The History of the Loyal Denominator

Christopher R. Green
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INTRODUCTION

Americans rightly regard The Fourteenth Amendment as the jewel of our Constitution. But why exactly is it legitimate? In recent years, Bruce Ackerman has reawakened the legal academy to the issues of Fourteenth Amendment legitimacy after a long dogmatic slumber, proposing a novel theory to answer the two chief concerns regarding Fourteenth Amendment legitimacy. 1 The Amendment’s legitimacy faces two challenges: (1) Congress’s tainted proposal of the Amendment in 1866 while excluding Southern representatives long after Confederate armies surrendered and President Andrew Johnson installed new Southern governments; and (2) tainted Southern ratifications that Congress coerced in 1867 through militarily imposed black suffrage and required as the price of readmission to Congress. After Congress fervently debated these problems early in Reconstruction, 2 such discussion largely died down after 1872—when the


Democratic Party platform treated the issue as settled—with only a small flare-up during the Civil Rights movement. Since Ackerman started work on the legitimacy issue in 1984, however, the issue has received significant scholarly treatments from John Harrison, Akhil Amar, and most recently, Tom Colby.

Does the Fourteenth Amendment lack basic legitimacy under Article V? If so, its legitimacy in contemporary American legal culture is problematic. Clarifying the exact nature of the Amendment’s legitimacy

Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 GEO. MASON U. CIV. RTS. L.J. 219, 229 n.28 (2009).

3. The 1872 Democratic platform stated, “We pledge ourselves to maintain the union of these States, emancipation and enfranchisement; and to oppose any reopening of the questions settled by the thirteenth, fourteenth and fifteenth amendments of the Constitution.” Gerhard Peters & John Woolley, Political Party Platforms: 1872 Democratic Party Platform, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29580 [https://perma.cc/8ZAL-P3P3].


has significant practical importance. If the Fourteenth Amendment is akin to an improperly issued check, concern that the Amendment has “come back marked ‘insufficient funds,’” as Martin Luther King, Jr. said of constitutional guarantees, is less justified. Different theories of the Fourteenth Amendment’s legitimacy also affect theories of the Amendment’s exact content, as well as the legitimacy of other parts of our constitutional culture. Who issued the Fourteenth Amendment check, and on what bank account, matters.

This Article and its companion9 defend a view that aims to fit the text and history of the Constitution, preserve Fourteenth Amendment legitimacy in a simple, appealing fashion, and clarify the Fourteenth Amendment’s author by framing the Fourteenth Amendment as an expression of the victorious Union’s Republican principles. The Fourteenth Amendment was a Northern-authored check on the bank of the Union that the South tried to invalidate.

I call the view “loyal denominatorism.” The disloyal South was not entitled to resume its Article I and Article V powers—including the “denominator power,” i.e., the right to be counted among the total of which three-fourths of the states’ ratifications were required, and so to be counted as voting “no” prior to ratifying—until Congress was satisfied with reestablished Southern loyalty. Accordingly, unrepresented former Confederates should be excluded from the denominator of Article V’s “three fourths of the several States”10 ratio.11 Only states deemed sufficiently loyal to be represented in Congress—i.e., included in “the

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8. Martin Luther King, Jr., I Have a Dream, Aug. 28, 1963, available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm [https://perma.cc/ZCL5-M9BW] (“In a sense we’ve come to our nation’s capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the ‘unalienable Rights’ of ‘Life, Liberty and the pursuit of Happiness.’ It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked “insufficient funds.””).


10. U.S. CONST. art. V.

11. Akhil Amar briefly flirted with this view, saying that Congress could have adopted the view, but the history in both 1867 and 1868 reject such a path. See infra note 37 and accompanying text.
several States” and “each State” referenced in Article I— are included in “the several States” in Article V. The Fourteenth Amendment thus became part of the Constitution on February 12, 1867 when Pennsylvania became the 20th state to ratify, and more than three-fourths of the 26 states were represented in Congress. Loyal denominatorism, therefore, conflicts with one of the only non-controversial facts about the Amendment—its adoption in July 1868, when 28 of the total 37 states of the Union had ratified. Similarly, loyal denominatorism moves the date of adoption of the Thirteenth Amendment from December 6, 1865 to June 30, 1865.

Another change, more interpretively significant than these slight changes in the exact dates of adoption, is of the traditionally understood constitutional author. Loyal denominatorism presents the states of the North as acting alone in adopting the Fourteenth Amendment, and therefore, loyal denominatorism suggests that the North alone uttered its text. That is, Northern concepts of equality, due process, and the privileges of citizens, rather than versions of these concepts Republicans and former Confederates jointly expressed, are the concepts the Fourteenth Amendment’s language articulates.

Although this Article focuses on the history of loyal denominatorism during Reconstruction, its companion defends the propriety of reading “state” as tacitly meaning “reliably loyal state” in Articles I, II, and V under traditional and contemporary philosophy of language and linguistics, the history of the law of war, and the separation of war powers between Congress and the President.

Part I of this Article explains the loyal-denominator view of Article V legitimacy in contrast to other contemporary views and in the context of the basic history of Reconstruction. Part II delves into the history of loyal denominatorism, first explaining how reading “state” as “reliably loyal state” could textually make sense, and then rehearsing arguments for the loyal denominator, organized both chronologically and then by source. An appendix sets out expressions of the loyal denominator in context.

12. See U.S. CONST. art. I, § 2, cl. 1 (“the People of the several States” entitled to representation in Congress); id. art. I, § 2, cl. 3 (“[E]ach State shall have at Least one Representative . . . .”); id. art. I, § 3, cl. 1 (Senate composed of “two Senators from each State”); see also id. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

13. See infra note 20.

14. See Green, supra note 9.
I. AN EXPOSITION OF LOYAL DENOMINATORISM

A loyal denominator tells a new story of how America’s constitutional scheme functioned during Reconstruction. The traditional story of ratification is that the Fourteenth Amendment became part of the Constitution only after Southern states ratified the amendment in 1868 in exchange for the right to be represented in Congress. Three different ways to see a loyal denominator in light of Reconstruction exist: (1) as a theory supporting Thirteenth Amendment legitimacy; (2) as a way to establish parity between states’ power to say “yes” and their power to say “no”; and (3) as a theory explaining the Reconstruction Act of 1867.

A. The Traditional Account and a Timeline

The traditional account of the Thirteenth and Fourteenth Amendments includes Southern ratifications. Congress proposed the Thirteenth Amendment in January 1865, receiving the ratifications of 19 loyal states and 8 former Confederate states by December 1865, for a total of 27 of the 36 states in the entire Union. Congress proposed the Fourteenth Amendment in June 1866, receiving the ratifications of 20 Northern and 8 former Confederate states by July 1868, for a total of 28 of the 37 states in the whole Union, including Nebraska, which joined the Union on March 1, 1867.

The loyal-denominator view asserts that the traditional story of the Thirteenth Amendment has an 8-states-too-high numerator and an 11-states-too-high denominator, preferring 20 of 26 states in February 1867 to 28 of 37 states in July 1868. For the Thirteenth Amendment, loyal denominatorism excludes Tennessee from the denominator, preferring 19 of 25 states in June 1865 to 27 of 36 states in December 1865.

Four key events exist in this timeline:

(1) the Southern states’ 1865 ratifications of the Thirteenth Amendment; 16
(2) the exclusion of Southern representatives from 1865 to 1868; 17
(3) the 1867 imposition of black suffrage, military rule, and a demand for ratification of the Fourteenth Amendment on the

15. See infra note 20.
17. See CONG. GLOBE, 39th Cong., 1st Sess. 1 (1865) (no Senators from former Confederacy); id. at 3 (no representatives from former Confederacy, over protest from Horace Maynard of Tennessee); for readmissions, see e.g., CONG. GLOBE, 40th Cong., 2nd Sess. 4320 (1868) (Frederick Sawyer from South Carolina seated as Senator).
South;\textsuperscript{18} and
(4) the Southern states’ 1868 ratifications of the Fourteenth Amendment.\textsuperscript{19}

The puzzle of Thirteenth and Fourteenth Amendment legitimacy is simple. Because only 25 states stayed loyal to the Union, a full Article V denominator requires ratifications from the South, either for the Thirteenth or Fourteenth Amendments, i.e., both (1) and (4) in the above timeline. A legitimate \textit{proposal} of the Fourteenth Amendment in Congress also requires the legitimacy of (2), the congressional exclusion that made it possible. The legitimacy of (4) requires the legitimacy of (3); Southern ratifications of the Fourteenth Amendment rested on procedures the Reconstruction Act imposed. The legitimacy of both (2) and (3), however, is in tension with the legitimacy of (1); if the Southern states validly ratified the Thirteenth Amendment in 1865, it was proper neither to exclude them in 1866 from Congress or for the Reconstruction Act of 1867 to deny their legitimacy. “Legal governments,” which (3) denied, are required for the Article V powers exercised in (1). The representative-selecting powers denied in (2) entail the amendment-ratifying powers affirmed in (1). A Southern-ratification-based Fourteenth Amendment is thus in tension with a Southern-ratification-based Thirteenth Amendment. Loyal denominatorism resolves the tension by dispensing with both ratification requirements.

A chart of Northern and Southern ratifications of the Thirteenth and Fourteenth Amendments as well as congressional events follows:

\begin{itemize}
\item \textsuperscript{18} See \textit{An Act to Provide for the More Efficient Government of the Rebel States}, 14 Stat. 428 (Mar. 2, 1867).
\item \textsuperscript{19} See \textit{infra} note 20.
\end{itemize}
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<th>North: 13A no</th>
<th>South: 13A yes</th>
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<td></td>
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<td>Senate passes 13A</td>
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<tr>
<td>1/31/1865</td>
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<td></td>
<td>House passes 13A</td>
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<td>DE, KY</td>
<td>VA, LA</td>
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<tr>
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<td>NJ</td>
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<td>AL, NC, GA (27/36 total), FL</td>
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<td>Congress excludes Southern reps; Seward declares 13A ratified with South in numerator &amp; denominator</td>
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<td>North: 14A no</td>
<td>South: 14A yes</td>
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<td>AR</td>
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<tr>
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<td></td>
<td>FL</td>
<td>AR &amp; FL readmitted</td>
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<td>7/1868</td>
<td>NC, SC, LA, AL, GA (28/37 total, 30/37 if OH-NJ)</td>
<td></td>
<td>NC, SC, LA, AL reps readmitted; GA reps readmitted but excluded after GA excludes black reps; Seward &amp; Congress declare 14A ratified, but treat Southern ratifications ambiguously</td>
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<td>10/1868</td>
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<td>VA</td>
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<td>1/1870</td>
<td>MS</td>
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Exact dates and other details are left for a footnote.20

20. Ratification dates for the Thirteenth and Fourteenth Amendments are set out in *The Constitution of the United States of America: Analysis and Interpretation*, Cong. Res. Serv., 30 n.5, 31 n.6 (2002). The Congressional Research Service (“CRS”) lists these dates for Thirteenth Amendment loyal ratifications: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine,
February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Ohio, February 10, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; Oregon, December 11, 1865; California, December 15, 1865; Iowa, January 17, 1866; and New Jersey, January 23, 1866.

Nine former-Confederate ratifications occurred during the same period: Virginia, February 9, 1865; Louisiana, February 15–16, 1865; Tennessee, April 7, 1865; Arkansas, April 14, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865; North Carolina, December 4, 1865; Georgia, December 6, 1865; Florida, December 28, 1865. On the full-denominator story, 8 of these states plus the 19 loyal-state ratifications received by June 1865, means the Thirteenth Amendment became law on December 6, 1865. Delaware rejected the Fourteenth Amendment on February 8, 1865; Kentucky on February 24, 1865; New Jersey on March 16, 1865 (prior to its acceptance the next year); and Mississippi on December 2, 1865. Id.

For the Fourteenth Amendment, the CRS lists the following dates for the loyal states (including Tennessee): Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866; Oregon, September 19, 1866; Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867; Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867; Rhode Island, February 7, 1867; Wisconsin, February 7, 1867; Pennsylvania, February 12, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; and Iowa, March 9, 1868. This list totals 23 loyal ratifications, but Ohio attempted to rescind ratification on January 15, 1868, New Jersey on February 20, 1868, and Oregon on October 15, 1868. Id.

Between the fall of 1866 and early 1868, three loyal border states and nine former Confederate states rejected the Fourteenth Amendment: Texas, October 27, 1866; Georgia, November 9, 1866; Florida, December 6, 1866; North Carolina, December 13, 1866; Arkansas, December 17, 1866; South Carolina, December 20, 1866; Kentucky, January 8, 1867; Virginia, January 9, 1867; Louisiana, February 6, 1867; Delaware, February 7, 1867; Maryland, March 23, 1867; and Mississippi, January 31, 1868. Id.

Seven former Confederate states ratified later in 1868, pressured by the Reconstruction Act: Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868; South Carolina, July 8, 1868; Louisiana, July 9, 1868; Alabama, July 13, 1868; and Georgia, July 21, 1868. Id. Finally, the government demanded three ratifications of former Confederate states even after three-fourths of the full denominator was reached: Virginia, October 8, 1869; Mississippi, January 17, 1870; and Texas, February 18, 1870. Id.

Slight disagreements on dates affect the exact dates on which the amendments became law under the loyal-denominator view. See, e.g., Thirteenth Amendment to the United States Constitution, WIKIPEDIA, https://en.wikipedia.org
B. Thirteenth Amendment Legitimacy Requires a Loyal Denominator

Citizens widely understood Congress’s actions in refusing to seat Southern representatives and in continuing to brand Southern states as “rebel states” in 1867 lacking “legal state governments” to conflict with the validity of Southern Thirteenth Amendment ratifications of 1865. The Southern legislatures that ratified the Thirteenth Amendment in 1865 were the same groups that Congress later deemed unable to elect Senators or supervise the election of Representatives. If those selections of representatives were void, so were the ratifications. Indeed, Southern ratifications—which President Johnson and Secretary of State William Seward trumpeted—were the chief rationale for seating these states’ representatives. In January 1866, the New York Herald made the argument in its pithiest form: “If a State Legislature is valid to ratify the amendment, it is valid for the election of its United States Senators. We cannot make it flesh in the one case and fish in the other.” The dissenters on the Joint Committee on Reconstruction—Senator Reverdy Johnson and Representatives A.J. Rogers and Henry Grider—claimed the South was entitled to its Article I rights and relied on the states’ presumed participation in the Article V process: “To consult a State not in the Union on the propriety of adopting a constitutional amendment to the government of the Union, and which is necessary to affect those States only composing the Union, would be an absurdity.”

New Jersey and Ohio attempted to rescind their ratifications in early 1868, but it was not clear whether they succeeded. On the full-denominator view, whether ratifications can be rescinded affects only the Fourteenth Amendment’s birth day—either July 9, when Louisiana ratified if the rescissions were ineffective, or July 21, when Georgia ratified if the rescissions were not—and not its birth month. The rescission-of-ratification issue loomed again, still unresolved, in the 1970s, when Nebraska, Tennessee, Idaho, Kentucky, and South Dakota rescinded their ratifications of the Equal Rights Amendment. See Danelle Moon, Daily Life of Women Among the Civil Rights Era 176–77 (2011). On the loyal denominator view, of course, the rescissions came after the Amendment had been enacted; this was the basis for New Jersey’s gubernatorial veto (overruled, alas) of the attempted rescission. See infra note 249.

22. See infra note 259.
assumed the Article I and Article V parity of the powers of “the several States.”

John Harrison notes that Republicans did not have any defensible theories to maintain Southern Thirteenth Amendment ratifications.24 Loyal denominatorism holds, however, that the Republicans did not need them, and that their actions in denying Article I rights to the South prove the point. Loyal denominatorism agrees with Johnson, Rogers, and Grider that if the South had Article V rights, it also had Article I rights. Performing a modus-tollens-for-modus-ponens switch25 on this reasoning, however, loyal denominatorism posits that, in denying the South Article I rights of representation, Congress implicitly denied that the South had Article V powers. As explained at length below, various leading Republicans explicitly made this argument.26

The same switch can be used against President Johnson’s later Thirteenth-Amendment-based attack on the Reconstruction Acts, which held that the Southern governments were illegal. Johnson asserted that the Reconstruction Act would imperil Thirteenth Amendment legitimacy by implicitly pushing Southern states out of the Article V numerator. This is not a problem, however, if the Act also implicitly pushes the Southern states out of the denominator. Johnson’s argument was as follows:

This bill . . . denies the legality of the governments of ten of the States which participated in the ratification of the amendment to the Federal Constitution abolishing slavery forever within the jurisdiction of the United States, and practically excludes them from the Union. If this assumption of the bill be correct their concurrence cannot be considered as having been legally given, and the

24. Harrison, supra note 5, at 416 (“How did the Republicans think they could keep those [Thirteenth Amendment] ratifications? I have been unable to find a straight answer to this question, perhaps because Republicans were unwilling to commit themselves to any one theory.”).

25. Modus ponens is the inference of the proposition \(q\) from the propositions \(p\) and \(p \rightarrow q\). Modus tollens is the inference of the proposition \(\neg p\) from the propositions \(\neg q\) and \(p \rightarrow q\).

26. See, e.g., the arguments in the Appendix by Frelinghuysen (first quotation, infra at 109), Stewart (third quotation, infra at 112), Sumner (eighth and ninth quotations, infra at 115), Ashley (first quotation, infra at 115–16), Bingham (fifth quotation, infra at 118 ), Broomall (second quotation, infra at 121), Curtin (second quotation, infra at 129), the Cleveland Daily Leader (first quotation, infra at 131), the Emporia News, infra at 131, the Evening Telegraph, infra at 131–32, the Daily Ohio Statesman, infra at 133, the New York Herald (first quotation, infra at 134–35), and the New York Times (second quotation, infra at 135–36).
important fact is made to appear that the consent of three fourths of the states—the requisite number—has not been constitutionally obtained to the ratification of that amendment . . . 27

Proponents of a loyal denominator agree with Johnson that a full Article V denominator, Thirteenth Amendment legitimacy, and the Reconstruction Act were an inconsistent triad. Johnson wanted to eliminate the Reconstruction Act, but scholars use the same argument to eliminate the full denominator. Illegal legislatures cannot ratify constitutional amendments any more than they can send Senators to Congress. In refusing to seat their Senators, Congress was not willing to allow Southern legislatures to exercise federal political authority, but treated these actions as void.

27. CONG. GLOBE, 39th Cong., 2nd Sess. 1731 (Mar. 2, 1867) (veto message of President Johnson). For other full-denominator-assuming, Thirteenth-Amendment-based attacks on the Reconstruction Act, see EVENING TELEGRAPH, Feb. 27, 1867, at 2 (quoting New York World: “In relation to the State Governments, we supposed that the Republican party would be bound by its own recognition of those Governments. The importance which they attached to the Emancipation amendment, and the fact that they recognized the Southern ratifications of it as valid, precluded them, in logic and consistency, from afterwards calling in question the competency of the ratifying State Governments. Congress has acknowledged the validity of that amendment, in a dozen different ways. It has repeatedly made it the basis of legislation, and even in proposing the amendment now pending, it recognized its validity by numbering the proposed amendment as the fourteenth, which it could not unless there was a thirteenth, and the thirteenth is precisely the Emancipation Amendment. It seemed against all antecedent probability that a Republican Congress would displace this amendment from the Constitution, by declaring that the ratifying States which had made up the three-fourths were not competent to act upon it. Even the pending amendment was submitted to the Southern States and their ratifications asked. Was it to be expected that Congress would so stultify itself as to declare illegal the very Governments it had thus recognized?”); NASHVILLE UNION & DISPATCH, Dec. 6, 1866, at 4 (“The Radical organ of this city says, that no jurist or statesman will affirm that the ratification of the constitutional amendment by the Southern States abolishing slavery, has any validity whatever. It also says that their Legislatures were illegal assemblies, and had no power to ratify. If this be so, slavery is not abolished by law. Without the ratifications of the Southern States the proposition failed of a three-fourths assent.”); CONG. GLOBE, 40th Cong., 2nd Sess. 544 (Jan. 15, 1868) (Representative James B. Beck of Kentucky: “If that constitutional amendment was adopted because of the votes of these States, when the Constitution provides that two thirds of Congress may, as it did, submit an amendment to the Constitution, and that it shall become a part of that instrument when ratified by three fourths of the State Legislatures—if those States had no civil State governments how could their State Legislatures act?”).
Consistency would require the same for other assertions of federal political authority.

C. Loyal Denominatorism as Recognition of the Naysaying Power of Article V

A second way to see loyal denominatorism is in relation to the exact nature of states’ power to reject amendments. The power to say “no” to an amendment is tremendously valuable; indeed, the power of a naysaying bloc of more than one-fourth of the States to prevent constitutional amendments is among the most conservative elements of our constitutional structure. Article V, however, does not mention the power of a state to say “no” to an amendment by, for instance, passing a resolution. States only have the following two powers in the text of Article V: (1) the power to say “yes”; and (2) the power to be included in the total number of states of which three-fourths must ratify. Loyal denominatorism sees the second power as an important power, which the rebellion suspended like many other rights.

Inclusion in the Article V denominator is a critical form of political power. In restoring Tennessee in July 1866, Congress claimed that “political relations in the Union” were to be restored only upon congressional action.28

28. Joint Resolution Restoring Tennessee to her Relations to the Union, 14 Stat. 364 (July 24, 1866). In fuller context,

[1] 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; . . . 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.

Id. The “former political relations” concept expressed in the joint resolution was a more concise form of the ideas set out at much greater length in the report of the Joint Committee on Reconstruction. The report grounds former Confederate states’ lack of Article I rights squarely on the rebellion:

From the time these confederated States thus withdrew their representation in Congress and levied war against the United States, the great mass of their people became and were insurgents, rebels, traitors, and all of them assumed and occupied the political, legal, and practical relation of enemies of the United States. . . . The States . . . did not cease until . . . their people [were] reduced to the condition of enemies conquered in war, entitled only by public law to such rights, privileges, and conditions as might be vouchsafed by the conqueror. . . . Having, by this treasonable withdrawal from Congress, and by flagrant rebellion and war, forfeited all civil and political rights and privileges under the federal
The most natural sense of “political relations” includes both positive and negative Article V powers as well as those under Article I. Loyal denominatorism thus maintains parity between Articles I and V. A former-Confederate-excluding collection of states could properly ratify a Fourteenth Amendment that a former-Confederate-excluding Congress properly proposed.

The parity between Article I and Article V is mirrored in the text. Both articles give rights to “the several States,” without any explicit textual qualification. Harrison, who finds loyal denominatorism “plausible but ultimately unpersuasive,” argues that the lack of textual qualification in Article V undermines the loyal-denominator theory: “Article V, however, is pretty clear about this: three-fourths of the states. If South Carolina was still a state, it counted.” On the other hand, if the bare text of Article V is deemed sufficiently clear to undermine loyal denominatorism, commentators should deem provisions regarding “States” in Articles I and II—and elsewhere in Article V, guaranteeing equal suffrage in the Senate—equally clear and unqualified. “State means state” works just as well for the selection of representatives or presidential electors as it does for ratifications.

A full defense of the legitimacy of reading implicit “non-rebel State” qualifications into both Articles I and V appears in the companion to this Article. Loyal denominatorism renders Congress’s treatment of the two articles more coherent: if Congress, in proposing the Fourteenth Amendment, acted legitimately in excluding Southern representatives on the ground that they were from “rebel States,” Congress must also have adopted an implicitly restrictive reading of “the several States” in Article I.

