however, the sole test should be that of "present fidelity—can they take the oath to support the Constitution of the United States?"²⁹

Thus the difference of opinion between proponents and opponents of the resolution was not so great as it first appeared. All seemed to

action of trespass against state officials who had searched his home, claiming that the charter government was illegitimate.

²² *Id.* at 42.

²³ See *Cong Globe*, 39th Cong, 1st Sess 1028 (Feb 26, 1866). See also *id.* at 29 (Dec 12, 1865).

²⁴ *Id.* at 1109 (Mar 1, 1866).

²⁵ See *id.* at 1137–38 (Mar 2, 1866). See also *id.* at 26 (Dec 12, 1865) (Sen Doolittle); Johnson, *Second Annual Message* (Dec 3, 1866), in 6 Richardson at 446–47 (cited in note 6) (rebuking Congress for failing to seat Southern legislators and declaring that the Constitution "intended to secure to every State and to the people of every State the right of representation in each House of Congress").

²⁶ See US Const Art I, §§ 2–3.

²⁷ See *Cong Globe*, 39th Cong, 1st Sess 29 (Dec 12, 1865).

²⁸ See *id.* at 1028 (Feb 26, 1866).

²⁹ *Id.* at 1049 (Feb 27, 1866).

agree that the question was one of loyalty. But whereas Saulsbury viewed it as an issue personal to the aspiring member, Trumbull made it an institutional question; he would apply the test of loyalty to the state government under whose aegis the member was elected.

Saulsbury's position is the easier to sustain. The Constitution does require individual members to swear to uphold it;³⁰ it says nothing about the loyalty of the state government itself—as contrasted with its republican character.³¹

As noted, Trumbull's position prevailed; the Senate approved the resolution excluding Southern representation on March 2, 1866.³² Three days later, Ohio Representative John Bingham presented another resolution from the Joint Committee proposing restoration of normal relations with Tennessee. That state, the preamble recited, had adopted a republican constitution consistent with that of the United States; it had organized a state government pursuant to that constitution; and both the constitution and the laws passed under it “proclaim[ed] and denote[d] loyalty to the Union.” With the people of Tennessee thus being “in a condition to exercise the functions of a State within this Union,” Tennessee was to be declared “one of the United States of America, on an equal footing with the other States,” provided that it enforced its constitution and laws in good faith, excluded from the franchise and from public office “those who have been engaged in rebellion against the United States,” and renounced both rebel debts and claims to compensation for the freeing of slaves.³³

This proposal was put on the back burner and discussion was sparse. Massachusetts Representative George Boutwell thought the Tennessee government was not republican without Negro suffrage;³⁴ Ralph Buckland of Ohio thought it should be recognized without conditions of any kind.³⁵ On July 19, as the session was about to close, Bingham offered a substitute resolution that stressed Tennessee's intervening ratification of the Fourteenth Amendment and avoided any suggestion that the state had ever been out of the Union:

Whereas the State of Tennessee has in good faith ratified the article of amendment to the Constitution of the United States, pro-

³⁰ See US Const Art VI.

³¹ See *id* Art IV, § 4.

³² See Cong Globe, 39th Cong, 1st Sess 1146–47 (Mar 2, 1866).

³³ *Id* at 1189 (Mar 5, 1866).

³⁴ See *id* at 3976 (July 20, 1866) (“Wherever a man and his posterity are forever disenfranchised from all participation in the government, that government is not republican in form.”). Senator Charles Sumner later offered an amendment to this effect in the Senate, but it failed badly. See *id* at 4000 (July 21, 1866).

³⁵ See *id* at 1623–26 (Mar 24, 1866).

posed by the Thirty-Ninth Congress to the Legislatures of the several States, and has shown otherwise, to the satisfaction of Congress, by a proper spirit of obedience in the body of her people, her return to her due allegiance to the Government, laws, and authority of the United States; Therefore,

*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Tennessee is hereby declared to be restored to her former, proper, practical relation to the Union, and again entitled to be represented by Senators and Representatives in Congress, duly elected and qualified, upon their taking the oaths of office required by existing laws.*³⁶

The House passed this substitute resolution the following day.³⁷ In the Senate there was some debate over what the preamble should say,³⁸ and after suggestions that it was undesirable to imply that any state that ratified the amendment was entitled to representation,³⁹ a wordier and more complex version was approved. In its final form, as signed by President Johnson on July 24, the resolution read as follows:

Whereas, in the year eighteen hundred and sixty-one, the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State in pursuance of an act of Congress were declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the twenty-second day of February, eighteen hundred and sixty-five, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession and debts contracted under the same were declared void; and whereas a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty: Therefore,

³⁶ Id at 3950 (July 20, 1866).

³⁷ See id at 3980 (July 21, 1866). The vote was 125-12.

³⁸ See especially the comments of Senator Wade, id at 3990-91 ("I am in favor of the more specific designation of the reasons given in the preamble reported by the committee that induce us to admit Tennessee . . . so that every man in the Union who reads it may know precisely the grounds upon which we act in admitting this State while we reject other States.").

³⁹ See id at 3999-4000 (Sen Morrill), 4000 (Sen Trumbull).

*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Tennessee is hereby restored to her former proper, practical relations to the Union, and is again entitled to be represented by senators and representatives in Congress.*⁴⁰

President Johnson grumbled over the terms of the preamble and protested that no resolution was necessary, but he signed it,⁴¹ and Tennessee's senators and representatives were duly seated.⁴² Many a red sun would set before that would happen to legislators from any of the other seceding states.

B. The Freedmen's Bureau

As I wrote in the preceding article, Congress in March 1865 created in the War Department the Freedmen's Bureau to look after the former slaves.⁴³ The initial statute was a temporary measure: the Bureau would cease to exist one year after the rebellion ended.⁴⁴ One of the first bills introduced when Congress met again that December was one to extend the Bureau's life and enlarge its powers.⁴⁵

The essence of the 1865 law was a mandate to provide freedmen with necessities and land. What the new bill would add was basically military protection for their civil rights. Wherever the ordinary course of judicial proceedings had been interrupted by the rebellion and civil rights or immunities were denied by state law on grounds of race, it was to be the president's duty, acting through the Bureau, to extend military protection and jurisdiction over all cases affecting the victims of such discrimination. The denial of such rights under color of state law was to be declared a misdemeanor, to be tried before an officer of the Bureau itself—but only, the bill reemphasized, where the ordinary courts were closed.⁴⁶

⁴⁰ Joint Resolution Restoring Tennessee to Her Relations to the Union, 14 Stat 364, 364 (July 24, 1866).

⁴¹ See Andrew Johnson, *To the House of Representatives* (July 24, 1866), in 6 Richardson 395, 397 (cited in note 6).

⁴² See Cong Globe, 39th Cong, 1st Sess 4113, 4293 (July 25 and 28, 1866, respectively) (Senate), 4148–49 (July 25, 1866) (House).

⁴³ See Currie, 73 U Chi L Rev at 1170–72 (cited in note 1).

⁴⁴ See An Act to Establish a Bureau for the Relief of Freedmen and Refugees § 1, 13 Stat 507, 507 (Mar 3, 1865).

⁴⁵ The bill was introduced on January 5, 1866, reported by the Judiciary Committee on January 11, and taken up by the Senate on January 12. See Cong Globe, 39th Cong, 1st Sess 129, 209 (Jan 5 and 12, 1866, respectively).

⁴⁶ The bill is summarized in id at 209–10 (Jan 12, 1866).

Opponents repeated the argument that Congress had no power to create eleemosynary institutions⁴⁷ and insisted it had no authority to protect civil rights either.⁴⁸ The loudest objections, however, were reserved for the enforcement provisions of the bill, which were assailed as giving judicial powers to the Bureau and infringing constitutional rights to indictment and to civil and criminal trial by jury.⁴⁹

The destitution of blacks, replied Maine Senator William Pitt Fessenden, was a consequence of the war; Congress could address it under its war powers.⁵⁰ During the war, Senator Trumbull observed, the army had fed refugees who came within the Union lines as a matter of simple humanity⁵¹ — he might have added that it was accepted practice to feed the hungry in conquered territory. Nor was the insurrection over, Trumbull continued; the privilege of habeas corpus remained suspended, and that was permissible only in times of rebellion or invasion.⁵² Moreover (as the Supreme Court has since confirmed), war powers did not abruptly terminate when hostilities ended.⁵³

Thus the constitutional basis for material assistance to the freedmen seemed relatively secure. Similar arguments might perhaps have been made for the protection of civil rights, as a conqueror may govern as well as nourish his charges. Senator Trumbull chose to rely instead on the newly ratified Thirteenth Amendment, which, as he explained it, abolished all incidents of slavery, including laws abridging civil rights.⁵⁴ We shall see more of this argument when we come to the Civil Rights Act of 1866.⁵⁵

⁴⁷ See, for example, id at 317, 369 (Jan 19 and 23, 1866, respectively) (Sen Hendricks), 372 (Jan 23, 1866) (Sen Johnson), 623 (Feb 1, 1866) (Rep Kerr), 935 (Feb 20, 1866) (Sen Davis).

⁴⁸ See, for example, id at 318 (Jan 19, 1866) (Sen Hendricks), 933–34 (Feb 20, 1866) (Sen Davis).

⁴⁹ See, for example, id at 318 (Jan 19, 1866) (Sen Hendricks), 347, 416, 935 (Jan 22, 25, and Feb 20, 1866, respectively) (Sen Davis).

⁵⁰ See id at 365 (Jan 23, 1866). Besides, said Senator Trumbull, Congress had helped the needy before, including slaves illegally imported and Indians who had fought for the South during the Civil War. See id at 319, 367–68 (Jan 19 and 23, 1866, respectively). The former was necessary and proper to suppression of the slave trade, said Hendricks with some force; he had no comparable explanation for Trumbull's alleged case of the Indians. See id at 368 (Jan 23, 1866).

⁵¹ See id at 936, 939–40 (Feb 20, 1866).

⁵² See id at 939. See also US Const Art I, § 9. President Johnson had revoked the suspension in many parts of the country; he had pointedly left it in place in the states of the former Confederacy. See Andrew Johnson, *Proclamation* (Dec 1, 1865), in 6 Richardson 333, 333 (cited in note 6).

⁵³ See Cong Globe, 39th Cong, 1st Sess 319 (Jan 19, 1866). See also *Woods v Cloyd W. Miller Co*, 333 US 138, 141–43 (1948) (“Whatever may be the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities.”).

⁵⁴ See Cong Globe, 39th Cong, 1st Sess 322 (Jan 19, 1866). For a narrower interpretation, see id at 318 (Sen Hendricks), 934 (Feb 20, 1866) (Sen Davis).

⁵⁵ 14 Stat 27 (Apr 9, 1866). See Part I.C.

For defense of the provisions conferring military jurisdiction, proponents relied once again on the war powers. We do not pretend, said Trumbull, that offenders may be tried without juries where the civil courts are open.⁵⁶ But military tribunals were permissible, he insisted, where the ordinary courts were closed, as in the seceding states;⁵⁷ the President tried civilians before military commissions in the South every day.⁵⁸ It was the responsibility of the conqueror, he seemed to be saying, to see that the laws were enforced.

The Supreme Court, in dictum in *Ex parte Milligan*,⁵⁹ was about to lend considerable support to this conclusion:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.⁶⁰

Whether the situation in the states reconstructed by Presidents Lincoln and Johnson actually corresponded with that contemplated in *Ex parte Milligan* is of course another question, but (by its own terms) if the courts were open, the provision for military jurisdiction would not apply.⁶¹

In a discursive and wide-ranging message, President Johnson vetoed the bill, largely on constitutional grounds.⁶² His arguments were familiar. On the one hand, the bill infringed the rights to a grand and a petty jury, and vested judicial authority in tribunals other than the courts established under Article III.⁶³ On the other, “[a] system for the support of indigent persons in the United States was never contem-

⁵⁶ See Cong Globe, 39th Cong, 1st Sess 320 (Jan 19, 1866).

⁵⁷ See id at 420 (Jan 25, 1866).

⁵⁸ See, for example, id at 938 (Feb 20, 1866).

⁵⁹ 71 US (4 Wall) 2 (1866).

⁶⁰ Id at 127.

⁶¹ In his first annual message, Johnson had told Congress that federal courts had been reopened in the South “as far as could be done.” Andrew Johnson, *First Annual Message* (Dec 4, 1865), in 6 Richardson 353, 357 (cited in note 6).

⁶² See Andrew Johnson, *Veto Message to the Senate of the United States* (Feb 19, 1866), in 6 Richardson 398 (cited in note 6).

⁶³ See id at 399–400 (“[T]he [military tribunals] are to take place without the intervention of a jury and without any fixed law or evidence.”). Johnson dismissed the war-powers argument on the ground that the war was over: “At present there is no part of our country in which the authority of the United States is disputed. . . . [T]he rebellion is in fact at an end.” Id at 400. In April he would formally declare the insurrection over everywhere but in Texas. See Andrew Johnson, *Proclamation* (Apr 2, 1866), in 6 Richardson 429, 432 (cited in note 6). In August he would say it was over in Texas as well. See Andrew Johnson, *Proclamation* (Aug 20, 1866), in 6 Richardson 434, 438 (cited in note 6).

plated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another.”⁶⁴ Finally, noting that none of the eleven states principally affected by the bill was represented in Congress at the time of its passage, Johnson took the occasion to protest that the authority of each House to pass upon the elections, returns, and qualifications of its members “can not be construed as including the right to shut out in time of peace any State from the representation to which it is entitled by the Constitution.”⁶⁵

A motion to override the veto failed to attract the necessary two-thirds vote in the Senate.⁶⁶ Three months later, however, a somewhat modified bill for the same purpose passed the House, and the following month the Senate concurred.⁶⁷ Reaffirming his earlier message, the President vetoed this second bill as well, adding in the plainest terms that there was no need to displace the ordinary civil courts:

Now, however, war has substantially ceased; the ordinary course of judicial proceedings is no longer interrupted; the courts, both State and Federal, are in full, complete, and successful operation, and through them every person, regardless of race and color, is entitled to and can be heard. . . . I can see no reason for the establishment of the “military jurisdiction” conferred upon the officials of the Bureau by the fourteenth section of the bill.⁶⁸

Unimpressed, Congress unceremoniously enacted the new bill over the veto.⁶⁹ Fortified with its controversial military jurisdiction over civil

⁶⁴ Johnson, *Veto Message* (Feb 19, 1866), in 6 Richardson at 401 (cited in note 6). “Pending the war,” the President added, “many refugees and freedmen received support from the Government, but it was never intended that they should thenceforth be fed, clothed, educated, and sheltered by the United States.” Id.

⁶⁵ Id at 404, citing US Const Art I, § 5, cl 1. See also Johnson’s statement questioning the factual predicate of the bill:

Reasoning from the Constitution itself and from the actual situation of the country, I feel not only entitled but bound to assume that with the Federal courts restored and those of the several States in the full exercise of their functions the rights and interests of all classes of people will, with the aid of the military in cases of resistance to the laws, be essentially protected against unconstitutional infringement or violation.

Johnson, *Veto Message* (Feb 19, 1866), in 6 Richardson at 405.

⁶⁶ See Cong Globe, 39th Cong, 1st Sess 943 (Feb 20, 1866). The vote was 30-18.

⁶⁷ See id at 2878 (May 29, 1866) (House), 3413 (June 26, 1866) (Senate), 3524, 3562 (July 2 and 3, 1866, respectively) (Senate and House concurrence in conference report, respectively). There was virtually no debate.

⁶⁸ Andrew Johnson, *Veto Message to the House of Representatives* (July 16, 1866), in 6 Richardson 422, 423 (cited in note 6).

⁶⁹ See An Act to Continue in Force and to Amend “An Act to Establish a Bureau for the Relief of Freedmen and Refugees,” and for Other Purposes § 1, 14 Stat 173, 173 (July 16, 1866).

rights cases in states not yet restored to representation in Congress, the Bureau had a new lease on life; it was to subsist for another two years.

C. The Civil Rights Act of 1866

One reason given by President Johnson why the military jurisdiction afforded by the Freedmen's Bureau bill was unnecessary was that another statute already provided a remedy for the abridgement of civil rights in the ordinary civilian courts.⁷⁰ That statute was the Civil Rights Act of 1866.

On December 13, 1865, Massachusetts Senator Henry Wilson brought up a bill "to maintain the freedom of the inhabitants in the States declared in insurrection by the proclamation of the President of the 1st of July, 1862."⁷¹ The proposal was short and simple: any law of a former rebel state that discriminated on racial grounds with respect to civil rights and immunities would be declared void, and it would be a misdemeanor to ordain or enforce it.⁷²

Such laws, Wilson explained, were still on the books, and the states were passing more of them. "Our right to declare void laws that practically make slaves of men we have declared to be free in those rebel states," Wilson continued, "cannot be questioned."⁷³ Eschewing reliance on the Thirteenth Amendment (whose ratification had not yet been proclaimed), he based his bill squarely "on the fact that these States are in insurrection and rebellion."⁷⁴ In other words, like the Emancipation Proclamation, the civil rights bill was an exercise of the power to suppress insurrection. Indeed, Massachusetts Senator Charles Sumner added a week later, the bill was incidental to the Proclamation itself, since it served to maintain the liberty of those whom the President had freed, as he had promised to do; slavery must be abolished in substance as well as form.⁷⁵

The critical provision, as President Johnson said, was § 14, see *id.* at 176–77, which no longer contained the criminal provisions included in the earlier bill.

⁷⁰ See Johnson, *Veto Message* (July 16, 1866), in 6 Richardson at 424–25 (cited in note 6).

⁷¹ Cong. Globe, 39th Cong., 1st Sess. 39 (Dec. 13, 1865).

⁷² See *id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.* at 91 (Dec. 20, 1865), also invoking the Thirteenth Amendment and the guarantee of a republican form of government, which seemed not to apply. Sumner went on to read from a bill of his own that, in addition to nullifying laws that drew racial distinctions, would have given the federal courts jurisdiction of all crimes by or against blacks and of all civil suits to which blacks were parties—on the purported ground that they were cases arising under federal law, which they were not. See *id.* As usual, Sumner's views were considerably in advance of those of most of his colleagues.

But the insurrection is over, protested Maryland Senator Reverdy Johnson; our authority to suppress it is gone.⁷⁶ As I have suggested in connection with the Freedmen's Bureau, I have doubts about this conclusion as a general matter. But it surely was true that passage of a civil rights law at this late date could not be defended, as the Proclamation had been, on the ground that it weakened the enemy.⁷⁷

Let us wait until the amendment is adopted, said Trumbull and Ohio's John Sherman; then our power to pass this bill will be clear.⁷⁸ For the amendment would not only abolish slavery; it would also give Congress authority to enforce its provisions.

Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power, by the express terms of this amendment, to secure all these rights. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms.⁷⁹

Senator Trumbull took the same position:

It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. These are rights which the first clause of the constitutional amendment meant to secure to all.⁸⁰

Now they tell us, sputtered Senator Saulsbury, that the Thirteenth Amendment was intended to authorize Congress "to enter my State and legislate for my people." Nobody had said so at the time the amendment was considered.⁸¹ That was true; the Amendment had

⁷⁶ See *id* at 40 (Dec 13, 1865). Wilson retorted that the rebellion was not over, as the President's insurrection proclamation remained in force. See *id* at 41.

⁷⁷ See Currie, 73 U Chi L Rev at 1157-60 (cited in note 1) (discussing the congressional debate over the Emancipation Proclamation and summarizing the argument of Proclamation supporters: "Slave labor fueled the rebellion and anything that weakened the enemy was within the President's authority").

⁷⁸ See Cong Globe, 39th Cong, 1st Sess 41 (Dec 13, 1865) (Sen Sherman), 43 (Sen Trumbull).

⁷⁹ *Id* at 41 (Sen Sherman). See also *id* at 42, listing other rights Senator Sherman considered "among the natural rights of free men." These included the "right to sue and be sued . . . to testify . . . to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, . . . to be educated, and to go and come at pleasure."

⁸⁰ *Id* at 43.

⁸¹ *Id* at 42.

been sold on the ground that it would do what it said it would do, which was to end slavery.⁸² “The amendment itself,” said Saulsbury,

was an amendment to abolish slavery. What is slavery? . . . Slavery is a *status*, a condition; it is a state or situation where one man belongs to another and is subject to his absolute control. . . . Cannot that *status* or condition be abolished without attempting to confer on all former slaves all the civil or political rights that white people have? Certainly. Your “appropriate legislation” is confined to the subject-matter of your amendment, and extends to nothing else. “Congress shall have power by appropriate legislation to carry this amendment into effect.” What amendment? The amendment abolishing slavery.⁸³

Right again. The Thirteenth Amendment forbade slavery, not racial discrimination; it did not authorize Congress to legislate equal civil rights.⁸⁴ To equate emancipation with freedom and freedom with the enjoyment of civil rights was nothing but a play on words.

It may be appropriate at this point to quote the Amendment itself:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

⁸² See Currie, 73 U Chi L Rev at 1175–78 (cited in note 1) (discussing congressional debate over the Thirteenth Amendment and citing legislative history that suggests that Congress only intended to ban slavery, not racial discrimination).

⁸³ Cong Globe, 39th Cong, 1st Sess 113 (Dec 21, 1865). An example of legitimate legislation to enforce the Thirteenth Amendment was an act of the same Congress criminalizing peonage, which was a variety of involuntary servitude for nonpayment of debts. See An Act to Abolish and Forever Prohibit the System of Peonage in the Territory of New Mexico and Other Parts of the United States, 14 Stat 546 (Mar 2, 1867). See also Cong Globe, 39th Cong, 2d Sess 1571 (Feb 19, 1867) (Sen Lane); *Clyatt v United States*, 197 US 207, 217 (1905) (upholding a later version of the statute, and declaring that legislation “may be necessary and proper” to enforce the Thirteenth Amendment and that such legislation “may be primary and direct in its character”). Its passage was not controversial. See also An Act to Prevent and Punish Kidnapping, 14 Stat 50 (May 21, 1866) (forbidding kidnapping for the purpose of placing the victim in slavery).

⁸⁴ Compare *City of Boerne v Flores*, 521 US 507, 519 (1997) (emphasizing that the enforcement provision of the Fourteenth Amendment empowered Congress only to enforce that Amendment, not to expand its meaning). The Supreme Court misguidedly took a different view of the Thirteenth Amendment. See *Jones v Alfred H. Mayer Co*, 392 US 409, 440 (1968) (upholding the Civil Rights Act of 1866).

Senator Cowan was right: yes, the United States should guarantee civil rights to all persons, but it could do so only by adopting another constitutional amendment.⁸⁵

On December 18, 1865, Secretary of State William Henry Seward proclaimed that the Thirteenth Amendment had been ratified by the requisite three-fourths of the states.⁸⁶ (Included in that number were eight states that had attempted to secede. This tells us something about the Secretary's views on whether those states were still in the Union, and no one in Congress was heard to complain.) On January 5, 1866, Senator Trumbull introduced a new civil rights bill.⁸⁷ It was designed, he said, to make the Amendment a reality.⁸⁸

As Senator Sherman had suggested,⁸⁹ Trumbull's bill was more specific as to the rights it protected than Wilson's original proposal. As finally enacted, its central provision read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁹⁰

Except for the citizenship provision, which was added later, this section was substantially the same as that offered by Senator Trumbull.⁹¹

⁸⁵ See Cong Globe, 39th Cong, 1st Sess 40–41 (Dec 13, 1865).

⁸⁶ See 13 Stat 774, 775 (Dec 18, 1865). See also Act to Provide for the Publication of the Laws of the United States, and for Other Purposes § 2, 3 Stat 439, 439 (Apr 20, 1818) (directing the Secretary to issue such a proclamation upon receiving notice that an amendment has been adopted).

⁸⁷ See Cong Globe, 39th Cong, 1st Sess 129 (Jan 5, 1866).

⁸⁸ See *id* at 474 (Jan 29, 1866).

⁸⁹ See *id* at 41–42 (Dec 13, 1865).

⁹⁰ Civil Rights Act of 1866 § 1, 14 Stat at 27.

⁹¹ See Cong Globe, 39th Cong, 1st Sess 211 (Jan 12, 1866). Section 2 of the statute (and of Trumbull's original bill) made it a misdemeanor for any person acting "under color of any law, statute, ordinance, regulation, or custom" to deny any of the rights protected by § 1; § 3 gave the federal district courts exclusive jurisdiction over all such offenses. See 14 Stat at 27. The same

Constitutional argument resumed. Trumbull repeated his contention that the Thirteenth Amendment authorized Congress to outlaw racial discrimination, and in the course of his speech he coined the celebrated term “badge of servitude.”⁹² Saulsbury repeated his rebuttal.⁹³ Others chimed in for or against the proposal without adding anything of substance on the main question.⁹⁴ Trumbull hastened to add that the bill had nothing to do with “political rights”; the case of women and children demonstrated that one could be free without having the right to vote.⁹⁵ The citizenship provision was defended largely as an exercise of the power of naturalization, which seems plausible;⁹⁶ opponents invoked the *Dred Scott v Sandford*⁹⁷ case⁹⁸ and insisted that this authority extended only to aliens.⁹⁹

section gave the federal trial courts jurisdiction, originally or on removal, of (among other things) “all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State . . . any of the rights secured to them by the first section of this act.” *Id.* This provision, precursor of the largely moribund removal statute now codified at 28 USC § 1443 (2000), can be defended, if at all, only on the ground that the denial or inability to enforce rights guaranteed by the Act was a federal ingredient of every case that fell within its ambit under *Osborn v Bank of the United States*, 22 US (9 Wheat) 738, 824 (1824). See Cong Globe, 39th Cong, 1st Sess 479 (Jan 29, 1866) (Sen Saulsbury) (denying the constitutionality of this provision). President Johnson took the same position in his *Veto Message to the Senate of the United States* (Mar 27, 1866), in 6 Richardson 405, 410–11 (cited in note 6) (“The [removal provision of the statute] undoubtedly comprehends cases and authorizes the exercise of powers that are not, by the Constitution, within the jurisdiction of the courts of the United States.”). For crippling narrow interpretations of the current provisions see *City of Greenwood v Peacock*, 384 US 808, 828 (1966) (“[T]he vindication of the defendant’s federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.”); *Georgia v Rachel*, 384 US 780, 804 (1966) (granting removal of a Georgia case in which civil rights protestors were charged with trespassing after a lunch counter sit-in only because, “[i]n the narrow circumstances of this case, any proceeding in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964”).

⁹² Cong Globe, 39th Cong, 1st Sess 474 (Jan 29, 1866). See also *id.* at 1761 (Apr 4, 1866) (stating that without the bill, the Amendment would be “a cheat and a delusion”).

⁹³ See *id.* at 476 (Jan 29, 1866).

⁹⁴ For arguments in support of the bill, see, for example, *id.* at 503–04 (Jan 30, 1866) (Sen Howard), 1151–52 (Mar 2, 1866) (Rep Thayer). For arguments against, see, for example, *id.* at 499–500 (Jan 30, 1866) (Sen Cowan), 576–77 (Feb 1, 1866) (Sen Davis), 1156 (Mar 2, 1866) (Rep Thornton), 1268 (Mar 8, 1866) (Rep Kerr), 1291 (Mar 9, 1866) (Rep Bingham).

⁹⁵ *Id.* at 476 (Jan 29, 1866), 606 (Feb 2, 1866), 1761 (Apr 4, 1866). See also *id.* at 768–69 (Feb 9, 1866) (Sen Johnson) (answering that voting is not an essential right and saying that “I considered myself a freeman a good while before I was twenty-one years of age, and I had not the right of franchise”), 1117 (Mar 1, 1866) (Rep James Wilson) (arguing that the bill would not extend voting rights to former slaves because “suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government”).

⁹⁶ See, for example, *id.* at 475 (Jan 25, 1866) (Sen Trumbull), 1152 (Mar 2, 1866) (Rep Thayer) (“We may naturalize any class of persons. It is a process to which you may not only submit foreigners, but one born in this country, and all the precedents bear me out in the position I assume.”).

The civil rights bill passed both Houses by wide margins,¹⁰⁰ only to encounter another veto from President Johnson. His main point was one made by Senator Saulsbury some three months before: Congress had no power to forbid racial discrimination; all the Thirteenth Amendment did was abolish slavery.¹⁰¹

Congress quickly overrode Johnson's veto.¹⁰² Equal rights became the law of the land.

D. The Fourteenth Amendment

Constitutional amendment was in the air. On December 18, 1865, as we have seen, ratification of the Thirteenth Amendment was proclaimed. The very next day, the House passed a proposed amendment to forbid payment of the rebel debt;¹⁰³ on the last day of January, it passed another to reduce the representation of any state that denied the right to vote on racial grounds.¹⁰⁴ On February 26, Representative Bingham, on behalf of the Joint Committee, presented a third amendment to which we must devote a bit more attention.

The proposal itself is quickly quoted:

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.¹⁰⁵

⁹⁷ 60 US (19 How) 393 (1856).

⁹⁸ See Cong Globe, 39th Cong, 1st Sess 1155 (Mar 2, 1866) (Rep Eldredge), quoting *Dred Scott*, 60 US (19 How) at 578 (Curtis dissenting).

⁹⁹ See, for example, Cong Globe, 39th Cong, 1st Sess 498 (Jan 30, 1866) (Sen Van Winkle), 523 (Jan 31, 1866) (Sen Davis), 1295 (Mar 9, 1866) (Rep Latham).

¹⁰⁰ The Senate vote was 33-12, the House 111-38. See *id* at 606-07 (Feb 2, 1866) (Senate), 1367 (Mar 13, 1866) (House). A committee recommended that the Senate concur with minor House amendments, and it did. *Id* at 1376 (Mar 14, 1866), 1413-16 (Mar 15, 1866).

¹⁰¹ See Johnson, *Veto Message* (Mar 27, 1866), in 6 Richardson at 406-07 (cited in note 6) (arguing that "hitherto every subject . . . in this bill has been considered as exclusively belonging to the States"). See also *id* at 411 (arguing that the bill was not necessary to enforce the Thirteenth Amendment because slavery had been successfully abolished and no attempts had been made to revive it).

¹⁰² See Cong Globe, 39th Cong, 1st Sess 1809 (Apr 6, 1866) (Senate), 1861 (Apr 10, 1866) (House).

¹⁰³ See *id* at 84-87 (Dec 19, 1865).

¹⁰⁴ See *id* at 535-38 (Jan 31, 1866). The purpose of this latter proposal, said Representative Blaine in explaining an earlier version, was to keep the abolition of slavery from giving the South an unfair advantage in the House (the three-fifths provision of Article I, § 2, clause 3 would no longer apply) and to create an incentive to give blacks the right to vote. *Id* at 141-42. See also Report of the Joint Committee on Reconstruction, HR Rep No 39-30, 39th Cong, 1st Sess XIII (1866).

¹⁰⁵ Cong Globe, 39th Cong, 1st Sess 1033-34 (Feb 26, 1866).

The reader will note that this amendment would confer no rights on its beneficiaries; it was a simple grant of legislative authority to Congress.

Bingham's pretensions for his proposal were modest:

Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution . . . is the language of the second section of the fourth article, and of a portion of the fifth amendment . . . [T]he proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.¹⁰⁶

In other words, the purpose of the amendment was to empower Congress to enforce the Privileges and Immunities and Due Process Clauses, which Bingham proceeded to quote in full.¹⁰⁷

If California Representative William Higby was right, the privileges and immunities part of Bingham's amendment was indeed modest. For Higby, like the Supreme Court, interpreted the Privileges and Immunities Clause simply to forbid discrimination against citizens of other states: "Had that provision been enforced, a citizen of New York would have been treated as a citizen in the State of South Carolina."¹⁰⁸ Vermont Representative Frederick Woodbridge, however, explained the reference quite differently. The amendment, he said, was "intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever state he may be, those privileges and immunities which are guaranteed [sic] to him under the Constitution of the United States."¹⁰⁹ This formulation does not sound in discrimination; it suggests the existence of a body of rights that the Constitution guarantees to all citizens, including those of the state whose laws are in question. That is not, of course, what Article IV appears to

¹⁰⁶ Id at 1034.

¹⁰⁷ Id. See also id at 1054 (Feb 27, 1866) (Rep Higby).

¹⁰⁸ Id. See also *Slaughter-House Cases*, 83 US (16 Wall) 36 (1872), stating in dictum:

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Id at 77. See also *Conner v Elliott*, 59 US (18 How) 591 (1856), which held that Louisiana was not required to give a Mississippi widow the same community-property rights it would have given its own citizens: "The law does not discriminate between citizens of the State and other persons." Id at 594.

¹⁰⁹ Cong Globe, 39th Cong, 1st Sess 1088 (Feb 28, 1866).

say: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”¹¹⁰

The remaining clause was even harder to trace to existing constitutional provisions: Congress was to have power to secure to everyone “equal protection in the rights of life, liberty, and property.” Bingham termed this a reference to the Due Process Clause of the Fifth Amendment. But that clause said nothing of equal protection; it protected life, liberty, and property only against deprivation without due process of law; and, Bingham to the contrary notwithstanding, it did not apply to the states.¹¹¹ Either the amendment would do more than allow Congress to enforce existing law, or it would not accomplish Bingham’s apparent goal.

New York Representative Robert Hale, who opposed the amendment, thought it would have sweeping effects:

I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead.¹¹²

Pennsylvania Representative Thaddeus Stevens demurred: did not the proposal mean only to authorize Congress to outlaw discrimination between different classes of individuals?¹¹³ As Hale replied, even that would be a significant departure—the original Constitution, we may add, having forbidden discrimination only against citizens of other states. But Hale had his own interpretation of the proposed provision, and it was broader: “[I]t is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.”¹¹⁴ Representative Woodbridge, who supported Bingham’s proposal, gave credence to both Hale’s and Stevens’s views:

It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever

¹¹⁰ US Const Art IV, § 2, cl 1.

¹¹¹ See *Barron v Mayor of Baltimore*, 32 US (7 Pet) 243, 247 (1833) (interpreting the Takings Clause of the same Amendment). For Bingham’s view, see *Cong Globe*, 39th Cong, 1st Sess 1090 (Feb 28, 1866):

But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen within their limits in the rights of life, liberty, and property.

