

Republicanism on the Outside: A New Reading of the Reconstruction Congress

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I. INTRODUCTION

The irregular process under which the Fourteenth Amendment was adopted has long been the source of controversy among legal historians.² The Thirty-Ninth Congress, which met during the two years directly following the end of the Civil War and the assassination of President Lincoln, amended the Constitution pursuant to its responsibility to “guarantee to every State in [the] Union a Republican Form of Government.”³ One historian, Bruce Ackerman, argues that the adoption of the Fourteenth Amendment did not conform to the requirements of Article V of the Constitution.⁴ Article V, however, is properly read in the context of the Republican Guarantee Clause.⁵ Furthermore, as articulated by Akhil Reed Amar, the Republican Guarantee Clause is properly understood against the backdrop of a “geostrategic vision.”⁶

This Article promotes a “republican” reading of Reconstruction, including the Fourteenth Amendment, during the Thirty-Ninth Congress. The reading invokes not only what I call “republicanism on the inside”—equal citizenship, popular sovereignty, and other traditional republican principles—but also what I call “republicanism on the outside”—the structural stability and geostrategic security that flow from republican government. The Reconstruction Congress viewed the Republican Guarantee Clause not solely as a vanguard of individual political rights, but also, and perhaps more importantly, as a guardian of the United States itself. Under the republican reading, Congress did its best to follow the Constitution, not to subvert it.

This Article also enters into an ongoing legal-historical debate over the

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2. JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 1 (1984).

3. U.S. CONST. art. IV, § 4.

4. *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-119 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (noting passage of Fourteenth Amendment unjustifiable under hypertextual constitutional analysis).

5. U.S. CONST. art. IV, § 4.

6. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 48-51, 278-80 (2005) [hereinafter AMAR, *AMERICA’S CONSTITUTION*] (discussing Federalist promotion of geostrategic vision).

constitutional legitimacy of the Reconstruction Congress. Bruce Ackerman has taken the position that congressional activity during the Reconstruction era can only be defended by a theory of constitutional “moments.” Akhil Amar, meanwhile, invokes the Republican Guarantee Clause to defend the constitutionality of the Thirty-Ninth Congress, arguing generally that the Republican Guarantee Clause ought to be interpreted in “geostrategic” terms and not simply in reference to individual rights. This Article will definitively demonstrate, with references to congressional debates, that the members of the Thirty-Ninth Congress viewed republicanism as a national security concept. This theory of republicanism, which I call “republicanism on the outside,” explains and justifies the Reconstruction era activity of the Thirty-Ninth Congress when no rights-based theory of republicanism would suffice.

This Article proceeds in four parts. Part I reviews the history of, and debate surrounding, the adoption of the Fourteenth Amendment. Part II outlines a theory of the Republican Guarantee Clause, including the dual framework of republicanism on the inside and republicanism on the outside. Part III shows how this theory animated the Thirty-Ninth Congress in its first session, as it closed its doors to representatives and senators from the former confederate states and proposed what would in time become the Fourteenth Amendment. Part IV discusses how the same theory applied to the second session of the Thirty-Ninth Congress as it enacted the First Reconstruction Act of 1867.

II. STRANGE HISTORY: “FORMALIST DILEMMAS”⁷ OF THE FOURTEENTH AMENDMENT

It is widely recognized that the circumstances surrounding the adoption of the Fourteenth Amendment were highly irregular.⁸ From the first day of the Thirty-Ninth Congress, would-be representatives and senators sent from the former confederate states were excluded.⁹ For months, a number of Democrats called for the admission of these legislators from former confederate states.¹⁰ But legislators from ten former confederate states remained barred from Congress throughout both sessions of the Thirty-Ninth Congress, with only

7. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 99 (discussing amendment ratification process in comparison with constitutional text).

8. See ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 99-119 (pointing out difficulties in reconciling passage of Thirteenth and Fourteenth Amendments with constitutional text); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 310-314 (5th ed., 2006) (noting unusual procedural history of Fourteenth Amendment); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 381-409 (2001) (discussing adoption of Thirteenth and Fourteenth Amendments against backdrop of Reconstruction).

9. CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865) (House approval of concurrent resolution to exclude former confederates); *id.* at 30 (Senate approval of resolution).

10. CONG. GLOBE (appendix), 39th Cong., 1st Sess. 135 (1866) (statement of Sen. Rogers); *id.* (statement of Rep. Randall); *id.* at 2081 (statement of Rep. Nicholson); *id.* at 2461-62 (statement of Rep. Finck); *id.* at 2506 (statement of Rep. Eldridge); *id.* at 2531 (statement of Rep. Strouse).

Tennessee's delegation gaining admission late in the first session.¹¹

During this first session, both chambers of Congress debated and officially proposed what would later become the Fourteenth Amendment.¹² Section 1 of the proposed amendment contained the citizenship, privileges and immunities, due process, and equal protection clauses. Section 2 effectively cancelled the Three-Fifths Clause of Article I, but conditioned the expected increase in representation for Southern states on the enfranchisement of blacks. Section 3 disqualified former rebels from future office-holding, while Section 4 repudiated the confederate debt. Finally, Section 5 gave Congress the power to enforce the foregoing provisions.¹³

During its second session, the Thirty-Ninth Congress became frustrated when ten of eleven excluded states refused to ratify the Fourteenth Amendment.¹⁴ There was some internal debate within the Republican Party, however, over whether the excluded states' votes were needed for ratification.¹⁵ In response to this debate, Congress moved to ensure that the rebel states would reconsider their rejection of the amendment. The First Reconstruction Act, enacted the final day of the Thirty-Ninth Congress over President Johnson's veto,¹⁶ imposed martial law on the South and conditioned readmission of each state on its ratification of the Fourteenth Amendment.¹⁷ Readmission was further conditioned on the addition of race-blind suffrage to each state's constitution and congressional approval of each constitution.¹⁸

Bruce Ackerman contends that these irregularities are so great that the Fourteenth Amendment cannot possibly be considered valid under Article V of the United States Constitution.¹⁹ First, Article V's requirement that two-thirds of each chamber of Congress agree to propose an amendment was met only because the Southern states were denied representation. If congressmen from the eleven former confederate states had joined those from the twenty-six loyal states, the Fourteenth Amendment would never have left Congress.²⁰ Second,

11. H.R.J. Res. 73, 39th Cong., 14 Stat. 364 (1866); see CONG. GLOBE, 39th Cong., 1st Sess. 3980 (1866) (House approval of joint resolution); *id.* at 4000 (Senate approval).

12. H.R.J. Res. 48, 39th Cong., 14 Stat. 358 (1866); see also CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866) (Senate approval of proposed amendment); *id.* at 3149 (House approval of proposed amendment).

13. See H.R.J. Res. 48, 39th Cong., 14 Stat. 358 (1866).

14. CONG. GLOBE, 39th Cong., 2nd Sess. 53 (1866) (statement of Rep. Blaine); *id.* at 86 (statement of Rep. Miller); CONG. GLOBE, 39th Cong., 2nd Sess. 1183 (1867) (statement of Rep. Garfield). Tennessee was the only excluded state to ratify the amendment and the state was quickly readmitted to Congress. See *supra* note 11 and accompanying text.

15. Compare CONG. GLOBE, 39th Cong., 2nd Sess. 1393-94 (1867) (statement of Sen. Doolittle) (arguing failure to include all states in vote on amendment "radically wrong"), with *id.* at 501 (statement of Rep. Bingham) (arguing in favor of power of represented states to ratify amendment), and *id.* at 1393 (statement of Sen. Sumner) (arguing confederate states' "sham governments" should not be enlisted in vote).

16. *Id.* at 1976.

17. First Reconstruction Act, ch. 153, sec. 5, 14 Stat. 428, 429 (1867).

18. See *id.*

19. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 99-119.

20. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 102.

Congress's enactment of the First Reconstruction Act conditioned the rebel states' readmission to Congress on their ratification of the Fourteenth Amendment, essentially forcing the states to ratify the amendment through illegal coercion.²¹ Just as Congress would never have mustered the supermajorities necessary to propose the amendment had it not barred Southern representatives from admission, the three-fourths threshold necessary for ratification of the proposed amendment would never have been achieved had Congress not forced the Southern states to ratify it almost literally at gunpoint. Third, if one adopts the position that the Southern states' participation in the adoption of the Fourteenth Amendment was unnecessary due to their treason against the Union, this position merely capitulates to the "secessionist logic" rejected by President Lincoln and the Republican Congress throughout the war.²² Fourth, this position cannot be reconciled with the procedures adopted for the Thirteenth Amendment: if the Southern states "counted" for the ratification of the Thirteenth Amendment, why did they not count for admission to Congress or the ratification of the Fourteenth Amendment?²³

Professor Ackerman does not believe that Congress's failure to conform to Article V procedures invalidates the Fourteenth Amendment,²⁴ as his theory of constitutional interpretation holds that the Constitution can be legitimately amended outside of Article V, and even non-textually at times.²⁵ But for textualists like Akhil Amar, there are only three options: explain the strange history of the Fourteenth Amendment as legal under Article V; declare the Fourteenth Amendment null and void; or find a new theory of constitutional interpretation. Professor Amar prefers the first approach, and he briefly answers Professor Ackerman's claims in *America's Constitution: A Biography*.²⁶

According to Professor Amar, the Southern states were properly excluded from representation in the Thirty-Ninth Congress because their "representatives" were elected by unrepublican governments.²⁷ Congress is the "Judge of the Elections, Returns and Qualifications for its own Members."²⁸ If these members were elected by all-white constituencies in violation of the Republican Guarantee Clause, Congress had the right to not seat such members and to continue on without them.²⁹ Congress also had the right to condition readmission on ratification of the Fourteenth Amendment, as the amendment

21. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 111.

22. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 114-15.

23. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 103, 109.

24. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 100.

25. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44-57 (1991) [hereinafter ACKERMAN, FOUNDATIONS].

26. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 364-80.

27. AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 368-76.

28. U.S. CONST. art. I, § 5.

29. AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 368-76.

itself was essential to the achievement of republican government guaranteed by the Constitution.³⁰ Furthermore, the republican government theory is not inconsistent with the history of the Thirteenth Amendment, because if unrepublican *white* governments ratified a pro-black amendment, it is virtually undeniable that republican governments would have done so as well.³¹ Lastly, the denial of representation to unrepublican governments does not buy into the “secessionist logic,” so long as one is careful to distinguish between a state that is out of the Union entirely—the secessionist position—and a state which remains in the Union but whose government has been destroyed and must be restored by Congress.³²

Professor Amar’s defense of the Fourteenth Amendment demands a more thorough explanation of both the Republican Guarantee Clause and the behavior of the Thirty-Ninth Congress. The remainder of this Article defends a republican understanding of the Thirty-Ninth Congress in more detail. Before turning to the debates and acts of the Thirty-Ninth Congress, however, I will first explain the theory of republicanism that I use to analyze the Reconstruction Congress.

III. THE REPUBLICAN GUARANTEE

The Republican Guarantee Clause comprises less than one sentence in the Constitution, and a vague one at that: “The United States shall guarantee to every State in this Union a Republican Form of Government”³³ What is a “republican” government, and why was it made a part of the Constitution? The theory that animated both the Framers of the Constitution and the members of the Thirty-Ninth Congress was a sophisticated understanding of republicanism consisting of two themes, which I shall call “republicanism on the inside” and “republicanism on the outside.”

A. *Republicanism on the Inside*

One conventional view of republicanism is simply government by the people, or popular sovereignty. In developing this theory of republicanism, Professor Amar suggests that true republicanism is properly understood as pro-democratic rather than anti-democratic.³⁴ At the time the Constitution was

30. AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 376-80.

31. AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 368-69.

32. See AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 378-79. John Harrison also defends the procedure used in adopting the Fourteenth Amendment against Professor Ackerman’s thesis. See Harrison, *supra* note 8, at 422-57. Professor Harrison is committed to the idea that de facto, albeit defective, state governments have the capacity to bind their states. *Id.* at 422-51. Further, he argues against the claim that the First Reconstruction Act was truly coercive once the Southern states had been made republican. *Id.* at 451-58.

33. U.S. CONST. art. IV, § 4.

34. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 756-59 (1994) (arguing direct democracy

adopted, popular sovereignty, and republicanism, entailed several things. First, it meant the creation of the Constitution itself was to be endorsed by the people. As Professor Amar notes, the process by which the Constitution was created and ratified enjoyed an unprecedented level of democratic participation.³⁵ Second, republicanism meant that, for constitutional purposes, the locus of sovereignty was in the people, not in the government.³⁶ Thus, the Ninth and Tenth Amendments restated what was already implicit in the Preamble and the structure of the Constitution itself: the people, not the government, were in charge and the government was created by and for the people, not the other way around.³⁷ Third, popular sovereignty eliminated the monarchy: if the locus of sovereignty is in the people, then it could not be in a “sovereign” prince.³⁸ Fourth, popular sovereignty meant there were to be no distinctions of birth—no aristocracy,³⁹ no hereditary offices,⁴⁰ no titles of nobility,⁴¹ no corruption of blood.⁴² The text of the Declaration of Independence declared, “All men are created equal,”⁴³ and this basis for popular sovereignty carried over to the Constitution.

Republicanism as popular sovereignty resonates in the present as well as the past. To be sure, the republicanism of the Constitution represented a clean break, both in form and substance, from the colonial past. The days of taxation without representation and the tyranny of King George were over.⁴⁴ But republicanism still means these things today; equal citizenship, consent of the governed, and no caste by birthright remain salient republican principles.

This is “republicanism on the inside”: the principles of government are rooted in popular sovereignty, and these virtues are *internal* to the polity in which they are practiced. In other words, the values of republicanism are held by the citizens, and the benefits of republicanism flow to those citizens. According to republicanism on the inside, those who live *inside* unrepublican states have reason to complain because they are denied the virtues of republican

consistent with republican government); see also AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 278 (noting Federalist essays of Hamilton and Publius linked Republicanism with majority rule); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 10-14 (1998) (acknowledging Anti-Federalists’ concerns over centralized congressional power failing to truly represent the people).

35. AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 7.

36. See G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 794 (1994).

37. See Amar, *supra* note 34, at 762 (stating invocation of the people in Republican Government Clause reaffirms principles of popular sovereignty).

38. See THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

39. See *id.* (denouncing governments in which nobles, aristocrats and monarchs rule as un-republican).

40. See DEL. CONST. of 1792, art. I, § 19 (providing provisions against hereditary office in each state); MD. CONST. of 1776, Declaration of Rights, art. XL (same); MASS. CONST. of 1780, pt. I, art. VI; N.H. CONST. of 1792, pt. I, art. IX (same); N.C. CONST. of 1776, Declaration of Rights, art. XXII (same); PA. CONST. of 1790, art. IX, § 24; S.C. CONST. of 1790, art. IX, § 5 (same).

41. U.S. CONST. art. I, § 9, cl. 8; *id.* § 10, cl. 1.

42. U.S. CONST. art. III, § 3, cl. 2.

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

government, namely the right to partake in collective self-government as a free and equal member of society together with others who are free and equal. As we shall see, however, this is not the only conception of republicanism, nor is it a complete version of the American theory.

B. *Republicanism on the Outside*

Republicanism on the inside cannot be the whole story; there must be more to republicanism than its internal, rights-based values. One reason I make this claim is that republicanism on the inside fails to address important questions about the Republican Guarantee on a textual level. For example, why does the Constitution “guarantee to every *State* in this Union a Republican Form of Government,”⁴⁵ rather than “guarantee to the *People* of every State in this Union a Republican Form of Government?” After all, throughout the Constitution, the people are directly named beneficiaries of constitutional guaranties,⁴⁶ and republicanism on the inside—popular sovereignty—is certainly designed to benefit the people.

Another textual question: Why did the Framers place the Republican Guarantee in Article IV, rather than include it in the list of negative constraints on States in Article I, Section 10 in the form, “No State shall abolish its Republican Form of Government?” Section 10, in fact, already contained certain “republican” requirements for the states, such as the ban on titles of nobility.⁴⁷ It surely would not have been difficult to extend this anti-monarchical measure into a full-blown “republican guarantee” in Section 10.

The idea of republicanism on the inside alone also fails on a political-historical level. When the Constitution was written, the states already had republican forms of government. The Articles of Confederation,⁴⁸ as well as most state constitutions,⁴⁹ sounded republican themes. The Federalist papers sought to assure Anti-Federalists that the requirements of the Republican Guarantee Clause were already met by all the states joining the Union.⁵⁰ What then is the benefit of a constitutional Republican Guarantee if state governments were already republican? For purposes of republicanism on the inside, there seemed to be little point in “form[ing] a more perfect Union.”⁵¹

This question is in fact part of a larger mystery of the Constitution: Why

45. U.S. CONST. art. IV, § 4 (emphasis added).

46. See U.S. CONST. pmbl.; *id.* art. I, §2; *id.* amends. I, II, IV, IX, X, XII (bestowing power upon and granting rights to the People in various contexts).

47. *Id.* art. I, § 10, cl. 1.

48. See ARTICLES OF CONFEDERATION art. VI (bestowing rights directly on the people of each state).

49. See *supra* note 40 and accompanying text (providing examples from state constitutional histories).

50. See THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961). “[T]he authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution.” *Id.*

51. U.S. CONST. pmbl.

would the people of the individual states, Americans enjoying their new freedom from British rule, want to put their freedom at risk by granting power to a national government? Professor Amar posits that the states “formed a more perfect Union” largely out of a concern for the “common defense.”⁵² In considering the Constitution in light of this “geostrategic vision,” it appears the states opted to “form a more perfect Union” to safeguard the security of their *borders*, not their *liberties*.⁵³

The Republican Guarantee itself must also be read as part of the geostrategic vision. The Constitution was not ordained primarily to protect the people from the unrepresentative excesses of their own state. Rather, it was designed to protect each state from unrepresentative regimes that might emerge in any *other* state. For example, if an unrepresentative despot took control of Pennsylvania, representative Delaware would be vulnerable. A “more perfect Union” would reduce this vulnerability with the Republican Guarantee providing even more security. The textual position of the Republican Guarantee makes more sense when considering this geostrategic view. The Guarantee was not included in the restrictions on state power of Article I, Section 10 because it was implemented to do more than deny certain powers to the states. The Guarantee instead created an affirmative obligation for the federal government to protect state governments “against Invasion” and “domestic Violence.”⁵⁴

A related geostrategic concern is the effect of an unrepresentative state government on the Union itself. An unrepresentative state government would threaten both the military security of its individual neighboring states and the structural security of the entire federal system. Because the Constitution envisions federalism, the United States is largely dependent on its member states, and their guaranteed representative forms of government, at every single level of government and in many articles of the Constitution. In Article I, a representative state legislature or constitution must establish voter qualifications for elections to the House of Representatives,⁵⁵ and a representative state legislature must choose United States senators.⁵⁶ In Article II, a representative state legislature must “direct” the “manner” in which presidential electors are to be appointed.⁵⁷ In Article V, representative state legislatures may ratify proposed

52. *Id.*; see AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 44. “The central argument for a dramatically different and more perfect Union was not that it would protect Virginians from the Virginia legislature, but rather that it would protect Virginia from foreign nations and sister states, and in turn protect these sisters from Virginia.” AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 44.

53. AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 44-51, 106-07, 120-22, 140-44, 185-89, 271-72, 280 (noting geostrategic concerns during drafting and ratification of Constitution, especially Article I, Sections 8-10; Article II; Article IV, Section 3; and Article IV, Section 4).

54. U.S. CONST. art. IV, § 4.

55. *Id.* art. I, § 2, cl. 1 (declaring House of Representatives members will be chosen “by the people of the several states”).

56. *Id.* art. I, § 3, cl. 1 (declaring senators will be chosen “by the Legislature” of each state).

57. *Id.* art. II, § 1, cl. 2.

amendments.⁵⁸ If the states do not have republican governments, the Union itself suffers, and its very Constitution is placed in jeopardy.

The geostrategic vision motivated the Framers to write the Republican Guarantee into the Constitution. Montesquieu once theorized that all governments in a confederation should be republican because a monarchy in one state would attempt to take over its republican neighbors.⁵⁹ This fear was echoed during the Constitutional Convention, where one delegate worried a “tyrant might gain control of one state, and then seek to subvert all the others.”⁶⁰ At the North Carolina ratifying convention, soon-to-be United States Supreme Court Justice James Iredell warned, “If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others”⁶¹ These arguments were repeated in the *Federalist Papers*: “A successful faction may erect a tyranny on the ruins of order and law,” warned Alexander Hamilton, who also sought to assure Anti-Federalists that “[t]he guarantee could only operate against change to be effected by violence;”⁶² likewise, James Madison argued that the Guarantee enabled the federal government “to defend the system against aristocratic or monarchical innovations,” for “who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?”⁶³ The Framers sought to convert Montesquieu’s theory into

58. U.S. CONST. art. V (providing constitutional amendments may be ratified by state conventions or legislature of the state).