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29. Harrison, supra note 5, at 375.
30. Id. at 421. In addition to the clarity of the text, Harrison also argues from the fuzziness of the alternative interpretation of the denominator. Id. at 421–22.
31. See Green, supra note 9.
32. Harrison has appealed at this point to the finality of Congress’s Article I determinations, i.e., the possible fact that others could not legitimately complain if Congress improperly refused admission to Southern representatives: “[E]ach house of Congress decides whom to admit, and there is nothing anyone else can do about that decision.” Id. at 452. He calls this a “basic point of constitutional law,” but admits the Supreme Court disagreed in Powell v. McCormack, 395 U.S. 486, 550 (1969). Even granting the finality of congressional decisions, Harrison’s
The companion to this Article\textsuperscript{33} considers John Harrison’s distinction between Articles I and V: that Article I requires a lawful apparatus of officials to operate, but Article V does not. States retained their rights under both Articles, he suggests, but were simply unable to exercise some of those rights for lack of officials. Although officials can rebel, the state itself cannot because secession is illegal. The companion paper attacks this view on the merits, but Harrison’s view is inconsistent with the Reconstruction Act, which labeled the former Confederate states, with the exception of Tennessee, as “rebel states.” Congress treated the states, not merely their agents, as unworthy of representation; the action of a state, not merely that of its agents, was required for readmission to Congress. If the Reconstruction Act was legitimate—and if not, the Fourteenth Amendment has significant trouble—this method of distinguishing Article I and Article V powers does not work.\textsuperscript{34}

\textit{D. Loyal Denominatorism as Legitimation for the Reconstruction Acts: Ackerman, Harrison, Amar, and Colby Contrasted}

The Reconstruction Act’s demand that the Southern states ratify the Fourteenth Amendment is a problem for the traditional account; ratifications made in response to illegitimate pressure are tarnished, if not rendered illegitimate. Loyal denominatorism, however, offers a simple explanation for this demand—the Fourteenth Amendment was already the law. The demand to ratify the Fourteenth Amendment was therefore like the demand that surrendering Confederates acknowledge the legitimacy of the Emancipation Proclamation—a pledge of fealty rather than an act of constitutional co-authorship.

Ackerman, Harrison, Amar, and Colby offer a great variety of conflicting explanations of Fourteenth Amendment legitimacy and, therefore, of the Reconstruction Act. Ackerman sees the Fourteenth Amendment as the first

strict position on the text undermines the legitimacy of those Article I determinations, and hence of the Fourteenth Amendment, on which two-thirds votes in Congress depended. With friends like Harrison, Fourteenth Amendment legitimacy hardly needs enemies. Loyal denominatorism offers an explanation for the Fourteenth Amendment, rather than its mere existence.

\textsuperscript{33} See Green, \textit{supra} note 9, at 182–84.

\textsuperscript{34} Similar comments apply to other attempts to justify Congress’s 1866 decision including problems with particular elections in the South. Even if that were a possible theory, the theory of the Reconstruction Act asserts that the representatives were from “rebel states,” and that the restoration of “political relations” required affirmative congressional action, not that particular elections were problematic.
great example of a non-Article V amendment that succeeded because of the capitulation of other national actors—President Johnson in 1868 and the Supreme Court in 1873—in a striking parallel with the events of the New Deal. Harrison sees the Fourteenth Amendment as the triumph of formalism: the unreviewable power of Congress to exclude members as long as Congress retains a quorum of the whole membership, and the unreviewable power of a state to agree to amendments despite the existence of great pressure upon them. Amar sees the Fourteenth Amendment as the triumph of federally imposed voting rules implemented to satisfy the Republican Form of Government clause. Colby sees the original Fourteenth Amendment as a failure from the perspective of legitimacy, but thinks its intergenerationally authored incarnation can gain legitimacy from the normative desirability of later cases like Brown v. Board of Education.

These interpretations take entirely different views of the Reconstruction Act of March 2, 1867 than loyal denominatorism would. From the loyal denominator view, the Reconstruction Act enforced an amendment that had become law 18 days earlier—and only eight days before initial passage of the bill—on February 12, rather than applying federal interference with a
pending amendment. Under this reading, the Reconstruction Act neither destroyed Article V by nationalizing the amendment process, as Ackerman would have it, nor read aggressively majoritarian requirements into the “republican form of government” of Article IV, as Amar would have it. The Reconstruction Act was not the means by which the Republicans “got away with something Article V probably was supposed to prevent,” as Harrison would have it, nor did it merely take another very preliminary step in an intergenerational process of authoring the Fourteenth Amendment, as Colby would have it. Instead, the Reconstruction Act enforced existing law.

II. A History of Fourteenth Amendment Loyal Denominatorism

This Part first explains the basic textual arguments at play in the loyal-denominator argument; the companion to this Article defends these arguments on the merits. Such textual arguments read implicit limits into the federal political powers of “the several States” and “each State” in the Constitution. The simplest, strongest version of loyal denominatorism is distinguished from the forms that Sumner, Stevens, or Amar have advocated. Sumner thought states committed suicide and became territories; Stevens thought the South successfully seceded but was reconquered, while Amar links exclusion from the Article V denominator to lack of black suffrage, rather than to secession, and thinks Congress was required to explicitly adopt a loyal denominator, rather than simply delay the existence of peace under the law.

This Part sets out, first chronologically and then by source, the arguments for a loyal denominator. The loyal-denominator theory had a surprisingly large number of different advocates during the Civil War, Reconstruction, and beyond. The theory was not a fringe position associated only with the likes of Stevens, Sumner, or an ad hoc rationalization of a power grab. Andrew Johnson first presented the loyal-denominator view in 1861, shortly after the passage of the Johnson–Crittenden War-Aims

40. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).
41. See supra note 36.
42. See Green, supra note 9.
43. See infra note 61 and accompanying text.
44. Cong. Globe, 38th Cong., 1st Sess. 2041 (Apr. 7, 1864)
45. See supra note 37 and accompanying text; see Amar, America’s Unwritten Constitution, supra note 6, at 87.
Resolutions. The “just a fringe view” idea is the product of historical whitewashing. James G. Blaine, seeking favor with the South during his presidential campaign in 1884, relegated the loyal denominator to the foolish fringe. Ackerman, following Carl Schurz and Blaine, sees Samuel Shellabarger, not Stevens or Sumner, as the most popular theorist of Reconstruction. Shellabarger, however, also advocated a loyal-denominator view, though not with Stevens and Sumner’s exact arguments. Even Blaine himself advocated the loyal-denominator view. John Bingham, whom Ackerman portrays as abandoning the loyal denominator in February 1867, actually stuck with the theory. Many Republicans forcefully advocated loyal denominatorism throughout Reconstruction and beyond, and the view eventually won favor with several commentators.

The historical survey is also important in rebutting the strongest argument against loyal denominatorism, on which Amar and Harrison rely: that at most the theory offered Congress an option that it might use, and that Congress decided not to use it in the Reconstruction Act. Although Congress as a body did not explicitly embrace the loyal-denominator view, it also did not explicitly embrace a former-Confederates-included denominator. Several of Congress’ actions implied a loyal denominator, and expressions of loyal denominatorism persisted throughout 1868 and after Reconstruction.

A. Various Textual Homes for Loyal Denominatorism

The textual argument rooted in the Reconstruction Act’s labeling of the former Confederate states besides Tennessee as “rebel states” is distinguished from other possible arguments for a loyal denominator. The simplest way to exclude the South from “the several States” of Article V is to say that the former Confederate territory was not composed of states at all, either because they successfully seceded and were reconquered—Thaddeus Stevens’s view—or because they committed “state suicide”—Charles Sumner’s view. As the Reconstruction Act affirmed continued Southern statehood, however, it is inconsistent with either Stevens’s or Sumner’s view. “Rebel states,” are, of course, states rather than territories.46

46. The Supreme Court later held that, as a “State,” Georgia was subject to the requirements of Article I, section 10, clause 3, such as the Contracts Clause, but noted that this continuing obligation was consistent with the suspension of other constitutional powers. White v. Hart, 80 U.S. 646, 651 (1872) (“At no time were the rebellious states out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected, and remained the same.”). The Court noted the acts that readmitted Southern representatives suggested the Southern states were states all along, albeit states with suspended constitutional privileges. Id. at 651–52.
The persistent focus on the rebellion, and not the South’s failure to provide sufficient suffrage, was the fundamental rationale for the Reconstruction Act. The Act justified military rule of the South during the states’ rebellion in 1860 and 1861, rather than states’ failure to provide sufficient voting rights for former slaves freed beginning in 1863. Although the Reconstruction Act imposed suffrage for freedmen on the South, the justification for military reconstruction itself was the suppression of the rebellion.47 Like the Emancipation Proclamation, the Reconstruction Act was justified as a means of suppressing the rebellion in a sufficiently definitive way. The companion to this Article48 defends, under the original meaning of Article V, a rebellion-based-suspension-of-rights form rather than a successful-secession-and-reconquest, state suicide, or lack-of-freedmen-suffrage-based forms of loyal denominatorism. A suspension-of-rights-based loyal denominatorism best fits the Reconstruction Act.

Tacit limits on “states” also fit with the generally accepted view—even by surrendering Confederates—that Confederates’ political rights were suspended during the war. If we read “states” strictly, the South had the right to leave behind representatives to resist the Union’s war aims, and the right to select presidential electors to vote against Lincoln in 1864. But even the most ardent surrendering Confederates, who objected to President Johnson’s imposition of conditions in 1865, thought that some sort of surrender was required.49 In the most extreme form of this

47. It is true that in several states with the largest slave and freedmen populations—South Carolina, Louisiana, and Mississippi—a minority of the male population held the political power. It is hard to understand why, precisely, they were republics rather than racial oligarchies or aristocracies. But this was equally true before the war; Madison worried about the same issue in 1792. Notes for the National Gazette Essays, in 14 THE PAPERS OF JAMES MADISON 157–69 (Hutchinson & Rachal eds., 1962), available at https://founders.archives.gov/documents/Madison/01-14-02-0144 [https://perma.cc/85BD-9YLU] (“In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact. The power lies in a part instead of the whole; in the hands of property, not of numbers. . . . In Virginia the aristocratic character is increased by the rule of suffrage, which requiring a freehold in land excludes nearly half the free inhabitants, and must exclude a greater proportion, as the population increases. At present the slaves and non-freeholders amount to nearly [three-fourths] of the State. The power is therefore in about [one-fourth].”).

48. See Green, supra note 9.

49. See WILLIAM DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS 100 (1897) (noting “Southern theory” as one of five theories of Reconstruction; the others were President Johnson’s theory, Stevens’s conquered-provinces theory, Sumner’s state suicide theory, and other Republicans’ “forfeited rights” theory); id. at 102 (noting that even under
surrender-only-required theory, laying down their weapons was enough. To be sure, Congress properly thought that it was not enough. Even the most extreme former Confederates did not adopt the unqualified “state means state” reading of the text. Only after Southern surrender could the states claim their federal powers; “state” at the very least did not include an actively rebellious state.

Consideration of the textual parity of Articles I and V heightens the implausibility of reading “state” without an implicit limit. The textual rationale for including former Confederate states in the Article V denominator—that is, the fact that “the several States” is textually unqualified in Article V—also applies to legislative powers during the war. South Carolina had the right, for example, to be represented in Congress during the Civil War despite illegally fighting to leave the Union.50

Harrison notes the temptation to flexibly interpret Article V to allow loyal states to enact constitutional amendments during a rebellion of more than one-fourth of the states, like the Civil War: “Common sense says that a government cannot allow itself to be paralyzed by treason. . . . If subverted states are still in the denominator, a violently disloyal minority can freeze the Article V process. That process may be very important during a rebellion.”51 Despite Harrison’s argument that the clarity of the text outweighs this practical consideration, the fact that treason could induce paralysis is a very weighty cost of his view.

Southern theory, “the states, it was admitted, were out of their constitutional relation to the general government. Their officers had taken no oath to support the Constitution of the United States. No senators or representatives were acting for the states in Washington. The authority of the United States judiciary was not recognized by state governments. . . . [I]t became the duty of the officers to take the oath required by the constitution, of the legislature to provide for the dispatch of congressmen to Washington, and of the people of the state to submit to the authority of the courts and officials of the national government. These steps having being taken, the Union would stand under the constitution as before the war.”). As Harrison notes, Dunning’s general normative views in favor of President Johnson have come under great criticism, but his account of the five theories of Reconstruction is “largely unaffected.” Harrison, supra note 5, at 390 n.82.

50. To be sure, Southern Representatives and Senators, most famously Jefferson Davis, left voluntarily, see CONG. GLOBE, 36th Cong., 2nd Sess. 487 (Jan. 21, 1861) (Davis’s farewell to Senate), so the issue of a right to representation from possible remaining disloyal states was not faced until December 1865. According to the strict no-qualification-in-the-text reading of “the several States,” however, the action of Senators like Jefferson Davis leaving Congress needlessly forfeited an invaluable constitutional right of the South.

51. Harrison, supra note 5, at 421.
The chief case on the change in constitutional rights during the war, the *Prize Cases*, likewise lends support to implicit qualifications on the rights of “states.” Akin to the Reconstruction Act’s use of the “rebel states” label, the Court referred to “states in Rebellion.”52 In approving the blockade of the South, unanimously as to seizures following congressional approbation and 5–4 as to earlier cases, the Court licensed an implicit qualification to the commercial rights of “states” in Article I, Section 9, clause 6: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . .”53 The Court held, this constitutional guarantee notwithstanding, “[W]e are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion which neutrals are bound to regard.”54

Distinguishing these various arguments allows for a more intelligent discussion of the arguments for loyal denominators. Several scholars have advocated limiting the Article I, II, and V denominators to reliably loyal states: states that Congress accepted back into the exercise of federal power. Many people read implicit conditions into Articles I, II, and V, such as “loyal States” or “reliably loyal States.” Because these arguments began at the same time as the war, it is not always easy to distinguish whether the phrase “loyal,” “reliably loyal,” or “facially loyal” correctly characterizes the implied restriction; borderline cases applying these various concepts only arose beginning in 1865. For the “reliably loyal” definition, it is hard to identify exactly how much reliability Congress

52. *Prize Cases*, 67 U.S. 635, 671 (1863); *cf. id. at 668 (“States organized in rebellion . . . .”); *id. at 671 (“States now in rebellion . . . .”); *id. at 673 (“[I]n organizing this rebellion, they have acted as States . . . .”).

53. U.S. CONST. art. I, § 9, cl. 6 (emphasis added). Congress noted this issue in July 1861 as it discussed the blockade. *See, e.g.*, CONG. GLOBE, 37th Cong., 1st Sess. 48, 49 (July 10, 1861) (Sen. Trusten Polk mentioning it twice); *id. at 58 (Rep. Clement Vallandingham); *id. at 67 (July 11, 1861) (Sen. Lazarus Powell); *id. at 150 (July 16, 1861) (Rep. Henry Burnett); *id. app. at 14 (July 19, 1861) (Sen. James Bayard); *see also CONG. GLOBE, 39th Cong., 1st Sess. 143 (Jan. 8, 1866) (Rep. Samuel Shellabarger) (defending the blockade based on suspension of states’ Article I rights).

54. *Prize Cases*, 67 U.S. at 671; *cf. id. at 688–89 (Nelson, J., dissenting) (“It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this Government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government.”).
might demand to that loyalty. Presumably, Congress was required to tolerate a chance of future rebellion or resistance to federal authority.\textsuperscript{55} All of these observers, however, consider states’ naysaying denominator power as an important federal power that the nation suspended during the rebellion.

In addition to laying the foundation for a full evaluation of the textual and historical merits of the loyal denominator, this historical discussion rebuts the historically-rooted arguments against loyal denominatorism, chiefly from Ackerman and Colby, but also from Amar, who claims that Congress “ultimately opted to include ex-Confederate states in the amendment process.”\textsuperscript{56}

Part B sets out the history of the loyal-denominator view chronologically, and Part C sorts instances of loyal denominatorism by source.

\textit{B. A Chronological Tour}

Americans discussed the tacit limits on the rights and powers of the states intermittently throughout the Civil War in a great variety of contexts. This section distinguishes eight episodes in the debate.

\textit{1. 1861: Andrew Johnson’s Assumption of a Loyal Denominator}

We begin, oddly enough, with Andrew Johnson, the lone Senator from a Confederate state who remained loyal to the Union, and co-sponsor of the Crittenden–Johnson War-Aims Resolutions, which the House and Senate overwhelmingly adopted on July 22 and July 25, 1861. These resolutions provided:

\begin{quote}
This war is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these objects are accomplished the war ought
\end{quote}

\textsuperscript{55}. For more on the vagueness of the requirement, see Green, \textit{supra} note 9, at 176 (quoting Aristotle and Macaulay on ineliminable vagueness of some moral and legal requirements).

\textsuperscript{56}. AMAR, \textit{AMERICA’S UNWRITTEN CONSTITUTION}, \textit{supra} note 6, at 87.
to cease.\textsuperscript{57}

As Ackerman notes, President Johnson “never tired of pointing out” this description of the War-Aims Resolutions when attacking the Republicans after the war.\textsuperscript{58} What exactly, however, did “unimpaired” states’ rights mean? The term did not mean retention of the naysaying Article V denominator power during the war. On July 27, two days after the Senate approved his resolution, Johnson rebutted Democratic insinuations that the North would abolish slavery in the states as soon as it could by pointing out that, even with the reduced Article V denominator, and thus the power to pass an anti-slavery amendment under the loyal-denominator theory, the free states had not sought to do so:

It has been said that the one great object was, first to abolish slavery in the District of Columbia and the slave trade between the states, as a kind of initiative measure; next, to exclude it from the Territories; and when the free States were three fourths of all the States, so as to have power to change the Constitution, they would amend the Constitution so as to give Congress the power to legislate upon the subject of slavery in the States, and to expel it from the States in which it is now. Has not that been the argument? Now, how does the matter stand? At the last session of Congress seven States withdrew, it may be said that eight withdrew, reducing the remaining slave states down to one fourth of the whole number of States. Now we have reached the point at which the charge has been made, that whenever the free States constituted a majority in the Congress of the United States, sufficient to amend the Constitution, they would so amend it as to legislate upon the institution of slavery within the States, and that the institution of slavery would be overthrown.\textsuperscript{59}

\textsuperscript{57} See CONG. GLOBE, 37th Cong., 1st Sess. 223 (July 22, 1861) (House approval); \textit{id.} at 265 (July 25, 1861) (Senate approval).

\textsuperscript{58} ACKERMAN, TRANSFORMATIONS, supra note 1, at 113; see also Colby, supra note 7, at 1682 (following Ackerman on the inconsistency of a loyal denominator with the resolutions).

\textsuperscript{59} CONG. GLOBE, 37th Cong., 1st Sess. 291 (July 27, 1861) (emphases added). Earlier in the year, Senator Anthony assumed, in discussing compromise proposals, that seceding states were still in the Article V denominator. CONG. GLOBE, 36th Cong., 2nd Sess. 408 (Jan. 16, 1861) (“Four States are already out of the Union, so far as their own act can place them without it; three others are waiting impatiently for the forms of secession, which shall sever them from the flag of their country. Seven States would refuse even to consider a proposition of
Amending the Constitution during the war only required three-fourths of the loyal states for Johnson. “Unimpaired” states’ rights, therefore, were only the ultimate aim of the war, not a statement of the status of those rights during the rebellion itself. Indeed, Congress’s approval of Lincoln’s blockade required the same temporary-imPAIRments-allowed interpretation of the resolutions. The constitutional commercial rights of states subject to a blockade would not continue without any interruption during the war; at best, the rights would resume once peace was achieved. How long that peace would take, and what measures would be required to defeat the Confederacy, were obviously unknown in July 1861. The Crittenden–Johnson resolutions left open how much security, and over what sort of time frame, constitutional supremacy, and the preservation of the Union would require.

2. February 1862: Sumner’s State Suicide Theory

In February 1862, Charles Sumner proposed resolutions that would exclude the Confederacy from Articles I, II, and V by moving the Confederacy entirely to the status of Article IV territories. Sumner’s “state suicide” theory contended that all powers of states were abandoned with the attempted secession. Sumner meant all powers, even purely domestic powers, producing the added benefit—most likely a motivating feature—that institutions like slavery that required domestic law automatically ceased to exist. Sumner argued:

[A]ny acts of secession or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory is inoperative and void against the Constitution, and when sustained by force it becomes a practical abdication by the State of all rights under the Constitution, while the treason which it involves still farther works an instant forfeiture of all those functions and powers essential to the continued existence of the State as a body-politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other

amendment to the Constitution. This would leave, in all the other States, but one to spare to form a constitutional majority. To adopt an amendment to the Constitution requires the assent of twenty-five States; only twenty-six States would vote upon it.”

60. An Act to Provide for the Collection of Duties on Imports, and for Other Purposes, 12 Stat. 255, §§ 5–6, at 257 (July 13, 1861); see supra notes 52–54 and accompanying text.
territory, and the State being, according to the language of the law, *felo-de-se* [i.e., a suicide], ceases to exist.61

Sumner’s theory conflicted with the Reconstruction Act. Still, Sumner was ahead of the curve in thinking about the legal problems of Reconstruction, and his solution implied a loyal denominator. Sumner offered a simple conceptual framework that would make clear that the North, once it had won the war, would remain in a genuine position of victory. Alternative theories of Reconstruction that emerged later differed on many details, but all of the theories shared Sumner’s fundamental goal to explain how the security of Union war aims could be extended into peacetime. To the extent that those aims required change to the Constitution, a loyal Article V denominator or its functional equivalent were essential.

3. December 1862: West Virginia

In December 1862, Congress and Lincoln’s cabinet debated the admission of West Virginia, carved out of the state of Virginia without consent from the majority of people of the state, in violation of the requirements of Article IV, Section 3, clause 1.62 A hill country remnant

61. CONG. GLOBE, 37th Cong., 2nd Sess. 737 (Feb. 11, 1862) (emphasis added). Representative Pendleton, criticizing the Thirteenth Amendment, noted that the theory was already almost three years old in January 1865. See CONG. GLOBE, 38th Cong., 1st Sess. 223 (Jan. 11, 1865) (“[Representative Ashley] holds that an act of secession is an abdication by the people of their rights but not a release of their duties; that it destroys, not the tie which binds them to the Union, but their form of Government, leaving them subject to the jurisdiction of the Federal Government and its absolute sovereignty with all the rights of local government, and he deduces from this the conclusion that the seceding States have no voice on this amendment, but are absolutely bound by it. That doctrine was promulgated by a Senator from Massachusetts [Mr. Sumner] nearly three years ago in a series of resolutions presented to the Senate . . . .”).

