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## Originalism and the Ratification of the Fourteenth Amendment

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## ORIGINALISM AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT

*Thomas B. Colby*

**ABSTRACT**—Originalists have traditionally based the normative case for originalism primarily on principles of popular sovereignty: the Constitution owes its legitimacy as higher law to the fact that it was ratified by the American people through a supermajoritarian process. As such, it must be interpreted according to the original meaning that it had at the time of ratification. To give it another meaning today is to allow judges to enforce a legal rule that was never actually embraced and enacted by the people. Whatever the merits of this argument in general, it faces particular hurdles when applied to the Fourteenth Amendment. The Fourteenth Amendment was a purely partisan measure, drafted and enacted entirely by Republicans in a rump Reconstruction Congress in which the Southern states were denied representation; it would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. And it was ratified not by the collective assent of the American people, but rather at gunpoint. The Southern states had been placed under military rule, and were forced to ratify the Amendment—which they despised—as a condition of ending military occupation and rejoining the Union. The Amendment can therefore claim no warrant to democratic legitimacy through original popular sovereignty. It was added to the Constitution despite its open failure to obtain the support of the necessary supermajority of the American people. This Article explores the fundamental challenge that this history poses to originalism.

**AUTHOR**—Professor of Law, George Washington University Law School. For helpful comments on earlier drafts of this Article, the author wishes to thank the participants at the Originalism Works-In-Progress Conference, sponsored by the Center for the Study of Constitutional Originalism at the University of San Diego School of Law, and the participants at the Constitutional Law Workshop at the University of Chicago Law School.

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INTRODUCTION

Originalists have traditionally based the normative case for originalism<sup>1</sup> primarily on principles of popular sovereignty: the Constitution owes its legitimacy as higher law to the fact that it was ratified by the American people through a supermajoritarian process. As such, it must be interpreted according to the original meaning that it had at the time of ratification. To give it another meaning today is to allow judges to enforce a legal rule that was never actually embraced and enacted by the people. And there is no warrant in a democratic nation for unelected judges to strike down popularly enacted statutes unless those statutes violate higher laws by which the people collectively agreed to be bound.<sup>2</sup>

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<sup>1</sup> Many constitutional theories lay claim to the label of “originalism.” See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–62 (2009). What those theories generally have in common is that they treat “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004). Lawrence Solum elaborates:

All or almost all originalists agree that the original meaning of the Constitution was fixed at the time each provision was framed and ratified. Almost all originalists agree that original meaning must make an important contribution to the content of constitutional doctrine: Most originalists agree that courts should view themselves as constrained by original meaning and that very good reasons are required for legitimate departures from that constraint.

Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 36 (Grant Huscroft & Bradley W. Miller eds., 2011).

<sup>2</sup> See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (“When a judge goes beyond the meaning of the words that were enacted—to . . . what the courts think would meet the needs and goals of society—the judge has no democratic

Whatever the merits of this argument in general, it faces particular hurdles when applied to the Fourteenth Amendment. The Fourteenth Amendment was a purely partisan measure, drafted and enacted entirely by Republicans in a rump Reconstruction Congress in which the Southern states were denied representation; it would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. And it was ratified not by the collective assent of the American people, but rather at gunpoint. The Southern states had been placed under military rule, and were forced to ratify the Amendment—which they despised with an (un)holy hatred—as a condition of ending military occupation and rejoining the Union.<sup>3</sup> The Amendment may have enjoyed military legitimacy—might makes right, and the victor on the battlefield can dictate the terms of the peace.<sup>4</sup> And it surely enjoyed moral legitimacy—right is right, and the evil of racism flies in the face of freedom and justice.<sup>5</sup> But it can claim no warrant to democratic legitimacy through original popular sovereignty. It was added to the Constitution despite its open failure to obtain the support of the necessary supermajority of the American people.

This Article explores the fundamental challenge that this history poses to originalism—a challenge that originalists have ignored.<sup>6</sup> The point of this Article is not to question whether, as a formalist matter, the Fourteenth Amendment was properly promulgated and ratified. Despite some vigorous

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warrant.”); Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909, 972 (2005) (“[W]hat warrant did the judiciary have in overruling the legislature and executive if not done pursuant to the People’s prior authoritative act which was embodied in a determinate text?”).

<sup>3</sup> See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (requiring the Southern states to establish new governments under new state constitutions, grant the right to vote to African Americans, and ratify the Fourteenth Amendment before being readmitted to the Union).

<sup>4</sup> See Albert J. Esgain, *The Position of the United States and the Soviet Union on Treaty Law and Treaty Negotiations*, 46 MIL. L. REV. 31, 32 n.3 (1969) (noting that historically, “international law disregarded the effect of coercion in the conclusion of peace treaties” (citing 1 L. OPPENHEIM, INTERNATIONAL LAW 891–92 (H. Lauterpacht ed., 8th ed. 1955))).

<sup>5</sup> See Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 422 (2010).

<sup>6</sup> Some scholars have made a very broad charge that originalists have all but ignored the Fourteenth Amendment altogether. See Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1207 (2009) (arguing that, for originalists, the Fourteenth Amendment “remain[s] a bit of a frontier, relatively unexplored and little understood”); *id.* at 1209 (arguing that “originalists—with a few notable exceptions . . .—have devoted little if any attention to the Second Founding”); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (“The Fourteenth Amendment is the Mr. Cellophane of originalist writing. Judges, scholars, and ordinary citizens writing or speaking in the originalist tradition consistently ignore the original understanding of the Fourteenth Amendment . . .”). The argument here is different—that, even when they do write about the Fourteenth Amendment, originalists have ignored its uniquely weak claim to legitimacy through popular sovereignty.

objections in the past,<sup>7</sup> that question has been put to rest by the judgment of history, if nothing else.<sup>8</sup> And the point is certainly not to suggest that judges err today in enforcing the Fourteenth Amendment judicially. From a *nonoriginalist* perspective, the Amendment's dubious origins have little bearing on its modern authority, given its moral force and the near-universal support and acceptance that it currently enjoys.<sup>9</sup> My object is instead to question whether the Amendment's shady origins undermine the argument that judges should interpret it *according to its original meaning*.

I also mean to suggest the possibility that the shortcomings in the framing of the Fourteenth Amendment could seriously undermine the normative appeal of originalism more generally. Some originalists have conceded that, as a result of both incorporation and the increased emphasis on substantive due process and equal protection, the "great bulk of constitutional law involves state, not federal law and nearly all such rulings purport to be based on the Fourteenth Amendment. For all practical judicial purposes, the Fourteenth Amendment has virtually become the Constitution."<sup>10</sup> This may overstate the point, but it is certainly the case that the Fourteenth Amendment has assumed center stage in a great many of the

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<sup>7</sup> See, e.g., Joseph L. Call, *The Fourteenth Amendment and Its Skeptical Background*, 13 BAYLOR L. REV. 1 (1961); Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that It Poses to Our Democratic Government*, 11 S.C. L.Q. 484 (1959); Walter J. Suthon, Jr., *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953); State Sovereignty Comm'n of La., *Unconstitutional Creation of the Fourteenth Amendment*, 23 GA. B.J. 228 (1960); Editorial, *If*, WORLD (N.Y.), July 23, 1868, at 4.

<sup>8</sup> The definitive treatment of this question is a masterful article by John Harrison. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001). The most compelling argument expressing skepticism on the question, at least as a formalist matter, comes from Bruce Ackerman. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–100, 115–16 (1998).

<sup>9</sup> For instance, in 1994, 87% of Americans approved of the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). See Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP NEWS SERVICE (May 14, 2004), <http://www.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx>.

<sup>10</sup> Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 632 (1993) (footnote omitted); see also, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 3 (2d ed. 1997) ("The Fourteenth Amendment is the case study par excellence of what Justice Harlan described as the Supreme Court's 'exercise of the amending power,' its continuing revision of the Constitution under the guise of interpretation. Because the Amendment is probably the largest source of the Court's business and furnishes the chief fulcrum for its control of controversial policies, the question whether such control is authorized by the Constitution is of great practical importance." (footnotes omitted)). As for incorporated rights, "[m]uch recent scholarship has suggested that originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition [or as opposed] to that of 1791." Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 464 (2012); see also Josh Blackman, *Response, Originalism at the Right Time?*, 90 TEX. L. REV. SEE ALSO 269, 276 (2012) (arguing that, as a matter of proper originalist theory, incorporated rights should be interpreted according to their public meaning "in 1868 rather than 1791").

most controversial debates in constitutional law. As such, if the normative arguments in favor of originalism do not hold water when applied to the Fourteenth Amendment, then, as a practical matter, the normative appeal of originalism is severely diminished.

Part I of this Article sets out the traditional normative defense of originalism as grounded in notions of popular sovereignty, and also recounts related defenses of originalism that sound in contract theory and in the pragmatic superiority of supermajoritarian decisionmaking. Part II then documents the very different reality of the adoption of the Fourteenth Amendment, which was enacted without the assent of the American people. Finally, Part III explores the implications for originalism of this disconnect between theory and reality, and evaluates possible originalist responses.

## I. PUBLIC CONSENSUS AND NORMATIVE JUSTIFICATIONS FOR ORIGINALISM

Most originalists defend their constitutional theory on normative grounds.<sup>11</sup> And the most common and most influential normative defenses of originalism—those sounding in popular sovereignty, contract, and utilitarianism—all share a common fundamental premise: that the Constitution was adopted by the collective will of a supermajority of the American people.

### *A. Popular Sovereignty*

As prominent originalist Kurt Lash has noted, “the most common and most influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people.”<sup>12</sup>

The argument typically unfolds something like this. The Declaration of Independence establishes that the American people are the locus of all sovereignty: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>13</sup> As the Preamble to the

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<sup>11</sup> To be sure, not all originalists do so. Of late, there has been an increasing tendency among academic originalists to treat originalism as a purely interpretive, rather than normative, theory. This development is discussed in Part III.B.3, *infra*.

<sup>12</sup> Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111 (1999) (“Traditional defenses of originalism often employ some version of a popular sovereignty argument.”); Lash, *supra* (noting that “originalist jurists generally” defend originalism in popular sovereignty terms); Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 776 (noting that “the appeal to democratic theory” is “probably the most popular defense of originalism”); Lawrence B. Solum, *Semantic Originalism* 128 (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24, 2008), *available at* <http://ssrn.com/abstract=1120244> (“The most common justification for originalism is rooted in the ideas of popular sovereignty and democratic legitimacy.”).

<sup>13</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Constitution makes clear, it was “We the People” who created the Constitution—who chose by ratifying that document to vest some of our sovereignty in the federal government, subject to the various limitations and reservations spelled out in the Constitution.<sup>14</sup> The Constitution was a sovereign act of the American people (or, perhaps more precisely, the people of the various American states<sup>15</sup>); it owes its status as law to the fact that the people collectively assented to it through the ratification process.<sup>16</sup> And it owes its status as *higher* law—capable of trumping ordinary laws—to the fact that, in enacting it, a supermajority of the American people chose—through an extraordinary, more deeply democratic process—to bind future, ordinary, representative, majoritarian lawmaking within its confines.<sup>17</sup> That is to say, it owes its status as higher law to the fact that it represents the collective will of the people themselves, rather than the will of a majority of the people’s elected agents.<sup>18</sup> The people can, of course,

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<sup>14</sup> See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. . . . The principles, therefore, so established, are deemed fundamental. And . . . the authority, from which they proceed, is supreme . . . .”); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976) (“The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.”).

<sup>15</sup> See THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he Constitution is to be founded on the assent and ratification of the people of America . . . not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong.”).

<sup>16</sup> See, e.g., WHITTINGTON, *supra* note 12, at 150 (“The Constitution gained its initial authority from the consent of those who would be governed by it through the mechanism of ratification.”); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986) (“The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the court[] to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.”).

<sup>17</sup> See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 7, 17–18 (2005) (emphasizing the supermajoritarian nature of the ratification process); Lash, *supra* note 12, at 1444 (“As the product of a more deeply democratic process, constitutional rules have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process.”).

<sup>18</sup> See, e.g., THE FEDERALIST NO. 78, *supra* note 15, at 525 (Alexander Hamilton) (“If there should happen to be an irreconcilable variance between [a statute and a constitution], that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”); *id.* (declaring that “where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former”); Stein, *supra* note 5, at 409 (noting but not endorsing the originalist arguments that the “Constitution, it is said, was the work of the People, while contemporary statutes are merely the work of

change the Constitution by employing the similarly supermajoritarian amendment procedures of Article V; when that happens, it is the newly amended Constitution that reflects the sovereign will of the people as a whole.<sup>19</sup> But unless and until a supermajority of the people formally amend the Constitution, ordinary (majoritarian) laws enjoy weaker status under principles of popular sovereignty than do the higher (supermajoritarian) rules of the Constitution, and thus the former must bow to the latter.<sup>20</sup>

Since the Constitution owes its status as higher law to the fact that its precepts earned the assent of the American people, and since the Constitution can only be changed through the supermajoritarian ratification process, it necessarily follows, originalists claim, that contemporary judges must give the Constitution the same meaning that it had at the time of ratification.

The Constitution meant something when it was ratified, and it was that something that the people agreed would bind them. If a judge interprets the Constitution to have some meaning other than its original meaning—to dictate some rule other than the one by which the people agreed to be bound—then she acts illegitimately, as there is no democratic warrant for allowing a judge-made rule to trump a majoritarian law.<sup>21</sup> A statute enacted

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the People’s representatives” and “the work of the People takes precedence over the work of the representatives of the People”).

<sup>19</sup> See, e.g., *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) (“[A]ll amendments must have the sanction of the people of the United States, the original fountain of power . . . and . . . ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people’s will and be binding on all.”); THE FEDERALIST NO. 78, *supra* note 15, at 527 (Alexander Hamilton) (observing the “fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness”); Lash, *supra* note 12, at 1446 n.24 (arguing that “it is the ultimately majoritarian basis of the Constitution and its rules for amendment that establish the legitimacy of the document under the theory of popular sovereignty”); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 692 (1993) (“Article V provides a regularized procedure for those extraordinary occasions on which We the People reassert our quasi-revolutionary right to alter or abolish the form of government under which we live.”).

<sup>20</sup> See WHITTINGTON, *supra* note 12, at 203 (“Originalism provides that current majorities can only be restricted by the demonstrable intentions of prior supermajorities . . . .”); William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1043 (2004) (noting the originalist belief that “[a]lthough such original meaning will sometimes trump the will of current majorities, it is ultimately consistent with democracy because it reflects the will of engaged supermajorities”); Lash, *supra* note 12, at 1442 (“Popular sovereignty holds that laws created by ordinary political majorities are *less* legitimate than the supermajoritarian law of the Constitution due to their more attenuated relationship to the actual will of the people.”).

<sup>21</sup> See, e.g., McConnell, *supra* note 2 (“When a judge goes beyond the meaning of the words that were enacted—to . . . what the courts think would meet the needs and goals of society—the judge has no democratic warrant.”); Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909, 972 (2005) (“[W]hat warrant did the judiciary have in overruling the legislature and executive if not done pursuant to the People’s prior authoritative act



by an elected legislature has a far greater claim to democratic legitimacy than does a rule adopted by a small handful of unelected judges. But its claim is weaker than that of the supermajoritarian rules originally understood to be embodied in the Constitution.<sup>22</sup>

To get at the point from a slightly different angle, the Constitution, as originally understood and collectively assented to by a supermajority of the people, is higher law. The only way to change that higher law is to follow the amendment procedures that the higher law prescribes: a supermajority of the people must collectively agree to alter the rules by which democracy will be confined by amending the Constitution through the Article V process. When judges give the Constitution a new meaning in the course of adjudication, they change the rules of higher law illegitimately, outside of the Article V process. Sovereignty rests with the people, not with a handful of unelected judges.<sup>23</sup>

Countless originalists have developed these themes.<sup>24</sup> To give just a few examples,<sup>25</sup> Raoul Berger has argued that the “Constitution represents

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which was embodied in a determinate text?”); Jose Joel Alicea, *Originalism in Crisis: The Movement Toward Indeterminate Originalism* 143 (May 22, 2010) (unpublished manuscript) (on file with author) (“Ever wary of the possibility that Rule by the People might be supplanted with Rule by the Judge, originalism jealously guards the people’s sovereignty against encroachments by judicial actors.”); *id.* at 138 (“For an originalist, the Constitution comprises the written commands of the popular sovereign to the people’s agents in government. The relationship between sovereign and agent is hierarchical; the former gives orders to the latter, who has no legitimate basis for flouting these commands.” (footnote omitted)).

<sup>22</sup> See, e.g., Lash, *supra* note 12, at 1446 (“Popular sovereignty thus provides an answer to one of the most vexing problems in modern constitutional law: the countermajoritarian difficulty. . . . Popular sovereignty theory resolves the difficulty by grounding judicial review in the more deeply democratic law of the people.” (footnote omitted)).

<sup>23</sup> See, e.g., Elizabeth Price Foley, *Judicial Engagement, Written Constitutions, and the Value of Preservation: The Case of Individual Rights*, 19 *GEO. MASON L. REV.* 909, 910 (2012) (“[Nonoriginalist judges] are actively seeking to modify the written social compact to suit their own, or their perception of society’s, current preferences. Judicial activism is a usurpation of the proper judicial role, and it undermines the proper role of We the People. Only the People may amend the written constitution when a sufficiently large number (i.e., a supermajority) believes strongly enough that a formal, written modification of the social charter is necessary.”); BERGER, *supra* note 10 (arguing that nonoriginalist interpretation amounts to an improper judicial “exercise of the amending power” (quoting *Reynolds v. Sims*, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting)) (internal quotation marks omitted)); Jeffrey Goldsworthy, *The Case for Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 1, 42, 57 (““The people’ today, or their representatives, . . . have exclusive legal authority to change their own constitution. The most powerful objection to non-originalism is that it usurps their power to change their constitution.”); WHITTINGTON, *supra* note 12, at 155 (“[M]ethods that authorize judicial activism in disregard of the intentions of the founders implicitly cast the Court itself in the role of the sovereign, authorized to remake constitutional meaning in accord with some preferred conception of the political good.”); *id.* at 140.

<sup>24</sup> See, e.g., JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 190–91 (2005) (describing the “originalist understanding of the Constitution as law rooted in popular sovereignty . . . as a favored and powerful organizing concept” and noting that the heart of originalism has “depended on the sovereign act of ratification, which had made politically authoritative and legally compelling rules with discernable content”); Daniel A. Farber,

fundamental choices that have been made by the people, and the task of the Courts is to effectuate them . . . . When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power.”<sup>26</sup> That is to say, “the Justices’ substitution of their own meaning for that of the Founders displaces the choices made by the people in conventions that ratified the Constitution, and it violates the basic principle of government by consent of the governed.”<sup>27</sup> Similarly, Edwin Meese has asserted that only an originalist “judge is properly treating the Constitution as the supreme law and is enforcing the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue.”<sup>28</sup> And Justice Scalia has exclaimed:

I care for the people that ratified the Constitution. . . . The validity of government depends upon the consent of the governed, and you find that consent in what the people agreed to. So what the people agreed to when they adopted the Constitution, what they agreed to when they adopted the Bill of Rights is what ought to govern us. Now the Bill of Rights is . . . in a sense anti-democratic in that it prevents the current majority from doing what it would like to do. But in another sense, it is quite democratic. The Bill of Rights was adopted, after all, democratically. It was the people self-limiting their power. . . . [Nonoriginalist interpretation] is not being faithful to the will of the people, . . . not following the will of the governed.<sup>29</sup>

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*The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1098 (1989) (“Reduced to its essence, the [originalist] argument is this: If judges get their authority from the Constitution, and the Constitution gets its authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers.”).

<sup>25</sup> See also JACK M. BALKIN, *LIVING ORIGINALISM* 54–55 (2011); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143, 159–64 (1990) [hereinafter BORK, *THE TEMPTING OF AMERICA*]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) (asserting that “no argument that is both coherent and respectable can be made supporting [nonoriginalism] because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society”); Graglia, *supra* note 10, at 633–34; Rehnquist, *supra* note 14, at 706 (calling nonoriginalism “a formula for an end run around popular government”); The Honorable Justice Clarence Thomas, *Judging* (Apr. 8, 1996), in 45 U. KAN. L. REV. 1, 6–7 (1996); Steven G. Calabresi, Op-Ed., *The Right Judicial Litmus Test*, WALL ST. J., Oct. 1, 2007, at A23 (“Non-originalist judicial review severely distorts the allocation of powers that is central to the Constitution.”).

<sup>26</sup> BERGER, *supra* note 10, at 314.

<sup>27</sup> *Id.* at 22–23; see also *id.* at 402–27 (discussing the importance of originalism in limiting the judiciary’s ability to impose its policy preferences on the people).

<sup>28</sup> Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 10 (1988).

<sup>29</sup> *Original Intent and a Living Constitution* (C-SPAN television broadcast Mar. 23, 2010), 15:43 to 18:08, available at <http://www.c-spanvideo.org/program/292678-1> (remarks of Justice Scalia); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989) (arguing that originalism is less likely than nonoriginalism to lead to judges substituting their own preferences for those of the sovereign people).