59. MONTESQUIEU, *THE SPIRIT OF LAWS* bk. IX, ch. 2, at 185 (David Wallace Carrithers ed., Univ. California Press 1977) (1748); see WILLIAM E. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 26, 66 (1972) (noting Madison followed Montesquieu’s belief that monarchies and republics could not coexist); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 522 (1962) (noting republican guarantee derived from Montesquieu’s notions on how to create a successful confederation).

60. Bonfield, *supra* note 59, at 519.

61. 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195 (Jonathan Elliot ed., 2nd ed., 1941) [hereinafter ELLIOT’S DEBATES] (quoting James Iredell in North Carolina ratification debate); see Bonfield, *supra* note 59, at 520. Justice Iredell would later interpret the Republican Guarantee Clause in *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 93 (1795).

62. THE FEDERALIST NO. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see WIECEK, *supra* note 59, at 67 (showing Hamilton attempted to justify suppression of insurrections while soothing fears of federal military power); Bonfield, *supra* note 59, at 520 (noting guarantee was to protect against changes effected through violence).

63. Bonfield, *supra* note 59, at 520-21 (quoting THE FEDERALIST NO. 43, at 287-88 (James Madison) (Ford ed., 1898)) (providing Madison’s argument for federal guarantee); see WIECEK, *supra* note 59, at 66 (noting Madison’s argument that federal intervention could suppress domestic violence and usurpations). The perceived threat of monarchy went beyond political theorizing.

Rumors circulated and increased [I]f the regency was illusory, the rumors and the fear they inspired as the Philadelphia Convention met were not. When the delegates insisted on writing in a guarantee of republican government, they were acting on fears that were real to them. The guarantee clause was designed in part to destroy forever the idea of an American king or lords.

WIECEK, *supra* note 59, at 42-43; see also *id.* at 42-50 (providing detailed account of rumors).

practice, and quell fears of tyrannical or monarchical control, by including the Republican Guarantee.⁶⁴

This, then, is “republicanism on the outside”: Republican government is guaranteed to protect the geostrategic security of each state from unrepblican aggressors next door, and to protect the structural security of the United States from unrepblican member states. The republican virtues of the Guarantee Clause are *external*; the relevant values of republicanism are held by *other* states, and the relevant benefits of republicanism flow to *other* states and to the Union as a whole. According to republicanism on the outside, those who live *outside* an unrepblican state have reason to complain, not because of the unrepblican suffering of their neighbors as such, but because their neighbors’ unrepblican government poses a threat to the security of other states and the integrity of the Union as a whole.

IV. THIRTY-NINTH CONGRESS, FIRST SESSION

During the Thirty-Ninth Congress’s first session, from December 1865 through July 1866, two series of debates occupied much of the time. First, Congress was faced with the question of whether to readmit the Southern delegations and on what grounds it could refuse them. Second, Congress heard the proposal of and ensuing debate over the Fourteenth Amendment, albeit without representatives of the Southern states present. It is my argument that both these acts—refusing readmission to the Southern delegations and proposing the Fourteenth Amendment without them—were justified, and justifiable, on the basis of the Republican Guarantee Clause. Many congressmen were primarily concerned with republicanism on the inside. They worried that as long as the rebel states denied blacks the basic rights of citizenship, no such state possessed a republican form of government. These concerns based on republicanism on the inside, however, do not tell the whole story. If we are to understand fully why the Thirty-Ninth Congress’s behavior during the first session was legitimate and lawful, we must view it through the lens of republicanism on the outside as well.

A. *Republicanism on the Inside*

If measured only by its commitment to republicanism on the inside, the Thirty-Ninth Congress opened with a bang and closed with a whimper. When the Senate session opened, Senator Charles Sumner immediately introduced a number of bills and regulations calling for Congress, pursuant to its powers under the Guarantee Clause, to restore republican forms of government to the

64. Bonfield, *supra* note 59, at 522; see THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) (quoting Montesquieu).

rebel states.⁶⁵ One resolution introduced by Senator Sumner required the “complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial, and all shall be equal before the law.”⁶⁶ In another resolution, Senator Sumner proposed that

no government can be accepted as ‘a republican form of government’ where a large proportion of native-born citizens, charged with no crime and no failure of duty, is left wholly unrepresented, although compelled to pay taxes; and especially where a particular race is singled out and denied all representation . . .

Despite its energetic start in listening to these proposals, however, Congress did not act on any of Senator Sumner’s bills or resolutions.⁶⁸ By the end of the first session, Senator James R. Doolittle chided Senator Sumner, and all but two senators had abandoned black suffrage as a condition of readmission to the Union.⁶⁹

Like the Senate, the opening session in the House of Representatives initially focused on republicanism on the inside. After being re-elected Speaker of the House, Representative Schuyler Colfax gave an opening address in which he reminded Congress that “its first and highest obligation is to guarantee to every State a republican form of government” and to “guarantee all necessary safeguards to the people, and afford, what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights.”⁷⁰ The next day, Representative Thaddeus Stevens, the leader of the radicals in the House, proposed a constitutional amendment declaring, “All national and State laws

65. CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865) (proposed restoration of rebel states and conditions for such restoration); see also WIECEK, *supra* note 59, at 193-95 (discussing resolutions and Senator Sumner’s obsession with the Guarantee Clause).

66. CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865) (statement of Sen. Sumner) (proposing resolution).

67. *Id.* (statement of Sen. Sumner) (proposing resolution); see also CONG. GLOBE, 39th Cong., 1st Sess. 592 (1866) (proposing Senate Resolution No. 28 requiring end of unrepublican governments and distinctions on basis of color or race).

68. 2 DAVID HERBERT DONALD, CHARLES SUMNER 241 (1996); WIECEK, *supra* note 59, at 195, 198. Senator Sumner was a highly visible figure in the Senate and arguably the leader of the radical wing of the Republican Party during the Reconstruction years. While his ideas are often viewed as heroic today, he did not have nearly as much influence in the Thirty-Ninth Congress as is often assumed. See MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 37 (1974) (noting Senator Sumner had great influence with public but lacked political acumen); 2 DONALD, *supra*, at 238-254, 262, 285. But see WIECEK, *supra* note 59, at 182 (“Though ahead of the main corps of Republican opinion, [Senator Sumner] prepared the way for acceptance of more moderate views”).

69. CONG. GLOBE, 39th Cong., 1st Sess. 4300 (1866) (statement of Sen. Doolittle); see BENEDICT, *supra* note 68, at 134 (providing account of Congress’s loss of enthusiasm for black suffrage).

70. CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865) (statement of Speaker Colfax).

shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.”⁷¹ On the following day, Representative John Bingham, a centrist Republican⁷² and the primary architect of the Fourteenth Amendment,⁷³ proposed an early version of the amendment’s Section 1, “empower[ing] Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property.”⁷⁴ These statements and proposals gave early indication that several members of Congress were genuinely concerned with the rights and freedoms of the freedmen of the South. Senator Sumner’s commitment to black suffrage, and the House’s focus on equal protection, reflects an understanding of the Republican Guarantee that closely tracks republicanism on the inside.

Throughout the first session, many congressmen continued to discuss republican government in terms that reflected values of popular sovereignty and republicanism on the inside. Senator Sumner continued to invoke the Guarantee Clause against “Oligarchy, Aristocracy, Caste, and Monopoly, founded on color, with the tyranny of taxation without representation”⁷⁵ He subsequently defined republican government as a system providing for equality of rights and consent of the governed, and opposed to the tyranny of taxation without representation.⁷⁶ He later refined the definition further, as “government founded on the people and the consent of the governed.”⁷⁷ Senator John B. Henderson also adopted this definition of republican government, citing “the true republican principle that ‘all men are created equal,’ and that when government is to be established, its just powers must come from ‘the consent of the governed.’”⁷⁸ Similarly, Representative Sidney Perham declared a “republican form of government . . . in the common acceptance of the term . . . is a government by the people, one in which the rights of all the citizens are equally respected.”⁷⁹ Further, Senator William M. Stewart observed that “[r]epublican government is founded upon the idea that the people are the only source of legitimate authority.”⁸⁰ Senator James W. Nye meanwhile cited the Republican Guarantee and referred to Article I, Section 10 of the Constitution, stating “[t]he Constitution . . . interdicts the granting of any title of nobility. It inhibits the establishment of any anti-

71. *Id.* (statement of Rep. Stevens) (proposing constitutional amendment).

72. BENEDICT, *supra* note 68, at 350.

73. *See* AMAR, THE BILL OF RIGHTS, *supra* note 34, at 181 (noting Rep. Bingham as central draftsman).

74. CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865) (statement of Rep. Bingham) (introducing joint resolution for constitutional amendment proposed).

75. CONG. GLOBE, 39th Cong., 1st Sess. 1228 (1866) (statement of Sen. Sumner).

76. *See id.* at 1230 (statement of Sen. Sumner) (espousing the rights of freemen).

77. *Id.* at 3998 (statement of Sen. Sumner) (defining republican form of government).

78. *Id.* at app. 120 (statement of Sen. Henderson).

79. CONG. GLOBE, 39th Cong., 1st Sess. 2082 (1866) (statement of Rep. Perham).

80. *Id.* at 2799 (statement of Sen. Stewart).

republican government through privileged class.”⁸¹ These statements all support a theory of republicanism on the inside: equal citizenship, consent of the governed, popular sovereignty.

These declarations on the meaning of republican government contrasted with views held by the Southern states, whose governments were not republican on the inside. Many congressmen focused primarily on the call for suffrage. Senator Henderson noted that James Madison regarded suffrage “as a fundamental article of republican government,” but was “deceived” in presuming that the states could be trusted to regulate voting qualifications on their own.⁸² Representative William Higby stated, whatever his colleagues’ disagreements about what constituted republican government, “[T]he general principle, I presume, will be admitted, that a government is *not* republican in form if it excludes a large portion of the citizens from participation in the government.”⁸³ Similarly, Senator Stewart proclaimed, “Every attempt to govern the people of any State by a minority . . . is a mockery on republican institutions”⁸⁴ Others argued that the Southern states were unrepublican because of abuses they committed against blacks,⁸⁵ or because of “hereditary” rules of government.⁸⁶ All these complaints essentially label the rebel states unrepublican on the inside. By refusing to grant their citizens the rights and privileges they are due, the congressmen charge, the Southern states are not conforming to the requirements of republican government as set out in the Constitution.