62. U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” (emphasis added)). The story is told in great detail in the first part of Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional?*, 90 CAL. L. REV. 291, 297–32 (2002). The second part is a fascinatingly intricate discussion of the semicolon after “other State,” which could make the clause prohibiting carving new states out of old states categorical, rather than only requiring old states’ consent, although reasons exist to reject this reading. Id. at 332–95.
“Virginia” legislature meeting in Wheeling, which those in the Western counties and near the District of Columbia, such as Alexandria, passed a resolution of consent. Republicans generally argued that by rebelling, the majority forfeited their right to be asked for consent under Article IV. Representative William P. Sheffield put the point in terms of Virginian estoppel:

It may be said that it is hard for these two thirds [i.e., the Eastern two-thirds of Virginia, governed by Richmond] to have us divide their territory without their consent. But, sir, they have put it in our power to do it by their own wrongful acts, and they are estopped from saying that it is unjust for us to do this thing.63

Representative Horace Maynard put the point in terms of moral responsibility for the consequences of secession:

[T]he pride of old Virginia may be wounded by seeing her mountain sons set up as a rival Commonwealth. Virginia, in common with the other rebellious regions, has earned it all. . . . Treason, rebellion, secession, war, have been brought upon them by their own bad, bold men, and with them be the consequences. We are not responsible for them.64

John Bingham equated rebellion with forfeiture of the right to speak for the state: “[I]f the majority of the people of Virginia have turned rebels, as I believe they have, the State is in the loyal minority.”65

Thaddeus Stevens and his allies articulated the point in a more radical form:

[N]one of the States now in rebellion are entitled to the protection of the Constitution . . . . I say, then, that we may admit West Virginia as a new State, not by virtue of any provision of the Constitution, but under our absolute power which the laws of war give us in the circumstances in which we are placed.66

Representative Martin Conway similarly spoke about why it was permissible to ignore Virginia’s Article IV rights: “[O]ur seceded states . . . are out of the Union by having acquired at least a belligerent character, thus securing an international status incompatible with their Federal relations.

63. CONG. GLOBE, 37th Cong., 3d Sess. 56 (Dec. 10, 1862).
64. Id. at 49 (Dec. 9, 1862).
65. Id. at 57 (Dec. 10, 1862).
66. Id. at 50 (Dec. 9, 1862).
This . . . makes their territory subject to our sovereign will whenever we take it from them.” 67 Using some of the same phrases, Representative Abram Olin also applied Stevens’ successful-secession-and-reconquest view: “I maintain that, in this instance, in reference to these rebellious States, they have acquired a belligerent character which gives them an international status which is entirely incompatible with the Federal status. They are beyond the Federal system.” 68

Lincoln similarly argued that the eastern Virginians forfeited their right to speak for Virginia in asserting Article IV rights: “Can this government stand, if it indulges constitutional constructions by which men in open rebellion against it, are to be accounted, man for man, the equals of those who maintain their loyalty to it?” 69 Under Lincoln’s view, the government only needed to consult loyal Virginians. Secretary of the Treasury, and future Chief Justice, Salmon P. Chase argued, “The legislature of Virginia, it may be admitted, did not contain many members from the eastern counties. It contained, however, representatives from all counties whose inhabitants were not either rebels themselves or dominated by greater numbers of rebels.” 70

For the Republicans supporting West Virginia statehood, to be a rebel was to forfeit the right to participate in the institutions that exercised Virginia’s Article IV rights. To that extent, the West Virginia debate gives strong support to one of the pillars of a loyal denominator: secession suspended Confederates’ constitutional rights. The Appalachian and D.C. area counties of Virginia, where loyalists had the upper hand, constituted the entire electorate choosing a legislature that would exercise Virginia’s Article IV rights—the denominator, a structured majority of which was required to control Virginia’s Article IV decision-making.

Some Republicans’ comments, however, understood secession as merely limiting Confederates’ right to speak for Virginia—not Virginia’s rights. The loyal denominator, however, requires a limit on state rights as

67. Id. at 38.
68. Id. at 45.
69. Abraham Lincoln, Opinion on the Admission of West Virginia into the Union, in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 27, Dec. 31, 1862 (Basler ed., 1953). Salmon P. Chase argued similarly,

It would have been as absurd as it would have been impolitic to deny to the large loyal population of Virginia the powers of a State government, because men, whom they had clothed with executive or legislative or judicial powers, had betrayed their trusts and joined in rebellion against their country.

JOHN G. NICOLAY & JOHN HAY, 6 ABRAHAM LINCOLN: A HISTORY 302 (1886).
70. NICOLAY & HAY, supra note 69, at 302.
such. If the Wheeling legislature had inherited Virginia’s rights by being loyal to the Union, perhaps it is a mistake to say that Virginia had even attempted to secede. Rather, those claiming to secede had, *ipso facto*, forfeited the right to act on Virginia’s behalf. Taken to its logical conclusion, the artificial entity of “Virginia” was, by its nature, simply incapable of attempting to secede. The individuals who misbehaved were, to coin a phrase, “*ipso facto ultra vires*”—by virtue of the fact of rebellion—the individuals were beyond their authority to act on Virginia’s behalf.

As explained in the companion to this Article, at one time, this sort of theory convinced many people that artificial entities like corporations could shield themselves from criminal liability simply by prohibiting their employees from committing crimes; that interpretation, however, of corporate misbehavior is now generally seen as an intellectual mistake. The Wheeling legislature’s inheritance of Virginia’s rights and powers under the Constitution—in the eyes of some supporters of West Virginia statehood—did not entail that there would always be such an entity able to inherit. Virginia’s geographical and political situation allowed a uniquely sharp division between generally loyal and disloyal parts of the state that Union armies could defend relatively easily. The problems of rebel-right forfeiture cannot always be navigated by imposing forfeitures of constitutional rights on individuals rather than on states. Further, the use of county divisions to mark boundaries between the states indicates that the forfeitures of secession attach to at least some artificial entities. When the Union created West Virginia, *counties* in which rebels were in control, not merely individual rebels, but counties—Unionist residents included—were excluded from participation in the creation process.

4. 1861 to 1864: Disputes over the Quorum

Denominators are not unique to Article V; provisions relating to states’ powers under Articles I and II also refer to fractions, thus requiring an assessment of the relevant denominators. Congress generally construed such provisions to refer to fractions of those from loyal states. The quorum rule of Article I, Section 5 provides that, “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members,”

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71. *See* Green, *supra* note 9, at 182–84.
72. Exactly which counties was a litigated issue before the Supreme Court in 1871. *See* Virginia v. West Virginia, 78 U.S. 39 (1871) (making a 6–3 decision in favor of inclusion of Berkeley and Jefferson counties in West Virginia).
73. For Congress’s treatment of Article I, see immediately *infra*; for its treatment of Article II, see *infra* notes 100–120 and accompanying text.
and a *Majority of each* shall constitute a Quorum to do Business. . . .”74 During the war, both Houses of Congress eventually decided that this provision meant only a majority of representatives from the loyal states. The House of Representatives excluded the Confederacy from its quorum calculations starting from its first meeting in July 1861.75 The Senate made the same decision only after Senator John Sherman of Ohio pressed the issue for several years. In 1862, Sherman explained the reduced denominator:

If you adopt any other principle you acknowledge the worst feature of secession. . . . [T]he Constitution is a machine intended to be perpetual, and it is not in the power either of a minority of the States or of a minority of the people of the States to break it up. A very small minority of the people of the United States might break up the Government, if it required thirty-five Senators always to be here to constitute a quorum. . . . It all turns on the question of whether or not a majority of all the Senators that might by possibility be elected—that is, a majority of sixty-eight—or whether a majority of those who have been elected, and are entitled to take their seats—that is, a majority of forty-nine—constitutes a quorum.76

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74. U.S. CONST. art. I, § 5, cl. 1 (emphasis added). The Twelfth Amendment and its predecessor in Article II similarly use fractions regarding presidential selection. See U.S. CONST. amend. XII, ¶ 3 (“The person having the greatest Number of votes for President, shall be the President, if such number be a *majority of the whole number of Electors appointed* . . . .”) (emphasis added); U.S. CONST. art. II, § 1, cl. 3 (identical “Majority of the whole Number of Electors appointed” provision in original Constitution); U.S. CONST. amend. XII, ¶ 3 (“[I]n choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from *two-thirds of the states*, and a majority of all the states shall be necessary to a choice.”) (emphasis added); U.S. CONST. art. II, § 1, cl. 3 (identical reference to “Member or Members from two-thirds of the States” in original Constitution). For the February 1865 dispute over “States” and these fractions in Article II, see infra notes 100–120 and accompanying text.

75. CONG. GLOBE, 37th Cong., 1st Sess. 210 (July 19, 1861) (ruling by Speaker of the House Galusha Grow that House has 183 members, of which 92 would be quorum). Including absent Confederates for quorum calculations would have meant a House size of 241 and a quorum of 121, considerably harder to meet out of only 183 loyal members.

76. CONG. GLOBE, 37th Cong., 2nd Sess. 3022 (June 30, 1862).
Sherman explained a few days later, “The opposite doctrine to that for which I contend, is the doctrine of secession.” The Senate put off this question, however, for several years. Sherman pressed the quorum reform measure steadily until the Senate finally changed its interpretation rule by a 26–11 vote in May 1864. Democrat Reverdy Johnson, one of the most thoughtful Democratic critics of Reconstruction, was one of Sherman’s allies in seeking the reading of “majority” in Article I that fit the practical situation:

Suppose it be doubtful. It cannot be, I submit to my friend from Kentucky [Garrett Davis, later a far less thoughtful foe of Reconstruction], so very clear. Then if it be doubtful, what should we do in the present condition of the country? Adopt that rule which the convenience of the legislation requires, which the business of our country demands at our hands . . . .

Tacit loyalty-based limits on the word “majority” were, then, commonplace, even among those who would later resist such limits on the word “state.”

5. 1864 and 1865: Wade–Davis, the Thirteenth Amendment, and Article II

As the Union army gradually suppressed the rebellion in different parts of the South, the Lincoln administration faced an immediate need to establish civil order. The military sought to allow locally selected officials to exercise power when practicable, but Congress and the President disputed what criteria to use to lend such officials republican or democratic legitimacy. The year 1864 saw the discussion and passage of the Wade–Davis Bill, which would have required the President to reconstruct the South on the basis of the vote of a majority of the electorates, rather than through Lincoln’s much more lenient “ten percent plan,” which would hold initial elections with fewer southern voters. Lincoln pocket vetoed the bill after its passage on July 2, although he said he would attempt to follow the bill’s guidelines. The Senate also passed the Thirteenth

77. Id. at 3190 (July 9, 1862).
78. See, e.g., id. at 3194 (tabling Sherman’s motion).
80. Id. at 2086.
82. Id.
Amendment on April 8, but on June 15, the Amendment fell 13 votes shy of two-thirds in the House, with a final vote of 93–65. During these events, discussion often turned toward the Article V denominator. Nevada became the 36th state admitted into the Union in October 1864. A loyal denominator before October would have required 18 of 24 states to ratify; a full denominator would have required 27 of 35 states.

Representative Henry Winter Davis, co-sponsor of the Wade–Davis Bill, briefly alluded to loyal denominatorism on March 22.83 He noted Thaddeus Stevens’s agreement with loyal denominatorism and enigmatically suggested that the view was “not without countenance in high judicial quarters.”84 Davis foresaw, however, that loyal denominatorism would “probably encounter as much doubt as the bill before this House,” i.e., the Wade–Davis bill itself, which Davis thought was more pressing than a possible constitutional amendment.85

On April 7, just before the Senate approved the Thirteenth Amendment, Democratic Senator Hendricks of Indiana argued that many states—including the Confederacy, but also Kentucky, Missouri, and Delaware—were in “no condition to consider amendments to the Constitution.”86 Jacob Howard interrupted, “If those States to which he refers are not in a condition to participate in the amendment of the Constitution, as is contemplated by this joint resolution, whose fault will it be? Can a party in that attitude take advantage of his own fault, of his own wrong?”87 Hendricks pressed Howard on the number required for ratification; Howard replied by reiterating that secessionists’ failure to participate was their own fault.88 When pressed again, Howard replied, “Of course, I suppose, there must be a concurrence of the constitutional number of States, which number would be three fourths of the States of the Union, or, in the language of the Constitution, in the Union.”89 At that time, another Senator jumped in with questions for Hendricks, so whether Howard’s “in the Union” language meant to convey loyal denominatorism is unclear; but less than a year later during the presidential-elector discussion, Howard expressed loyal denominatorism with zeal.90

83. See infra note 230. Davis referred to 34 states, possibly forgetting (or refusing to acknowledge) West Virginia, admitted as the 35th state in June 1863.
84. CONG. GLOBE, 38th Cong., 1st Sess. app. 84 (Mar. 22, 1864).
85. Id.
86. CONG. GLOBE, 38th Cong., 1st Sess. 1457 (Apr. 7, 1864).
87. Id.
88. Id.
89. Id.
90. See infra notes 111–115 and accompanying text (discussing Article II on a partly territorial model) and note 212.
Democratic Senator Henderson’s attack on loyal denominatorism discussed later in this Article demonstrates the issue was present.91

On May 2, 1864, Thaddeus Stevens laid out his conquered-provinces theory. Criticizing the committee’s version of the Wade–Davis Bill, he said of the South’s “rights under the Constitution” that “war has abrogated them all.”92

The next day, Representative Daniel Gooch of Massachusetts struck a similar note, tying all rights under the Constitution to the recognition of Congress’s Article I rights:

>[A]s the governments in the revolted States have by treason, rebellion, and adhesion to the southern confederacy been overthrown and destroyed, no such State can have any status in the Union for any purpose until a loyal State government shall have been established therein, and recognized by the Congress of the United States. And when that shall have been done it will become the duty of the other departments to immediately recognize the act and accord such State all the rights and privileges of a State in the Union.93

The same day, William D. Kelley of Pennsylvania offered the first extended defense of a loyal denominator in the specific context of Article V, quoting Stevens’s proposed rule that only “three fourths of the non-seceding States” were required.94 Kelley expressed complete confidence that the Supreme Court would agree with him on the point.95 He echoed Sumner’s idea of state suicide.96 Representative Daniel Morris advanced a more nuanced form of loyal denominatorism on May 31.97 Morris saw the Confederacy as in the Union as to a duty of fealty, but out as to Article I and Article V power—“three fourths of the now loyal States” was enough for him.98

Loyal denominatorism was not, of course, universal among proponents of the Thirteenth Amendment. Three senators who would later advocate a

91. **Cong. Globe, 38th Cong., 1st Sess. 1463 (Apr. 7, 1864)** (“To consider the seceded States out of the Union and take the sanction of three fourths of the remainder will be attacked for unconstitutionality.”).
92. *Id.* at 2041 (May 2, 1864).
93. *Id.* at 2071 (May 3, 1864).
94. See infra note 238.
95. See infra note 238.
97. See infra note 240.
98. See infra note 240.
loyal denominator—Henry Wilson and Lyman Trumbull in March, and James Harlan in April—supported a full denominator view in 1864.\(^{99}\) Davis, Gooch, Kelley, Morris, and Stevens showed, however, that proponents offered a loyal Article V denominator as one interpretation of the legal problem of Reconstruction.

The denominator issue loomed as Lincoln was reelected in November 1864: would electors from the portions of the former Confederacy under Union control count as part of the relevant “majority” of electoral votes required under Article II and the Jeffersonian modification to presidential selection in the Twelfth Amendment? Arkansas, Tennessee, and Louisiana tried to exercise Article II rights by appointing electors. Congress rejected their electoral votes, passing a resolution on February 8, 1865 that declared the South was not entitled to representation in the Electoral College.\(^{100}\) In the discussions leading to that decision, Senator Wade\(^ {101}\) and Representative James Wilson\(^ {102}\) pressed Article II loyal denominatorism. Although the House passed the resolution without a recorded vote,\(^ {103}\) the

\(^{99}\) See infra notes 218 (Wilson), 217 (Trumbull), and 211 (Harlan).

\(^{100}\) Resolution No. 12, 13 Stat. 567, 567–68 (Feb. 8, 1865):

Whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the government of the United States, and were in such a condition on the eighth day of November, eighteen hundred and sixty-four, that no valid recognition for electors of President and Vice President of the United States, according to the constitution and laws thereof, was held therein on said day: Therefore . . . the states mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States, for the term of office commencing on the fourth day of March, eighteen hundred and sixty-five; and no electoral votes shall be received or counted from said states concerning the choice of President and Vice-President for said term of office.

\(^{101}\) Cong. Globe, 38th Cong., 2nd Sess. 5 (Dec. 7, 1864) (presenting petition “remonstrating against the admission of Senators or Representatives from the pretended State of Louisiana into the Congress of the United States, and the reception of any electoral vote of that State in counting the votes for President and Vice President of the United States . . . ”).

\(^{102}\) Id. at 65 (Dec. 19, 1864) (Wilson “introduced a joint resolution declaring certain States not entitled to representation in the electoral college”); id. at 82 (reporting back and recommitting resolution from Judiciary Committee).

\(^{103}\) Id. at 505 (Jan. 30, 1865) (House passing initial version without recorded vote); id. at 595 (Feb. 4, 1865) (Senate passing version with revised preamble, 29–10); id. at 602 (Feb. 4, 1865) (House concurring in Senate amendment).
Senate was more active. Senator Van Eyck proposed allowing electoral votes from Louisiana. Senator Trumbull noted that Arkansas, Tennessee, and Louisiana had appointed electors, but that Congress had the power to decide when to restore states’ Article II privileges. Senators Howe and Harris argued that the rebellion had substantially ended in Louisiana, justifying the counting of their electoral votes. Senator Harris associated states’ Article I and Article II powers, arguing that both questions should be left open. Reverdy Johnson vehemently denied that Lincoln signed the bill, but with some third-person disclaimers. See id. at 688 (Lincoln’s statement of Feb. 8, 1865):

In his own view, however, the two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the manner of canvassing or counting electoral votes; and he also disclaims that, by signing said resolution, he has expressed any opinion on the recitals of the preamble, or any judgment of his own upon the subject of the resolution.

Id. at 711 (same reported to Senate).

104. Id. at 533 (Feb. 1, 1865). He noted that generally, the rebellion suspended states’ federal privileges:

[W]henever the testimony is furnished to my mind that these States have, by the aid of the General Government, or by the efforts of their own people, or by the act of both combined, reestablished themselves, so to speak, or set their State governments in action anew and have commenced again to revolve in their old orbits, I shall feel it to be my duty, so far as I am concerned, to extend to them all the privileges and all the rights which the loyal people of a loyal State are entitled to at the hands of their sister States, whether upon this floor or anywhere else.

Id. at 535.

105. Id. at 534; see also id. at 535 (“[U]ntil there shall be some action by Congress recognizing the organization which has been set up in Louisiana, we ought not to count electoral votes from that State. We have not done so yet, and until we do it we ought not to count the electoral vote.”).

106. Id. at 536.

107. Id. at 537.

108. Id. at 548 (Feb. 2, 1865):

It is true that the States specified did rebel; the first part of the recital is true; but that the inhabitants of those States and the local authorities of all of those States were in a state of armed rebellion on the 8th day of November, the day of the presidential election, I am not prepared to assert. On the contrary, I choose to leave that question open. I think it
those in a state in rebellion had Article II powers, despite still being in the Union. Johnson said that the rebel states were “[not in a constitutional sense but practically] out of the Union,” adding in response to a question that rebel states were “not out in one sense.”

Senator Jacob Howard’s contribution to the February 1865 Article II debate offered an unusually clear and full theory of Reconstruction, essentially the same as Shellabarger’s articulation a year later: states still existed, but had no more federal political authority than territories. Howard noted the general theoretical importance of the issue, even though the electoral votes at issue would not affect whether Lincoln prevailed over McClellan: “I certainly regard it as a measure of very great importance, especially as a precedent for the future, and as indicating the opinion of Congress on the subject, to use a familiar term, of ‘reconstruction,’ or rather the rights of the States in rebellion.”

Howard went on, noting that Reverdy Johnson’s speech in favor of the resolution gave him “a little gratification” because it represented “the sentiment which I long since expressed upon this floor.” Howard’s theory had an important affinity with Thaddeus Stevens’s “conquered province” story: “[T]he United States . . . have the same power and authority over the conquered States, over the communities once States in this Union but now conquered and subjected by our arms as the nation itself would possess over foreign territory conquered in the same way.” Howard stressed an important difference, though this suspension of states’ rights could not last forever:

[In the case of a conquest of a rebel State by the arms of the United States the Government hold the territory thus subdued in trust for a specific purpose, and that purpose is to restore it ultimately and in its own discretion to its original position in the Union, to the enjoyment of all the functions and privileges pertaining to or required of a State of the United States under the Constitution.]

ought to be left open until the question as to whether or not the Senators who are now applying for admission here from the State of Louisiana shall be admitted shall be brought before the Senate.

109. Id. at 553. Johnson asked incredulously, “[I]s it possible that the inhabitants of a State thus at war with the United States have a right to vote in any Presidential election for President of the United States?” Id.

110. Id.

112. Id. at 554.

113. Id. at 554.

114. Id.
Howard explained that the suspension might last until the government reliably reestablished loyalty:

[Such a condition would last] until I am perfectly satisfied, upon due evidence, that the decided majority of the voting population of the State has become loyal to the Government of the United States, is friendly to that Government, and is willing and anxious to proceed in the discharge of the functions of the State of the Union, honestly and fairly . . . .

Senators Pomeroy and Sherman likewise associated states’ Article I and Article II powers. Senator Collamer spoke generally of the

115. Id. Howard reiterated the distinction between his views and Sumner’s state suicide view two days later, responding to Doolittle’s characterization. Id. at 578 (Feb. 3, 1865):

[T]he power of the United States over a conquered State which has been in rebellion is the ordinary power of the conqueror over conquered territory; but that in this particular case there is superadded to the rights and duties of the conqueror a trust, growing out of the Constitution of the United States, which is to be performed by the United States in its discretion and in due time, in the shape of a restoration of the conquered State to the Union. Congress may take its own time to bring about this restoration. There are no limitations in the Constitution in regard to the mode or time in which it is to be done. The territory, however, having been once a State, must be restored to its condition of a State by the action of Congress at some time . . . .

116. Id. at 555 (“I do not suppose that States that are not represented in either House of Congress should have a representation in the Electoral College.”); id. (“Under the instructions and impressions that the members from Arkansas received here last session, they distinctly understood that States not represented in either branch of Congress would have no right to vote at the presidential election.”).

117. Id. at 579 (Feb. 3, 1865) (“The idea that Louisiana shall vote in the Electoral College and make a President for us when no man can speak for her here, and no man can speak for her in the House of Representatives, is, in my judgment, an absurdity.”).

118. Later, Congressmen looked back on the Article II precedent, especially in 1868 when the same question recurred. See, e.g., CONG. GLOBE, 40th Cong., 2nd Sess. 855 (Feb. 4, 1868) (Senator George H. Williams of Oregon):

[D]oes not the Constitution in express terms confer the right upon every State to vote for President and Vice President of the United States? If in consequence of this rebellion those States forfeited that right, I will ask if they did not necessarily forfeit other express and implied rights under the Constitution?
suspension of states’ powers under the Constitution.\textsuperscript{119} The New York World, critical of Republicans, noted the parity between Article II and Article V powers.\textsuperscript{120}

A week before the Article II decision, on January 31, 1865, the House approved the Thirteenth Amendment for which it had come 13 votes short of two-thirds the previous June. Although loyal denominatorism was not included in Steven Spielberg’s version of that vote in \textit{Lincoln},\textsuperscript{121} loyal denominatorism received a significant amount of discussion in Congress, the press, and legal treatises during 1865. The government thus prominently set the loyal denominator before the public mind during the proposal and ratification of the Thirteenth Amendment, as well as the Fourteenth Amendment. In January 1865, several Representatives advocated a loyal denominator, as others either noted the issue and left it open or assumed that Republicans would use the theory.\textsuperscript{122} Senator Sumner and Representative Stevens added defenses of a loyal denominator in February;\textsuperscript{123} following Sumner’s lead, the National Anti-

\textit{Id.} at 3605 (June 30, 1868) (Senator Henry Anthony of Rhode Island): “I take it that the representation in the Electoral College depends precisely upon the same principle that should govern representation in the two Houses of Congress. . . . [I]f Congress has a right to affirm the disability, it depends upon Congress to say when the disability ceases.” This time, Congress acted before the election and tied Article I and Article II rights together, 15 Stat. 257 (July 20, 1868), and only Mississippi, Texas, and Virginia were excluded from the presidential election.