Bingham actually had quoted the relevant language from *Barron*, as if it showed the courts were unwilling to enforce the Bill of Rights. *Id* at 1089–90.

¹¹² *Cong Globe*, 39th Cong, 1st Sess 1063 (Feb 22, 1866).

¹¹³ See *id* (Feb 27, 1866).

¹¹⁴ *Id* at 1064.

state he may be that protection to his property which is extended to the other citizens of the State.¹¹⁵

With such gaping differences of opinion as to its meaning, it is perhaps just as well that further consideration of Bingham's amendment was postponed until April,¹¹⁶ when it was superseded by a more comprehensive proposal from the Joint Committee offered by Representative Stevens—a proposal that with a little tinkering would become the Fourteenth Amendment itself.¹¹⁷

Like the eventual amendment, this proposal was comprised of five sections. The first, which we think of as the heart of the present provisions, embodied the familiar Privileges and Immunities, Due Process, and Equal Protection Clauses:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹¹⁸

There was as yet no definition of citizenship.

Sections 2 and 4 incorporated the essence of the two amendments the House had earlier approved: representation should be reduced in proportion to the disfranchisement of adult males (except for participation in the rebellion or other crimes), and neither the United States nor any state should pay rebel debts—or claims for the emancipation of slaves. Section 3 would have excluded all those who had voluntarily adhered to the insurrection from voting in federal elections until 1870. And § 5 (like § 2 of the Thirteenth Amendment) would have given Congress authority to enforce the amendment “by appropriate legislation.”¹¹⁹

A separate bill introduced in the same package would have restored states that ratified the new amendment to representation in Congress once it became law.¹²⁰

The proposed amendment was amended in several respects as it wended its way through Congress. The provision respecting represen-

¹¹⁵ *Id.* at 1088 (Feb 28, 1866).

¹¹⁶ *See id.* at 1095.

¹¹⁷ This Amendment was proposed in the House on April 30, 1866, see *Cong Globe*, 39th Cong, 1st Sess 2286, but the accompanying report of the Joint Committee was not printed until June 20, see *HR Rep No 39-30* at 1 (cited in note 104). The report was also printed, without appendices or dissent, as *S Rep No 39-112*.

¹¹⁸ *Cong Globe*, 39th Cong, 1st Sess 2286 (Apr 30, 1866).

¹¹⁹ *Id.*

¹²⁰ *See id.*

tation was fine-tuned.¹²¹ Disfranchisement of willing rebels was replaced by disqualification of their leaders from state or federal office—until Congress by a two-thirds vote should remove the disability. A clause was added ensuring the validity of the public debt, including pension claims. Citizenship was defined at the beginning of the first section: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹²² The Privileges and Immunities, Due Process, and Equal Protection Clauses were untouched, as was the enforcement provision.¹²³

Surprisingly little energy was expended in attempting to explain what the central provisions of § 1 were intended to do. Vermont Senator Luke Poland viewed the Privileges and Immunities Clause as designed simply to enable Congress to enforce the eponymous provision of Article IV.¹²⁴ Representative Stevens explained the Equal Protection Clause as ensuring that “[w]hatever law protects the white man shall afford ‘equal’ protection to the black man,” as the Civil Rights Act had already done.¹²⁵ By its very terms, as Stevens seemed also to suggest, the Due Process Clause would make the corresponding provision of the Fifth Amendment applicable for the first time to the states.¹²⁶

To Representative Bingham, the provisions of § 1 would simply authorize Congress

¹²¹ Representative Stevens thought this the “most important” provision of the entire Amendment. *Id.* at 2459 (May 8, 1866).

¹²² Senator Howard’s explanation of the proviso that persons born here must also be within their jurisdiction was at least as ambiguous as the phrase it clarified: the language was designed to exclude “persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the United States,” and would include “every other class of persons.” *Cong Globe*, 39th Cong, 1st Sess 2890 (May 30, 1866). Senator Conness unequivocally said the Amendment would make citizens of the children of Chinese nationals if they were born in the United States, see *id.* at 2891, but Senator Johnson said a person subject to jurisdiction of the United States was one not subject to “some foreign Power,” *id.* at 2893, and Senator Trumbull said Indians were not subject to our jurisdiction because they were subject to tribal authority, see *id.* at 2893 (arguing that, for example, Indians were not subject to United States jurisdiction because they could not be sued in US courts, were not subject to federal laws, and in some cases had not signed treaties with the United States). See also *id.* at 2895 (Sen Hendricks) (arguing that Indians “are not now citizens, they are subjects”). An express exclusion for Indians was thus defeated on the ground that it was unnecessary. See *id.* at 2897. For an argument that the Jurisdiction Clause excluded only such persons as foreign soldiers and diplomats, see James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 *Green Bag* 2d 367, 369 (2006).

¹²³ See US Const Amend XIV, §§ 1, 5.

¹²⁴ See *Cong Globe*, 39th Cong, 1st Sess 2961 (June 5, 1866).

¹²⁵ *Id.* at 2459 (May 8, 1866). The Civil Rights Act provided, among other things, that blacks should enjoy the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” 14 Stat at 27. See also Part I.C.

¹²⁶ “But the Constitution limits only Congress, and is not a limitation on the States. This amendment supplies that defect.” *Cong Globe*, 39th Cong, 1st Sess 2459 (May 8, 1866).

to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.¹²⁷

There are echoes here of Senator Poland: all Congress can do is to enforce the privileges and immunities of all citizens. But the reference to “all citizens” suggests that Bingham may have had something more in mind than the prohibition of discrimination against outsiders that is generally understood to be the mandate of Article IV. As we read on, we find our suspicion confirmed: Bingham seems to have understood Article IV to do more than merely outlaw discrimination against citizens of other states.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic.¹²⁸

Where Bingham found a guarantee of equal protection in the preexisting Constitution remains a mystery. Equally interesting is what he was suggesting once again with respect to privileges and immunities: that Article IV forbade the states to deny them to *any citizen*, not just to the citizens of other states.

This interpretation turns Article IV and the comparable Fourteenth Amendment provision either into a general nondiscrimination principle or, more radically, into the proposition that there are certain privileges and immunities of citizenship that no state may deny at all.¹²⁹

Michigan Senator Jacob Howard, who in light of the indisposition of Senator Fessenden undertook to explain the Joint Committee’s handiwork to the Senate,¹³⁰ offered the most comprehensive explanation of the first section, and in so doing he gave its provisions yet another interpretation that was to figure prominently in later opinions of the Supreme Court.

The purpose of the original Privileges and Immunities Clause, said Howard, was to remove the disabilities of alienage and “to put the citizens of the several States on an equality with each other as to

¹²⁷ Id at 2542 (May 10, 1866).

¹²⁸ Id.

¹²⁹ Another glance at the text of the Article IV provision may be in order: “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” US Const Art IV, § 2, cl 1.

¹³⁰ Fessenden was Chairman of the Joint Committee. See Cong Globe, 39th Cong, 1st Sess 2764–65 (May 23, 1866).

all fundamental rights”; it was to make them, “*ipso facto* . . . citizens of the United States.”¹³¹ So far, so good; it protected outsiders against discrimination. But what were the privileges and immunities in question? Justice Bushrod Washington had given a rather lengthy list of them on circuit in *Corfield v Coryell*,¹³² and it was these, among others, that the citizens of each state were to enjoy, as Washington put it, “in every other State.”¹³³

“To these privileges and immunities,” Howard continued, “should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution,” which he proceeded to enumerate.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights . . . are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition on State legislation.¹³⁴

Nor, Howard continued, had Congress any authority to enforce these guarantees:

They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers.¹³⁵

A central purpose of the proposal was to remedy these deficiencies: “The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees,” while the fifth section would empower Congress to enforce them.¹³⁶

There it is in unmistakable black and white: § 1 of the amendment would make the Bill of Rights applicable to the states.¹³⁷

¹³¹ Id at 2764–65.

¹³² 6 F Cases 546 (CC ED Pa 1823).

¹³³ Id at 551–52 (including in a long list of “privileges and immunities” the right to sue and be sued, the right to own property, the right to vote, and the right to reside anywhere in the country).

¹³⁴ Cong Globe, 39th Cong, 1st Sess 2765 (May 23, 1866).

¹³⁵ Id at 2765–66.

¹³⁶ Id at 2766. One may quibble, of course, with Howard’s assertion that *none* of the rights that he identified already applied to the states; the Privileges and Immunities Clause was rather plainly a limitation on state power.

¹³⁷ The Equal Protection and Due Process Clauses, Howard added, were meant to “abolish[] all class legislation and do[] away with the injustice of subjecting one caste of persons to a

Thus there is some support in the legislative history for no fewer than four interpretations of the first section of the proposed amendment, and in particular of its Privileges and Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states.

The Supreme Court, the reader may recall, adopted a variant of the first interpretation in the *Slaughter-House Cases*:¹³⁸ the Privileges and Immunities Clause protected only those rights that the citizen already enjoyed as a matter of federal law.¹³⁹ The other three interpretations appeared in the various dissenting opinions;¹⁴⁰ Justice Hugo Black famously embraced Senator Howard's argument that the Fourteenth Amendment subjected the states to the Bill of Rights.¹⁴¹

The explanation most prominently proffered in Congress, however, was that the amendment would remove lingering doubts as to the constitutionality of the Civil Rights Act and protect it against possible repeal.¹⁴² The committee's phraseology strongly supports this

code not applicable to another." He went on to assure his listeners that § 1 would not confer voting rights: "The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law." *Id.* Representative Bingham confirmed that § 2, by penalizing those states that abridged the right of suffrage on racial grounds, demonstrated that § 1 did not guarantee the right to vote. See *id.* at 2542 (May 10, 1866).

¹³⁸ 83 US (16 Wall) 36 (1872).

¹³⁹ *Id.* at 74 (holding that "the privileges and immunities of the citizens of the State . . . whatever they may be, are not intended any additional protection by this paragraph of the amendment").

¹⁴⁰ See *id.* at 95 (Field dissenting) ("[The Fourteenth Amendment] recognizes in express terms, if it does not create, citizens of the United States . . . The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent on his citizenship of any State."), 97 ("The privileges and immunities designated are those *which of right belong to the citizens of all free governments.*"), 119 (Bradley dissenting) ("[E]ven if the Constitution were silent, the fundamental privileges and immunities, as such, would be no less real and no less inviolable . . . Their very citizenship conferred those privileges, if they did not possess them before. And those privileges they would enjoy whether they were citizens of any State or not."), 126 (Swayne dissenting) ("The privileges and immunities of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to [a citizen] by reason of his membership in the Nation.").

¹⁴¹ See *Adamson v California*, 332 US 46, 71–72 (1947) (Black dissenting). For Black's examination of the legislative history of the Fourteenth Amendment, see *id.* at 92–123 (Appendix to Opinion of the Court).

¹⁴² See, for example, Cong Globe, 39th Cong, 1st Sess 2459 (May 8, 1866) (Rep Stevens), 2462 (Rep Garfield), 2464 (Rep Thayer), 2498 (May 9, 1866) (Rep Broomall), 2502 (Rep Raymond), 2511 (Rep Eliot). Senator Poland, who as indicated took a narrower view of the Privileges and Immunities Clause, attributed this result to the Equal Protection Clause. See *id.* at 2961 (June 5, 1866). See also generally Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan L Rev 5 (1949) (reviewing the legislative history and later case law interpreting the Fourteenth Amendment).

reading. States were already forbidden to deny privileges or immunities to citizens of other states; now they were to be forbidden to deny them to *any* citizen, including their own. Moreover, the first clause was admirably designed to do what most legislators said it would do. For the Civil Rights Act itself singled out a series of privileges and immunities that had to be extended to all citizens if they were extended to whites; the Amendment generalized this principle to include all privileges and immunities. As I have said elsewhere, I think Justice Field was right: the Privileges and Immunities Clause was intended to interdict state racial discrimination with respect to a wide range of fundamental rights.¹⁴³

The Fourteenth Amendment passed the House 128-37¹⁴⁴ and the Senate 33-11.¹⁴⁵ The House approved the Senate's changes on June 13, 1866,¹⁴⁶ and the President sent the Amendment to the states.¹⁴⁷ Two years elapsed before the Secretary of State was able to certify that the requisite number of states had ratified it, and then he equivocated. New Jersey and Ohio had both attempted to rescind their ratifications; if their rescissions were invalid, the Amendment had become part of the Constitution.¹⁴⁸ The very next day, Congress took matters into its own hands, proclaiming that three-fourths of the states had ratified the Amendment—again including several former Confederate states—but giving no explanation.¹⁴⁹ Ratification, it seems, was irrevocable,¹⁵⁰ and the Amendment was law.

¹⁴³ See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 344–48 (Chicago 1985). In this light, the Equal Protection Clause, which now serves this office, seems to have been designed initially to constitutionalize the Civil Rights Act provision granting nonwhites “the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.” See *id.* at 349, quoting the Civil Rights Act of 1866, 14 Stat at 27. For Field's argument, see *Slaughter-House Cases*, 83 US (16 Wall) at 100–01 (Field dissenting).

¹⁴⁴ See Cong Globe, 39th Cong, 1st Sess 2545 (May 10, 1866).

¹⁴⁵ See *id.* at 3042 (June 7, 1866).

¹⁴⁶ See *id.* at 3149.

¹⁴⁷ Representative LeBlond objected that the resolution should be presented to the President for approval or veto under Article I, § 7, but the Speaker ruled his point out of order. See *id.* at 3197–98 (June 15, 1866). It had long been settled that the president had no right to veto constitutional amendments. See *Hollingsworth v Virginia*, 3 US (3 Dall) 378, 382 (1798) (holding that the Twelfth Amendment had been “constitutionally adopted” even though it had not been submitted to the president); Currie, *The First Hundred Years* at 20–23 (cited in note 143). In sending the Amendment to the states for ratification, President Johnson noted that he waived constitutional questions about presentment and the legitimacy of proposing amendments in the absence of eleven states and emphasized that his action did not imply approval of the Amendment itself. See Andrew Johnson, *Special Message to the Senate and House of Representatives* (June 22, 1866), in 6 Richardson 391, 392 (cited in note 6).

¹⁴⁸ See William H. Seward, 15 Stat 706, 707 (July 20, 1868).

¹⁴⁹ See 15 Stat 709, 709–10 (July 21, 1868).

¹⁵⁰ The analogy of an ordinary contract certainly supports this conclusion: an offer cannot be rejected after it has been accepted. On the other hand, several Southern states had rejected

E. The Reconstruction Act

The Joint Committee's initial plan, as we have seen, was that seceding states would be welcomed back to Congress once they ratified the Fourteenth Amendment and it was adopted.¹⁵¹ In the meantime, apparently, the reconstructed state governments established under Lincoln and Johnson would continue to function subject to military protection and without congressional approval.¹⁵²

The Southern states, however, turned down the bargain; with the exception of Tennessee (which as we have seen was promptly readmitted to representation¹⁵³), every one of them rejected the Fourteenth Amendment.¹⁵⁴ By the time Congress met again in December 1866, it was plain that a new approach was needed.

Representatives Stevens and Ashley¹⁵⁵ promptly produced a pair of substitutes for the Committee's bill that would have provided machinery for the creation of new state governments in the seceded states. Both proposals demanded Negro suffrage, disfranchisement and disqualification of certain former rebels, and a guarantee of equal civil rights; Ashley's version imposed other conditions as well. Both proceeded on the premise that the existing governments were illegitimate and ought to be replaced.¹⁵⁶

After some desultory discussion, the original bill and its proposed amendments were referred back to the Joint Committee for further study.¹⁵⁷ Within ten days, the committee reported a brand new bill embodying a brand new approach. Not a word was said about how to establish new governments or readmit the seceding states to Congress; all the bill would do was to place those states under military control.

the Amendment before they ratified it, and their votes were counted; this would not be allowed in the case of a private contract either. See Restatement (Second) of Contracts §§ 35 comment c, 36, 38(1) (1979).

¹⁵¹ See text accompanying note 120.

¹⁵² As commander in chief, the Joint Committee said, the president "might properly permit the people to assemble, and to initiate local governments, and to execute such local laws as they might choose to frame not inconsistent with, nor in opposition to, the laws of the United States." HR Rep No 39-30 at VIII (cited in note 104).

¹⁵³ See Part I.A.

¹⁵⁴ See Foner, *Reconstruction* at 268-69 (cited in note 8) (describing Southern hostility to the proposed Amendment, including rejection by all ten Southern legislatures and a statement by the governor of South Carolina that Southerners were required to "concede more to the will of their conquerors" than at any time in history).

¹⁵⁵ James Ashley was an Ohio Republican. This and other biographical references to senators and representatives in this article are taken from *Biographical Directory of the United States Congress 1774-1989* (GPO 1989), online at <http://bioguide.congress.gov/biosearch/biosearch.asp> (visited Jan 12, 2008).

¹⁵⁶ See Cong Globe, 39th Cong, 2d Sess 250 (Jan 3, 1867) (Rep Stevens), 253-54 (Rep Ashley).

¹⁵⁷ See id at 813-17 (Jan 28, 1867).

The “pretended . . . governments” of ten states, the preamble recited (Tennessee understandably being excepted), had been “set up without the authority of Congress and without the sanction of the people”; they “afford[ed] no adequate protection for life or property”; it was “necessary that peace and order should be enforced in said so-called States until loyal and republican State governments [could] be legally established.” The “so-called States” were thus to be “made subject to the military authority of the United States,” which was “to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish . . . all disturbers of the public peace and criminals.” To this end, the Army might permit civil courts to try offenders, or it might set up “military commissions or tribunals” instead.¹⁵⁸ This was not a bill to reform state government; it provided solely for military protection.¹⁵⁹

The bill was attacked on the expected grounds that military government was not republican¹⁶⁰ and that civilians could not be tried by military courts.¹⁶¹ It was defended on the grounds that the law of nations permitted the conqueror to govern as he liked,¹⁶² that military government was necessary to put down the insurrection,¹⁶³ and, as the preamble suggested, that it was essential to preserve order until republican governments could be put in place.¹⁶⁴

Representative Bingham offered an amendment designed to ensure that military control was indeed a step toward reestablishment of republican government—providing for readmission to Congress, once the Fourteenth Amendment became law, of any state that ratified the Amendment, adopted a republican constitution, and provided for suffrage without regard to race. It was indeed imperative for Congress to ensure law and order, said Bingham, but the people should also be

¹⁵⁸ Id at 1037 (Feb 6, 1867).

¹⁵⁹ See id at 1214 (Feb 13, 1867) (Rep Stevens):

It was not intended as a reconstruction bill. It was intended simply as a police bill to protect the loyal men from anarchy and murder, until this Congress, taking a little more time, can suit gentlemen in a bill for the admission of all those rebel States upon the basis of civil government.

¹⁶⁰ See id at 1207 (Rep Davis).

¹⁶¹ See id at 1078 (Feb 7, 1867) (Rep LeBlond), 1079 (Rep Finck) (stating that “there was no authority in these military tribunals either to try, convict, or punish, any citizen who was not in the military or naval service of the United States”), citing *Ex parte Milligan*, 71 US (4 Wall) at 122–24.

¹⁶² See Cong Globe, 39th Cong, 2d Sess 1076 (Feb 7, 1867) (Rep Stevens).

¹⁶³ See id at 1175 (Feb 12, 1867) (Rep Shellabarger).

¹⁶⁴ See id at 1100 (Feb 8, 1867) (Rep Shellabarger), 1104 (Reps Garfield and Stevens), 1208 (Feb 13, 1867) (Rep Boutwell). By speaking of “so-called States” the preamble also appeared to suggest the familiar argument that the areas in question were no longer states and thus not entitled to republican government at all. See id at 1207 (Mar 6, 1866) (Rep Boutwell) (“Congress was the department of the Government that was to decide in case of two governments set up in a State which was the republican form of government.”), citing *Luther*, 48 US (7 How) at 42.

given “an opportunity to rid themselves once and for all of military rule.”¹⁶⁵ But a motion to recommit the bill for the addition of a variant of Bingham’s proposal (the so-called Blaine Amendment) was roundly defeated; it was as a purely military measure to preserve order that the bill passed the House.¹⁶⁶

Basic objections to the bill that had been voiced in the House were echoed in the Senate.¹⁶⁷ More importantly, the bill was amended. “I recognize the necessity for this bill,” said Nevada Republican William Stewart, “but I want the Union men in the South to have an argument to show that there is redemption for the South if they do right. . . . If you want men to rally around you in the South you must state the terms of restoration.”¹⁶⁸ It was John Sherman of Ohio who offered the consequent amendment, and it was in most respects a carbon copy of that presented by Representative James G. Blaine in the House: when the conditions spelled out above were satisfied, the state would be readmitted to representation—and military government would cease.¹⁶⁹

The Senate accepted this amendment the very day it was proposed, and then it proceeded to pass the amended bill.¹⁷⁰ The House voted not to concur in the Senate amendment;¹⁷¹ the Senate insisted.¹⁷² The House then voted to concur in the Senate amendment with two amendments of its own,¹⁷³ and the Senate accepted the House amend-

¹⁶⁵ Cong Globe, 39th Cong, 2d Sess 1210–12 (Mar 6, 1866). The final version of Bingham’s proposal expressly provided that military rule would terminate once the conditions of the bill were met. See id at 1213.

¹⁶⁶ See id at 1213, 1215. The day before it passed the military bill, however, the House approved a separate measure looking toward the reestablishment of civil government in Louisiana on the basis of suffrage without regard to race and disfranchisement of many who had borne arms against the United States. The Louisiana bill is printed in id at 1128–29 (Feb 11, 1867); for its passage see id at 1175 (Feb 12, 1867). It never made it through the Senate.

¹⁶⁷ See, for example, id at 1388, 1461 (Feb 15–16, 1867) (Sen Hendricks), 1451–52 (Feb 16, 1867) (Sen Saulsbury). Senator Sherman responded that the Supreme Court (in *Ex parte Milligan*) had said that military trials would be permissible in rebel states, id at 1462; Senator Buckalew replied that *Ex parte Milligan* had said only that they would be permissible on the battlefield. Id at 1463. What the Court had actually said was that military trials were admissible when the civilian courts were closed. See 71 US (4 Wall) at 127 (“If, in foreign invasion or war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails . . . as no power is left but the military, it is allowed to govern by military rule until the laws can have their free course.”).

¹⁶⁸ Cong Globe, 39th Cong, 2d Sess 1369 (Feb 15, 1867). See also id at 1557 (Feb 19, 1867) (Sen Lane).

¹⁶⁹ See id at 1459 (Feb 16, 1867).

¹⁷⁰ See id at 1467, 1469.

¹⁷¹ See id at 1340 (Feb 19, 1867).

¹⁷² See id at 1570.

¹⁷³ See id at 1399 (Feb 20, 1867). The House amendments would disfranchise those rebels proposed to be excluded from office under § 3 of the Fourteenth Amendment and declare existing state governments “provisional” and subject to military authority.

ments.¹⁷⁴ The bill went to President Johnson, who vetoed it.¹⁷⁵ The House and Senate passed it again, by the necessary two-thirds majority.¹⁷⁶ The date was March 2, 1867. The Reconstruction Act was law.¹⁷⁷

So much for the procedural thicket. What did the law actually say?

It began with a preamble purporting to state findings crucial to the validity of the entire enterprise. There were no “legal state governments” and was no “adequate protection for life or property” in any of the rebel states except Tennessee; it was necessary to enforce “peace and good order” in those states until “loyal and republican State governments” could be established.¹⁷⁸

Sections 1 through 4 placed the ten states in question under “military authority” and authorized military trials of civilians, as in the original House bill.

Section 5 was the Senate amendment, promising both admission to Congress and the end of military rule for states that adopted constitutions “in conformity with the Constitution of the United States,”¹⁷⁹ that provided for Negro suffrage, and that ratified the Fourteenth Amendment, once that Amendment became law. At the end of this section was a proviso, added by the House, disfranchising and disqualifying from the state constitutional convention those rebels the Fourteenth Amendment would exclude from state or federal office.

Section 6, also added by the House, declared that existing civil governments in the affected states should be “deemed provisional only, and in all respects subject to the paramount authority of the United States.”¹⁸⁰

President Johnson thought the bill unconstitutional. To begin with, the statements in the preamble were simply false. State governments were functioning in all the former Confederate states, and there was no evidence that they were unwilling or unable to enforce the law. The provision for lifting military control upon the occurrence of certain conditions—whether or not order was restored—demonstrated that the justification for the bill given in the preamble was a fraud: military rule was to be used not to preserve order, “but solely as a means of coercing the people into the adoption of principles and

¹⁷⁴ See *id* at 1645.

¹⁷⁵ See Andrew Johnson, *Veto Message to the House of Representatives* (Mar 2, 1867), in 6 Richardson 498 (cited in note 6).

¹⁷⁶ See Cong Globe, 39th Cong, 2d Sess 1733 (House), 1976 (Senate).

¹⁷⁷ See An Act to Provide for the More Efficient Government of the Rebel States, 14 Stat 428 (Mar 2, 1867).

¹⁷⁸ *Id* at 428.

¹⁷⁹ *Id* at 429.

¹⁸⁰ *Id*.

measures [such as the Fourteenth Amendment] to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment.”¹⁸¹

Moreover, the President continued, the bill would establish a military despotism. The commanding officer of each district was bound by no law; he could define for himself what constituted personal or property rights, or crime. He was permitted but not required to institute military tribunals; he was authorized “to punish without trial.”¹⁸² The bill would establish martial law in a time of peace, while the Supreme Court had said it was permissible only when by virtue of invasion or rebellion the courts were closed. The bill would deny citizens the constitutional right to presentment by a grand jury, to jury trial before the established civilian courts, and to freedom from arrest without a judicial warrant and probable cause. It would authorize the deprivation of life, liberty, and property without due process of law. It would suspend the writ of habeas corpus although there was neither invasion nor rebellion, as the Constitution required. It would contradict the constitutional guarantee of a republican form of government.¹⁸³

Finally, said the President, the bill undertook to dictate to the states in the matter of suffrage, which was a subject the Constitution reserved to the states.¹⁸⁴

Was Johnson right? The question is complex. Let us break it down into parts.

First. I believe the power to suppress rebellion includes authority to maintain the peace in areas regained from the insurgents and that this authority continues after actual hostilities are concluded.¹⁸⁵ That is the rule of the law of nations with respect to international conflicts, and it seems reasonable to think the Framers would have wanted the powers they conveyed to correspond to international custom.¹⁸⁶

Second. Whether this authority to keep the peace embraces the military trial of civilians depends, as the Supreme Court said in *Ex parte Milligan*, on whether the civilian courts are open and running, as President Johnson said they were. For the only excuse for reading implied exceptions into constitutional rights to grand and petty juries

¹⁸¹ Johnson, *Veto Message* (Mar 2, 1867), in 6 Richardson at 498–500 (cited in note 6).

¹⁸² *Id.* at 500–01.

¹⁸³ See *id.* at 504–06, quoting *Ex parte Milligan*, 71 US (4 Wall) at 127, and US Const Art IV, § 4.

¹⁸⁴ See Johnson, *Veto Message* (Mar 2, 1867), in 6 Richardson at 507 (cited in note 6).

¹⁸⁵ See Cong Globe, 39th Cong, 2d Sess 1175 (Feb 12, 1867) (Rep Shellabarger). Even the Joint Committee endorsed the appointment of military governors on this basis. See HR Rep No 39-30 at VII–VIII (cited in note 104).

¹⁸⁶ The Joint Committee wholeheartedly agreed that the President had both the power and the duty to preserve the peace. See HR Rep No 39-30 at VIII (cited in note 104).

and civilian judges is that the Framers could not have intended that when the system broke down, the laws should not be enforced.¹⁸⁷

Third. When state and local government collapsed with the approach of the Union armies, the Guarantee Clause of Article IV demanded that the United States take action to restore republican government. The military governments installed by Presidents Lincoln and Johnson, and the civilian governments established under military rule, may be viewed as successive steps in fulfillment of the constitutional guarantee.¹⁸⁸

Fourth. The preamble to the statute dismissed the civil governments established under Lincoln and Johnson as illegal, and the Joint Committee's report appeared to suggest they were not republican—largely, it seems, because the new state constitutional provisions adopted in response to presidential urging had not been submitted to the people for ratification.¹⁸⁹ If as is often said the essence of republicanism is popular sovereignty,¹⁹⁰ it ought to suffice that the conventions that promulgated those provisions were elected by the people. Although there may still have been need for military support to enforce the laws, I think Congress had no constitutional reason for displacing the existing civil governments in favor of military rule.

Fifth. Article V, as President Johnson said, contemplates that each state shall decide for itself whether or not to ratify a proposed constitutional amendment. Congress has no right to coerce a state into ratification—or into the extension of voting rights—by denying the right

¹⁸⁷ See letter from Salmon P. Chase to Robert A. Hill (May 1, 1869), in John Niven, ed, 5 *The Salmon P. Chase Papers* 302 (Kent State 1998) (“I may say to you that had the merits of the McCordle case been decided the court would doubtless have held that his imprisonment for trial before a military commission was illegal.”).

¹⁸⁸ See 11 Op Atty Gen 322, 323 (Aug 23, 1865) (James Speed, AG) (justifying the appointment of provisional governors on this ground). The Joint Committee, following dicta in *Luther*, took the position that it was Congress, not the president, that was supposed to guarantee the states a republican form of government. See HR Rep No 39-30 at IX (cited in note 104), citing *Luther*, 48 US (7 How) at 42. What the Constitution *says* is that “[t]he United States” shall guarantee republican government; the obligation seems to lie upon the president as well as Congress. See US Const Art IV, § 4. See also William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 76–77 (Cornell 1972) (“Responsibility for enforcing the clause was not limited to any one branch of the government, so that federal courts, as well as Congress and the President, in the future might enforce it.”).

¹⁸⁹ See HR Rep No 39-30 at XIV–XV (cited in note 104).

¹⁹⁰ See, for example, Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 206 (Yale rev ed 1966) (Mr Randolph) (approving the [Guarantee] Clause because “no state . . . ought to have it in their power to change its government into a monarchy”); Federalist 43 (Madison), in *The Federalist* 288, 291 (Wesleyan 1961) (Jacob E. Cooke, ed) (justifying the provision as a safeguard “against aristocratic or monarchical innovations”); Wiecek, *The Guarantee Clause* at 62–63 (cited in note 188).

to representation in the House and Senate (or the right to its own republican government) until it complies with congressional desires.¹⁹¹

Sixth. I agree with President Johnson that the Reconstruction Act was unconstitutional.

F. The Tenure of Office Act¹⁹² and Other Tales

Back in 1789, after a furious debate, Congress acknowledged the president's right to remove the secretaries of foreign affairs, war, and the treasury without cause and without Senate approval. The statutes were carefully phrased in such a way as to permit them to be supported both by those who thought the Constitution gave the president that authority and by those who thought Congress ought to confer it as a matter of policy.¹⁹³

On March 2, 1867, the same day the Reconstruction Act became law, Congress, over yet another presidential veto,¹⁹⁴ enacted the Tenure of Office Act, which established a new congressional policy with respect to the removal of executive officers. Most persons appointed by the president with Senate consent would hold their offices "until a successor shall have been in like manner appointed and duly qualified." Cabinet officers, in contrast, were to remain in office "for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with

¹⁹¹ For a sophisticated effort to refute the coercion thesis, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U Chi L Rev 375, 451–57 (2001). A related issue was resolved when Congress voted, over the President's veto, to condition the admission of Nebraska to statehood on the extension of suffrage to blacks. See An Act for the Admission of the State of Nebraska into the Union § 3, 14 Stat 391, 392 (Feb 9, 1867). For Johnson's veto message, see Andrew Johnson, *Veto Message to the Senate* (Jan 29, 1867), in 6 Richardson 489, 490–91 (cited in note 6) (arguing that the bill was self-contradictory for declaring Nebraska an "equal" but mandating a "condition precedent" to its admission). The constitutional issue was the same that had been debated at length when it was proposed to condition Missouri's admission on the gradual abolition of slavery; nothing new was added in the veto message or in the congressional debates. Among the dissenters, however, were Senator Howard and Representative Bingham, neither of whom could be described as unusually zealous in their support of either white supremacy or states' rights. For Missouri, see Currie, *The Jeffersonians* at 232–43 (cited in note 2); for Howard and Bingham, see Cong Globe, 39th Cong, 2d Sess 333 (Jan 8, 1867) (Sen Howard), 450 (Jan 14, 1867) (Rep Bingham).

¹⁹² An Act Regulating the Tenure of Certain Civil Offices ("Tenure of Office Act" or "Tenure Act"), 14 Stat 430 (Mar 2, 1867).

¹⁹³ See, for example, An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs § 2, 1 Stat 28, 29 (July 27, 1789) (providing for the appointment of a chief clerk in the Department of Foreign Affairs, who was to take charge of departmental records, books, and papers "whenever [the secretary] shall be removed from office by the President of the United States"). See also Currie, *The Federalist Period* at 36–41 (cited in note 2).

¹⁹⁴ See Andrew Johnson, *Veto Message to the Senate of the United States* (Mar 2, 1867), in 6 Richardson 492 (cited in note 6).

the advice and consent of the Senate.”¹⁹⁵ The difference in treatment between the two classes was designed to permit a new president to choose his own cabinet.¹⁹⁶ The bottom line was that no one appointed with Senate consent could be removed by the president alone.¹⁹⁷

Apart from the unconvincing assertion that Congress had settled the question in 1789,¹⁹⁸ the arguments on both sides were essentially those that had been made in the earlier debate. Pennsylvania Representative Thomas Williams and Wisconsin Senator Timothy Howe suggested that officers could be removed only by impeachment¹⁹⁹—a position that would have made the bill itself unconstitutional, since it provided for removal by the president with Senate approval. At one point, Senator Sherman insisted that the true constitutional rule was that the power of removal was incidental to that of appointment—which would have invalidated his own suggestion that cabinet members should serve at the president’s pleasure.²⁰⁰ More promising was Sherman’s alternative argument that because the Constitution was silent, Congress could regulate tenure as it chose²⁰¹—presumably as necessary and proper to creation of the office itself.²⁰²

On the other side, Pennsylvania Senator Charles Buckalew and Kentucky Representative Elijah Hise repeated Madison’s argument that removal was an inherently executive power²⁰³—a position that among other things assumed the doubtful premise that the clause vesting executive powers in the president was a grant of executive authority generally rather than a designation of the officer in whom

¹⁹⁵ Tenure of Office Act § 1, 14 Stat at 430.