In addition to Congress’s general understanding of republican government, the relationship between republican government and the Fourteenth Amendment in particular must be considered.⁸⁷ The debates on Section 1 of

81. *Id.* at 1072 (statement of Sen. Nye).

82. *Id.* at app. 116-17 (statement of Sen. Henderson) (quoting THE FEDERALIST NO. 52 (James Madison)).

83. CONG. GLOBE, 39th Cong., 1st Sess. 2252 (1866) (statement of Rep. Higby) (emphasis added).

84. *Id.* at 2800 (statement of Sen. Stewart).

85. See CONG. GLOBE, 39th Cong., 1st Sess. 107 (1865) (statement of Sen. Sumner) (presenting petition by black citizens of Tennessee claiming no state government is republican in form “which does not protect the rights of all citizens, irrespective of color”); *id.* at 127 (statement of Sen. Sumner) (presenting a similar petition by black citizens of Alabama, complaining of abuses ranging from arson of black churches to the continuation of slavery); *id.* at app. 154 (statement of Sen. Morrill). Senator Morrill asked and answered:

Who says that these slaves ceasing to be slaves become free men? . . . Sir, it does not follow by any means that these men who were slaves are free men, but according to the whole code of the South—morals, laws, and constitutions of the South—the very structure of its society, civil, social, and political, they are outside of the pale of society, outside of the pale of the Constitution.

Id. at app. 154.

86. See CONG. GLOBE, 39th Cong., 1st Sess. 1071 (1866) (statement of Sen. Nye) (presenting evidence of a conspiracy in the South to establish hereditary legislative and executive offices).

87. Debates on the proposed amendment began on February 26, 1866. See *id.* at 1034 (statement of Rep. Bingham). The debates continued until the Fourteenth Amendment was approved by the House of Representatives on June 13, 1866. See *supra* note 12 and accompanying text.

the amendment revealed Congress's sensitivity to principles of republicanism on the inside. Most congressmen viewed the Privileges and Immunities Clause as incorporating the Bill of Rights's protections against the states,⁸⁸ and many viewed these and the other protections of Section 1 as essential to republican government as well.

The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquility [sic], provide for the common defense, promote the general welfare, and secure the blessings of liberty;" a government whose "citizens shall be entitled to all privileges and immunities of other citizens;" where "no law shall be made prohibiting the free exercise of religion;" where "the right of the people to keep and bear arms shall not be infringed;" where "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law."

Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.⁸⁹

Viewed in light of the Republican Guarantee, and all that republicanism on the inside entails, the Fourteenth Amendment was "not only justifiable, but necessary."⁹⁰ Equality of citizenship, privileges and immunities, equal protection, and due process: these are all internal concerns about the proper relationship between government and the people, the central theme of republicanism on the inside.⁹¹

Not only were these provisions seen as appropriate and even necessary

88. See CONG. GLOBE, 39th Cong., 1st Sess. 1617 (1866) (statement of Rep. Moulton) ("There is neither freedom of speech, of the press, or protection of life, liberty, or property" in the South); *id.* at 1838 (statement of Rep. Clarke) (noting Black Codes in Alabama and Mississippi prohibit blacks from owning firearms in contravention of the Second Amendment); *id.* at 2542 (Rep. Bingham noted "many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws . . .").

89. *Id.* at 1629 (statement of Rep. Hart); see also *id.* at 2766 (statement of Sen. Howard) ("This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government . . .").

90. *Id.* at 1088 (statement of Rep. Woodbridge).

91. The Citizenship Clause, which eventually made its way from the Civil Rights Act, ch. 31, sec. 1, 14 Stat. 27, 27 (1866), to Section 1 of the Fourteenth Amendment, links the civil rights concerns of the Thirty-Ninth Congress directly back to the anti-aristocracy concerns of the Founders. Just as early Americans sought to prohibit "hereditary emoluments," see *supra* note 40; see also U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. art. III, § 3, cl. 2., the Thirty-Ninth Congress sought to eliminate "corruption of blood" by eliminating race-based birthright: "All persons *born* or naturalized in the United States . . . are citizens." U.S. CONST. art. XIV, § 1, cl. 1 (emphasis added); see also *supra* note 47 and accompanying text.

pursuant to the Republican Guarantee Clause, much of the Fourteenth Amendment—Sections 1 and 2 in particular—was viewed as declaratory, redundant, or clarifying of the rights and constraints already inherent in the Founders' Constitution.⁹² Representative Bingham felt that no state ever had the right to abridge its citizens' privileges and immunities or exclude them from the franchise, and that Sections 1 and 2 merely provided constitutional top-down remedies where there were none before.⁹³ Similarly, Senator Jacob M. Howard proclaimed that the Citizenship Clause of Section 1 was merely declaratory.⁹⁴ Representative William D. Kelley of Pennsylvania read the privileges and immunities, equal protection, and due process clauses of the amendment, and claimed, "There is not a man in Montgomery or Lehigh county that will not say those provisions ought to be in the Constitution *if they are not already there*."⁹⁵ Ultimately, the Thirty-Ninth Congress did not present the principles of the Fourteenth Amendment as revolutionary, or even new to the Constitution at all, but rather as a restatement of the requirements already contained within it.⁹⁶

92. Cf. AMAR, *THE BILL OF RIGHTS*, *supra* note 34, at 147-56 (discussing the "declaratory theory" and "Barron contrarians").

93. CONG. GLOBE, 39th Cong., 1st Sess. app. 57 (1866) (statement of Rep. Bingham) ("I favor this amendment as a penalty in aid of the rights guarantied by the Constitution as it now stands"); *id.* at 2542 (statement of Rep. Bingham) ("No State ever had the right, under the forms of law or otherwise to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic . . ."); see also *id.* at 2905 (statement of Rep. Bromwell) ("The States never had the right, and therefore never reserved it, to fight against and oppose such measures as these.")

94. *Id.* at 2890.

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.

Id. (statement of Sen. Howard). It could be argued that the Citizenship Clause was needed to overturn the *Dred Scott* decision. *Scott v. Sandford*, 60 U.S. 393 (1856). However, Senator Henderson insisted that the Citizenship Clause "will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government." *Id.* at 3031 (statement of Sen. Henderson).

95. *Id.* at 2468 (statement of Rep. Kelley) (emphasis added).

96. There was some internal conflict within the Republican Party over whether a constitutional amendment was necessary in order for Congress to carry out Reconstruction, given the claims that the principles of the amendment were already contained within the meaning of the existing document. Compare *id.* at 1283 (statement of Sen. Sumner) (proposing by statute the prohibition on denial of civil or political rights on account of color, pursuant to Guarantee Clause and Thirteenth Amendment), and *id.* at 2536 (statement of Rep. Longyear) ("And it makes no difference in this respect whether such regulations are established by statute or by constitutional amendment"), with *id.* at app. 120-21 (statement of Sen. Henderson) (arguing Constitution accepts non-republican government), and *id.* at 2542 (statement of Rep. Bingham) ("There was a want hitherto, and there remains a want now, in the Constitution of our country, which proposed amendment will supply"). In arguing that, without the Fourteenth Amendment, the Constitution lacked a clear call for republican government, Senator Henderson stated:

Our governments must be truly republican. The present Constitution tolerates something else. Let us amend it . . .

After considering all these arguments and rhetoric, one can find some preliminary answers to Professor Ackerman's challenge that the Fourteenth Amendment failed to comply with Article V.⁹⁷ The Southern states were denied admission to Congress because their governments did not meet the requirements of republicanism on the inside—equality of citizenship, consent of the governed, civil rights, no caste. Furthermore, the Thirty-Ninth Congress was justified in adopting the Fourteenth Amendment without the participation of the Southern states because those states were unlikely to become republican on the inside unless Congress imposed republican requirements on them. These requirements are found in Sections 1 and 2 of the Fourteenth Amendment. Thus, according to the conventional republican argument, congressional action on the Fourteenth Amendment was simply an exercise of Congress's powers under the Republican Guarantee Clause.

B. Republicanism on the Outside

The explanation of republicanism on the inside, however, is not fully satisfying. Looking at the Fourteenth Amendment and the debates of the Thirty-Ninth Congress's first session, questions arise that republicanism on the inside is unable to answer. Namely, where do Sections 2 and 3 of the Fourteenth Amendment fit into the republican picture?⁹⁸ Today, Sections 1 and 5 are the only parts of the Fourteenth Amendment discussed. During the debates of the Thirty-Ninth Congress, however, Section 1 received relatively little attention.⁹⁹ Representative Thaddeus Stevens considered Section 2 "the most important in the article,"¹⁰⁰ while Representative Joseph Defrees declared that Section 3 "contains the essence of the whole proposition."¹⁰¹

Yet it is nearly impossible to read republicanism on the inside into Sections 2 and 3. True, Section 2 addressed issues of black suffrage, and some Republican leaders tried to sell it as a suffrage clause.¹⁰² The final version of

My conclusion is, that a mistake was made in recognizing a constitution as republican that permitted slavery. I knew of no way to get rid of it except by constitutional amendment. I think another mistake was committed in leaving each State to so far abridge the right of suffrage as to change, in theory, the republican form. But such is the Constitution and you cannot change it by act of Congress. That is my conclusion.

Id. at app. 120-21.

97. *See supra* notes 19-23 and accompanying text.

98. *See supra* note 12 and accompanying text.

99. *See* AMAR, THE BILL OF RIGHTS, *supra* note 34, at 203 (noting more attention was paid to portions of the Fourteenth Amendment that would determine who controlled the country).

100. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

101. *Id.* at app. 227 (statement of Rep. Defrees).