\textsuperscript{119} CONG. GLOBE, 38th Cong., 2nd Sess. 590 (Feb. 4, 1865):

\quad [T]he States which have been declared in a state of insurrection are incapable of exercising their privileges or their duties within this Government as integral parts of this Union while they continue in that situation, and . . . their restoration shall be either by an act of Congress or by the reception of their representatives by the two Houses.

\textit{Id.} at 592 (“Congress may, in fixing the status of these States . . . make it one of the conditions of their again exercising their franchise as integral members of the Union, that they shall be placed in a position which will enable the Union to continue and exist.”).

\textsuperscript{120} “[I]f they [Arkansas and Tennessee] should ratify [the Thirteenth Amendment], the question fairly arises whether States that are not permitted to vote for President can be parties to a change in the fundamental law.”\textit{The New York World, reprinted in Holmes County Farmer,} Feb. 9, 1865, at 2.

\textsuperscript{121} LINCOLN (Dreamworks Pictures 2012).

\textsuperscript{122} See \textit{infra} notes 219 (Ashley), 231 (Thomas T. Davis), 246 (Starr), 226 (Broomall leaving issue open), 272 (Rogers opposing the amendment but assuming that Republicans would use a loyal denominator to legitimize it), and 273 (2007 historian Holzer noting same assumption).

\textsuperscript{123} See \textit{infra} notes 216 (Sumner) and 247 (Stevens).
Slavery Standard promoted loyal denominatorism in March. Joel Prentiss Bishop similarly defended the loyal denominator when discussing slavery in his 1865 treatise. Lincoln’s last public address, three days before his assassination on April 14, left loyal denominatorism regarding the Thirteenth Amendment conspicuously open, refusing to commit to either a full or a loyal denominator:

To meet this proposition, it has been argued that no more than three fourths of those States which have not attempted secession are necessary to validly ratify the amendment. I do not commit myself against this, further than to say that such a ratification would be questionable, and sure to be persistently questioned; while a ratification by three-fourths of all the States would be unquestioned and unquestionable.

This sort of agnosticism appeared again and again in discussions of the Article V process. In 1867, important Republicans holding the balance of power in Congress, like John Sherman, refused to be pinned down either way. As a result of the prevalence of such professed agnosticism, the South was ultimately invited to adopt the Fourteenth Amendment without Congress’s position being made clear; whether the South was actually participating in the adoption of the Amendment or demonstrating its loyalty to an amendment already adopted was uncertain. Ackerman interprets Congress’s failure to affirmatively adopt loyal denominatorism as a rejection of the view. Lincoln’s agnosticism, however, had two sides, just as did the agnosticism of those who would follow him: Lincoln refused to reject the loyal denominator, even as he refused to embrace it.

124. See infra note 252.
125. See infra note 264.
126. See Last Public Address, Apr. 11, 1865, in 8 COLLECTED WORKS, supra note 69, at 404. Lincoln’s statement was recalled and paired alongside Thaddeus Stevens’s loyal denominatorism in the Memphis Daily Appeal, Feb. 9, 1867, at 2. Lincoln assumed a full denominator in proposing a gradual compensated emancipation amendment in December 1862. See Journal of the Senate, Dec. 1, 1862, at 22 (“The plan is proposed as permanent constitutional law. It cannot become such without the concurrence of, first, two-thirds of Congress, and, afterwards, three-fourths of the States. The requisite three-fourths of the States will necessarily include seven of the slave States.”).
127. For instance, Ackerman harps on Congress’s failure to declare the Fourteenth Amendment ratified in July 1867, when Seward reported 20 ratifications. ACKERMAN, TRANSFORMATIONS, supra note 1, at 445–46 n.41. Ackerman also harps on Henry Wilson’s delay until Seward proclaimed the Thirteenth Amendment ratified. Id. at 155–56.
Similarly, individuals who noted there was a significant unresolved issue regarding the loyal denominator—and were therefore unsure whether the Fourteenth Amendment was in the Constitution between February 1867 and July 1868—did not assert that the South was free to ignore the Fourteenth Amendment during that time. Taking agnostics at their word means not taking their indecision as the embrace of a full denominator.

The Thirteenth Amendment achieved three-fourths of the loyal denominator on June 30, 1865. Congress was not in session at the time, but advocates of the loyal denominator were paying attention. In July 1865, Representative Henry Winter Davis, who articulated the Article V loyal denominator over a year before, in March 1864, noted his view that the Thirteenth Amendment was already part of the Constitution. In September 1865, the National Republican noted the open issue of whether the Thirteenth Amendment was already the law.

These discussions of tacit limits on “states” in a wide variety of constitutional contexts underscore that the loyal denominator was not an innovation improvised only to legitimate the Fourteenth Amendment. Inferring implicit limits of the Constitution’s powers to reliably loyal states was, instead, the typical Republican interpretation of the Constitution during the rebellion.

6. Late 1865 and 1866: Disputes Over Thirteenth Amendment Legitimacy

As Republicans debated different theories of the Thirteenth Amendment’s legitimacy at length before drafters wrote the Fourteenth Amendment, these discussions offer a full picture of the intellectual background before the main Fourteenth Amendment events of 1866, 1867, and 1868 unfolded. Loyal denominatorism was alive and well before the Fourteenth Amendment was even a gleam in John Bingham’s eye.

December 1865 was a busy month. On December 4, Congress met again, excluding the South, and on December 6, Georgia’s ratification supplied three-fourths of the full denominator. Secretary of State Seward proclaimed the Thirteenth Amendment ratified on December 18, explicitly adopting full denominatorism. It is wrong, however, to characterize Seward’s proclamation as meaning that “Southern states had been

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128. See infra Appendix (expressions of agnosticism by Edmunds, Sherman, Miller, Williams, Raymond, and the National Republican).
129. See infra note 230.
130. See infra note 288.
131. 13 Stat. 774, 775 (proclamation by Secretary of State William H. Seward, Dec. 18, 1865) (“[T]he whole number of states in the United States is thirty-six.”).
included in the denominator for the Thirteenth Amendment." Seward included them in the denominator, but he had no authority to settle the question, and various Republicans had argued throughout the year that they were outside the denominator. As Dunning noted later, "Much abuse has been heaped upon Mr. Seward for his action in recognizing the right of the rebel states to vote on this matter." Unsurprisingly, loyal denominatorism gained popularity in December 1865, advocated outside Congress and in Congress in January 1866.

Shellabarger mentioned the power to stop constitutional amendments alongside other suspended constitutional privileges of the South in an important January 8, 1866 speech. Shellabarger’s embrace of an Article V loyal denominator is particularly telling in light of James Blaine’s comments on the subject, on which Ackerman relies heavily. In 1884, Blaine wrote:

The great majority of the Republican leaders, however, did not at all agree with the theory of Mr. Stevens and the mass of the party were steadily against him. The one signal proof of their dissent from the extreme doctrine was their absolute unwillingness to attempt an amendment to the Constitution by the ratification of three-fourths of the Loyal States only, and their insisting that it must be three-fourths of all the States, North and South.

132. Colby, supra note 7, at 1643 (relying on ACKERMAN, TRANSFORMATIONS, supra note 1, at 103).
133. Seward’s July 1868 proclamations about the Fourteenth Amendment make this very clear. See 15 Stat. 706, 707 (proclamation of July 20, 1868):
[N]either the act just quoted from [the 1818 act for publication of the laws of the United States, at 3 Stat. 439 (1818)] nor any other law, expressly or by conclusive implication, authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of State legislatures, or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment to the Constitution . . . .
135. See infra notes 225 (Bromwell), 226 (Broomall), 234 (Farnsworth), 236 (Jenckes), 242 (Schenck), 244 (Shellabarger), and 245 (Spalding).
136. See CONG. GLOBE, 39th Cong., 1st Sess. 142–45 (Jan. 8, 1866).
137. See ACKERMAN, TRANSFORMATIONS, supra note 1, at 446. Ackerman states the date as 1886, rather than 1884. It is true that one of the more widely available copies of Blaine’s book is marked with an 1886 publication date, but the copyright on the 1886 printing is dated 1884. See infra note 138.
138. JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 140 (1884).
Like Ackerman, Blaine claimed that Stevens’s view was just the view of the fringe, and Blaine pointed to Shellabarger’s view as the more mainstream Republican position. But Shellabarger himself contended that the South lost its Article V privileges with secession, together with all other federal political authority. Blaine’s account has another fatal flaw: Blaine himself—although he repudiated the loyal denominator in 1866—advocated a loyal denominator in February 1867.

Further good reason to be skeptical of Blaine’s 1884 statements about the South exists. Blaine was about to become the first Republican to lose a presidential election since John Fremont’s maiden run for the party in 1856, and he was especially keen on currying favor in the South. Cultivating Southern self-esteem by claiming the Confederacy had never forfeited its Article V rights except in the eyes of a few radicals was evidently part of that plan. Representative John Roy Lynch’s memoir blames Blaine as the chief source of the Republican Party’s failure to persevere in protecting the Reconstruction governments in the South against violence and fraud, and ascribes to Blaine a particularly naïve understanding of Southern politics in 1884. In Lynch’s view, Blaine had been critical to the defeat of voting-rights legislation at the end of Republican control of the House of Representatives in February 1875 and in suppressing a March 1877 investigation into the election of L.Q.C. Lamar as Mississippi’s first “post-Redemption” Senator following widespread pre-election violence. Lynch depicts Blaine as thinking that his kindness to Lamar in allowing Reconstruction to die in Mississippi would help Blaine’s chances in carrying the state.

139. Id. at 135.
140. See CONG. GLOBE, 39th Cong., 1st Sess. 142–45 (Jan. 8, 1866).
141. See infra note 222.
143. Id.
144. See id. at 131 (regarding the Federal Elections Bill, “It is safe to say that this bill would have passed both Houses and become a law, but for the unexpected opposition of Speaker Blaine”); id. at 134–35 (conversation between Blaine and Lynch revealing Blaine’s political motives in undermining the bill).
145. Id. at 186–89 (recounting Blaine’s surprise support for Lamar in March 1877 when both Blaine and Lamar were entering the Senate, thus undermining Senator Oliver Morton’s plan to investigate the violence in Mississippi).
146. Id. at 225 (Lynch telling Blaine in 1884 that fraud would prevent Blaine from getting a fair vote in Mississippi, but Blaine insisting that Lamar would help him receive one); id. at 226:
In short, the discussions from December 1865 and January 1866 plainly show that Republicans simply did not accept the full-denominatorism of Seward’s Thirteenth Amendment proclamation; Republicans had their own straightforward loyal-denominator theory of Thirteenth Amendment legitimacy available. Nineteen of the loyal twenty-five states ratified by the summer of 1865, making the Southern ratifications superfluous. Seward’s official listing of the Southern ratifications changed nothing about whether those ratifications came from states with the power to say “no” and to be included in the relevant denominator.

7. 1866 to 1867: The Fourteenth Amendment and Reconstruction Act

Throughout the consideration and proposal of the Fourteenth Amendment and predecessor proposals in the spring of 1866, Republicans continued to push the loyal denominator in February and March. When drafters proposed the Fourteenth Amendment to Congress in May, several representatives pressed the theory again. Although some elements of the press that would later embrace a loyal denominator denied the theory in 1866, other press outlets embraced it or noted its popularity among Republicans.

After Congress proposed the Amendment by two-thirds votes of both houses in June, it invited Southern states to give their assent, but only one took them up on the offer: Tennessee, in July 1866. Following its assent, Tennessee was immediately readmitted to Congress just before the first session of the 39th Congress closed. Congress’s treatment of Tennessee’s proof of renewed loyalty in its Fourteenth Amendment ratification—and particularly the congressional description of Tennessee’s

Mr. Blaine had been chiefly instrumental in bringing about a condition of affairs at the South which made it impossible for any of his Democratic or Republican friends in that section to be of any material service to him at the time [i.e., in the election of 1884] he most needed them.

147. See supra note 20.
148. See infra notes 214 (Lane), 225 (Bromwell), and 226 (Broomall), 247 (Stevens).
149. See infra notes 247 (Stevens), 223 (Bingham), and 233 (Eliot).
150. See infra notes 256 (Evening Telegraph) and 260 (The New York Times).
151. See infra note 258 (The Nation).
152. See infra notes 277 (Daily Phoenix), 278 (Lynchburg News), and 279 (Nashville Daily Union).
153. See supra note 20.
status before it had given such proof—is its clearest embrace of the suspended rights of the South. Congress asserted in the readmission joint resolution that Tennessee’s “[s]tate 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.” In context, “political relations in the Union” included Article I rights; this category likely includes Article V denominator rights as well.

Loyal denominatorism was an important topic during the campaign in the fall of 1866, which Republicans won decisively, both in elections for the 40th Congress and in-state elections for the legislatures that would ratify the Fourteenth Amendment en masse in January and February 1867. The New York Times, which did not convert to loyal denominatorism until January 1867, again assumed a full-denominatorism view in October. The New York Herald changed positions during the fall: advocating a loyal denominator in October, then switching back to a full denominator at the beginning of November, before coming back to loyal denominatorism—full force and at length—at the end of November. The Baltimore Gazette noted the popularity of loyal denominatorism in November. In December, the lame duck second session of the 39th Congress met, and many members and newspapers advocated a loyal denominator. Republicans were the party of loyal-only rule, either in Congress or in the adoption of amendments, and voters got what they wanted.

In January and February 1867, congressional exposition of the loyal denominator came to a crescendo as the critical three-fourths-of-represented-states threshold approached and culminated on February 12 with Pennsylvania’s ratification. Many congressmen and newspapers advocated a loyal denominator, and others kept the issue open or noted its popularity.

154. See supra note 20.
155. See infra note 260.
156. See infra note 259.
157. See infra note 276.
158. See infra notes 212 (Howard), 216 (Sumner), 218 (Wilson), 245 (Spalding), 255 (Emporia News), 259 (New York Herald), 261 (Rafmsman’s Journal), 256 (Evening Telegraph), and 281 (Staunton Spectator).
159. See infra notes 220 (Baker), 223 (Bingham), 225 (Bromwell), 229 (Culom), 237 (Julian), 238 (Kelley), 241 (Pike), 243 (Scofield), 245 (Spalding), 247 (Stevens), 256 (Evening Telegraph, noting popularity), 259 (New York Herald), 260 (New York Times), 263 (Western Reserve Chronicle), 285 (Miller, leaving issue open), 287 (Raymond, open), and 280 (New York Tribune, noting popularity), 212 (Howard), 213 (Harlan), 215 (Stewart), 216 (Sumner), 221 (Banks), 222 (Blaine), 232 (Delano), 235 (Ingersoll), 253 (Boston Post), 259 (New
The discussions in Pennsylvania are particularly instructive, both because the state was the key 20th ratification, and because Delaware recorded the 10th rejection of the Fourteenth Amendment on February 7, 1867. If these “no” votes were to hold, the only reason for Northern states to ratify would be the loyal-denominator theory. Further, the Pennsylvania House considered and rejected almost 2:1 a motion in favor of a full Article V denominator. When Pennsylvania pulled the nation across the loyal-denominator three-fourths threshold, it did so with its eyes wide open. Andrew Gregg Curtin, the governor of Pennsylvania whose term ended in January 1867, made his loyal-denominatorism clear; and the future Democratic U.S. Senator William Wallace, then in the state senate, noted the prevalence of loyal-denominatorism during the debate on ratification.

The House passed a resolution on February 4, 1867 requesting a report from Seward on ratifications, specifically limited to states represented in Congress. Seward replied with a list of only nine states, leaving out eight states that had ratified in January, but whose certifications apparently had not yet been received in Washington. The House did so again on February 15, 1867, and Seward replied with five more states.

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York Herald, and 277 (Daily Phoenix, noting popularity). Blaine’s statement in favor of a loyal denominator is especially significant here, because he later falsely claimed that very few Republicans believed it. See supra notes 137–146 and accompanying text.


161. See Joseph Bliss James, The Ratification of the Fourteenth Amendment 165 (1984) (57–31 vote against “a statement that Southern states should be considered in the number necessary for ratification”).

162. See infra notes 248 (Curtin) and 274 (Wallace).


164. Id. at 1029 (Feb. 6, 1867) (listing Connecticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, and an incompletely-authenticated ratification from New Hampshire). Of these states, all but Vermont, West Virginia, Kansas, and Missouri were 1866 ratifications. Ohio, New York, Illinois, Michigan, Minnesota, Maine, Nevada, and Indiana, all January 1867 ratifiers, were not included. See Cong. Res. Serv., supra note 20.

165. Cong. Globe, 39th Cong., 2nd Sess. 1262 (Feb. 15, 1867) (resolution offered by Wilson, approved by unanimous consent).

166. Id. at 1348 (Feb. 19, 1867) (letter from President Johnson referring to Seward report, but not accompanied in Globe by report itself); House of Representatives, 39th Cong. 2nd Sess, House Ex. Doc. No. 94 (Feb. 19, 1867) (available at https://goo.gl/QiMV2b [https://perma.cc/V37B-9LXC]) (Feb. 16 letter of Seward listing Indiana, Ohio, Illinois, Minnesota, and New York). That
leaving out six states. The House passed a resolution on July 5, 1867 requesting a report on state ratifications. Seward replied on July 19 with a list of 20 states, leaving out two states. This two-state omission is particularly significant because Nebraska’s entrance into the Union on March 1, 1867, raised the loyal-denominator three-fourths threshold from 20 to 21. This change offers a simple reply to Ackerman’s question of why Congress did not press ahead with an official declaration of a loyal-denominator Fourteenth Amendment—the paperwork on one more ratification would need to be processed. Congressional unwillingness to challenge Seward’s role in formally receiving ratifications did not abandon its members’ clearly-stated views on the number of ratifications required.

The fact that certifications were often slow to reach official quarters in Washington explains another aspect of the Reconstruction Act that could repudiate the loyal denominator: on March 2, 1867, Congress referred to the time when the Fourteenth Amendment would become part of the Constitution, as well as the time that Southern states approved it. In the absence of all the proper certifications, there may have been uncertainty as to the exact time that ratifications would count. The loyal denominator itself had edged up to 27 on March 1, 1867 when Nebraska became a state, meaning that on March 2, fewer than three-fourths of the then-represented states had ratified. Massachusetts brought the loyal-denominator ratification fraction back over three-fourths, to 21 of 27, on March 20. The Congress passing the Reconstruction Act knew that the loyal-denominator threshold had been passed; waiting for the paperwork could, however, justify the language of the statute.

left out Michigan, Maine, and Nevada from January 1867 and Rhode Island, Wisconsin, and Pennsylvania from February 1867. See supra note 20.


168. Id. at 740 (July 19, 1867) (listing 20 states). Seward omitted Maine, which ratified in January 1867, and Nebraska, which ratified in June 1867. See Cong. Res. Serv., supra note 20. There was also uncertainty about exactly when Nebraska would fulfill the conditions for statehood set out in the statute of admission.

169. Ackerman, Transformations, supra note 1, at 445–46 n.41.

170. An Act to Provide for the More Efficient Government of the Rebel States, 14 Stat. 428, 429 sec. 5 (Mar. 2, 1867) (referring to the time “when said article shall have become a part of the Constitution of the United States”).

171. On July 21, 1868, Speaker of the House Schuyler Colfax held a gubernatorial telegram of Georgia’s ratification insufficient: “The Chair doubts whether this is an official notice such as is required. It should be sent by mail.” Cong. Globe, 40th Cong., 2nd Sess. 4296 (July 21, 1868).
The interpretation of the Reconstruction Act marks an important divide between the approach of this Article and that of Akhil Amar. On the theory here, the Reconstruction Act imposed a Fourteenth Amendment already binding on the South. On Amar’s theory, however, the Reconstruction Act demanded that the South participate in an act of forced co-authorship of the amendment, rather than purely submitting to already established law.

For all of his loyal-denominator-friendly remarks—his “true blue only” approach—Amar ultimately agrees with Ackerman that Congress decided not to legitimize the Fourteenth Amendment through the loyal-denominator theory, though Amar thinks Congress could have done so. His only reason for the conclusion that Congress “ultimately opted to include ex-Confederate states in the amendment process,” is his interpretation of the Reconstruction Act: “Congress improvised a two-stage strategy that relied heavily on the verdict of the true-blue states in the first stage of enactment, but then gave ex-gray states an important role during the final stage of enactment.” The Reconstruction Act, however, did not invite the South to contribute ratifications which would count under Article V; it invited the South to ratify the Fourteenth Amendment as a precondition to readmission in Congress.

Many advocates of the loyal denominator understood this invitation as a pledge of loyalty to an already-established amendment. Virginia,
Texas, and Mississippi were also required to approve the Fourteenth Amendment, even though they were admitted to representation long after July 1868. Those ratifications were unambiguously pledges of loyalty; loyal denominatorism would interpret the 1868 ratifications similarly.

Amar and his coauthors have correctly pointed out Ackerman’s misconstruction of Bingham’s position in February 1867. Ackerman reads Bingham as abandoning the loyal denominator in a speech on February 13—the day after Pennsylvania’s critical 20th ratification. But Bingham actually embraced it in the very speech Ackerman cites for the proposition. Bingham celebrated Pennsylvania’s critical ratification the day before: “They [the freedmen] ask that that decree of the people who saved the nation’s life, and which, thank God, by the recorded legislative act of twenty represented States of this Union has become a part of the supreme law of the land, shall be enforced by act of Congress.” Ackerman, however, understood this speech as rejecting a loyal denominator. “By February, [Bingham] abandoned radical mathematics and adopted an

show their submission to the terms we are trying to impose, they will permit the loyal States to make this a part of the Constitution of the United States by a three-fourths vote, and then come in express their acceptance of it.”); 247 (Stevens: “[I]n adopting those amendments their [former Confederate States’] aid will neither be desired nor permitted, but . . . when they enter the Union they will swear allegiance to a Constitution to which the consent of their legislatures shall not be asked.”); 259 (N.Y. Herald: “We may establish the constitutional amendment by three-fourths of the States, and then reorganize territorially each of the outside States . . . [T]hey may come in on the terms of the amendment.”); 263 (Western Reserve Chronicle: “[I]t is an act of mere grace to ask the late rebellious States to ratify the Amendment. Their approval or disapproval amounts to nothing, farther than indicating their temper.”); 267 (Andrews: “The ratification by the disloyal States was simply . . . an evidence that they might be restored with safety to their former condition in the Union.”); 269 (Wright: “It is true that Congress, when reconstructing the seceded States, required them to ratify the recent amendments. But this was done not for the sake of securing their votes to make the amendment valid, but as a guarantee that the seceded States had accepted the results of the war in good faith.”); 278 (Lynchburg News: “The programme . . . is evident, viz.: to announce the adoption of the proposed amendment as soon as it shall have been ratified by three-fourths of the States now represented, and to make its subsequent ratification by the Southern states an indispensable condition of their restoration”); and 279 (Nashville Daily Union: “Three-fourths of the States now represented in Congress are to be deemed sufficient for the ratification of the proposed amendment; and its ratification by the other States is to be required only as a condition”).