¹⁹⁶ See Cong Globe, 39th Cong, 2d Sess 1515 (Feb 18, 1867) (Sen Williams).

¹⁹⁷ The motivating cause was President Johnson’s alleged abuse of the patronage power to punish his opponents and reward his friends. See, for example, *id* at 1516 (Sen Sherman) (“We have seen within the last year the spectacle of the whole revenue service upturned. Why? To reward partisans to betray a party. . . . The evil of this course became so palpable that men of all parties desired some change.”). See also McKittrick, *Johnson and Reconstruction* at 495 (cited in note 5) (“The act had grown directly out of the wholesale removals from rank-and-file federal offices made by Johnson both during and after the election campaign of 1866. It was designed primarily to protect Republican officeholders from executive retaliation.”).

¹⁹⁸ See, for example, Cong Globe, 39th Cong, 2d Sess 387 (Jan 10, 1867) (Sen Johnson), 388 (Sen Buckalew). President Johnson, in his veto message, made the same mistake. Johnson, *Veto Message* (Mar 2, 1867), in 6 Richardson at 495 (cited in note 6). Others in Congress, however, correctly interpreted the 1789 decision. See Cong Globe, 39th Cong, 2d Sess 942 (Feb 1, 1867) (Rep Hale), 1040 (Feb 6, 1867) (Sen Howe).

¹⁹⁹ See Cong Globe, 39th Cong, 2d Sess 20 (Dec 5, 1866) (Rep Williams), 1039 (Feb 6, 1867) (Sen Howe).

²⁰⁰ See *id* at 1516 (Feb 18, 1867).

²⁰¹ See *id* at 1046 (Feb 6, 1867). See also *id* at 442 (Jan 14, 1867) (Sen Williams).

²⁰² See US Const Art I, § 8, cl 18.

²⁰³ See Cong Globe, 39th Cong, 2d Sess 467 (Jan 15, 1867) (Sen Buckalew), 940 (Feb 1, 1867) (Rep Hise).

powers elsewhere given were lodged.²⁰⁴ Unanswerable in my opinion, on the other hand, were Pennsylvania Representative Russell Thayer's contention that the statute effectively transferred executive authority from the president to the cabinet in violation of the vesting clause²⁰⁵ and Senator Buckalew's point that without authority to control his subordinates, the president could not fulfill his constitutional duty to take care that the laws were faithfully enforced.²⁰⁶

None of this was new, and I shall not linger over it. Let me tell you a related story about a contemporaneous attempt to dilute the president's constitutional authority as commander in chief.

When the army appropriations bill for fiscal 1868 reached the floor of the House, it was found to contain an extraneous rider that came as a surprise even to some members of the committee that reported the bill.²⁰⁷ Here it is in the form in which it was finally adopted:

And be it further enacted, That the head-quarters of the General of the army of the United States shall be at the city of Washington, and all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the army, and in case of his inability, through the next in rank. The General of the army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to the requirements of the section shall be null and void.²⁰⁸

²⁰⁴ See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 641 (1952) (Jackson concurring) ("I cannot accept the view that [Article II, § 1, clause 1] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers afterwards stated."); US Const Art II, § 1. It also contradicted the Supreme Court's express holding that a federal judge could fire his own clerk. See *Ex parte Hennen*, 38 US (13 Peters) 230, 262 (1839) (denying a writ of mandamus to a fired clerk seeking reinstatement).

²⁰⁵ See Cong Globe, 39th Cong, 2d Sess 91 (Dec 12, 1866). See also *id* at 92 (Rep Kasson). Compare these with *Morrison v Olson*, 487 US 654, 705 (1988) (Scalia dissenting) ("[The Vesting Clause] does not mean *some of* the executive power, but *all of* the executive power.").

²⁰⁶ See Cong Globe, 39th Cong, 2d Sess 464 (Jan 15, 1867). See also *id* at 936 (Feb 1, 1867) (Reps Hale and Hise); US Const Art II, § 3.

²⁰⁷ See, for example, Cong Globe, 39th Cong, 2d Sess 1354 (Feb 19, 1867) (Rep Niblack) ("I never heard of it until it was read at the Clerk's desk this afternoon when we went into committee for the consideration of this bill. I must say that it struck me when I heard it as a most extraordinary kind of legislation.").

²⁰⁸ An Act Making Appropriations for the Support of the Army for the Year Ending June Thirtieth, Eighteen Hundred and Sixty-eight, and for Other Purposes § 2, 14 Stat 485, 486-87 (Mar 2, 1867). Criminal penalties were provided for those who issued such orders or knowingly transmitted or obeyed them. *Id*. The original version of this section was substantially identical except that it did not contain the phrase "except at his own request." See Cong Globe, 39th Cong, 2d Sess 1351-52 (Feb 19, 1867) (Rep LeBlond).

Senators Fessenden and Edmunds defended this provision as an exercise of congressional power to make rules for the government of the armed forces;²⁰⁹ Senator Johnson and others attacked it as stripping the president of the command authority given him by Article II, § 2.²¹⁰

Drawing the line between the power to make rules and the power of command is no easy task, and we have little in the way of precedent.²¹¹ It does seem to me, however, that in adopting the quoted provision, the Congress went too far. In the first place, the statute shared with the Tenure of Office Act the vice of depriving the president of effective control over his subordinates by denying him the right of removal. But it did not stop there; it forbade the commander in chief even to reassign his top general without the imprimatur of the Senate. As Senator Buckalew argued, one of the essential characteristics of a commander is the right to give orders to his inferiors;²¹² the president can hardly be said to command when he cannot even send the general of the army where in his opinion that officer is needed.²¹³

A second substantive provision was tacked onto the appropriation bill as it journeyed through the Senate:

And be it further enacted, That all militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forthwith disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited under any circumstances whatever, until the same shall be authorized by Congress.²¹⁴

²⁰⁹ See Cong Globe, 39th Cong, 2d Sess 1851 (Feb 26, 1867) (Sen Fessenden), 1853 (Sen Edmunds). George Edmunds was a senator from Vermont. See also US Const Art I, § 8, cl 14.

²¹⁰ See Cong Globe, 39th Cong, 2d Sess 1354 (Feb 19, 1867) (Rep Niblack), 1355 (Rep Wright), 1851–52 (Feb 26, 1867) (Sen Johnson), 1853 (Sen Buckalew), 1854–55 (Sen Dixon). See also US Const Art II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States.”).

²¹¹ The closest authority today is *Youngstown*, 343 US at 589 (holding that the President had no right to seize steel mills in response to a labor dispute).

²¹² See Cong Globe, 39th Cong, 2d Sess 1853 (Feb 26, 1867).

²¹³ See *id* at 1354 (Feb 19, 1867) (Rep Niblack), 1855 (Feb 26, 1867) (Sen Dixon). If the requirement that orders be issued through the general of the army implied that that officer had discretion whether or not to transmit them, the unconstitutionality of the provision was even more patent; Congress had essentially transferred the president’s constitutional powers to the general of the army. See David M. Dewitt, *Impeachment and Trial* 201–02 (State Hist Socy Wis 1967):

A more palpable violation of the Constitution could not be imagined. It was an attempt to make a subordinate independent of his superior officer, to circumscribe the powers of the officer expressly made commander-in-chief of the army by the Constitution, and actually to associate the Senate with that officer in the command of the army.

²¹⁴ Army Appropriations Act of 1867 § 6, 14 Stat at 487.

The message could not have been plainer: nine Southern states were deprived of their militias.

It seemed most extraordinary, mused Senator Waitman Willey of West Virginia, to strip a state of its militia entirely. “It strikes me also,” he said mildly, “that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace.”²¹⁵ Article I, we may observe, clearly contemplates the existence of state militias.²¹⁶ But it was Senator Thomas Hendricks of Indiana who put his finger on the most obvious source of constitutional objection: the Second Amendment. “A well regulated militia being necessary to the security of a free State,” the Amendment provides, “the right of the people to keep and bear arms shall not be infringed.”²¹⁷

One would be hard put, under ordinary circumstances, to imagine a more egregious violation of this provision. It is true that Senator Wilson, sponsor of the militia measure, voluntarily withdrew a requirement that the militia be “disarmed” as well as “disbanded,”²¹⁸ but it made no difference. The right to bear arms is the right to bear them in combat, not merely to display them above the mantel; a militia that is disbanded and forbidden to be called into service is no militia at all.

The militias in question, Wilson responded, were nothing but bunches of rebel thugs who went about the countryside harassing freedmen and “committing outrages of various kinds.”²¹⁹ Besides, he added, on the theory on which Congress was proceeding in dealing with the rebel states, they were entitled to no militia to begin with.²²⁰

The theory Wilson had in mind seems to have been that secession had succeeded and that the entities affected were no longer states. I have taken issue with this assessment before, and it was inconsistent with the terms of the very measure Wilson proposed. But there was food for thought in Wilson’s other suggestion. The idea of former Confederate states arming themselves again was unsettling to say the least. Even Hendricks had to admit that “[o]f course in time of war people bearing arms in hostility to the Government would not be protected,”²²¹ and in the absence of the Second Amendment one might well have found the militia ban necessary and proper to suppressing

²¹⁵ Cong Globe, 39th Cong, 2d Sess 1848 (Feb 26, 1867).

²¹⁶ See US Const Art I, § 8, cl 15–16.

²¹⁷ US Const Amend II. See also Cong Globe, 39th Cong, 2d Sess 1849 (Feb 26, 1867) (Sen Hendricks).

²¹⁸ Cong Globe, 39th Cong, 2d Sess 1849 (Feb 26, 1867).

²¹⁹ *Id.*

²²⁰ See *id.* at 1848–49. See also *id.* at 1849 (Sen Lane) (characterizing the Southern militias as “dangerous to the public peace and to the security of Union citizens in those States”).

²²¹ *Id.*

the rebellion. Perhaps the answer is that Congress simply chose the wrong remedy: even during an insurrection a state is entitled to its militia, but it may not use it for illegal purposes such as making war against the United States.

President Johnson signed the army appropriation bill. He needed the money. But he took the occasion to protest in no uncertain terms the two extraneous provisions we have just discussed:

The act entitled “An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes” contains provisions to which I must call attention. Those provisions are contained in the second section, which in certain cases virtually deprives the President of his constitutional functions as Commander in Chief of the Army, and in the sixth section, which denies to ten States of this Union their constitutional right to protect themselves in any emergency by means of their own militia. Those provisions are out of place in an appropriation act. I am compelled to defeat these necessary appropriations if I withhold my signature to the act. Pressed by these considerations, I feel constrained to return the bill with my signature, but to accompany it with my protest against the sections which I have indicated.²²²

As I have said, I think he was right on both counts—as usual.

The Thirty-ninth Congress found time for little of significance that was not connected in some way with the aftermath of the war. It did manage to excise from the Court of Claims Act a provision for executive review that had made decisions of that tribunal nonjudicial and thus not subject to reexamination in the Supreme Court.²²³ In a rare exercise of the power “to fix the standard of weights and measures,” it authorized use of the metric system, in the process defining the competing American system for the first time, by indirection.²²⁴ It finally enacted a bankruptcy law, replete with provisions for proceedings instituted voluntarily by the debtor, which passed unchallenged despite the firestorm that had been raised a generation before over the alleged distinction between bankruptcy and insolvency laws.²²⁵ Fol-

²²² Andrew Johnson, *Special Message to the House of Representatives* (Mar 2, 1867), in 6 Richardson 472, 472 (cited in note 6).

²²³ See An Act in Relation to the Court of Claims § 1, 14 Stat 9, 9 (Mar 17, 1866). For the background of this measure see Currie, *Democrats and Whigs* at 194–203 (cited in note 2).

²²⁴ See An Act to Authorize the Use of the Metric System of Weights and Measures § 1, 14 Stat 339, 339 (July 28, 1866). See also US Const Art I, § 8, cl 5. For the futile history of earlier efforts to establish weights and measures, see Currie, *The Jeffersonians* at 308–09 (cited in note 2) (describing Jefferson’s failed attempts to convince Congress to establish the metric system).

²²⁵ See An Act to Establish a Uniform System of Bankruptcy throughout the United States § 11, 14 Stat 517, 521–22 (Mar 2, 1867) (providing bankruptcy proceedings for persons owing

lowing the recent precedent in the equally improbable field of agriculture, Congress also established a new Department of Education to collect statistics, diffuse information, and “otherwise promote the cause of education throughout the country.”²²⁶ One foolish congressman defended this measure as an exercise of the power to pass “all laws which shall be necessary for the common good and welfare,”²²⁷ but no such authority exists; as in the case of agriculture, the only conceivable constitutional basis for this statute was a broad interpretation of the power to spend.²²⁸

Finally, as the Thirty-ninth Congress came to a close, it adopted the following remarkable provision:

[N]o person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflam[m]able at less temperature or fire-test than one hundred and ten degrees Fa[h]renheit; and any person so doing, shall be held to be guilty of [a] misdemeanor, and on conviction thereof by indictment or presentment in any court of the United [States] having competent jurisdiction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment for a term of not less than six months nor more than three years.²²⁹

Whence did Congress derive authority to enact such a prohibition? The public safety as such is not among the subjects the Constitution entrusts to Congress.

more than \$300). There was no question of Congress’s authority to pass the bill, said Representative Jenckes; the constitutional provision covered the entire subject of “persons who have failed in business” and the distribution of their estates. See *Cong Globe*, 39th Cong, 1st Sess 1696–97 (Mar 28, 1866). For the earlier contretemps, see Currie, *Democrats and Whigs* at 128–35 (cited in note 2). Section 14 also contained a still-controversial provision excluding from the bankrupt estate all property exempted from execution by state law, despite the continuing objection that it made the law disuniform in violation of Article I, § 8, clause 4. See *An Act to Establish a Uniform System of Bankruptcy* §14, 14 Stat at 522–23. To exempt \$1,000 in one state and \$100 in another, said Senator Trumbull, could hardly be called uniform. See *Cong Globe*, 39th Cong, 2d Sess 949 (Feb 1, 1867). But to recognize state exemptions, replied Senator Doolittle, was “to reach the property which under the law of the State is liable for the payment of debts,” and that was a uniform rule. *Id* at 951. For further debate, see *id* at 949–66; for earlier discussion of the uniformity question, see Currie, 73 *U Chi L Rev* at 1168–70 (cited in note 1).

²²⁶ *An Act to Establish a Department of Education* § 1, 14 Stat 434, 434 (Mar 2, 1867).

²²⁷ *Cong Globe*, 39th Cong, 1st Sess 3045 (June 8, 1866) (Rep Moulton).

²²⁸ See *id* at 2968–69 (June 5, 1866) (Rep Rogers) (insisting that Congress had no authority to interfere with education and lamely distinguishing the Agriculture Department on the ground that it distributed information of a national character). The agricultural precedent is discussed in Currie, 73 *U Chi L Rev* at 1143–45 (cited in note 1).

²²⁹ *An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes* § 29, 14 Stat 471, 484 (Mar 2, 1867) (alterations in original).

The legislative history of the naphtha provision is brief. Ohio Representative Robert Schenck offered it as an amendment to a bill to revise the internal revenue laws, and he explained its purpose:

Naphtha now pays a tax of ten cents a gallon, while illuminating oil pays a tax of twenty cents a gallon. The consequence is that naphtha, being a cheap article, is mixed with illuminating oil, and people, unconscious of the fact they are buying a different article, purchase this fraudulent article, for it is such, a mixture almost as explosive as gunpowder.²³⁰

It made sense to keep the tax on naphtha low, as it was a useful article; but Congress should do something to combat the temptation to mix it with illuminating oils, which endangered the public safety.²³¹

Schenck said nothing to identify the source of Congress's power, and no one in either House raised the question.²³² The Supreme Court unceremoniously struck down the law in 1870. There was no reason, wrote Chief Justice Salmon P. Chase, to think that the naphtha provision was regarded as a means to promote the collection of taxes, and Congress had no power over purely intrastate commerce:

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.²³³

That looks right to me, and thus one of the rare efforts of the Thirty-ninth Congress to legislate on matters unconnected with the war and its consequences ended in ignominious failure. No one, however, could dismiss as inconsequential a Congress that enacted the Civil Rights and Reconstruction Acts and proposed the Fourteenth Amendment. And to ensure that it could continue to pursue its agenda without interruption, Congress also adopted a statute providing that thenceforth it would meet after elections on the fourth of

²³⁰ Cong Globe, 39th Cong, 2d Sess 1260 (Feb 14, 1867).

²³¹ Id.

²³² The Senate amended the bill to move the provision to another section, but without discussion of the merits. See id at 1914, 1920 (Feb 28, 1867).

²³³ *United States v Dewitt*, 76 US (9 Wall) 41, 43–44 (1869).

March as well as in December; the new Congress would convene the day after its predecessor adjourned.²³⁴

And with that we have completed our survey of the work of the Thirty-ninth Congress.

II. THE ORDEAL OF PRESIDENT JOHNSON

A. The Unfinished Agenda

1. Fine tuning.

In obedience to its own recent command, Congress met on March 4, 1867, just after its predecessor had adjourned. No sooner had the legislators convened than they turned their attention to repairing the Reconstruction Act they had adopted only a few days before, for in their haste to get something on the books, they had neglected to provide machinery for establishing the new state governments the statute envisioned.²³⁵

By March 23, the supplemental bill became law. It provided in some detail for registration of qualified voters, election of convention delegates (if the people voted to hold a convention), and submission of the resulting constitution to the voters for approval—all under the watchful eye of the governing military authority. If Congress was satisfied that the constitution reflected the people's will and conformed to the first Reconstruction Act, the state would once again be entitled to representation.²³⁶

Several members raised constitutional objections to the supplemental bill, and President Johnson vetoed it.²³⁷ Most of the complaints,

²³⁴ See An Act to Fix the Times for the Regular Meetings of Congress § 1, 14 Stat 378, 378 (Jan 22, 1867). See also US Const Art I, § 4 (“The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.”). This provision was changed by the Twentieth Amendment. See US Const Amend XX, § 2. One may argue, I suppose, that in providing for an *additional* session, Congress was not appointing a “different day” within the clause just quoted but was providing for a special session, which Article II, § 3 authorizes the president to call. See US Const Art II, § 3. Be that as it may, President Johnson signed the bill, although as we know, he was never reluctant to veto legislation on constitutional grounds.

²³⁵ See Cong Globe, 40th Cong, 1st Sess 17 (Mar 7, 1867) (Rep Kelley), 49–50 (Mar 11, 1867) (Sen Sumner), 52 (Sen Sherman), 63 (Rep James Wilson). At least one early observer described the omission as intentional. See Dewitt, *Impeachment and Trial* at 211–12 (cited in note 213).

²³⁶ See An Act Supplementary to an Act Entitled “An Act to Provide for the More Efficient Government of the Rebel States,” Passed March Second, Eighteen Hundred and Sixty-seven, and to Facilitate Restoration §§ 1–5, 15 Stat 2, 2–4 (Mar 23, 1867).

²³⁷ See Andrew Johnson, *Veto Message to the House of Representatives* (Mar 23, 1867), in 6 Richardson 531, 533 (cited in note 6) (arguing that the bill's universal male suffrage requirement meant that the Southern states would “have no constitution except as may be arbitrarily dictated by Congress”).

however, had been made and dismissed when the earlier bill was under consideration. Thus Johnson repeated his conviction that the states already had republican governments, Representative Marshall and Senator Hendricks denied that Congress could dictate Negro suffrage, and Marshall insisted that the first Reconstruction Act was unconstitutional.²³⁸ The sole novelty was New York Representative Fernando Wood's suggestion that military conduct of the contemplated elections was inconsistent with the guarantee of republican government.²³⁹ Without quite invoking the Constitution, the President seemed to echo both the old objections and the new:

If ever the American citizen should be left to the free exercise of his own judgment it is when he is engaged in the work of framing the fundamental law under which he is to live. That work is his work, and it can not properly be taken out of his hands. All this legislation proceeds upon the contrary assumption that the people of each of these States shall have no constitution except such as may be arbitrarily dictated by Congress and formed under the restraint of military rule.²⁴⁰

I have earlier indicated my agreement with the arguments that the rebel states already enjoyed republican government and that Congress could not condition readmission to its chambers on the eradication of racial discrimination in voting.²⁴¹ The procedural objection to the role of the army in running the elections (assuming they were justified at all) strikes me as less persuasive. The rebel states were already under military control, and the army's electoral responsibilities were purely ministerial. If republican government was to be guaranteed, someone had to run the electoral machinery; since the federal government was responsible for ensuring that the states were republican, it stands to reason that the process be carried out by federal personnel. The results of the elections remained in the hands of the people.

²³⁸ See *id.* at 533–34 (Johnson); Cong Globe, 40th Cong, 1st Sess 65 (Mar 11, 1867) (Rep Marshall), 169 (Mar 16, 1867) (Sen Hendricks). Senator Sumner proposed that the bill be amended to provide for public education as well. *Id.* Fessenden suggested that the justification for requiring universal suffrage was to ensure republican government. See *id.* at 50–51 (Mar 11, 1867). Morton countered that education too was essential to a republican state. See *id.* at 69 (Mar 12, 1867). Sumner's amendment failed by a tie vote. See *id.* at 165–66, 168, 170 (Mar 16, 1867).

²³⁹ See Cong Globe, 40th Cong, 1st Sess 62 (Mar 11, 1867). Without calling the bill's plan unconstitutional, Senator Fessenden, on grounds of popular sovereignty, urged that no conventions be held until the existing governments requested them. See *id.* at 96 (Mar 14, 1867). Senator Trumbull responded that the provisional governments were not representative, see *id.* at 110 (Mar 15, 1867), Senator Stewart said they were controlled by former rebels who would never ask for a convention, see *id.* at 111, and Fessenden's amendment was rejected, see *id.* at 118.

²⁴⁰ See Johnson, *Veto Message* (Mar 23, 1867), in 6 Richardson at 533 (cited in note 6).

²⁴¹ See Part I.E.

The President's veto was quickly overridden, and the second Reconstruction Act became law.²⁴² Only three months elapsed before Congress enacted a third one, over yet another veto.²⁴³

The impetus for this latest law came from a pair of opinions by Attorney General Henry Stanbery narrowly interpreting the first two Reconstruction Acts, especially with regard to military authority.²⁴⁴ The first section of the new statute declared that the earlier provisions meant precisely what they said: that the existing governments in ten rebel states "were not legal state governments" and that they were "subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress."²⁴⁵ Section 2 expressly empowered military commanders (subject to review by the general of the army) to suspend or remove any state officer and to provide for the performance of his duties either "by the detail of some competent officer or soldier of the army, or by the appointment of some other person, and to fill vacancies occasioned by death, resignation, or otherwise."²⁴⁶

Sections 5 and 6 dealt with the question of voter eligibility. Contrary to the Attorney General's opinion, the willingness of an applicant to take the required loyalty oath was not to be conclusive; the registration board was explicitly authorized to determine for itself whether he was entitled to vote.²⁴⁷ In addition, it was enough for disqualification that a prospective voter had held state office before participating in the rebellion, "whether he has taken an oath to support the Constitution of the United States or not," as the Attorney General

²⁴² See Cong Globe, 40th Cong, 1st Sess 303, 314–15 (Mar 23, 1867).

²⁴³ See An Act Supplementary to an Act Entitled "An Act to Provide for the More Efficient Government of the Rebel States," Passed on the Second Day of March, Eighteen Hundred and Sixty-seven, and the Act Supplementary thereto, Passed on the Twenty-third Day of March, Eighteen Hundred and Sixty-seven, 15 Stat 14 (July 19, 1867). For the veto message, see Andrew Johnson, *Veto Message to the House of Representatives* (July 9, 1867), in 6 Richardson 536 (cited in note 6).

²⁴⁴ See *The Reconstruction Acts*, 12 Op Atty Gen 141 (May 24, 1867) (Henry Stansbery, AG); *The Reconstruction Acts*, 12 Op Atty Gen 182 (June 12, 1867) (Henry Stansbery, AG). See also Cong Globe, 40th Cong, 1st Sess 523 (July 9, 1867) (Sen Trumbull) ("The necessity for this legislation grows entirely out of what is conceived to be a misconstruction of the reconstruction acts passed at the former session of Congress.").

²⁴⁵ An Act Supplementary to an Act Entitled "An Act to Provide for the More Efficient Government of the Rebel States" § 1, 15 Stat at 14.

²⁴⁶ Id § 2, 15 Stat at 14. The two following sections gave the same powers of appointment and removal to the general of the army and ratified removals and appointments already made. See id §§ 3–4, 15 Stat at 15. The Attorney General had denied the existence of any such powers. See *The Reconstruction Acts*, 12 Op Atty Gen at 189 (cited in note 244).

²⁴⁷ Contrast An Act Supplementary to an Act Entitled "An Act to Provide for the More Efficient Government of the Rebel States" § 5, 15 Stat at 15, with *The Reconstruction Acts*, 12 Op Atty Gen at 201 (cited in note 244).

had said he must have done.²⁴⁸ Finally, the state offices in question were declared to include “all civil offices created by law for the administration of any general law of a State, or for the administration of justice”—evidently embracing municipal officers, whom the Attorney General had said were excluded.²⁴⁹ As a last slap at the parsimonious legal adviser, § 10 provided that “[n]o district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.”²⁵⁰

The registration provisions of the third law significantly restricted the pool of eligible voters, but they raised no new constitutional questions. The serious problem of Congress’s power to supplant state authority had been resolved before and was agitated again.²⁵¹ The only new issue of constitutional dimension concerned the appointment of officers by the generals.

President Johnson put his finger on the difficulty in his veto message, invoking the plain provisions of Article II:

The power of appointment of all officers of the United States, civil or military, where not provided for in the Constitution, is vested in the President, by and with the advice and consent of the Senate, with this exception, that Congress “may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments.” But this bill, if these are to be considered inferior officers within the meaning of the Constitution, does not provide for their appointment by the President alone, or by the courts of law, or by the heads of Departments, but vests the appointment in one subordinate executive officer, subject to the approval of another

²⁴⁸ Contrast An Act Supplementary to an Act Entitled “An Act to Provide for the More Efficient Government of the Rebel States” § 6, 15 Stat at 15, with *The Reconstruction Acts*, 12 Op Atty Gen at 203 (cited in note 244).

²⁴⁹ Contrast An Act Supplementary to an Act Entitled “An Act to Provide for the More Efficient Government of the Rebel States” § 6, 15 Stat at 15, with *The Reconstruction Acts*, 12 Op Atty Gen at 203 (cited in note 244).

²⁵⁰ An Act Supplementary to an Act Entitled “An Act to Provide for the More Efficient Government of the Rebel States” § 10, 15 Stat at 16. President Johnson thought this provision would authorize military appointees to ignore judicial orders, see Johnson, *Veto Message* (July 9, 1867), in 6 Richardson at 539–40 (cited in note 6), but the context makes this literal reading unconvincing; the section was obviously aimed at the Attorney General.

²⁵¹ See Part I.E. See also Cong Globe, 40th Cong, 1st Sess 537 (July 9, 1867) (Rep Brooks), 628 (July 13, 1867) (Sen Davis); Johnson, *Veto Message* (July 9, 1867), in 6 Richardson at 536–38 (cited in note 6).

subordinate executive officer. . . . [T]his provision of the bill is . . . opposed to the Constitution.²⁵²

The sole response to this argument was given by Illinois Senator Richard Yates:

Somebody has been appointed to perform the duties of the office of Governor. Why? Because he is Governor? No. Congress cannot appoint a Governor. He is appointed simply to perform temporarily the duties of the office of Governor. He is the mere agent of Congress, or at least of the persons appointed by Congress to discharge those duties.²⁵³

This distinction looks pretty flimsy until one recalls that when the Senate is in session, Article II requires the consent of that body to fill certain offices and that ever since 1795, the president alone had nevertheless been permitted by statute to assign individuals to perform their attendant duties.²⁵⁴ Moreover, it was not altogether clear that individuals assigned by the commanders would be officers of the United States rather than of the states whose laws they were to administer. Representative Wood said they would, because federal officers would appoint them;²⁵⁵ but it could plausibly be argued that the decisive factor was the nature of their duties, not the source of their authority—as the House had concluded in 1847 in holding that military volunteers appointed by the states were officers of the United States and disqualified from sitting in Congress by Article I, § 6.²⁵⁶

2. Restoration et al.

In July 1868, Congress again extended the life of the Freedmen's Bureau.²⁵⁷ In March of the preceding year, it had authorized the secretary of war to expend the Bureau's funds to prevent the starvation of "any and all classes of destitute or helpless persons" in Southern states

²⁵² Johnson, *Veto Message* (July 9, 1867), in 6 Richardson at 543 (cited in note 6). See also US Const Art II, § 2; Cong Globe, 40th Cong, 1st Sess 540 (July 9, 1867) (Rep Wood). Even so stalwart a Republican as Senator Roscoe Conkling was troubled by this argument. See *id* at 528.

²⁵³ Cong Globe, 40th Cong, 1st Sess 534 (July 9, 1867).

²⁵⁴ See, for example, US Const Art II, § 2, cl 3; An Act to Amend the Act Intituled "An Act Making Alterations in the Treasury and War Departments," 1 Stat 415 (Feb 13, 1795).

²⁵⁵ See Cong Globe, 40th Cong, 1st Sess 540 (July 9, 1867).

²⁵⁶ See Currie, *Democrats and Whigs* at 247–48 (cited in note 2) (describing how two elected representatives were denied seats in 1847 because they had accepted state appointments as volunteer officers to fight in the Mexican War). President Johnson thought that if the individuals were state officers it was obvious the commanders could not appoint them, see Johnson, *Veto Message* (July 9, 1867), in 6 Richardson at 543 (cited in note 6), but this objection seemed to evaporate once it was decided that the army could govern the former Confederate states.

²⁵⁷ See An Act to Continue the Bureau for the Relief of Freedmen and Refugees, and for Other Purposes § 1, 15 Stat 83, 83 (July 6, 1868).

“where a failure of the crops and other causes have occasioned widespread destitution.”²⁵⁸ Senator Lot Morrill of Maine had inquired where Congress got authority to feed the starving,²⁵⁹ and Wisconsin Senator Timothy Howe had said it was no more appropriate to do so than to provide for the victims of a recent fire in Portland, Maine.²⁶⁰ Senator Hendricks had countered that Congress had the same right to help others as it had to provide for the freedmen,²⁶¹ and Trumbull had added that the army fed prisoners of war.²⁶² Morrill had retorted that it was one thing to ameliorate the consequences of the war and quite another to give relief for crop failure.²⁶³ The war powers sustained the former, he implied; they could not support the latter. But Trumbull had already declared that crop failure too was a consequence of the war.²⁶⁴ To the extent that was true, it would not be necessary to take refuge in broad construction of the power to tax to promote the general welfare.²⁶⁵

In March 1869, Congress extended the statute of limitations for most federal crimes committed in rebel states during the war.²⁶⁶ Federal courts in those states were shut down at the time, Representative Bingham explained; crimes would go unpunished unless the statute was extended. “[T]he principle involved in the bill,” he added, “is sustained by every writer upon law accepted as authority in America and sustained by the precedents, so far as I know, of every State in this Union.”²⁶⁷ And indeed no one in Congress questioned either the constitutionality or the expediency of the bill; it passed both Houses without any debate save Bingham’s brief explanation.²⁶⁸

Of course the constitutional issue was not quite that simple. There was first of all the question whether the war powers had expired with the conflict itself, but the Reconstruction Acts had rightly established they had not, and the Supreme Court would confirm this conclusion in upholding a comparable statute applicable to civil cases in 1870.²⁶⁹

²⁵⁸ A Resolution for the Relief of the Destitute in the Southern and Southwestern States, 15 Stat 28, 28 (Mar 30, 1867).

²⁵⁹ See Cong Globe, 40th Cong, 1st Sess 41 (Mar 8, 1867).

²⁶⁰ See id at 45 (Mar 9, 1867). See also id at 234 (Mar 20, 1867) (Rep Trump) (denying Congress’s right to give away money in the Treasury), 235 (Rep Wood) (denying Congress’s power to spend for charity).

²⁶¹ See id at 45 (Mar 9, 1867). See also id at 89 (Mar 13, 1867) (Rep Bingham).

²⁶² See id at 41 (Mar 9, 1867).

²⁶³ See id.

²⁶⁴ See id.

²⁶⁵ See US Const Art I, § 8, cl 1.

²⁶⁶ See An Act Relating to the Time for Finding Indictments in the Courts of the United States in the Late Rebel States, 15 Stat 340 (Mar 3, 1869).

²⁶⁷ Cong Globe, 40th Cong, 3d Sess 1821 (Mar 2, 1869).

²⁶⁸ See id at 293 (Jan 12, 1869) (Senate), 1821 (Mar 2, 1869) (House).

²⁶⁹ See *Stewart v Kahn*, 78 US (11 Wall) 493, 507 (1870) (“[T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the

More troublesome was the difficulty posed by Article I, § 9, which forbade the enactment of ex post facto laws, for the bill would apply to offenses committed prior to its enactment. Bingham seems to have alluded to this problem and cryptically dismissed it: “It is the exercise of legislative power simply over the law of the forum, and on that question there is not a division of opinion among the jurists of America.”²⁷⁰ By this, he appeared to mean that the question was one of procedure and that the ban on retroactivity did not apply.²⁷¹

The classic definition of ex post facto laws, however, encompasses certain matters of procedure. In *Calder v Bull*,²⁷² for example, Justice Samuel Chase defined ex post facto laws to include those that retroactively “create or aggravate the crime; or [i]ncrease the punishment, or change the rules of evidence, for the purpose of conviction.”²⁷³ If it is unjust to alter the rules of evidence retroactively, it may be equally unjust to extend the time during which one may be prosecuted and convicted. On the other hand, Blackstone convincingly told us that the reason for avoiding ex post facto legislation was to prevent unfair surprise:

[I]t is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.²⁷⁴

This rationale appears inapplicable to our case: it seems unlikely that a malefactor will decide to commit what has already been declared a crime in reliance on a short statute of limitations.²⁷⁵

power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.”)