102. *See id.* at 431 (statement of Rep. Bingham) ("I submit to my friend that this proviso is nothing but a penalty for a violation on the part of the people of any State of the political right of franchise guaranteed by the Constitution to their free male fellow-citizens of full age"); *id.* at app. 57 (providing further commentary from Rep. Bingham); *see also id.* at 1276 (statement of Sen. Fessenden). Senator Fessenden stated:

Section 2, however, was dedicated to canceling the Three-Fifths Clause and reducing congressional representation from the South, not to establishing universal male suffrage. Section 3, meanwhile, addressed the disfranchisement of rebels, an idea counter to the essence of republicanism on the inside—popular sovereignty.¹⁰³

The Thirty-Ninth Congress had good reason to cancel the Three-Fifths Clause and to prevent rebel officers from holding government office, but these acts had little to do with republicanism on the inside. Rather, Congress was largely motivated by concern for the military security of the country and the structural stability of the federal government. Congress's motivation for change was based on republicanism on the outside.

First, consider Congress's decision not to admit Southern representatives pursuant to the Republican Guarantee. As suggested earlier, a number of congressmen were genuinely concerned with Southern states' denial of fundamental rights to their black citizens. There is strong evidence, however, that Congress's justification for denying readmission was substantially based on external, security-related concerns, not internal, right-based objections. Representative Reader W. Clarke warned that readmission could bring another war: "Who does not know that an unconditional restoration of those States would result in fresh revolts, and that all our bloody battles will have to be fought over again before our grandchildren shall have attained to manhood? . . . The war did not squelch out rebellion; it simply disarmed it."¹⁰⁴ Similarly, Representative Ephraim R. Eckley justified excluding the Southern delegations on the basis that exclusion would prevent another war.¹⁰⁵ Representative John F. Farnsworth feared that if the Southern states were readmitted to Congress, Robert E. Lee would be the next President of the United States.¹⁰⁶ Finally, Representative John L. Thomas declared that no state should be readmitted until it proved its loyalty to the Union to the satisfaction of Congress.¹⁰⁷

These national security concerns were not unrelated to the Republican Guarantee. Representative James W. Patterson declared that the government has an inherent right to defend itself, and that the Southern delegation would be

If we believe it is wrong in the States to deprive this race of the right of suffrage, they having become freemen, if they are fit to exercise it, I do not see that it is any great breach of morality to provide that if they do it, a political punishment shall follow

Id. at 1276 (statement of Sen. Fessenden).

103. *See supra* Section III.A (describing popular sovereignty as essential to republicanism on the inside).

104. CONG. GLOBE, 39th Cong., 1st Sess. 1008 (1866) (statement of Rep. Clarke).

105. *Id.* at 2535. Rep. Eckley stated, "It is claimed that we have no right to exclude their Representatives. I think we have. We do not want another war, and we would be faithless if we did not secure such guarantee as would last through all time." *Id.*

106. *Id.* at 2540 (statement of Rep. Farnsworth) (describing potential election of Lee as a "calamity").

107. *Id.* at 2090 (statement of Rep. Thomas) (calling for "unmistakable proofs of repentance and loyalty").

admitted when republican government was restored *and* when it was secure for the Union.¹⁰⁸ Similarly, Senator Stewart observed that “every attempt to govern the people of any State by a minority . . . is a mockery on republican institutions and will inevitably produce anarchy and discord.”¹⁰⁹ According to Representative John W. Longyear, the Republican Guarantee permits Congress to place demands on the South as may be necessary for the “future security and perpetuity” of the nation’s existence.¹¹⁰ In other words, the security problems posed by the rebel states were not extra-constitutional problems. Rather, the Framers foresaw these problems and equipped the Constitution with the Guarantee Clause in order to address them. The Guarantee Clause would not only empower Congress to refuse to seat two dukes sent as senators from a state controlled by a prince, but also to reject congressional delegations from unrepresentative, rebel governments.

Because the Republican Guarantee Clause protects the structural security of the Union in a government structured by federalism, the Thirty-Ninth Congress was especially aware that seating unrepresentative delegations would distort the national political system, with potentially disastrous consequences. Representative Samuel Shellabarger was among the first to warn of this, asking:

Sir, how long may this nation survive with a Senate elected by rebel Legislatures; or with treaties made by Senators chosen by rebel States; or with a President selected by electors chosen by the Legislature of South Carolina; or with a President elected in a House of Representatives where each rebel state casts one vote; or with a House of Representatives elected by electors whom a rebel legislature would authorize to vote; or with officers over United States forces appointed by rebel governors; or with such constitutional amendments as would be ratified by rebel legislatures; or with a traitor for President whom you could only remove by the impeachment of a Senate elected by rebel legislatures; or with such foreign ministers and other officers of the United States as such a Senate would confirm; or with a prohibition upon your closing the ports of the eleven rebel States to a commerce supplying them with all the supplies of war, unless you also closed all the ports of the other States?¹¹¹

Similarly, Senator Timothy O. Howe warned that the Southern states, “having found they cannot successfully *fight* against the United States . . . would, doubtless, like the privilege of sending here some hundred or more

108. CONG. GLOBE, 39th Cong., 1st Sess. 2694 (1866) (statement of Rep. Patterson) (laying out requirements and characteristics that must be displayed for readmission).

109. *Id.* at 2800 (statement of Sen. Stewart) (calling for enfranchisement of all people).

110. *Id.* at 2536 (statement of Rep. Longyear).

111. *Id.* at 143 (statement of Rep. Shellabarger).

representatives to *vote* against it.”¹¹² Additionally, Representative Thomas stated that disloyal representatives from the South would “clog the wheels of Government.”¹¹³ These congressmen viewed unrepublicanism in the Southern states as more than just a problem in the South; they viewed it as a threat, both militarily and structurally, to the integrity of the nation.¹¹⁴

Republicanism on the outside was an equally strong motivation as the Thirty-Ninth Congress deliberated over Sections 2 and 3 of the proposed Fourteenth Amendment. In order to understand why republicanism on the outside figured so prominently in the debates over Sections 2 and 3, it is important to see that republicanism on the inside on its own failed to justify either of those provisions.

As discussed, Section 2 cancels the Three-Fifths Clause; it makes total population the baseline by which congressional representation is determined and proportionately reduces the representation of states disfranchising any part of their male citizenry.¹¹⁵ The radical wing of the Republican Party was dissatisfied with this provision because it did not require black suffrage; it

112. CONG. GLOBE, 39th Cong., 1st Sess. 168 (1866) (statement of Sen. Howe).

113. *Id.* at app. 59 (statement of Rep. Thomas).

114. Several members of Congress expressed this concept in terms of a metaphorical unrepublican disease threatening the health of the country:

No State can vitally wound the true republican principle that “all men are created equal,” and that when government is to be established, its just powers must from the “consent of the governed,” without causing injury and bringing disease into the entire system. If wrong be done in one of the States, it is eventually felt by the nation . . . Missouri has an interest in the State governments of Virginia, Louisiana, and Texas. If these governments become diseased, the whole body suffers, for the States are but limbs of that body.

Id. at app. 120 (statement of Sen. Henderson).

Sir, if it be an outrage for me to refuse to admit to my house a man coming from a locality infected with some loathsome, contagious disease until I am satisfied I can do it without running any risks or hazards of my life, or to the life of the inmates of my house, then it is monstrous in me to refuse men admission here, coming from disloyal constituencies, until I am satisfied their admission will not endanger the life of the Republic.

Id. at 2090 (statement of Rep. Thomas).

Sir, in the healing art there are two classes of physicians. Those of the one class are able to heal the outward symptoms of a wound, to give it a healthy surface, and remove the corruption which meets the eye, while the virulent and deep-seated disease still lingers in a latent form to break forth soon again with increased severity. But, sir, a physician of the other class, with the skill of the wisest surgery cuts deeply and eradicates the festering mass, and thus by a merciful severity restores lasting health.

Id. at 2253 (statement of Rep. Higby).

115. See U.S. CONST. art. I, § 2, cl. 3 (Three-Fifths Clause); see also *id.* art. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . .”).

merely encouraged black suffrage and named the price a state must pay for disfranchising its black population.¹¹⁶ Centrist Republicans in favor of the amendment argued it did not permit disfranchisement, as the radicals thought, but rather created a penalty for conduct that was already illegal under the Constitution.¹¹⁷ Undoubtedly, the radicals had the stronger argument; any Southern state with a large black population would likely submit to Section 2 in order for the white government to maintain its domination of state politics, as white supremacists would prefer having a smaller Democratic delegation to a larger Republican one.¹¹⁸ For if congressmen committed to republicanism on the inside, then, Section 2 was a sham; it would not enfranchise blacks in the South,¹¹⁹ and it would not promote popular sovereignty. All Section 2 would accomplish is to reduce Southern representation in Congress and in the Electoral College.¹²⁰

Arguably, the reduction of representation from the Southern states is what the Thirty-Ninth Congress wanted to accomplish most. Many feared that Southern whites continued to pose a threat to the security of the Union and the stability of the federal government. Congress therefore proposed Section 2 with greater concern for the strategic elements of republicanism than the political rights of Southern blacks per se. Representative Thomas, for instance, stood against an amendment supporting black suffrage, but supported Section 2 because “[f]our years of carnage and blood has taught me who the friends of the Republic are, and in their hands I hope it may remain.”¹²¹ Representative Thomas found common ground with Thaddeus Stevens, who advocated black

116. See CONG. GLOBE, 39th Cong., 1st Sess. 406 (1866) (statement of Rep. Eliot) (arguing states should not have right to disfranchise large masses of citizens even if penalized); *id.* at 1225 (statement of Sen. Sumner) (arguing amendment as proposed would be detriment to the Constitution).

117. See *supra* note 102.

118. Further, Southern states did not have to fear the loss of any representation in the United States Senate.

119. See CONG. GLOBE, 39th Cong., 1st Sess. app. 60 (1866) (statement of Rep. Thomas) (“I am satisfied that no southern State will grant the suffrage to the negro”).