178. Amar et al., Reconstructing the Republic, supra note 6, at 126 n.27.
179. ACKERMAN, TRANSFORMATIONS, supra note 1, at 196.
180. See infra note 223.
alternative scheme that envisioned ratification by a super-majority of all the states.\textsuperscript{182} Amar rightly calls this a “misleading account,”\textsuperscript{183} and points to Bingham’s statements in 1868 supporting a loyal denominator.\textsuperscript{184} Bingham’s 1868 statements, however, likewise undermine Amar’s claim that the Reconstruction Act made the Confederates part of the process of constitutional adoption.

In sum, Bingham drafted the critical language of Section One, but also paid careful attention to the progress of ratification over time. He was on watch when the critical threshold was passed and continued explaining the loyal-denominator theory long enough into Reconstruction to make it clear to careful observers that the loyal denominator had not been abandoned in the Reconstruction Act.

8. Later in 1867 and Beyond

The persistence of expressions of loyal denominatorism even after Congress passed the Reconstruction Acts in March 1867 reveals that Congress had not embraced a full denominator in the Acts.\textsuperscript{185} In September, Sherman left the issue open, as did the\textit{Evening Telegraph} in November.\textsuperscript{186} The\textit{New York Herald} continued to advocate a loyal denominator the same month.\textsuperscript{187} In June 1867, Timothy Farrar’s treatise adopted a loyal denominator by including the Fourteenth Amendment in his copy of the Constitution.\textsuperscript{188} The 1868 edition of Joel Prentiss Bishop’s treatise likewise retained his 1865 adoption of loyal denominatorism, although Paschal’s 1868 treatise left the issue open.\textsuperscript{189}

In late spring of 1868, the process initiated in the Reconstruction Act began to produce Southern acceptance of the Fourteenth Amendment; first, however, a flurry of congressmen expressed loyal denominatorism.\textsuperscript{190} New

\textsuperscript{182} Ackerman, \textit{TRANSFORMATIONS, supra} note 1, at 196.
\textsuperscript{183} Amar et al., \textit{Reconstructing the Republic, supra} note 6, at 126 n.27.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} See \textit{infra} notes 216 (Sumner), 223 (Bingham), 253 (\textit{Boston Post}), and 239 (Lawrence).
\textsuperscript{186} See \textit{infra} notes 256 (\textit{Evening Telegraph}) and 284 (Sherman).
\textsuperscript{187} See \textit{infra} notes 284 (Sherman), 256 (\textit{Evening Telegraph}), and 259 (\textit{New York Herald}).
\textsuperscript{188} See \textit{infra} note 266.
\textsuperscript{189} See \textit{infra} notes 264 (Bishop) and 271 (Paschal).
\textsuperscript{190} See \textit{infra} notes 209 (Fessenden); 210 (Frelinghuysen); 211 (Harlan); 212 (Howard); 215 (Stewart); 216 (Sumner); 217 (Trumbull); 223 (Bingham); 227 (Cobb); 228 (Colfax); 224 (Boutwell); 238 (Kelley); 247 (Stevens); 249 (New Jersey Governor Ward); 257 (\textit{Montana Post}); 277 (\textit{Daily Phoenix}, noting
Jersey Governor Ward’s adoption of the loyal denominator came in a veto—which a Democratic state legislature overrode—of an attempted rescission of New Jersey’s ratification. Ward insisted that the rescission was too late—the Fourteenth Amendment had already entered the Constitution.

None of these 1868 advocates of loyal denominatorism had any indication that Congress had given up on the issue; neither did any of the treatise writers providing loyal-denominator explanations of the Fourteenth Amendment’s legitimacy years later: Andrews in 1874, Hurd in 1881, Wright in 1889, and Burgess in 1902.

Several Republicans, like Edmunds, Miller, Morton, Sherman, and Williams, wanted to remain indecisive on the scope of the denominator and wait for Southern ratifications until July 1868 before insisting that the Fourteenth Amendment was law. Statements in support of a full Article V denominator, however, were quite rare among Republicans, let alone reasoned defense of the position. Harrison says that “[a] few came out explicitly against” a loyal denominator, but the only example he gives is Charles Drake of Missouri. Drake was not in Congress during the framing of either the Fourteenth Amendment in 1866 or the Reconstruction Act in 1867; Drake served only part of a single Senate term from 1867 until 1870, when he joined the Court of Claims. Even Drake, Harrison concedes, “hedged a little.” Drake wanted to wait for more Southern ratifications before admitting Arkansas, noting the condition in the Reconstruction Act requiring that the Fourteenth Amendment itself become law before states would be allowed back in Congress.

Senators Trumbull and Fowler then approached Drake, causing him to back off slightly: “It does require twenty-eight, in my judgment. At any rate, you never can get it declared in any such way as to give satisfaction and peace to the people of this country.” Senator Roscoe Conkling, a
member of the Joint Committee on Reconstruction and also a member of the House in 1866, raised similar questions during the debate on Arkansas’s readmission, suggesting he also thought the Reconstruction Act’s Fourteenth-Amendment-adopted condition had not yet been met.199 Like Drake, however, he backpedaled shortly later, expressing apparent agnosticism.200 Nevertheless, Congress passed the Arkansas bill.201 Running Conkling’s argument in reverse, Congress’s June 1868 passage itself could be, in tandem with the Reconstruction Act’s Fourteenth-Amendment-becoming-the-law readmission condition, an implicit assertion that the Fourteenth Amendment was indeed already the law.

The House and Senate passed a resolution on July 21, 1868, declaring that “three fourths and more of the several States of the Union” had ratified the Fourteenth Amendment, including states from the South on its list.202 Congress conspicuously left out, however, the sort of language that Seward included in his December 1865 statement on the Thirteenth Amendment on the size of the denominator. By merely stating that Southern states ratified, Congress did not settle the capacity in which they had done so—as authors or as demonstrations of loyalty.203

The lack of perfect clarity from Congress is not fatal to this argument, which depends on congressional power to delay the return of Confederates’ federal political authority, absent some reason to adopt a clear statement rule in favor of secessionists’ rights. Congress itself used a contrary presumption in its readmission of Tennessee in July 1866: positive action from the law-making power is required in order for federal political relations to be restored. A loyal denominator follows if the following are met: (1) the rebellion suspended the naysaying Article V denominator power; and (2) Congress had taken no action restoring such power. Congress restored such powers implicitly when Article I powers were restored; there is also no clear statement rule against the reestablishment of rebels’ rights. Absent reason to think otherwise, assuming Article I and V parity is appropriate.

The legitimacy of the Fourteenth Amendment does not depend on the adoption of a theory of the legitimacy of the Amendment, only the truth

199. Id. at 2607 (May 27, 1868) (condition not met).
200. Id. at 2665 (May 29, 1868) (“Without going back of the fourteenth amendment of the Constitution, be it ratified now or about to be ratified . . .”).
201. An Act to Admit the State of Arkansas to Representation in Congress, 15 Stat. 72 (June 22, 1868).
202. Id. at 4266 (July 21, 1868) (Senate resolution listing Ohio, New Jersey, and several Southern states); id. at 4296 (House concurring in resolution).
203. See AMAR, AMERICA’S UNWRITTEN CONSTITUTION, supra note 6.
of the theory. This is the flip side of the warning that Reverdy Johnson gave in February 1867, shortly before he became the only Democratic vote in favor of any Reconstruction measure by voting for the Reconstruction Act. Johnson argued that even if Congress pushed through the Fourteenth Amendment on a loyal-denominator theory, the Supreme Court might disagree and invalidate the amendment. The truth of the theory of legitimacy was critical, not its congressional recognition. Likewise, if three-fourths of the represented states, in fact, had the power to enact the Fourteenth Amendment, Congress’s later agnosticism and failure to adopt the theory in a more official and forceful manner cannot take such power away. As one anonymous commentator on the Ohio and New Jersey issue put it, “[T]he ratification of the amendment depended upon the fact of three-fourths of the States having assented to it, and not upon the proclamation of the Secretary of State, nor upon a joint resolution of Congress . . . .” This statement is correct; Article V declares that amendments are valid “when ratified,” not when Congress is fully satisfied of the validity of such ratifications and their sufficiency as a portion of reliably-loyal states.

204. For more, see Green, supra note 9, at 190–94.
205. CONG. GLOBE, 39th Cong., 2nd Sess. 1393 (Feb. 15, 1867).
206. Id.
207. See id:
When will the Constitution be amended by the ratification of three fourths of those States that are represented? Who is to decide that? That is an open question, and must be an open question just as much after you have declared that it is to be a part of the Constitution when ratified by three fourths as if you leave it blank. If in point of law the States that are now represented are the States to whom it is to be referred and by whom is to be ratified the constitutional amendment proposed by Congress, then the Constitution of the United States will be altered in that respect; but if it is to be submitted to more than the States that are represented in Congress, that is to say, to all the States, the question will be open whether Congress declares it or not, and that is a question of constitutional law which Congress cannot decide by any declaration. It may go for what it is worth, that in the opinion of Congress (if that should be the action of Congress) the Constitution may be amended by the ratification of three fourths of the represented States, but whenever the question arises in the judiciary it will be governed by other considerations. It must be governed by what is the meaning of the Constitution in that particular . . .
C. A Survey of Arguments and Support for Loyal Denominatorism

In addition to the chronological arrangement of loyal denominatorism during the course of the Civil War and Reconstruction, it will be useful to survey loyal-denominator arguments by source as well.

1. Officials

During the Civil War and Reconstruction, several dozen Senators and Representatives expressed loyal denominatorism, often at great length:

- Senator William Pitt Fessenden of Maine;\(^ {209} \)
- Senator Frederick T. Frelinghuysen of New Jersey;\(^ {210} \)
- Senator James Harlan of Iowa;\(^ {211} \)
- Senator Jacob Howard of Michigan;\(^ {212} \)
- Senator Samuel J. Kirkwood of Iowa;\(^ {213} \)
- Senator Henry S. Lane of Indiana;\(^ {214} \)
- Senator William M. Stewart of Nevada;\(^ {215} \)
- Senator Charles Sumner of Massachusetts;\(^ {216} \)

\(^ {209} \) CONG. GLOBE, 40th Cong., 2nd Sess. 709 (Jan. 23, 1868) (concurring in Trumbull’s insistence that only the Secretary of State, and not Congress, submitted the Thirteenth Amendment to former Confederate states).
\(^ {210} \) Id. at 2692 (May 30, 1868); id. at 2862 (June 5, 1868) (“[A]s I have said before, I am satisfied that the fourteenth amendment is now adopted.”).
\(^ {211} \) Id. at 1073–74 (Feb. 10, 1868). Four years before, Harlan included Confederates in the denominator. CONG. GLOBE, 38th Cong., 1st Sess. 1437 (Apr. 6, 1864).
\(^ {212} \) CONG. GLOBE, 39th Cong., 2nd Sess. 186 (Dec. 19, 1866); id. at 1365 (Feb. 15, 1867); CONG. GLOBE, 40th Cong., 2nd Sess. 2863–64 (June 5, 1868); CONG. GLOBE, 40th Cong., 3rd Sess. 987 (Feb. 8, 1869).
\(^ {213} \) CONG. GLOBE, 39th Cong., 2nd Sess. 1393 (Feb. 15, 1867).
\(^ {214} \) CONG. GLOBE, 39th Cong., 1st Sess. 740 (Feb. 8, 1866).
\(^ {215} \) CONG. GLOBE, 39th Cong., 2nd Sess. 1366 (Feb. 15, 1867); CONG. GLOBE, 40th Cong., 2nd Sess. 327 (Jan. 6, 1868); id. at 661 (Jan. 21, 1868); id. at 662.
\(^ {216} \) CONG. GLOBE, 38th Cong., 2nd Sess. 588 (Feb. 4, 1865); CONG. GLOBE, 39th Cong., 1st Sess. 2 (Dec. 4, 1865); id. at 91–92 (Dec. 20, 1865); CONG. GLOBE, 39th Cong., 2nd Sess. 7 (Dec. 4, 1866); id. at 1396 (Feb. 15, 1867); CONG. GLOBE,
• Senator Lyman Trumbull of Illinois;\(^{217}\)
• Senator Henry Wilson of Massachusetts;\(^{218}\)
• Representative James M. Ashley of Ohio;\(^{219}\)
• Representative Jehu Baker of Illinois;\(^{220}\)
• Representative Nathaniel P. Banks of Massachusetts;\(^{221}\)
• Representative James G. Blaine of Maine;\(^{222}\)
• Representative John A. Bingham of Ohio;\(^{223}\)

40th Cong., 1st Sess. 439 (Mar. 29, 1867); CONG. GLOBE, 40th Cong., 2nd Sess. 453 (Jan. 10, 1868); id. at 877 (Jan. 31, 1868); id. at 1145 (Feb. 13, 1868).

217. CONG. GLOBE, 40th Cong., 2nd Sess. 709 (Jan. 23, 1868). Trumbull included Confederates in the denominator in 1864. CONG. GLOBE, 38th Cong., 1st Sess. 1314 (Mar. 28, 1864) (“[I]s probable that it can have the ratification of three fourths of the States? We now have thirty-five States . . . .”).

218. CONG. GLOBE, 39th Cong., 2nd Sess. 192 (Dec. 19, 1866). In 1864, Wilson included Confederates in the denominator. See CONG. GLOBE, 38th Cong., 1st Sess. 1180 (Mar. 18, 1864) (“It will require the sanction of three fourths of the States; and where can you count twenty-seven legislatures to-day that you have any security for?”).

219. CONG. GLOBE, 38th Cong., 2nd Sess. 140 (Jan. 6, 1865); CONG. GLOBE, 40th Cong., 2nd Sess. 119 (Dec. 10, 1867).


221. Id. at 176 (Feb. 9, 1867).

222. CONG. GLOBE, 39th Cong., 2nd Sess. 1182 (Feb. 12, 1867). For more on Blaine’s later claim about the unpopularity of the loyal denominator, see supra notes 137–146 and accompanying text. It is true that Blaine disavowed loyal denominatorism as unpopular on the campaign trail in 1866 before embracing it in 1867 and then disavowing it again in 1884. See The Fourteenth Amendment as a Basis of Reconstruction, in LIFE OF HON. JAMES G. BLAINE, CONTAINING AN ACCOUNT OF HIS LAST SICKNESS AND DEATH 291–92 (James Wilson Pierce ed. 1893) (speech in Skowhegan, Maine, August 29, 1866) (“The theory has been maintained by some of the more extreme men of the Republican party that three-fourths of the States required by the Constitution to ratify the amendment should, under present circumstances, properly mean three-fourths of the loyal States, but the general, and I think the wiser, conclusion of the party has been to adhere to the ratification of three-fourths of all the States in the Union . . . .”).

223. CONG. GLOBE, 39th Cong., 1st Sess. 124 (Dec. 21, 1865); id. at 2541 (May 10, 1866); id. at 2599 (May 15, 1866); CONG. GLOBE, 39th Cong., 2nd Sess. 501 (Jan. 16, 1867); id. at 502; id. at 505; id. at 811 (Jan. 28, 1867); id. at 1211 (Feb. 13, 1867); CONG. GLOBE, 40th Cong., 1st Sess. 64 (Mar. 11, 1867); LINCOLN COUNTY
Representative George Boutwell of Massachusetts;\textsuperscript{224}

Representative Henry P.H. Bromwell of Illinois;\textsuperscript{225}

Representative John M. Broomall of Pennsylvania;\textsuperscript{226}

Representative Amasa Cobb of Wisconsin;\textsuperscript{227}

Representative—and Speaker of the House—Schuyler Colfax of Indiana;\textsuperscript{228}

Representative Shelby M. Cullom of Illinois;\textsuperscript{229}

Representative Henry Winter Davis of Maryland;\textsuperscript{230}

Representative Thomas T. Davis of New York;\textsuperscript{231}

\textsuperscript{224} \textit{Herald}, Jan. 30, 1868, at 2; \textit{Cong. Globe}, 40th Cong., 2nd Sess. 1908 (Mar. 16, 1868); \textit{id.} at 1928 (Mar. 17, 1868); \textit{id.} at 2463 (May 14, 1868).

\textsuperscript{225} \textit{Cong. Globe}, 40th Cong., 2nd Sess. 1930 (Mar. 17, 1868) (pressing Congress to act under section 3 of the Fourteenth Amendment to relieve disabilities).

\textsuperscript{226} \textit{Cong. Globe}, 39th Cong., 1st Sess. 384 (Jan. 23, 1866); \textit{id.} at 919 (Feb. 19, 1866); \textit{Cong. Globe}, 39th Cong., 2nd Sess. 615 (Jan. 21, 1867). The press missattributed Bromwell’s resolution in favor of a loyal denominator to George Boutwell, a member of the Reconstruction committee. \textit{See Charleston Daily News}, Jan. 22, 1867, at 1 (“Mr. Boutwell introduced a joint resolution declaring the rebel States disqualified from voting pending future Constitutional Amendments, until formally restored, and in the meantime three-fourths of the represented States are competent to amend the Constitution . . .”).

\textsuperscript{227} \textit{Cong. Globe}, 39th Cong., 1st Sess. 98 (Dec. 20, 1865); \textit{id.} at 469 (Jan. 27, 1866); \textit{id.} at 919 (Feb. 19, 1866). While the Thirteenth Amendment was being proposed, Broomall left the issue open. \textit{See Cong. Globe}, 38th Cong., 2nd Sess. 220 (Jan. 11, 1865).

\textsuperscript{228} \textit{Charleston Daily News}, May 28, 1868, at 2 (Cobb proposing amendment to be effective “upon the ratification of this amendment by three-fourths of the States represented in Congress”); \textit{Vermont Daily Transcript}, May 25, 1868, at 2 (same); \textit{see Cong. Globe}, 40th Cong., 2nd Sess. 2527 (May 18, 1868) (Cobb proposing amendment, but without text).


• Representative Columbus Delano of Ohio;\textsuperscript{232}
• Representative Thomas D. Eliot of Massachusetts;\textsuperscript{233}
• Representative John F. Farnsworth of Illinois;\textsuperscript{234}
• Representative Ebon C. Ingersoll of Illinois;\textsuperscript{235}
• Representative Thomas A. Jenckes of Rhode Island;\textsuperscript{236}
• Representative George W. Julian of Indiana;\textsuperscript{237}
• Representative William D. Kelley of Pennsylvania;\textsuperscript{238}
• Representative William Lawrence of Ohio;\textsuperscript{239}
• Representative Daniel Morris of New York;\textsuperscript{240}
• Representative Frederick A. Pike of Maine;\textsuperscript{241}
• Representative Robert C. Schenck of Ohio;\textsuperscript{242}
• Representative Glenni W. Scofield of Pennsylvania;\textsuperscript{243}
• Representative Samuel Shellabarger of Ohio;\textsuperscript{244}

\textsuperscript{232} CONG. GLOBE, 39th Cong., 2nd Sess. 1126 (Feb. 11, 1867).
\textsuperscript{233} CONG. GLOBE, 39th Cong., 1st Sess. 2773 (May 23, 1866).
\textsuperscript{234} \textit{id}. at 384 (Jan. 23, 1866).
\textsuperscript{235} CONG. GLOBE, 39th Cong., 2nd Sess. app. 89 (Feb. 7, 1867).
\textsuperscript{236} CONG. GLOBE, 39th Cong., 1st Sess. 386 (Jan. 23, 1866).
\textsuperscript{237} CONG. GLOBE, 39th Cong., 2nd Sess. app. 80 (Jan. 28, 1867).
\textsuperscript{238} CONG. GLOBE, 38th Cong., 1st Sess. 2078 (May 3, 1864); \textit{id}. at 2080; CONG. GLOBE, 39th Cong., 2nd Sess. 260 (Jan. 3, 1867); \textit{id}. at 289 (agreeing with Spalding that the South would not resist the Fourteenth Amendment if imposed, but would prefer not to be part of the process of enacting it); CONG. GLOBE, 40th Cong., 2nd Sess. 1931 (Mar. 17, 1868) (referring to powers already given to Congress under Section 3).
\textsuperscript{239} CONG. GLOBE, 39th Cong., 2nd Sess. app. 28 (July 20, 1867).
\textsuperscript{240} CONG. GLOBE, 38th Cong., 1st Sess. 2614 (May 31, 1864).
\textsuperscript{241} CONG. GLOBE, 39th Cong., 2nd Sess. 255 (Jan. 3, 1867).
\textsuperscript{242} COLUMBIA, S.C. DAILY PHOENIX, Jan. 19, 1866, at 2.
\textsuperscript{243} CONG. GLOBE, 39th Cong., 2nd Sess. 598 (Jan. 19, 1867).
\textsuperscript{244} CONG. GLOBE, 39th Cong., 1st Sess. 143 (Jan. 8, 1866).
• Representative Rufus P. Spalding of Ohio;\(^{245}\)
• Representative John F. Starr of New Jersey;\(^{246}\)
• Representative Thaddeus Stevens of Pennsylvania;\(^{247}\)
• Governor Andrew Gregg Curtin of Pennsylvania;\(^{248}\)
• Governor Marcus L. Ward of New Jersey;\(^{249}\) and
• the members of the North Carolina Constitutional Convention’s Committee on Disabilities.\(^{250}\)

2. Newspapers

Many Republican newspapers\(^ {251}\) developed loyal.denominator arguments and spread them to a wider audience:

• the National Anti-Slavery Standard;\(^ {252}\)

\(^{245}\) Id. at 132 (Jan. 5, 1866); CONG. GLOBE, 39th Cong., 2nd Sess. 224 (Dec. 20, 1866); id. at 288 (Jan. 5, 1867); id. at 289; id. at 497 (Jan. 16, 1867).

\(^{246}\) CONG. GLOBE, 38th Cong., 2nd Sess. 482 (Jan. 28, 1865).

\(^{247}\) Id. at 734 (Feb. 10, 1865); CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865); id. at 1310 (Mar. 10, 1866); id. at 2459 (May 8, 1866); CONG. GLOBE, 39th Cong., 2nd Sess. 252 (Jan. 3, 1867); id. at 290 (Jan. 5, 1867); CONG. GLOBE, 40th Cong., 2nd Sess. 1966 (Mar. 18, 1868); id. at 1967; see also supra note 238 (Kelley introducing language taken from Stevens).

\(^{248}\) The Amendment at the North, N.Y. TIMES, Jan. 4, 1867; PENNSYLVANIA SENATE JOURNAL 17, 18 (Jan. 2, 1867).


\(^{250}\) CONG. GLOBE, 40th Cong., 2nd Sess. 2413 (May 11, 1868) (asking for congressional relief from “the fourteenth article of the Constitution of the United States, known as the ‘Howard amendment’”).

\(^{251}\) Although this survey of newspapers reveals significant support for a loyal denominator, it has been chiefly confined to the newspapers in the Library of Congress’s “Chronicling America” (chroniclingamerica.loc.gov (last accessed June 26, 2018)) database. Important papers supporting the loyal denominator, like the Boston Post, National Anti-Slavery Standard, New York Herald, New York Times, and Washington Chronicle are not (yet) in that database, though newspapers that frequently quote their editorials are. The New York Times is available online at http://query.nytimes.com/search/sitesearch/ (last accessed June 26, 2018) but without page numbers.