²⁷⁰ Cong Globe, 40th Cong, 3d Sess 1821 (Mar 2, 1869).

²⁷¹ See, for example, *Duncan v State*, 152 US 377, 382–83 (1894) (holding that procedural changes that “leav[e] untouched all the substantial protections . . . [of] the existing law” are not ex post facto laws).

²⁷² 3 US (3 Dall) 386 (1798).

²⁷³ *Id* at 391.

²⁷⁴ William Blackstone, 1 *Commentaries on the Laws of England* *46 (Chicago 1979). See also *Miller v Florida*, 482 US 423, 431 (1987) (stressing the centrality of fair notice).

²⁷⁵ The Supreme Court, adverting obliquely to the distinct problem of fair notice of the need to preserve evidence, has recently struck down, over four dissents, on ex post facto grounds a statute extending the time for prosecution when the extension was enacted after the original period had already expired. See *Stogner v California*, 539 US 607, 615 (2003) (assimilating, implausibly, the case to Justice Chase’s second category in *Calder*, namely laws retroactively increasing the punishment for crime). Contrast this with *United States v Chandler*, 66 F3d 1460, 1467–68 (8th Cir 1995) (“There was no violation of the *ex post facto* clause either facially or as applied . . . because the amendment occurred prior to the running of the original period.”). It may be, however, that the 1869 law can be justified even as applied to cases in which the limitation period had expired before its adoption on the ground that it had been implicit from the beginning that the statute would be tolled while the courts were closed. See *Hanger v Abbott*, 73

The big event of the Fortieth Congress in the field of reconstruction, however, was the virtual completion of the reconstruction process in seven of the former Confederate states.

It began with Arkansas on June 22, 1868. That state, having adopted a republican constitution and ratified the Fourteenth Amendment, was readmitted to representation in Congress on one “fundamental condition”: that the state constitution never be amended to deny black citizens the right to vote.²⁷⁶ President Johnson vetoed the bill on the grounds that it presupposed the validity of the Reconstruction Acts, that no legislation was necessary to entitle a state to seats in Congress, and that the condition the statute would impose was unconstitutional.²⁷⁷ Congress overrode him, and three days later it passed a second statute providing that North Carolina, South Carolina, Georgia, Florida, Alabama, and Louisiana would be entitled to representation, on the same condition, as soon as they ratified the Fourteenth Amendment.²⁷⁸ Once more, Congress repassed the bill over the President’s veto.²⁷⁹

Johnson was right again. The Reconstruction Acts were unconstitutional, the Constitution itself gave states the right to representation, and, among other things, the condition offended the equal-footing doctrine, which the Supreme Court has since said enjoys constitutional rank:²⁸⁰ other states retained the right to amend their own constitutions.²⁸¹

Within a month, all six of the states in question ratified the Amendment and became, by the terms of the statute, entitled to rep-

US (6 Wall) 532, 541–42 (1867) (“Peace restores the right and the remedy, and as that cannot be if the limitation continues to run . . . it necessarily follows that the operation of the statute [of limitations] is also suspended.”); *Stogner*, 539 US at 620 (discussing *Stewart* and noting that “the Court could have seen the relevant statute as ratifying a pre-existing expectation of tolling due to wartime exigencies, rather than as extending limitations periods that had truly expired”).

²⁷⁶ An Act to Admit the State of Arkansas to Representation in Congress, 15 Stat 72, 72 (June 22, 1868).

²⁷⁷ See Andrew Johnson, *Veto Message to the House of Representatives* (June 20, 1868), in 6 Richardson 648, 648–50 (cited in note 6).

²⁷⁸ See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, 15 Stat 73 (June 25, 1868). Georgia was subjected to a further condition, the excision of two provisions of its constitution identified only by their section and subdivision numbers. See *id.* at 73. Professor Foner has said the problem provisions dealt with repudiation of pre-1865 debts. See Foner, *Reconstruction* at 338 (cited in note 7).

²⁷⁹ For the veto message, see Andrew Johnson, *Veto Message to the House of Representatives* (June 25, 1868), in 6 Richardson 650 (cited in note 6).

²⁸⁰ See *Coyle v Smith*, 221 US 559, 579 (1911) (striking down a law that forbade Oklahoma from moving its capital as a condition of admission to the Union). Even such a staunch Republican as Senator Lyman Trumbull accepted this argument. See Cong Globe, 40th Cong, 2d Sess 2602 (May 27, 1868).

²⁸¹ See Johnson, *Veto Message* (June 25, 1868), in 6 Richardson at 651 (cited in note 6) (arguing that the six-state statute “imposes conditions which are in derogation of the equal rights of the States”).

resentation in Congress.²⁸² Senators and representatives from reconstructed Alabama, Arkansas, Florida, Louisiana, and the Carolinas were accordingly seated during June and July of 1868.²⁸³

The case of Georgia was more complex. Georgia representatives were admitted to the House on July 25,²⁸⁴ and they were seated again when Congress met for its third session in December.²⁸⁵ Georgia's senators, however, were never sworn in during the Fortieth Congress. When the credentials of Joshua Hill were presented on December 7, Missouri Senator Charles Drake objected:

If I understand the position of matters correctly, after a loyal Legislature had been elected in that State under the reconstruction act of Congress, the white men of the Legislature combined and expelled from their seats all the colored members of the Legislature, thereby placing that body under rebel control. If this be true, then I claim we should not recognize the reconstruction of Georgia as complete.²⁸⁶

Senator Sherman replied that the expulsion had taken place after Mr. Hill's election. Drake's riposte was that Congress's power over the former rebel states was continuing and that the Senate should intervene to preserve the gains made during Reconstruction.²⁸⁷ The matter was referred to the Judiciary Committee,²⁸⁸ which over two dissents embraced Drake's position;²⁸⁹ and that was the last we heard about Georgia senators during the Fortieth Congress.

But that was not the full extent of Georgia's troubles. A presidential election had been held in November of 1868, and Congress was to assemble in joint session in February for the counting of electoral votes. Congress had already (over the veto) renewed its 1865 resolution denying unreconstructed states the right to choose electors.²⁹⁰ That meant

²⁸² See William H. Seward, 15 Stat 708, 708–10 (July 28, 1868) (announcing adoption of the Amendment).

²⁸³ See Cong Globe, 40th Cong, 2d Sess 3389, 3440 (June 23 and 24, 1868, respectively) (Arkansas), 3607, 3655 (June 30 and July 1, 1868, respectively) (Florida), 3764, 4144 (July 6 and 17, 1868, respectively) (North Carolina), 4151, 4216 (July 17 and 18, 1868, respectively) (Louisiana), 4216, 4312–20 (July 18 and 22, 1868, respectively) (South Carolina), 4295, 4459 (July 21 and 25, 1868, respectively) (Alabama). Except in the case of South Carolina, the Senate's action is cited first.

²⁸⁴ See *id* at 4471–72 (July 25, 1868).

²⁸⁵ See Cong Globe, 40th Cong, 3d Sess 6 (Dec 7, 1868).

²⁸⁶ *Id* at 2.

²⁸⁷ See *id*.

²⁸⁸ See *id* at 43 (Dec 10, 1868).

²⁸⁹ See generally S Rep No 40-192, 40th Cong, 3d Sess (Jan 25, 1869).

²⁹⁰ See A Resolution Excluding from the Electoral College Votes of States Lately in Rebellion, Which Shall Not Have Been Reorganized, 15 Stat 257 (July 20, 1868). For the earlier resolution see Currie, 73 U Chi L Rev at 1222–24 (cited in note 1); for President Johnson's *Veto Message to the Senate* of July 20, 1868, see 6 Richardson 651 (cited in note 6).

Mississippi, Virginia, and Texas—and, given the difficulties experienced by Georgia’s purported senators, possibly that state as well.

Congress had also adopted a joint rule requiring rejection of any electoral votes that might be challenged unless both Houses voted to accept them.²⁹¹ Just before the joint session began, however, anticipating a challenge to Georgia’s votes, the House and Senate agreed on a concurrent resolution designed to avoid a decision whether the challenge should be sustained. The solution was that followed in similar cases in the past. If Georgia’s vote did not affect the outcome of the election, the count should be reported in the alternative: if Georgia’s votes were counted the tally would be *X* for candidate *A* and *Y* for *B*; if they were not, one of these figures would be reduced by the number of Georgia’s votes.²⁹²

Objections to counting Georgia’s vote were duly made in joint session. Among them were the assertions that Georgia was not entitled to representation in Congress and that its electors had voted on the wrong day.²⁹³

The two Houses separated to consider the objections. The Senate, pursuant to the concurrent resolution, concluded that objections were not in order, as Georgia’s vote was not decisive.²⁹⁴ The House, ignoring the resolution it had just approved, voted to reject Georgia’s votes.²⁹⁵ When the joint session resumed, Senate President pro tem Benjamin Wade (who presided over the proceedings as the Constitution prescribed²⁹⁶) ruled the challenge out of order and announced the results in accordance with the concurrent resolution, over rambunctious protestations from members of the House:

[I]n either case, whether the votes of the State of Georgia be included or excluded, I do declare that Ulysses S. Grant, of the State of Illinois, having received a majority of the whole number of electoral votes, is duly elected President of the United States for four years, commencing on the 4th day of March, 1869; and that Schuyler Colfax, of the State of Indiana, having received a

²⁹¹ See Cong Globe, 40th Cong, 3d Sess 332 (Jan 13, 1869).

²⁹² See id at 971–72, 978 (Feb 8, 1869). For earlier employment of this formula, see Currie, *Democrats and Whigs* at 273–77 (cited in note 2) (adopting a similar method to consider Wisconsin’s electoral votes in the 1856 presidential election, where Wisconsin electors were unable to meet on the appointed day due to a snowstorm).

²⁹³ See Cong Globe, 40th Cong, 3d Sess 1050 (Feb 10, 1869).

²⁹⁴ See id at 1054.

²⁹⁵ See id at 1059.

²⁹⁶ See US Const Amend XII.

majority of the whole number of electoral votes for Vice President of the United States, is duly elected Vice President.²⁹⁷

House members continued to grumble after the joint session ended, and some attacked the constitutionality of the joint rule, the concurrent resolution, or both.²⁹⁸ Wiser heads urged that Congress pass legislation to clarify the procedure for resolving similar disputes before an election depended on it,²⁹⁹ but it was not to be; and thus Congress would be caught without a plan when the crisis finally occurred.

B. Clipping the Wings of the Court

In 1866, to prevent President Johnson from appointing new judges, Congress had provided that until deaths or resignations reduced the number of Supreme Court Justices from nine to seven, no vacancies on that tribunal should be filled.³⁰⁰ Since there were progressively fewer judges, it was increasingly difficult to muster a quorum; so in December 1867, Senator Trumbull reported a harmless bill to reduce the quorum from six justices to five.³⁰¹

Approved by the Senate in a twinkling,³⁰² the bill went to the House. There the Judiciary Committee reported it with an amendment that would have required a two-thirds vote to strike down an act of Congress.³⁰³

This gambit had been attempted before, in 1823.³⁰⁴ The constitutionality of a supermajority requirement had been thoroughly explored at that time, and the 1868 debate added nothing of importance. Supporters continued to insist that Article III left it to Congress even to specify the number of justices on the Court—as necessary and proper to the functioning of that body, though nobody quite said so.³⁰⁵

²⁹⁷ Cong Globe, 40th Cong, 3d Sess 1062–63 (Feb 10, 1869). The vote was 214–80 if Georgia was counted, 214–71 if it was not. See *id.* The defeated Democrats were Horatio Seymour and Frank Blair.

²⁹⁸ See, for example, *id.* at 1064–67, 1094–97; Cong Globe App, 40th Cong, 3d Sess 171–72 (Feb 13, 1869) (Rep Shellabarger), 190–91 (Rep Bromwell), 201 (Rep McCormick).

²⁹⁹ See, for example, Cong Globe, 40th Cong, 3d Sess 1094 (Feb 11, 1869) (Rep Butler), 1196 (Feb 13, 1869) (Rep Broomall). See also Cong Globe App, 40th Cong, 3d Sess 1220 (Feb 15, 1869) (Rep Bromwell) (proposing a constitutional amendment).

³⁰⁰ See An Act to Fix the Number of Judges of the Supreme Court of the United States, and to Change Certain Judicial Circuits, 14 Stat 209 (July 23, 1866).

³⁰¹ See Cong Globe, 40th Cong, 2d Sess 19 (Dec 4, 1867).

³⁰² See *id.*

³⁰³ See *id.* at 478 (Jan 13, 1868) (Rep James Wilson).

³⁰⁴ See Currie, *The Jeffersonians* at 329–32 (cited in note 2) (describing an 1823 proposed bill to require seven votes in the Supreme Court for “any opinion, which may involve the validity of the laws of the United States, or of the States respectively”).

³⁰⁵ See, for example, Cong Globe, 40th Cong, 2d Sess 482–83 (Jan 13, 1868) (Rep Spalding). See also US Const Art I, § 8, cl 18.

Massachusetts Representative Henry Dawes pointed out that the Constitution expressly empowered Congress to make “regulations” governing the exercise of the Court’s appellate jurisdiction.³⁰⁶ Representative Bingham reminded his colleagues that the 1789 Judiciary Act, by setting the number of justices at six, had itself required a two-thirds vote.³⁰⁷

On the other side, Illinois Democrat Samuel Marshall protested that the amendment would direct judges to uphold a law they believed invalid, although their oath made it their duty to follow the Constitution,³⁰⁸ and added that it would permit Congress to violate the Constitution with impunity.³⁰⁹ The amendment, said Connecticut Representative Richard Hubbard, was an attempt to muzzle the Court with respect to the constitutionality of Reconstruction.³¹⁰

The House adopted the two-thirds amendment and passed the bill.³¹¹ The Senate sent it to committee,³¹² where it died.

That was in January 1868. On February 17, the Supreme Court upheld its jurisdiction in a case called *Ex parte McCordle*.³¹³ On March 12, the House appended to an innocuous Senate bill to eliminate the jurisdictional amount in suits against internal revenue officers an amendment that would repeal an 1867 provision authorizing the Supreme Court to review the decisions of lower federal courts in habeas corpus cases.³¹⁴ Here is the entire House debate on the jurisdiction-stripping proposal:

Mr. Wilson, of Iowa. Will the gentleman from Ohio [Mr. Schenck] yield to me to offer an amendment to this bill?

Mr. Schenck. I will hear the amendment.

Mr. Wilson, of Iowa. I desire to move to amend the bill by adding to it the following:

Sec. 2. And be it further enacted, That so much of the act approved February 5, 1867, entitled “An act to amend an act to

³⁰⁶ See Cong Globe, 40th Cong, 2d Sess 487 (Jan 13, 1868). See also US Const Art III, § 2.

³⁰⁷ See Cong Globe, 40th Cong, 2d Sess 480 (Jan 13, 1868).

³⁰⁸ See id. The 1789 law, Marshall added, had done no such thing. See id at 481.

³⁰⁹ See id at 480. Representative Hubbard argued that just as the jury-trial provisions implied a traditional body of twelve men, Article III’s references to courts implied decision by a simple majority. See id at 486.

³¹⁰ See id.

³¹¹ See id at 489.

³¹² See id at 504 (Jan 14, 1868).

³¹³ 73 US (6 Wall) 318 (1868) (holding that the Supreme Court had appellate jurisdiction over circuit court review of a petition for a writ of habeas corpus to a military district commander in the South).

³¹⁴ See Cong Globe, 40th Cong, 2d Sess 1859–60 (Mar 12, 1868).

establish the judicial courts of the United States, approved September 24, 1789,” as authorizes an appeal from the judgment of a circuit court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby, repealed.

Mr. Schenck. I am willing to have the amendment received, and now I call the previous question on the bill and amendment.

The previous question was seconded and the main question ordered.

The amendment of Mr. Wilson, of Iowa, was agreed to.

The bill, as amended, was then read the third time, and passed.³¹⁵

Later that day, back in the Senate, Pennsylvania Democrat Charles Buckalew, correctly surmising that this was “a very important amendment,” asked for an explanation. All he got was the following:

Mr. Williams. The amendment is one that has been adopted by the House of Representatives and explains itself. It provides, in regard to a particular jurisdiction conferred by an act passed in 1867, that so much of that act as confers that jurisdiction shall be repealed. It leaves the law of 1789 in full force and effect.³¹⁶

Yes, replied Buckalew, but what was the jurisdiction conferred by the 1867 statute, and why should it be withdrawn? There was no answer. The Senate rejected Buckalew’s request to postpone the subject until the next day and concurred in the amendment by a vote of 32-6.³¹⁷ And thus, with no explanation whatsoever, the Supreme Court was denied jurisdiction to review a pending case in which the constitutionality of congressional reconstruction was at stake.

When they discovered what the majority had done, defenders of the Court protested the underhanded and deceitful manner in which the amendment had been hurried through Congress.³¹⁸ Maine Representative James G. Blaine gleefully responded that those who objected should have been more alert.³¹⁹ Robert Schenck of Ohio added that the Court had been usurping the power to decide “political” questions

³¹⁵ *Id.*

³¹⁶ *Id.* at 1847.

³¹⁷ See *id.*; An Act to Amend an Act Entitled “An Act to Amend the Judiciary Act, Passed the Twenty-fourth of September, Seventeen Hundred and Eighty-nine, 15 Stat 44 (Mar 27, 1868).

³¹⁸ See, for example, Cong Globe, 40th Cong, 2d Sess 1881 (Mar 14, 1868) (Rep Boyer).

³¹⁹ See *id.* at 1882.

(he gave no examples) and declared it his solemn duty “to clip the wings of that court.”³²⁰

Indeed, said Representative Wilson a few days later, his amendment had been intended to reach the *Ex parte McCardle* case and others like it. It had been rumored that the Court was preparing to go outside the case (which involved the military trial of a civilian) and invalidate Reconstruction in toto; it was Congress’s obligation to take its jurisdiction away.³²¹ He did not identify the source of Congress’s power to do so.

Remarkably, no one else did either in the course of this debate. The Supreme Court did when it upheld the repealing statute and dismissed the appeal in *Ex parte McCardle*: Article III gives the Supreme Court appellate jurisdiction over certain classes of cases “with such exceptions . . . as the Congress shall make.”³²²

On its face this provision makes the case for the constitutionality of repeal seem easy, but it was not. President Johnson, who had ten days to think about it, went to the heart of the difficulty when he returned the bill to the Senate without his approval. To secure to the people “the blessings of liberty” was one of the objects of the Constitution as stated in the preamble. To protect that liberty, the Constitution guaranteed, among other things, freedom from unreasonable searches or seizures and restrictions on the suspension of habeas corpus. To enforce these “inestimable privileges,” the Supreme Court was given jurisdiction to review lower court decisions in habeas cases. To remove that jurisdiction, Johnson argued, was “not in harmony with the spirit and intention of the Constitution”:

It can not fail to affect most injuriously the just equipoise of our system of Government, for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation.³²³

Senator Hendricks picked up this theme in the brief debate over whether to override the President’s veto. The jurisdiction-stripping proposal, he said, was nothing less than an attempt “to strike down the judiciary of the country.”

³²⁰ Id at 1883–84.

³²¹ See id at 2061–62 (Mar 21, 1868).

³²² US Const Art III, § 2. See also *Ex parte McCardle*, 74 US (7 Wall) at 514. Senator Frelinghuysen had adverted to this provision in the course of an earlier and unrelated debate. See Cong Globe, 40th Cong, 2d Sess 791 (Jan 28, 1868).

³²³ Andrew Johnson, *Veto Message to the Senate of the United States* (Mar 25, 1868), in 6 Richardson 646, 647 (cited in note 6).

Does not the Constitution contemplate that all legislation shall undergo the test of the Supreme Court of the United States? Marshall thought so; Taney thought so. . . . I regard it as very serious when we propose to strip any one of the departments of the Government of its legitimate power with a view to our exercising power without restraint. I believe the safety of the people, the liberty of the people, requires that one department of the Government shall be a check upon the other; that the legislative shall check the executive, and that the judiciary shall check both the legislative and the executive within the sphere allowed by the Constitution.³²⁴

Reverdy Johnson of Maryland expounded further on the importance of judicial review. Without jurisdiction over federal question cases, he argued, “the Government would have ended long since.”³²⁵ It was the Supreme Court that so far had kept other branches of government “within their constitutional orbits.”³²⁶ De Tocqueville had written that judicial review was “one of the most powerful barriers which has ever been devised against the tyranny of political assemblies”;³²⁷ Story and Kent had assured us that if it had not been for the Supreme Court, “the Constitution would be a dead letter.”³²⁸

Supporters of the bill were not converted; they bulldozed the veto by wide margins.³²⁹

But the argument against the stripping bill was powerful indeed: the innocuous-looking authority to make “exceptions” to the Court’s appellate jurisdiction should not be construed, as Professor Henry

³²⁴ Cong Globe, 40th Cong, 2d Sess 2118 (Mar 26, 1868).

³²⁵ Id at 2121.

³²⁶ Id.

³²⁷ Cong Globe, 40th Cong, 2d Sess 2121 (Mar 26, 1868), quoting Alexis De Toqueville, *Democracy in America* 83 (Oxford 1953) (Henry Steele Commager, ed) (Henry Reeve, trans).

³²⁸ Cong Globe, 40th Cong, 2d Sess 2121 (describing the conclusions of “approved Commentaries upon [the] Constitution”). See also Senator Johnson’s ringing defense of judicial review in an unrelated Reconstruction debate, insisting, on the basis of sources ranging from the opinions in *Hayburn’s Case*, 2 US (2 Dall) 409 (1792), and *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), through Alexander Hamilton in *The Federalist* to Kent and Story, that judicial review was essential to the enforcement of constitutional limitations. See Cong Globe, 40th Cong, 2d Sess 771–73 (Jan 27, 1868).

Representative Woodward also argued that, however broad the legislative authority with respect to future litigation, Congress could not deprive the Court of jurisdiction in a pending case. See id at 2062 (Mar 21, 1868). Wilson replied that the Supreme Court had already held that statutes curtailing jurisdiction applied to pending cases, see id at 2170 (Mar 27, 1868), and the Court would reaffirm this conclusion in *Ex parte McCordle*, 74 US (7 Wall) at 514.

³²⁹ See Cong Globe, 40th Cong, 2d Sess 2128 (Mar 26, 1868) (Senate), 2170 (Mar 27, 1868) (House).

Hart would later put it, “to destroy the essential role of the Supreme Court in the constitutional plan.”³³⁰

Whether the law upheld in *Ex parte McCardle* was really subject to this objection is another question. As Hart himself acknowledged, lower federal courts were still open in habeas corpus cases,³³¹ and the *Ex parte McCardle* opinion suggested (as the Court later held) that there might be an alternative route to the Supreme Court.³³² Suffice it to say that by restricting the Court’s jurisdiction, Congress succeeded in foiling yet another attempt to challenge the validity of the reconstruction laws, and in so doing it asserted authority to insulate its own enactments to a considerable degree from the salutary institution of judicial review.³³³

C. Impeachment

Andrew Johnson was not a temperate man. Nor was he the least bit sympathetic toward congressional plans for Reconstruction. It was not long before influential members of Congress decided it would be best if he returned to private life.

Unfortunately for them, the United States did not have a parliamentary system in which a president could be deposed by a simple majority vote of no confidence. The only available weapon was impeachment for and conviction of “treason, bribery, or other high crimes and misdemeanors,” which required an accusation by the House of

³³⁰ Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1365 (1953).

³³¹ See *id.*

³³² See *Ex parte McCardle*, 74 US (4 Wall) at 515; *Ex parte Yerger*, 75 US (8 Wall) 85, 103–05 (1869) (holding that the 1868 Act did not strip the Court of its appellate jurisdiction over habeas corpus which had been granted prior to the 1867 Act).

³³³ For earlier unsuccessful efforts to test the constitutionality of congressional reconstruction, see *Mississippi v Johnson*, 71 US (4 Wall) 475, 501 (1867) (refusing to consider a request for an injunction prohibiting enforcement of the Reconstruction Acts, reasoning that “this court has no jurisdiction of a bill to enjoin the President in his official duties”); *Georgia v Stanton*, 73 US (6 Wall) 50, 77 (1868) (holding that the Court lacked subject matter jurisdiction over a suit seeking to enjoin enforcement of the Reconstruction Acts). For fuller treatment of the decisions noted in this Part, see Currie, *The First Hundred Years* at 299–307 (cited in note 143). See especially *id.* at 305 (“[E]ven stronger than *Marbury*’s presumption that the Framers did not mean to leave Congress as sole judge of its own powers is the presumption that they did not both create a judicial check and render it avoidable at the whim of Congress.”).

Not long after stripping the Supreme Court of its jurisdiction over *Ex parte McCardle*, Congress, without explanation, provided for the removal from state to federal court of actions against common carriers for damage or loss occasioned by the Civil War. See An Act in Relation to the Appointment of Midshipmen from the Lately Reconstructed States, 15 Stat 267 (Jan 30, 1869). Why Congress thought such cases arose under federal law, as it apparently concluded, is beyond me.

Representatives and a two-thirds vote in the Senate.³³⁴ It was accordingly to the impeachment provisions that Johnson's enemies turned.³³⁵

1. Failure in the House.

As early as January 1867, before the first Reconstruction Act was adopted, no fewer than three resolutions were introduced in the House urging that President Johnson be impeached.³³⁶ The most detailed of the three was that submitted by Representative James Ashley of Ohio, which specified the crimes and misdemeanors he attributed to the President:

I do impeach Andrew Johnson, Vice President and acting President of the United States,³³⁷ of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law:

In that he has corruptly used the appointing power;

In that he has corruptly used the pardoning power;

In that he has corruptly used the veto power;

In that he has corruptly disposed of public property of the United States;

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors.³³⁸

This resolution was shipped off to the Judiciary Committee,³³⁹ which heard reams of evidence and took until November to report.³⁴⁰ When

³³⁴ US Const Art I, §§ 2, 3 and Art II, § 4.

³³⁵ There are at least four full-length books devoted to the Johnson impeachment. See generally Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (Norton 1999); Dewitt, *Impeachment and Trial* (cited in note 213); Milton Lomask, *Andrew Johnson: President on Trial* (Farrar, Strauss and Giroux 1960); Gene Smith, *High Crimes and Misdemeanors: The Impeachment and Trial of Andrew Johnson* (Morrow 1977). The ones to read are those of Benedict and Dewitt. For briefer treatments, see Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* ch 7 (Illinois 1992); Raoul Berger, *Impeachment: The Constitutional Problems* ch IX (Harvard 1973). And yes, Chief Justice William Rehnquist wrote at some length about the Johnson impeachment in his *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (Morrow 1992).

³³⁶ See Cong Globe, 39th Cong, 2d Sess 319–20 (Jan 7, 1867) (Reps Loan, Kelso, and Ashley).

³³⁷ This insulting formulation, which harks back to a dispute that had occurred on the death of President Harrison, was later dropped because, as Representative Boutwell reminded the House, only when the president was tried would the chief justice preside. See Cong Globe, 40th Cong, 2d Sess 1544 (Feb 29, 1868); US Const Art I, § 3, cl 6; Currie, *Democrats and Whigs* at 177–81 (cited in note 2) (describing the debate over whether Vice President Tyler had obtained the “office” or merely the “powers and duties” of the presidency when President Harrison died).

³³⁸ Cong Globe, 39th Cong, 2d Sess 320 (Jan 7, 1867).

³³⁹ Id at 321.

it did it recommended that the President be impeached—but only by a vote of 5-4.

The crux of Ashley's indictment, the majority declared, was "*usurpation of power*, which involves, of course, a violation of law."

And here it may be remarked that perhaps every great abuse, every flagrant departure from the well-settled principles of government, which has been brought home to its present administration, whether discovering itself in special infractions of its statutes, or in the profligate use of the high powers conferred by the Constitution on the President, or revealing itself more manifestly in the systematic attempt to seize upon its sovereignty, and disparage and supersede the great council to which that sovereignty has been intrusted [sic], is referrible [sic] to the one great overshadowing purpose of reconstructing the shattered governments of the rebel States in accordance with his own will, in the interests of the great criminals who carried them into the rebellion, and in such a way as to deprive the people of the loyal States of all chances of indemnity for the past or security for the future, by pardoning their offences, restoring their lands, and hurrying them back—their hearts unrepentant, and their hands yet red with the blood of our people—into a condition where they could once more embarrass and defy, if not absolutely rule the government which they had vainly endeavored to destroy.³⁴¹

In other words, President Johnson had had the gall to attempt to reconstruct the former Confederate states on his own.³⁴²

The remainder of the report was a bill of particulars nearly sixty pages long. It accused the President, among other things, of having set up new governments in the former Confederate states; of having created offices, filled them, and paid those who held them, all without senatorial or congressional approval; of having returned to their original owners certain railroads seized by the government; of having granted indiscriminate pardons, employed the veto excessively, obstructed the execution of laws, and abused the appointing power by removing officers on political grounds and reappointing nominees

³⁴⁰ See generally Impeachment of the President, HR Rep No 40-7, 40th Cong, 1st Sess (Nov 25, 1867).

³⁴¹ Id at 2. Johnson's great offense, Representative Boutwell told the House, was that he had abused his powers in order to reconstruct Southern governments in the interest of the rebellion. Cong Globe App, 40th Cong, 2d Sess 60 (Dec 6, 1867).

³⁴² "In a word, the dominating motive of the opposition to the Lincoln-Johnson plan of reconstruction was the conviction that its success would wreck the Republican party, restore the Democrats to power and bring back the days of Southern supremacy." Dewitt, *Impeachment and Trial* at 23 (cited in note 213).

after the Senate had rejected them; of having employed federal workers for electioneering purposes while they were being paid a government salary; of having tried to dissuade the people of the rebellious states from accepting the terms of congressional reconstruction; of having encouraged a bloody riot in New Orleans; and of having endeavored to bring Congress itself “into odium and contempt.”³⁴³

It may well be doubted whether any impeachable acts were shown. The dissenting members of the committee thought not. Among other things, they insisted, crimes were violations of penal laws; both crimes and misdemeanors meant indictable offenses.³⁴⁴ This conclusion, they argued, followed from the words of the Constitution itself: “[c]rimes” and “[m]isdemeanors” were “terms of art, and we have no authority for expounding them beyond their true technical limits.”³⁴⁵ Other constitutional provisions, the dissenters contended, confirmed this interpretation. Article I provided that a party impeached and convicted would still be subject to indictment and punishment in the ordinary courts; “[h]ow can this be if his offence be not an indictable crime?” Article II empowered the president to pardon offenses against the United States “except in cases of impeachment”; Article III, with the same exception, required a jury trial of all crimes. Both of these clauses, the dissenters suggested, implied that impeachable offenses were indeed crimes in the narrow technical sense—as in their view the term “high crimes and misdemeanors” already made clear.³⁴⁶ The principal dissent went on to maintain that (with the exception of Judge Pickering’s case, which it described as “disreputable”) previous impeachments had invariably charged the respondents with indictable crimes, and that (although not all the precedents could be reconciled) the better English cases had recognized the necessity of an indictable offense before the Constitution was adopted.³⁴⁷ Along the way the dissent quoted Blackstone for good measure: “[A]n impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law.”³⁴⁸

³⁴³ HR Rep No 40-7 at 45–47 (cited in note 340).

³⁴⁴ See *id.* at 61, 77.

³⁴⁵ *Id.* at 61–62.

³⁴⁶ *Id.* at 63–64.

³⁴⁷ *Id.* at 64–75. For Pickering’s case, see Currie, *The Jeffersonians* at 23–31 (cited in note 2) (describing the successful attempt to impeach and convict Judge Pickering for dementia, drunkenness, and insanity, including debates over whether Pickering needed to be guilty of a statutory crime in order to be impeached and whether his insanity was a defense to impeachment, as it would be in ordinary criminal proceedings).

³⁴⁸ HR Rep No 40-7 at 62 (cited in note 340), quoting William Blackstone, 4 *Commentaries on the Laws of England* *259 (Chicago 1979). The law in question, the dissent continued, must be federal, “for no act is a crime in any sovereignty except such as is made so by its own law.” HR Rep No 40-7 at 61 (cited in note 340). It must also be statutory because the Supreme Court had

The reader may have perceived that the above summary says nothing about the views of American commentators. In fact the dissenters barely mentioned them, and then in an effort to show they were not so opposed to the dissenters' own position as might at first glance appear.³⁴⁹ Not surprisingly, the majority report made considerable hay out of the American observers. In most prominent place stands no less an authority than Alexander Hamilton, who explained to the people of New York when the Constitution was being considered that "[t]he subjects of [a court of impeachment's] jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust."³⁵⁰ Not a word was said about indictable offenses; the crux of impeachment was abuse of the public trust.

After a glance at the early treatise of William Rawle (noting in connection with impeachment that, among other things, "the involutions and varieties of vice are too many and too artful to be anticipated by positive law"³⁵¹), the report turns to Justice Joseph Story, whose writings explicitly repudiate the minority's position:

The offences to which the power of impeachment has been, and is ordinarily applied as a remedy, are of a *political* character. Not but that crimes of a strictly legal character fall within the scope of the power, but that it has a more enlarged operation, and reaches what are aptly termed political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide for them by positive law. . . .

However much it may fall within the political theories of some statesmen and jurists to deny the existence of a common law, belonging and applicable to the nation in ordinary cases, no one

held there was no federal common law of crimes. *Id.* at 75–78, citing *United States v Hudson and Goodwin*, 11 US (7 Cranch) 32 (1812) (holding that federal courts do not have jurisdiction in common law criminal cases). But Blackstone himself at another point had suggested another and broader definition of high misdemeanors: "The first and principal is the *mal-administration* of such high officers, as are in the public trust and employment. This is usually punished by the method of impeachment." Blackstone, 4 *Commentaries* at *121.