120. See *id.* at app. 60 (statement of Rep. Thomas) (“The effect of this amendment will be that the States lately in rebellion will lose ten Representatives in this House”). Former slave states previously accustomed to representation for three-fifths of their non-voting slave populations would stand to lose that representation under Section 2. For a state with a black population of fifty percent, that would be a three-eighths reduction in the size of its delegation to the House of Representatives. Without Section 2, former slave states stood to gain representation, because their slave populations had become free populations, worth “five-fifths” in Congress and the Electoral College. See *id.* at 2766 (statement of Sen. Howard) (“The three-fifths principle has ceased in the destruction of slavery . . . Under the present Constitution this change will increase the number of Representatives from the once slaveholding States by nine or ten.”). The state with a black population of fifty percent would see the size of its House delegation increase by twenty-five percent. It is a sign of how important this numbers game was to the Thirty-Ninth Congress that members frequently submitted population tables as exhibits accompanying their statement; these tables compared the white and black populations and congressional delegations of the various states. See, e.g., *id.* at 357 (census of 1860 table accompanying statement of Rep. Conkling); *id.* at app. 60 (statement of Rep. Thomas) (calling for table with “most accurate [population] accounts” obtainable); *id.* at 683 (table from census of 1860 accompanying statement of Sen. Sumner); *id.* at 2251 (table from census of 1860 accompanying statement of Rep. Higby).

121. *Id.* at app. 61 (statement of Rep. Thomas).

suffrage but was nevertheless satisfied with Section 2 as well. Representative Stevens stated that reducing representation from the South would permit “the loyal Congress [to] mature their laws and so amend the Constitution as to secure the rights of every human being, and *render disunion impossible*.”¹²² These debates demonstrate that the Thirty-Ninth Congress, in approving Section 2, despite the unlikelihood that it would actually bring about changes consistent with the values of republicanism on the inside, was instead motivated by the values of republicanism on the outside—the security of the Union.

Some Democrats in the Thirty-Ninth Congress claimed that the proposed Fourteenth Amendment was an attempt by Republicans to consolidate their own power at the expense of Democrats and the South under the pretense of commitment to republican government.¹²³ To some extent, they may have been right.¹²⁴ But if Section 2 is viewed in light of the principles of republicanism on the outside, rather than republicanism on the inside, the Democrats’ cynical claims are weakened. Although Section 2 would not achieve black suffrage, it would reduce the power of the states that had torn the Union apart. It was therefore a proper invocation of the Republican Guarantee Clause and must be understood as republicanism on the outside, not republicanism on the inside.

Before the Civil War, the unrepublican governments of the South had the very effect on their sister states, and the country as a whole, that the Founding Fathers had feared from “aristocratic or monarchical innovations.”¹²⁵ Secession and the four-year war that followed constituted a threat to the

122. *Id.* at 2459 (statement of Rep. Stevens) (emphasis added).

123. See CONG. GLOBE, 39th Cong., 1st Sess. 117-19 (1865) (statement of Rep. Finck); CONG. GLOBE, 39th Cong., 1st Sess. app. 55 (1866) (statement of Rep. Johnson); CONG. GLOBE, 39th Cong., 1st Sess. 2466-67 (1866) (statement of Rep. Boyer); see also WIECEK, *supra* note 59, at 182 (“The guarantee clause in Reconstruction often became a rationale for expedience. In Sumner’s hands[,] it was a constitutional fig leaf covering policies of arguable validity but unquestioned necessity.”); Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. S. HIST. 192, 208 (1949) (calling Reconstruction “a bald attempt to perpetuate the party victory brought about by the war”).

124. See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens) (advancing “conquered provinces” theory and urging that rebel states be reduced to territorial status so they can “eat the fruit of foul rebellion”); CONG. GLOBE, 39th Cong., 1st Sess. 1016 (1866) (statement of Rep. Beaman) (“Today the wayward States are subject to our control, and we may enforce order and require justice.”); CONG. GLOBE, 39th Cong., 1st Sess. 2880 (1866) (statement of Rep. J.M. Ashley) (“If the southern people are stupid enough to suppose that such men as Alexander H. Stephens will ever be admitted into the Senate or House of Representatives[,] they might as well be undeceived now.”).

125. See *supra* note 63 and accompanying text.

By 1860, the Slave Power exemplified all the evils that the original Article IV guarantee of republican government had aimed to avert. Aggressive slavocrats had flouted basic democratic freedoms within their own states, menaced freedom-lovers in neighboring states, and begun to corrupt the character of federal institutions that rested on state-law foundations.

security of the nation that had not been experienced in fifty years and resulted in carnage never seen before or since. Thus, Reconstruction did not simply represent an opportunity to protect minorities from maltreatment in the South; the very survival of the Union was at stake.

Even Republicans who were disappointed in Section 2 and advocated full political rights for blacks expressed their position using the vocabulary of republicanism on the outside—stability, security, loyalty. Representative Perham, fearing that “the rebels are in the ascendency” in the South, urged Congress to give blacks the right to vote, for he “would sooner trust a *loyal* black man with the ballot than a *disloyal* white man.”¹²⁶ Similarly, Representative Roswell Hart believed that the only alternative to military confrontation was the expansion of suffrage; he called for action to “[reinforce] the loyal white men of these States, not by soldiers from without, but by the loyal black men within these States.”¹²⁷ When challenged by Democrats who pointed out that most Northern states did not permit blacks to vote,¹²⁸ defenders of black suffrage responded that republican government is denied when so large a portion of a state’s population is disfranchised that the integrity of the political system *outside* the state is threatened as a result.¹²⁹ Republicanism on the inside simply cannot defend black suffrage on such grounds.

Section 3 of the Fourteenth Amendment also can be justified by the Republican Guarantee only if that clause is understood in terms of republicanism on the outside. Section 3 prohibited those who supported the rebellion after previously holding public office from ever again holding public office, either in state or federal government.¹³⁰ This version of Section 3 was mild compared to that which was reported out of the Joint Committee on Reconstruction. The originally reported Section 3 called for a thorough disfranchisement, prohibiting anyone who had taken part in the rebellion from voting before 1870.¹³¹ The early version was met with such fierce opposition

126. CONG. GLOBE, 39th Cong., 1st Sess. 2083, 2085 (1866) (statement of Rep. Perham) (emphasis added).

127. *Id.* at 1630 (statement of Rep. Hart); *see also id.* at 2882 (statement of Rep. J.M. Ashley) (“Let the ballot be placed in the hands of every loyal man in the South, and this nation is safe—safe from rebellion, safe from repudiation, safe from a war of races, safe from the domination of traitors in its councils. Sir, without the ballot in the hands of every loyal man the nation is not safe.”); *id.* at 2947 (statement of Rep. J.F. Wilson) (“But, sir, not only do the white loyalists of the South need the aid of the votes of every loyal man in the South, but the Republic also needs them.”).

128. *See id.* at 2987 (statement of Sen. Cowan) (declaring states with no black population have no business telling other states that they must accept black voting).

129. *See id.* at 684 (statement of Sen. Sumner) (describing as “unreasonable and reprehensible” the argument that “since certain States at [sic] the North have disfranchised the few colored persons within their borders, the United States are so far constrained by this example that they cannot protect the millions of freedmen from disfranchisement, and cannot save the Republic from the peril of such a crying injustice.”). The “hypocrisy of the North” challenge was also faced during debates on the Reconstruction bills in the second session. *See* CONG. GLOBE, 39th Cong., 2nd Sess. 351 (1867) (statement of Rep. Broomall) (citing the doctrine of *de minimis non curat lex*).

130. U.S. CONST. amend. XIV, § 3.

131. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (reporting an early version of the Fourteenth

from both Democrats¹³² and moderate Republicans¹³³ that it was eventually exchanged for the prohibition on office-holding.¹³⁴ No matter which version of Section 3 is considered, however, it is simply not justifiable in terms of republicanism on the inside, whose proponents advocated popular sovereignty and equal citizenship. The early version, which would have disfranchised hundreds of thousands, perhaps millions, was not consistent with popular sovereignty.¹³⁵ Instead, it served primarily to prevent former rebels from electing government representatives that would threaten the security of the Union.¹³⁶

Substitution of the milder Section 3, the ban on office holding for former officeholders who had breached their oaths of loyalty to the Constitution, still required a republicanism on the outside understanding of the Republican Guarantee. The objective of Section 3 was to prevent “aristocratic or monarchical innovations”¹³⁷ by leaders who had previously shown themselves capable of breaking their constitutional oaths and threatening the integrity of the Union. The surest way of securing the nation against similar future threats was to prevent anti-republican innovators from ever again holding public office. In many ways the revised version of Section 3 is *more* in line with republicanism on the outside than its predecessor. While the original Section 3 only disfranchised rebels from voting for federal offices, the final Section 3 reflects Congress’s understanding that holding state office is not exclusively local in effect under the American system of federalism. The early version of Section 3 would have permitted rebels to vote for state legislators, who in turn would have voted for United States senators.¹³⁸ If disloyal men held high office in Southern states’ governments, they could use their positions to

Amendment from the Reconstruction Committee). This early version of Section 3 read: “Until the 4th day of July in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.” *Id.*

132. *Id.* at 2467 (statement of Rep. Boyer) (arguing disfranchisement of Southern states brings country nearer to despotism than republicanism); *id.* at 2501 (statement of Rep. Shanklin) (arguing disfranchisement of Southern states removes them from Union after war was just completed to keep them in).

133. *Id.* at 2502 (statement of Rep. Raymond) (discussing unfairness of exclusion of Southern states); *id.* at 2537 (statement of Rep. Beaman) (proposing substitute proposal); *id.* at 2540 (statement of Rep. Farnsworth) (stating disfranchisement is of no practical value).

134. *Id.* at 2897 (statement of Sen. Howard) (presenting revised amendment).

135. CONG. GLOBE, 39th Cong., 1st Sess. 2469 (1866) (statement of Rep. Boyer) (stating disfranchisement of large number of citizens equals establishment of oligarchy); *id.* at 2502 (statement of Rep. Raymond) (describing disfranchisement of so many Southern whites as “oligarchical and not republican”).

136. *See id.* at 2102 (statement of Rep. Shellabarger) (citing principles of national self-preservation and self-defense in support of rebel disfranchisement); *id.* at 2919 (statement of Sen. Willey) (stating disfranchisement justified on grounds that it “provid[es] security for the future peace of the country”).

137. *See supra* note 63 and accompanying text.

138. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2537 (1866) (statement of Rep. Beaman) (characterizing early version of Section 3 as useless and irrational); *id.* at 2768 (statement of Sen. Howard) (favoring practical benefit of ostracizing former rebellious leaders from selection of future leaders); *see also supra* note 111 and accompanying text (discussing other national effects of local unrepublicanism).

threaten the security of neighbor states and “clog the wheels of government.”¹³⁹

After seeing republicanism on the outside at work in the first session of the Thirty-Ninth Congress, Professor Ackerman’s arguments can be more easily answered. Republicanism on the inside implies that Congress refused to admit Southern congressional delegations as a way to punish those states for failing to meet a constitutional requirement that had little effect on the rest of the country. Republicanism on the outside rejects this view because an unrepugnant state “infects” the entire federal government with unrepugnantism. An unrepugnant government poses a threat to the Union as a whole, and blocking the admission of unrepugnant states to Congress becomes essential to the enforcement of the Republican Guarantee. Republicanism on the inside also helps explain why Section 1 of the Fourteenth Amendment was a necessary measure to enforce the Republican Guarantee against the unrepugnant South. But only republicanism on the outside can provide the needed explanations for Sections 2 and 3. Those sections, too, reflected Congress’s view of unrepugnant government as an “infection,” encouraging republican government in the South, but more importantly, reducing the dangerous effects of unrepugnantism on the rest of the country.

V. THIRTY-NINTH CONGRESS, SECOND SESSION

Reviewing the first session of the Thirty-Ninth Congress through the lens of republicanism on the outside largely legitimizes the process by which the Fourteenth Amendment was proposed. Still, questions remain concerning the enactment of the First Reconstruction Act at the end of the second session.¹⁴⁰ Assuming Congress could justifiably propose the Fourteenth Amendment without Southern representation, how could it justify placing the South under military occupation and requiring the amendment’s ratification as a condition to readmission? This course of action seemingly suffers the taint of coercion.¹⁴¹

Five separate elements to the First Reconstruction Act should be considered:

Military Government: The imposition of martial law on the South and the authority of military officers to restore order in the states.¹⁴²

Convention Condition: The condition that each state must organize a constitutional convention with race-blind suffrage.¹⁴³

Constitution Condition: The condition that each state constitution must include race-blind suffrage and other essential components of republican

139. CONG. GLOBE, 39th Cong., 1st Sess. app. 59 (1866) (statement of Rep. Thomas). See *supra* notes 112-114 and accompanying text (discussing fear of disloyalists holding government positions).

140. First Reconstruction Act, ch. 153, 14 Stat. 428 (1867); see CONG. GLOBE, 39th Cong., 2nd Sess. 1976 (1867) (overriding President’s veto and enacting the bill into law).

141. See 2 ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 111 (asserting Congress’s procedure for procuring ratification of Fourteenth Amendment breaches Article V).

142. First Reconstruction Act, ch. 153, sec. 1-3, 14 Stat. 428, 428 (1867).

143. *Id.* sec. 5.

government.¹⁴⁴

Ratification Condition: The condition that each state legislature, once reconstructed pursuant to the foregoing provisions, must ratify the Fourteenth Amendment.¹⁴⁵

Adoption Condition: The condition that the Fourteenth Amendment actually be adopted into law, having received enough votes under Article V to become the law of the land.¹⁴⁶

Republicanism on the inside can explain some of these provisions, but certainly not all of them. Republicanism on the outside, however, makes the Reconstruction Act look less like coercion and more like a strong but legitimate enforcement of the Republican Guarantee.

A. Republicanism on the Inside

The procedural history of the First Reconstruction Act provides some insight into the concerns of the Thirty-Ninth Congress during the second session. On February 13, 1867, the House of Representatives passed the initial version of the First Reconstruction Act¹⁴⁷ and sent the Senate a bill providing only for the military occupation of the South.¹⁴⁸ Provisions similar to provisions two through five above had been promoted by Representative Bingham¹⁴⁹ and Representative James G. Blaine,¹⁵⁰ but were bitterly opposed by Representative Stevens¹⁵¹ and rejected by the House.¹⁵² The conditions of readmission were added only after the bill reached the Senate.¹⁵³ At that point, Representative Stevens continued to rally against the conditions,¹⁵⁴ but the House finally agreed to the Senate's amendments so that a bill could be sent to the President before the end of the term.¹⁵⁵

144. *Id.*

145. *Id.*

146. First Reconstruction Act, ch. 153, sec. 5, 14 Stat. 428, 429.

147. See CONG. GLOBE, 39th Cong., 2nd Sess. 1215 (1867).

148. *Id.* at 1360 (summary of bill reaching the Senate).

149. *Id.* at 1176-77 (detailing proposed amendments of Rep. Bingham); *id.* at 1212 (statement of Rep. Bingham) (encouraging provisions giving people opportunity to adopt republican government).

150. *Id.* at 1182 (statement of of Rep. Blaine) (proposing amendment).

151. CONG. GLOBE, 39th Cong., 2nd Sess. 1213-14 (1867) (statement of Rep. Stevens) (commenting on injustice of bill).

152. *Id.* at 1215.

153. See *id.* at 1361 (statement of Sen. Sherman) (proposing amendment); *id.* at 1469 (amended bill passes Senate).

154. *Id.* at 1315 (statement of Rep. Stevens) (presenting motion for non-concurrence in Senate's amendments); *id.* at 1340 (noting initial House refusal to concur in Senate amendments).

155. CONG. GLOBE, 39th Cong., 2nd Sess. 1400 (1867) (marking House concurrence with Senate amendments). Because the President was not expected to sign the bill, Congress was under pressure to pass it at least ten days before the end of the term in order to avoid a pocket veto and override the President's veto. See 2 DONALD, *supra* note 68, at 286; see also CONG. GLOBE, 39th Cong., 2nd Sess. 1336 (1867) (statement of Rep. Lawrence) (acknowledging bill's imperfections but urging its passing regardless). The result was marathon sessions of Congress lasting well past midnight. See JAMES, *supra* note 2, at 209 (describing late

As the House considered the initial form of the bill, which contained only the military government provision, much of the focus was on restoring internal order to the Southern states, rather than reconstructing state governments to make them acceptable to Congress and neighboring states. The object of the bill, said Representative Martin R. Thayer, was “to guaranty present protection and equal justice to the Union men of the South. It is to prevent assassination, murder, robbery, arson, banishment, and all that long catalogue of cruelties to which the Union men and the freedmen of the South are . . . subjected, without remedy and without redress.”¹⁵⁶ Representative Kelley defended the Stevens bill against Representative Bingham’s add-ons on the same grounds, stating:

This, sir, I may say, is little more than a mere police bill It proposes to give peace and safety to every man . . . irrespective of the tint of his complexion, or whether he fought against or for his country’s flag. Its object is to preserve peace and vindicate the sanctity of human life.¹⁵⁷

These congressmen presented military occupation not as a defensive measure on the part of the United States, but rather as a tool to enforce the rule of law within a state where the state government itself failed to do so.

Meanwhile, some supporters of the Bingham amendment and its Senate counterpart also expressed their views in terms of republicanism on the inside. Just as Section 1 and black suffrage had been supported as measures of republicanism on the inside in the first session,¹⁵⁸ some members of Congress supported the Reconstruction Act’s readmission conditions in these terms. “Constitutions of government are made by the voluntary act of the people, not by rifled ordnance and the bayonet,” stated Representative Bingham in support of his amendment, urging Congress to give the people of the South “an opportunity to adopt a republican form of government.”¹⁵⁹ Representative James F. Wilson supported the Bingham amendment because he saw martial law in the South as a means of ensuring popular sovereignty for its people; he stated:

night sessions due to intense pressure to pass bill); *see also* CONG. GLOBE, 39th Cong., 2nd Sess. 1398 (1867) (noting motion agreed to at three o’clock a.m.); *id.* at 1469 (noting motion agreed to at twenty-two minutes past six o’clock a.m.).

156. CONG. GLOBE, 39th Cong., 2nd Sess. 1098 (1867) (statement of Rep. Thayer); *see also* BENEDICT, *supra* note 68, at 214-15 (noting radicals’ call for total reorganization of southern states to ensure constitutional guarantees upheld).

157. CONG. GLOBE, 39th Cong., 2nd Sess. 1177 (1867) (statement of Rep. Kelley). Similar remarks were made in the Senate. *See id.* at 1376 (statement of Sen. Wilson); *id.* at 1462 (statement of Sen. Sherman).

158. *See supra* Section IV.A (discussing republicanism on the inside during the first session of the Thirty-Ninth Congress).

159. CONG. GLOBE, 39th Cong., 2nd Sess. 1212 (1867) (statement of Rep. Bingham).

Now, sir, one of the rights in the enjoyment of which the people of the southern States are to be protected is the right of the people peaceably to assemble This bill presents a liberal plan to the loyal people of [those] State[s] upon which they may act under the protection of the military arm of this Republic in the formation of a State government of just such character as may to them seem best.¹⁶⁰

Further, some Republicans felt that without the conditions of ratification added onto the bill, it did not do enough to promote republicanism on the inside.¹⁶¹ Military government, after all, is a far cry from popular sovereignty.

Republicanism on the inside, then, serves as a plausible explanation for some of the second session's Reconstruction debates. A number of those who supported the first half of the bill justified military government of the South on the grounds it was needed to restore internal order to the region and protect the rights and safety of blacks.¹⁶² Just as the drafters of Section 1 of the Fourteenth Amendment deemed denial of equal protection, due process, and rights of citizenship un-republican, state-sponsored or state-tolerated violence against blacks in the South was surely un-republican as well. Meanwhile, some supporters of the second half of the bill—provisions two through five—justified the conditions of readmission on the grounds that no state in the South could ever be republican unless it met those criteria.¹⁶³ By requiring race-blind suffrage for delegates to the state constitutional convention, and in the state constitutions themselves, Congress finally placated radical Republicans who were dissatisfied with Section 2's failure to require black suffrage.¹⁶⁴ Further, by placing military government and conditions for readmission in the same bill, Congress implied that military occupation was but a means of reestablishing republicanism on the inside in the occupied states.

B. Republicanism on the Outside

Again, republicanism on the inside does not fully answer Professor Ackerman's challenge. Military government is a questionable and extreme tool for enforcing internal republican values such as equality and popular sovereignty.¹⁶⁵ It is unlikely that Congress truly thought it could permanently instill such republican values at gunpoint. Viewed through the lens of

160. *Id.* at 1318 (statement of Rep. Wilson).

161. *See id.* at 1331 (statement of Rep. McRuer) ("I do not belong to that party which desires no military government for the rebel States; nor do I belong to that party which apparently desires nothing else than military governments for those States").

162. *See supra* notes 156-157 and accompanying text (noting peace and safety as primary concerns of bill).

163. *See supra* notes 159-161 and accompanying text (discussing need for popular sovereignty as element of republicanism).