\(^{252}\) The Constitutional Amendment, National Anti-Slavery Standard (Mar. 11, 1865), reprinted in AFRICAN AMERICAN FREEDOM JOURNEY IN NEW YORK
• the Boston Post;\textsuperscript{253}
• the Cleveland Daily Leader;\textsuperscript{254}
• the Emporia News;\textsuperscript{255}
• the Evening Telegraph;\textsuperscript{256}
• the Montana Post;\textsuperscript{257}
• the Nation;\textsuperscript{258}
• the New York Herald;\textsuperscript{259}

\begin{footnotesize}
\begin{itemize}
  \item \textit{Cleveland Daily Leader}, Dec. 13, 1865, at 1; \textit{Cleveland Daily Leader}, Dec. 21, 1865, at 2.
  \item \textit{Emporia News}, Dec. 29, 1866, at 2.
  \item \textit{Montana Post}, Feb. 29, 1868, at 1.
  \item \textit{2 Nation 673} (May 28, 1866); \textit{id.} at 744 (June 12, 1866).
\end{itemize}
\end{footnotesize}
the New York Times; 260

the Raftsmen’s Journal; 261

the Washington Chronicle; 262 and

the Western Reserve Chronicle. 263

Crowning Event of the War: The Constitutional Abolition of Slavery Throughout the United States, N.Y. HERALD, Feb. 1, 1865 (looking forward to “the final ratification of three-fourths of the thirty-six States belonging to the Union.”). However, between these adoptions of full-denominatorism, the paper recognized that Article I and Article V rights went together. See KENOWEE COURIER, Jan. 6, 1866, at 3 (quoting New York Herald).

260. Congress and the Amendment, N.Y. TIMES, Jan. 21, 1867; The Reconstruction Question in Congress, N.Y. TIMES, Jan. 28, 1867. For reprints of the editorials, see, e.g., EVENING TELEGRAPH, Jan. 22, 1867, at 2 (reprinting Jan. 21 editorial); EVENING TELEGRAPH, Jan. 28, 1867, at 2 (reprinting Jan. 28 editorial). The Times took a contrary position in 1866. See The Constitutional Amendment on the Basis of Representation, Feb. 3, 1866 (“[T]he Senate has yet to act upon it, and after that, it must receive the ratification of three-fourths of all the States. He must be a very sanguine man who believes that this can ever be secured.”) (emphasis added); Will the President Stand His Ground?, DAILY PHOENIX, Feb. 8, 1866, at 2 (quoting this passage); The South and the Constitutional Amendment, N.Y. TIMES, Oct. 8, 1866 (“[I]n a brief period the North will be able to impart constitutional validity to the Amendment whether the South ratify it or not. Territories now awaiting admission will doubtless be invested with the dignity of States in the coming Winter; other States may be formed out of States where a demand for division already exists; and by this perfectly constitutional process the power of amending the Constitution may be secured, despite the inaction or hostility of the South.”).

261. RAFTSMAN’S JOURNAL, Dec. 5, 1866, at 2; cf. RAFTSMAN’S JOURNAL, Jan. 30, 1867, at 2 (noting issue raised by Spaulding’s request that the Judiciary Committee report on how many ratifications were required). Contrary to the paper’s impression, and that of some other papers, see, e.g., DAILY PHOENIX, Jan. 17, 1867, at 3; CHARLESTON DAILY NEWS, Jan. 17, 1867, at 1; STAUNTON SPECTATOR, Jan. 22, 1867, at 2. The House never approved Spalding’s resolution; Representative Finck objected. CONG. GLOBE, 39th Cong., 2nd Sess. 497 (Jan. 16, 1867). No Judiciary Committee report was prepared.

262. See supra note 245 (Spalding noting that Washington Chronicle editor agreed with loyal-denominator theory).

263. WESTERN RESERVE CHRONICLE, Jan. 23, 1867, at 2.
3. Treatises

At least seven legal treatises defended loyal denominatorism during and after Reconstruction:

- Joel Prentiss Bishop in 1865;\(^{264}\)
- Orestes Augustus Brownson in 1866;\(^{265}\)
- Timothy Farrar in 1867;\(^{266}\)
- Israel Ward Andrews in 1874;\(^{267}\)
- John Codman Hurd in 1881;\(^{268}\)
- Albert Orville Wright in 1889;\(^{269}\) and
- John W. Burgess in 1902.\(^{270}\)

George W. Paschal’s treatise left the issue open in 1868.\(^{271}\)

4. Others’ Recognition of Widespread Support

Andrew Jackson Rogers opposed the Thirteenth Amendment based on his assumption that Republicans would only use loyal states to ratify it, as


\(^{265}\) **Orestes Augustus Brownson**, *The American Republic: Its Constitution, Tendencies, and Destiny* 325 (1866).

\(^{266}\) **Timothy Farrar**, *Manual of the Constitution of the United States of America* § 448, at 401 & n.1 (1867); *see id.* at ix (introduction written in June 1867).


\(^{269}\) **Albert Orville Wright**, *An Exposition of the Constitution of the United States* 249–50 (1889); *id.* at 284.

\(^{270}\) **J.W. Burgess**, *Reconstruction and the Constitution* 1866–1876 81 (1902).

in they would adopt the loyal-denominator theory of its legitimacy. Later historians have noted that this assumption was widespread. Several opponents of the Fourteenth Amendment acknowledged that loyal denominatorism was extremely popular among Republicans:

- Pennsylvania state senator William Wallace;
- former Georgia governor Joseph Brown;
- the *Baltimore Gazette*;
- the *Daily Phoenix of Columbia, South Carolina*;
- the *Lynchburg News*;
- the *Nashville Daily Union*;
- the *New York Tribune* and
- the *Staunton Spectator*.

5. Agnosticism

Like Lincoln’s last speech, several Republican sources left the issue open, revealing that the full denominator was not fully established in their minds:

- Senator George Edmunds of Vermont;

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281. *Staunton Spectator*, Dec. 4, 1866, at 2. *The Spectator* expected the Supreme Court to disagree with loyal denominatorism. *Id.*
Senator Oliver Morton of Indiana;\textsuperscript{283} Senator John Sherman of Ohio;\textsuperscript{284} Representative George Miller of Pennsylvania;\textsuperscript{285} Representative Thomas Williams of Pennsylvania;\textsuperscript{286} Representative Henry Raymond of New York;\textsuperscript{287} and the National Republican.\textsuperscript{288}

CONCLUSION

Several aspects of Reconstruction history are best explained by recognizing that three-fourths of the Northern states ratified the Thirteenth and Fourteenth Amendments, rather than three-fourths of the entire Union. By undermining the legitimacy of Southern governments because of their status as “rebel states,” the Reconstruction Act undermined full-denominator theories of the Thirteenth Amendment and read an implicit “non-rebel” condition into “the several States” in Article I. Further, only loyal denominator theories recognize that the power to say no to a constitutional amendment—that is, to be included in the Article V denominator—is among the States’ greatest political power in their relations with the federal government. Accordingly, robust reasons support the suspension at the time of secession of the denominator power and the South’s other federal political privileges.

Many Republicans, and even a few key Democrats, set out the logic of a loyal denominator from the very beginning of the Civil War; this analysis of the Thirteenth and Fourteenth Amendments’ legitimacy continuously persisted throughout the entirety of the process of Reconstruction and beyond. Congress embraced the logic of the Article V loyal denominator when it considered its quorum rules and rules for the

\textsuperscript{283} \textit{id.} at 2629 (May 28, 1868) (noting that unless loyal denominatorism were true, condition precedent in Reconstruction Act would not be met at the time Arkansas was admitted).
\textsuperscript{284} \textit{Keowee Courier}, Sept. 7, 1867, at 1 (speech of Senator Sherman at Canton, Ohio); \textit{Cong. Globe}, 40th Cong., 2nd Sess. 2860 (June 5, 1868).
\textsuperscript{287} \textit{Cong. Globe}, 39th Cong., 2nd Sess. 718 (Jan. 24, 1867); \textit{id.} at 719.
\textsuperscript{288} \textit{Nat’l Republican}, Sept. 28, 1865, at 2.
restoration of rights of representation under Article I, and its rules for presidential electors under Article II. No Republicans rebutted the loyal-denominator theory with any extended explanation in favor of a full denominator.

APPENDIX: LOYAL DENOMINATORISM IN CONTEXT

1. Expressions of Loyal Denominatorism

Senator Frederick T. Frelinghuysen of New Jersey, CONG. GLOBE, 40th Cong., 2nd Sess. 2692 (May 30, 1868):

[T]he fourteenth amendment is now a part of the Constitution of the United States, and I think the Senators on this side of the Chamber must so hold. Ten states are more than one fourth of the whole number of States; and can it be that ten States can rebel against this Government and make an amendment of the Constitution necessary, and then have the legal and constitutional right to defeat the adoption of the amendment which their treason has rendered necessary? . . . The fourteenth amendment has the ratifications of three fourths of the loyal States, and that is all the thirteenth amendment has. We have declared that the Legislatures of these other States which were in rebellion which have ratified the thirteenth amendment were not legal Legislatures; and further, if by reason of their rebellion the rights of the rebel States were not forfeited, this Congress was not a constitutional body having the ability by a two-thirds vote to submit either amendment. I do not see the argument by which to avoid the conclusion that the fourteenth amendment is now a part of the Constitution.

Senator James Harlan of Iowa, CONG. GLOBE, 40th Cong., 2nd Sess. 1073–74 (Feb. 10, 1868):

I know it has been insisted here during this discussion by several Senators that in their opinion Congress has impliedly recognized the legality of these organizations in submitting proposed amendments to the Constitution of the United States, which amendments could not become valid as part of the Constitution without the affirmation or consent of three fourths of all the States. They say that the assent of some of these States was necessary to secure this three-fourths vote, and as one of these proposed amendments has been declared to be a part of the Constitution, as they maintain, in consequence of their affirmation of a part of
these provisional States, Congress is concluded . . . . It is clear that the Congress of the United States never intended by the passage of these concurrent resolutions to declare that these organizations called governments, formed irregularly without authority of law, had, by the action of Congress, become legal and binding. There can now be no doubt on that subject, because Congress has since enacted a law declaring in so many words that these State governments are illegal and must be considered provisional only . . . .

Senator Jacob Howard of Michigan, CONG. GLOBE, 39th Cong., 2nd Sess. 186 (Dec. 19, 1866):

[W]e saw fit to propose an additional article to the Constitution, which upon being ratified by three fourths of the States—of course I mean three fourths of the States in the Union and not out of the Union—it should become a part of the Constitution of the country.

Id. at 1365 (Feb. 15, 1867):

It declares that “when the constitutional amendment proposed as article fourteen by the Thirty-Ninth Congress shall have become a part of the Constitution of the United States,” &c. That may be done, it is very true, without consulting the rebel States; it is possible that it may become part of the Constitution without the votes of the rebel States; and here suffer me to remark that I do believe most sincerely that it is the right of three fourths of the loyal States remaining in the Union at any time to amend the Constitution, and that such amendment would be valid as an amendment, and that it is not necessary in amending the Constitution that we should take into the account the votes of the rebel States.

CONG. GLOBE, 40th Cong., 2nd Sess. 2863–64 (June 5, 1868):

[T]his amendment is already part and parcel of the Constitution, it having been ratified by more than three fourths of the States recognized as being in the Union and participating in our legislation. . . . When the rebel States passed their ordinances of secession, withdrew from all participation in the legislation of Congress, formed a new government alien and foreign to the Government of the United States, they forfeited and lost all their political rights under the Constitution of the United States. They could not after that, during the pendency of the war, appeal to the
Constitution for any purpose whatever. They had no right to claim anything under it. They had no right to set it up for any purpose whatever where their own political interests were concerned. . . . [I]f the political rights of the rebel States were actually forfeited and terminated, or, in other words, if those rights had passed over to the conqueror, the United States, and into the hands of this Government, then surely they have no right to participate in the ratification of the Constitution . . . . [W]hen three fourths of the remaining loyal States formally ratified that amendment, it became to all intents and purposes part of the Constitution of the United States, and is now binding upon us, and upon the rebel States.

_Cong. Globe, 40th Cong., 3rd Sess._ 987 (Feb. 8, 1869):

[W]hile the rebel States were, so to speak, _de facto_ out of the Union, after they had forfeited their political rights under the Constitution, they were at the mercy and subject to the action of Congress of the United States. . . . Mr. HENDRICKS: Now I understand him to say that it belongs to all the loyal States in the aggregate; that the people of the loyal States rightfully control it.
Mr. HOWARD: Three fourths.


The belief is entertained, I think, by a majority of this Chamber, certainly by myself, that the ratification of the constitutional amendment by the due proportion, three fourths of the States represented here, will make it a part of the Constitution.

Senator Henry S. Lane of Indiana, _Cong. Globe, 39th Cong., 1st Sess._ 740 (Feb. 8, 1866):

I should not doubt . . . that we might secure its adoption by three fourths of the loyal States who never seceded, and I believe that whenever that question is presented the Supreme Court of the United States will determine that a ratification by that number of States is a constitutional approval of an amendment so as to make it the supreme law of the land. I have no doubt about it.

[W]e have the constitutional right and constitutional power to treat these States as conquered provinces. I do not doubt that, because I believe we have the power to do about as we please with them.

CONG. GLOBE, 40th Cong., 2nd Sess. 327 (Jan. 6, 1868):

Before the Senator takes his seat I should like to ask him if he has examined the bearing of our new constitutional amendment on a case like this? . . . Does the Senator regard that amendment as having been adopted by the requisite constitutional majority? Is the ratification of three fourths of the States represented in Congress sufficient?

Id. at 661 (Jan. 21, 1868):

[W]e have submitted a constitutional amendment, which I maintain is now a part of the Constitution, upon a high authority and upon as just principles as any part of our legislation or any of our acts of authority since the rebellion commenced. I believe I can show that the adoption of this constitutional amendment rests upon the same exercise of authority, the same theory, that allowed us to pass laws after the South seceded; that allowed a portion of the States to elect a President of the United States and carry on the Government; that allowed us to submit the first constitutional amendment abolishing slavery; and allowed us to adopt it. . . . [T]he States now represented in Congress have all the authority vested in the United States by the Constitution. . . . If any objection can be urged against the complete ratification of this constitutional amendment, it can be contended with the same plausibility that it has not been submitted at all.

Id. at 662:

[T]he same principle that allows us to legislate and carry on the Government without those States which have broken off their practical relations and have no right to be heard allows us to do anything that the Constitution permits, and to amend it and perfect it as the exigencies of the case demand. We have submitted a constitutional amendment; three fourths of the States entitled to be heard have ratified it; and I contend that it is a part of the Constitution of the United States.

Senator Charles Sumner of Massachusetts, CONG. GLOBE, 38th Cong., 2nd Sess. 588 (Feb. 4, 1865) (proposing resolution):
The rule followed in ascertaining the two thirds of both Houses proposing the amendment to the Constitution should be followed in ascertaining the three fourths of the several States ratifying the amendment. . . . [A]s in the first case, the two thirds are founded on the simple fact of representation in the two Houses, so in the second case the three fourths must be founded on the simple fact of representation in the Government of the country and the support thereof. . . . [A]ny other rule . . . recognizes the power of rebels in arms to interpose a veto upon the national Government in one of its highest functions.


[A]t the time when such [Thirteenth] amendment was submitted as well as since, there were sundry States which, by reason of rebellion, were without Legislatures, so that, while the submission was made in due constitutional form, it was not, as it could not be, made to all the States, but to “the Legislatures of the several States,” in obedience both to the letter and spirit of the provision of the Constitution authorizing amendments, there being a less number of Legislatures of States than there were States; . . . since the Constitution expressly authorizes amendments to be made, any construction thereof which would render the making of amendments at times impossible, must violate both its letter and its spirit; . . . to require the ratification to be by States without Legislatures as well as by “the Legislatures of the States,” in order to be pronounced valid, would put it in the power of a long-continued rebellion to suspend, not only the peace of the nation, but its Constitution also; . . . from the terms of the Constitution, and the nature of the case, it belongs to the two Houses of Congress to determine when such ratification is complete; . . . more than three fourths of the Legislatures to which the proposition was made have ratified such amendment. . . . [T]he amendment abolishing slavery has become, and is, a part of the Constitution of the United States.

Id. at 91–92 (Dec. 20, 1865):

This bill, of course, proceeds on the idea that the [Thirteenth] amendment is now a part of the Constitution, to all intents and purposes. And who can doubt this conclusion? It has been already adopted by “the Legislatures of three fourths of the States,’’ in
other words by three fourths of the States having Legislatures. The States having no legislatures at the time of its proposition by Congress are not to be counted. Of what value can be the enforced consent of the disloyal and barbarous bodies that have pretended to act for certain States at the dictation of military power? Military power may govern during the war, but it is impotent to make a republican State or to give assent to an amendment of the Constitution.

CONG. GLOBE, 39th Cong., 2nd Sess. 7 (Dec. 4, 1866):

I shall to-morrow or some subsequent day ask leave to introduce resolutions declaring . . . the exclusion of such States with illegal governments from representation in Congress, and from voting on constitutional amendments.

Id. at 1396 (Feb. 15, 1867):

[I]n point of fact only the States actually represented in Congress have valid Legislatures; therefore only those States can be competent to act on this constitutional amendment.

CONG. GLOBE, 40th Cong. 1st Sess. 439 (Mar. 29, 1867):

You have then, sir, another clause of the Constitution which has lately found a place there by the votes of three fourths of the loyal States, by which it is declared that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”

CONG. GLOBE, 40th Cong., 2nd Sess. 453 (Jan. 10, 1868) (proposing resolution):

[A]n amendment to the Constitution proposed by the Thirty-Ninth Congress, and known as article fourteen, has already been adopted by the Legislatures of twenty-two States, to wit, Connecticut, New Hampshire, Tennessee, New Jersey, Vermont, Oregon, New York, Ohio, Illinois, West Virginia, Kansas, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Maine: and whereas it is duly provided in the Constitution that an amendment duly proposed shall be valid when “ratified by the Legislatures of three fourths of the several States;” . . . the amendment to the Constitution proposed by the Thirty-Ninth Congress, and known as article fourteen, having received the requisite ratification, is
valid to all intents and purposes as part of the Constitution.

_Id._ at 877 (Jan. 31, 1868):

This amendment was originally proposed by a vote of two thirds of Congress, composed of the representatives of the loyal States. It has now been ratified by the Legislatures of three fourths of the loyal States, being the same States which originally proposed it, through their representatives in Congress. The States that are competent to propose a constitutional amendment are competent to adopt it.

_Id._ at 1145 (Feb. 13, 1868):

[T]he amendment has already been adopted by three fourths of the States that took part in proposing it, and this is enough.

Senator Lyman Trumbull of Illinois, _CONG. GLOBE_, 40th Cong., 2nd Sess. 709 (Jan. 23, 1868):

The constitutional amendments were never, in point of fact, submitted by Congress to any of these rebel States. They were proposed and submitted to the States of the Union. . . . We had the acquiescence of these pretended State governments to it, and it did no harm. I am glad we had it. That it was necessary I do not admit.


The legislatures of thirteen loyal States meet next month, and before the 4th of March this constitutional amendment will be adopted by three fourths of the States represented in Congress.

Mr. SUMNER. That is enough.

Mr. WILSON. I regard that number as enough.

Representative James M. Ashley of Ohio, _CONG. GLOBE_, 38th Cong., 2nd Sess. 140 (Jan. 6, 1865):

[W]henever three fourths of the States now represented in Congress give their consent to this proposition it will become legally a part of the national Constitution, unless other States, now without civil governments known to the Constitution, establish governments such as Congress shall recognize, and such States, together with any new States which may be admitted shall be represented in Congress _before_ three fourths of the States now
represented adopt the proposed amendment; in which event the
States thus recognized or admitted must be added to the number
of States now represented in Congress, and the ratification of three
fourths of the States thus recognized, and none others, is all that
will be required to adopt this amendment. . . . If we may
constitutionally pass this amendment by a vote of two thirds of a
quorum of this House and Senate as now constituted, three fourths
of the States now represented in Congress may constitutionally
adopt it, provided they do so before any new States are admitted,
or before a rebel State government is organized and recognized by
the joint action of Congress and the Executive.

CONG. GLOBE, 40th Cong., 2nd Sess. 119 (Dec. 10, 1867):

The States which during the war maintained their fidelity to the
Constitution and the Union constituted the nation, and a
ratification by three fourths of those States of that [i.e., the
Thirteenth] amendment made it part of the Constitution. The
unwarranted “assumption” of the acting President in demanding
the ratification of that amendment by the illegal State governments
which he had organized, and Mr. Seward’s “assumption” in
issuing a proclamation declaring the amendment ratified by the
votes of said rebel States, undoubtedly could not give validity to
that amendment after Congress had declared that the governments
in said States were illegal and constitutional governments.

Representative Jehu Baker of Illinois, CONG. GLOBE, 39th Cong., 2nd
Sess. app. 76 (Jan. 17, 1867):

Such a line of policy as coming from the gentleman from
Pennsylvania becomes the more strange when we remember that
it is his opinion, stoutly and often expressed, that it only requires
three fourths of the loyal States to ratify the amendment—a
number certain to be obtained. . . . We have proposed, as I have
stated, an amendment to the Constitution, which few of us
question will be adopted. Within a very few months it may be a
part of the Constitution of the United States.

Representative Nathaniel P. Banks of Massachusetts, CONG. GLOBE, 39th
Cong., 2nd Sess. app. 176 (Feb. 9, 1867):

There is no recourse for us but to take the plain practical, simple
method of reconstruction, which does not depend upon the leading
men of the South or upon any arrangement of a temporary
character. It is to reconstruct the political society of the insurgent States in such manner as to exclude every element of hostility to the existence of the Government. And such a measure is presented in the constitutional amendment adopted by this Congress at its last session. And in my opinion whenever three fourths of the States represented in this Congress shall have ratified it by their Legislatures, it will have become a part of the Constitution of the United States.

Representative James G. Blaine of Maine, CONG. GLOBE, 39th Cong., 2nd Sess. 1182 (Feb. 12, 1867) (proposed statutory amendment):

[W]hen the constitutional amendment proposed as article fourteen by the Thirty-Ninth Congress shall have become a part of the Constitution of the United States by the ratification of three fourths of the States now represented in Congress.

Id.:

[This amendment] specifically declares the doctrine that three fourths of the States now represented in Congress have the power to adopt the constitutional amendment, and it does not even by implication give them to understand that their assent or ratification is necessary to its becoming a part of the Constitution. It implies that their assent to it is a qualification for themselves; merely an evidence both moral and legal of good faith and loyalty on their part. We specifically provide against their drawing the slightest inference in favor of their being a party in any degree essential to the valid ratification of that amendment.

Representative John A. Bingham of Ohio, CONG. GLOBE, 39th Cong., 1st Sess. 124 (Dec. 21, 1865):

[H]e would be a bold man who would dare to say that after the loyal States had maintained the supremacy of their Constitution, and more than three fourths of all the loyal States had so amended their Constitution, that their action was void without the consent of the rebel States . . . .

Id. at 2541 (May 10, 1866):

No State lately in insurrection, according to one the measures reported, in case it shall become a law of the United States, can ever exercise political powers in this Union until the pending
constitutional amendment shall first have become a part of the Constitution of the United States, by the consent of the Legislatures of three fourths of the States now maintaining their constitutional relations to the Government . . . .