The most sophisticated and thoughtful arguments along these lines have been offered by Michael McConnell and Keith Whittington. McConnell argues that an “essential characteristic[] of any theory of interpretation under our Constitution, which follow[s] from the function of constitutional interpretation in our system,” is that “it must be understood as having its origins in the consent of the governed.”<sup>30</sup> “The words of the Constitution are not authoritative for fetishistic reasons, but because they are the verbal embodiment of certain collective decisions made by the people.”<sup>31</sup> That is to say,

If the Framers’ words have authority for us today, this is because, in Chief Justice Marshall’s words, “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.” This, he said, “is the basis on which the whole American fabric has been erected.”<sup>32</sup>

“The theory of judicial review,” in turn, is “based on . . . the claim that in enforcing the Constitution [judges] are carrying out the will of the people.”<sup>33</sup> “It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions. To enforce *something else* . . . separates the text from the source of its authority.”<sup>34</sup> Hence the necessity for originalism: if “[a]ll power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it,” then “[i]t follows that the Constitution should be interpreted in accordance with their understanding.”<sup>35</sup> Judicial “interpretation must be fairly traceable to a decision that was made, at some level of intelligible principle, by the people in the course of constitution-making or amending.”<sup>36</sup> “If the Constitution is held to embody principles that the people did not choose, such a holding has no democratic legitimacy. Judicial review is not an

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<sup>30</sup> Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360 (1988).

<sup>31</sup> Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1278 n.45 (1997).

<sup>32</sup> *Id.* at 1278–79 (footnote omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

<sup>33</sup> *Id.* at 1279 n.45.

<sup>34</sup> *Id.*

<sup>35</sup> McConnell, *supra* note 2, at 1132; *see also* McConnell, *supra* note 31, at 1279 (“It would seem to follow that it is the principles to which the people assented, understood as nearly as is possible as they understood them, which should guide us today.”); *id.* at 1292 (“I have a great deal of affinity for the originalist notion that the Constitution must be read in light of the reasons that give it authority, from which it follows that the governing principles of the document, as understood by the Framers and Ratifiers, remain authoritative.”); McConnell, *supra* note 2, at 1132 (“If the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.”).

<sup>36</sup> McConnell, *supra* note 30.

intergenerational game of bait-and-switch.”<sup>37</sup> This, McConnell asserts, is “the theoretical foundation of originalism.”<sup>38</sup>

Whittington too “seeks to ground the authority of originalist jurisprudence . . . in a theory of popular sovereignty,”<sup>39</sup> and concludes that “popular sovereignty . . . dictates the adoption of an originalist method of interpretation.”<sup>40</sup> He repeats the traditional originalist arguments that “the people are taken to be sovereign, and the written text of the Constitution is taken to be the durable expression of their will”<sup>41</sup> and that “the durable will of the founders is authoritative because it represents the formal consent of the governed to the government, as they voluntarily accept the future application of coercive force to restrain individual citizens and government officials.”<sup>42</sup> He further notes that this, in turn, necessitates originalist jurisprudence because “[a]bandoning originalism allows the judiciary to impose value choices that have not been authorized by democratic action.”<sup>43</sup>

Whittington asserts, however, that this traditional justification for originalism is “inadequate” and “underdeveloped.”<sup>44</sup> He thus sets out to articulate a “fully developed originalist theory of popular sovereignty.”<sup>45</sup> His theory is rich and refined,<sup>46</sup> and cannot easily be summarized in a few paragraphs. But at its heart, it emphasizes both the uniquely deep, deliberative nature of constitution making, and the continued ability of the people to remake the Constitution to reflect their current will.

First, Whittington argues that the Constitution reflects the sovereign will of the people in a way that statutes do not because the Constitution was the product of a unique process of open deliberation and collaboration between the majority and the minority.<sup>47</sup> Whereas the legislative process involves party-driven, factionalized majoritarianism, the constitution-making process involves the people coming together to deliberate for the greater good. At the end of that process, members of the minority acquiesce in the final product because they recognize that they had a fair voice in the deliberation and because they accept “the Constitution as written as the

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<sup>37</sup> *Id.*

<sup>38</sup> McConnell, *supra* note 2, at 1132; *see also id.* at 1137 (“Originalism refers to the will of the people at the founding . . .”).

<sup>39</sup> WHITTINGTON, *supra* note 12.

<sup>40</sup> *Id.* at 154.

<sup>41</sup> *Id.* at 112.

<sup>42</sup> *Id.*; *see also id.* at 59 (noting that the constitutional “text is not simply a list of words but is the embodied will of the people”).

<sup>43</sup> *Id.* at 112.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 110–59.

<sup>47</sup> *See id.* at 145–49.

authoritative expression of the popular will, binding themselves as well as their opponents.”<sup>48</sup>

Second, Whittington disclaims reliance on any sort of theory of “tacit consent” by the people in our time who did not themselves agree to the Constitution.<sup>49</sup> Instead, he focuses on a notion of “potential sovereignty”—that the Constitution is binding today because it preserves for the present people the ability to make higher law in the event that they choose to do so. This, in turn, dictates the necessity of originalist interpretation:

[O]riginalism secures the effectiveness of a future expression of popular will. By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people. Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions.<sup>50</sup>

“We can replicate the fundamental political act of the founders only if we are willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own.”<sup>51</sup> As such, government officials (including judges) who act as agents of the people must confine themselves to the authority granted to them by the Constitution, as it was understood by the people who enacted it. “By enforcing the original terms of the constitutional contract as articulated by its authors, an originalist Court ensures that the efforts of the sovereign are not in vain, that its will is effectuated in its absence.”<sup>52</sup> In this manner, the “Court is not simply an antidemocratic feature of American politics but is an instrument of the people in preserving the highest promise of democracy.”<sup>53</sup> This is the sense in which the “fundamental basis for the authority of originalism is its capacity to retain a space for the popular sovereign.”<sup>54</sup>

### B. *The Constitution as Contract*

A related defense of originalism sounds in principles of contract.<sup>55</sup> Michael Dorf explains that, as noted above, many originalists believe that

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<sup>48</sup> *Id.* at 146.

<sup>49</sup> *See id.* at 129.

<sup>50</sup> *Id.* at 156.

<sup>51</sup> *Id.* at 133.

<sup>52</sup> *Id.* at 156.

<sup>53</sup> *Id.* at 111.

<sup>54</sup> *Id.* at 154; *see also id.* at 111 (arguing that “originalism . . . enforces the authoritative decision of the people acting as sovereign”).

<sup>55</sup> *See, e.g.,* Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J.L. & LIBERTY 517, 525 (2009) (“[T]he strongest argument for originalism in my view comes from the idea that a constitution is essentially a contract.”); *id.* at 520 (noting that originalism is based on the “underlying idea that a constitution is indeed a pact, a social contract designed to create legitimate governing institutions

“the Constitution derives its authority from its ratification during particular periods in American history. Under this view, any departure from the understandings of those discrete periods robs constitutional interpretation of its claim to legitimacy.”<sup>56</sup> In other words, “[t]he political theory underlying strict originalism is a form of social contract theory.”<sup>57</sup>

Some originalists have taken the contract analogy to the next level. They opine that, because “the Constitution was designed and approved like a contract” among the American people,<sup>58</sup> the law should treat it that way—as something of a legally binding contract. It follows that the Constitution must be interpreted to reflect the actual “meeting of the minds” of the American people.<sup>59</sup> That is to say, it must be interpreted to reflect the meaning that was understood by those who contractually agreed to be bound by it.<sup>60</sup> Judge Easterbrook elaborates: “The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist . . . interpretation by the judicial branch. Otherwise a pack of lawyers is changing the terms of the deal, renegeing on behalf of a society that did not appoint them for that purpose.”<sup>61</sup>

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responsive to the political and social divides of a society”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1139 (2003) (noting the “reliance-based contract theory” of constitutional interpretation” (footnote omitted) (quoting David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 756 (2001))).

<sup>56</sup> Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997).

<sup>57</sup> *Id.*; see also Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 OXFORD J. LEGAL STUD. 525, 553–54 (2003) (noting that contract-based theories of originalism are grounded in the authority of the ratifiers to establish binding rules).

<sup>58</sup> Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998); see also Meese, *supra* note 28, at 8 (“A . . . purpose of a written constitution is to confer democratic legitimacy by formally expressing the consent of the people to the government’s exercises of authority. Thus, in a democracy or a republic (as opposed to a constitutional monarchy or oligarchy), a constitution becomes a social contract by which the people agree to be bound by laws which are made pursuant to and in accord with the Constitution’s commands.”). Alternatively, the Constitution might be viewed as a “contract between the people and the Government.” 143 CONG. REC. 2460 (1997) (statement of Rep. Ron Paul).

<sup>59</sup> *Cf.* *Bowsher v. Merck & Co.*, 460 U.S. 824, 864 (1983) (Blackmun, J., concurring in part and dissenting in part) (“A contract, after all, is a meeting of the minds.”); *Richmond & Alleghany R.R. v. R.A. Patterson Tobacco Co.*, 169 U.S. 311, 314 (1898) (“The contract is the concrete result of the meeting of the minds of the contracting parties.”).

<sup>60</sup> See MARK R. LEVIN, *LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO* 36 (2009) (“The Conservative is an *originalist*, for he believes that much like a contract, the Constitution sets forth certain terms and conditions for governing that hold the same meaning today as they did yesterday and should tomorrow.”).

<sup>61</sup> Easterbrook, *supra* note 58.

*C. Supermajoritarianism as Utilitarianism*

A recent advance in originalist theory comes from the work of John McGinnis and Michael Rappaport, who, in a series of articles over the past several years, have articulated “a new normative defense of originalism.”<sup>62</sup> This new defense is pragmatic and utilitarian; it seeks to establish that originalism produces normatively desirable rules for society.<sup>63</sup> That is to say, “originalism advances the welfare of the present day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories.”<sup>64</sup>

That is so, argue McGinnis and Rappaport, because the Constitution required supermajoritarian consensus to enact and amend, and a “constitution that is enacted under a strict supermajority process is likely to be desirable.”<sup>65</sup> “Supermajoritarian passage has many benefits, including promoting consensus and encouraging desirable long-term provisions.”<sup>66</sup> Only “provisions that enjoy consensus support” can make their way into a Constitution that features a supermajoritarian enactment and amendment process;<sup>67</sup> constitutional provisions can “not generally be enacted unless they receive[] the support of significant portions of both parties.”<sup>68</sup> Thus, constitutional provisions will “not be based on partisan motivations.”<sup>69</sup> “In this more cooperative environment, legislators would be more likely to focus on the interests citizens have in common rather than their parties’ narrow interests.”<sup>70</sup> Laws enacted to serve shared, long-term interests are inherently better than laws enacted to serve the immediate and narrow interests of the majority party.<sup>71</sup>

It follows from all of this that judges should interpret the Constitution “according to its original meaning to preserve the benefits of the widespread agreement that gave it birth.”<sup>72</sup> “It was,” after all, “by virtue of

<sup>62</sup> John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

<sup>63</sup> See *id.* at 1698 & n.6; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383 (2007).

<sup>64</sup> McGinnis & Rappaport, *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1699.

<sup>67</sup> *Id.* at 1706.

<sup>68</sup> *Id.* at 1708.

<sup>69</sup> *Id.* at 1706.

<sup>70</sup> *Id.* at 1708. Cf. WHITTINGTON, *supra* note 12, at 141 (“The fact that the constitution will be controlling not just today but also tomorrow directs the sovereign to consider those likely effects as well, pushing him toward a more universal perspective.”).

<sup>71</sup> See McGinnis & Rappaport, *supra* note 63, at 387 (“[M]ajorities in a party system tend to be partisan. Because of partisanship, majorities will tend to abuse their power . . .”).

<sup>72</sup> McGinnis & Rappaport, *supra* note 62.

that meaning that these provisions received the widespread support that remains the touchstone of their beneficence.”<sup>73</sup>

## II. THE LACK OF A SUPERMAJORITARIAN, NATIONAL, BIPARTISAN, AND DELIBERATIVE CONSENSUS IN THE PROMULGATION AND RATIFICATION OF THE FOURTEENTH AMENDMENT

Part I of this Article recounted the Rockwellian portrait of American constitution making—as painted by originalists—as a process of near-universal, nonpartisan, supermajoritarian agreement among the American people. This Part seeks to demonstrate a chasmic divide between the originalists’ ideal and the reality of the making of the Fourteenth Amendment.<sup>74</sup>

### A. *Supermajoritarian, National Support?*

Article V requires double supermajorities to amend the Constitution: “two thirds of both Houses [of Congress]”<sup>75</sup> and “three fourths of the

<sup>73</sup> *Id.* at 1696.

<sup>74</sup> The Fourteenth Amendment provides:

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

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

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

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

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

U.S. CONST. amend. XIV.

<sup>75</sup> *Id.* art. V. Actually, Article V affords an alternative avenue for proposing amendments: “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments.” *Id.* This avenue, which also requires a supermajority at the proposal stage,



several States.”<sup>76</sup> Scholars have noted that “the real aim and practical effect of the complicated amending procedure was . . . to ensure that passage of an amendment would require a *nationally* distributed majority.”<sup>77</sup> One cannot hope to secure the assent of two-thirds of both Houses of Congress—especially the Senate, which is not apportioned by population<sup>78</sup>—and three-fourths of the states without a proposal that enjoys widespread support throughout the entirety of the country.

It is this near-universal support that gives the Constitution and its amendments their authority in the eyes of the originalists whose work is discussed above in Part I. Yet the Fourteenth Amendment manifestly was not enacted with widespread, national, supermajoritarian support.

The story of the Fourteenth Amendment’s enactment has been well-told elsewhere,<sup>79</sup> and the object here is not to offer a detailed and definitive account. A brief summary will do.

When the Civil War ended in early 1865, some of the previously secessionist governments of the Confederate states attempted to return to

has never been used. See Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 CONST. COMMENT. 53, 60 (2012).

<sup>76</sup> U.S. CONST. art. V. Article V does not, however, require supermajority votes in each state legislature at the ratification stage, if Congress chooses ratification by state legislatures, rather than by state conventions. See Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 203 (2002) (“While Article V requires ratification by three-fourths of the state legislatures, only a simple majority is required in each state legislature.”). The states are permitted to determine their own thresholds for ratification. See *Dyer v. Blair*, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (three-judge court) (Stevens, J.). A few have imposed supermajority requirements. See *id.* at 1305 n.34.

<sup>77</sup> MARTIN DIAMOND, *Democracy and The Federalist: A Reconsideration of the Framers’ Intent*, in AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT 17, 23–24 (William A. Schambra ed., 1992); see also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125–26 (1996) (explaining Article V’s emphasis on national supermajorities). Madison explained:

If we try the Constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established Government. Were it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character: In rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character.

THE FEDERALIST NO. 39, *supra* note 15, at 257 (James Madison).

<sup>78</sup> See U.S. CONST. art. I, § 3, cl. 1.

<sup>79</sup> See, e.g., JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984); JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997).

the Union, but Presidents Lincoln and Johnson refused to recognize them.<sup>80</sup> Instead, Johnson appointed for those states provisional governors who convened conventions of voters loyal to the Union (as determined by Johnson's own criteria). Those conventions then rejected secession and legislated against slavery.<sup>81</sup>

The conventions also facilitated elections of new state and federal legislators. Most of the new state legislatures quickly ratified the proposed Thirteenth Amendment, ending slavery, and the Secretary of State of the United States accepted those ratifications and counted them in declaring that Amendment to be adopted.<sup>82</sup>

As the Congress prepared to meet for a new session at the end of 1865, the Southern states sent their newly elected Senators and Representatives to Washington. But the Republican leadership of the House and Senate refused to seat them.<sup>83</sup> The resulting partial, "rump" Congress—devoid of Southern representation—then proposed the Fourteenth Amendment.<sup>84</sup>

The Fourteenth Amendment made it through the Congress only because the congressional leaders (from the North) refused to seat the elected Senators and Representatives from the South. The Amendment received 120 votes in the House and 33 votes in the Senate—enough to exceed the constitutional threshold of a two-thirds majority only because the elected congressional contingents from the Southern states had not been permitted to vote. Had the full complement of Senators and Representatives from the South been seated (and thus included in the denominator), the Amendment would have "required 162 votes in the House" and 48 votes in the Senate to pass—far more than it would have received, given the universal opposition in the South.<sup>85</sup> As Bruce Ackerman notes, "[e]very student of the period recognizes that, were it not for the purge of Southern Senators and Representatives, the 'Congress' meeting in June [of 1866] would *never* have mustered the two-thirds majorities required to propose the Fourteenth Amendment."<sup>86</sup>

On top of that, the Amendment would never have been ratified by three-fourths of the states without the use of force and coercion. There were thirty-seven states in 1868,<sup>87</sup> and the Constitution required twenty-eight of

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<sup>80</sup> See Harrison, *supra* note 8, at 393.

<sup>81</sup> See *id.* at 395–97.

<sup>82</sup> See *id.* at 396–98.

<sup>83</sup> See *id.* at 398–99. As Bruce Ackerman has pointed out, this presents something of a disconnect. See 2 ACKERMAN, *supra* note 8, at 103. The Southern states were treated as part of the Union for purposes of ratifying the Thirteenth Amendment, but not as part of the Union when constituting the Congress that enacted the Fourteenth Amendment.

<sup>84</sup> See Harrison, *supra* note 8, at 401–04. The text of the Fourteenth Amendment is reproduced in note 74, *supra*.

<sup>85</sup> See 2 ACKERMAN, *supra* note 8, at 102, 174; see also Harrison, *supra* note 8, at 404.

<sup>86</sup> 2 ACKERMAN, *supra* note 8, at 102.

<sup>87</sup> Harrison, *supra* note 8, at 412.

them to ratify. That meant that a mere ten states voting no would have been enough to defeat the Amendment. Of the eleven former Confederate states, Tennessee—unique among the Southern states with a Republican-dominated legislature—was the only one to initially vote to ratify the Amendment.<sup>88</sup> (Tennessee’s process of ratification was, however, sufficiently peculiar—a quorum was reached only through the use of force against opposition legislators—as to raise legitimate doubts about whether its people were really in favor.)<sup>89</sup>

Thus, it was impossible to ratify the Amendment without the support of some of the recalcitrant former Confederate states. Indeed, given that three non-Confederate states—Maryland, Delaware, and Kentucky—voted against ratification, and a fourth, California, took no action because its legislature was deadlocked,<sup>90</sup> the votes of *several* Southern states were necessary to secure the Amendment’s passage.

1. *Southern Resistance.*—Those votes did not come—and would never have come—voluntarily. It would be difficult to overstate the depth and breadth of opposition to the Fourteenth Amendment in the South. Leading Southern newspapers and politicians routinely described it as an “insulting outrage,”<sup>91</sup> an “abominable,”<sup>92</sup> “obnoxious measure,”<sup>93</sup> and a “nefarious,”<sup>94</sup> “foul,”<sup>95</sup> “monstrous proposition.”<sup>96</sup> There was a remarkable

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<sup>88</sup> See *id.* at 404 & n.156. Congress promptly rewarded Tennessee by readmitting it to the Union and seating its Senators and Representatives in Congress. See *id.* at 404.

<sup>89</sup> See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 189 (1908) (“And in the case of Tennessee it may be said that it had been ratified against the will of the people of that State.”). Opponents of the Amendment in the state legislature sought to avoid a vote in order to defeat the quorum requirement, but they were tracked down, arrested, and dragged to the legislative chamber—despite the support of their constituents, who tried to help them hide, and despite writs of habeas corpus issued by the state courts demanding that they be released. See JAMES, *supra* note 79, at 19–23. The Speaker of the Tennessee House refused to sign a certificate of ratification because he believed that there had been no legitimate quorum in the legislature, but Congress simply ignored his objections. See *id.* at 26. In the words of one historian, the ratification of the Fourteenth Amendment in Tennessee was the result of “some of the most violent and irregular scenes in the history of parliamentary government in America.” 1 ELLIS PAXSON OBERHOLTZER, *A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 187* (1917).

<sup>90</sup> See CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 5 (1912). California’s House was controlled by Democrats, and its Senate was controlled by Republicans, “so that it was useless to vote.” FLACK, *supra* note 89, at 207.

<sup>91</sup> MISSISSIPPI SENATE JOURNAL 8 (1866), quoted in JAMES, *supra* note 79, at 150 (remarks of Mississippi Governor Benjamin G. Humphreys).

<sup>92</sup> Editorial, *The Constitutional Amendment In and Out of Congress*, DAILY SUN (Ga.), Jan. 12, 1867, at 2, quoted in BOND, *supra* note 79, at 235.

<sup>93</sup> Editorial, *The Constitutional Amendment*, TRI-WKLY. CONSTITUTIONALIST (Augusta, Ga.), Oct. 17, 1866, at 2, quoted in JAMES, *supra* note 79, at 92.