³⁴⁹ See HR Rep No 40-7 at 77–78 (cited in note 340) (citing Story and Rawle, and implying that punishment for a crime not defined by sovereignty through formal law would be tantamount to passing a bill of attainder).

³⁵⁰ HR Rep No 40-7 at 48 (cited in note 340), quoting Federalist 65 (Hamilton), in *The Federalist* 439, 439 (cited in note 190).

³⁵¹ HR Rep No 40-7 at 49 (cited in note 340), quoting William Rawle, *A View of the Constitution of the United States of America* 211 (Hein 2d ed 2003).

has as yet been bold enough to assert that the power of impeachment is limited to offences positively defined in the statute book of the Union as impeachable high crimes and misdemeanors.³⁵²

Congress itself, Story concluded, had “unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct”; and “in the few cases of impeachment which had theretofore been tried, no one of the charges had rested on any statutable misdemeanor.”³⁵³ Massachusetts Representative George Boutwell summed up the majority’s position in a speech to the House a few days later: no indictable offense needed to be established; any abuse of public trust would do.³⁵⁴

The issue whether an indictable offense was necessary for impeachment would arise again in President Nixon’s case a century later.³⁵⁵ I agree with the prosecution in both cases that it was not. The text of the Constitution does not answer the question; “high crimes and misdemeanors” is a term of art. British precedents are in disarray. The virtual unanimity of early American commentators, beginning with the knowledgeable Hamilton, goes a long way to demonstrate what the Framers must have had in mind. Congressional practice is equally probative of the original understanding, for in none of the earlier impeachments did the House allege the infraction of particular statutory provisions, even when it could easily have done so. Finally, the narrow interpretation urged by President Johnson’s defenders left so much heinous conduct outside the pale of impeachment that the

³⁵² HR Rep No 40-7 at 51–52 (cited in note 340), quoting Joseph Story, 1 *Commentaries on the Constitution of the United States* §§ 764, 797 at 541, 563–64 (Little, Brown 4th ed 1873) (Thomas M. Cooley, ed).

³⁵³ HR Rep No 40-7 at 52 (cited in note 340), quoting Story, 1 *Commentaries* § 799 at 564–65 (cited in note 352).

³⁵⁴ See Cong Globe App, 40th Cong, 2d Sess 58–59 (Dec 6, 1867). See also Cong Globe, 40th Cong, 2d Sess 463 (Jan 11, 1868) (Rep Ward) (serious abuse of official trust). Arguments on both sides of this question were repeated by opposing counsel once the trial began and by individual senators in the opinions in which they explained their votes, but little of significance was added. See, for example, Cong Globe Supp, 40th Cong, 2d Sess 29–30 (Mar 30, 1868) (Rep Benjamin Butler, for the House managers), 134 (Apr 10, 1868) (Benjamin R. Curtis, for the respondent). Butler did append to his opening remarks a lengthy and learned brief prepared by Ohio Representative William Lawrence, id at 41–51 (Mar 30, 1868), which is a valuable source of early efforts to define impeachable offenses. See also Theodore W. Dwight, *Trial by Impeachment*, 15 Am L Reg 257, 261 (1867) (insisting that an indictable offense must be shown); William Lawrence, *The Law of Impeachment*, 15 Am L Reg 641, 644 (1867) (taking the contrary position).

³⁵⁵ See the so-called Doar Report, Impeachment Inquiry Staff of the House Judiciary Committee, *Constitutional Grounds for Presidential Impeachment* 38–44 (Public Affairs 1974) (noting that the Framers were probably aware of a noncriminal meaning for “high crimes and misdemeanors”), and President Nixon’s brief, James D. St. Clair, et al, *An Analysis of the Constitutional Standard for Presidential Impeachment* 60 (1974) (arguing that the purpose of Constitutional language on impeachment was to “restrict the political reach of the impeachment power”).

constitutional provisions could not serve their intended purpose—such as Judge Humphreys’s abandonment of his duties or a president’s deliberate usurpation of congressional power.³⁵⁶

More important for present purposes than what I think constitute high crimes and misdemeanors is what the House thought in 1867, and significantly not all Republicans agreed at the time that no crime in the technical sense had to be alleged. The dissenters from the Judiciary Committee’s report included two Republicans, James Wilson of Iowa and Frederick Woodbridge of Vermont. We must allege specific crimes, said Wilson on the floor of the House; “a bundle of generalities” would not suffice.³⁵⁷ Indeed, Wilson added, it really didn’t matter whether indictable crimes had to be charged; even on the majority’s test no impeachable offense had been shown.³⁵⁸ The Constitutional Convention, as Ohio Democrat Philadelph Van Trump pointed out, had at Madison’s suggestion rejected a proposal to provide for impeachment on grounds of mere “maladministration”; “[s]o vague a term,” Madison had argued, “will be equivalent to a tenure during pleasure of the Senate.”³⁵⁹ The majority’s recommendation was roundly defeated; the House found no cause for impeachment.³⁶⁰

2. Defeat in the Senate.

That was in December 1867. Then, on February 21, 1868, President Johnson sent the following message to his Secretary of War, Edwin M. Stanton:

Sir: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.³⁶¹

At the same time the President by separate letter “authorized and empowered” Major-General Lorenzo Thomas “to act as Secretary of

³⁵⁶ Professor Berger, who wrote an entire book on the subject of impeachment, concurred in this conclusion. See Berger, *Impeachment* at 59–78 (cited in note 335). See also Currie, *The Jeffersonians* at 34–35 (cited in note 2) (describing the impeachment of Justice Chase on “essentially political” grounds).

³⁵⁷ Cong Globe App, 40th Cong, 2d Sess 65 (Dec 6, 1867).

³⁵⁸ See *id* at 62, 64–65.

³⁵⁹ See Cong Globe, 40th Cong, 2d Sess 174 (Dec 13, 1867); Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 550 (Yale rev ed 1966).

³⁶⁰ See Cong Globe, 40th Cong, 2d Sess 68 (Dec 7, 1867). The vote was 57-108. The reader perhaps needs no reminder that the Constitution expressly gives the president the powers of veto and pardon. US Const Art I, § 7 and Art II, § 2.

³⁶¹ Andrew Johnson, *Executive Order* (Feb 21, 1868), in 6 Richardson 663, 663 (cited in note 6).

War *ad interim*” and enjoined upon him “the discharge of the duties pertaining to that office.”³⁶²

The next day the House received word of the President’s letter to Stanton and referred it to the Committee on Reconstruction. The Committee reported before the day was out: President Johnson should be impeached.³⁶³

Johnson had played right into the House’s hands, giving it the smoking gun it had been looking for. The President, crowed Representative Rufus Spalding of Ohio, had violated the Tenure of Office Act, which requires Senate consent to discharge a member of the Cabinet; and the statute makes violation of its provisions a misdemeanor punishable by law.³⁶⁴ Wilson and Woodbridge, who had dissented when impeachment was first proposed, were convinced: now the President had willfully offended the law of the land.³⁶⁵

New York Democrat James Brooks had three answers for the committee: the Tenure Act was inapplicable to Stanton, who had been appointed not by Johnson but by his predecessor, Abraham Lincoln; Congress could not limit the president’s authority to discharge a member of his Cabinet, as Congress had decided in 1789; and in any event the president could not be impeached for an honest difference of opinion as to the validity or interpretation of the law.³⁶⁶

After an ample measure of repetition of the arguments on both sides the House voted 126-47 that President Johnson should be impeached.³⁶⁷ Articles of impeachment were duly drafted and approved.³⁶⁸

³⁶² *Id.*

³⁶³ See Cong Globe, 40th Cong, 2d Sess 1326–27 (Feb 21, 1868), 1336 (Feb 22, 1868).

³⁶⁴ See *id.* at 1339–40 (Feb 22, 1868).

³⁶⁵ See *id.* at 1386–87 (Feb 24, 1868) (Rep James Wilson), 1387–88 (Rep Woodbridge). See also Dewitt, *Impeachment and Trial* at 360–64 (cited in note 213) (suggesting that the attempted removal of Stanton was a “harmless peccadillo,” a trivial incident seized upon as an excuse for an impeachment really based on other grounds).

³⁶⁶ See Cong Globe, 40th Cong, 2d Sess 1336–38 (Feb 22, 1868).

³⁶⁷ See *id.* at 1400 (Feb 24, 1868).

³⁶⁸ As presented to the Senate, the articles are printed in Cong Globe Supp, 40th Cong, 2d Sess 3–5 (Mar 5, 1868). This supplement contains a full report of the Senate proceedings. For the vote to approve the articles, see Cong Globe, 40th Cong, 2d Sess 1616–18, 1642 (Mar 2 and 3, 1868).

On the same day on which the House adopted the articles of impeachment the Senate was debating proposed rules for the conduct of the trial under Article I, § 5, clause 2 (“[e]ach House may determine the rules of its proceedings”), and an important question arose as to the role of the chief justice during the trial. The Constitution said only that when the president was tried, “the Chief Justice shall preside,” US Const Art I, § 3, cl 6. Did that mean, Senator Sherman inquired, that he was entitled to vote on the question of innocence or guilt? Senator Howard said it did not. The Constitution required a two-thirds vote of present “members” for conviction, and the chief justice was not a member; it gave the Senate “the sole power to try all impeachments,” and the Senate was composed of two senators elected from each state. See Cong Globe, 40th Cong, 2d Sess 1585–86 (Mar 2, 1868), citing US Const Art I, § 3, cl 1, 6. Howard seems right as rain, but not everyone was prepared to vote on so momentous a question; the rule was phrased

There were eleven articles in all. As Representative Boutwell informed the House when he offered the committee's draft, most of them were based upon the firing of Stanton and his replacement by General Thomas.³⁶⁹ The ninth article alleged that Johnson had told a certain General Emory that the appropriations rider requiring the president to issue orders through the general of the army was unconstitutional, with the intent of inducing Emory to accept orders directly from the president in violation of law. The tenth charged Johnson in a series of "intemperate, inflammatory, and scandalous harangues" had "attempt[ed] to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States" and in so doing had "brought the high office of the President of the United States into contempt, ridicule, and disgrace." The final article in essence accused the President of attempting to obstruct the execution of the Tenure of

to leave the matter open by providing, in terms of the Constitution itself, that conviction required the votes of two-thirds of the "members" present. See *Cong Globe*, 40th Cong, 2d Sess 1587.

A related question arose a few minutes later: should the rules permit the chief justice to pass initially on the admissibility of evidence, subject to review by the Senate itself? Senator Sherman suggested the power to do so was implicit in the power to preside—just as, in ordinary Senate proceedings, the vice president or president pro tem ruled provisionally on points of order. Senator Hendricks, agreeing, argued that in any event the Senate could authorize him to do so in the exercise of its rulemaking power. Senator Buckalew vigorously disagreed: the Senate's "sole power to try all impeachments" empowered it to decide all questions of law or fact. Moreover, Senator Howard added, the Senate could not delegate to its presiding officer powers conferred on it by the Constitution; the senators themselves must pass upon the admissibility of evidence. As adopted, the rule seemed to squint in the direction of permitting the chief justice to pass on the evidence if he chose, though those who had spoken against the disputed authority voted to sustain this version of the rule: "The Presiding Officer may in the first instance submit to the Senate, without a division, all questions of evidence and incidental questions." *Id* at 1595–1603. After all, as Chief Justice Chase said in ruling on the admissibility of evidence during the trial, the rule said only that he *might* submit the question to the Senate in the first instance; it did not say he had to. See *Cong Globe Supp*, 40th Cong, 2d Sess 60 (Mar 31, 1868). After further haggling the Senate then retired (on the casting vote of the Chief Justice!) and revised the rule to reflect Chase's interpretation: the presiding officer could either refer such questions directly to the Senate or decide them himself, subject to Senate review. See *id* at 62–63. No one invoked the judicial analogy: in an ordinary trial the judge rules on evidentiary questions, the jury on innocence or guilt.

One final procedural snag was encountered as the trial was about to begin. The Constitution requires that in impeachment cases the Senate shall be under oath or affirmation. US Const Art I, § 3, cl 6. Senator Hendricks objected that Ohio Senator Benjamin Wade should not be sworn: as president pro tem in the absence of a vice president, he was disqualified for interest because if the respondent was convicted he would assume the duties of the presidency. Sherman protested that the Constitution vested the power to try cases in the Senate, which was composed of two members from each state; Reverdy Johnson replied that the statutes fixed the number of Supreme Court Justices too, but that did not mean they should sit in cases in which they had a personal stake. That sounds right to me, but in the end Hendricks withdrew his objection for procedural reasons, and Wade was sworn; he later voted to convict President Johnson on the three counts on which a vote was ultimately taken. See *Cong Globe*, 40th Cong, 2d Sess 1671–79 (Mar 5, 1868), 1700–01 (Mar 6, 1868); *Cong Globe Supp*, 40th Cong, 2d Sess 411, 414–15 (May 12, 1868).

³⁶⁹ See *Cong Globe*, 40th Cong, 2d Sess 1542–43 (Feb 29, 1868). The first eight articles, in slightly varying words, charged Johnson with one or the other of these actions.

Office Act, the Reconstruction Act, and the rider concerning the general of the army.³⁷⁰

The President's answer admitted that he had removed Stanton and authorized Thomas to exercise his functions but denied that he had broken the law. It conceded he had told Emory the rider was unconstitutional but denied he had asked him to disobey it. It denied that in his addresses he had meant to bring Congress into disrespect or to call its legitimacy into question and invoked his constitutional freedom of speech. And it denied that he had sought to impede the enforcement of the laws.³⁷¹

The trial began on March 30 with the opening statement of Massachusetts Representative Benjamin Butler, one of the managers for the House. Butler was at pains to insist once more that no indictable crime had to be proved:

[A]ny malversation in office highly prejudicial to the public interest, or subversive of some fundamental principle of government by which the safety of a people may be in danger, is a high crime against the nation, as the term is used in parliamentary law.³⁷²

It was not necessary, he said again, that the act be in violation of some positive law.

The crucial question, said Butler, was whether the president had the right to remove and replace his secretary of war. If he had, then the first eight articles would collapse. But he had no such authority. The precedents were conflicting: if the First Congress had decided that Cabinet officers served at the president's pleasure, the Congress that enacted the Tenure of Office Act had decided they did not. The constitutional clause vesting executive power in the president did not give him all powers that could be classified as executive; it was more plausible to conclude that removal followed the power of appointment, which in relevant cases required Senate consent. And even if the president possessed the power of removal, Congress could regulate it under the Necessary and Proper Clause—as it had done by requiring Senate approval in the case of the comptroller of the currency in 1863 and a court-martial for military or naval officers in 1866.³⁷³

³⁷⁰ See *id.* at 1543.

³⁷¹ See Cong Globe Supp, 40th Cong, 2d Sess 12–18 (Mar 23, 1868).

³⁷² *Id.* at 29 (Mar 30, 1868).

³⁷³ See An Act to Provide a National Currency, Secured by a Pledge of United States Stocks, and to Provide for the Circulation and Redemption Thereof § 1, 12 Stat 665, 665–66 (Feb 25, 1863); An Act Making Appropriations for the Support of the Army for the Year Ending Thirtieth of June, Eighteen Hundred and Sixty-seven, and for Other Purposes § 5, 14 Stat 90, 92 (July 13, 1866). As Butler said, President Johnson himself signed the latter bill. See *id.* at 93.

The Tenure of Office Act, Butler continued, was yet another exercise of that congressional power, and it applied to the case at hand. What it said was that Cabinet officers should remain in office “for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.”³⁷⁴ Secretary Stanton, said Butler, had been appointed by President Lincoln, whose term ran until 1869; he was thus still in office and could be removed only with the Senate’s blessing.³⁷⁵ As for the assignment of General Thomas to perform the Secretary’s duties, Johnson relied on a 1795 statute authorizing the president, in case of a vacancy in office, to appoint “any person” to perform its attendant duties; but an 1863 statute on the same subject, which made no mention of vacancies caused by removal, had repealed all inconsistent provisions—of which, Butler implied, the 1795 law was one.³⁷⁶ Finally, the President had no right to disobey the Tenure of Office Act even if it was unconstitutional, for his authority to pass on its validity was “exhausted” when Congress passed it over his veto.³⁷⁷

Former Supreme Court Justice Benjamin R. Curtis, author of the principal dissent in the *Dred Scott* case, made the opening statement for the defense. The Tenure of Office Act, he argued, was inapplicable to Stanton. The Secretary had been appointed by President Lincoln, not by his successor; and Lincoln’s first and second terms had both expired. The reason for providing that a Cabinet officer held office only during the term of the president who appointed him was to allow a new president to choose his own Cabinet; and both the House and the Senate had been told when the statute was being debated that it would not require Johnson to keep his predecessor’s advisers. Besides, Congress in 1789 had recognized the president’s constitutional right to remove the secretary of war; and if he thought a law unconstitutional it was his duty to disobey it—as any ordinary citizen would be free to do—in order to provoke a judicial test of its validity. Finally, said Curtis, the 1795 law authorizing the president to assign someone temporarily to perform the duties of a vacant office was still in force; the

³⁷⁴ Tenure of Office Act § 1, 14 Stat at 430.

³⁷⁵ See Cong Globe Supp, 40th Cong, 2d Sess 32–34 (Mar 30, 1868). Alternatively, said Butler, if Lincoln’s term had expired when he died then it was illegal to keep Stanton on at all. See id at 34.

³⁷⁶ See id at 35, citing An Act to Amend the Act Intituled “An Act Making Alterations in the Treasury and War Departments,” 1 Stat 415 (Feb 13, 1795), and An Act Making Appropriations for the Service of the Post-Office Department during the Fiscal Year Ending the Thirtieth of June, Eighteen Hundred and Sixty-four, 12 Stat 646 (Feb 19, 1863).

³⁷⁷ Cong Globe Supp, 40th Cong, 2d Sess 36 (Mar 30, 1868).

1863 statute applied only to cases of death, resignation, and disability, and was not inconsistent with the Act of 1795.³⁷⁸

Closing arguments, once the expected evidence was in, were interminable but largely repeated points that had already been made.³⁷⁹ The Senate decided to vote separately on each article without debate, with leave to file written opinions within the next two days.³⁸⁰

Presumably because it was thought to pose the strongest case for conviction, the Senate began with Article XI, which dealt largely with alleged efforts to impede execution of the laws. This article makes for painful reading:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, A.D. 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-Ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said Thirty-Ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A.D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirements of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War;

³⁷⁸ See *id.* at 123–36 (Apr 9–10, 1868).

³⁷⁹ See *id.* at 251–406 (Apr 22–May 6, 1868).

³⁸⁰ See *id.* at 409 (May 11, 1868).

and, also, by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled “An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,” approved March 2, 1867; and, also, to prevent the execution of an act entitled, “An act to provide for the more efficient government of the rebel States,” passed March 2d, 1867, whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, A.D. 1868, at the city of Washington, commit and was guilty of a high crime and misdemeanor in office.³⁸¹

The Senate acquitted President Johnson of this charge by a vote of 35-19.³⁸² The shift of a single vote would have meant conviction.

The Senate then suspended the impeachment proceedings for ten days to reconnoiter. When it returned it voted on Articles II and III, which turned on the assignment of General Thomas; the results were exactly the same. Recognizing that there was no point in proceeding further, the Senate adjourned the trial *sine die*. The attempt to remove President Johnson had failed.³⁸³

Edmund Ross, Republican of Kansas, is commonly credited with having courageously rescued Johnson from conviction and removal.³⁸⁴ But Ross was not alone; at least seven Republicans joined opposition senators in voting not guilty on all three counts.³⁸⁵ Those seven included not only such predictable dissenters as Dixon of Connecticut and Doolittle of Wisconsin but, more dramatically, the influential mainstream Republicans Lyman Trumbull and William Pitt Fessenden.

Both Trumbull and Fessenden wrote opinions explaining their vote and how they would have ruled on the remaining articles.³⁸⁶ Both concluded that the Tenure of Office Act left the President free to discharge Stanton, for reasons that had been urged by lawyers for the defense. Even if Johnson had been mistaken, Trumbull added, it would have been wrong to convict him for mere misconstruction of a doubt-

³⁸¹ Id at 411 (May 16, 1868).

³⁸² See id.

³⁸³ See id at 412-15 (May 26, 1868).

³⁸⁴ See, for example, John F. Kennedy, *Profiles in Courage* ch 6 (Harper & Row 1961).

³⁸⁵ Dixon, Doolittle, Fessenden, Grimes, Henderson, Ross, and Trumbull. Cong Globe Supp, 40th Cong 2d Sess 411-15 (May 12 and 26, 1868). There were ten if one includes Joseph Fowler of Tennessee, Daniel Norton of Minnesota, and Peter Van Winkle of West Virginia, all of whom the Biographical Directory identifies as having been elected as Unionists. See Claude Albright, *Dixon, Doolittle, and Norton: The Forgotten Republican Votes*, 59 Wis Mag Hist 90-100 (1975-1976).

³⁸⁶ Cong Globe Supp, 40th Cong, 2d Sess 417-20 (Sen Trumbull), 452-57 (Sen Fessenden) (Trumbull's and Fessenden's opinions appear to have been submitted shortly after the final vote on May 26, 1868).

ful law.³⁸⁷ The assignment of Thomas, in the opinion of both Senators, was authorized by the 1795 law.³⁸⁸ It was not clear that that law had been repealed, and long congressional acquiescence in assignments plainly outside the governing statute made it improper to convict the president on the appointment counts even if he had exceeded his statutory authority. Both Trumbull and Fessenden concluded that the evidence did not support the allegation that Johnson had attempted to induce General Emory to violate the law; that the President's speeches, while discreditable, were not grounds for impeachment; that the effort to keep Stanton from resuming his office was lawful because Johnson had the right to remove him; and that the other charges of obstructing the enforcement of statutes had not been proved.³⁸⁹

Each of these opinions closed with an admonition not to be overzealous in wielding the fearsome weapon of impeachment. It was an instrument, wrote Fessenden, that "might be liable to very great abuse, especially in times of high party excitement." It was "a power to be exercised with extreme caution [if at all] when you once get beyond the line of specific criminal offenses."

The office of President is one of the great coördinate branches of the Government, having its defined powers, privileges, and duties; as essential to the very framework of the Government as any other, and to be touched with as careful a hand. Anything which conduces to weaken its hold upon the respect of the people, to break down the barriers which surround it, to make it the mere sport of temporary majorities, tends to the great injury of our Government, and inflicts a wound upon constitutional liberty. It is evident, then, as it seems to me, that the offense for which a Chief Magistrate is removed from office . . . should be of such a character as to commend itself at once to the minds of all right-thinking men as, beyond all question, an adequate cause.³⁹⁰

Wise words. Those of Senator Trumbull were even better:

Once set the example of impeaching a President for what, when the excitement of the hour has subsided, will be regarded as insufficient causes . . . and no future President will be safe who happens to differ with a majority of the House and two thirds of the Senate on any measure deemed by them important, particu-

³⁸⁷ See *id.* at 418.

³⁸⁸ See *id.* at 419 (Sen Trumbull), 455 (Sen Fessenden).

³⁸⁹ See *id.* at 417–20 (Sen Trumbull), 452–57 (Sen Fessenden). On the free-speech question, see also Berger, *Impeachment* at 273–74 (cited in note 335) (“[A]rticle 10 may be regarded as a brazen assault on the right freely to criticize the government, not least the Congress.”).

³⁹⁰ Cong Globe Supp, 40th Cong, 2d Sess 457.

larly if of a political character. Blinded by partisan zeal, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their purposes, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity? They are all gone. In view of the consequences likely to flow from this day's proceedings, should they result in conviction on what my judgment tells me are insufficient charges and proofs, I tremble for the future of my country. I cannot be an instrument to produce such a result.³⁹¹

Other senators who voted for acquittal went beyond the purely statutory arguments of Fessenden and Trumbull to find constitutional grounds for their conclusion. Old Reverdy Johnson, the best of the congressional Democrats and a former Attorney General, concluded that the Tenure of Office Act was unconstitutional and that Article II, by vesting executive power in the president and constraining him to ensure execution of the laws, empowered him to assign someone to a vacant office to prevent a void in enforcement.³⁹²

In all of this I think Senator Johnson was right. I have already indicated my opinion that the Tenure Act could not pass constitutional muster.³⁹³ If the president could not discharge his secretary of war, a portion of the executive power would be vested in the Cabinet in violation of Article II, § 1;³⁹⁴ and as former Attorney General Henry Stanbery argued in defense of the President, he could not fulfill his obligation to look after the execution of the laws.³⁹⁵

Thus I conclude that President Johnson acted within his rights when he discharged Mr. Stanton and assigned General Thomas to perform his duties *ad interim*. But even if the President was wrong I agree with Senator Johnson that a difference of opinion is not a crime; no one should be impeached for an honest mistake in interpreting the law.³⁹⁶

What then do we learn about the Constitution from the disreputable effort to remove Andrew Johnson from the presidency? With respect to the meaning of the impeachment provisions themselves the bottom line is equivocal. For although the House's rejection of the original "bundle of generalities" suggests that a majority thought it necessary to allege some violation of law, its later approval of a count based exclusively on the President's irascible speeches suggests the

³⁹¹ *Id* at 420.

³⁹² See *id* at 430–31.

³⁹³ See the discussion in Part I.F.

³⁹⁴ "The executive power shall be vested in a President of the United States of America."

³⁹⁵ See Cong Globe Supp, 40th Cong, 2d Sess 376 (May 2, 1868). See also US Const Art II, § 3.

³⁹⁶ See Cong Globe Supp, 40th Cong, 2d Sess 431 (Sen Johnson).

contrary; and in the Senate the issue turned in the end on substantive questions of presidential power, not on the definition of an impeachable act. There was a reprise of constitutional arguments about the president's right of removal, but that was all old hat and nothing novel was added. The argument that the Constitution itself authorized the president to avoid a vacuum in office may have been new, and I find it persuasive. But the real lesson of the Johnson impeachment was the result, for it established for all time the salubrious constitutional principle that no one should be impeached because he disagrees with the congressional will.³⁹⁷

D. The Fifteenth Amendment

The Thirteenth Amendment had abolished slavery. The Fourteenth had guaranteed due process of law, equal protection of the laws, and the privileges and immunities of citizens of the United States. No one in Congress had suggested when these Amendments were proposed that either of them would extend the right to vote to African-Americans. Supporters of the Civil Rights Act, to provide a secure constitutional base for which the Fourteenth Amendment had been in part adopted, had expressly denied that that statute would confer political rights.³⁹⁸

Most of the former Confederate states had been coerced into providing for Negro suffrage as a condition of readmission to Congress.³⁹⁹ When the Fortieth Congress met for its third session in December, 1868, serious efforts were begun to require color-blind voting throughout the country.⁴⁰⁰

The first proposals sought to accomplish this goal by constitutional amendment, which seemed plausible. Some members, however, thought Congress had power to do it by statute.⁴⁰¹ Massachusetts Representative George Boutwell perceived three distinct bases for congressional authority: the clause of Article I, § 4 permitting Congress to regulate the "times, places and manner" of its own elections; the provi-

³⁹⁷ See Dewitt, *Impeachment and Trial* at 578–79 (cited in note 213) (quoting a portion of Trumbull's argument that Johnson's impeachment would threaten future presidents' ability to disagree with Congress). For a strikingly different view, see Benedict, *Impeachment and Trial* at 180 (cited in note 335) (deploring Johnson's acquittal and morosely opining that the result in Johnson's case made it almost inconceivable that any future president would be removed).

³⁹⁸ See the discussions in Parts I.C and I.D.

³⁹⁹ See Part I.E. Tennessee, having been welcomed back earlier, was exempt from this requirement. See Part I.A. Mississippi, Texas, and Virginia had not yet been restored to their proper place in Congress. See Part II.A.

⁴⁰⁰ See, for example, Cong Globe, 40th Cong, 3d Sess 6 (Dec 7, 1868) (Sens Cragin and Pomeroy).

⁴⁰¹ See, for example, *id* at 902–03 (Feb 5, 1869) (Sen Sumner).

sion of Article IV, § 4 requiring the United States to guarantee each state “a republican form of government”; and the Privileges and Immunities Clause of the Fourteenth Amendment, which Congress could enforce by legislation under § 5. The “manner” of election, as Boutwell understood it, embraced “everything relating to an election, from the qualifications of the elector to the deposit of his ballot in the box.” The very crux of republican government, as James Wilson had said in the Pennsylvania ratifying convention, was popular suffrage. Finally, said Boutwell, the Fourteenth Amendment guaranteed to every citizen all privileges that any citizen enjoyed, including the right to vote.⁴⁰²

Opponents were ready with answers to all these suggestions. Voter qualifications, said Wisconsin Representative Charles Eldredge, were not embraced within congressional authority over the “manner” of voting. They were specifically provided for by a different constitutional provision: Article I, § 2 decreed that in House elections “the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature”—in other words, that their qualifications should be determined by state law.⁴⁰³ In any event, Eldredge added, the “time, place and manner” provision applied only to congressional elections, not to presidential or state contests, which were also covered by the bill.⁴⁰⁴ As for the Guarantee Clause, it did not require that every citizen enjoy the right to vote; no state had ever extended the franchise so far, and yet they had always been considered republican.⁴⁰⁵ Finally, said Eldredge, even if the Fourteenth Amendment was law—and how it could be so considered by members who thought rebel states not entitled to representation he

⁴⁰² See *id.* at 556–59 (Jan 23, 1869). See also *id.* at 902–03 (Feb 5, 1869) (Sen Sumner). Senator Yates suggested that the Thirteenth Amendment, by freeing the slaves, had made them citizens and given them the right to vote, which Congress could enforce by legislation under that Amendment’s second section. See *id.* at 1004 (Feb 8, 1869). As I have said, I think the Thirteenth Amendment authorized Congress to enforce only its prohibition of slavery. See Currie, 73 U Chi L Rev at 1177–78 (cited in note 1); Part I.C.

⁴⁰³ Cong Globe, 40th Cong, 3d Sess 642–44 (Jan 27, 1869), citing, among other sources, Federalist 52 (Madison), in *The Federalist* 353 (cited in note 191). Justice Black would later overlook this distinction in his tiebreaking opinion in *Oregon v Mitchell*, 400 US 112, 119–24 (1970) (holding that pursuant to the Fourteenth and Fifteenth Amendments it was within Congress’s power to restrict the use of literacy tests in state and federal elections). See also David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 562 (Chicago 1990) (discussing Justice Black’s failure to address the Article I delegation of the determination of voter qualifications to the states). The Congressman’s name is spelled “Eldridge” in the Congressional Globe; I have used the spelling given in the Biographical Directory of Congress.

⁴⁰⁴ See Cong Globe, 40th Cong, 3d Sess 644 (Jan 27, 1869). Justice Black would weakly find “inherent” power to regulate presidential elections, but he was at a loss to find similar authority in the case of state officers, and his vote was decisive *against* federal regulation of qualifications in state elections. See *Mitchell*, 400 US at 119–24.

⁴⁰⁵ See Cong Globe, 40th Cong, 3d Sess 644 (Jan 27, 1869).

could not fathom—its second section, by reducing the representation of states that excluded blacks from voting, unmistakably acknowledged that they retained the authority to do so, as everyone had understood at the time of its passage.⁴⁰⁶

Eldredge's objections were echoed by several of his colleagues;⁴⁰⁷ even such determined Republicans as Jacob Howard and Timothy Howe shared his reservations.⁴⁰⁸ Moreover, those objections were unanswerable. And partly because of such doubts the voting rights bill faded away without a vote in either House; Congress decided to propose a constitutional amendment instead.⁴⁰⁹

As usual, there were some who denied that the Constitution *could* be amended to extend the suffrage to blacks. "I say the power of amendment is limited to the correction of defects that might appear in the practical operations of the Government," bleated Indiana Senator Thomas Hendricks; "but the power of amendment does not carry with it the power to destroy one form of government and establish another."⁴¹⁰ The proposal before the Senate would do no such thing, snorted Missouri's Charles Drake,⁴¹¹ and he was right. Indiana's Oliver Morton added that there were no implicit limits to the amending power to begin with,⁴¹² and he was right too; the contrary arguments were no more persuasive in 1869 than they had been before.⁴¹³

Seeing they were getting nowhere, enemies of the amendment retreated to a second line of defense. It was not enough, Garrett Davis of Kentucky announced in the Senate, that two-thirds of those voting favored the proposed alteration; two-thirds of the whole membership were required.⁴¹⁴ As Trumbull retorted, Congress had rejected this ar-

⁴⁰⁶ See *id.* at 644–45.

⁴⁰⁷ See, for example, *id.* at 653–58 (Rep Kerr), 688–91 (Jan 28, 1869) (Rep Beck), 697–99 (Jan 29, 1869) (Rep Burr). Senator James Doolittle, a Wisconsin Republican, turned the Guarantee Clause argument on its head: no government was republican unless it had power to decide who should vote in its own elections. See Cong Globe App, 40th Cong, 3d Sess 151 (Feb 6, 1869).

⁴⁰⁸ See Cong Globe, 40th Cong, 3d Sess 985, 1003 (Feb 8, 1869) (Sen Howard), 1000 (Sen Howe) (noting that neither women nor children had the right to vote).

⁴⁰⁹ See Cong Globe App, 40th Cong, 3d Sess 154 (Feb 9, 1869) (Sen Wilson).

⁴¹⁰ Cong Globe, 40th Cong, 3d Sess 988 (Feb 8, 1869). See also *id.* at 995 (Sen Davis) 1639 (Feb 26, 1869) (Sen Buckalew); Cong Globe App, 40th Cong, 3d Sess 161–62 (Feb 8, 1869) (Sen Saulsbury).

⁴¹¹ See Cong Globe, 40th Cong, 3d Sess 988 (Feb 8, 1869).

⁴¹² See *id.* at 990. See also *id.* at 993 (Sen Drake).