*Id.* at 2599 (May 15, 1866):

If the measures be finally passed as they now stand, the constitutional amendment must be first ratified by the northern States or three fourths of the States now represented in Congress before any of the insurrectionary States may ratify it, reorganize their government, and be admitted to representation.


[T]his Congress of the United States had full power, without the consent and against the consent of every insurrectionary State in this land, to propose the pending amendment to all the organized States of this Union for ratification.

*Id.* at 502:

[A] Congress that can lawfully legislate can lawfully propose amendments, and States that can lawfully elect the Congress can lawfully ratify amendments to the Constitution of the United States.

*Id.* at 505:

[I]f three fourths of the organized and represented States put this amendment into the Constitution of the United States, it will bind the insurgent States and give them the benefits of it as well, whenever in good faith those States choose to accept it, while, in the mean time, it will also bind us and empower us by law to secure full and equal protection to all.

*Id.* at 811 (Jan. 28, 1867):

I trust the day is not distant when by solemn act of the Legislatures of three fourths of the States of the Union now represented in Congress the pending constitutional amendment will become part of the supreme law of the land . . . .

*Id.* at 1211 (Feb. 13, 1867):

They [the freedmen] ask that that decree of the people who saved
the nation’s life, and which, thank God, by the recorded legislative act of twenty represented States of this Union has become a part of the supreme law of the land, shall be enforced by act of Congress.

CONG. GLOBE, 40th Cong. 1st Sess. 64 (Mar. 11, 1867):

To my mind nothing is clearer than that the organized represented States of this Union are the Union; and twenty of those States, being three fourths of the whole number represented, having ratified the amendment to the Constitution proposed by the Thirty-Ninth Congress, that amendment has become part of the fundamental law.

LINCOLN COUNTY HERALD, Jan. 30, 1868, at 2:

It was in anticipation of this action [by Ohio attempting to rescind its Fourteenth Amendment ratification] that Mr. Bingham on the same day, introduced in the Federal House of Representatives a joint resolution to declare that that amendment had become a part of the Constitution by the mere ratification of three-fourths of the “loyal States” . . . .

CONG. GLOBE, 40th Cong. 2nd Sess. 1908 (Mar. 16, 1868):

[W]e do believe, or at least I believe, that the fourteenth article of the amendments having already been ratified by three fourths of the organized States of this Union is therefore entitled to be proclaimed a part of the Constitution . . . .

Id. at 1928 (Mar. 17, 1868):

I believe myself that the amendment is a part of the Constitution.

Id. at 2463 (May 14, 1868):

[T]he new grant of power which has come to Congress through the fourteenth article of the amendments . . . enables the people in Congress assembled to enforce this condition.

Representative Henry P.H. Bromwell of Illinois, CONG. GLOBE, 39th Cong. 1st Sess. 384 (Jan. 23, 1866):

[T]here fourths of the States which were not in the rebellion are sufficient. I do not see how any State which has been in rebellion can act on the Constitution. I do not see how a State which has
abolished its State government as a part of the United States, and has been acting in open hostility to the Government—I do not see how such a State can have submitted to its Legislature a proposition for ratification.

Id. at 919 (Feb. 19, 1866) (proposing resolution):

[Former Confederate states] have no right in conscience to vote upon any amendment of the Federal Constitution, or otherwise act so as to affect the rights of loyal States, until first restored to full power in this Union by Congress; . . . when any amendment shall be proposed by Congress and ratified by the Legislatures of three fourths of the loyal and recognized States, the same shall be taken and held thereafter as part of the Constitution of the United States for all purposes.

CONG. GLOBE, 39th Cong., 2nd Sess. 615 (Jan. 21, 1867) (proposing resolution):

[T]o participate in altering or amending the Constitution of the Union can only be done by States of the Union, and is the discharge of the highest function possible in a State of the Union—a function derived wholly from its status in the Union . . . [I]n ratifying amendments to the Constitution of the United States, as well those now pending as those which may hereafter be proposed by Congress, the said several States are not entitled to any vote, and are wholly incapable either of accepting or rejecting any such amendment, so as to bind thereby the loyal States of the Union, until they shall severally be restored to their former relation to the Union, in full power and competency as States of the Union, by consent of the United States through the Congress thereof.

Representative John M. Broomall of Pennsylvania, CONG. GLOBE, 39th Cong., 1st Sess. 98 (Dec. 20, 1865): (proposing resolution):

[T]he amendment to the Constitution of the United States abolishing slavery or involuntary servitude, except as punishment for crime, having now been ratified by three fourths of the States comprising the Government of the United States, to wit, the States of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Ohio, Missouri, Nevada, Indiana, Minnesota, Vermont, Connecticut, and New Hampshire, the same has thereby become the paramount law of the land; and the House of Representatives congratulates
the country on being at last and forever free.

_Id._ at 469 (Jan. 27, 1866):

It would be curious if we must consult those who have repudiated the Constitution whether we shall amend it or not. What have they to do with altering a compact who deny being parties to it? According to this notion, if these eleven States had held out forever, the remaining twenty-five, not being three fourths of the thirty-six, never could alter the Constitution. Besides, if the votes of these States were needed to ratify the amendment, then there was no amendment to ratify. If these States must be counted in the ratification they were entitled to a voice in the adoption, and if so, the amendment did not pass by the constitutional majority in either branch of Congress. If two thirds of the Senators and Representatives from the loyal States alone could lawfully adopt the amendment, three fourths of the Legislatures of the loyal States alone could lawfully ratify it.

_Id._ at 919 (Feb. 19, 1866) (proposing resolution):

[T]he states that did not renounce their allegiance to the Federal Government during the late rebellion . . . are the only States clothed with legal power to consider and decide upon amendments to that Constitution. . . . States which did, by their Legislatures, call conventions for the purpose of expressly denying allegiance to the Federal Constitution and Government . . . did abrogate all State government as States of this Union; and did abdicate all government as in and of this Union . . . have no right in conscience to vote upon any amendment of the Federal Constitution, or otherwise act so as to affect the rights of loyal States, until first restored to full power in this Union by Congress . . . . [W]hen any amendment shall be proposed by Congress and ratified by the Legislatures of three fourths of the loyal and recognized States, the same shall be taken and held thereafter as part of the Constitution . . .

Representative Schuyler Colfax of Indiana, Speaker of the House, _CONG. GLOBE,_ 40th Cong., 2nd Sess. 1928 (Mar. 17, 1868):

The opinion of the Chair is that the fourteenth article of the constitutional amendments has been adopted and is part of the Constitution.
Representative Shelby M. Cullom of Illinois CONG. GLOBE, 39th Cong., 2nd Sess. 814 (Jan. 28, 1867):

The constitutional amendment will be ratified by three fourths of the States in their practical relations to the Government. It will thus in my judgment become a part of the Constitution.

Representative Henry Winter Davis of Maryland, CONG. GLOBE, 38th Cong., 1st Sess. app. 84 (Mar. 22, 1864):

If it be assumed that the basis of calculation shall be three fourths of the States now represented in Congress I agree to that construction of the Constitution . . . .

BURLINGTON FREE PRESS, July 21, 1865, at 4 (quoting “Henry Winter Davis, in his oration at Chicago”):

[W]hen it shall have received the assent of three-fourths of those now recognized as States and represented in Congress, let Congress instantly proclaim it as the fundamental law of the land, valid and binding as the Constitution itself, of which they will have made it a part.

Representative Thomas T. Davis of New York, CONG. GLOBE, 38th Cong., 2nd Sess. 155 (Jan. 7, 1865):

We propose simply to submit to the people of the States the proposition to amend the Constitution. It requires the assent of three fourths of all the States represented in this Congress.

Representative Columbus Delano of Ohio, CONG. GLOBE, 39th Cong., 2nd Sess. 1126 (Feb. 11, 1867):

Mr. Delano introduced a bill declaring the ratification of the fourteenth article of the Constitution of the United States, proposed by the first session of the Thirty-Ninth Congress . . . .

Representative Thomas D. Eliot of Massachusetts, CONG. GLOBE, 39th Cong., 1st Sess. 2773 (May 23, 1866):

The Freedman’s Bureau was a necessity created by military law. It was a law before the [Thirteenth] amendment was ratified by three fourths of the loyal States.

Representative John F. Farnsworth of Illinois, CONG. GLOBE, 39th Cong., 1st Sess. 384 (Jan. 23, 1866):
[T]here fourths of the States which were not in rebellion are sufficient. I do not see how a State which has been in the rebellion can act on the Constitution.

Representative Ebon C. Ingersoll of Illinois, CONG. GLOBE, 39th Cong., 2nd Sess. app. 89 (Feb. 7, 1867):

The late rebel States are to all intents and purposes as much territories of the United States, subject to the exclusive control of Congress, as are the territories of Utah, New Mexico, Montana, or any other Territory belonging to the Government.

Representative Thomas A. Jenckes of Rhode Island, CONG. GLOBE, 39th Cong., 1st Sess. 386 (Jan. 23, 1866):

[I]n three fourths of the States that would be required to ratify an amendment on this subject, nearly all of them have made the suffrage so nearly universal that the distinction is scarcely material.

Representative George W. Julian of Indiana, CONG. GLOBE, 39th Cong., 2nd Sess. app. 80 (Jan. 28, 1867):

Congress may . . . leav[e] the amendment to the disposition of the loyal States, whose representatives in Congress for nearly six years past have ignored the existence of disloyal States in dealing with the mighty concerns of war and peace and the amendment of the Constitution.


I would like to have the bill declare in his [Thaddeus Stevens’s] language that “in all proceedings to amend the Constitution of the United States none of the States embraced in the southern confederacy can be permitted to participate, nor can they be counted as among the States necessary to form a constitutional majority to adopt said amendments; and that whenever any amendments shall be ratified by three fourths of the non-seceding States, they shall be taken and adjudged to be a part of the Constitution.”

Id. at 2080:

The three fourths of the remaining States will unquestionably be
held to be adequate to act . . . .

**CONG. GLOBE, 39th Cong., 2nd Sess. 260 (Jan. 3, 1867):**

[T]he political status of the South cannot be settled until its rebellious leaders discover that the loyal people of the country are able to defend its institutions against the usurpations of Andrew Johnson, accept the constitutional amendments already adopted and which are in process of adoption by three fourths of the States which now constitute the Union, and submit to Congress constitutions republican in form upon which the people shall have set the seal of their approval.

Representative William Lawrence of Ohio, **CONG. GLOBE, 39th Cong., 2nd Sess. app. 28 (July 20, 1867):**

It is not true that Congress called on these States to ratify any constitutional amendment. The Secretary of State sent the amendment to those States, but their ratification was not necessary, since three fourths of the States having legal State governments can ratify an amendment.

Representative Daniel Morris of New York, **CONG. GLOBE, 38th Cong., 1st Sess. 2614 (May 31, 1864):**

[T]he revolting states are within the Union so far as fealty and obedience are concerned; but as far as having a voice in the enactment of laws and amending the Constitution, they are out of the Union. Till they are pardoned and restored to favor, they are not to be counted among the States of the Union. Wherefore three fourths of the now loyal States are competent and they alone are to be heard in ratifying any amendment of the Constitution that may be proposed.

Representative Frederick A. Pike of Maine, **CONG. GLOBE, 39th Cong., 2nd Sess. 255 (Jan. 3, 1867):**

The amendment was submitted only to the States recognized by the Congress as States, and their action alone should govern the question of its adoption or rejection. . . . We shall adopt the amendment by means of three fourths of the loyal States . . . .

Representative Robert C. Schenck of Ohio, Columbia, S.C. **DAILY PHOENIX, Jan. 19, 1866, at 2:**
Schenck, of Ohio, a leading member of this Congress of the dominant party, in his recent speech at his State capitol, insisted that this amendment “should be adopted by three-fourths of the loyal States before admitting the other States,” and that they, the now excluded States, as a condition of restoration, should be required to ratify it, “for otherwise,” said he, “they might defeat it, and ultimately gain such power as to undo all that has been done to prevent a repetition of the late disasters.”

Representative Glenni W. Scofield of Pennsylvania, CONG. GLOBE, 39th Cong., 2nd Sess. 598 (Jan. 19, 1867):

[I]f sent to them by us it was only to allow them an opportunity to prove their loyalty by giving it their assent. . . . [U]nlike the Secretary of State, we did not expect that the assent of these [former Confederate] communities would fasten this amendment upon the country without the concurrence of three fourths of the adhering States, nor that their dissent would defeat it if that concurrence was had.

Representative Samuel Shellabarger of Ohio, CONG. GLOBE, 39th Cong., 1st Sess. 143 (Jan. 8, 1866):

Sir, how long may this nation survive with . . . such constitutional amendments as would be ratified by rebel legislatures . . . ? . . . [A] State in rebellion, and whose government and people are in actual hostility to the United States, is not a component part of this Union, during the continuance of such rebellion, for the purpose of exercising any power . . . .

Representative Rufus P. Spalding of Ohio, CONG. GLOBE, 39th Cong., 1st Sess. 132 (Jan. 5, 1866):

The amendment was fully ratified by three fourths of all the States represented in Congress, and acting in harmony with the Government, at the time the two-thirds vote was given in that body, and no additional sanctions were wanted, as none in fact could be given by assemblies of men having no share in the governing power of the nation.

CONG. GLOBE, 39th Cong. 2nd Sess. 224 (Dec. 20, 1866):

If ratified by three fourths of the States represented in Congress it will, in my judgment, become a part of the Constitution. Of this I have no reasonable doubt.
Id. at 288 (Jan. 5, 1867) (noting his misquotation by the loyal-denominatorist *Washington Chronicle*):

I said expressely that I believed the ratification of that amendment by three fourths of the loyal States was sufficient to make it a part of the Constitution of the United States. And in that I agreed exactly with the editor of the paper upon which I was then commenting.

Id. at 289:

I would earnestly advise the loyal States, all of the loyal States that will do so, to adopt that amendment of the Constitution; and, as I said the other day, I would earnestly advise the Legislatures of the so-called States of the South to do the same thing, not because they make it a part of the Constitution by doing do, but because they express their own sense of the utility of the measure and their accordance in sentiment with it.

Id.:

I was informed not many days ago in the town of Petersburg, Virginia . . . by some of the gentleman residents there that they wanted this difficulty settled. I said to them, “Here is the constitutional amendment and you repudiate it.” They replied, “If you can put that constitutional amendment in force without our aid then do it and we will submit to it. We do not so much complain of the provision itself as that we are called into action to vote on it as a part of the Constitution of the United States.” Upon the hypothesis that their action on it only goes to show their submission to the terms we are trying to impose, they will permit the loyal States to make this a part of the Constitution of the United States by a three-fourths vote, and then come in a express their acceptance of it.

Id. at 497 (Jan. 16, 1867):

[The Judiciary Committee should be instructed to] prepare and report to this House an opinion in writing respecting the necessity of obtaining any further sanction to the constitutional amendment than three fourths of the States actually represented in the Congress of the United States.
[W]e can never agree . . . that the States in rebellion, while in rebellion, must be included in estimating the number of States required for approval of amendments to the Constitution; that those States that have rebelled, separated themselves from, and attempted to destroy this Government, do nevertheless still hold within this Government, under the Constitution thereof, a controlling power with reference to making amendments thereto; and that they, taking up the sword and bidding defiance to the Government and its military forces, do at the same time hold such rights under and within the Government they are seeking to destroy as to prevent the people of the United States, during the willful and determined absence of these rebels, and without their consent making any change in the Constitution itself.

Representative Thaddeus Stevens of Pennsylvania, CONG. GLOBE, 38th Cong., 2nd Sess. 734 (Feb. 10, 1865):

The constitutional amendment, if finally adopted by three fourths of the loyal States, as I have no doubt it will be, will prohibit forever the admission of any State into the Union with slavery in its constitution.

CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865):

[N]one of the rebel States shall be counted in any of the amendments of the Constitution until they are duly admitted into the family of States by the law-making power of their conqueror. For more than six months the amendment of the Constitution abolishing slavery has been ratified by the Legislatures of three fourths of the States that acted on its passage by Congress, and which had Legislatures, or which were States capable of acting, or required to act, on the question.

Id. at 1310 (Mar. 10, 1866):

[I]n adopting those amendments their [former Confederate States’] aid will neither be desired nor permitted, but . . . when they enter the Union they will swear allegiance to a Constitution to which the consent of their legislatures shall not be asked.

Id. at 2459 (May 8, 1866) (introducing the Fourteenth Amendment on behalf of the Reconstruction Committee):

Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any
proposition more stringent than this. I say nineteen, for I utterly repudiate and scorn the idea that any State not acting in the Union is to be counted on the question of ratification. It is absurd to suppose that any more than three fourths of the States that propose the amendment are required to make it valid; that States not here are to be counted as present.

CONG. GLOBE, 39th Cong., 2nd Sess. 252 (Jan. 3, 1867):

I know of no Republican who does not ridicule what Mr. Seward thought a cunning movement, in counting Virginia and other outlawed States among those which had adopted the constitutional amendment abolishing slavery.

Id. at 290 (Jan. 5, 1867):

[W]hen three fourths of the loyal States shall have ratified that amendment—and I suppose all on this side of the House agree with me—it will become a part of the Constitution of the United States.

CONG. GLOBE, 40th Cong., 2nd Sess. 1966 (Mar. 18, 1868):

Since the adoption of the fourteenth amendment, however . . .

Id. at 1967:

The fourteenth amendment, now so happily adopted . . .

Governor Andrew Gregg Curtin of Pennsylvania, The Amendment at the North, N.Y. TIMES, Jan. 4, 1867:

One of the points mooted by Governor Curtin should warn the Southern States of the fate that is in reserve for them if they disregard the warnings of the time. According to Governor Curtin, the voice of the excluded States counts as nothing for or against the amendment. To render it efficacious the ratification by three-fourths of the States now represented in Congress is all that is necessary. The proposition . . . implies the reduction of the now excluded States to something resembling a territorial condition.

PENNSYLVANIA SENATE JOURNAL 17, 18 (Jan. 2, 1867) (message from Governor A.G. Curtin):

A question has been raised whether the States lately in rebellion, and not yet restored to their privileges by Congress, are to be
counted on this vote—in other words, whether those who have rebelled and been subdued shall be entitled to a potential voice in the question of the guarantees to be required of them for future obedience to the laws. So monstrous a proposition is, it appears to me, not supported by the words or spirit of the Constitution. The power to suppress insurrection, includes the power of making provision against its breaking out afresh. These States have made an unjust war upon our Common Government and their sister States, and the power given by the Constitution to make war on our part, includes the power to dictate, after our success, the terms of peace and restoration. . . . If two-thirds of Congress, as now constituted, could lawfully propose those amendments, then three-fourths of the States, not excluded from representation in Congress, form a sufficient majority to effect their lawful adoption. It was determined again when Congress, by an almost unanimous vote, declared the rebellious States without the right of representation in the Electoral College in 1864.


This ratification, by three-fourths of the States, must be deemed already to have been made, unless the Legislatures shall assume to decide that when more than one-fourth of the States have, by rebellion and war, withdrawn from their duties and functions as States, and rendered constitutional amendments essential to the welfare of the nation, such States can by their action, prevent the adoption of those amendments, and thus occasion, indirectly and partially, the results which rebellion and war waged more openly and thoroughly to produce. Of the States that have maintained their fidelity to the Union, and their constitutional relations to each other and the General Government, more than three-fourths have ratified the amendment, and I cannot deem it open to doubt that their action is sufficient and conclusive.


Mr. Sumner is very confident that the Amendment will be held to become a part of the Constitution when ratified by three-fourths
of the loyal States.


   By an amendment of the Constitution, ratified by three-fourths of the loyal States, the black man is declared free.

The Boston Post, CHARLESTON DAILY NEWS, Feb. 12, 1867, at 2:

[T]he Boston Post . . . sweepingly proceeds to show how Congress can declare three-fourths of the States represented to be competent to adopt an amendment to the Constitution . . .

NAT’L REPUBLICAN, Mar. 11, 1867, at 2 (quoting The Boston Post):

   If the constitutional amendment were to be ratified by three-fourths of the Northern, or represented, States, as Mr. Sumner has all along claimed it can be, and should be, then it follows that Massachusetts may yet be forced to accept and obey it, although she now refuses to accept it for herself. The requisite majority of the States could compel us to it, let our protests be as loud as we feel like making them.

CLEVELAND DAILY LEADER, Dec. 13, 1865, at 1 (emphasis added):

   In view of the pending Constitutional Amendment abolishing slavery, which can only become of binding effect when ratified by the legislatures of three-fourths of the states, it is of the greatest importance to determine the number of States which are to be recognized as in the Union. It seems to us perfectly manifest that only those states which are represented in Congress, and are thus recognized by that body as having a voice in the national government, are to be practically regarded as states in the Union, and the ratification of the amendment by the legislatures of three-fourths of these states is amply sufficient to make it part of the constitution. Certainly it would be an anomaly if states which were engaged in rebellion against the government could, by their mere passive silence, neutralize the votes of the loyal states on a grave constitutional question. This would be the result if the other interpretation were insisted upon. Should it be held that there are now thirty-six states in the Union, the eleven lately rebellious and still un-reconstructed States would have as much power to defeat the
amendment as if they were in full accord with the government. . . . Certainly if these states are not allowed to initiate legislative action in Congress, they cannot perfect that action by their state legislatures. The vote of two-thirds of the members of Congress from the loyal states was sufficient for the passing of the amendment through that body, and by a parity of reasoning its ratification by the legislatures of three-fourths of the loyal states is sufficient for its final adoption.

*Id.*, Dec. 21, 1865, at 2:

It will be seen that the Secretary estimates the total number of States in the Union at thirty-six, including all the so-called Confederate States and excluding Colorado. The number of States enumerated as having ratified the amendment is twenty-seven, including Virginia, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, and Georgia. While we believe that the amendment has been legally ratified, and rejoice that it has been proclaimed a part of the Constitution, we must dissent from this reasoning of Mr. Seward. The States above named are not in their proper relation to the Union, and their ratification ought not to be admitted as legal and binding. The amendment is adopted, but without their aid.

*Emporia News*, Dec. 29, 1866, at 2:

Mr. Spaulding of Ohio, rated as rather conservative, stated in debate, that should the amendment be ratified by three-fourths of the states now represented, it would be properly adopted. His reputation as a jurist gives weight to his opinion. We cannot see why, if the laws passed by a majority of Congress as now composed, are legal, a constitutional amendment adopted by them would not be equally as valid.

*Evening Telegraph*, Jan. 2, 1867, at 1:

If two-thirds of Congress, as now constituted, could lawfully propose those amendments, then three-fourths of the States, not excluded from representation in Congress, form a sufficient majority to effect their lawful adoption. It was determined again by the formal sanction of both the great political parties, when Congress, by an almost unanimous vote, declared the rebellious States without the right of representation in the Electoral College in 1864.
MONTANA POST, Feb. 29, 1868, at 1:

The Legislatures of three-fourths of the entire number of States not having ratified the proposed amendment, it has never been declared a part of the Constitution, but three-fourths of the States now represented in Congress have ratified it. . . . If the position maintained by the Union party regarding the non-existence of any duly organized and recognized civil State governments within the late rebellious States is correct, and we firmly and truly believe it is, then, under the fifth article of the Constitution, ratified as the amendment is by the requisite number of legislatures in the organized States, we believe that it is to all intents and purposes a proper part of the Constitution.