<sup>94</sup> Editorial, *National Politics*, WILMINGTON J. (N.C.), Sept. 20, 1866, at 2, quoted in JAMES, *supra* note 79, at 102.

<sup>95</sup> Editorial, *The Bad Faith of the Radicals*, FED. UNION (Milledgeville, Ga.), Oct. 16, 1866, quoted in JAMES, *supra* note 79, at 92.

consensus against it among both Southern politicians and the (white) Southern people.<sup>97</sup>

Southerners felt that the Amendment was downright insulting and debasing to them as a people. “‘Humiliating’ and ‘degrading’ were the adjectives most frequently used to describe its provisions.”<sup>98</sup> The people felt that the process by which the Amendment had been proposed—in a Congress that refused to seat the Southern contingents—combined with the Amendment’s draconian terms—providing for some measure of racial equality, forcing the enfranchisement of African Americans while at the same time disenfranchising many former white Confederates, and vastly expanding the power of the federal government—were “intentionally shamefully offensive to the Southern people.”<sup>99</sup> The “true and gallant Southern man feels his cheeks mantle with shame to think of it.”<sup>100</sup> As one Southerner colorfully put it in a letter to the Governor of North Carolina, it felt as though Congress was asking the men of the South to “[d]rink our own piss and eat our own dung.”<sup>101</sup>

This they would not do.<sup>102</sup> The common view was that the “Southern people ‘should not at least cooperate in [their] own humiliation’” by ratifying the Fourteenth Amendment.<sup>103</sup> “The very idea [was] too disgusting and shocking to be entertained by the Southern mind. . . . The shame of the deed, if done, would resound throughout all the ages of the world.”<sup>104</sup> It

<sup>96</sup> JAMES, *supra* note 79, at 103 (quoting N.C. ARGUS, Oct. 11, 1866).

<sup>97</sup> See Joseph B. James, *Southern Reaction to the Proposal of the Fourteenth Amendment*, 22 J. S. HIST. 477, 477, 482 (1956) (noting the “remarkable consensus” of opposition in the Southern legislatures, and the “active public opinion in the South against the Fourteenth Amendment”); JAMES, *supra* note 79, at 10 (“Before any state in the South had acted, the *Chicago Tribune* summarized opinion from Southern newspapers as almost unanimously opposed to the amendment.” (citing Editorial, *The South and the Offer of Congress*, CHI. TRIB., June 21, 1866)). The views of Southern blacks will be considered in Part III, *infra*.

<sup>98</sup> BOND, *supra* note 79, at 55.

<sup>99</sup> Editorial dated June 22, 1866, *Reconstruction*, WILMINGTON J. (N.C.), June 28, 1866, at 4, *quoted in* JAMES, *supra* note 79, at 101.

<sup>100</sup> BOND, *supra* note 79, at 38 (quoting OXFORD FALCON (Miss.), Nov. 11, 1866) (referring to Section 3 of the Amendment).

<sup>101</sup> Letter from D.F. Caldwell to Jonathan Worth (Sept. 30, 1866), *in* 2 THE CORRESPONDENCE OF JONATHAN WORTH 802 (J.G. de Roulhac Hamilton ed., 1909) (emphasis omitted), *quoted in* BOND, *supra* note 79, at 55.

<sup>102</sup> See, e.g., Editorial, *The Constitutional Amendment—Duty of the Southern States*, GA. WKLY. TELEGRAPH, June 18, 1866, at 5, *quoted in* JAMES, *supra* note 79, at 82 (“Every honest Southerner will reject with scorn the infamous condition, and despise the craven spirits that suppose us capable of such base submission.”). Even some Northerners thought that it was “impossible for any decent Southerner ever to vote for it.” Letter from John Quincy Adams to Montgomery Blair (Nov. 29, 1866), *quoted in* JAMES, *supra* note 79, at 120.

<sup>103</sup> Editorial, *Congressional Reconstruction—The Amendment*, DAILY CLARION & STANDARD (Jackson, Miss.), June 20, 1866, at 2, *quoted in* JAMES, *supra* note 79, at 10.

<sup>104</sup> Editorial, *The Legislature and the Constitutional Amendment*, RICH. WHIG, Jan. 9, 1867 (emphasis omitted) (quoting LOUISVILLE J.), *quoted in* BOND, *supra* note 79, at 147.

would be, according to the Arkansas legislature's Committee on Federal Relations, "a sacrifice of principle, dignity, and self-respect" and an "act of disgrace."<sup>105</sup> If the South were to ratify, she would, according to Florida Governor David Walker, be "eviscerated of her manhood [sic], despoiled of her honor, recreant of her duty, and without her self-respect."<sup>106</sup> As the Texas Senate Committee on Federal Relations put it, ratification would indicate the "loss of our honor as a people, and our self-respect as individual men."<sup>107</sup>

The South was therefore fervently unwilling to ratify, even though it was understood that the failure to do so would surely prevent the Congress from readmitting the former Confederate states to the Union.<sup>108</sup> Even at that price, the Amendment was simply too vile to the Southern states for them to voluntarily give their consent.<sup>109</sup> The Governor of North Carolina flatly declared that "[n]o Southern State, where the people are free to vote, will adopt it."<sup>110</sup> As the joint committee of the North Carolina legislature to which the Amendment had been referred put it, the South "can never consent to it,—Never!"<sup>111</sup>

There were a number of reasons for the South's vehement, hysterical opposition. For one thing, of course, Southerners objected to the process by which the Amendment had been proposed—by a Congress from which the Southern contingents had been excluded.<sup>112</sup> But the South also objected

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<sup>105</sup> 6 AMERICAN ANNUAL CYCLOPAEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1866, at 27 (D. Appleton & Co. eds., 1868), *quoted in* JAMES, *supra* note 79, at 99.

<sup>106</sup> BOND, *supra* note 79, at 173 (internal quotation marks omitted); *see also, e.g.*, Editorial, *Gov. Murphy's Message*, DES ARC CITIZEN, Nov. 17, 1866, at 2, *quoted in* BOND, *supra* note 79, at 194 (arguing that the Amendment "destroys the honor of Arkansas, insults the memory of her noble dead, and writes infamy and disgrace upon her brow").

<sup>107</sup> JOURNAL OF THE SENATE OF TEXAS, ELEVENTH LEGISLATURE 423 (1866), *quoted in* James, *supra* note 97, at 485; *see also* James, *supra* note 97, at 485 ("Such words were to be repeated endlessly in the South . . .").

<sup>108</sup> *See* James, *supra* note 97, at 489 ("Most newspapers took the attitude of the Abbeville (South Carolina) *Press* that it would be better 'to remain forever unrepresented than accept terms so humiliating.'"); Editorial dated June 22, 1866, *Reconstruction*, WILMINGTON J. (N.C.), June 28, 1866, at 4, *quoted in* JAMES, *supra* note 79, at 101 (arguing that it would be better to submit to a provisional government than to surrender "honor and manhood" voluntarily).

<sup>109</sup> *See, e.g.*, BOND, *supra* note 79, at 38 (arguing that "no honorable people would voluntarily sanction" the Amendment (quoting JACKSON WKLY. CLARION, Oct. 10, 1866)); Editorial, *Congressional Action*, NATCHEZ DAILY COURIER (Miss.), June 5, 1866, at 2, *quoted in* JAMES, *supra* note 79, at 148 ("[W]e trust no Southern State will ever yield its sanction.").

<sup>110</sup> Letter from Jonathan Worth to Benjamin S. Hedrik (July 4, 1866), *reprinted in* 2 THE CORRESPONDENCE OF JONATHAN WORTH, *supra* note 101, at 666; James, *supra* note 97, at 469 n.8.

<sup>111</sup> JAMES, *supra* note 79, at 107.

<sup>112</sup> *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 93–96 (1988). The *Little Rock Daily Gazette*, for instance, objected that the Amendment was improper because it was never "acted upon by a Congress of such a character as is provided for by the Constitution, inasmuch as nearly one-third of the States were refused representation

vociferously on the merits. Two of the principal substantive objections were that the Amendment treated blacks as the equals of whites and that it undermined federalism by transferring far too much authority to the federal government.<sup>113</sup>

First the racial issue. As William Nelson has noted, “[m]uch of the opposition to the Fourteenth Amendment, both Northern and Southern, was deeply racist in tone and character.”<sup>114</sup> Section 1 of the Amendment—which contains the Citizenship Clause, the Equal Protection Clause, the Privileges or Immunities Clause, and the Due Process Clause<sup>115</sup>—clearly mandated some substantial degree of racial equality. For that reason, Southerners derisively referred to the Fourteenth Amendment as the “negro equalization amendment,”<sup>116</sup> and were terrified that it would “giv[e] negroes political and social equality with the whites.”<sup>117</sup> (It might even, they worried, someday be interpreted to preclude laws banning interracial marriage.)<sup>118</sup> White Southerners adamantly refused to support an amendment that would “compel [them] to live on a level with the sickening stench of degraded humanity.”<sup>119</sup>

In addition, Section 2 of the Amendment—which apportioned seats in the House of Representatives by population, but proportionally reduced the representation of states that do not have universal suffrage for adult men<sup>120</sup>—appeared to force the Southern states to enfranchise the freed slaves, else they would drastically reduce their own power in Congress. This too was unacceptable. Southerners believed it “a stupendous folly to remove the blacks from the tutelage of the superiour [sic] race.”<sup>121</sup> As

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in the Congress which acted upon this amendment.” *Constitutional Amendment*, LITTLE ROCK DAILY GAZETTE, Dec. 13, 1866, at 2, quoted in NELSON, *supra*, at 93 & 227 n.14.

<sup>113</sup> See NELSON, *supra* note 112, at 96; Editorial, *The Constitutional Amendments*, NATCHEZ DAILY COURIER (Miss.), June 14, 1866, at 2, quoted in BOND, *supra* note 79, at 37 (declaring that the “amendments . . . stink in the nostrils of honest men”); BOND, *supra* note 79, at 215 (objecting that the Amendment would “permanently change the form of government [and] force negro equality and negro suffrage upon the country” (quoting GALVESTON WKLY. NEWS, Feb. 14, 1866)).

<sup>114</sup> NELSON, *supra* note 112, at 96.

<sup>115</sup> See *supra* note 74.

<sup>116</sup> BOND, *supra* note 79, at 86 (quoting S.W., Oct. 10, 1866).

<sup>117</sup> *The Constitutional Amendment*, DAILY ARK. GAZETTE (Little Rock), Nov. 2, 1866, at 2, quoted in BOND, *supra* note 79, at 192; see also, e.g., FLACK, *supra* note 89, at 158 (opining that the primary objection to the Amendment is to Section 1, which “forbids a State from depriving him (a negro) of any rights or privileges which a white man may possess” (quoting MONTGOMERY MAIL, Feb. 1867)).

<sup>118</sup> See BOND, *supra* note 79, at 59 (discussing the report of the North Carolina Joint Select Committee).

<sup>119</sup> Editorial, *Negro Equality—The Civil Rights Law Begins to Operate*, ROME WKLY. COURIER (Ga.), Apr. 27, 1866, at 1, quoted in BOND, *supra* note 79, at 232.

<sup>120</sup> See *supra* note 74.

<sup>121</sup> Editorial, DAILY RICH. EXAMINER, Jan. 6, 1866, at 2, quoted in NELSON, *supra* note 112, at 98; see also JAMES, *supra* note 79, at 111 (“No sane man would desire to extend the right of suffrage to these people without ‘abridgement’ . . . .” (quoting FLORIDA HOUSE JOURNAL, 2d Session 75–80 (1866) (report of Joint Committee on Federal Relations))).

Georgia Governor C.J. Jenkins explained, white Southerners believed that it was foolish to give the vote to the blacks, “nearly all of whom are notoriously unqualified for it.”<sup>122</sup> Indeed, many Southerners viewed the Amendment as a “nefarious conspiracy to transfer, so far as crafty and iniquitous legislation can effect the object, the government, the civilization of these States from the white race to negroes.”<sup>123</sup>

On top of (and perhaps closely related to) these viciously racist objections, Southerners articulated equally strident federalist concerns. “[T]he perennial Southern obsession with states’ rights,” explains one historian, “permeated the general public discussion” of the Fourteenth Amendment.<sup>124</sup> The South was concerned that the Amendment would grant far too much legislative power to the federal Congress: “It confers in Congress large and undefined power, at the expense of the reserved rights of the State. It transfers to the United States a criminal and police regulation over the inhabitants of the States, touching matters purely domestic.”<sup>125</sup> Indeed, Southerners thought that the Amendment would give Congress “absolute control over all the people of a State and their domestic concerns.”<sup>126</sup> That, in turn, would “alter the form and fashion of our Government . . . [and] centralize all power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capital.”<sup>127</sup> As Florida Governor David Walker put it:

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<sup>122</sup> 4 THE CONFEDERATE RECORDS OF THE STATE OF GEORGIA 545 (Allen D. Candler ed., 1910), *quoted in* JAMES, *supra* note 79, at 91; *see also* JAMES, *supra* note 79, at 61 (noting that a Texas Senate committee argued that blacks were not morally or intellectually qualified to vote); *id.* at 94 (“[Southerners] objected to black suffrage most of all, for they believed that largely uneducated population incapable of governing.”).

<sup>123</sup> JOURNAL OF THE HOUSE OF REPRESENTATIVES, ELEVENTH LEGISLATURE, STATE OF TEXAS 578–79 (1866) (Committee on Federal Relations), *quoted in* James, *supra* note 97, at 484.

<sup>124</sup> BOND, *supra* note 79, at 102. *See, e.g., id.* at 103 (dubbing the Amendment “a violation of the rights of one quarter of the states, . . . a gross usurpation of the rights of the states, . . . a centralization of power in the national government” (omissions in original) (quoting MONTGOMERY DAILY MAIL, Oct. 19, 1866 (quoting Alabama Governor Robert M. Patton)); BOND, *supra* note 79, at 128 (declaring the Amendment to be “subversive of all State rights” (quoting ABBEVILLE PRESS (S.C.), Oct. 19, 1866)).

<sup>125</sup> BOND, *supra* note 79, at 39 (quoting JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISSISSIPPI 78–79 (1866) (report of the Mississippi Joint Standing Committee on State and Federal Relations)).

<sup>126</sup> BOND, *supra* note 79, at 194 (quoting LITTLE ROCK DAILY CONSERVATIVE, Apr. 12, 1867).

<sup>127</sup> JOURNAL OF THE SENATE OF TEXAS, ELEVENTH LEGISLATURE 422–23 (1866) (report of the Texas Senate Committee on Federal Relations), *quoted in* JAMES, *supra* note 79, at 61; *see also* BOND, *supra* note 79, at 37 (objecting that the Amendment would transfer “all power to an oligarch in Congress” (quoting VICKSBURG DAILY HERALD (Miss.), June 1, 1866)); Editorial, *The Legislature*, CHARLESTON DAILY COURIER, Nov. 27, 1866, at 2, *quoted in* JAMES, *supra* note 79, at 117 (“Whether we consider the manner of its proposal or the nature of its provisions, it is alike inconsistent with statesmanship or policy. . . . It changes the character of the Government by transferring to Congress the supreme power over the States.”).

These two Sections [1 and 5] taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely changing the form of the government.<sup>128</sup>

One newspaper editorialist wondered, “What evil, then, . . . could Congress fasten upon the Southern States which is not constitutionally and legally provided for in this amendment?”<sup>129</sup>

The South further worried that the Amendment would also unduly augment the power of the federal *judiciary* at the expense of its state counterparts. It “would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity.”<sup>130</sup>

In combination, the South believed, this augmentation of federal legislative and judicial power would work an unacceptable, fundamental change in the very nature of our country.<sup>131</sup> It would “destroy the limitations of the Constitution, and make the United States Government omnipotent.”<sup>132</sup> One Southerner phrased the concern in these terms:

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<sup>128</sup> JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF FLORIDA AT THE 2D SESSION OF THE FOURTEENTH GENERAL ASSEMBLY 8 (J.B. Oliver 1866), *quoted in* BOND, *supra* note 79, at 173–74; *see also* JOURNAL OF THE SENATE OF ARKANSAS, SIXTEENTH SESSION 259–60 (Little Rock, Price & Barton 1870) (report of the Arkansas Committee on Federal Relations), *quoted in* BOND, *supra* note 79, at 196 (“The great and enormous power sought to be conferred on Congress . . . takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States.”); CHESTER JAMES ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 68 (1981) (“The first section of this amendment, considered in connection with the fifth, is virtually an annulment of State authority in regard to rights of citizenship. It invests the Congress of the United States with extraordinary power at the expense of the States.” (quoting Committee on Federal Relations of the Florida House Report of November 23, 1866)); Editorial, *The Constitutional (Howard) Amendment*, WKLY. SENTINEL (Raleigh), Oct. 15, 1866, at 1, *quoted in* FLACK, *supra* note 89, at 156 n.55 (“That amendment, we hold, is adverse . . . to the inherent and rightful powers of the States, provides for and looks to a consolidated sovereignty, instead of a government of limited powers, [and] breaks down the wholesome checks of the Constitution and of the State governments . . .”).

<sup>129</sup> Editorial, *Ought the Southern States to Adopt the Constitutional (Howard) Amendment?*, WKLY. SENTINEL (Raleigh), Oct. 15, 1866, at 2 (emphasis omitted), *quoted in* FLACK, *supra* note 89, at 157.

<sup>130</sup> *Governor’s Message*, MOBILE DAILY ADVERTISER & REG., Nov. 13, 1866, at 2 (remarks of Alabama Governor R.M. Patton), *quoted in* NELSON, *supra* note 112, at 105; *see also* JAMES, *supra* note 79, at 151 (“This Amendment would disturb, to a degree which no jurist can foresee, the established relation between the Federal and State Courts.” (quoting MISSISSIPPI SENATE JOURNAL 196 (1866) (report of the Standing Committee on State and Federal Relations))).

<sup>131</sup> *See, e.g.*, Editorial, *The Proposed Constitutional Amendment*, DAILY INTELLIGENCER (Atlanta), Oct. 4, 1866, at 2, *quoted in* FLACK, *supra* note 89, at 154 (“Should the amendment become a part of the Constitution, we shall have a far different government from that inherited from our fathers.” (quoting Mississippi Judge Sharkey)).

<sup>132</sup> Editorial, *The Nation*, CHARLESTON MERCURY, Dec. 4, 1866, at 2, *quoted in* BOND, *supra* note 79, at 126; *see also* TEXAS HOUSE JOURNAL 578 (1866) (report of the Committee on Federal Relations),



“[States will] distain the whole thing as . . . a fraud and a swindle. This Amendment destroys the independance [sic] and separate existence of the States, and changes our whole form of Government . . . . We would be no longer a Union of States but a *Nation*.”<sup>133</sup> In fact, the hyperbole ran, “[f]rom the moment of its engraftment upon the Constitution of the United States, the States would in effect cease to exist as bodies politic.”<sup>134</sup>

Mississippi Governor Humphreys summed up the Southern opposition to the Amendment in a fiery address to his state’s legislature:

This amendment, adopted by a Congress of less than three-fourths of the States of the Union, in palpable violation of the rights of more than one-fourth of the States, is such an insulting outrage and denial of the equal rights of so many of our worthiest citizens who have shed lustre and glory upon our section and our race, both in the forum and in the field, such a gross usurpation of the rights of the State, and such a centralization of power in the Federal Government, that I presume, a mere reading of it, will cause its rejection by you.<sup>135</sup>

If the states were to do otherwise, Southerners insisted, then freedom might well come to an end altogether. “If these amendments are adopted it will radically change the form of the Government which we have inherited from our fathers, if it does not in its ultimate consequences destroy our boasted freedom, and extinguish the torch of republican liberty in this Western world.”<sup>136</sup>

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*quoted in* BOND, *supra* note 79, at 216 (“There is scarcely any limit to the power sought to be transferred by this section from the States to the United States.” (referring to Section 1)); JOURNAL OF THE SENATE OF ARKANSAS, SIXTEENTH SESSION 260 (Little Rock, Price & Barton 1870) (report of the Committee on Federal Relations, Dec. 10, 1866), *quoted in* ANTIEAU, *supra* note 128 (lamenting that the Amendment “takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States”); JOURNAL OF THE HOUSE OF REPRESENTATIVES OF ARKANSAS, SIXTEENTH SESSION 287–89, *quoted in* ANTIEAU, *supra* note 128 (warning that “the sovereignty of the States might be completely subverted, by divesting them of the rights now secured by the Constitution”).

<sup>133</sup> Letter from George C. Watkins to David Walker (Aug. 22, 1868), *quoted in* BOND, *supra* note 79, at 196; *see also* Editorial, *Congress and Restoration: The State of the Question*, HINDS COUNTY GAZETTE (Raymond, Miss.), June 22, 1866, *quoted in* BOND, *supra* note 79, at 37 (arguing that the Amendment would “make[] the United States no longer thirty-six States, but one State”); Editorial, *The Constitutional Amendments*, NATCHEZ DAILY COURIER (Miss.), June 14, 1866, *quoted in* BOND, *supra* note 79, at 38 (alleging that, under the Amendment, the “States hereafter are but provinces”).