⁴¹³ For earlier arguments that the amending power was limited, see, for example, the discussion of the Twelfth Amendment in Currie, *The Jeffersonians* at 54–56 (cited in note 2) (explaining that the only restrictions on constitutional amendments were those mentioned in the document itself) and of the Thirteenth in Currie, 73 U Chi L Rev at 1175–76 (cited in note 1) (explaining that the usual objections were made to the constitutional authority for the Thirteenth Amendment, but that these objections were invalid since the amendment did not violate any of the three explicit limitations).

⁴¹⁴ See Cong Globe, 40th Cong, 3d Sess 1641 (Feb 26, 1869).

gument before, and the Chair rejected it again.⁴¹⁵ Connecticut Republican James Dixon asked the Senate to require ratification by conventions rather than legislatures on the ground that conventions better reflected the voice of the people;⁴¹⁶ his more Republican colleague Orris Ferry responded that legislatures were democratic and conventions dilatory, and Congress did not provide for conventions.⁴¹⁷

More interesting was the question of just what the amendment should say. Kansas Senator Samuel Pomeroy thought it should ban discrimination on grounds of sex as well as race;⁴¹⁸ Representative Bingham sought to outlaw discrimination on such grounds as religion and property.⁴¹⁹ Senator George Williams of Oregon wanted to protect loyal whites, the Irish, and the foreign-born.⁴²⁰ Senator Morton presciently highlighted the risk of evasion: if the amendment spoke only of race, a state could disfranchise blacks indirectly by requiring education or property.⁴²¹ Williams expanded on this important theme:

Suppose the people of that State should provide that no person should vote or hold office who did not have a freehold qualification. Apparently that would operate equally upon all citizens, but it might practically operate to exclude nine tenths of the colored persons from the right of suffrage. Where would be the remedy? The State would have exclusive jurisdiction over these questions, and its decision would be irreversible by Congress or any other power; so that if a State should decide that the black people should be disfranchised by any legislation not putting it upon the

⁴¹⁵ See *id.* at 1641–42. See also Currie, *The Jeffersonians* at 61–64 (cited in note 2) (explaining how Congress concluded that two-thirds of the members present were sufficient based on the Bill of Rights as precedent, but expressing skepticism that this is the proper interpretation of the Framers' intent).

⁴¹⁶ See *Cong. Globe*, 40th Cong., 3d Sess 542 (Jan 23, 1869), 706–08, 711 (Jan 29, 1869). In so doing Dixon presented a constitutional issue, since in response to a question he declared his belief that Congress could regulate how convention delegates should be chosen. See *id.* at 543 (Jan 23, 1869). See also *id.* at 912 (Feb 5, 1869) (Sen Buckalew) (urging that the amendment be submitted to legislatures chosen after the amendment was proposed).

⁴¹⁷ See *id.* at 854–55 (Feb 4, 1869); A Resolution Proposing an Amendment to the Constitution of the United States, 15 Stat 346, 346 (Feb 27, 1869) (“*Resolved . . . That the following article be proposed to the legislatures of the several States.*”).

⁴¹⁸ See *Cong. Globe*, 40th Cong., 3d Sess 543 (Jan 23, 1869).

⁴¹⁹ See *id.* at 722 (Jan 29, 1869).

⁴²⁰ See *id.* at 900–01 (Feb 5, 1869). As the proposal initially passed the Senate, it forbade discrimination based on nativity, property, education, and creed, as well as race and color, and with respect not only to voting but to holding office as well. The Senate also added an extraneous provision requiring that presidential electors be chosen by popular vote. See *id.* at 1224 (Feb 15, 1869).

⁴²¹ See *id.* at 863 (Feb 4, 1869). See also *id.* at 900 (Feb 5, 1869) (Sen Williams).

ground of color or race, it would be valid legislation so far as this amendment reported by the committee is concerned.⁴²²

Williams's solution was to authorize Congress to override state restrictions on suffrage generally: "Congress shall have power to abolish or modify any restriction upon the right to vote or hold office prescribed by the constitution or laws of any State."⁴²³

One difficulty with Williams's version was that it would not be self-executing; its efficacy would depend on the disposition of a later Congress. To list additional forbidden grounds of disqualification, on the other hand, risked both accidental omission and a loss of supporters who thought, for example, that a literacy test was a perfectly sound requirement. And so Congress proved blind to the very real problem that Morton and Williams had the foresight to envision. As sent to the states for ratification the Amendment read as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.⁴²⁴

Between the poll tax, the literacy test, the grandfather clause, and the white primary, a hundred years would pass before this noble principle became a reality—and then only by a combination of judicial decision, further constitutional amendment, and simple legislation under the enforcement clause of § 2.⁴²⁵

⁴²² Id at 900.

⁴²³ Id at 899.

⁴²⁴ A Resolution Proposing an Amendment, 15 Stat at 346.

⁴²⁵ See generally US Const Amend XXIV (prohibiting the use of a poll tax to deny the right to vote); *Harper v Virginia Board of Elections*, 383 US 663 (1966) (holding that requiring the payment of a poll tax violates the Equal Protection Clause of the Fourteenth Amendment); Voting Rights Act Amendments of 1970 § 201, Pub L No 91-285, 84 Stat 314, codified at 42 USC § 1973b(a)(1) (2000) (upheld in *Mitchell*, 400 US 112); *Guinn v United States*, 238 US 347 (1915) (holding the Oklahoma constitution's "grandfather clause" unconstitutional as a violation of the Fifteenth Amendment); *Smith v Allwright*, 321 US 649 (1944) (holding that Article I, § 4 authorized Congress to regulate primary as well as general elections and therefore there could be no race-based denial of the right to vote in primary elections). See also Voting Rights Act of 1965 § 5, Pub L No 89-110, 79 Stat 439, codified at 42 USC § 1973 (2000) (forbidding states with a history of racial discrimination to make *any* change in their voting laws without prior federal approval); *South Carolina v Katzenbach*, 383 US 301, 302 (1966) (upholding § 5 of the Voting Rights Act of 1965).

III. THE SOUTH RESTORED

A. Voting Rights

On March 30, 1870, pursuant to authority granted by statute in 1818, Secretary of State Hamilton Fish proclaimed that the Fifteenth Amendment, having been ratified by the requisite three-fourths of the states, had become “valid to all intents and purposes as part of the Constitution of the United States.”⁴²⁶

In transmitting this proclamation to Congress, President Ulysses S. Grant (who had succeeded Andrew Johnson the year before) departed from custom to add a few noble sentiments of his own. Adoption of this Amendment, he wrote, “completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life.”⁴²⁷ As President Washington had said in his Farewell Address, however, government by the people could work only for an enlightened and educated public. And thus Grant concluded with the following unexpected peroration: “I would therefore call upon Congress to take all the means within their constitutional powers to promote and encourage public education throughout the country.”⁴²⁸

We shall return to the subject of education in due course. For the moment it may be advisable to say a bit more about the Fifteenth Amendment itself.

First let me remind the reader just what the Amendment actually *said*. It is mercifully concise:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

It was not long before members of Congress decided it was time to pass legislation under § 2 to enforce the Amendment’s command.

⁴²⁶ Hamilton Fish, *Special Message* (Mar 30, 1870), in James D. Richardson, ed, *7 A Compilation of the Messages and Papers of the Presidents 1789–1897* (“Richardson”) 56, 57 (US Congress 1900). For the statute authorizing the Secretary of State to make this determination, see An Act to Provide for Publication of the Laws of the United States, and for Other Purposes, 3 Stat 439 (Apr 20, 1818). The House later adopted a resolution to the same effect. Cong Globe, 41st Cong, 2d Sess 5441 (July 11, 1870).

⁴²⁷ Ulysses S. Grant, *Special Message to the Senate and House of Representatives* (Mar 30, 1870), in 7 Richardson 55, 56 (cited in note 426).

⁴²⁸ Id. See also George Washington, *Farewell Address* (Sept 17, 1796), in James D. Richardson, ed, *1 A Compilation of the Messages and Papers of the Presidents 1789–1897* 213, 220 (US Congress 1900).

Let us begin at the end: on May 31, 1870, barely two months after the Amendment itself was promulgated, President Grant signed into law An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union, and for Other Purposes.⁴²⁹ This statute was not so concise; it consisted of twenty-two sections consuming the better part of seven pages in the Statutes at Large. We shall make our way through the labyrinth one section at a time.

First, however, a general observation. Unsurprisingly, given the debates over proposal of the Amendment itself, there were some who denied that it had been adopted at all. Changes of this magnitude, it was argued, were beyond the amending power. Congress could not propose amendments while excluding legislators from the states that had attempted to secede. States excluded from Congress had no right to ratify. Legislatures elected before the Amendment was proposed had no right to approve it, as the public had had no opportunity for debate. New York had rescinded its ratification; the Indiana legislature had lacked a quorum; three states had been coerced by making ratification a condition of representation in Congress.⁴³⁰ There was little that was new in these contentions, and no new arguments were presented to support them. Suffice it to say that the majority was unimpressed and undeterred; most members agreed with Secretary Fish that the Fifteenth Amendment was law.⁴³¹

Section 1 of the new statute basically restated the Amendment;⁴³² if the Amendment itself was valid, so was this provision. Section 2 essentially outlawed racial bias in voter *registration*: officials charged with administering laws requiring “any act . . . as a prerequisite or

⁴²⁹ 16 Stat 140 (May 31, 1870).

⁴³⁰ Most of these arguments were advanced by Maryland Senator George Vickers, who had weird ideas about interpretation of the Amendment as well. See Cong Globe, 41st Cong, 2d Sess 3480–82 (May 16, 1870). See also *id* at 3665 (May 20, 1870) (Sen Davis).

⁴³¹ At one point, at Representative Bingham’s urging, the House without discussion passed a bill declaring that a state had no right to rescind its ratification of a constitutional amendment. *Id* at 5356–57 (July 8, 1870). But whether a state is permitted to rescind seems to me a question of the interpretation of Article V, on which Congress’s views—even if embodied in legislation, which in this case they were not—can be nothing more than persuasive, not binding. See Cong Globe App, 41st Cong, 2d Sess 614 (July 15, 1870) (Rep Stiles).

⁴³² Act to Enforce the Right of Citizens to Vote § 1, 16 Stat at 140:

[A]ll citizens of the United States who are or shall be otherwise entitled and qualified by law to vote at any election by the people . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

The reference to state and territorial laws should suffice to dispel any inference from the unmodified term “allowed” that purely private action was meant to be forbidden. The reader will notice that nothing is said about congressional legislation; the statutory provision is narrower than the constitutional one it was designed to enforce.

qualification for voting” were enjoined to afford all citizens “the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude,” on pain of criminal sanctions and civil damages.⁴³³ Such sanctions were textbook examples of measures to enforce constitutional commands, but there was more than a little screaming over the notion that Congress could regulate registration as a means of ensuring the right to vote.⁴³⁴ Screaming may sometimes be called for, but here it was not; to deny the right to register definitively denies the right to vote.⁴³⁵

Section 4 was more troublesome. It imposed the same civil and criminal sanctions on “any person” who,

by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid.⁴³⁶

The reader will quickly perceive that this provision raised two grave constitutional questions. First, it was not limited to state or federal action: it unambiguously forbade *any person* to interfere with the exercise of the right to vote. Second, it was not expressly limited to interference on account of race, color, or previous condition of servitude; it could easily be construed to forbid interference with voting rights on *any ground* whatever.

Needless to say, this provision did not escape censure during the course of congressional debate. California Senator Eugene Casserly called attention to both problems. The Amendment forbade denial of voting rights only on the basis of race, color, or previous condition of servitude; and it limited only the United States and the states. Section 2 gave Congress authority only to enforce the Amendment, not to enlarge it; and thus Congress could forbid neither individual action nor denial of the vote on grounds other than race.⁴³⁷

⁴³³ Id § 2, 16 Stat at 140.

⁴³⁴ See, for example, Cong Globe, 41st Cong, 2d Sess 3872 (May 27, 1870) (Rep Kerr).

⁴³⁵ Section 3 added that any person denied the opportunity to perform a prerequisite act in violation of § 2 should be deemed to have performed it and was entitled to vote. Act to Enforce the Right of Citizens to Vote § 3, 16 Stat at 140–41.

⁴³⁶ Id § 4, 16 Stat at 141.

⁴³⁷ See Cong Globe App, 41st Cong, 2d Sess 472–73 (May 20, 1870). See also Cong Globe, 41st Cong, 2d Sess 3661 (May 20, 1870) (Sen Thurman) (reasserting the state action problem), 3666 (Sen Davis) (echoing both objections). Compare these with *City of Boerne v Flores*, 521 US 507, 519–20 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress’s enforcement powers under § 5 of the Fourteenth Amendment); and compare the discussion of the Civil Rights Act of 1866 in Part I.C.

Cassery's first point went unchallenged. Good Republicans like Oliver Morton, George Edmunds, and John Sherman conceded that the Fifteenth Amendment gave Congress no authority to ban interference with voting on other than racial grounds.⁴³⁸ Happily, the statutory text furnished a basis for finding the lack of an express limitation not fatal after all: to outlaw interference with voting in any election "as aforesaid" could easily be read to incorporate § 1's express reference to discrimination on grounds of race.

The private action problem is not so easy to circumvent. "Any person" is pretty broad language. Conceivably "as aforesaid" might be pressed into service again to suggest that Congress meant interference under color of state law, since § 1 speaks of a right to vote, anything in state law notwithstanding. But no supporter of the provision took this weasely way out. Rather they insisted that § 4 *did* prohibit purely private action⁴³⁹ and that the Amendment could not otherwise be adequately enforced.⁴⁴⁰ Indeed, Senator Howard added, the framers of the Amendment had plainly meant to reach individual action. It was true, he conceded, that the text spoke only of a prohibition upon government.

It does not, in terms, relate to the conduct of mere individuals, and a very "strict construction" court of justice might, as I can well conceive, refuse to apply the real principles of the amendment to the case of individuals

But I do not think that when Congress passed this amendment and laid it before the States they intended to confine its operation solely to the legislation of Congress . . . or to do the same thing in reference to State legislation. Their intention and purpose were, beyond a doubt, for I witnessed all the discussion that took place in the Senate, to secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there.

To hold that the Amendment did not apply to individual action, Howard concluded, would not be

in harmony with the views of the advocates and friends of the amendment, and if carried out by the courts the clause itself will be stripped in a large degree of that remedial and protective jus-

⁴³⁸ See Cong Globe, 41st Cong, 2d Sess 3571 (May 18, 1870), 3666 (May 20, 1870) (Sen Davis). The Supreme Court would confirm this conclusion in *United States v Reese*, 92 US 214 (1876). See also Currie, *The First Hundred Years* at 393–95 (cited in note 143). As we shall see, Congress's power over *congressional* elections was broader, but § 4 applied to other elections as well.

⁴³⁹ See, for example, Cong Globe, 41st Cong, 2d Sess 3561 (May 18, 1870) (Sen Stewart), 3608 (May 19, 1870) (Sen Schurz).

⁴⁴⁰ See *id* at 3671 (May 20, 1870) (Sen Morton).

tice which was in the minds of its authors when it was under discussion in these Chambers.⁴⁴¹

There are several difficulties with this argument. First, whatever one thinks of the use of legislative history in general, *subsequent* statements of those who participated in the debates have traditionally been given precious little weight on the question of legislative intent—for the reason, among others, that there is a not inconsiderable risk of doctored testimony. Moreover, my own reading of the debates on which Senator Howard purported to rely reveals no evidence whatever that any member of Congress contemplated that the Amendment would apply to private citizens. Finally, there is a serious question whether even strong extraneous proof of intention should be permitted to dictate an interpretation wholly at variance with the plain words of the document itself. In my view it was as clear that the Fifteenth Amendment was limited to government action as it was that it outlawed only racial discrimination in voting—or that the Thirteenth Amendment forbade only slavery, not racial discrimination as such.

North Carolina Senator John Pool tried another tack in defense of the penalties to be inflicted on private actors in § 4 (for lawmakers from the reconstructed states tended to be Republicans). Pool was prepared to assume that the Amendment applied only to the government. But if a state neglected to enforce its laws to prevent individual interference with the right to vote, he urged, Congress had a duty to intervene. For “by acts of omission,” Pool opined, the state “may practically deny the right.”⁴⁴²

Stated thus baldly, the argument must fail—as it would nearly a century later when the same contention was repeatedly pressed upon the Supreme Court.⁴⁴³ If I fail to prevent you from committing a crime, it is you who have committed it, not I; and to argue that the state has a duty to prevent private interference with voters begs the very question to be resolved.

Pool’s further reference to the *Fourteenth* Amendment, however, raises a more challenging question. Section 1 of that Amendment likewise employed the term “deny,” and it did so, said Pool, “in contradistinction to the first clause, which says, ‘No State shall make or enforce any law’ which shall do so and so.”

That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch

⁴⁴¹ Id at 3655.

⁴⁴² Id at 3611 (May 19, 1870).

⁴⁴³ See the discussion in Currie, *The Second Century* at 419–20 (cited in note 403).

of the subject. It shall not deny by an act of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.⁴⁴⁴

This is a plausible argument. The Civil Rights Act, for which the Fourteenth Amendment was meant to provide an unimpeachable constitutional base, expressly guaranteed to all citizens, regardless of race, the “full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.”⁴⁴⁵ For as the Supreme Court would soon say in the *Slaughter-House Cases*, there were two distinct problems with which the statute (and thus the Amendment) were meant to deal: the Southern states had adopted laws affirmatively denying blacks a number of privileges and immunities, and “[i]t was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.”⁴⁴⁶ “Against this background,” as I have written elsewhere, “equal protection seems to mean [as the words themselves imply] that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury.”⁴⁴⁷

There remains one difficulty with Pool’s argument—not at the level of theory but in its application to the terms of § 4. Pool’s contention was that the state would offend the Constitution by declining to enforce laws for the voter’s protection. Yet the statute punished the *individual* who obstructed the voter, although as we have seen private actors are incapable of violating either the Fourteenth Amendment or the Fifteenth. If it is the state that has sinned, should it not be the state that is punished? On Pool’s theory it appears that the statute penalized the wrong party.

Pool had an answer for that too. It was impracticable to punish a state; a state could hardly be imprisoned for committing a crime. The only way to ensure that voters received the equal protection that the state denied was for the United States to protect them; and thus, he seemed to say, federal punishment of the individual miscreant was the only appropriate means of enforcing the Fourteenth Amendment.⁴⁴⁸

Why not punish the state officer responsible for the offense, who for this purpose may be considered the state? Pool said it couldn’t be done,⁴⁴⁹ but the two preceding sections did precisely that, and in cases

⁴⁴⁴ Cong Globe, 41st Cong, 2d Sess 3611 (May 19, 1870).

⁴⁴⁵ An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication § 1, 14 Stat 27, 27 (Apr 9, 1866).

⁴⁴⁶ 83 US (16 Wall) at 70.

⁴⁴⁷ Currie, *The First Hundred Years* at 349 (cited in note 143).

⁴⁴⁸ See Cong Globe, 41st Cong, 2d Sess 3611 (May 19, 1870).

⁴⁴⁹ See *id.*

involving mere omissions too. A better argument might be that, as Chief Justice Marshall had said of the Necessary and Proper Clause in Article I, the authorization of “appropriate legislation” to enforce the Amendments gave Congress a choice among reasonable means;⁴⁵⁰ “appropriate” is surely not a *more* confining term than “necessary and proper.”⁴⁵¹

Section 5 of the statute, added in response to a suggestion from Senator Pool,⁴⁵² also applied to purely private action, to “control” as well as to obstruct the act of voting, and by such means (beyond bribery and threats of violence) as threatened loss of a lease or a job.⁴⁵³ Similarly, § 6 proscribed private combinations to violate the statute itself or to hinder the exercise of “any right or privilege granted or secured . . . by the Constitution or laws of the United States.”⁴⁵⁴ If either of these provisions can be sustained as a valid exercise of congressional authority, it is only on the basis of the argument adumbrated by Senator Pool.⁴⁵⁵

Sections 14 and 15 were garden-variety provisions for enforcing the disqualification from public office prescribed in § 3 of the Fourteenth Amendment—by *quo warranto* and criminal sanctions.⁴⁵⁶ They posed no constitutional problems.⁴⁵⁷

Sections 16 and 17 essentially restated the central provisions of the 1866 Civil Rights Act, and § 18 expressly reenacted that entire statute.⁴⁵⁸ Reenactment after adoption of the Fourteenth Amendment made perfect sense, as Congress had had no authority to pass it when it was adopted. Why it had to be done twice in the same statute nobody paused to explain.

Sections 19 and 20 prohibited fraud and other improper practices in connection with voting in and registration for *congressional* elec-

⁴⁵⁰ See *McCulloch v Maryland*, 17 US (4 Wheat) 316, 421 (1819) (“[A]ll means which are appropriate, . . . but consist with the letter and the spirit of the constitution, are constitutional.”). See also US Const Art I, § 8, cl 18.

⁴⁵¹ New York Representative Noah Davis attempted to equate the two formulations, as Marshall had come close to doing in *McCulloch*: “appropriate” legislation under § 2 was that which was necessary and proper to carry out the Amendment. See Cong Globe, 41st Cong, 2d Sess 3882 (May 27, 1870).

⁴⁵² See Cong Globe, 41st Cong, 2d Sess 3611–12 (May 19, 1870). See also *id* at 3678 (May 20, 1870) (Sen Morton).

⁴⁵³ See Act to Enforce the Right of Citizens to Vote § 5, 16 Stat at 141.

⁴⁵⁴ *Id* § 6, 16 Stat at 141.

⁴⁵⁵ See *United States v Harris*, 106 US 629, 644 (1883) (striking down a statute making it a crime for individuals to conspire to deprive another of the equal protection of the laws); Currie, *The First Hundred Years* at 396–98 (cited in note 143) (discussing the possibility that the Equal Protection Clause imposes on states a duty to take positive action to protect blacks).

⁴⁵⁶ See Act to Enforce the Right of Citizens to Vote §§ 14–15, 16 Stat at 143–44.

⁴⁵⁷ See *id*. Sections 7–13 dealt essentially with ancillary matters and raised no interesting constitutional questions.

⁴⁵⁸ *Id* §§ 16–18, 16 Stat at 144.

tions, the “time, place, and manner” of which Congress had express authority to regulate under Article I, § 4.⁴⁵⁹ Senator Thurman denied that the fraud provision had anything to do with time, place, or manner,⁴⁶⁰ but he was wrong: under the sections in question the relevant elections had to be conducted in a free and honest way. The reader will note that these provisions were not limited, as others were, to actions based upon racial grounds. They did not have to be; as Senator Morton explained, federal authority over congressional elections was broader.⁴⁶¹

So much, for the time, for voting rights. Let us turn to other questions of congressional power.

B. Trademarks, Education, and Fish

What do trademarks, education, and fish have in common? Only that none of them is listed in the Constitution as a subject of congressional legislation, and that all three were the subject of bills or statutes introduced or adopted during the Forty-first Congress.

Let us begin with trademarks. In the context of a general revision of the patent and copyright laws, the House Committee on Patents recommended adoption of a brand new provision giving federal protection to trademarks as well. Treaties with several nations gave foreign trademarks the same effect throughout the United States as they had in their country of origin, Rhode Island Representative Thomas Jenckes explained; domestic trademarks ought to enjoy the same pro-

⁴⁵⁹ Id §§ 19–20, 16 Stat at 144–45. See Cong Globe, 41st Cong, 2d Sess 3872 (May 27, 1870) (Rep Bingham).

⁴⁶⁰ See Cong Globe, 41st Cong, 2d Sess 3675 (May 20, 1870).

⁴⁶¹ See id at 3571 (May 18, 1870). As initially introduced by Senator Sherman, the fraud provision applied to all federal elections. See id at 3664 (May 20, 1870). Reminded by Trumbull and Davis that Article II left regulation of the choice of presidential electors to state law, Sherman sheepishly dropped them from his proposed amendment. See id (Sen Trumbull). See also id at 3667 (Sen Davis), 3670 (Sen Sherman).

In February 1871, the 1870 statute was amended, essentially to provide for the appointment (by federal judges) of federal election supervisors to prevent hanky-panky in the polling place, again with regard to congressional elections. An Act to Amend an Act Approved May Thirty-one, Eighteen Hundred and Seventy, Entitled “An Act to Enforce the Rights of Citizens of the United States to Vote in the Several State of the Union, and for Other Purposes” § 2, 16 Stat 433, 433–34 (Feb 28, 1871). Plainly this too was a regulation of the manner of election. The only constitutional issue of note it presented was whether Article II’s provision for appointment of inferior officers by the president, the heads of departments, or “the courts of law” permitted Congress to empower judges to appoint officers outside their own department. The Supreme Court upheld this and other features of the 1871 law in *Ex parte Siebold*, 100 US 371, 398 (1880). See also the unfortunate decisions in *Morrison v Olson*, 487 US 654, 673–77 (1988) (upholding a provision for judicial appointment of a special prosecutor), and *Ex parte Hennen*, 38 US (13 Peters) 230, 257–58 (1839) (noting, in dictum, that “[t]he appointing power here designated . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.”).

tection.⁴⁶² After spelling out the operation of his proposal, Jenckes moved on to the copyright provisions of the bill. He said nothing about Congress's authority over trademarks.

The House debated the bill briefly and passed it, without further mention of the trademark provision.⁴⁶³ In the Senate, Waitman Willey of West Virginia disclosed that his Patent Committee had recommended striking the trademark sections on the ground that the rights in question were adequately protected by the common law. He also announced that he had changed his mind: he thought Congress ought to provide additional protection after all. Other senators agreed with him, and the motion to strike the trademark provisions failed.⁴⁶⁴ As in the House, no one bothered either to question their constitutionality or to defend it, and the Senate passed the bill too.⁴⁶⁵ President Grant signed it into law on July 8, 1870.⁴⁶⁶

The statute was straightforward and reminiscent of the patent and copyright laws. The user of a trademark could obtain the exclusive right to employ it for a renewable term of thirty years by recording it in the patent office, and infringers were made subject to suit for damages and injunction.⁴⁶⁷ The only difficulty was to discover a basis for its enactment, and not one member of Congress so much as mentioned the constitutional question.

Article I, § 8 gave Congress the right to issue patents and copyrights, but it said nothing about trademarks:

The Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.⁴⁶⁸

A trademark has nothing to do with science or the useful arts except to identify their products; one who devises a trademark is neither an author nor an inventor; the mark itself is neither a writing nor a discovery within the meaning of the constitutional provision. When the trademark provisions came before the Supreme Court in 1879, the Court properly struck them down. The clause in question, wrote Jus-

⁴⁶² See Cong Globe, 41st Cong, 2d Sess 2683 (Apr 14, 1870). There was no printed committee report on this legislation.

⁴⁶³ See id at 2872–80 (Apr 21, 1870).

⁴⁶⁴ See id at 4821–22 (June 24, 1870).

⁴⁶⁵ See id at 4827. A conference committee ironed out differences between other portions of the House and Senate versions of the bill. See id at 5136 (July 2, 1870) (Rep Jenckes), 5143.

⁴⁶⁶ An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights §§ 77–84, 16 Stat 198, 210–12 (July 8, 1870).

⁴⁶⁷ See id §§ 77–79 at 210–11.

⁴⁶⁸ US Const Art I, § 8, cl 8.

tice Samuel Miller, protected only “the fruits of intellectual labor,” while a trademark did not “depend upon novelty, invention, discovery, or any work of the brain It is simply founded on priority of appropriation.”⁴⁶⁹ As I have written elsewhere, Miller might equally have based his conclusion on the ground that “the trademark law served to prevent confusion of goods rather than, as the Constitution requires, ‘to promote the Progress of Science and Useful Arts’ by encouraging creative activity.”⁴⁷⁰ Congress in this case plainly dropped the ball.

Education? The reader may recall that, in passing on to Congress the Secretary of State’s certificate that the Fifteenth Amendment had been adopted, President Grant had beseeched Congress “to take all the means within their constitutional powers to promote and encourage public education throughout the country.”⁴⁷¹ For only an enlightened citizenry, Grant had insisted, could make republican government work.⁴⁷²

Even earlier, as we shall see, Congress over constitutional objections had made it a condition of Virginia’s representation in Congress that the state never amend its new Constitution so as to deny its citizens the benefit of an adequate system of public schools.⁴⁷³ Shortly before *that*, Tennessee Representative William Prosser had introduced a bill to provide federal support for education in general. Some denied Congress’s power to do so, Prosser acknowledged, but they were in error; his proposal was amply supported by the Preamble, which among other things made it an object of the Constitution to “promote the general welfare.”⁴⁷⁴ A few months later Massachusetts Representative George F. Hoar, building upon the President’s plea, chimed in with the assertion that anything that was indispensable to republican government lay within Congress’s power—which seemed to suggest that education was necessary and proper either to guarantee the states such a government or to the exercise of all federal functions.⁴⁷⁵

The Forty-first Congress adjourned for the second time without action on Prosser’s proposal. Hoar took up the cudgels once again shortly after it met for the third time in December 1870. A national school system, he argued, was necessary to running the government, as

⁴⁶⁹ *In re Trade-Mark Cases*, 100 US 82, 93–94 (1879).

⁴⁷⁰ Currie, *The First Hundred Years* at 435 (cited in note 143). Nor could the statute be sustained as an exercise of the commerce power, for it was not limited to trademarks used in interstate or foreign commerce, see *In re Trade-Mark Cases*, 100 US at 96–98. See also Currie, *The First Hundred Years* at 430 (cited in note 143); and compare the fate of a similarly unrestricted regulation of the composition of illuminating oils, discussed in Part I.F.

⁴⁷¹ Grant, *Special Message* (Mar 30, 1870), in 7 Richardson at 56 (cited in note 426).

⁴⁷² See *id.* See also Part III.B.

⁴⁷³ The same condition was later imposed on Mississippi and Texas. See Part III.F.1.

⁴⁷⁴ Cong Globe, 41st Cong, 2d Sess 759, 763–65 (Jan 25, 1870).

⁴⁷⁵ See Cong Globe App, 41st Cong, 2d Sess 478–79 (June 6, 1870).

uneducated citizens were incapable of governing themselves.⁴⁷⁶ Education furthered all the aims listed in the Preamble, which he went through one by one. The power to tax in order to promote the general welfare, Hoar continued, was “almost unlimited” and left to the discretion of Congress. Education was necessary to ensure republican government in the states. It was also necessary to carry out the Fourteenth and Fifteenth Amendments, Hoar concluded, as only the educated could intelligently exercise the right to vote.⁴⁷⁷

Echoing some of Hoar’s arguments, Pennsylvania Representative Washington Townsend added that Congress had previously spent money to establish a Department of Agriculture.⁴⁷⁸ But opponents of the education proposal were voluble too. Congress had authority to promote science by granting patents and copyrights, said Representative Bird, but no power over education in general.⁴⁷⁹ The Preamble, said Representative McNeely, gave Congress no authority; it merely stated the Constitution’s goals.⁴⁸⁰ The Guarantee Clause, said Representative Kerr, was meant to protect existing governments created by the people themselves;⁴⁸¹ to hold that it required general education, McNeely added, would mean that, contrary to Madison’s assertion, no state had had a republican government when the Constitution was adopted, for none had a general system of public schools.⁴⁸² Land grants to public institutions of higher learning, Kerr added, were distinguishable: they were an exercise of Congress’s express power to dispose of the territory and other property of the United States.⁴⁸³ Finally, Kerr concluded, to follow the proponents’ “shadowy, visionary, and transcendental” arguments would destroy all limitations on federal power, for if Congress could regulate education it could regulate, for example, marriage as well.⁴⁸⁴

The education bill died in utero; it was never put to a vote in the House. We do not know to what extent its failure was based upon simple parsimony and to what extent on constitutional scruples.

⁴⁷⁶ See Cong Globe, 41st Cong, 3d Sess 808 (Jan 28, 1871).

⁴⁷⁷ See id at 1040–41 (Feb 7, 1871).

⁴⁷⁸ See id at 1375–77 (Feb 17, 1871). See also Currie, 73 U Chi L Rev at 1143–45 (cited in note 1) (discussing the debate about the source of congressional authority to promote agriculture).

⁴⁷⁹ See Cong Globe App, 41st Cong, 3d Sess 77 (Jan 28, 1871).

⁴⁸⁰ Id at 97 (Feb 8, 1871). See also Cong Globe, 41st Cong, 3d Sess 1371 (Feb 17, 1871) (Rep Kerr).

⁴⁸¹ See Cong Globe, 41st Cong, 3d Sess 1371.

⁴⁸² See Cong Globe App, 41st Cong, 3d Sess 98 (Feb 8, 1871).

⁴⁸³ See Cong Globe, 41st Cong, 3d Sess 1371 (Feb 17, 1871); US Const Art IV, § 3. See also Cong Globe App, 41st Cong, 3d Sess 98 (Feb 8, 1871) (Rep McNeely).

⁴⁸⁴ See Cong Globe, 41st Cong, 3d Sess 1371 (Feb 17, 1871).

As an original matter I believe the bill's opponents were right. The Guarantee Clause and Fifteenth Amendment arguments seem to me strained, and I have long believed Madison was correct in construing the general welfare provision to limit federal spending to that which is incidental to the exercise of other federal powers. But it may have been a trifle late to make these objections. Apart from the arguably distinguishable land-grant colleges,⁴⁸⁵ legislative precedent favored a broad interpretation of the spending power. Not only had Congress established a Department of Agriculture, as Townsend reminded the House; it had created a Department of Education as well.⁴⁸⁶ That entailed federal spending in support of education; it was hard to distinguish the aid bill that Congress declined to pass.

And those fish? In February 1871, as the Forty-first Congress was approaching its final adjournment, the House and Senate passed a joint resolution empowering a federal commissioner to investigate a reported decline in valuable food fish on the coasts and lakes of the United States, and to report to Congress "whether any or what protective, prohibitory, or precautionary measures should be adopted in the premises."⁴⁸⁷ Another exercise of a broadly conceived power to spend? "Prohibitory" measures, if later adopted, could hardly be defended on such a ground. The preamble to the statute noted that the alleged decline adversely affected "the interests of trade and commerce"; did Congress imagine it had authority to regulate *production* in order to promote interstate and foreign trade?