The Nation, 2 NATION 673 (May 28, 1866):

[I]t only needs to be adopted by Congress to secure the general assent of the people, among whom, of course, we do not reckon the people of the States that revolted, because we do not hold their assent necessary to any constitutional amendment. . . .

Id. at 744 (June 12, 1866):

[The proposals of Reconstruction Committee] may now be considered certain of adoption by Congress, and almost certain to be ratified by three-fourths of the States at present lawfully organized.

EVENING TELEGRAPH, Oct. 13, 1866, at 7 (quoting New York Herald):

The conditions laid down by Congress have been approved by the popular voice—by the people of the Northern States, who have the sole power over the question in their hands.

DAILY OHIO STATESMAN, Nov. 29, 1866, at 2:

The New York Herald has suddenly become the advocate of the idea that there is no need that the South should have a voice in the adoption of the pending Constitutional Amendment; that the ratification by three-fourths of “the loyal” States is all that is absolutely necessary. This idea we shall expect to find favor in the eyes of the Radicals. They will argue with considerable pertinency, that if the laws enacted by a Congress from which the latterly insurgent States are excluded are Constitutional, and thus unquestionably valid, then any Constitutional Amendment that
may be adopted by three-fourths of the States that are represented in this Congress will be equally Constitutional and valid.

N.Y. HERALD, quoted in EVENING TELEGRAPH, Dec. 1, 1866, at 7:

The shortest plan for a speedy and comprehensive settlement . . . is the plan of amendment, and its ratification by three fourths of the States now constituting the Government of the United States. If we admit the right of the excluded States to a voice in the ratification, we must admit their right to resume their vacated seats in Congress just as they are; and that all the legislation of Congress in their absence, since they laid down their arms as a hostile Confederacy, is null and void.

Id., Dec. 25, 1866, quoted in STAUNTON SPECTATOR and GENERAL ADVERTISER, Jan. 1, 1867, at 1:

We may establish the constitutional amendment by three-fourths of the loyal States, and then reorganize territorially each of the outside States on this basis; but we shall gain little time by this plan. . . . After being two or three years out in the cold, or five, ten or twenty, reason and common sense may prevail among them, and they may come in on the terms of the amendment.

DAILY OHIO STATESMAN, Dec. 22, 1866, at 2 (quoting New York Herald):

[I]f the doctrine is not sound that three-fourths of the represented States are competent to make the amendment a part of the supreme law, it [the Thirteenth Amendment] is void from the fact that a number of the Southern States required to make up three-fourths of all the States were reduced to the ratification in an irregular way and by Federal compulsion on the part of President Johnson, in the exercise of the discretion of a conqueror.

WESTERN RESERVE CHRONICLE, Dec. 26, 1866, at 2:

The New York Herald has been converted to the position which Mr. Stevens took more than two years ago, that three-fourths of the loyal States are sufficient for the ratification of the Constitutional Amendment. The Rebel States lost all their rights in the Union when they seceded. They cannot expect to have a controlling voice in the reconstruction of the Government.

It is highly probable that before the 4th of next March, the constitutional amendment will have been ratified by three-fourths of the States now represented in Congress. It will then stand before the country as the ultimatum of the North—an ultimatum which, accepted or not by Southern legislatures, Congress will not hesitate to enforce as part of the Constitution.

New York Herald, Editorial, The Powers and Policy of Congress in Reference to the South, quoted in EVENING TELEGRAPH, Jan. 15, 1867, at 2:

[W]ill it be best to insist only upon the rights of Congress to prescribe the terms of reconstruction and restoration? This is a nice question . . . but it may be settled by recognizing the States interested as “States whose functions have been impaired and suspended, but not destroyed by their Rebellion,” as viewed by President Johnson. Thus, acting upon the sound conclusion that the States represented in the general Government are legally the United States, Congress has only to declare the pending Constitutional amendment part and parcel of the supreme law of the land, with its ratification by three-fourths of the adhering States, in order to make it binding upon the outside States, with or without their consent . . . .

New York Herald, Editorial, The Work Before the Reconstruction Committee—The Right Way to Do It, quoted in EVENING TELEGRAPH, Feb. 1, 1867, at 2:

[While Congress is thus disposing of the stumbling-block now at the head of the Executive department, and providing a substitute in his place, the ratification of the pending amendment will have been consummated by three-fourths of the States constituting now the Government of the United States. Leaving out Nebraska and Colorado, the whole number of States entitled to a voice upon this amendment is twenty-six, of which number twenty is three-fourths. Already the ratification has been made by Maine, New Hampshire, Connecticut, Rhode Island, Vermont, New York, New Jersey, Ohio, Indiana, Illinois, Missouri, Kansas, Minnesota, Oregon, Nevada, Tennessee, and West Virginia—seventeen States. We want only three more, and Pennsylvania, Massachusetts, Michigan, Wisconsin, Iowa, and California can surely supply those three within the next thirty days. The duty will then devolve upon Congress of proclaiming the amendment part and parcel of the Federal Constitution, the supreme law of the
land, binding alike upon the inside and outside States and the Territories. With this proclamation by law it will become the duty of the President, under such an enabling act as Congress may pass, on the basis of this amendment, to proceed to the reconstruction of the Rebel States . . . .


The required number of the States having ratified the amendment, it is even now “valid to all intents and purposes as part of the Constitution” . . . [A]s Congress has since rejected as illegal and void all of Mr. Johnson’s acts of reconstruction, all these Southern ratifications go for nothing, and if the amendment abolishing slavery, therefore, is not part of the Constitution by the voice of three-fourths of the States adhering to the national Government, then slavery is not legally abolished.

The New York Times, Congress and the Amendment, N.Y. TIMES, Jan. 21, 1867:

It is also possible that on a general and by no means irrational review of the case, the ratification by three-fourths of the represented States may be held to invest the Amendment with constitutional validity, and thus to provide the guarantees which must precede restoration.

The Reconstruction Question in Congress, N.Y. TIMES, Jan. 28, 1867:

The autumn elections were contested and won on the merits of the amendment, as the groundwork of restoration; and already the Legislatures of eighteen states have ratified it, in every case by large majorities, Pennsylvania, Nevada, and California will as surely ratify it before the session close; more than completing three-fourths of the States which now compose the Government of the Union. A plan which is thus indisputably indorsed by the people whom the majority in Congress represent, cannot with propriety by superseded by other measures. . . . It should now be stated, authoritatively, whether the amendment is a failure because rejected by the South, or whether it is to be efficacious despite the South. . . . Mr. Bingham’s view of the subject . . . harmonizes with common sense, and with the unavowed but practically adopted theory of the Government during and since the Rebellion. The
States which relinquished their share in the Government, and which are still excluded from it, can scarcely be said to participate in the sovereignty which is implied in a change in the Constitution. They were not consulted in the framing of the amendment, and on that ground deny its constitutionality; and if their right to govern continues forfeited or suspended, their right to say yea or nay to the amendment is at best questionable. The prima facie right belongs exclusively to the States which formed the Government during the Rebellion, which have enacted laws, and which dictate terms on which the excluded States shall resume their places in the Union. On this hypothesis three-fourths of the represented States may render the amendment valid, in perfect consistency with admitted facts. The parties who impugn the constitutionality of such a proceeding are most likely to be those who deny the constitutionality of all laws enacted during the exclusion of the South; and their opposition is not entitled to more respect in one case than the other.

The Raftsmen’s Journal, RAFTSMAN’S JOURNAL, Dec. 5, 1866, at 2:

The coming question is, Will the affirmative action of three-fourths of the States represented in Congress be sufficient to engraft the amendment to the Constitution? If not, then the question—who shall decide the terms of restoration—receives for its answer, the States that did their utmost to destroy the Union. Common, if not legal sense, admits of no such construction.

RAFTSMAN’S JOURNAL, Jan. 30, 1867, at 2:

The resolution offered in the House of Representatives by Mr. Spaulding of Ohio, instructing the Committee on the Judiciary to prepare and report to the House an opinion in writing respecting the necessity of obtaining any further sanction to the Constitutional Amendment than three-fourths of the States actually represented, opens an important question. The report of the Committee will be awaited with special interest.

The Western Reserve Chronicle, WESTERN RESERVE CHRONICLE, Jan. 23, 1867, at 2:

The idea, deemed violently radical not long since, that three-fourths of the States represented in Congress have full legal power to ratify an Amendment to the Constitution, seems now to be obtaining even in conservative quarters. To us it seems the only
safe and consistent theory to venture upon. . . . If then the loyal States are the true constituent elements of the General Government, they have an unquestionable right to mould and establish its fundamental law. Hence it is an act of mere grace to ask the late rebellious States to ratify the Amendment. Their approval or disapproval amounts to nothing, farther than indicating their temper. Their hostility to the Amendment cannot kill it, provided three-fourths of the States represented in Congress approve it.

Joel Prentiss Bishop, Joel Prentiss Bishop, 1 Commentaries on the Criminal Law § 776, at 433–34 n.1 (3rd ed. 1865):

Are these [former Confederate] States to be counted in estimating the three fourths? . . . Whenever the law submits anything to persons or bodies, it submits it to those only having legal power to act. . . . [I]n legal construction, the expression “two thirds of both houses,” means two thirds of those members who are actually in their seats and voting. It does not include members who exist only in theory of law, neither does it include actual members who are absent from the legislative halls, because only in the legislative halls does the law allow them to act. . . . By the same course of reasoning . . . when there are States which have no legislatures—States which . . . are even forbidden by the Constitution to put forth any legislative act—and there is a call, in general terms, upon “the legislatures of three fourths of the several States,” those States which cannot legally respond to the call, to whom, therefore, the call cannot be constitutionally addressed—those States which have no legislatures, and no power of legislative action—are not to be taken into account.

Orestes Augustus Brownson, Orestes Augustus Brownson, The American Republic: Its Constitution, Tendencies, and Destiny 325 (1866):

What then do the people of the several States that seceded lose by secession? They lose, besides incurring, so far as disloyal, the pains and penalties of treason, their political rights, or right, as has just been said, to be in their own department self-governing communities, with the right of representation in Congress and the electoral colleges, and to sit in the national convention, or of being counted in the ratification of amendments to the constitution . . . .

The fourteenth amendment . . . is now, 1866, in the process of adoption by the State legislatures. [Footnote:] It has since been adopted by more than three-fourths of the twenty-seven States, now [1867] actually composing, by participating in, the government.


In a time of rebellion, is a ratification of a proposed Amendment by the legislatures of three fourths of the loyal States sufficient to make the Amendment valid? . . . [T]his question must be answered affirmatively. If a State has forfeited her right to participate in the ordinary legislation of the nation, if she is deemed unfit, because of the disloyalty of her people, to assist in enacting the ordinary laws, much less can she claim participation in the higher and more sacred work of changing the great organic law of the nation. A proposed Amendment to the Constitution is no more dependent on the assent of a State holding such relation to the nation, than upon that of a Territory. But did not Congress direct the recent Amendments to be sent for ratification to the disloyal as well as to the loyal States? This was done, it is true; but this does not prove that their ratifications were essential to the validity of the Amendments. . . . Congress made the ratification of these Amendments by those States a condition of their restoration to the Union. It was for this reason that the Amendments were sent to them, and not because such ratification was essential to their validity. They were ratified by three-fourths of the loyal States, and would be valid without the assent of any of the others. The ratification by the disloyal States was simply . . . an evidence that they might be restored with safety to their former condition in the Union.


The only basis for the actual reconstruction measures of Congress being either the theory of conquest or of State-lapse, those measures were an assertion that, within the limits of the ten States of the former Confederacy, there was no political people
participating in that sovereignty which, as a unit, is held by the
United States, as recognized by other nations, and which gave to
the written Constitution the authority of law within those ten
States, as within every portion of the national domain. As a
consequence, no one of these States had the capacity to adopt an
amendment to the Constitution, as a State to be counted in
estimating the requisite three-fourths. Those adopted since the
close of the war were in fact adopted by the authority of the States
choosing to continue in that Union in which only they had
independent political existence.

Albert Orville Wright, ALBERT ORVILLE WRIGHT, AN EXPOSITION
OF THE CONSTITUTION OF THE UNITED STATES 249–50 (1889):

When States are in rebellion, must a proposed amendment be
ratified by three-fourths of all the States, or by three-fourths of the
loyal States? By three fourths of the loyal States. It has been
decided by Congress that rebel States lose their rights as States,
until restored to the Union by act of Congress. As rebel States have
lost their rights as States, they need not be counted in making up
the number of States, three-fourths of which must ratify a
proposed amendment before it becomes a part of the Constitution.
It is true that Congress, when reconstructing the seceded States,
required them to ratify the recent amendments. But this was done
not for the sake of securing their votes to make the amendment
valid, but as a guarantee that the seceded States had accepted the
results of the war in good faith.

Id. at 284:

Congress held that rebel States have lost their rights as States, and
therefore that only three-fourths of the loyal States are needed to
ratify the amendments. This decision by the only lawful authority
(for the Supreme Court cannot decide political questions) binds us
legally, whether it was a right or wrong decision. Three-fourths of
the States then recognized as in the Union ratified each of these
amendments, and they are therefore legally a part of the
Constitution.

John W. Burgess, JOHN W. BURGESS, RECONSTRUCTION AND THE
CONSTITUTION 1866-1876 81 (1902):

The true theory . . . was that held by Mr. Stevens, viz., to consider
only those “States” which had never attempted secession, those
“States” which had never been members of the Southern Confederacy, as constituting the “States” of the Union at that moment, and all other territory and people subject to the jurisdiction of the United States as being under the exclusive government of the central Government; to amend the Constitution by a three-fourths majority of these loyal “States”; and then to admit these reconstructed communities as new “States” into the Union with its amended Constitution. The amended Constitution would then have the same power over them as if the Amendment had been ratified by them. In fact, their petition for admission or recognition as “States” of the Union with the amended Constitution would imply their assent to the Amendment as well as to every other part of the Constitution. The more moderate Republicans feared that the Southern communities would not feel obligated to a Constitution amended in this way. It is difficult to see why they should not. The Southern statesmen knew that Congress had no power under the Constitution to require of new “States” obedience to anything as a condition of their admission to the Union, but the Constitution as it was at the moment of their admission.

2. Indications of Widespread Loyal Denominatorism

George W. Paschal, GEORGE W. PASchal, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 281 (1868) (citing FARRAR):

There are many persons whose opinions are entitled to respect, who maintain that the ratification is complete without the concurrence of the non-reconstructed States.


With the vast bulk of slaveholding territory still in rebellion against the Union and considered ineligible to participate in the coming ratification process, few observers in Washington doubted that the amendment would quickly win the required three-fourths of the loyal states.

Representative Andrew Jackson Rogers of New Jersey, CONG. GLOBE, 38th Cong., 2nd Sess. 151 (Jan. 7, 1865):
[I]t is proposed by this amendment that the States in which slavery exists shall have no vote, because they are not in a position to exercise the right to vote upon this question. But it is proposed that three fourths of the States—States wherein slavery does not exist; States which have no interest in that species of property—shall get together, and by the action of three fourths of them deprive of their property the citizens of the loyal border States . . . .


The language of the proposition, as set forth by Congress in its resolution is, that these amendments, when ratified by three-fourths of the states, shall be valid as a part of the Constitution, and by many of those in power it is asserted that three-fourths of the States means three-fourths of twenty-six States, thus utterly ignoring the existence of ten.

Former Georgia governor Joseph Brown, KEOWEE COURIER (Pickens Court House, S.C.), Mar. 9, 1867, at 1 (letter of Feb. 23, 1867):

The Radical party is at issue with the President . . . . They have over two-thirds in each branch of Congress, and have power to pass any measure they please over his veto . . . . They are, in my opinion, also a unit in their determination, as soon as three-fourths of the States which they call loyal, by which is meant, the States represented in Congress, have ratified the constitutional amendment, to declare it adopted, and to enforce the reconstruction. This, they have the power to do. It is, therefore, a fixed fact that the constitutional amendment will be adopted in a very short time.

The Baltimore Gazette, Editorial, quoted by NEW YORK WORLD, in turn quoted in EVENING TELEGRAPH, Nov. 28, 1866, at 2:

There is a strong tendency in the Republican party to assume the bold position that ratification by three-fourths of the “represented” States is all that is requisite to engrat amendments on the Constitution.

The Daily Phoenix of Columbia, South Carolina, DAILY PHOENIX, June 20, 1866, at 3:

The country will soon be startled by the avowal, on the part of the leading radicals in Congress, that it will only require the votes of
three-fourths of the States now represented in Congress—that is so say, the votes of nineteen States—to ratify the constitutional amendment. The radicals have determined to insist upon this, and to declare the amendment ratified as soon as nineteen States have so voted.

*Id.*, Jan. 11, 1867, at 2:

The Herald’s Washington correspondent gives the following as the latest reconstruction programme: “It is stated this afternoon, upon unquestionable authority, that the leaders of the majority in Congress have agreed upon a programme for the present session, in so far as the Southern States are concerned, and that it embraces, first, the ratification of the constitutional amendment by three-fourths of the States represented in Congress; and, second, the reorganization of the recusant States by compulsion. The adoption of the amendment by the Legislatures will be completed, it is expected, by the 1st of February, when measures will be immediately carried through in Congress, looking to the governing of the South by the military arm.

*Id.*, Feb. 5, 1867, at 3:

The delegation of North Carolina Unionists left Washington, for their homes, on Monday. The delegation has been there two weeks, and concluded, after interviews with the leading politicians, that the amendment will be declared ratified when three-fourths of the represented States have sanctioned it.

*Id.*, Apr. 30, 1868, at 1:

The Republicans of Congress hold that the constitutional amendment, upon which they swept the country in the State elections of 1866, known as article fourteen, has been duly ratified by the necessary three-fourths of the States represented in the General Government.

*The Lynchburg News*, LYNCHBURG NEWS, quoted in STAUNTON SPECTATOR, May 15, 1866, at 2:

The programme . . . is evident, viz.: to announce the adoption of the proposed amendment as soon as it shall have been ratified by three-fourths of the States now represented, and to make its subsequent ratification by the Southern states an indispensable condition of their restoration to the Union, and the admission into
Congress of their representatives.

*The Nashville Daily Union,* NASHVILLE DAILY UNION, May 16, 1866, at 1:

This is an important feature . . . in the scheme of the committee. Three-fourths of the States now represented in Congress are to be deemed sufficient for the ratification of the proposed amendment; and its ratification by the other States is to be required only as a condition of their restoration to Congress.


There are fourteen States that will not ratify the amendment, and it can only be carried over their heads by ignoring them in the court, and assuming that three-fourths of the States at present represented in Congress will suffice to ratify it.

*The Staunton Spectator,* STAUNTON SPECTATOR, Dec. 4, 1866, at 2:

It is now decided that the requisite three-fourths of all the States cannot be induced to adopt the proposed Constitutional Amendment. The Radicals will probably assume that it is only necessary to have the adoption of three-fourths of the States now represented in Congress.

3. Loyal-Denominator Agnosticism

Senator George Edmunds of Vermont, CONG. GLOBE, 40th Cong., 2nd Sess. 2662 (May 29, 1868):

[I]t is contended by some statesmen and jurists that three fourths of the States which must assent to this article of the Constitution means three fourths of the States which had legal and loyal and represented governments at the time the article was proposed. It is contended by another class of statesmen and jurists, whose purity is not to be questioned, that the Constitution plainly means that three fourths of the States are three fourths of all the States, and, therefore, in order to have it become a part of the Constitution, you must have twenty-eight States assent to it, instead of nineteen, or whatever the number would otherwise be. . . . [T]he inclination of my mind is, if it is of value to anybody to know it, in favor of the latter proposition. I hold myself ready to change my opinion if I shall be convinced, or that inclination if it shall turn out to be
wrong.

Senator John Sherman of Ohio, Keowee Courier, Sept. 7, 1867, at 1 (speech of Senator Sherman at Canton, Ohio):

Some members were in favor of limited confiscation of land; some in favor of military governments; some in favor of treating the amendment as already adopted by three-fourths of the loyal States; but neither of these measures met the assent of Congress.

Cong. Globe, 40th Cong., 2nd Sess. 2860 (June 5, 1868):

Now, it is a matter of dispute whether that amendment has been adopted, what number of States is required for its adoption . . . .


It is . . . contended by some able lawyers on this floor that it is not necessary to include these ten unrepresented States; and if that position is tenable, then but three fourths of the twenty-six States would be required, to wit, twenty, and upon that hypothesis we have pledged three more States than are sufficient to accomplish this desirable object. But, as I stated on a former occasion in this Hall in regard to a constitutional amendment abolishing slavery, it is a question too important to theorize upon, as there is no telling what the Supreme Court of the United States, as now or shall hereafter be constituted, may decide in regard to the status of these ten insurrectionary States . . . .

Cong. Globe, 40th Cong., 2nd Sess. 1692 (Mar. 5, 1868):

[W]e should wait until these States are reconstructed. . . . Then there can be no longer any doubt as to the question of the adoption of the fourteenth article of amendment to the Constitution of the United States, if it is not already adopted. It is a mooted question now whether that amendment has not been adopted by the ratification of three fourths of the loyal States. I know it is contended by some that it must be ratified by the Legislatures of three fourths of all the States in the Union (including those lately in rebellion).

Id. at 1932 (Mar. 17, 1868):

If two thirds [sic] of the loyal States is sufficient it has been adopted; if not it has not been adopted. In order to prevent any difficulty that
might arise on the question I say we ought to insist that three fourths of all the States of this Union should ratify it . . .

Id. at 2209 (Mar. 28, 1868):

This amendment being ratified by three fourths of all the States of the Union, there can be no question raised as to whether a ratification by three fourths of the States that did not claim to have seceded would be sufficient . . .

Representative Thomas Williams of Pennsylvania, CONG. GLOBE, 40th Cong., 2nd Sess. 2692 (May 30, 1868):

[T]he doctrine . . . that the fourteenth amendment is not any part of the Constitution by virtue of the ratification of three fourths of the loyal States [is] a proposition the correctness of which I am not now prepared to admit.

Id. at 3009 (June 10, 1868):

If it be true that twenty-three States, being more than three fourths of the loyal States of the Union, having ratified the constitutional amendment, it is now a part of the Constitution, then this clause is perfectly constitutional and perfectly proper; but there is doubt upon that question; people do differ as to whether or not that has taken effect.

Representative Henry Raymond of New York, CONG. GLOBE, 39th Cong., 2nd Sess. 718 (Jan. 24, 1867):

If we hold with many that the loyal States alone may amend the Constitution, we can find seven States out of the twenty-six, with less than a million of population, who can absolutely defeat any amendment.

Id. at 719:

Those gentlemen . . . maintain that the actual sovereignty of the nation rests with those States which never renounced their share of it, and that three fourths of those States are as competent to ratify constitutional amendments as their representatives are to enact laws. My learned friend from Ohio [Mr. Bingham] holds this opinion and sustains it with his accustomed ability and eloquence. The argument in its support is certainly not without force, and the theory is held by some very able writers on constitutional law.
National Republican, Nat’l Republican, Sept. 28, 1865, at 2 (emphasis added):

Some are of the opinion that the amendment has already been legally ratified, as two thirds [sic] of the states not in rebellion ratified it, and it is argued that a State which is waging war against the Government for its destruction has no right to be consulted respecting proposed modifications of the fundamental law. But, while these hold that the Constitution may be legally amended by three fourths of the States actually and loyally in the Union at the time, it is argued by most statesmen that to silence all cavil and set aside all doubts, the amendment should be ratified by three fourths of all the States.