<sup>134</sup> FLORIDA STATE SENATE JOURNAL, *supra* note 128, at 102 (Committee on Federal Relations Report), *quoted in* BOND, *supra* note 79, at 174.

<sup>135</sup> JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISSISSIPPI AT A CALLED SESSION, OCTOBER 1866, at 8 (Jackson, J.J. Shannon & Co. 1866), *quoted in* BOND, *supra* note 79, at 38–39.

<sup>136</sup> JOURNAL OF THE SENATE OF TEXAS, ELEVENTH LEGISLATURE 422 (1866) (report of the Senate Committee on Federal Relations), *quoted in* BOND, *supra* note 79, at 217; *see also* Editorial, *The Constitutional Amendment*, DAILY ARK. GAZETTE, Nov. 3, 1866, at 2, *quoted in* BOND, *supra* note 79, at 192 (arguing that the Amendment would create “a Government, which, under the form of a Republic, will be as despotic as an absolute monarchy”); BOND, *supra* note 79, at 87 (arguing that the

Those few Southern officials who spoke in favor of the Fourteenth Amendment (most of whom were pro-Union and had come into power only through the machinations of the federal government) did so for purely prudential reasons. They feared the wrath of the North, and worried that the South's failure to ratify the Amendment would lead the North to impose even less palatable terms in its stead.<sup>137</sup> The Governor of Arkansas, for instance, urged ratification, but "on purely pragmatic grounds, favoring the substance of the amendment no more than those who strongly opposed it."<sup>138</sup>

Those scattered pleas were drowned out by the deafening chorus of opposition. With the exception of Tennessee, discussed above,<sup>139</sup> the Southern legislatures all voted overwhelmingly to reject the Fourteenth Amendment. The votes against the Amendment were unanimous in almost half of the Southern legislatures, and nearly so in all of the others.<sup>140</sup> Those votes made clear that, as former South Carolina Provisional Governor B.F. Perry explained to President Johnson, "[w]orse terms may be imposed by Congress, but they will be *imposed* & not *voluntarily accepted*."<sup>141</sup> The Southern people held firm to the view expressed by one newspaper editor:

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Amendment would bring about "the end of American constitutional liberty" (quoting NEW ORLEANS PICAYUNE, June 26, 1866); Editorial, *The Proposed Constitutional Amendment*, DAILY INTELLIGENCER (Atlanta), Oct. 4, 1866, at 2, quoted in FLACK, *supra* note 89, at 154 ("Then indeed will the Sun of Liberty have set in the South.").

<sup>137</sup> See, e.g., BOND, *supra* note 79, at 103–04 (noting that Alabama Governor Robert M. Patton ultimately decided that it would be best to ratify the Amendment, but he explained to voters that he remained opposed to it "in principle" (internal quotation marks omitted)); *id.* at 145 (noting that Virginia Governor Francis Pierpont urged ratification "in a message suffused with Realpolitik"); *id.* at 196 (noting that Arkansas Governor Isaac Murphy supported the Amendment only on prudential grounds).

<sup>138</sup> JAMES, *supra* note 79, at 113; see also FLACK, *supra* note 89, at 195 (noting that the Governor of Alabama eventually changed his mind and supported "the ratification of the Amendment as a matter of necessity and expediency," but "he added that his views as to the merits of the Amendment had not changed in the least").

<sup>139</sup> See *supra* notes 88–89 and accompanying text.

<sup>140</sup> See FLACK, *supra* note 89, at 203 (noting that the Virginia Senate rejected unanimously, and the Virginia House rejected 74–1); JAMES, *supra* note 79, at 99–100 (noting that the Arkansas Senate rejected 24–1, and the Arkansas House rejected 68–2); *id.* at 107 (noting that the Amendment received only one vote in the North Carolina Senate, and was defeated in the North Carolina House 93–10); *id.* at 112 (noting that both the Florida House and the Florida Senate rejected unanimously); *id.* at 119 (noting that the South Carolina House rejected 95–1 and the South Carolina Senate rejected unanimously); *id.* at 130 (noting that the Alabama Senate rejected 28–3, and the Alabama House rejected 69–8); *id.* at 152 (noting that the Mississippi House and Senate both rejected unanimously); *id.* at 154 (noting that the Louisiana House and Senate both rejected unanimously); James, *supra* note 97, at 486 (noting that Georgia rejected unanimously "in the Senate and with only two dissenting voices in the House"); *id.* at 485 (noting that the Texas House rejected 70–5, and the Texas Senate rejected 27–1).

<sup>141</sup> Letter from B.F. Perry to Andrew Johnson (Nov. 10, 1866), *reprinted in* 11 THE PAPERS OF ANDREW JOHNSON 449 (Paul H. Bergeron ed., 1994), *quoted in* JAMES, *supra* note 79, at 116.

“Never, *never* should the South adopt it—never till absolutely, literally, *forced* to do it!”<sup>142</sup>

And forced they were. When ratification finally came, it came at gunpoint.

2. *The Northern Response.*—Upon the initial proposal of the Amendment in 1866, the highly coercive background—with the South unrepresented in Congress and being led to believe that worse terms would come if it did not cooperate<sup>143</sup>—was enough to prompt President Johnson to write that, if the South were to ratify, “it can in no way be imputed to them as their voluntary act.”<sup>144</sup> Yet the South held firm, and did not ratify. Then, when the Radical Republicans won convincingly in the 1866 elections in the North—having campaigned in favor of the Amendment and in opposition to President Johnson’s support for moderation in Reconstruction<sup>145</sup>—the Southern states received a clear message that things were going to get a whole lot worse if they still refused to ratify. At that point, “no Southern leader could consider the amendment solely on its merits as possible constitutional law.”<sup>146</sup> And yet the South held firm again, and still did not ratify.

By this time, the North had seen enough. The prevailing sentiment in the Republican Congress was that, in Senator Doolittle’s words, “the people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it.”<sup>147</sup> Thus, before the new Fortieth Congress convened, the old Thirty-Ninth Congress met for a final session in late 1866 and early 1867, during which it enacted (over President Johnson’s veto) the first Military Reconstruction Act.<sup>148</sup> That Act announced that “no legal State governments . . . exist[.]” in the ten former Confederate states not currently represented in Congress, and declared that those states were to be placed under military rule.<sup>149</sup> The Act divided the South into five military districts,

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<sup>142</sup> BOND, *supra* note 79, at 232 (quoting S. HERALD (Liberty, Miss.), Oct. 22, 1866).

<sup>143</sup> See, e.g., JAMES, *supra* note 79, at 58–59 (“[T]his plan contains the best terms you will ever get—and they should be promptly accepted. . . . Don’t let Andy Johnson deceive you. He don’t know the Northern people.” (quoting Letter from Rep. Rutherford B. Hayes of Ohio to Guy M. Bryan of Texas (Oct. 1, 1866))).

<sup>144</sup> *Id.* at 31 (quoting President Andrew Johnson, Speech (undated draft)).

<sup>145</sup> See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 505 n.111 (1989) (“The Fourteenth Amendment was the centerpiece of the Republican campaign in 1866 . . . .”); Harrison, *supra* note 8, at 405 (“When the voters went to the polls, the Democrats . . . got their clock cleaned. The Fortieth Congress would have crushing Republican majorities.”).

<sup>146</sup> James, *supra* note 97, at 486.

<sup>147</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1644 (1867) (remarks of Sen. Doolittle (R-WI)).

<sup>148</sup> Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

<sup>149</sup> *Id.* pmb., § 1.

each to be governed by a military commander.<sup>150</sup> The states in those districts could escape military rule and be readmitted to the Union only by: establishing new governments under new state constitutions, granting the right to vote to African Americans, and ratifying the Fourteenth Amendment.<sup>151</sup> Shortly thereafter, when the Southern states continued to drag their feet, Congress passed a supplementary Reconstruction Act that instructed the military commanders to instigate and supervise the reconstruction process: to register voters and hold elections for the people to determine whether to have constitutional conventions, and if so, to elect delegates to those conventions.<sup>152</sup> The military commanders were then to facilitate referenda on the state constitutions that the conventions produced.<sup>153</sup>

One Northern Democrat in Congress described the procedures outlined in the Reconstruction Acts in the following terms:

You go to the people of these ten States with the bayonet in one hand and your proposed constitutional amendment in the other, and ask them to make their choice—the amendment . . . or the bayonet and the sword and military government. That is, you propose to coerce by military power the people of these States into a ratification of your constitutional amendment . . . .<sup>154</sup>

President Johnson echoed that the “military rule which [the Reconstruction Acts] establish[] is plainly to be used . . . solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed.”<sup>155</sup>

That is just what happened. Pursuant to the Reconstruction Acts, the military commanders imposed military rule, disbanded the existing state governments, and removed many state officials—including several Governors—who stood in their way.<sup>156</sup> The military commanders then supervised the process of registering voters, electing delegates to state constitutional conventions (through elections in which many former Confederates were disqualified from voting), drafting and ratifying new state constitutions, and electing new governments pursuant to those new state constitutions.<sup>157</sup>

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<sup>150</sup> See *id.* § 1.

<sup>151</sup> See *id.* § 5.

<sup>152</sup> See Act of Mar. 23, 1867, ch. 6, §§ 1–4, 15 Stat. 2, 2–3.

<sup>153</sup> See *id.* § 4.

<sup>154</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1333 (1867) (remarks of Rep. Finck (D–OH)).

<sup>155</sup> *Id.* at 1969 (veto message of President Andrew Johnson), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=72072&st=johnson&st1=veto#axzz1wTnnqUCm>.

<sup>156</sup> See JAMES, *supra* note 79, at 211–12; Harrison, *supra* note 8, at 379 n.14.

<sup>157</sup> See JAMES, *supra* note 79, at 211–12; Harrison, *supra* note 8, at 406–08.

Those new state legislatures—created under state constitutions that had been drafted by federal military mandate<sup>158</sup>—were then tasked with ratifying the Fourteenth Amendment as a condition of ending military rule and gaining readmittance to the Union.<sup>159</sup> At that point, the beleaguered Southern press began to advocate compliance, both to get their homeland back from the Northern army, and to begin the process of rebuilding their devastated economy.<sup>160</sup> Southern politicians grudgingly followed suit. They were prepared “to embrace the Congressional plan of reconstruction—not as a matter of choice—but from stern necessity.”<sup>161</sup> As Alabama Governor Robert Patton put it, “to contend against [the Fourteenth Amendment] now is simply to struggle against the inevitable.”<sup>162</sup> One historian explains that “[r]atification was reluctantly accepted as the price required for other developments deemed absolutely necessary.”<sup>163</sup> “Southerners responded unhappily to the application of force and the desire for peace rather than to any real support for the amendment.”<sup>164</sup> They were beat down, tired of living under military rule, and out of options.<sup>165</sup>

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<sup>158</sup> Many Southerners questioned the legitimacy and representative authority of these new governments. For instance, Governor Jonathan Worth of North Carolina wrote to the new legislators, “I regard all of you as in effect appointees of the military power of the United States, and not as deriving your powers from the consent of those you claim to govern.” ROBERT SELPH HENRY, *THE STORY OF RECONSTRUCTION* 317 (1963) (quoting Letter from Jonathan Worth to W.W. Holden (June 30, 1868)); see also Editorial, *The New Revolution*, CHARLESTON DAILY COURIER, July 6, 1868, at 2, quoted in JAMES, *supra* note 79, at 252 (“To-day the Legislature, created by the Reconstruction Acts, and who owe their origin not to the votes of the accustomed voters of our State, but to the Radical majority in Congress, and the presence of arms, will convene.”).

<sup>159</sup> See JAMES, *supra* note 79, at 215–16.

<sup>160</sup> See *id.* at 212–13.

<sup>161</sup> A.R. Johnston, Address at Sardis, Mississippi (Oct. 13, 1869), in *Speech of Hon. A.R. Johnston*, FOREST WKLY. REG. (Miss.), Nov. 17, 1869, at 1, quoted in BOND, *supra* note 79, at 44.

<sup>162</sup> JAMES, *supra* note 79, at 213 (quoting NEW ORLEANS TIMES, Mar. 8, 1867); see also Letter of Hon. T.J. Wharton, DAILY CLARION (Jackson, Miss.), Mar. 16, 1867, at 2, quoted in JAMES, *supra* note 79, at 214 (“We have to deal with things as they are—not as we would have them.”); G.T. Beauregard, *Southern Relief Bill*, NEW ORLEANS TIMES, Mar. 26, 1867, at 6, quoted in JAMES, *supra* note 79, at 253 (“[A] futile resistance would only cause our rivets to be driven closer.”).

<sup>163</sup> JAMES, *supra* note 79, at 304.

<sup>164</sup> *Id.* at 303; see also *id.* at 244 (noting that North Carolinians “submitted to . . . the ratification of the Fourteenth Amendment . . . with resignation to a fate over which they had lost control”); *id.* at 245 (noting that the North Carolina legislature ratified “[d]espite the existence of such strong feelings among the people of North Carolina”).

<sup>165</sup> But see 2 ACKERMAN, *supra* note 8, at 204 (implying that the Southern ratifications were still, at least in some sense, voluntary, because “Congress had not relieved Republicans in each state from the formidable task of repeatedly mobilizing majority support for their effort to represent the People—first, in authorizing a constitutional convention; next, in approving the new Republican constitution; and finally, in gaining legislative consent for the Fourteenth Amendment”). Ackerman views the Reconstruction Acts as merely “triggering decisions—leaving it up to the (nationally defined) People of each state to determine whether they would go along with the nation-centered enterprise of constitutive redefinition initiated by the Fourteenth Amendment.” *Id.* at 205.

The new Southern legislatures all ratified the Fourteenth Amendment over the next several years.<sup>166</sup> Congress accepted those ratifications, and declared the Amendment adopted as soon as twenty-nine states (including the first six of the unrepresented Southern states) had ratified it.<sup>167</sup>

It should be obvious that this story bears virtually no resemblance to the idealized process of lawmaking by national supermajoritarian consensus that many originalists believe to be the essential hallmark of constitutional legitimacy and the underlying normative basis for originalism itself. Six of the twenty-nine ratifying states had ratified at gunpoint. Two others—Ohio and New Jersey—were counted in the total despite the fact that their legislatures had already rescinded their ratification votes.<sup>168</sup> And another ratifying state—West Virginia—was of

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<sup>166</sup> See Harrison, *supra* note 8, at 408.

<sup>167</sup> See JAMES, *supra* note 79, at 296–97.

<sup>168</sup> When electoral winds changed in the Democrats' direction, the legislatures of Ohio, New Jersey, and Oregon all voted to rescind their former ratifications of the Fourteenth Amendment. See COLLINS, *supra* note 90; Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 35–36, 45–47 (2008). In the cases of Ohio and New Jersey, this happened before the Amendment had received enough ratification votes to become effective. See JAMES, *supra* note 79, at 282–85. The Ohio legislature insisted that its prior ratification vote had been “a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race, endangering the perpetuity of our free institutions.” 64 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF OHIO, FIFTY-EIGHTH GENERAL ASSEMBLY 12 (Columbus, LD. Myers & Bro. 1868), *quoted in* JAMES, *supra* note 79, at 282. And the New Jersey Legislature worried that the Amendment, *inter alia*, imposed “new prohibitions upon the power of the state to pass laws, and interdicts the execution of such parts of the common law as the national Judiciary may esteem inconsistent with the vague provisions of the said amendment.” S.J. Res. 1, at 12–13 (N.J. 1868), *available at* <http://www.nj.gov/state/archives/doc14thamendment.html>, *quoted in* JAMES, *supra* note 79, at 2885. Oregon's rescission vote came after the Fourteenth Amendment had already become effective, but the state legislature claimed to base its decision to rescind ratification in part on its conclusion that the Southern ratifications had been coerced and were therefore illegitimate. See JAMES, *supra* note 79, at 300; S.J. Res. 4, 5th Reg. Sess. (Or. 1868), *reprinted in* GENERAL LAWS OF THE STATE OF OREGON PASSED AT THE FIFTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY THEREOF 111–15 (Salem, Oregon, W.A. McPherson 1868). Congress refused to accept any of these rescissions, as some members insisted that once a state votes to ratify an amendment, it may not change its mind, even if the amendment has not yet become effective. See JAMES, *supra* note 79, at 284, 287–88. (On the other hand, Congress had no problem allowing—indeed, forcing—the Southern states that initially voted *not* to ratify to change *their* minds. *Cf.* Editorial, *Tragic Era Strategy*, WASH. POST, June 7, 1939, at 10 (“Nor is it logical to permit State legislatures to change their action from negative to affirmative but not from affirmative to negative during the period when a constitutional change is an active issue.”).) There is a vigorous scholarly debate over the validity of a state's attempt to rescind a prior ratification while an amendment is still pending. See, e.g., Peter Michael Jung, Note, *Validity of a State's Rescission of its Ratification of a Federal Constitutional Amendment*, 2 HARV. J.L. & PUB. POL'Y 233 (1979); *cf.* *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (finding the question whether a state ratified an amendment to be a political question). John Harrison argues that these rescissions make little difference to the question of whether the Fourteenth Amendment is formally legitimate; if the Southern ratifications count, then the votes of these states are not needed, and if the Southern ratifications do not count, then the votes of these states are not enough. See Harrison, *supra* note 8, at 378 n.11. Still, these actions do seem relevant to the question of whether there really was a formally expressed supermajoritarian consensus in favor of the Fourteenth

dubious constitutional origin to begin with.<sup>169</sup> The American people did not, in fact, coalesce around the mandate of the Fourteenth Amendment. There was *no* national<sup>170</sup> supermajoritarian consensus in its favor.

*B. Nonpartisan, Deliberative Consensus?*

As noted above,<sup>171</sup> some originalists have emphasized that a key benefit of originalism is that the Constitution's supermajoritarian enactment and amendment requirements ensure that constitutional provisions will "not be based on partisan motivations."<sup>172</sup> Because constitutional provisions can "not generally be enacted unless they receive[] the support of significant portions of both parties,"<sup>173</sup> the Framers of constitutional provisions will "focus on the interests citizens have in common rather than their parties' narrow interests."<sup>174</sup> Accordingly, by following the original meaning of those provisions, judges will be enforcing the consensus views of the people about matters universally understood to be in the long-term collective interest of society as a

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Amendment. See *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 69–72, 78–81 (1977–1978) [hereinafter House Hearings] (testimony of Professor Charles L. Black, Jr., Yale Law School) (forcefully arguing that, where a state has voted to formally rescind its ratification, that state can no longer be counted in seeking to establish a national consensus).

<sup>169</sup> At the start of the Civil War, a breakaway, pro-Union province of Virginia declared itself to be the lawful government of Virginia, much to the chagrin of most actual Virginians, and then purported to give "Virginia's" consent to the creation the new state of West Virginia, which was to occupy that same breakaway corner of Virginia and was to be governed by that same pro-Union government. See Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 297–301 (2002); 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 . . . without the Consent of the Legislatures of the States concerned as well as of the Congress."). There is an intriguing argument that, as a formalist matter, this process actually complied with the Constitution. See Kesavan & Paulsen, *supra*, at 332–95. But even if it did, the fact that one of the states that voted to ratify the Fourteenth Amendment was dubiously carved out of a corner of an existing state that despised the Amendment undermines the notion that the Amendment really enjoyed the supermajority support of three-fourths of the states.

<sup>170</sup> Georgia Governor Charles Jenkins railed against the sectional nature of the Amendment, complaining that it would "fall upon citizens inhabiting one latitude like an avalanche from its mountain perch, crushing where it settles; whilst upon those of another latitude it will alight unfelt like a feather floating in still air." 4 THE CONFEDERATE RECORDS OF THE STATE OF GEORGIA, *supra* note 122, at 546, quoted in James, *supra* note 97, at 489.

<sup>171</sup> See *supra* Part I.C.

<sup>172</sup> McGinnis & Rappaport, *supra* note 62, at 1706.

<sup>173</sup> *Id.* at 1708.

<sup>174</sup> *Id.*

whole.<sup>175</sup> It is for this reason that originalism is said to advance the public good.<sup>176</sup>

Other originalists, who focus more on popular sovereignty than utilitarianism, have similarly emphasized that, to reflect the will of the people, the Constitution must be the product of fair and open deliberation between the majority and the minority.<sup>177</sup> Whittington explains that:

The majority cannot simply impose its will on the minority through strength, even if that power is only the strength of votes. Rather, the majority must open itself to the minority by engaging it in deliberation. Even if the minority is ultimately unconvinced and there remains disagreement when the final vote is taken, the minority has been accepted as internal to the whole and not as an alien element simply to be defeated. The process of constitutional formation cannot be guided by the slogan “to the victor go the spoils,” for genuine efforts at conversion and reconciliation are integral to the process of gaining political authority over those who are finally outvoted. The majority, therefore, must be willing to put the ultimate constitutional outcome in doubt.<sup>178</sup>

“[F]or this reason, political factions are inconsistent with constitutional deliberation” and “party-line votes violate the basis for determining the sovereign will.”<sup>179</sup> “In such instances, the sovereign will cannot be representative of the whole but is explicitly the rule of a partial society over the whole through the instrument of law.”<sup>180</sup>

But the Fourteenth Amendment was as partisan as it gets. It was entirely the work of the Northern Republican Party. Southerners played no role at all in the framing process, save for a few committee witness appearances,<sup>181</sup> and even Northern Democrats were essentially excluded from the process. “It was felt that the Democratic Party could not be entrusted with any part of the solution of the problem of reconstruction. . . . This sentiment was normal in 1865.”<sup>182</sup> Indeed, the Fourteenth Amendment served as the de facto Republican Party campaign platform for the 1866

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<sup>175</sup> Cf. WHITTINGTON, *supra* note 12, at 141 (“The fact that the constitution will be controlling not just today but also tomorrow directs the sovereign to consider those likely effects as well, pushing him toward a more universal perspective.”).