We shall never know. Not only did Congress fail to discuss the constitutionality of this fishy resolution; it hardly debated the resolution at all.⁴⁸⁸

C. The Income Tax

During the Civil War, to cover extraordinary expenses, Congress adopted a medley of new taxes, including the first federal income

⁴⁸⁵ See Currie, 73 U Chi L Rev at 1142–43 (cited in note 1) (discussing the passage of legislation to allow the land grants); Currie, *Democrats and Whigs* at 50–53 (cited in note 2) (discussing the controversy over federal authority to grant land to the states for colleges).

⁴⁸⁶ See Part I.F.

⁴⁸⁷ Joint Resolution for the Protection and Preservation of the Food Fishes of the Coast of the United States, 16 Stat 593, 594 (Feb 9, 1871).

⁴⁸⁸ See Cong Globe, 41st Cong, 3d Sess 584–85 (Jan 18, 1871), 683 (House), 980 (Senate). Representative Dawes did suggest that the work would be done without additional pay by scientists connected with the Smithsonian Institution and that it would cost about \$5,000 a year. See id at 683. For discussion of the constitutionality of the Smithsonian itself, see Currie, *Democrats and Whigs* at 136–41 (cited in note 2).

tax.⁴⁸⁹ So far as I have been able to discover, its constitutionality was taken for granted. But once the war was over and it was proposed to extend the income tax, voices were raised insisting that it ought not to be reenacted, as it was unconstitutional.⁴⁹⁰

The argument was that the levy on income was a direct tax within the meaning of Article I, §§ 2 and 9, and that it was not apportioned among the states according to population, as those provisions required.⁴⁹¹

The hard question was to define just what a direct tax was. The Constitution itself gave only one clue: § 9 provided that, absent an apportionment, “[n]o capitation, or other direct, tax shall be laid.”⁴⁹² A capitation tax was a poll tax, imposed on individuals per capita. In 1796 the Supreme Court added in dictum that taxes on land were also direct, opining that it seemed that the *only* taxes that were direct were those on capitation or land.⁴⁹³ Repeating this ipse dixit, the Court in 1869 had actually upheld a corporate income tax on the ground that it was not direct.⁴⁹⁴ But that was not enough to convince some members of Congress in 1870–1871.

The ground taken by the Court was that to apportion the tax according to population would have such mischievous results that it could not have been intended:

The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in

⁴⁸⁹ See Currie, 73 U Chi L Rev at 1140–41 (cited in note 1) (explaining the nation’s first income tax and the lack of debate about its constitutionality).

⁴⁹⁰ The initial tax was repealed in 1862, An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt § 89, 12 Stat 432, 473 (July 1, 1862), reinstated in 1864, An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes § 116, 13 Stat 223, 281 (June 30, 1864), increased (again) in 1865, An Act to Amend an Act Entitled “An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes,” Approved June Thirtieth, Eighteen Hundred and Sixty-four § 1, 13 Stat 469, 479 (Mar 3, 1865), reduced in 1867 and scheduled to expire three years later, An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes § 113, 14 Stat 471, 477–80 (Mar 2, 1867). The proposal to extend it indefinitely was § 35 of House Bill 2045 in the second session of the Forty-first Congress. See Cong Globe, 41st Cong, 2d Sess 3993 (June 1, 1870).

⁴⁹¹ See, for example, Cong Globe, 41st Cong, 2d Sess 4717 (June 22, 1870) (Sen Corbett); Cong Globe, 41st Cong, 3d Sess 746 (Jan 26, 1871) (Sen Cole).

⁴⁹² US Const Art I, § 9, cl 4.

⁴⁹³ See *Hylton v United States*, 3 US (3 Dall) 171, 175 (1796) (Chase) (“[T]he *direct* taxes contemplated by the Constitution, are only *two*, . . . a *capitation*, or *poll* tax . . . and a tax on land.”), 176 (Paterson) (“The Constitution declares, that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax.”), 181 (Iredell) (“[I]t is evident that the Constitution contemplated none as direct [taxes] but such *as could be apportioned*”). See also Currie, *The First Hundred Years* at 31–37 (cited in note 143) (discussing the policy considerations behind the decisions in *Hylton*).

⁴⁹⁴ See *Pacific Insurance Co v Soule*, 74 US (7 Wall) 433, 444–46 (1869), citing *Hylton*, 3 US (3 Dall) at 175, 177.

the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results.⁴⁹⁵

This had also been the principal argument of the various justices in the 1796 case of *Hylton v United States*.⁴⁹⁶

Senator Morton, a proponent of the tax, said the Supreme Court (he didn't recall where) had said income taxes were not direct.⁴⁹⁷ Supreme Court decisions, retorted Illinois Senator Richard Yates, were not binding on Congress,⁴⁹⁸ and he was right: as President Jackson had said in his famous veto of the bill to extend the Second Bank of the United States, each branch of government had a responsibility not to do anything it believed contrary to the Constitution.⁴⁹⁹

On the merits, one representative turned the Supreme Court's argument on its head: because the tax *could* be apportioned by population, it had to be.⁵⁰⁰ Not only did it seem unlikely in the extreme that the Framers (or the Court) would have embraced any such corollary; no effort was made to show that the consequences of such an apportionment would not be, as the Court had argued, bizarre.

Others tried analogy. Yates called the income tax as direct as "a tax on horses, cattle, or property of any kind;"⁵⁰¹ Bayard said a tax on the profit from land was the equivalent of a tax on the land itself.⁵⁰² But Yates made no effort to explain how a tax on income resembled a tax on cattle, and whether his analogies were themselves direct seemed doubtful after the Supreme Court held that a levy on carriages was not.⁵⁰³ As for the comparison with land taxes, which all agreed were direct, it would not invalidate a tax on income from other sources. Moreover, in anticipating Bayard's argument New York Rep-

⁴⁹⁵ *Pacific Insurance*, 74 US (7 Wall) at 446.

⁴⁹⁶ 3 US (3 Dall) 171, 174 (1796) (Chase), 179–80 (Paterson), 181–83 (Iredell).

⁴⁹⁷ See Cong Globe, 41st Cong, 2d Sess 4897 (June 27, 1870).

⁴⁹⁸ See *id.*

⁴⁹⁹ Andrew Jackson, *Veto Message to the Senate* (July 10, 1832), in James D. Richardson, 2 *A Compilation of the Messages and Papers of the Presidents 1789–1897* 576, 582 (US Congress 1900). See also Currie, *Democrats and Whigs* at 63–65 (cited in note 2) (discussing the strength of Jackson's argument that each branch is free to interpret the Constitution for itself).

⁵⁰⁰ See Cong Globe App, 41st Cong, 2d Sess 447 (June 1, 1870) (Rep Reeves).

⁵⁰¹ Cong Globe, 41st Cong, 2d Sess 4897 (June 27, 1870).

⁵⁰² See Cong Globe App, 41st Cong, 2d Sess 523 (June 23, 1870).

⁵⁰³ See *Hylton*, 3 US (3 Dall) at 171.

representative Noah Davis managed to undermine it completely: to tax the profits of land was an *indirect* means, he declared, of taxing the land itself.⁵⁰⁴

Some efforts were made to ground the unconstitutionality of the income tax on the language of the constitutional provisions themselves. Pennsylvania Senator John Scott proclaimed that the Framers would never have employed the broad term “capitation and other direct taxes” if they had had only land and poll taxes in mind;⁵⁰⁵ New York Representative John Griswold seemed to suggest that a direct tax was one assessed directly upon those who would bear its ultimate burden.⁵⁰⁶ That the provision might include taxes other than the two the Supreme Court had mentioned, however, did not prove that an income tax was among them; and Senator Thurman punctured Griswold’s otherwise promising balloon by pointing out that there were cases in which an income tax too might be passed on to someone else.⁵⁰⁷

Asked about the legislative precedents that appeared to sustain the tax, Senator Yates resorted to the most desperate of constitutional argumentation: “[N]othing was unconstitutional during the war.”⁵⁰⁸ This contention answers itself, and the Supreme Court had reduced it to smithereens in *Ex parte Milligan*: there is not a word in the Constitution to suggest it is inapplicable in times of war.⁵⁰⁹

Unimpressed by any of the opposing arguments, the House in 1870 passed a bill that among other things would have extended the income tax indefinitely.⁵¹⁰ The Senate initially voted to strike out the income tax provision⁵¹¹ but then thought better of it, limiting the authorization to a

⁵⁰⁴ See Cong Globe, 41st Cong, 2d Sess 4031 (June 2, 1870).

⁵⁰⁵ See Cong Globe App, 41st Cong, 2d Sess 514 (June 22–23, 1870).

⁵⁰⁶ See *id* at 429 (June 3, 1870).

⁵⁰⁷ See Cong Globe, 41st Cong, 2d Sess 4757 (June 23, 1870). On the viability of Griswold’s definition, see Currie, *The First Hundred Years* at 36 n 41 (cited in note 143) (noting that it had been employed by John Stuart Mill), 35 (noting that to Adam Smith a charge on income was the very essence of a direct tax).

⁵⁰⁸ Cong Globe, 41st Cong, 2d Sess 4897 (June 27, 1870).

⁵⁰⁹ See 71 US (4 Wall) at 120–21 (“The Constitution is a law for rulers and people, equally in war and peace . . . and under all circumstances.”). See also Currie, *The First Hundred Years* at 288 (cited in note 143). I’m not a lawyer, admitted Senator Buckingham, but if I don’t pay the Government will come and take it from me, and I call that pretty direct. See Cong Globe, 41st Cong, 3d Sess 745 (Jan 26, 1871). See also *id* at 755 (Sen Carpenter). That, of course, was true of all taxes, duties, imposts, and excises, so it failed to distinguish a direct imposition from any other.

⁵¹⁰ See Cong Globe, 41st Cong, 2d Sess 4107 (June 6, 1870). For the relevant provision, see *id* at 3993 (June 1, 1870).

⁵¹¹ See *id* at 5088 (July 1, 1870).

period of two years.⁵¹² After a conference that is how it ended: the income tax would still be collected for the years 1870 and 1871.⁵¹³

Both Houses thus had decisively rejected the constitutional objection. But opponents were not prepared to surrender. No sooner was the extension in place than bills were introduced in both Houses to repeal the income tax completely.⁵¹⁴ Constitutional arguments were trotted out again, but they didn't amount to much.⁵¹⁵ Nevertheless the Senate narrowly managed to pass a bill of its own to abolish the income tax,⁵¹⁶ only to founder on the House's insistence that under Article I, § 7 only it was entitled to originate revenue bills, even those whose effect was to lower rather than to increase taxes.⁵¹⁷ The Senate stuck to its guns,⁵¹⁸ but it takes two to tango.⁵¹⁹ An effort to take up a similar House bill was jettisoned after its sponsor concluded it would not pass the House.⁵²⁰

The income tax thus survived until the end of 1871, as the 1870 law provided. For the time being it was not renewed. But another legislative precedent had now been established: after a full airing of the issue, both the House and the Senate had decided that income taxes did not have to be apportioned according to population.⁵²¹

⁵¹² The final Senate version is printed in id at 5414–15.

⁵¹³ An Act to Reduce Internal Taxes, and for Other Purposes § 6, 16 Stat 256, 257 (July 14, 1870).

⁵¹⁴ See, for example, Cong Globe, 41st Cong, 3d Sess 20 (Dec 6, 1870) (Reps Hill and Kellogg), 64 (Dec 12, 1870) (Rep Ketcham), 720 (Jan 25, 1871) (Sen Scott).

⁵¹⁵ I have noted a few of them above. See, for example, text accompanying notes 500–08.

⁵¹⁶ See Cong Globe, 41st Cong, 3d Sess 755 (Jan 26, 1871).

⁵¹⁷ See id at 791 (Jan 26, 1871) (Rep Hooper) (returning the bill to the Senate on this ground), 1873 (Mar 2, 1871) (conference report, recording that the House adhered to its position). See also Cong Globe App, 41st Cong, 3d Sess at 264–68 (Mar 3, 1871) (Rep Garfield).

⁵¹⁸ See Cong Globe, 41st Cong, 3d Sess 1873 (Mar 2, 1871).

⁵¹⁹ US Const Art I, § 7. When this issue was debated in 1833, it was adroitly sidestepped by substituting a House bill for one initiated by the Senate and *amending* it to conform to the Senate provisions. See Currie, *Democrats and Whigs* at 116 & n 154 (cited in note 2).

⁵²⁰ See Cong Globe, 41st Cong, 3d Sess 1851 (Mar 2, 1870) (Rep Hooper).

⁵²¹ For the Supreme Court's later reversal on this issue, see *Pollock v Farmers' Loan & Trust Co*, 157 US 429, 583 (1895) (noting the importance of apportionment to the ratification of the Constitution and holding that constitutional protection cannot be "frittered away" by calling a direct tax "indirect"); Currie, *The Second Century* at 24–26 (cited in note 403). Unapportioned income taxes were legalized by the Sixteenth Amendment in 1913.

Ancillary constitutional issues were also raised in Congress but not resolved. Senator Sherman opposed an attempt to limit the income tax to corporations on the ground that the Constitution required it to be uniform. See Cong Globe, 41st Cong, 2d Sess 4713 (June 22, 1870). Senator Bayard responded convincingly that the requirement was geographical only: duties, imposts, and excises were directed to be "uniform throughout the United States." Id at 5077 (July 1, 1870). See also US Const Art I, § 8, cl 1. Senator Scott argued that no tax could be applied to sitting federal judges or to the president because it would effectively reduce their salaries in contravention of Articles II and III. See Cong Globe App, 41st Cong, 2d Sess 520 (June 23, 1870); Cong Globe, 41st Cong, 3d Sess 721 (Jan 25, 1871); US Const Art II, § 1, cl 7 and Art III, § 1. Senator Conkling observed that some courts were holding that the United States could not tax

D. San Domingo

We have spoken at length about the powers of Congress. Let us now say a word about those of the president and Senate, as defined by Article II, § 2: “The President . . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”

On January 10, 1870, President Grant dispatched the following cursory message: “I transmit to the Senate, for consideration with a view to its ratification, a treaty for the annexation of the Dominican Republic to the United States.”⁵²²

I suspect that at the time this message was not so startling as it seems,⁵²³ but it certainly came as a surprise to me. What was it all about?

In a later message Grant expounded at length upon the advantages of annexation, stressing national defense, trade, and the Monroe Doctrine:

The acquisition of San Domingo is an adherence to the “Monroe doctrine;” it is a measure of national protection; it is asserting our just claim to a controlling influence over the great commercial traffic soon to flow from west to east by way of the Isthmus of Darien; it is to build up our merchant marine; it is to furnish new markets for the products of our farms, shops, and manufactories; it is to make slavery insupportable in Cuba and Porto Rico at

the salaries of state officers either. See Cong Globe, 41st Cong, 3d Sess 721 (Jan 25, 1871). Attorney General Ebenezer Hoar had embraced the first of these arguments in 1869, 13 Op Atty Gen 161 (Oct 13, 1869) (Ebenezer Hoar, AG) (explaining that a tax on the salary of the president or federal officers would be an unconstitutional diminution of salary). The Supreme Court would first endorse both of them (the latter on grounds of intergovernmental immunity), only to abandon them in the following century. Compare *Evans v Gore*, 253 US 245, 263 (1920) (concluding that the Sixteenth Amendment did not authorize the taxation of a federal judge’s salary), with *O’Malley v Woodrough*, 307 US 277, 277–78 (1939) (finding that applying the income tax to federal judges is constitutional). Compare also *Collector v Day*, 78 US (11 Wall) 113 (1871) (holding that the power to tax state officers belonged to the state government), with *Helvering v Gerhardt*, 304 US 405, 424 (1938) (holding that the burden imposed on state governments by federal taxation of state officers was not so great as to be unconstitutional).

⁵²² Ulysses S. Grant, *Special Message to the Senate* (Jan 10, 1870), in 7 Richardson 46, 46 (cited in note 426).

⁵²³ In fact, Indiana Representative Goodlove Orth had introduced a joint resolution to acquire San Domingo as early as February 1869. Cong Globe, 40th Cong, 3d Sess 769 (Feb 1, 1869). President Johnson had recognized the Dominican Republic in 1866, Andrew Johnson, *Special Message to the Senate and House of Representatives* (Jan 30, 1866), in 6 Richardson 377 (cited in note 6), and Secretary of State William Henry Seward had been negotiating for the purchase or lease of a naval port there since the Civil War. See Charles Callan Tansill, *The United States and Santo Domingo, 1798–1873: A Chapter in Caribbean Diplomacy*, 283–86 (Johns Hopkins 1938). Annexation itself had been under discussion at least since 1868, *id* at 265–70, and President Johnson had adverted to it in his annual message of that year. Andrew Johnson, *Fourth Annual Message* (Dec 9, 1868), in 6 Richardson 672, 688 (cited in note 6). Tansill’s book relates the history of US-Dominican relations in considerable detail.

once, and ultimately so in Brazil; it is to settle the unhappy condition of Cuba and end an exterminating conflict; it is to provide honest means of paying our honest debts without overtaxing the people; it is to furnish our citizens with the necessaries of everyday life at cheaper rates than ever before; and it is, in fine, a rapid stride toward that greatness which the intelligence, industry, and enterprise of the citizens of the United States entitle this country to assume among nations.⁵²⁴

Not everybody saw it that way, however, and the Senate flatly rejected the treaty.⁵²⁵

The President refused to give up. In his second annual message, in December of the same year, he pressed his pet project on Congress once again:

In view of the importance of this question, I earnestly urge upon Congress early action expressive of its views as to the best means of acquiring San Domingo. My suggestion is that by joint resolution of the two Houses of Congress the Executive be authorized to appoint a commission to negotiate a treaty with the authorities of San Domingo for the acquisition of that island, and that an appropriation be made to defray the expenses of such a commission. The question may then be determined, either by the action of the Senate upon the treaty or the joint action of the two Houses of Congress on a resolution of annexation, as in the case of the acquisition of Texas.⁵²⁶

As in the case of the acquisition of Texas! That was enough to raise eyebrows both in and out of the Senate, for as in the case of Texas the President's plan contemplated a major agreement between

⁵²⁴ Ulysses S. Grant, *Second Annual Message* (Dec 5, 1870), in 7 Richardson 96, 100 (cited in note 426). The immediate impetus for the President's message, as he later informed Congress, was a warning from Dominican officials that if the United States declined to accept them "they would be compelled to seek protection elsewhere." Ulysses S. Grant, *Special Message to the Senate and House of Representatives* (Apr 5, 1871), in 7 Richardson 128, 129 (cited in note 426).

⁵²⁵ 17 Sen Exec J 502-03 (June 30, 1870). We are informed that the Senate conducted "deliberate and protracted consideration" on the treaty, see Cong Globe, 41st Cong, 3d Sess 195 (Dec 20, 1870) (Sen Davis), but unfortunately Senate debates on such "executive" matters as treaties and appointments were not recorded. Senator Morton rhetorically inquired whether it was not true that the treaty had received a majority of votes in the Senate, but he was ruled out of order. See *id.*

⁵²⁶ Grant, *Second Annual Message* (Dec 5, 1870), in 7 Richardson at 100-01 (cited in note 426). This and other passing references to the "island" led some to suspect that the President had designs upon Haiti as well. See, for example, Cong Globe, 41st Cong, 3d Sess 230 (Dec 21, 1870) (Sen Sumner). There is some evidence that he did. See Tansill, *The United States and Santo Domingo* at 275 (cited in note 523) (discussing a House resolution to authorize the President to extend the protection of the United States to both Haiti and the Dominican Republic).

two sovereign nations, and as in the case of Texas it was argued that it could be made only by treaty.⁵²⁷

Supporters of the President's proposal pointed to Texas as a precedent for the acquisition of San Domingo by joint resolution.⁵²⁸ It was no such thing, said Senator Davis: Texas had settled that we could acquire new *states* by joint resolution, not territories⁵²⁹—and as Senator Thurman observed, nobody envisioned making San Domingo a state.⁵³⁰ What difference did that make? Senator Williams asked. It had been settled since the Louisiana Purchase in 1803 that the United States could acquire foreign territory; since no provision expressly authorized annexation, the manner in which it was done was left to Congress.⁵³¹

It made all the difference in the world, said Senator Thurman. It was the treaty power that authorized the acquisition of territory, and it authorized only the making of treaties.⁵³² States were different, Senator Davis added, because annexation was necessary and proper to the admission of new states.⁵³³ No comparable provision, Thurman concluded, justified the acquisition of mere territories; they could be annexed only by conquest or treaty.⁵³⁴

Williams tried again. “[T]he provision that Congress may regulate territory belonging to the United States would seem to imply that Congress may acquire what it is authorized to regulate.”⁵³⁵ Not necessarily; for in the first place there already was territory for Congress to regulate (the Northwest Territory), and in the second place there was no doubt that territory could be acquired by treaty. The opponents were right. The case of Texas was not on point, and the effort to acquire San Domingo by joint resolution was a barefaced attempt to circumvent limitations on the treaty power.

The opponents had the better arguments; the proponents had the votes. Congress adopted the President's joint resolution, without authorizing the commissioners to negotiate a treaty and specifically de-

⁵²⁷ For Texas, see Currie, *Descent into the Maelstrom* at 97–100 (cited in note 2) (discussing the controversy surrounding the annexation of Texas through a joint resolution). For San Domingo see, for example, Cong Globe, 41st Cong, 3d Sess 195 (Dec 20, 1870) (Sen Davis), 251 (Dec 21, 1870) (Sen Stockton).

⁵²⁸ See, for example, Cong Globe, 41st Cong, 3d Sess 252 (Sen Williams).

⁵²⁹ See *id* at 195 (Dec 20, 1870). See also *id* at 386 (Jan 9, 1871) (Rep Wood).

⁵³⁰ See *id* at 193 (Dec 20, 1870). As adopted, the joint resolution empowering the president to appoint a commission twice referred expressly to annexation of San Domingo as a territory. See A Resolution Authorizing the Appointment of Commissioners in Relation to the Republic of Dominica, 16 Stat 591, 591 (Jan 12, 1871).

⁵³¹ See Cong Globe, 41st Cong, 3d Sess 250–51 (Dec 21, 1870).

⁵³² See *id* at 250.

⁵³³ See *id* at 195 (Dec 20, 1870).

⁵³⁴ See *id* at 193.

⁵³⁵ *Id* at 251 (Dec 21, 1870).

nying any intention to commit Congress to a policy of annexation.⁵³⁶ Grant duly appointed a commission, which recommended acquisition.⁵³⁷ There, for the moment, the ball stopped; suffice it to say that we never did annex the Dominican Republic.⁵³⁸

E. Congress and the Courts

1. Retirement.

First the good news. The reader may recall that, while Andrew Johnson was president, Congress had reduced the number of future justices of the Supreme Court; it did not trust Johnson to make a new appointment.⁵³⁹ No sooner was Johnson replaced by the supposedly dependable U.S. Grant than Congress, in April 1869, restored the Court to its full complement of nine justices, one for each circuit.⁵⁴⁰ At the same time Congress unburdened the justices by providing for the appointment of circuit judges and by decreeing that circuit courts could be held by a single circuit justice, circuit judge, or district judge.⁵⁴¹ The best thing the statute did, however, was to take a stab at the serious problem of superannuated judges by giving some of them an incentive to leave the bench:

And be it further enacted, that any judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.⁵⁴²

⁵³⁶ See A Resolution Authorizing the Appointment of Commissioners in Relation to the Republic of Dominica, 16 Stat at 591. More than once the resolution referred to the territory in question as “the Republic of Dominica.” That was confusing, since today at least “Dominica” is the name of a distinct Caribbean Island between Guadeloupe and Martinique; language elsewhere in the same document makes clear it was the Dominican Republic that Congress had in mind.

⁵³⁷ See Grant, *Special Message* (Apr 5, 1871), in 7 Richardson at 129–30 (cited in note 426). The report itself is Sen Exec Doc 9, 42d Cong, 1st Sess (Apr 5, 1871).

⁵³⁸ The same Congress witnessed a second unusual episode regarding the treaty power, but I have discussed it elsewhere and shall not repeat myself here. See An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, for the Year Ending June Thirty, Eighteen Hundred and Seventy-two, and for Other Purposes, 16 Stat 544, 566 (Mar 3, 1871). See generally David P. Currie, *Indian Treaties*, 10 Green Bag 2d 445 (2007).

⁵³⁹ See Part II.B.

⁵⁴⁰ See An Act to Amend the Judicial System of the United States § 1, 16 Stat 44, 44 (Apr 10, 1869).

⁵⁴¹ See *id* § 2, 16 Stat at 44–45.

⁵⁴² *Id* § 5, 16 Stat at 45.

Under Article III, § 1 the judges held their offices “during good behavior,” which meant for life unless removed by impeachment and conviction.⁵⁴³ They were free to resign, but there were embarrassing recent examples of Supreme Court justices who had remained in harness long after they should have put themselves out to pasture, lest they lose their sole means of support.⁵⁴⁴ The 1869 statute made it possible for judges in that position to make way for new blood and keep their salary.

No constitutional questions were raised as to this provision, and for good reason: there was no plausible constitutional objection. A provision governing the retirement of judges was obviously necessary and proper to the functioning of the federal courts,⁵⁴⁵ and it was perfectly compatible with Article III’s tenure provision: judicial independence is not compromised by giving the judges an incentive to retire.

What was considerably more troubling was a related proposal that Congress fortunately did not adopt. It was all very well to tempt incompetent judges to quit by promising them remuneration, but what if they refused the bait? Not everyone is the best judge of whether he is losing the ability to cut the mustard, and neither old age nor incapacity is a “high crime[] or misdemeanor[]” within the impeachment provision. The House committee, which proposed the retirement provision, thought something ought to be done about those who preferred to go on sitting as well.

To understand this proposal it is necessary to know that under the House committee version retired justices would continue to be, odd as it may seem, members of the Court.⁵⁴⁶ When a judge retired, the president was to appoint an additional judge, who should, “in connection with or in the absence of his senior associate, hold the courts prescribed by law for said senior or retired judge” so long as the latter remained on the court. In other words retirement under the committee proposal was not retirement as we usually conceive it. Apparently the “retired” judge (like senior circuit judges today) could continue to sit if he chose (which would seem to defeat the purpose of the entire provision)—except that if he did he would have to share his duties with the judge who had been appointed to replace him.⁵⁴⁷

⁵⁴³ See US Const Art II, § 4.

⁵⁴⁴ See Cong Globe App, 41st Cong, 1st Sess 1–2 (Mar 29, 1869) (Rep Butler).

⁵⁴⁵ See US Const Art I, § 8, cl 18.

⁵⁴⁶ The committee’s amendment appears at Cong Globe, 41st Cong, 1st Sess 337 (Mar 29, 1869).

⁵⁴⁷ Bingham later denied that this provision meant what it clearly appeared to say, insisting that the statute did not permit two Supreme Court justices to hold circuit court and that a justice and his replacement were “as distinct as any other two justices on the Supreme Court.” Id at 344 (Mar 30, 1869).

That was a crackpot scheme to begin with, but it gets worse. If a judge was too incapacitated to certify his own age and years of service, someone else could do it for him. In that case, or if the judge simply refused to retire, he was to be treated exactly as if he had.

Needless to say, these provisions provoked constitutional objections. “Mr. Speaker,” said Representative Lawrence,

the amendment offered by my colleague [Mr. Bingham,] if I correctly understood the reading of it, contemplates one contingency in which a judge may be retired without his consent. I wish to inquire of my colleague whether the Committee on the Judiciary has considered the question whether we have the power under the Constitution of the United States to retire a judge from service without his consent and to strip him of the character with which he is clothed by the Constitution?⁵⁴⁸

Bingham replied that nothing in the proposed language would require a judge to resign his office; for the amendment expressly provided that a judge retired from active service would remain a member of the court.⁵⁴⁹ Lawrence tried again:

Now, under this bill it is proposed to retire the judges without their own consent, to say that they shall hold their offices, but that they shall not discharge the duties of the office. . . . I submit the inquiry whether it is competent to say that a judge who holds his office shall not be permitted to discharge the duties of his office.⁵⁵⁰

The answer was obviously no; tenure during good behavior implies that the judge may go on judging, not merely that he shall continue to receive his salary. But once again Bingham denied that Lawrence had correctly understood the provision. There was not a word in the committee’s proposal, he insisted, to suggest that retired judges were forbidden to exercise their functions.

[It] simply provides that we may have a justice to act in the place of one who bears his life commission, but who by his own voluntary act retires from active service at the age of seventy years, or who by reason of infirmity is neither able to make report to the court of his age nor to discharge any of the duties of the court.⁵⁵¹

⁵⁴⁸ Id at 338 (Mar 29, 1869).

⁵⁴⁹ See id. Bingham had already conceded the premise of Lawrence’s argument: “I think I am justified in saying that the committee are of the opinion that it is not competent for the Congress of the United States under the Constitution to pass any law requiring a judge of the United States to resign.” Id at 337.

⁵⁵⁰ Id at 338.

⁵⁵¹ Id.

This response was not wholly candid. An additional judge was also to be appointed if the incumbent simply refused to go into retirement. Nor was it wholly convincing: to say that the new judge would be named to “act in the place” of the old seemed to concede Lawrence’s suggestion that the latter would be expected not to sit any more. Indeed that *was* Bingham’s expectation, no matter how many times he insisted that the retiring judge would not be deprived of his right to hear cases:

I think it but fair to conclude that when a judge, by reason of the infirmities of age, voluntarily retires from active service, under the provisions of this law he will voluntarily remain retired when he knows that an acting judge to take his place has been appointed and that by the Constitution his salary cannot be diminished because of his being still a judge of the court.⁵⁵²

Thus Bingham’s jerry-built scheme seems a classic attempt to eat one’s cake and have it too. To ensure its constitutionality, “retired” judges would be permitted to sit if they liked, although their authority would be diluted by the presence of an additional judge. If they did sit, the amendment would not achieve its purpose, but they were *expected* not to—an expectation that seems without factual basis in the case of the judge who elects not to retire. Representative Kerr saw in Bingham’s proposal a grave threat to judicial independence: “The proposition contained in this bill amounts in legal effect to a supersedure of those judges whose places are thus to be supplied.”⁵⁵³

The House adopted Bingham’s half-baked amendment.⁵⁵⁴ The Senate rejected it,⁵⁵⁵ and the House gave way.⁵⁵⁶ Bingham offered one last plaintive protest: what about the judge who’s too sick to resign?⁵⁵⁷ His colleagues ignored him, and it was just as well; there was nothing Congress could do about him in the face of Article III.

2. Judicial review.

Congress may have trusted President Grant to nominate acceptable judges, but there were those in Congress who still did not trust the Supreme Court.

Back in 1868 the House had passed a bill to require a two-thirds vote of the justices to declare a federal statute unconstitutional, and

⁵⁵² Id at 337.

⁵⁵³ Id at 342.

⁵⁵⁴ See id at 344.

⁵⁵⁵ See id at 575 (Apr 7, 1869).

⁵⁵⁶ See id at 650 (Apr 8, 1869).

⁵⁵⁷ See id.

Congress had actually stripped the Supreme Court of jurisdiction to decide a pending challenge to Reconstruction.⁵⁵⁸ In December 1869 Missouri Senator Charles Drake decided to go the whole hog: he introduced a bill to abolish judicial review of federal legislation entirely.⁵⁵⁹

Drake's argument was essentially a dissenting opinion to *Marbury v Madison*.⁵⁶⁰ The Constitution did not provide for judicial review; one branch of government was not empowered to annul the acts of another. The judicial power should be understood as it existed in 1787, and at that time there was no tradition of judicial review. Article VI required Congress to uphold the Constitution, that is, to determine for itself the limits of its authority. Congress could be trusted to respect those limits, and if it did not the next election provided the ultimate check. Judicial review made unelected judges omnipotent; it would be absurd to conclude that the Framers had meant to give the judges such sweeping powers and then permit Congress to nullify them by the simple device of removing jurisdiction.⁵⁶¹

Edmunds of Vermont and Saulsbury of Delaware, poles apart on the political spectrum, provided the anticipated response. Judicial review was a great safeguard of liberty, and it was the judges' responsibility to say what the law was.⁵⁶² *The Federalist* had recognized judicial review; without it Congress could do essentially as it pleased. Statutes were law only if made in pursuance of the Constitution.⁵⁶³

Drake's quixotic bill was shipped off to the Judiciary Committee, on whose recommendation its consideration was indefinitely postponed.⁵⁶⁴ It was just as well. For the Supreme Court had held long before that judicial review was implicit in the Constitution; and judicial powers given by the Constitution cannot be taken away by statute.

Senator Sumner had a more modest proposal that still would have gutted Supreme Court review in reconstruction cases: the appellate power of that tribunal in habeas corpus cases would simply be repealed.⁵⁶⁵ Language in the *Ex parte McCordle* case could be read to suggest that Congress could impose whatever limitations it wished under its express power to make "exceptions" to the appellate jurisdiction of the Supreme Court, but at the same time the opinion em-

⁵⁵⁸ See Part II.B.

⁵⁵⁹ See Cong Globe, 41st Cong, 2d Sess 2 (Dec 6, 1869).

⁵⁶⁰ 5 US (1 Cranch) 137 (1803). See also Currie, *The First Hundred Years* at 69–74 (cited in note 143) (discussing the rhetoric and substance of Justice Marshall's opinion in *Marbury*).

⁵⁶¹ See Cong Globe, 41st Cong, 2d Sess 87–92 (Dec 13, 1869).

⁵⁶² See id at 94 (Sen Edmunds).

⁵⁶³ See id at 94–95 (Sen Saulsbury).

⁵⁶⁴ See id at 96, 1250 (Feb 14, 1870). A similar bill introduced by Senator Sumner the same session met a similar fate. See id at 167 (Dec 16, 1869), 4305 (June 10, 1870).

⁵⁶⁵ See id at 3 (Dec 6, 1869).

phasized that the statute had not attempted to shut off every avenue of appeal in the pending case.⁵⁶⁶ Whether a law that denied all Supreme Court review of a whole class of constitutional cases would be consistent with what Henry Hart called the Court's "essential role" in the constitutional plan⁵⁶⁷ remained to be decided; it remains to be decided today.