<sup>176</sup> See *supra* Part I.C.

<sup>177</sup> See *supra* Part I.A.

<sup>178</sup> WHITTINGTON, *supra* note 12, at 147.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; see also *id.* at 145 (“[T]he sovereign gains his political authority by his claim to represent the whole of the people. The sovereign is not a partial entity, representing a single class or subunit of society against the rest but claims to encompass the whole.”).

<sup>181</sup> See James, *supra* note 97, at 479–80.

<sup>182</sup> COLLINS, *supra* note 90, at 2.



elections.<sup>183</sup> And opinions about it were so divisive along party lines that one newspaper declared that “the feelings of the different portions of the country, are more embittered now, than they were while the conflict was raging.”<sup>184</sup>

Far from receiving significant support from both parties, the Fourteenth Amendment was a purely Republican measure from start to finish.<sup>185</sup> As James G. Blaine, a House Republican from Maine who soon assumed the role Speaker of the House, remembered it, the Fourteenth Amendment was “carried, from first to last, as a party measure—unanimously supported by the Republicans, unanimously opposed by the Democrats.”<sup>186</sup> “[T]he line of Democratic hostility in Nation and in State was absolutely unbroken”;<sup>187</sup> the Amendment “failed to attract the vote of a single Democratic member in any State Legislature in the whole Union.”<sup>188</sup> Blaine observed that “[i]t is very seldom in the history of political issues, even when partisan feeling is most deeply developed, that so absolute a division is found as was recorded upon the question of adopting the Fourteenth Amendment.”<sup>189</sup>

It bears repeating that this was not a situation in which one party was so popular throughout the nation that it was able to muster the necessary supermajority to enact its agenda over the wishes of the other party. That would still be partisanship, but at least it would be overwhelmingly popular partisanship. But that was not what happened here. Rather, this was a situation in which the dominant party’s agenda was *not* that universally popular, but was still forced upon the other party. The dominant party was not “willing to put the ultimate constitutional outcome in doubt.”<sup>190</sup> To the contrary, it made clear through a show of military force that, no matter how strong the opposition, one way or another the Fourteenth Amendment was going to end up in the Constitution.

What is more, the Fourteenth Amendment can be seen as the product of the basest sort of partisanship—seeking to advance political ends, rather

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<sup>183</sup> See NELSON, *supra* note 112, at 58; *id.* (referring to the Amendment as “one of the best platforms our party can have to fight the copperheads at the coming elections” (quoting Letter from J.A. Chase to John Sherman (June 8, 1866))).

<sup>184</sup> Editorial, *Radicalism*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER (N.Y.), Aug. 4, 1866, at 306, quoted in JAMES, *supra* note 79, at 47.

<sup>185</sup> See NELSON, *supra* note 112, at 113 (“The nation did, in fact, divide along party lines in its support of or opposition to the amendment, and, in that sense, the Democratic opponents of the amendment were correct about its partisan quality.”).

<sup>186</sup> 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS 309 (Norwich, Conn., The Henry Bill Publishing Co. 1886).

<sup>187</sup> *Id.* at 310; see also COLLINS, *supra* note 90, at 14 (noting that “Democrats everywhere with one voice raised the cry of protest and warning,” and that “the Democratic press was a unit against it”).

<sup>188</sup> 2 BLAINE, *supra* note 186.

<sup>189</sup> *Id.*

<sup>190</sup> WHITTINGTON, *supra* note 12, at 147.

than policy ends. The Republicans were not simply trying to cram their policies down the throats of the Democrats; they were seeking to entrench their party's political power at the expense of the Democrats. Democrats charged that the Amendment was "designed solely to perpetuate party ascendancy, not to subserve the public good."<sup>191</sup> They lamented that "the Government is to be revolutionized to secure the ascendancy of the Republican party."<sup>192</sup> Democrats saw the Amendment as the product of "the law of party necessity," designed to secure to Republicans "the continuance of power, its offices and rich spoils."<sup>193</sup> As one newspaper put it, it was a scheme "[t]o fix . . . power in the line of perpetuity, so as to . . . serve the selfish purposes of present possessors" in accordance with "the wishes and sentiments of the temporary majority of a section of the Union."<sup>194</sup>

These were not simply sour grapes. There was substantial truth to what the Democrats said. "One of the immediate purposes of the adoption of the Amendment was to assist in destroying the power of the Democratic Party in the South and in its place to build up Republicans."<sup>195</sup> It was designed to "more firmly establish and maintain the control of the Government by the Republican Party."<sup>196</sup> "This party purpose was made no secret."<sup>197</sup> As one Republican explained, he had "a holy hatred" for the Democrats and was "willing to sacrifice almost anything to keep the democratic party out of power."<sup>198</sup>

Now it is surely true that the Republicans had powerful reasons for seeking to entrench their political power—reasons that resonate strongly with us today on moral grounds. The Republicans had come to recognize that the recently enacted Thirteenth Amendment had unintended, perverse effects. By freeing the slaves, the Thirteenth Amendment immediately increased the political power of the Southern states in the Congress. Recall that, under the three-fifths compromise in the original Constitution, representation in the House of Representatives and the Electoral College was apportioned according to population, with slaves counting as only

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<sup>191</sup> Editorial, *The Howard Constitutional Amendment*, SEMI-WKLY. FLORIDIAN (Tallahassee), Oct. 2, 1866, at 2, *quoted in* BOND, *supra* note 79, at 172.

<sup>192</sup> CONG. GLOBE, 39th Cong., 1st Sess. 426 (1866) (remarks of Rep. Eldridge (D-WI)).

<sup>193</sup> *Id.* app. 238 (remarks of Sen. Davis (D-KY)).

<sup>194</sup> Editorial, *Proposed Changes in the Constitution*, LITTLE ROCK DAILY GAZETTE, Dec. 28, 1865, at 1, *quoted in* NELSON, *supra* note 112, at 95; *see also* Editorial, *The Only Issue*, DAILY EXAMINER (S.F.), May 4, 1866, at 2, *quoted in* NELSON, *supra* note 112, at 109 (arguing that the Amendment would "convert the government into a mere party engine, to be wielded, not for the good of the people, but to suit the whims, passions, prejudices, interests and aggrandizement of a successful party").

<sup>195</sup> COLLINS, *supra* note 90, at 11.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Letter from A.L. Brewer to John Sherman (Dec. 28, 1865) (original in the Papers of John Sherman 1846–1893, Library of Congress, Washington, D.C.) (copy on file with author), *quoted in* NELSON, *supra* note 112, at 46.

three-fifths of a person.<sup>199</sup> Now that all of the slaves had been freed, the former slave states suddenly had significantly more proportional representation in the federal government—enough power to potentially seize the upper hand. Yet the Democrats who controlled those states were vehemently opposed to civil rights, racial equality, and suffrage rights for African Americans. And they had enacted the notorious “black codes” that ensured that the freed slaves would have few rights, and no political strength.<sup>200</sup> As such, the Thirteenth Amendment ended up just giving more political power to Southern whites.<sup>201</sup> The Republicans feared that, if this were to result in the racist Democrats regaining control of the federal government, the Civil War would have been fought for naught. “More appeared at stake than partisan control of the apparatus of government; the stake which the Republicans perceived—the stake for which 364,511 Union troops had lost their lives—was the future of liberty in the United States and, perhaps, in the world.”<sup>202</sup>

But, of course, political parties virtually always believe that their obtaining or maintaining political power is essential for the good of the country—that the other party’s policies are so dangerously un-American that freedom and security will suffer tremendously should the other party gain the upper hand.<sup>203</sup> And in any event, however noble we find the Republicans’ aims, and however much we might agree with their

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<sup>199</sup> See U.S. CONST. art. I, § 2, cl. 3, *partly repealed* by U.S. CONST. amend. XIV, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”); *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

<sup>200</sup> See Harrison, *supra* note 8, at 401.

<sup>201</sup> See *id.* at 400–01 (“As free people the former slaves would count as whole persons for apportionment, not as three-fifths. They remained disenfranchised, however, so rather than having a voice of their own they amplified that of their former masters.” (footnote omitted)).

<sup>202</sup> NELSON, *supra* note 112, at 46 (footnote omitted).

<sup>203</sup> For current examples, see, for instance, Devin Dwyer, *Obama Warns Women that Romney, GOP Will “Close Doors of Opportunity,”* ABC NEWS BLOGS (Apr. 27, 2012, 7:09 PM), <http://abcnews.go.com/blogs/politics/2012/04/obama-warns-women-that-romney-gop-will-close-doors-of-opportunity>, which notes that “President Obama warned women voters today that Republicans in Congress and presumptive GOP presidential nominee Mitt Romney want to ‘close doors of opportunity we thought we’d kicked open a long time ago’”; Emily Friedman, *Iran Will Have Nukes if Obama Is Re-Elected, Romney Says,* ABC NEWS BLOGS (Mar. 4, 2012, 4:06 PM), <http://abcnews.go.com/blogs/politics/2012/03/iran-will-have-nukes-if-obama-is-re-elected-romney-says>, quoting Mitt Romney’s claim that “[i]f Barack Obama gets re-elected, Iran will have a nuclear weapon and the world will change if that’s the case”; and Serafin Gomez, *Romney: If Obama Re-elected U.S. Will Have a “Greece-Like” Crisis,* FOX NEWS BLOGS (Dec. 19, 2011), <http://politics.blogs.foxnews.com/2011/12/19/romney-if-obama-re-elected-us-will-have-greece-crisis>, quoting Mitt Romney as saying, “I think before the end of his second term, if he were reelected, there’s a very high risk that we would hit a financial crisis that Greece or Italy have faced.”

assessment of the stakes, the fact remains that their proposed Amendment was a partisan measure through and through—seeking to perpetuate the power of the dominant party<sup>204</sup>—and the controversial principles upon which it was based were manifestly not embraced by the minority party.<sup>205</sup>

Nor was the minority party willing to accept the legitimacy of either the amending process or the final result. Keith Whittington has emphasized that a key component of the original Constitution's claim to reflect the sovereign will of the people is that the Anti-Federalist minority, despite losing the debate, was willing to accept both the constitution-making process and the ultimate outcome.<sup>206</sup> That was essential, because the “continued rejection of the general law by the minority indicates that there is in fact no common society between the majority and minority; they do not form a single people and therefore possess no common sovereign.”<sup>207</sup> Yet that is exactly what happened with the Fourteenth Amendment. The Democrats repeatedly and vociferously objected to the process by which the Amendment was carried in a rump Congress and then forced upon the South,<sup>208</sup> and they refused to accept the validity of the Amendment even after it had been declared effective.<sup>209</sup>

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<sup>204</sup> See *The Passage of the Reconstruction Amendment*, CHI. TRIB., June 20, 1866, at 2, quoted in JAMES, *supra* note 79, at 170 (recounting the concern among legislators “that the amendment is the cunning headwork of politicians, providing for the present, rather than building up, regardless of considerations of expediency, a sure foundation for the lasting internal peace and prosperity of the Republic”); Editorial, *The Constitutional Amendment, a Proposition of Pains, Penalties, and Not of Repose*, CHARLESTON DAILY COURIER, Oct. 19, 1866, at 2, quoted in BOND, *supra* note 79, at 122 (“The moment any party succeeds in incorporating into the written charter of right, and common compact of protection, and privilege, its platform based upon the temporary passions of the hour, the fall of free government is sealed.”).

<sup>205</sup> See COLLINS, *supra* note 90, at 12 (“The opposition of the Democratic Party to the adoption of the Fourteenth Amendment was something more than a fight for self-preservation. It was a struggle to maintain the time-honored principles upon which that party was founded. The Democratic Party had always stood for local government where only local interests were involved. It had worked on the theory that the Federal Government possessed and should possess only delegated powers—that its sphere of activity was circumscribed by definite limitations.”); CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (remarks of Rep. Rogers (D–NJ)) (“[The Fourteenth Amendment] saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence. . . . It will result in a revolution worse than that through which we have just passed.”).

<sup>206</sup> See WHITTINGTON, *supra* note 12, at 146–47.

<sup>207</sup> *Id.* at 146.

<sup>208</sup> See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 1969 (1967) (veto message of President Andrew Johnson), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=72072> (“The military rule which it establishes is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment.”); NELSON, *supra* note 112 (noting objections to the procedure used in Congress).

<sup>209</sup> See, e.g., CONG. GLOBE, 41st Cong., 3d Sess. 1252 (1871) (remarks of Sen. Morton (R–IN)) (asserting that “the Democratic party . . . has . . . declared . . . that the fourteenth and fifteenth

## III. IMPLICATIONS AND OBJECTIONS

There are ample reasons to question the general strength of the popular normative justifications for originalism. Indeed, many critics have already done so quite effectively.<sup>210</sup> To briefly hit on some of the highlights, justifying originalism on the basis of popular sovereignty or social contract rings a bit hollow when one considers the fact that the people who actually consented to the ratification of the Constitution are all long dead. As Gary Lawson puts it, arguments for an originalist interpretation of the Constitution “cannot rely on its past ratification . . . . There is simply no way to bridge the gap between *A*’s acceptance and *B*’s obligation. Past majorities cannot bind present individuals.”<sup>211</sup> Indeed, Daniel Farber argues that:

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amendments are nullities, and will be by them disregarded when they come into power”; noting that the House Democrats unanimously voted against a July 11, 1870 resolution declaring the Fourteenth Amendment to be valid; and asserting that “no Democratic convention, Legislature, or leading statesman, so far as I know, has accepted or admitted the validity of the amendments”); Chin & Abraham, *supra* note 168, at 33 (noting that, “[i]n 1959, the United States Commission on Civil Rights reported on ‘the great stubborn fact that many people have not yet accepted the principles, purposes or authority of the Fourteenth or Fifteenth Amendments’” (quoting *Excerpts from Report and Recommendations of Commission on Civil Rights*, N.Y. TIMES, Sept. 9, 1959, at 44 (Late City Edition))); J. RES. OF THE GEORGIA GENERAL ASSEMBLY 45 (S. RES. No. 39), at 348, 350 (Ga. 1957), available at <http://georgiainfo.galileo.usg.edu/1957resn-7.htm> (urging Congress “to enact such legislation as they may deem fit to declare that the 14th and 15th amendments to the Constitution of the United States were never validly adopted and that they are null and void and of no effect,” and declaring that “the continued recognition of the 14th and 15th Amendments as valid parts of the Constitution of the United States is incompatible with the present day position of the United States as the World’s champion of Constitutional governments resting upon the consent of the people given through their lawful representatives”). *But see The Platform, in* OFFICIAL PROCEEDINGS OF THE NATIONAL DEMOCRATIC CONVENTION, HELD AT BALTIMORE, JULY 9, 1872, at 40 (Boston, Rockwell & Churchill 1872), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29580> (“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 to the Constitution.”).

<sup>210</sup> See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 69–75 (2009) (criticizing the popular sovereignty defense of originalism); Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905 (2007) (criticizing the supermajoritarian defense of originalism); Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1425–43 (2007) (criticizing the contract-based defense of originalism); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655–60 (2008) (criticizing the social contract defense of originalism); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1496–505 (1985) (criticizing the social contract defense of originalism); Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 13–25 (2009) (criticizing the popular sovereignty defense of originalism); Stein, *supra* note 5, at 406–33 (criticizing the popular sovereignty and supermajoritarian defenses of originalism).

<sup>211</sup> Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835 (1997); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 11 (2004) (“Anything less than

[I]n seeking a majoritarian source of legitimacy, we perhaps should look not to the vote of the [Framers] but rather to the popular support of the Constitution today. Since most people are not historians, that popular support may be based on the current legal understanding of the Constitution rather than on its original understanding.<sup>212</sup>

In addition, popular sovereignty, supermajoritarian, and contractarian defenses of originalism all must grapple with the highly inconvenient fact that, even at the time of the framing, the vast majority of the American people did not have a say in the ratification of the Constitution. “Among those excluded from the franchise were women, African-American slaves, almost all Native Americans, and many poor white [and free black] males, who were excluded by property qualifications and poll taxes.”<sup>213</sup> As Larry Simon—who has calculated that only about 2.5% of the population actually voted in favor of ratification<sup>214</sup>—explains, the “Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today who hold conceptions of our interests and selves very different from the ones held by those in the original clique.”<sup>215</sup> On top of all this, consent-based justifications must come to terms with the fact that, in reality, the ratifying public did not actually understand the Constitution.<sup>216</sup> Indeed, the provisions of the Constitution that touch upon controversial subjects were ratified only because, rather than having a universally understood and collectively endorsed meaning, they were drafted with ambiguous language that meant very different things to different people.<sup>217</sup>

These various critiques are well-known, and it is not my purpose here to recount or analyze them in any detail. My point is instead to suggest that,

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unanimous consent simply cannot bind nonconsenting persons.”); *id.* at 11–31 (developing this argument); Farber, *supra* note 24, at 1099 (“[T]he ratifiers had no claim at all to represent those of us alive today, so it is unclear how their majority vote can override the will of current majorities: ‘We did not adopt the Constitution, and those who did are dead and gone.’” (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980))).

<sup>212</sup> Farber, *supra* note 24, at 1099; *see also* Berman, *supra* note 210, at 73 (arguing that if the public now supports a particular constitutional meaning, then notions of popular sovereignty suggest that courts should follow that meaning, not the original one).

<sup>213</sup> Stein, *supra* note 5, at 398 & n.5 (footnote omitted); *see also* BARNETT, *supra* note 211, at 20 (“Though voting requirements varied with local jurisdictions, in no place could women, children, indentured servants, or slaves vote. Moreover, it was not uncommon to have a property requirement that limited the voting rights of white males and free black males.”).

<sup>214</sup> *See* Simon, *supra* note 210, at 1498 n.44.

<sup>215</sup> *Id.* at 1499–500.

<sup>216</sup> *See* Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 629, 642–47 (2012) (arguing that the American people likely had very little understanding of the meaning of the Constitution and its amendments, and therefore did not knowingly endorse or acquiesce in them).

<sup>217</sup> *See* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 586–99 (2008).

however bruised the normative case for originalism may be as a result of these critiques, the normative case is substantially weaker when it comes to the Fourteenth Amendment than it is for the rest of the Constitution. The Fourteenth Amendment is *sui generis*,<sup>218</sup> and when it comes to its interpretation, normative defenses of originalism are subject to unique objections that go well above and beyond the universal objections just noted.

Originalists have potential answers to the general critiques of their normative case. In response to the argument that a popular sovereignty defense is untenable because the current generation cannot be bound by the dead hand of its ancestors, originalists often argue, for instance, that because the people retain the authority to amend the Constitution today, their failure to exercise that authority amounts to tacit consent to the decisions of their forefathers.<sup>219</sup> And in response to the concern that the Framers may not really have understood or agreed about what they were signing on to, originalists often argue that the people can fairly be held to have assented to the objective meaning of the constitutional text that they ratified, regardless of their subjective understandings.<sup>220</sup> And in response to the concern that many people at the time of the framing were not permitted to have their voices heard,<sup>221</sup> originalists can argue that subsequent amendments have made up for the initial democratic deficiencies,<sup>222</sup> or that most of the excluded persons probably would have agreed with the persons who did get to vote.<sup>223</sup>

One can certainly question the efficacy of these and other originalist responses.<sup>224</sup> But whatever we think of these arguments, the point here is

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<sup>218</sup> Actually, the other Reconstruction Amendments may also be susceptible to some of the objections raised here, but this Article does not address them.

<sup>219</sup> See Paulsen, *supra* note 19, at 696 (arguing that “the First Amendment remains valid, and consistent with popular sovereignty . . . because it has not been repealed by the recognized mechanisms for expressing so fundamental a change in the sovereign will of the People”); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 195–97 (2008) (discussing this response and rejoinders to it).

<sup>220</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 7–9 (2011).

<sup>221</sup> Actually, for the most part, “defenses of originalism have . . . failed to address . . . the exclusion of African-Americans and women from the constitutional enactment process.” McGinnis & Rappaport, *supra* note 62, at 1697; see also *id.* at 1697 n.4 (“[W]e cannot think of any extended analysis of these matters by [another] originalist.”).

<sup>222</sup> See *id.* at 1757–64 (arguing that the Reconstruction Amendments and the Nineteenth Amendment largely correct for the initial failure to allow women and most African Americans to participate in the ratification of the Constitution).

<sup>223</sup> See *id.* at 1763 n.228 (“The close connection between women and male relatives may mean that women’s suffrage at the time of ratification would not have made a large difference.”); McGinnis & Rappaport, *supra* note 63, at 396 n.55 (arguing that there is no “strong evidence” that “the Constitution would have been systematically different” had “women and African-Americans” been included in the framing process).

<sup>224</sup> For my part, I will confess to finding them wholly unsatisfactory.

that the Fourteenth Amendment opens a whole different kettle of fish. It presents a problem that cannot be addressed with the usual responses. The concern with the Fourteenth Amendment is not (just) that modern views may differ from those of the framing generation, or that many of the Framers may not have known what they were getting themselves (and us) into, or that we cannot be certain whether some members of the framing generation who were excluded from the decisionmaking process would have agreed with the end result. The unique concern with the Fourteenth Amendment is that, at the time of its enactment, a very sizable portion of the American people—enough to defeat the Constitution’s supermajority requirements—with a clear understanding (at least in general terms) of what the Amendment set out to accomplish, expressly and vehemently disagreed with it, and yet were forced to ratify it against their will.<sup>225</sup>

If originalism is justified because the provisions of the Constitution were voluntarily adopted by a supermajority of the American people, in whom all sovereignty is vested,<sup>226</sup> or because supermajoritarianism produces better laws,<sup>227</sup> then what warrant is there for insisting on an originalist interpretation of a provision that openly failed to obtain the support of a supermajority of the people? And if originalism is justified because the Constitution is a contract among the people,<sup>228</sup> then what warrant is there for insisting on an originalist interpretation of a provision to which the people ultimately agreed only involuntarily, under severe duress?<sup>229</sup>

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<sup>225</sup> See, e.g., J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 634 (2d ed. 1969) (“In reality Congress in 1867–1868 was not merely submitting an amendment to the states. It was creating fabricated governments in the South, to which there was given not an untrammelled opportunity of voting *Yes* or *No* on the proposed constitutional article, but only the alternative of voting *Yes* or being denied recognition as states in the Union.”); Jason Mazzone, *Unamendments*, 90 *IOWA L. REV.* 1747, 1807 (2005) (“Ratification of the Fourteenth Amendment came about through plain coercion.”).

<sup>226</sup> See *supra* Part I.A.

<sup>227</sup> See *supra* Part I.C.

<sup>228</sup> See *supra* Part I.B.

<sup>229</sup> Arguably, the circumstances in which the Southern states were placed do not technically qualify as “duress” under the law of contract, especially as it existed at the time. See Harrison, *supra* note 8, at 419, 452 (suggesting this possibility). That point is certainly debatable. See *id.* at 419 (noting that in “the nineteenth century there was good authority for the proposition that a contract was invalid because of duress . . . if major violence was used or threatened”); 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 395 (Boston, Little, Brown & Co. 5th ed. 1866) (declaring that a threat renders a contract voidable if it “was of sufficient importance to destroy the threatened party’s freedom”); RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”). But, in any event, the contract metaphor is just that—a metaphor. I am not aware of any originalist who believes that the Constitution is subject in every respect to all of the particulars of contract law. See, e.g., BARNETT, *supra* note 211, at 100 (arguing that, while many aspects of contract law theory are relevant to constitutional interpretation, the Constitution should not be treated “as a



Even if we accept (as virtually everyone does) that the Fourteenth Amendment is lawfully part of the Constitution today, despite its dubious origins, we cannot deny that there were irregularities, to put it mildly, in its enactment and ratification.<sup>230</sup> Those irregularities render the normative case for originalism much less compelling—perhaps even devastated—when applied to the Fourteenth Amendment, the very constitutional provision “that most concern[s] originalists who worry about judicial activism.”<sup>231</sup>

Originalists have ignored this problem altogether.<sup>232</sup> What follows is an analysis of possible responses available to them. Part III.A considers arguments that could be made to try to contest or get around the lack of a supermajoritarian consensus. If those arguments fail, Part III.B considers ways in which originalists might seek to come to terms with the inapplicability of their normative arguments to the Fourteenth Amendment.

#### A. Possible Counterarguments

One suspects that originalists would not be quick to concede that the normative arguments for originalism are incompatible with the ratification of the Fourteenth Amendment. This section considers, and ultimately rejects, a number of arguments that originalists might advance to contest or dodge this claim.

1. *The Fourteenth Amendment Did, in Fact, Receive the Necessary Supermajoritarian Support.*—To begin with, there are several arguments that originalists could offer in support of a claim that, despite the history recounted above, the Fourteenth Amendment actually did garner the support of a supermajority of the people.

a. *It was the later ratification votes, not the earlier rejection votes, that were the true expression of the will of the majority of the Southern people.*—Originalists might argue that the initial votes by the Southern state legislatures to reject the Fourteenth Amendment were not truly representative of the actual views of a majority of the Southern people, because those all-white legislatures were not elected by the population as a whole. Indeed, the argument might go, when Congress mandated the election of new state governments under the Reconstruction Acts, those governments, elected through universal suffrage (or universal male suffrage, anyway), were truly representative in a way

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contract in a literal sense”). The bottom line is that the social contract metaphor breaks down if the “contract” was coerced and the people did not agree to its terms.

<sup>230</sup> See Harrison, *supra* note 8, at 409 (arguing that the Amendment was formally valid, but acknowledging that the “process . . . was, to say the least, extraordinary”).

<sup>231</sup> Colby, *supra* note 217, at 598.

<sup>232</sup> The minor exception here is McGinnis and Rappaport, who have addressed this issue, but only in a footnote. See McGinnis & Rappaport, *supra* note 62, at 1727 n.83. Their analysis is discussed below in Parts III.A.3 and III.A.4.

that the earlier white supremacist governments had never been.<sup>233</sup> When those new inclusive governments voted to ratify the Fourteenth Amendment, that was a formal expression of the true views of a majority of the Southern people; in combination, blacks, free for the first time to vote, and liberal whites outnumbered the racist white minority that had previously controlled the state legislatures. Accordingly, the argument would go, the Fourteenth Amendment really did receive the formal consent of the people of three-fourths of the states, just as soon as more of those people were given a voice in the process. Whatever *federalism* concerns we might have with the federal Congress forcibly remaking state governments (and perhaps we should not have any after the Civil War), we should not have any *popular sovereignty* concerns with the decision of those remade state governments to ratify the Fourteenth Amendment. Unlike the older racist governments, those new state governments actually represented the true wishes of the people.

This would be a tidy response. But unfortunately, it does not work. For one thing, the new state governments were not elected through universal male suffrage. The Reconstruction Act expressly allowed for the disenfranchisement of voters “for participation in the rebellion.”<sup>234</sup> Although the extent of the phenomenon has often been overstated,<sup>235</sup> there was in fact significant disenfranchisement of white voters who had supported or been active in the rebellion.<sup>236</sup> As such—even leaving aside the lack of women’s suffrage—the new state governments were not elected through a truly representative process either. They just replaced one (morally reprehensible) form of disenfranchisement with another (morally understandable) one.

In addition, even beyond the effects of disenfranchisement, the new state governments ended up comprised of representatives who were disproportionately willing to vote for the Fourteenth Amendment. By the time the new governments were elected, conservative whites were humiliated and defiant, and many chose not to vote, whether as a form of protest, as a racist refusal to share a voting booth with blacks, or as a

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<sup>233</sup> Cf. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 *DRAKE L. REV.* 911, 1004 (2008) (“The new Southern state constitutions established a much more democratic electorate. As a result, the new legislatures that ratified the Fourteenth Amendment came from a far more democratic system than the legislatures they replaced. From the perspective of a modern democratic understanding of popular sovereignty, the ratification was more, not less, acceptable.”).

<sup>234</sup> Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

<sup>235</sup> See Forrest G. Wood, *On Revising Reconstruction History: Negro Suffrage, White Disenfranchisement, and Common Sense*, 51 *J. NEGRO HIST.* 98, 104–08 (1966). For an example, see McElwee, *supra* note 7, at 491, 500, 503.

<sup>236</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 323–24 (Henry Steele Commager & Richard B. Morris eds., 1st Perennial Classics 2002) (1988); Wood, *supra* note 235, at 105–07.

reflection of profound disillusionment.<sup>237</sup> Once the military occupation of Radical Reconstruction had begun, it became obvious to white voters that Congress would ultimately ensure, whether through additional massive white disenfranchisement or otherwise, that the South would ratify the Fourteenth Amendment. There was no point in bothering to vote, and so many of them did not.<sup>238</sup> In other words, it was only because of the coercive military occupation—and because the North had made clear that it would dictate the ultimate outcome no matter what—that most of the new Southern state legislatures ended up firmly in the hands of the liberal, Republican minority.

Finally, it must not be forgotten that these new, disproportionately Unionist state governments acted at gunpoint. They had been given no choice but to ratify, and it is impossible to say with any confidence that their ratification votes were voluntary.<sup>239</sup> Indeed, the history discussed above strongly suggests that they were not.<sup>240</sup> As one additional data point, consider the fact that the new Georgia legislature was still riddled with enough racist bile to expel the duly elected black representatives.<sup>241</sup> One can surely question whether a legislature like that would have ratified the Fourteenth Amendment in the absence of federal coercion.<sup>242</sup>

*b. Even though the Southern ratification votes were not voluntary, there really was majority support for the Amendment in the Southern states.*—A second possible rejoinder is related to the previous one. Originalists might argue that, even if the actual ratification process in the South was flawed and not truly the product of voluntary choice, the fact remains that a majority of the

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<sup>237</sup> See Wood, *supra* note 235, at 108–10; JAMES, *supra* note 79, at 214.

<sup>238</sup> See Wood, *supra* note 235, at 110 (“It must have been quite obvious from the beginning that the Radicals were going to have things their way; and that the establishment of military districts indicated that they were going to depend on federal bayonets, not Negro voters. Had southern whites turned out in force, it is probable that the Radicals would have resorted to the most obvious expedient: simply secure the disenfranchisement of more whites. This probability may have discouraged many from even bothering to make the trek to the registration office.”).

<sup>239</sup> Cf. 2 ACKERMAN, *supra* note 8, at 198 (“Keep in mind that ‘the South’ placed under unconventional threat” of “indefinitely extended military occupation unless they ratified [Congress’s] constitutional initiative” was “not the lily-white South, but the newly minted governments of black and white voters *after* their constitutions had been certified as complying fully with the requirements of Republican government.”). *But see* Harrison, *supra* note 8, at 452 (arguing that the threat of continued nonrepresentation in Congress until the Amendment was ratified was probably unnecessary, as “Congress had done the real work when it brought about the creation of [the new] state governments”).

<sup>240</sup> See *supra* notes 158–65 and accompanying text.

<sup>241</sup> See FONER, *supra* note 236, at 346–47.

<sup>242</sup> Georgia’s Provisional Governor informed the legislature that, by Act of Congress, “you are *required* to duly ratify the amendment to the Constitution proposed by the 39th Congress, and known as Article 14 . . . before the State shall be entitled and admitted to representation in Congress as a State of the Union.” JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF GEORGIA 49 (1868) (emphasis added).

Southern people really did support the Fourteenth Amendment. Because freed slaves and Unionists combined to outnumber conservatives, the argument would go, if there had been a fair ratification process with universal suffrage in the South, the Amendment would have been ratified. Yes, the actual process was faulty, but in a sense: no harm, no foul. Because the Southern people actually did support it, the Amendment still represents their sovereign will.

There are two problems with this argument. First, it is likely empirically wrong. Blacks were a majority in only two or three Southern states.<sup>243</sup> In some other Southern states, they comprised only about a quarter or a third of the population.<sup>244</sup> Virulent racism and a rabid obsession with states' rights ran very deep in the Southern white population,<sup>245</sup> and it appears that only a negligible percentage of Southern whites supported the Amendment on its merits.<sup>246</sup>

Second, in any event, “would have voted for the Amendment” is not the same thing as “did vote for the Amendment.” Relying on what the people likely would have done, rather than what the people in fact did do, is profoundly informal, and profoundly nonoriginalist. As Keith Whittington has emphasized, “originalism insists on the reality of consent” and “abandon[s] the notion of tacit or hypothetical consent.”<sup>247</sup> “[O]riginalism insists that consent cannot be assumed but must be obtained from those people who will be subjected to government power.”<sup>248</sup> Joel Alicea explains that, for an originalist, the fact that polls show that the people overwhelming support a particular proposition is irrelevant, for constitutional purposes, unless the Constitution is formally amended (voluntarily). Only then can we say that “there exists a genuine and

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<sup>243</sup> See AMAR, *supra* note 17, at 374 (noting that only South Carolina and Mississippi had black majorities); Chin & Abraham, *supra* note 168, at 41 n.105 (“At least in Louisiana, Mississippi, and South Carolina, where African-Americans were a majority of the population, there is no reason to doubt the majoritarian nature and popular support for the amendment[.]”).

<sup>244</sup> See Wood, *supra* note 235, at 99.

<sup>245</sup> See *supra* Part II.A.1.

<sup>246</sup> See BOND, *supra* note 79, at 125 (noting that “[v]irtually all white South Carolinians,” even the Unionists, opposed black suffrage, and opposed the Amendment because it seemed to impose it); *id.* at 101 & 114 n.7 (noting that, at the time of the first ratification vote in the Alabama legislature, the legislature was dominated by Unionists, rather than secessionists, but it still overwhelmingly rejected the Amendment); *id.* at 173 & 185 n.36 (“So universal was the white opposition to the amendment that one Florida editor declared in mid-November, just four days before the legislature met: ‘Having seen no evidence of favor to the Constitutional amendment from any respectable quarter in the South, we have felt no disposition to discuss its merits.’” (quoting *The Constitutional Amendment*, ST. AUGUSTINE EXAMINER, Nov. 10, 1866, at 2)); Wood, *supra* note 235, at 108–10 (suggesting that it was only because conservative whites largely abandoned the political process that the new Southern governments were able to ratify the Amendment); see also *supra* Part II (discussing the lack of consensus in the proposal and ratification of the Fourteenth Amendment).

<sup>247</sup> WHITTINGTON, *supra* note 12, at 156.

<sup>248</sup> *Id.* at 157.

overwhelming national consensus that has emerged after a lengthy period of reasoned public discourse.<sup>249</sup> The idea “that popular sovereignty can be exercised without any formal participation by the people in constitutional development”<sup>250</sup>—that popular opinion can be relied upon to justify a change in the content or meaning of the Constitution in the absence of actual consensual ratification—is a “nonoriginalist approach to popular sovereignty”<sup>251</sup> that “runs counter to an originalist notion of what popular sovereignty means.”<sup>252</sup>

*c. Even though the Amendment did not win the voluntary support of a majority of Southerners, it was still supported by a significant majority of Americans, and thus represents the popular will of the American people as a whole.*—Bruce

Ackerman has argued that, even though the enactment of the Fourteenth Amendment did not (in his opinion) satisfy the strict requirements of Article V, the Republican landslide victories in the 1866 and 1868 elections showed that a significant majority (though not a supermajority) of the American people as a whole (though perhaps not of Southerners) approved of the Amendment.<sup>253</sup> These and related historical events—including the impeachment of President Johnson and his response to it—demonstrate that the Fourteenth Amendment was the product of its own sort of higher lawmaking, and was thus a legitimate act of popular sovereignty, notwithstanding its failure to comply with Article V.<sup>254</sup>

Some originalists might be tempted by this argument—more so than by the previous one—as Ackerman’s claim at least relies on actual elections as formal indicia of popular support. If constitutional authority comes from the consent of the people, then perhaps formal and informal acts of the people that evince that consent—such as a national election that

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<sup>249</sup> Alicea, *supra* note 21, at 107–08. Cf. THE FEDERALIST NO. 78, *supra* note 15, at 527–28 (Alexander Hamilton) (“Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.”).

<sup>250</sup> Alicea, *supra* note 21, at 105.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 111.

<sup>253</sup> See 2 ACKERMAN, *supra* note 8, at 178–238.

<sup>254</sup> See *id.* Of course, Ackerman’s view is far more nuanced than the text suggests. He opines that, notwithstanding the irregularities in its enactment, the Fourteenth Amendment was not “an outrageous case of textualist rupture and sectional imposition,” *id.* at 184, because the South actively participated in the constitutional conversation. *Id.* at 183. And he believes that, ultimately, the South (along with President Johnson and the Supreme Court) backed down, albeit reluctantly, and acquiesced in the higher lawmaking pretensions of the Republican Congress. See Ackerman, *supra* note 145, at 506–07.

was widely understood at the time to be “a referendum on the Fourteenth Amendment”<sup>255</sup>—should be enough to legitimate constitutional change.

Tempted as they might be, one suspects that few originalists would be willing to go along with Ackerman here. Ackerman’s emphasis on popular sovereignty and historical consent makes him something of a fellow traveler on the originalist train.<sup>256</sup> But originalists typically bristle at Ackerman’s assertion that the people can change the meaning or content of the Constitution through unconventional means—that it is legitimate for constitutional change to come through transformative constitutional moments outside of the Article V amendment process.<sup>257</sup> That belief is anathema to most originalists.<sup>258</sup> Michael Dorf explains that “[t]his difference is fundamental. From the strict originalist’s perspective, the notion that the Constitution can be amended without complying with the Article V procedures is radically destabilizing” because it “robs the Constitution of its positivist character.”<sup>259</sup>

Ackerman’s elegant theory is historically based popular sovereignty without originalism. Originalists use popular sovereignty as a justification for insisting that we follow the original meaning of the constitutional text.<sup>260</sup> Ackerman uses popular sovereignty as a justification for overriding

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<sup>255</sup> Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11.5 U. PA. J. CONST. L. 1381, 1396 (2009) (discussing the 1866 election); see also FONER, *supra* note 236, at 267 (“More than anything else, the [1866] election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted ‘with so exclusive reference to a single issue.’” (quoting Editorial, *The People’s Verdict*, N.Y. TIMES, Oct. 11, 1866, at 4)).

<sup>256</sup> See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 932 (2009) (“[E]ven if Ackerman . . . do[es] not describe [his] views as originalist, it is clear that [his] approach[] to the Constitution, which emphasize[s] popular sovereignty and the constitutional text, ha[s] had both direct and indirect influences over contemporary theoretical debates explicitly concerned with originalism.”). Thus, many commentators, including some originalists, have labeled Ackerman as an originalist of sorts. See, e.g., Lash, *supra* note 12, at 1440 n.6 (claiming that Ackerman “advocat[es] originalism under the theory of popular sovereignty”); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992) (book review) (“Ackerman’s theory is merely originalism flying under liberal colors.”).

<sup>257</sup> See, e.g., BARNETT, *supra* note 211, at 108–09 (rejecting Ackerman’s constitutional theory for this reason); BORK, *THE TEMPTING OF AMERICA*, *supra* note 25, at 215 (same); Raoul Berger, *Bruce Ackerman on Interpretation: A Critique*, 1992 BYU L. REV. 1035 (1992) (book review) (same).

<sup>258</sup> See Stein, *supra* note 5, at 409 (arguing that Ackerman “is not actually an originalist,” because, while “his eloquent exposition of the concept of popular sovereignty can be relied upon by originalists of a more traditional bent,” his “insistence that the Constitution can be amended, and has been amended, outside the Article V process” is a “departure from originalism”).

<sup>259</sup> Dorf, *supra* note 56, at 1780; see also Sherry, *supra* note 256, at 928 (“Like the originalists, Ackerman insists that we are bound by the past, but he agrees with non-originalists that constitutional change can occur without formal amendments.”).

<sup>260</sup> See *supra* Part I.A. See generally Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 302–08 (2005) (discussing the heavy emphasis that modern originalists place on the constitutional text); Randy E. Barnett, *Underlying*

the original meaning of the constitutional text. He would allow for constitutional change through the expressed will of the people, even in the absence of either supermajoritarian support<sup>261</sup> or the approval of three-fourths of the individual states.<sup>262</sup> To an originalist, on the other hand, the Constitution can be changed when the people collectively act to change it, but the people must act in compliance with the original meaning of Article V—the constitutional text that dictates the procedures for effectuating constitutional change. Article V unequivocally requires supermajoritarianism and state-by-state ratification, and it seems clearly to contemplate no other legitimate means of constitutional amendment.<sup>263</sup> Indeed, much of the rhetoric of originalism has focused on the argument that what is illegitimate about nonoriginalism is that it allows for constitutional change (in that case, by judges) outside of Article V.<sup>264</sup>

2. *The Requisite Supermajority Support Was Achieved When Additional States Ratified the Fourteenth Amendment Years After It Became Effective.*—Originalists might argue that, even without the coerced Southern ratifications, the requisite formal supermajority support for the Fourteenth Amendment was ultimately achieved when, in the twentieth and twenty-first centuries, many additional states voted to ratify it.<sup>265</sup>

Recall that, as there were thirty-seven states in 1868, it was necessary for twenty-eight states to ratify in order for the Amendment to become effective. By the end of 1870, thirty-three states had ratified, but ten of those ratifications were coerced, and three of the noncoerced ratifying states had subsequently sought to rescind their ratification votes.<sup>266</sup> Since that time, however, the three states that voted to rescind their ratifications

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*Principles*, 24 CONST. COMMENT. 405, 413 (2007) (“To remain faithful to the Constitution . . . , we must never forget it is a text we are expounding. . . . [I]t is not the underlying principles that are applied to present circumstances but the original meaning of the text interpreted in light of these principles.” (emphasis omitted)).