The Senate Judiciary Committee rewrote Sumner's bill to make it still more restrictive of judicial review. Not only would the committee version strip the Court of appellate jurisdiction in habeas matters and in all cases growing out of the reconstruction laws; it would forbid the federal courts "to question the decision of the political departments on political questions" as well.⁵⁶⁸

As Senator Trumbull said, the Supreme Court itself had disclaimed authority to decide political questions; to that extent the bill merely restated the existing law.⁵⁶⁹ But that was not all the committee proposed. "The Senator from Illinois will admit," said Senator Thurman when the matter was first brought up on the floor,

that the bill is entirely original in its character; that nothing like it has ever before been proposed in the American Congress; that it is not merely a declaration that to Congress alone belongs the decision of political questions, but that it further assumes to decide what are political questions and to take that question from the courts; and that it abolishes in effect all the jurisdiction of the Supreme Court in *habeas corpus*. A bill so original and far-reaching, that goes far beyond the reconstruction acts, I submit ought not to be pressed to a vote without the fullest discussion.⁵⁷⁰

The bill did in fact attempt to tell the courts what questions were political. "[I]t rests with Congress," § 2 recited, "to decide what government is the established one in a State."⁵⁷¹ Trumbull reminded his colleagues that the Supreme Court had said the same thing in *Luther*.⁵⁷² But the bill also went beyond the precedents to declare "political" a controversial question the Court had never so characterized:

[I]t is hereby declared that the act of Congress entitled "An act to provide for the more efficient government of the rebel States,"

⁵⁶⁶ See Part II.B. See also US Const Art III, § 2.

⁵⁶⁷ Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts* at 1365 (cited in note 330). Compare the discussion in Part II.B.

⁵⁶⁸ Cong Globe, 41st Cong, 2d Sess 167 (Dec 16, 1869).

⁵⁶⁹ See *id* at 168, quoting *Foster v Neilson*, 27 US (2 Pet) 253, 307 (1829).

⁵⁷⁰ Cong Globe, 41st Cong, 2d Sess 96 (Dec 13, 1869).

⁵⁷¹ *Id* at 167 (Dec 16, 1869).

⁵⁷² See *id* at 168; *Luther*, 48 US (7 How) at 42.

passed March 2, 1867, and the several acts supplementary thereto, are political in their character, the propriety or validity of which no judicial tribunal is competent to question.⁵⁷³

This passage was a bald-faced attempt to preclude judicial review of the constitutionality of the Reconstruction Acts, and Thurman was right to describe it as “original and far-reaching.” If Congress can insulate its legislation from judicial scrutiny by the simple device of labeling it political, judicial review is a hollow shell. Like Drake’s ill-fated effort to abolish judicial review by name, Trumbull’s committee bill claimed for Congress authority to take from the courts a power the Constitution gave them. It was no less unconstitutional because it spoke in euphemisms or because it removed only two types of questions from judicial cognizance; it was a flat violation of Article III.

Fortunately this bill never passed the Senate. It was first postponed to permit consideration of the Georgia reconstruction bill⁵⁷⁴ and then passed over twice when its friends attempted to bring it up.⁵⁷⁵ The majority seems to have recognized that Congress had better things to do than to undermine one of the principal elements in our intricate system of checks and balances.

3. Pardons.

A final incident during the same session, however, demonstrated that the Forty-first Congress was not so respectful of judicial authority as the preceding discussion might lead one to believe. That incident concerned the effect of a presidential pardon on suits to recover property that had fallen into federal hands during the Civil War.

A statute passed in 1863 permitted the owner of such property to recover its proceeds by suing in the Court of Claims, provided he could convince the court “that he has never given any aid or comfort to the present rebellion.”⁵⁷⁶ In *United States v Padelford*,⁵⁷⁷ in 1870, the Supreme Court held that a presidential pardon for giving aid and comfort to the enemy, by wiping out the offense, satisfied the statutory requirement:

In the case of *Garland*, this court held the effect of a pardon to be such “that in the eye of the law the offender is as innocent as if he had never committed the offence;” and in the case of *Armstrong’s*

⁵⁷³ Cong Globe, 41st Cong, 2d Sess 167 (Dec 16, 1869).

⁵⁷⁴ See id at 169.

⁵⁷⁵ See id at 2895 (Apr 22, 1870), 4305 (June 10, 1870).

⁵⁷⁶ An Act to Provide for the Collection of Abandoned Property and for the Prevention of Frauds in Insurrectionary Districts within the United States § 3, 12 Stat 820, 820 (Mar 3, 1863).

⁵⁷⁷ 76 US (9 Wall) 531 (1870).

Foundry, we held that the general pardon granted to him relieved him from a penalty which he had incurred to the United States. It follows that at the time of the seizure of the petitioner's property he was purged of whatever offence against the laws of the United States he had committed by the acts mentioned in the findings, and relieved from any penalty which he might have incurred.⁵⁷⁸

That was on April 30, 1870. Less than a month later, on May 24, our old friend Senator Drake sought to attach to an innocuous appropriation bill a rider designed to reverse the *Padelford* decision. No pardon should be admissible to show that a claimant had not given aid or comfort to the rebellion; it should be taken rather as conclusive proof that he had. Upon such proof the Court of Claims should dismiss the case. And if that tribunal had already decided for the claimant, the Supreme Court should reverse its judgment on appeal.⁵⁷⁹

The Supreme Court had misconstrued the statute, Drake explained. It had entered judgment in favor of one who *had* given aid and comfort to the rebellion.⁵⁸⁰

Frederick Sawyer of South Carolina, himself a Republican, took issue with Drake's conclusion. President Lincoln's pardon proclamation, which he quoted, expressly stated that one of its consequences would be the "restoration of all rights of property," excepting slaves.⁵⁸¹ Senator Edmunds was unimpressed: the statute required the claimant to have been loyal, not pardoned for disloyalty.⁵⁸²

Edmunds may have been right that Congress had not meant to reward a man who had betrayed his country and then been forgiven for having done so. But if the statute required the courts to ignore a presidential pardon it may well have been unconstitutional. For as Senator Saulsbury said in attacking the constitutionality of Drake's rider, it denied the pardon its intended effect, which was to eradicate the stain of disloyalty. And Article II unequivocally gave the president the right to pardon offenses against the United States.⁵⁸³

Drake lamely attempted to defend himself on the ground that his amendment said nothing about the effect of a pardon; it merely laid down a rule of evidence for the Court of Claims.⁵⁸⁴ I think Saulsbury

⁵⁷⁸ Id at 542–43 (citations omitted).

⁵⁷⁹ See Cong Globe, 41st Cong, 2d Sess 3751–52 (May 24, 1870).

⁵⁸⁰ See id at 3810 (May 25, 1870).

⁵⁸¹ See id. The proclamation appears in full in Abraham Lincoln, *Proclamation* (Dec 8, 1863), in 6 Richardson 213 (cited in note 6).

⁵⁸² See Cong Globe, 41st Cong, 2d Sess 3810 (May 25, 1870).

⁵⁸³ See id at 3813. See also US Const Art II, § 2; Cong Globe, 41st Cong, 2d Sess 3821 (May 25, 1870) (Sen Davis).

⁵⁸⁴ See Cong Globe, 41st Cong, 2d Sess 3813.

got the better of him: Drake's proposal would take from the claimant what the president had a constitutional right to give him.

Saulsbury had a second objection to Drake's proposal: when the Court of Claims had decided for the plaintiff, the Supreme Court was directed to reverse its judgment. And "[w]here," asked Saulsbury, "does my learned friend get the power for Congress to say to the Supreme Court of the United States what judgment they shall render in a case?"⁵⁸⁵ Drake thought he had an answer: "They dismissed the McArdle [sic] case because the jurisdiction of the court was taken from them."⁵⁸⁶

Allen Thurman, Democrat of Ohio, jumped on Drake with both feet. Of course, he acknowledged, Congress could curtail the appellate jurisdiction of the Supreme Court. "But it is one thing to take away from a court its jurisdiction, and it is another thing for the Legislature to tell a court how it shall decide a cause."

If you want to take away from the Supreme Court its jurisdiction of a case, take it away. That is one thing. You have the power to take away jurisdiction of many classes of causes if you see fit to do so; but you cannot, while you leave it jurisdiction over a case, direct the court what decision it shall make; and that is exactly one of the vices of the amendment of the Senator from Missouri. He leaves to the Supreme Court its jurisdiction, if I understood the amendment correctly when it was read, but he directs that the court shall reverse the judgment of the Court of Claims.⁵⁸⁷

Senator Trumbull, who agreed with Drake that *Padelford* ought to be overruled, was convinced by Thurman's distinction.

The point is that the courts have not jurisdiction; and I think we should say that the courts shall not entertain any jurisdiction of the suit. I do not think it is proper to say that the Supreme Court shall reverse the judgment.⁵⁸⁸

Trumbull's own proposal was that the statute say only that no pardon should be admissible to establish the claimant's right to sue in the Court of Claims.⁵⁸⁹

Senator Edmunds had objected to Trumbull's version when it was first introduced: it did nothing about cases that the Court of Claims had already decided and that were pending before the Supreme Court

⁵⁸⁵ Id at 3814.

⁵⁸⁶ Id.

⁵⁸⁷ Id at 3820.

⁵⁸⁸ Id at 3824.

⁵⁸⁹ See id at 3816.

on appeal.⁵⁹⁰ Trumbull's proposal would let a decision in favor of the claimant stand; Edmunds thought it ought to be set aside if the amendment was to achieve its goal.

But the problem was jurisdictional, Trumbull insisted.

We have no right to interfere in the matter, except that we can give just such jurisdiction as we please to the Court of Claims, and the Supreme Court should not take jurisdiction of any case that comes from the Court of Claims by appeal of which the Court of Claims has not jurisdiction. . . . I think the proper way is to direct the court not to entertain jurisdiction of these cases.⁵⁹¹

That would do no good, retorted Senator Howard; if the Supreme Court dismissed the appeal for want of jurisdiction, the claim would still exist, "and it would come up again in some other form; whereas, if the judgment were reversed by the Supreme Court, there would be the end of the whole thing forever."⁵⁹²

It was at this point that Edmunds offered an amendment designed to satisfy both Howard and Trumbull. If the Court of Claims had relied on a pardon to find in favor of the claimant, the Supreme Court should not reverse; it should "have no further jurisdiction [] and shall dismiss the cause for want of jurisdiction."⁵⁹³

Senator Morton interposed the same objection that Edmunds himself had made against Trumbull's proposed amendment: if the appeal was dismissed for lack of jurisdiction, an erroneous Court of Claims judgment would still stand. Not so, Edmunds replied, for the result would not be merely to dismiss the appeal. "[W]e say they shall dismiss the case out of court for want of jurisdiction; not dismiss the appeal, but dismiss the case—everything."⁵⁹⁴

Drake accepted Edmunds's amendment, the Senate accepted Drake's modified proposal,⁵⁹⁵ and it was in substantially this form that the measure became law: if the Court of Claims had decided for the claimant on the basis of a pardon, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."⁵⁹⁶

⁵⁹⁰ See *id.* at 3820.

⁵⁹¹ *Id.* at 3824.

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ See *id.* at 3825.

⁵⁹⁶ An Act Making Appropriations for the Legislative, Executive, and Judicial Expenses of the Government for the Year Ending the Thirtieth of June, Eighteen Hundred and Seventy-one, 16 Stat 230, 235 (July 12, 1870).

The language itself is suggestive; its author's explanation provides the smoking gun. The jurisdictional terminology was a sham. To dismiss a case already decided by the lower court is to exercise jurisdiction, not to decline it. And Thurman was dead right. It may be permissible to deprive the Supreme Court of jurisdiction, as it did in *Ex parte McCardle*; but if the Court has jurisdiction it must decide the case for itself. That is the essence of the judicial power.

The Supreme Court agreed. It held Mr. Drake's proviso unconstitutional.⁵⁹⁷

F. The Final Four

When the Forty-first Congress met in March 1869, four of the former Confederate states remained outside the congressional pale. Virginia, Mississippi, and Texas had lagged in doing what the Reconstruction Acts required. Georgia, as we have seen, was caught backsliding, and its senators were shown the door. It was more than a year before all four states were back in their places, and the process was both long-winded and rocky.

1. Mississippi, Virginia, and Texas.

In his brief Inaugural Address of March 4, President Grant said nothing about Reconstruction beyond a vapid plea to every citizen "to do his share toward cementing a happy union."⁵⁹⁸ In the House, however, Massachusetts Republican Benjamin Butler soon reported a committee proposal that would authorize Mississippi—whose voters had rejected a new constitution in an election allegedly tainted by intimidation and fraud—to resubmit that document to the people in hopes that this time it would be approved.⁵⁹⁹ John Farnsworth of Illinois offered a joint resolution to authorize submission of a new Virginia constitution to the voters as well.⁶⁰⁰ But the end of the session was fast approaching. The Mississippi proposal was postponed until the following December, when Congress would meet again; the Virginia resolution was dispatched to committee, from which it could hardly be expected to emerge in time for quick congressional action.⁶⁰¹

⁵⁹⁷ See *United States v Klein*, 80 US (13 Wall) 128, 129 (1872); Currie, *The First Hundred Years* at 308–11 (cited in note 143).

⁵⁹⁸ Ulysses S. Grant, *First Inaugural Address* (Mar 4, 1869), in 7 Richardson 6, 8 (cited in note 426).

⁵⁹⁹ See Cong Globe, 41st Cong, 1st Sess 253–54 (Mar 24, 1869).

⁶⁰⁰ See *id* at 517 (Apr 5, 1869).

⁶⁰¹ See *id* at 437 (Apr 1, 1869), 517 (Apr 5, 1869).

It was at this point that the President decided to intervene. Surely, he wrote on April 7, Congress would agree that it was desirable to restore the remaining states to their “proper relations to the Government” as soon as it could safely be done, and Virginia’s convention had approved a new constitution nearly a year before. He thought it appropriate to call the attention of Congress to the propriety of authorizing a prompt referendum on that constitution and the election of officers for whom it provided, so that Congress could pass on its adequacy in December. “I am led to make this recommendation,” the President continued,

from the confident hope and belief that the people of that State are now ready to cooperate with the National Government in bringing it again into such relations to the Union as it ought as soon as possible to establish and maintain, and to give to all its people those equal rights under the law which were asserted in the Declaration of Independence in the words of one of the most illustrious of its sons.

At the same time, Grant concluded, Congress might also consider

whether there is not just ground for believing that the constitution framed by a convention of the people of Mississippi for that State, and once rejected, might not be again submitted to the people of that State in like manner, and with the probability of the same result.⁶⁰²

Congress set to work with celerity. Within a day Representative Butler reported a bill looking toward constitutional referenda in both Virginia and Mississippi, and in Texas to boot.⁶⁰³ The bill passed the House the same day and the Senate the next,⁶⁰⁴ with a minimum of discussion. The President signed it the day after that, which was the date on which Congress adjourned. Legislative wheels often turn slowly, but with sufficient motivation they can move with less deliberation than speed.

The basic principle underlying the bill⁶⁰⁵ had been settled since the first Reconstruction Act: Congress could provide for elections, and the Army could conduct them, in order to restore republican government where for the time it did not exist. One important condition was

⁶⁰² Ulysses S. Grant, *Special Message to the Senate and House of Representatives* (Apr 7, 1869), in 7 Richardson 11, 12 (cited in note 426).

⁶⁰³ See Cong Globe, 41st Cong, 1st Sess 633 (Apr 8, 1869).

⁶⁰⁴ See id at 636, 662 (Apr 9, 1869).

⁶⁰⁵ An Act Authorizing the Submission of the Constitutions of Virginia, Mississippi, and Texas, to a Vote of the People, and Authorizing the Election of State Officers, Provided by the Said Constitutions, and Members of Congress, 16 Stat 40 (Apr 10, 1869).

added in the Senate: before it would be readmitted to Congress, each state would have to ratify the Fifteenth Amendment.⁶⁰⁶ The usual suspects made the usual protest. Thurman of Ohio, Davis of Kentucky, Stockton of New Jersey, and Bayard of Delaware all insisted that a ratification induced by coercion was no ratification at all.⁶⁰⁷ But of course Congress in 1867 had made ratification of the Fourteenth Amendment a condition of restoration to representation;⁶⁰⁸ what it could do for one Amendment it could do for another as well.

2. Georgia.

That left Georgia, which unlike Virginia, Mississippi, and Texas had been among the states provided for by the general reconstruction statute of 1868 but which was said to have seated members who were ineligible and expelled those who were black.⁶⁰⁹ It was December before Congress got around to legislating once more for Georgia, and the second session of the Forty-first Congress was in full swing. Georgia's unique history made for unique provisions not prescribed in the earlier statute providing for the other three recalcitrant states. Not only was Georgia (like the others) required to ratify the Fifteenth Amendment before its legislators would be seated; it was also peremptorily instructed to reassemble the legislature it had earlier elected, to administer an oath testifying that its members were not disqualified under the Fourteenth Amendment, and to refrain from excluding any member on the basis of race.⁶¹⁰

The coercion argument was again made and rebutted.⁶¹¹ New York Representative Samuel Cox mounted a broader attack on the obligations Congress was about to impose. The bill could not be justified as a war measure, as there was no war; nor as a provision for the admission of a new state, as Georgia was a state already; nor as a means of guaranteeing a republican government, as Georgia already had one.⁶¹² Proponents largely contented themselves with the observa-

⁶⁰⁶ Id § 6, 16 Stat at 41.

⁶⁰⁷ See Cong Globe, 41st Cong, 1st Sess 655 (Apr 9, 1869) (Sen Thurman), 658 (Sen Davis), 659 (Sen Stockton), 660 (Sen Bayard).

⁶⁰⁸ See Part I.E.

⁶⁰⁹ See Foner, *Reconstruction* at 347 (cited in note 8).

⁶¹⁰ An Act to Promote the Reconstruction of the State of Georgia, 16 Stat 59 (Dec 22, 1869).

⁶¹¹ See, for example, Cong Globe, 41st Cong, 2d Sess 208 (Dec 17, 1869) (Sen Morton) (noting that Congress had already conditioned the seating of legislators on approval of the Fourteenth Amendment), 223 (Sen Casserly) (arguing that ratification presupposed free choice).

⁶¹² See id at 282 (Dec 21, 1869). The oath requirement was a special case, for it could be defended as an exercise of Congress's power to enforce § 3 of the Fourteenth Amendment. See US Const Amend XIV, § 5.

tion that Congress had imposed conditions on legislative seating before,⁶¹³ which was true.⁶¹⁴ Senator Howard attempted to deny there was any coercion: Georgia was free to reject the bargain and remain outside the Union.⁶¹⁵ I think Senator Bayard got the better of him: the robbery victim can likewise keep his life if he's willing to part with his cash.⁶¹⁶ Progress of the bill was relentless and rapid; the President signed it six days after it was first reported to the Senate.⁶¹⁷

3. Virginia—again.

Meanwhile, in his first annual message in early December, President Grant had informed Congress that Virginia had performed all the conditions prescribed by law and “recommend[ed] that her Senators and Representatives be promptly admitted to their seats” and the state itself “fully restored to its place in the family of States.”⁶¹⁸ Alas, it was not to be so simple. As in the case of Georgia, Congress decided to raise the ante again—and this time without the excuse that the state had misbehaved in the interim. The 1867 statute had required Virginia to revise its constitution and ratify the Fourteenth Amendment; the 1869 law had required it to ratify the Fifteenth. The state had done all three.⁶¹⁹ But that was no longer enough to satisfy Congress. Informed by the Georgia experience, Congress in January 1870 declared Virginia entitled to representation in its chambers, provided that its officers swore that they were not disqualified by the Fourteenth Amendment, and on condition that the state constitution never be amended to deny the vote to any class of persons then qualified, to deny the right to hold office on racial grounds, or to deprive any citizen of the right to a comprehensive and adequate system of public schools.⁶²⁰

⁶¹³ See, for example, Cong Globe, 41st Cong, 2d Sess 170 (Dec 16, 1869) (Sen Sawyer) (arguing that the requirements of ratification are not duress, but a test of whether the people's attitude is such that they should be readmitted to the Union), 172 (Sen Williams) (arguing that coercion is not completely foreign to the Constitution, since three-fourths of the states can impose their will on the other fourth and that Congress, the American people, and the courts have accepted the practice of requiring ratification of constitutional amendments).

⁶¹⁴ See, for example, the cases of Virginia, Mississippi, and Texas, cited in this Part, and the 1868 statute laying down terms for the recognition of six other states, including Georgia, considered in Part II.

⁶¹⁵ See *id* at 174.

⁶¹⁶ See *id* at 172.

⁶¹⁷ See *id* at 165; An Act to Promote the Reconstruction of the State of Georgia, 16 Stat at 59.

⁶¹⁸ Ulysses S. Grant, *First Annual Message* (Dec 6, 1869), in 7 Richardson 27, 29 (cited in note 426).

⁶¹⁹ See the recitation in the new statute, An Act to Admit the State of Virginia to Representation in the Congress of the United States, 16 Stat 62, 62 (Jan 26, 1870).

⁶²⁰ See *id* at 62–63. There was an exception permitting disfranchisement on conviction of crime. See *id*.

As in the case of Georgia, a hubbub had arisen in Congress over the conditions the majority intended to impose. If Virginia was a state, chirped Ohio Democrat George Washington Morgan in the House, the Constitution entitled it to representation in Congress; it ought not to be brought back “manacled in chains.”⁶²¹ Even the admission of a new state, said Kentucky Senator Garrett Davis in opposing an additional condition that was ultimately rejected, could be conditioned only on the existence of a republican form of government, which the Constitution itself required.⁶²²

As in the case of Georgia, supporters of the proposed conditions invoked precedent: Congress had imposed conditions on representation before.⁶²³ Wisconsin Senator Matthew Carpenter (a Republican) argued that Congress ought not to deny Virginia the right that other states enjoyed to amend their own constitutions;⁶²⁴ Illinois Representative John Hawley reminded his colleagues that Congress had already conditioned the representation of other Southern states on not denying the vote to those to whom the state constitution granted it.⁶²⁵ That was true; as Michigan Senator Jacob Howard pointed out, Congress had done just that in conditionally admitting Georgia and five other states in 1868.⁶²⁶

More difficult was to contrive a principled justification for the contested provisions. The oath proviso was explained, and I think rightly, as an exercise of congressional authority to enforce § 3 of the Fourteenth Amendment.⁶²⁷ More generally, Ohio Representative Wil-

⁶²¹ Cong Globe, 41st Cong, 2d Sess 408 (Jan 12, 1870).

⁶²² See id at 356 (Jan 11, 1870). Davis spoke in the context of a proposal by Missouri Senator Charles Drake to provide that Virginia would be kicked out of Congress if it ever rescinded its ratification of the Fifteenth Amendment. See id at 352. Good Republicans objected that Virginia had no right to rescind and that Congress ought not to imply that it had. See, for example, id (Sen Trumbull). Others doubted that Congress could impose conditions to be met after Virginia was readmitted to Congress or expel it for their infraction, arguing among other things that all states were required to be equal. See, for example, id at 355 (Sen Williams), 386 (Jan 12, 1870) (Sen Carpenter). To meet the first objection Drake revised his amendment to apply if the state *purported* to rescind its ratification, id at 385, but his proposal was defeated anyway, id at 416 (Jan 13, 1870), and nothing of much value was said regarding the alleged right of rescission. See, for example, id at 354 (Jan 11, 1870) (Sen Howard) (observing that Article V provided that an amendment would become law once it had been ratified by three-fourths of the states).

⁶²³ See, for example, id at 432 (Jan 13, 1870) (Rep Lawrence).

⁶²⁴ See id at 468 (Jan 14, 1870).

⁶²⁵ See id at 480–81.

⁶²⁶ See id at 599 (Jan 20, 1870). See also Part II.A.

⁶²⁷ See, for example, id at 387 (Jan 12, 1870) (Sen Wilson), 405–06 (Rep Paine), 517 (Jan 17, 1870) (Sen Stewart); US Const Amend XIV, § 5. Some solons contended that laws enforcing the Amendment had to apply uniformly to all states, see, for example, Cong Globe, 41st Cong, 2d Sess 494 (Jan 14, 1870) (Rep Bingham), but nothing in the language or history of the provision suggests it. Compare this with the Voting Rights Act of 1965, 42 USC § 1973b(b), which imposed

liam Lawrence defended the imposition of conditions under the power to admit new states and guarantee a republican form of government.⁶²⁸

Lawrence's first argument holds no water: Congress was not admitting new states. Conditions designed to ensure republican government were concededly appropriate, but none of those forced upon Virginia met that criterion. History refuted the argument that either universal suffrage or colorblind eligibility to office was indispensable to a republican form, while the notion that public education was a stretch indeed.⁶²⁹

The President signed the Virginia bill on January 26, 1870, and Virginia's senators and representatives were seated without further ado.⁶³⁰

4. The rest.

Identical statutes respecting Mississippi and Texas were adopted in the next two months.⁶³¹ It would be nice to be able to report that there was no debate on either of these bills, as the subject had just been done to death; but unfortunately that was not the case. The Senate insisted on rehashing the whole issue of conditions in the context of the Mississippi bill. Senator Howard asserted that it was up to Congress to decide what was necessary to achieve republican government and that education was the surest way to preserve it.⁶³² Ohio Senator Allen Thurman observed that neither Massachusetts nor Rhode Island provided for universal suffrage and that if public schools were an essential element of republicanism few states would qualify.⁶³³ Senator Davis added that *The Federalist* had said a republican government was one that was neither an aristocracy nor a monarchy and that all existing state governments were republican.⁶³⁴ And the Constitution, Davis and Bayard pointedly added, meant what the Framers intended it to mean.⁶³⁵ Thurman neatly summed up the originalist premise that underlay his conclusions:

What was a republican form of government when the Constitution was formed would be a republican form of government now,

certain requirements designed to enforce the Fifteenth Amendment in states where it had been widely evaded.

⁶²⁸ See Cong Globe, 41st Cong, 2d Sess 432 (Jan 13, 1870).

⁶²⁹ This idea, however, would reappear in another context before long. See Part III.B.

⁶³⁰ See id at 809, 822, 828, 835 (Jan 27, 1870), 850 (Jan 28, 1870).

⁶³¹ See An Act to Admit the State of Mississippi to Representation in the Congress of the United States, 16 Stat 67 (Feb 23, 1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, 16 Stat 80 (Mar 30, 1870).

⁶³² See Cong Globe, 41st Cong, 2d Sess 1218 (Feb 11, 1870), 1252-53 (Feb 14, 1870).

⁶³³ See id at 1218 (Feb 11, 1870).

⁶³⁴ See id at 1287 (Feb 15, 1870). See also id at 1281 (Sen Bayard).

⁶³⁵ See id at 1281 (Sen Bayard), 1285 (Feb 16, 1870) (Sen Davis).

for the Constitution has not changed in that respect. The same meaning that that provision had when it first went into force is the meaning which it has now. Subsequent events cannot change that meaning, and therefore what was a republican form of government when that Constitution was adopted by the American people, and went into operation in 1789, is, in contemplation of that instrument, a republican form of government now.⁶³⁶

Indiana Senator Oliver Morton challenged the whole basis of Thurman's argument. What was republican in 1787, he contended, was not necessarily republican any more.

Now, Mr. President, I controvert [Thurman's] position entirely. I insist that definitions advance, that what was a democracy in the time of ancient Greece is not now regarded as a democracy; that such a republic as that of Venice would not now be regarded as a republic but simply as an oligarchy; and that the definition of a republican form of government, which was perhaps contemplated when that clause was put into the Constitution, is not now regarded as a definition of a republican form of government either in the Constitution or out of it.⁶³⁷

The Constitution, Senator Carpenter countered, did not "change[] with the fluctuations of public opinion."⁶³⁸ But Morton, it turned out, was not saying it did. His position turned out to be much less radical in this respect than it had first appeared.

I controvert the position that this clause means the same thing in the Constitution that it did in 1787, because every amendment that is put into that instrument which is in conflict with an existing clause modifies and changes the meaning of that existing clause. . . .

Now, Mr. President, by the thirteenth amendment, abolishing slavery, we have declared that slavery in a State is not consistent with a republican form of government; have we not? By the adoption of the fifteenth amendment, declaring that suffrage shall not be denied on account of race or color, we have substantially declared that the denial of suffrage on account of race or color is not consistent with a republican government in a State; and that is my argument.⁶³⁹

⁶³⁶ Id at 1218 (Feb 11, 1870).

⁶³⁷ Id at 1254 (Feb 14, 1870). See also id at 1258 (Sen Yates).

⁶³⁸ Id at 1323 (Feb 16, 1870).

⁶³⁹ Id at 1254 (Feb 14, 1870).

The same was true, said Morton, of the Fourteenth Amendment: it too had altered the definition of republican government.⁶⁴⁰

Morton's major premise is easy enough to swallow. Of course an amendment modifies inconsistent preexisting provisions; that is what amendments are for. The difficulty lies in his minor premise: what is there to suggest that the Civil War Amendments were meant to alter the definition of republican government? It was Senator Bayard again who put his finger on the problem:

As to the position that the thirteenth and fourteenth amendments change the definition of a republican form of government . . . I say they do no such thing. Supposing those amendments to have been duly made a part of the Constitution, . . . they are, as part and parcel of the Constitution, the supreme law of the land; all the States obey them and conform to them, not because of the republican definition, but under that express power which makes the Constitution of the United States the supreme law for all the States and all the people.⁶⁴¹

Senator Trumbull, whose Republican credentials were impeccable, echoed Bayard's argument:

I submit to the honorable Senator [Morton] that the meaning of the Constitution as to what a republican form of government is . . . has in no respect been changed by the amendments to the Constitution of the United States. Of course a State can do nothing in violation of the Constitution of the United States which prohibits slavery; nothing in violation of the fourteenth amendment; nothing in violation of the fifteenth amendment, if it be adopted; but the reason is not because Congress is bound to guaranty a republican form of government to the several States, but because in violating these amendments the State violates distinct and positive provisions of the Constitution.⁶⁴²

Touché.

Thus Morton's argument was no more convincing than its major premise was heretical; but it was startling to find as early as 1870 any suggestion of departure from the original understanding at all. Senator Bayard went beyond announcing that constitutional commands remained constant; he added an impassioned argument as to why it should be so. "Give a man the power to use words in what meaning he pleases," said Bayard, "and you destroy any government and any limi-

⁶⁴⁰ See *id.*

⁶⁴¹ *Id.* at 1282 (Feb 15, 1870).

⁶⁴² *Id.* at 1363 (Feb 17, 1870).

tation that was ever devised.” To permit words to be used “in any sense confessedly not intended by those who placed them in the written charter” was to “giv[e] up all limitations of government. It is abandoning every check upon power.”⁶⁴³

And answer came there none. There could hardly have been an answer. To say the meaning of written law changes with enlightened public opinion is to make a mockery of the very premise of written law.

Jurisprudence to one side, Mississippi joined Virginia as a state entitled to representation in Congress, on the aforesaid conditions. Texas followed a month later, providentially without further debate.⁶⁴⁴ There was a minor fracas over the seating of one of Mississippi’s senators, who was black; for although the 1866 Civil Rights Act and the Fourteenth Amendment had declared him a citizen, the Constitution required him to have been one for nine years.⁶⁴⁵ Senator Howard silenced the objection with the assertion that Senator Revels had been a citizen from birth—citing the statute, which he seems to have deemed retroactive, and pointedly declining to accept the *Dred Scott* decision, which appeared to deny that blacks had been citizens before.⁶⁴⁶

Finally, though Georgia was said to have met all of Congress’s conditions as early as March 1870,⁶⁴⁷ a disputation over the terms of the officials it had previously elected held up that state’s welcome until the last day of the second session, in July;⁶⁴⁸ Georgia legislators were not seated until January 1871.⁶⁴⁹ The sutures were now all in place; the schism was officially closed.

Reconstruction is commonly said to have ended in 1877.⁶⁵⁰ That is when, in consequence of the arrangement settling the disputed election between Samuel Tilden and Rutherford B. Hayes, the last federal troops were withdrawn from the former Confederate states.⁶⁵¹ It was not long afterwards that the reconstructed governments were back in the hands of the antebellum Southern elite; Reconstruction had effectively been reversed.

⁶⁴³ Id at 1282 (Feb 15, 1870).

⁶⁴⁴ See An Act to Admit the State of Texas to Representation in the Congress of the United States, 16 Stat at 80.

⁶⁴⁵ See US Const Art I, § 3, cl 3. See also Cong Globe App, 41st Cong, 2d Sess 125 (Feb 24, 1870) (Sen Saulsbury).

⁶⁴⁶ See Cong Globe, 41st Cong, 2d Sess 1543 (Feb 24, 1870). Texas’s senators and representatives were sworn without incident or delay. See id at 2301, 2328 (Mar 31, 1870).

⁶⁴⁷ See id at 1703 (Mar 4, 1870) (Rep Butler).

⁶⁴⁸ See An Act Relating to the State of Georgia, 16 Stat 363, 363–64 (July 15, 1870). For the beginnings of the tedious dispute over terms of office, see Cong Globe, 41st Cong, 2d Sess 1744 (Mar 7, 1870) (Rep Bingham).

⁶⁴⁹ See Cong Globe, 41st Cong, 3d Sess 527 (Jan 16, 1871), 871 (Feb 1, 1871).

⁶⁵⁰ See, for example, Foner, *Reconstruction* at 577–85 (cited in note 8).

⁶⁵¹ Id.

2008]

The Reconstruction Congress

495

There is much to say about this process of “redemption” by those whom Reconstruction was designed to supplant.⁶⁵² There is also much to say about constitutional issues in Congress during the years 1871–1877, from the time Reconstruction was completed to the time it was effectively abandoned. I hope to say something about that period myself. But that is material for another study; this article is long enough as it is. The adjournment of the Forty-first Congress provides a logical stopping point, as it marks the end of the process of Reconstruction; what happened during the heyday of reconstructed governments will be my next concern.

⁶⁵² See Nicholas Lemann, *Redemption: The Last Battle of the Civil War* (Farrar, Straus and Giroux 2006) (detailing the first stages of this process even before the troops were withdrawn).