<sup>261</sup> See Stein, *supra* note 5, at 413 (noting that Ackerman’s theory does not depend on supermajorities).

<sup>262</sup> See 2 ACKERMAN, *supra* note 8, at 198–205 (arguing that Reconstruction went a long way toward effectuating a fundamental change in American constitutionalism by, to a substantial degree, replacing the federalism-based amending procedures of Article V with something more like a national plebiscite).

<sup>263</sup> See U.S. CONST. art. V. Akhil Amar has offered an argument sounding heavily in originalism for the propriety of some forms of amendment outside of Article V. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). So far, however, originalists have not been convinced. See Monaghan, *supra* note 77, *passim* (refuting Amar’s arguments).

<sup>264</sup> See *supra* note 23 and accompanying text.

<sup>265</sup> See Chin & Abraham, *supra* note 168, at 38 (suggesting this possibility).

<sup>266</sup> See *supra* notes 143–70 and accompanying text.

have repealed their rescission resolutions or voted again to re-ratify: Oregon did so in 1973; New Jersey and Ohio did so in 2003.<sup>267</sup> On top of that, four additional states have now voted to ratify the Amendment: Delaware, which initially rejected the Amendment in 1867, voted to ratify in 1901; Kentucky, which initially rejected in 1867, voted to ratify in 1976; Maryland, which initially rejected in 1867, voted to ratify in 1959; and California, which initially was deadlocked and failed to act on the Amendment, voted to ratify in 1959.<sup>268</sup> Of course, that still gets us to only twenty-seven states, one short of the twenty-eight that were necessary for ratification in 1868,<sup>269</sup> let alone the thirty-eight states that were necessary by the time that some of these later states acted.<sup>270</sup> But it seems reasonable to conclude that the people of the thirteen states that joined the Union after 1868 formally expressed their consent to the Fourteenth Amendment (and the rest of the Constitution) when they petitioned for statehood.<sup>271</sup> If that is so, then forty states can be said to have voluntarily ratified the Fourteenth Amendment, which gets us over the constitutional supermajority requirement without including the forced ratifications by the Southern states.

The problem with this argument, from a popular sovereignty standpoint, is twofold. First, although ratification over the course of a century or more might be sufficient to formally comply with Article V, which does not impose an express time limit on ratification,<sup>272</sup> it does not support a claim that the Amendment actually represents the formally

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<sup>267</sup> See Chin & Abraham, *supra* note 168, at 36.

<sup>268</sup> See COLLINS, *supra* note 90; JAMES, *supra* note 79, at 158, 169, 177; Chin & Abraham, *supra* note 168, at 29, 31–33.

<sup>269</sup> See Chin & Abraham, *supra* note 168, at 41.

<sup>270</sup> Cf. Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 102–07 (1994) (noting that Congress declared the Twenty-Seventh Amendment—which was proposed in 1789, when there were only nine states—to be valid after the thirty-eighth state ratified it in 1992).

<sup>271</sup> See, e.g., Omnibus Enabling Act of 1889, ch. 180, 25 Stat. 676, 676 (Act of Congress establishing the process by which North Dakota, South Dakota, Montana, and Washington were to achieve statehood) (providing that the proposed states must hold constitutional conventions, at which, among other things, the elected delegates “shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States”). See generally Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 126–29 (2004) (outlining the process that Congress has followed in admitting new states).

<sup>272</sup> See, e.g., *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 88 (1992) (“That the ratification of the Congressional Pay Amendment has stretched across more than 200 years is not relevant under the straightforward language of Article V. Article V contains no time limits for ratification.”); Paulsen, *supra* note 19, at 692–94. In *Coleman v. Miller*, the Supreme Court found this issue to be a political question, such that Congress can choose to propose and accept an amendment without a time limit for ratification. 307 U.S. 433, 452–56 (1939).



expressed agreement of a supermajority of the people.<sup>273</sup> As the Supreme Court has noted, for “ratification [to be] the expression of the approbation of the people . . . it must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.”<sup>274</sup>

Second, the public meaning of the Fourteenth Amendment was very different between the time of its initial proposal and the time of these later ratifications. When Maryland and California voted to ratify in 1959, for instance, they did so as a “vote of support for *Brown* [*v. Board of Education*].”<sup>275</sup> *Brown* was, of course, a “famously nonoriginalist decision,”<sup>276</sup> in which the Supreme Court refused to consider historical evidence of original meaning and declared that “we cannot turn the clock back to 1868 when the Amendment was adopted.”<sup>277</sup> California and Maryland’s ratification of the Fourteenth Amendment in the 1950s was therefore “an endorsement of its *current* interpretation”<sup>278</sup>—an endorsement of its contemporary meaning, rather than its original meaning. These later ratifications manifestly cannot be taken to demonstrate supermajority support for, and agreement to be bound by, the original meaning of the Fourteenth Amendment.<sup>279</sup>

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<sup>273</sup> See House Hearings, *supra* note 168, at 69, 72, 81–82, 85 (testimony of Prof. Charles L. Black, Jr., Yale Law School) (arguing that ratification over a period of decades cannot be taken to reflect the sovereign will of the people because “consent given in [one year] might be very stale [a decade and a half later] and hardly evidence of any consensus”); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 521–29 (1994) (arguing that amendments ratified over a long period of time do not reflect the will or consent of the people); Paulsen, *supra* note 19 (“To permit ratification over a period of two centuries is to erode, if not erase, the ideal of overwhelming popular agreement.”). *But see* Paulsen, *supra* note 19, at 695–96 (arguing that, because “[p]opular sovereignty—the consent of the people to their form of government—can be transmitted over time,” “it is not clear why the requisite ‘consensus’ may not be measured across generations”).

<sup>274</sup> *Dillon v. Gloss*, 256 U.S. 368, 370–71, 375–76 (1921) (upholding the time limit for ratification that Congress placed upon the Eighteenth Amendment).

<sup>275</sup> Chin & Abraham, *supra* note 168, at 32–33.

<sup>276</sup> Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1204 (2012); *see also* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (arguing that *Brown* cannot be squared with originalism); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949, 953–55 (1995) (arguing that the result in *Brown* is consistent with originalism, but conceding that the Court’s actual reasoning in *Brown* was profoundly and explicitly nonoriginalist).

<sup>277</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

<sup>278</sup> Editorial, *Refreshing Gesture*, WASH. POST & TIMES HERALD, Apr. 7, 1959, at A16 (emphasis added) (“The Maryland legislators could have used this opportunity to express disapproval and indignation over the Supreme Court’s decision in the school desegregation cases decided under the Fourteenth Amendment. Instead, they made a point voting overwhelmingly for the Amendment, which must necessarily constitute an endorsement of its current interpretation.”).

<sup>279</sup> *Cf. Congressional Pay Amendment*, *supra* note 272, at 95 n.13 (“It is conceivable that the goal of consensus, if there is one, could be defeated where the last State to ratify harbors an entirely different

3. *The Southern Objections to the Amendment Should Not Count Because the Southern States Lacked a Republican Form of Government.*—Akhil Amar has argued that Congress was justified

in refusing to seat the representatives from the Southern states because Congress legitimately found that those states, by refusing to enfranchise their massive African-American minorities, did not have a republican form of government.<sup>280</sup> By the same token, argues Amar, Congress's insistence on ratification of the Fourteenth Amendment as a condition of reentering the Union was justifiable because the Fourteenth Amendment was designed to ensure the continuing existence of republican government in the South.<sup>281</sup>

Amar offers this argument in support of a claim that the enactment of the Fourteenth Amendment formally complied with the terms of Article V<sup>282</sup>—a question on which I take no position here.<sup>283</sup> McGinnis and Rappaport, however, seek to extend Amar's argument to address the question whether the Amendment "represented a national consensus."<sup>284</sup> They argue that, "[i]f the Reconstruction Amendments were legal," then

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intent or purpose in approving the amendment than did the first ratifying States or the proposing Congress.").

<sup>280</sup> See AMAR, *supra* note 17, at 368–76; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); *id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."). Of course, most Northern states did not allow free blacks to vote either. But, argues Amar, blacks were only a tiny percentage of the population in the North, and Congress could reasonably conclude that disenfranchising 2% of the male population does not offend the basic republican ideal of government in the way that disenfranchising 25%–50% of the male population does. See AMAR, *supra* note 17, at 374.

<sup>281</sup> See AMAR, *supra* note 17, at 376–80.

<sup>282</sup> See *id.* at 366 (arguing that, *contra* Ackerman, "Reconstruction Republicans plausibly acted within the general Article V framework, even as they repeatedly found themselves obliged to improvise, interpolate, and make commonsensical judgment calls to resolve many difficult legal issues that were arising for the first time in the mid-1860s (and that have never recurred)").

<sup>283</sup> The fact that a constitutional provision is formally valid does not necessarily mean that it reflects the consensus views of a supermajority of the people. Cf. Harrison, *supra* note 8, at 458 (noting that the "Republicans . . . got away with something Article V probably was supposed to prevent" but explaining that "[t]his is no problem for a formalist"). Imagine, for instance, that Congress were to follow a big win for the Democratic Party in a national election by proposing a constitutional amendment seeking to expand and constitutionalize the welfare state. And imagine further that, after well over one-fourth of the states enthusiastically voted down the proposed amendment, the Democratic supermajority in Congress refused to seat the elected Senators and Representatives from the recalcitrant "red states" until those states changed their minds about ratification. If the chastised states were ultimately to give in and ratify the proposed amendment, that might well satisfy Article V as a formalist matter. See *id.* at 453–54. But it would be outrageous to suggest in those circumstances that the amendment actually garnered the consent of a supermajority of the American people.

<sup>284</sup> McGinnis & Rappaport, *supra* note 62, at 1727 n.83. Although McGinnis and Rappaport advance this argument (and the one discussed in Part III.A.4, *infra*) in support of their supermajoritarian defense of originalism, it would seem to be equally applicable to the popular sovereignty and contract defenses.

“this analysis would largely address the concerns about their consensus character.”<sup>285</sup> They elaborate:

[S]uppose, as Amar suggests, that many of the confederate states were properly excluded from voting because they did not have the constitutionally required republican form of government. Then, the amendments would have been legal, having passed with the requisite constitutional supermajorities. It is true that the consensus behind the amendments would have excluded much of the former Confederacy, but the Constitution would have made the judgment that nonrepublican states should be excluded. When a portion of the country is no longer republican, there is a tradeoff between requiring an extended consensus and limiting input to those with republican values, and the Constitution would have chosen republican values over a full consensus.<sup>286</sup>

In other words, the racist Southern state governments that initially rejected the Fourteenth Amendment (prior to being remade at the hand of Congress) were not truly “republican,” insofar as they disenfranchised their sizable black populations. As such, the Constitution made the judgment to exclude those states from the national consensus that is necessary for constitutional amendments, perhaps because their “values” were constitutionally unacceptable, or perhaps because nonrepublican governments cannot be taken to speak for the people as a whole.

McGinnis and Rappaport are the only originalists of whom I am aware who have directly addressed the ramifications of the irregularities in the framing of the Fourteenth Amendment for the normative defense of originalism. While they deserve much credit for recognizing and confronting the problem (albeit only in a footnote), their reasoning seems unconvincing. The whole theory behind the traditional normative defenses of originalism is that the Constitution represents the voice of the people as whole, not the voice of the fraction of the people that the Framers or the Congress considered worthy of being heard. If the Constitution indeed makes the judgment that people who hold certain values will not be counted, then that suggests that the Constitution is not actually the voice of the people. There may well be good, moral reasons for excluding racists (or monarchists, or anarchists, or what-have-you) from the process of shaping our higher law. But doing so is not consistent with a notion that that higher law is possessed of a “consensus character.”<sup>287</sup>

Perhaps McGinnis and Rappaport’s argument is more narrowly focused on the nature of the excluded values. Perhaps the argument is that, in order to establish a genuine supermajority that truly manifests the collective sovereignty of the populace, it is necessary to have a certain degree of inclusiveness in the ratification process. The South could be excluded from the framing of the Fourteenth Amendment because its lack

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

of republicanism (as a result of its disenfranchisement of blacks) meant that its elected representatives could not speak for the whole of its people in the process of higher lawmaking. That is to say, in order to achieve legitimate popular sovereignty and supermajoritarianism, it was necessary to exclude the racist states that disenfranchised minorities; the normative justifications for originalism require us to “cho[ose] republican values over a full consensus.”<sup>288</sup>

But if that is the argument, then it proves too much, and it would seem to undercut the entire originalist enterprise. With a few exceptions, blacks were not represented in the ratification of the original Constitution either. Nor were the poor, Native Americans, or women.<sup>289</sup> Indeed, women were also not able to participate in the ratification of the Fourteenth Amendment.<sup>290</sup> If constitutional legitimacy depends on popular sovereignty, supermajoritarianism, or both, and if popular sovereignty and supermajoritarianism preclude disenfranchising a significant percentage of the population, then virtually the entire Constitution was illegitimate from the get-go, and there is no reason to interpret it according to its original meaning.<sup>291</sup>

4. *Despite Its Lack of Supermajoritarian Support, the Fourteenth Amendment Corrected for the Initial Exclusion of African Americans from the Framing of the Constitution.*—McGinnis and Rappaport offer another argument to address the concerns with the framing of the Fourteenth Amendment:

Even if one did conclude that [forcing the Fourteenth Amendment upon the South] was problematic . . . , following the amendment[] might still be justifiable under our theory as a normative matter. The amendment[] operated to correct a supermajoritarian failure—the original Constitution’s exclusion of blacks from political participation—and therefore might be justified on that basis. If the Judiciary enforced the amendment[] under this theory, that

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<sup>288</sup> *Id.*

<sup>289</sup> See *supra* notes 213–15 and accompanying text.

<sup>290</sup> This was a point that several Northern Democrats made at the time in response to the republican form of government argument. See AMAR, *supra* note 17, at 376.

<sup>291</sup> On the topic of values, one might be tempted to shrug aside the concerns raised in this Article by arguing that, because the white Southerners were secessionists, slave owners, and racists, we ought to have no qualms about the fact that their views were disregarded or forcefully overridden in the making of the Fourteenth Amendment. That might be a perfectly viable argument for a nonoriginalist to make. But it will not do for an originalist who claims normative authority for originalism based on supermajoritarianism or popular sovereignty. If the legitimacy of the Constitution is grounded in the will of the people, rather than in the Constitution’s moral goodness, then our own views of morality are no substitute for formal actions of a supermajority of the people. Indeed, the original Constitution is riddled with provisions that were included only at the insistence of racist slaveholders. See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 89–90 (1982). Yet we still follow them.

enforcement would represent a judicial correction of the original exclusion of African-Americans.<sup>292</sup>

McGinnis and Rappaport elaborate that the Reconstruction Amendments afford blacks the same rights that whites had at the time of the framing of the original Constitution and “provide African-Americans with the provisions they would have been able to obtain in 1789 if there had been no supermajoritarian failure and, instead, they had fully participated in the enactment process.”<sup>293</sup>

This argument, too, does not seem compelling. It all but concedes the validity of the core nonoriginalist objection to originalism that the Constitution was initially flawed from a supermajoritarian and popular sovereignty standpoint.<sup>294</sup> But then it goes on to suggest that that flaw has somehow been corrected by another amendment that was *itself* flawed from a supermajoritarian and popular sovereignty standpoint. The original Constitution was not actually the product of the sovereign will of a supermajority of the people, but that’s okay, because its shortcomings have been made up for by the Fourteenth Amendment, which was not the product of the sovereign will of a supermajority of the people either! Both the counterfactual nature of this argument and its assertion that two wrongs make a right seem hard to square with the core precepts of originalism.<sup>295</sup> How can we possibly know whether the Fourteenth Amendment contains the provisions that would have been included in the original Constitution a century earlier had blacks been allowed to participate in the framing? (Indeed, much of the Fourteenth Amendment addresses matters other than race, and many of the federalism-based objections to the Amendment ostensibly had nothing to do with race.) And, in any event, originalism accords primacy to the written text that was actually enacted voluntarily by a supermajority of the people, not to the provisions that we think would have been enacted had the whole of the people been able to participate in the framing.<sup>296</sup> If neither the original Constitution nor the Fourteenth Amendment was actually ratified voluntarily by the requisite supermajority, then the normative case for originalism is doubly crippled.

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<sup>292</sup> McGinnis & Rappaport, *supra* note 62, at 1727 n.83 (citation omitted).

<sup>293</sup> *Id.* at 1759.

<sup>294</sup> *See id.* at 1758 (“Supermajority rules have the virtue of creating consensus solutions, but if a class of voters is excluded from the process, its absence casts doubt on the existence or content of that consensus. . . . Moreover, the supermajoritarian process is designed to protect minorities. But it will have difficulty doing so if those minorities cannot participate.”).

<sup>295</sup> *Cf. Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment) (refusing to correct for one deviation from the original constitutional meaning with another, because “two wrongs do not make a right”).

<sup>296</sup> *See supra* Part III.A.1.b.

5. *Because the Popular Sovereignty Rationale for Originalism Is Best Understood as Forward-Looking, Past Popular Sovereignty Failures Do Not Undermine It.*—Some originalists have argued that the popular sovereignty justification for originalism should be understood as forward-looking, rather than backward-looking.<sup>297</sup> That is to say, they argue that originalism protects the sovereignty of the people today, not the sovereignty of the Framers. In Whittington’s words:

[O]riginalism secures the effectiveness of a future expression of the popular will. By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people. Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions.<sup>298</sup>

Or, as Steven Smith puts it:

[I]nsofar as originalism has a central and animating normative purpose, that purpose, it seems, is to empower people—actual human beings—to debate and deliberate and then adopt constitutional provisions with the confidence that these will mean and do pretty much what the human beings who adopt them understand and intend the provisions to mean and do.<sup>299</sup>

Drawing upon this line of thought, an originalist might argue that the shortcomings in the ratification of the Fourteenth Amendment are irrelevant. It is not the will and authority of nineteenth-century Americans that matters; it is the will and authority of present and future Americans. Regardless of the flaws in the ratification of the Fourteenth Amendment, interpreting that Amendment (and the entire Constitution) according to its original meaning is still normatively desirable because a commitment to originalism is necessary in order to assure present and future generations that their will to impose higher law will be respected.

But forward-looking popular sovereignty can dictate only that we must follow the original meaning of constitutional provisions that were the product of genuine supermajoritarianism.<sup>300</sup> Why would it reassure the people of today of their capacity for entrenched higher lawmaking for judges to enforce the original meaning of a provision that was not the product of the sovereign will of the people of the past? Indeed, this

<sup>297</sup> See *supra* notes 49–54 and accompanying text.

<sup>298</sup> WHITTINGTON, *supra* note 12, at 156; see also *id.* at 111 (“[O]riginalism . . . preserves the possibility of similar higher-order decision making by the present and future generations of citizenry.”).

<sup>299</sup> Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 192 (2010) (emphasis omitted) (footnote omitted).

<sup>300</sup> Cf. Stein, *supra* note 5, at 419 (noting that the forward-looking popular sovereignty argument would only commit the people today to an originalist interpretation of provisions that were “enacted under democratically legitimate procedures”).

argument can be flipped on its head. Forward-looking popular sovereignty may actually supply a reason *not* to employ originalism in interpreting the Fourteenth Amendment. By *not* enforcing the desires of the Republicans who crammed the Fourteenth Amendment down the throats of the South, we would reassure present and future generations that their collective will to impose (or not to impose) higher law will never be overridden (either contemporaneously or in the future) through coercion or brute force, but rather only through genuine acts of the collective will of the whole of the people.

6. *The Fourteenth Amendment Was a Peace Treaty, and Even Coerced Peace Treaties Are Legally Binding.*—It is sometimes remarked that the “Fourteenth Amendment was a major part of a peace treaty allowing for Southern states to be readmitted to the Union after the Civil War.”<sup>301</sup> This observation could provide an alternative basis for the legitimacy of the Fourteenth Amendment. Even if the Amendment was militarily forced upon the South by the triumphant Northern army—and thus was not the product of supermajoritarian popular sovereignty<sup>302</sup>—the fact remains that, under international law, “[c]oerced peace treaties are binding.”<sup>303</sup>

In other words, an originalist might argue that, while the rest of the Constitution owes its legitimacy to the fact that it is the product of the sovereign will of a supermajority of the people, the Fourteenth Amendment has a different source of legitimacy: it reflects the terms of peace lawfully imposed upon the defeated South by the victorious North.<sup>304</sup> These two sources of legitimacy are nearly polar opposites—one is grounded in

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<sup>301</sup> Curtis, *supra* note 233, at 1003; *see also* NELSON, *supra* note 112, at 110–11 (“The Fourteenth Amendment was understood less as a legal instrument to be elaborated in the courts than as a peace treaty to be administered by Congress in order to secure the fruits of the North’s victory in the Civil War.”); WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861*, at 4 (New York, C.G. Burgoyne 1892) (declaring that the “fruits of our war are gathered and preserved” in the Fourteenth Amendment, which was “adopted soon after the war, and with the express intention to make its results secure”); Mazzone, *supra* note 225, at 1805–06 (“[M]uch like the imposition of a constitution on occupied Japan in 1946 by the Supreme Command for the Allied Powers, the Reconstruction Amendments were imposed by the northern victors on the defeated southern states.” (footnote omitted)).

<sup>302</sup> Whittington emphasizes that, under principles of popular sovereignty, the “majority cannot simply impose its will on the minority through strength,” and the “process of constitutional formation cannot be guided by the slogan ‘to the victor go the spoils.’” WHITTINGTON, *supra* note 12, at 147.

<sup>303</sup> Harrison, *supra* note 8, at 457. Historically, “international law disregarded the effect of coercion in the conclusion of peace treaties.” Albert J. Esgain, *The Position of the United States and the Soviet Union on Treaty Law and Treaty Negotiations*, 46 MIL. L. REV. 31, 32 n.3 (1969) (citing 1 L. OPPENHEIM, *INTERNATIONAL LAW* 891–92 (H. Lauterpacht ed., 8th ed. 1955)). “The use of force in their effectuation does not derogate from the legislative character and binding force of a peace treaty.” *Id.* (citing J.L. BRIERLY, *THE LAW OF NATIONS* 245 (5th ed. 1955)).

<sup>304</sup> *Cf.* *Testa v. Katt*, 330 U.S. 386, 390 (1947) (declaring that “the fundamental issues over the extent of federal supremacy had been resolved by war”).

consent, the other in force. But, the argument would go, they are equally valid.

Perhaps. But even so, this argument cannot get originalists as far as they need to go. The notion that the Fourteenth Amendment is a peace treaty might be a reason to treat it as legitimate, but it is not a reason to require that it be interpreted according to its original meaning. The traditional argument for originalism is that the Constitution must be interpreted according to its original meaning *because its legitimacy is based on the consent of the people*.<sup>305</sup> If the Fourteenth Amendment's legitimacy is based on something other than the consent of the people, then the argument for its originalist interpretation dissolves. In general, international law does not demand strict originalism in treaty interpretation.<sup>306</sup> And even those who insist that treaties be interpreted according to their original meaning do so based on principles of mutual consent that mirror the traditional normative defenses of originalism—that, in order to effectuate the shared will of the party states, courts should seek the “original shared understanding of the contracting parties.”<sup>307</sup> For the same reasons that the Fourteenth Amendment does not represent the sovereign will of the people, it also does not represent the mutual consent of either the ratifying people or the ratifying states. What normative justification is there for binding today's Southerners (who bear no responsibility for the Civil War) to the potentially vindictive intentions or understandings of the people who defeated their ancestors on the battlefield a century and a half ago?<sup>308</sup> And, once we take away the pretense of mutual consent of the Framers, why should the fact that the North was empowered to dictate the terms of the Confederate surrender in the 1860s mean that we *all* must be bound today by the outdated, and even-at-the-time highly controversial, nineteenth-century notions of liberty and equality that were held by the prevailing Unionists, rather than by our own evolving understanding of the lofty freedoms that are guaranteed by the abstract terms of the Fourteenth Amendment?<sup>309</sup>

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<sup>305</sup> See *supra* Part I.

<sup>306</sup> See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 125 (2003) (noting that “generally accepted principles of international law” and the Vienna Convention on the Law of Treaties, which “is the primary source in international law for interpreting a treaty,” place a “teleological emphasis on the object and purpose of a treaty,” which “allows a dynamic or evolving interpretation that can move a treaty away from the original intent of its drafters” (internal quotation marks omitted)).

<sup>307</sup> *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting).

<sup>308</sup> Cf. COLLINS, *supra* note 90, at 8 (describing the initial case for the Fourteenth Amendment as “an appeal to fanaticism, fear, and revenge” in the North).

<sup>309</sup> Cf. Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249, 260 n.26 (2004) (“Since the Founding, it has been understood that the meaning of . . . treaties can be dynamic.”); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 832



7. *The Southern States Need Not Be Included in the Article V Denominator.*—Finally, originalists might argue that the Southern states, having voluntarily sought to secede from the Union, effectively removed themselves from the denominator in the Article V ratification equation. Thus, the necessary supermajority support was obtained in 1867, as soon as the Fourteenth Amendment was ratified by three-fourths of the loyalist states. On this theory, the subsequent ratifications by the Southern states “were a pledge of loyalty, not a constitutional necessity.”<sup>310</sup>

It is difficult to see how this argument could establish the Amendment’s popular sovereignty *bona fides*. Indeed, it struggles even as a means of establishing the Amendment’s formal compliance with Article V.<sup>311</sup>

Recall that the North’s entire theory of the war had been that the South had never legally seceded at all<sup>312</sup>—that the war had been fought for the purpose of “preserv[ing] the Union with all the dignity, equality, and rights of the several States unimpaired.”<sup>313</sup> It is thus difficult to turn around and assert that the Southern states, having seceded, did not count as “States” for purposes of amending the Constitution.<sup>314</sup> Not surprisingly, then, the Republican majority in Congress never endorsed this theory, and neither Congress nor the Secretary of State treated the Fourteenth Amendment as effective until it had been ratified by three-fourths of *all* of the states.<sup>315</sup>

Indeed, the Southern states had already been included in the denominator for the ratification of the Thirteenth Amendment.<sup>316</sup> That had been an intentional choice, designed to establish that that Amendment was promulgated, in President Johnson’s words, “in the name of the whole people.”<sup>317</sup>

There is no other way to establish that proposition. One cannot demonstrate that a constitutional amendment reflects a supermajoritarian consensus among the people simply by excluding from the equation the people of the states that rejected it.

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(2005) (“[I]t is well-known that treaties are to be construed also in light of . . . subsequent practice, and developments and evolved meanings in customary international law.”).

<sup>310</sup> Harrison, *supra* note 8, at 413 (recounting, but not endorsing, this theory).

<sup>311</sup> *See id.* at 420 (finding the argument “ultimately unpersuasive”); *see also* Texas v. White, 74 U.S. (7 Wall.) 700, 725–26 (1868) (declaring that the Confederate States remained states for constitutional purposes); *id.* at 728 (explaining that, as such, the Thirteenth Amendment did not become effective until ratified by three-fourths of all of the states, North and South).

<sup>312</sup> *See, e.g.*, 2 ACKERMAN, *supra* note 8, at 113–14.

<sup>313</sup> CONG. GLOBE, 37th Cong., 1st Sess. 223 (1861).

<sup>314</sup> *See* 2 ACKERMAN, *supra* note 8, at 113–14.

<sup>315</sup> *See id.*

<sup>316</sup> *See id.* at 103.

<sup>317</sup> *Annual Message to Congress* (Dec. 4, 1865), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1895, at 358 (James D. Richardson ed., 1898); *see also* 2 ACKERMAN, *supra* note 8, at 150–55 (discussing the issue).

### B. Coming to Terms with the History

If none of the preceding counterarguments succeeds, then it seems that originalists will have to come to terms with the fact that the normative case for originalism is inapplicable to the Fourteenth Amendment. They will then be presented with several options.

*1. Refuse to Give Legal Effect to the Fourteenth Amendment.*—Originalists have sometimes suggested that, where there was disagreement among the framing generation about the meaning or reach of a constitutional provision, judges should interpret that provision to enact only those propositions that garnered the necessary supermajoritarian support.<sup>318</sup> It would seem to follow that, where there was no consensually expressed supermajority support for constitutionalizing *any* proposition potentially embodied in a proposed amendment—as was the case with the Fourteenth Amendment—the courts should decline to enforce that amendment altogether.<sup>319</sup>

That reasoning makes sense. But it is a nonstarter. It seems vanishingly unlikely that any originalist would be willing to stick to those guns here. Doing so would be radically destabilizing to an unprecedented degree and would invalidate a huge range of cases—from incorporation of the Bill of Rights against the states to *Brown v. Board of Education*—that no constitutional theory can realistically reject. Originalism is currently enjoying an unprecedented surge in popularity.<sup>320</sup> It is not about to commit suicide now.<sup>321</sup>

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<sup>318</sup> See, e.g., WHITTINGTON, *supra* note 12, at 96–97; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 245–51 (1988); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 64 (2006) (noting but not endorsing the possibility that “one could say that the intentions of a majority of ratifiers represents constitutional meaning because the participants in the ratification process *agreed*—i.e., intended—that the majority’s intentions would represent the intentions of the whole group”); Maltz, *supra* note 12, at 802 (“The relevant intention must be the narrowest of any necessary members of the coalition that approves the language. The Constitution requires a full two-thirds of the voting members of each house to support any proposed change. If the critical issue is the idea embodied in the language, then two-thirds must endorse the idea as well. If fewer than two-thirds believe that they are endorsing an idea, that idea has not gained the constitutionally required majority.”).

<sup>319</sup> Cf. WHITTINGTON, *supra* note 12, at 96–97 (suggesting that, if a supermajority of the relevant Framers did not in fact agree on any core content of a constitutional provision, then that provision has no legal meaning); Kay, *supra* note 318, at 248–50 (same).

<sup>320</sup> See Rosenthal, *supra* note 276, at 1183–86.

<sup>321</sup> “No constitutional theory is taken seriously unless it can accommodate the result in *Brown*.” Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 488 (2005). Even leading originalists have recognized this fact. See, e.g., BORK, *THE TEMPTING OF AMERICA*, *supra* note 25, at 77 (“*Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”); McConnell, *supra* note 276, at 952 (“The supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has

2. *Enforce the Original Meaning of the Fourteenth Amendment Anyway.*—Addressing the controversy over whether the Fourteenth Amendment was lawfully ratified, Bryan Wildenthal has opined that:

[A]t some point, we simply have to decide whether an amendment is to be honored as written. Conceding that Congress broke some eggs to make the Fourteenth Amendment omelette, it is part of the Constitution. Unless one rejects it altogether as an illegitimate usurpation, it should be enforced with full regard for how it was understood by those who wrote it.<sup>322</sup>

Originalists who generally rely on the traditional normative defenses could employ the same thinking in response to the concerns raised in this Article. Conceding that the Fourteenth Amendment was not a reflection of the sovereign will of a supermajority of the people, it is nonetheless part of the Constitution now. (Indeed, many originalists believe that its proposal and ratification technically complied with Article V.)<sup>323</sup> Unless we want to reject it as an illegitimate usurpation, we should enforce it according to its original meaning.

But that would just gloss over the issue. *Why* should we insist on following its original meaning if it was not the product of the sovereign will of a supermajority of the people? If the reason why originalists insist on following original meaning does not apply to the Fourteenth Amendment, then originalism gives us no reason to be bound by that Amendment's original meaning, even if we are bound by the original meaning of the rest of the Constitution. With nothing to counterbalance them, the numerous and potent normative arguments in favor of nonoriginalism<sup>324</sup> would seem to carry the day.

3. *Abandon the Normative Defense of Originalism.*—A final option for originalists would be simply to abandon the common normative defenses of originalism altogether—not just for the Fourteenth Amendment, but for the entire Constitution. Those defenses have already been substantially undercut by incisive criticism.<sup>325</sup> Perhaps this additional, and potentially devastating, blow will lead originalists to forsake them completely.

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assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”)

<sup>322</sup> Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1612 (2007).

<sup>323</sup> See, e.g., AMAR, *supra* note 17, at 366; Harrison, *supra* note 8, at 457–60.

<sup>324</sup> See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 23–26 (4th ed. 2011); Farber, *supra* note 24, at 1087–100.

<sup>325</sup> See *supra* notes 210–17 and accompanying text.

Originalists might seek instead to defend originalism on a different normative ground—one that is not premised on the consent of the people.<sup>326</sup> To that end, they could try to fall back on the other common normative defense of originalism: that it is preferable to the alternatives because it does a better job of constraining judges.<sup>327</sup> But that would not be a retreat to safe ground, as this defense is ultimately premised on notions of popular sovereignty as well. If the goal is simply to constrain judges, there are certainly better ways to do so than requiring them to follow the original meaning.<sup>328</sup> We could, for instance, require them to be strictly bound by the result of a coin flip,<sup>329</sup> or to defer absolutely to the decisions of other government institutions.<sup>330</sup> The only reason why someone committed to judicial constraint would insist on *original meaning* as the means of constraint, rather than coin flips, or precedent,<sup>331</sup> or Thayerian deference,<sup>332</sup>

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<sup>326</sup> See, e.g., BARNETT, *supra* note 211 (seeking to defend a particular version of originalism on normative grounds that focuses on libertarian legitimacy, rather than popular sovereignty).

<sup>327</sup> See, e.g., Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 291 (1996) (“The criteria of originalism constrain all the participants in the game—including, most especially, the referees.”); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 237 (2010) (arguing that “originalism promises to constrain constitutional interpretation”); Scalia, *supra* note 29, at 863 (arguing that originalism is “less likely to aggravate the most significant weakness of the system of judicial review”—that is, “that the judges will mistake their own predilections for the law”); Whittington, *supra* note 1, at 602 (noting that the “primary commitment” of originalism initially “was to judicial restraint” and that “[o]riginalist methods of constitutional interpretation were understood as a means to that end”—as a “mechanism to redirect judges from essentially subjective consideration of morality to objective consideration of legal meaning”).

<sup>328</sup> *But see* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (“The only way in which the Constitution can constrain judges is if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments.”).

<sup>329</sup> See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 53 (2000) (“Maximal judicial constraint is not the goal; a mandatory coin flip in every litigated case might constrain the judiciary, but to what end?”); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 327 n.59 (2010) (“An even worse version of the constraint argument is that the need for constraint indicates that judges ought to adopt a particular interpretive method, such as some version of originalism. Every method of interpretation and decision making presents constraints. A need for judicial constraint is not an especially productive way of choosing among methods.” (citing ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 156 n.31 (2d ed. 2005) as “noting that judges could objectively constrain themselves by flipping coins”).

<sup>330</sup> See Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295, 1347 (2008) (noting that near-absolute deference is at least as constraining as originalism).

<sup>331</sup> *Cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925–28 (1996) (arguing that a commitment to common law judicial decisionmaking would be more constraining than originalism).

<sup>332</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that courts should strike down a statute only if its unconstitutionality is “so clear that it is not open to rational question”).

or representation reinforcement,<sup>333</sup> or any of a thousand other potentially more constraining options, is that originalism can be said to prevent judges from interfering with democracy except where necessary to vindicate the will of the people themselves<sup>334</sup>—the very notion of popular sovereignty that cannot fairly be applied to the Fourteenth Amendment.<sup>335</sup>

As such, originalists might choose instead to simply stop defending originalism on normative grounds altogether. To a substantial degree, this is already happening. In recent years, academic originalists have begun, in small but increasing numbers, to treat originalism as a purely interpretive, rather than normative, theory.<sup>336</sup> These theorists insist that “the merit of originalism as a . . . theory of interpretation does not depend on social contract theory or any other theory of political legitimacy. One can be a strict interpretative originalist and forcefully deny that the Constitution has any political legitimacy.”<sup>337</sup> Boiled down to its essence, their argument is that all legal texts—indeed all texts of all sorts—should be understood according to their original semantic meaning, regardless of the manner in which they were drafted or adopted.<sup>338</sup> They view originalism as a theory of textual meaning, not a theory of constitutional or judicial legitimacy.

Perhaps the arguments in this Article will encourage additional originalists to follow suit. After all, originalists who eschew the normative defense of originalism—who ground their theory in notions of linguistic meaning rather than collective consent—will not be fazed by this Article. The semantic meaning of the Fourteenth Amendment is not affected by the way in which it was forced upon the South.

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<sup>333</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that courts should strike down statutes only when there has been a breakdown in the democratic process).

<sup>334</sup> Cf. BORK, *THE TEMPTING OF AMERICA*, *supra* note 25, at 163–64 (“In . . . its *vindication of democracy* against unprincipled judicial activism, the philosophy of original understanding does better by far than any other theory of constitutional adjudication can.” (emphasis added)); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *YALE L.J.* 1501, 1525 (1989) (book review) (“The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic . . . and not the political-moral principles of whomever happens to occupy the judicial office.”).

<sup>335</sup> In any event, originalists have recently tended to back away from this defense of originalism. See Whittington, *supra* note 1, at 608–09 (explaining that, in recent originalist writing, “there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge”); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 750–51 (2011). And for good reason. See *id. passim* (arguing that recent theoretical advances in originalism have necessarily extinguished any plausible claim that originalism can meaningfully constrain judges).

<sup>336</sup> See Colby, *supra* note 335, at 735–36 (discussing this development in originalist theory).

<sup>337</sup> Lawson, *supra* note 211, at 1825. For a sophisticated discussion of this issue, see Solum, *supra* note 12, at 28–30, 126–63.

<sup>338</sup> See, e.g., Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 *HARV. J.L. & PUB. POL’Y* 485, 486 (2008).

This budding movement away from popular sovereignty has been highly controversial in originalist circles. Many leading originalists deny the wisdom, and even the possibility, of separating normative theories of originalism from interpretive ones. Whittington, for instance, insists that it “is the role of the constitutional theorist not only to grapple with the full meaning of the Constitution but also to examine the nature of constitutionalism more generally and the normative basis for any particular expression of it.”<sup>339</sup> And McConnell claims that “[w]e cannot address the question of *how* to interpret the Constitution for the purpose of resolving present-day disputes without first understanding *why* we should consult the decisions of persons long dead for that purpose.”<sup>340</sup> McConnell argues that “it turns out that our answer to the ‘why’ question has implications for the ‘how’ question. We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative.”<sup>341</sup> Indeed, some originalists have argued that an understanding of constitutional legitimacy as deriving from popular sovereignty is essential to the very notion of originalism—that “originalism demands popular sovereignty as a matter of historical and interpretative accuracy.”<sup>342</sup>

It is not my purpose here to referee this intramural dispute among originalists. I will only observe that there would be a substantial cost to choosing this path. The primary normative defenses of originalism are central to originalism’s popular appeal. They provide an easily understandable and intuitively powerful reason to insist on following the original meaning. The social contract model “is the political theory the man in the street supplies when he appeals to the Constitution.”<sup>343</sup> As one scholar has put it, the “notion of popular sovereignty is a prototypically and traditionally American way of thinking about government and society, a factor which undoubtedly plays no small part in originalism’s persistence and appeal, even in the face of strong criticism.”<sup>344</sup> Take away the normative defenses of originalism—turn it into a dry and technical theory of semantic textual interpretation instead—and you cede the high ground and lose the talking points that appeal to the masses.<sup>345</sup> Semantic, linguistic theory is a thin reed upon which to place the weight of a demand to the

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<sup>339</sup> WHITTINGTON, *supra* note 12, at 111.

<sup>340</sup> McConnell, *supra* note 2, at 1128.

<sup>341</sup> *Id.*

<sup>342</sup> Alicea, *supra* note 21, at 52.

<sup>343</sup> Easterbrook, *supra* note 58.

<sup>344</sup> James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 9 (1991).

<sup>345</sup> *Cf.* Colby, *supra* note 335, at 744–64, 776–78 (arguing that the theoretical advances of the New Originalism have come at a substantial cost to the traditional nature, potential benefits, and popular appeal of originalism—particularly its claim to impose judicial constraint).

American people that they must be constrained by the potentially stunted conceptions of liberty and equality that prevailed a century or two ago.<sup>346</sup>

#### CONCLUSION

This Article has sought to make a simple but important point: the traditional normative case for originalism does not hold water when applied to the Fourteenth Amendment—the constitutional provision that underlies most controversial cases. Because the usual reasons to insist on originalism do not apply to the Fourteenth Amendment, it becomes much more difficult to explain why, in interpreting that Amendment’s open-ended guarantees of freedom in the twenty-first century, we must remain bound by outmoded nineteenth-century conceptions of “equal protection,” “liberty,” “due process of law” and the like. This difficulty poses a serious challenge to originalism—a challenge that calls for an answer.

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<sup>346</sup> The best way to sell this argument would be to appeal to the fact that Article VI binds judges by an oath to support the Constitution. *See* U.S. CONST. art. VI, cl. 3. Thus, if, as a matter of linguistic necessity, the only true meaning of the Constitution is its original meaning, then judges who practice nonoriginalism violate their oath of office. *See* Colby, *supra* note 335, at 740 (noting this argument). Still, even so dressed up, this argument depends entirely on the underlying claim of semantic theory—that the true “meaning” of a document is necessarily its original meaning—again, a thin reed upon which to base the originalist case to the public.