164. *See supra* notes 115-120 and accompanying text (discussing radicals' dissatisfaction with Section 2).

165. *See* CONG. GLOBE, 39th Cong., 2nd Sess. 1731 (1867) (veto message of President Johnson).

republicanism on the outside, however, the First Reconstruction Act is a rational and legitimate attempt to enforce the Republican Guarantee.

First, consider the explanations provided by members of the Thirty-Ninth Congress for resorting to military government in the South. As suggested earlier, one argument posits that Congress pursued military government due to fears for the welfare and safety of blacks and other unionists within the Southern states.¹⁶⁶ In fact, Congress's fears for the security of the country seemingly provided just as much incentive. Representative Shellabarger, for example, who in the first session so clearly recognized the nationwide dangers of readmitting congressional delegations from unrepudiated states,¹⁶⁷ argued in the second session that the rebellion was in a state of war *cessante*: though crushed for the time being, the rebellion still presented a threat to the Union and should be dealt with on a military basis.¹⁶⁸

Security concerns also animated the congressmen who opposed the Bingham amendment. Congressman Bingham's amendment provided for the end of military government if rebel states met the readmission conditions in Section 5 of the Act.¹⁶⁹ Those following the more radical views of Representative Stevens, however, thought this opportunity for readmission presented too great a danger to the security of the country. "[A]ny general proposition for the restoration of these States to the Union upon any basis set forth in an act of Congress is fraught with the greatest danger to the future peace and prosperity of the Republic," Representative George S. Boutwell argued.¹⁷⁰ Representative Boutwell and others warned that if the Bingham amendment were to become law, Congress would be turning over the government to disloyal men, thereby endangering the Republic.¹⁷¹

Republicanism on the outside explains the views of these congressmen in a way republicanism on the inside does not. Considering that unrepudiated governments in the South would potentially have military implications for the rest of the country, military government in the Southern states does not appear to be such an extreme measure to enforce the Republican Guarantee. Nor does military government seem such an implausible means of establishing

166. See *supra* Section V.A (discussing republicanism on the inside in the second session of the Thirty-Ninth Congress).

167. See *supra* note 111 and accompanying text. Shellabarger also devised the "destroyed governments" theory of the rebel states' constitutional status, an alternative to Stevens's "conquered provinces" theory.

168. CONG. GLOBE, 39th Cong., 2nd Sess. 1099 (1867) (statement of Rep. Shellabarger) (noting rebellion still sufficiently strong to be of concern).

169. See *supra* notes 143-146 and accompanying text (discussing elements of First Reconstruction Act).

170. CONG. GLOBE, 39th Cong., 2nd Sess. 1209 (1867) (statement of Rep. Boutwell).

171. *Id.* at 1316 (statement of Rep. Boutwell) (stating people of country unprepared to accept return of disloyal men); *id.* at 1317 (statement of Rep. Stokes) (speaking against return of power to disloyal men); *id.* at 1322 (statement of Rep. Bromwell); *id.* at 1323 (statement of Rep. Donnelly); *id.* at 1332 (1867) (statement of Rep. Henderson) ("I see such men as Lee and Beauregard . . . sitting in the conventions which are to form constitutions under which loyal men are to live").

republican government when the latter is understood not simply as popular sovereignty, but also as republicanism on the outside—i.e., stability, security, and loyalty.

The other major provisions of the Reconstruction Act were the conditions of readmission imposed by the Bingham amendment and those adopted by the Senate. When Congress required black suffrage for constitutional conventions and in each state constitution in the First Reconstruction Act, the congressmen who had earlier complained about the inadequacy of Section 2 of the Fourteenth Amendment were vindicated.¹⁷² Rather than voice concerns of republicanism on the inside, congressmen in the second session of the Thirty-Ninth Congress paved the way for military enforcement of black suffrage by expressing the importance of the franchise in terms of republicanism on the outside. Given the right to vote, argued Representative Hamilton Ward, blacks will have the “power . . . to protect themselves and to *preserve the Republic*.”¹⁷³ Similarly, Representative John M. Broomall stated that the purpose of granting suffrage to blacks was so “the loyal majority may protect themselves *and the country* against their and its implacable foes”¹⁷⁴ Thus, black suffrage in the South was not only an end in itself, but also a means to security for the country overall.¹⁷⁵

Congress’s imposition of the ratification condition, denying each state readmission to Congress unless it ratified the Fourteenth Amendment, was also discussed in the terms of republicanism on the outside. Arguably, Representative Bingham’s case for conditioning readmission on ratification rests on two statements. First, Bingham argued the Fourteenth Amendment ought to be made a condition of readmission because “[i]f it had been there from the beginning, you never in my judgment would have been troubled with the late rebellion.”¹⁷⁶ Second, Bingham compared ratification of the Fourteenth

172. See 2 DONALD, *supra* note 68, at 287; *supra* notes 126-129 and accompanying text (providing examples of congressional fears of disloyalty and calls for black suffrage). Those Congressmen who had complained, to no avail, that Tennessee should not have been readmitted without black suffrage were also vindicated by the conditions of the First Reconstruction Act. See CONG. GLOBE, 39th Cong., 1st Sess. 4000 (1866) (rejecting, by vote of 34-4 in the Senate, proposed amendment of Sen. Sumner conditioning readmission of Tennessee on race blind suffrage). After the Fourteenth Amendment was passed by Congress and ratified by Tennessee, Congress debated and approved Tennessee’s readmission to Congress before the end of the first session. See *supra* notes 11, 15 and accompanying text (discussing Tennessee’s readmission). Tennessee’s readmission stands out as an anomaly because it was not subject to the conditions of the First Reconstruction Act.

173. CONG. GLOBE, 39th Cong., 2nd Sess. 117 (1866) (statement of Rep. Ward) (emphasis added).

174. *Id.* at 351 (statement of Rep. Broomall) (emphasis added). This remark by Rep. Broomall and that of Rep. Ward were not made directly in reference to the First Reconstruction Act, but before that bill was introduced. *Supra* text accompanying note 173.

175. Realistically, black suffrage could also be seen as a means for continued political domination by the Republican Party. See CONG. GLOBE, 39th Cong., 2nd Sess. 1184 (1867) (statement of Rep. Garfield) (“[T]he fortunes of the Republic and the safety of the party of liberty are inseparably bound up with the rights of the black man”).

176. *Id.* at 500 (statement of Rep. Bingham).

Amendment to the first great ratification, Article VII.¹⁷⁷ “It has become apparent that the nation must perish” unless the Fourteenth Amendment becomes law, Bingham declared.¹⁷⁸ “As in 1789 the Constitution authorized nine States to exclude from the Union any or all of the remaining four States which should refuse to ratify the Constitution, so to-day, in 1866,” no state should be readmitted unless it agrees to the terms of the amendment.¹⁷⁹ To be sure, Representative Bingham and others believed the ratification condition was good “republican” policy for states to incorporate into their constitutions. But they also believed it represented an important policy in the history of the United States overall, fraught with consequences related to security and national in scope.

The final condition of readmission, requiring that the Fourteenth Amendment actually become part of the Constitution, is also explained by republicanism on the outside. In terms of republicanism on the inside, the adoption condition is certainly difficult to understand. Assuming a state government incorporated republican requirements into its own constitution and ratified the Fourteenth Amendment, how could Congress deny the state readmission simply because the amendment was not yet adopted? Tennessee had ratified the amendment before the enactment of the First Reconstruction Act, and its congressmen were seated almost immediately despite the fact the Fourteenth Amendment was not yet in effect.¹⁸⁰ Congress soon realized, though, the imprudence of allowing other states to follow suit. Without an effective Fourteenth Amendment, Section 2 would not apply and the Southern states would be overrepresented in Congress if they disfranchised their black citizens.¹⁸¹ Further, once they had been readmitted, the states could revert back to un-republican government, clogging the wheels of government once again.¹⁸² Viewed through the lens of the republicanism on the outside, the “adoption” condition of readmission is not “coercion,” but rather a means to ensure security for the Union and stability for its federalism.

It should now be clear that military reconstruction was implemented due more to republicanism on the outside than republicanism on the inside. True, Congress was alarmed by the lawlessness of the South and the vulnerability of blacks and pro-Union whites in that region. But even more alarming, from a national point of view, was the threat the South posed to the rest of the country

177. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

178. CONG. GLOBE, 39th Cong., 1st Sess. 3980 (1866) (statement of Rep. Bingham).

179. *Id.* at 3980 (statement of Rep. Bingham). This statement was made during the debates on the readmission of Tennessee.

180. H.R.J. Res. 73, 39th Cong., 14 Stat. 364 (1866); *see id.* at 3980 (House approval of joint resolution); *id.* at 4000 (Senate approval).

181. *See id.* at 3978 (statement of Rep. Higby) (objecting to readmission of Tennessee).

182. *See* CONG. GLOBE, 39th Cong., 2nd Sess. 1381 (1867) (statement of Sen. Howard) (fearing that Southern states would renege on conditions once readmitted).

if proper republican governments were not restored there. If Congress intended to readmit the Southern delegations to Congress, it needed assurance that readmission would not pose a risk to the security of the country and the stability of the federalist system. The ratification condition was made part of the Reconstruction Act because military occupation and ratification were both essential to implementing the Republican Guarantee, and neither provided an effective Guarantee without the other.

VI. CONCLUSION

This Article began by describing irregularities in the adoption history of the Fourteenth Amendment and questioning whether the procedural legitimacy of the Amendment's adoption could be saved. This Article argued that it could, on account of the Republican Guarantee Clause of Article IV. In order to understand that the Thirty-Ninth Congress acted legitimately pursuant to the Republican Guarantee, however, one must read that clause somewhat broadly. The broad reading is the proper reading because the original, primary purpose of the Republican Guarantee was not to protect the rights and freedoms of citizens from their states, but to protect each other state and the Union itself from the threats posed by un-republican neighbors and member states. In other words, the Republican Guarantee has limited concern for republicanism on the inside and its ideals of equality of citizenship and popular sovereignty. Rather, the Guarantee is focused on republicanism on the outside and its purposes of providing security for the states and stability for the Union. Undoubtedly, the Reconstruction Era was an anomalous period of American history as the country was attempting to recover from one crisis and prevent crises in the future. Nevertheless, this strange history need not be deemed extra-constitutional. Viewed through the lens of republicanism on the outside, the behavior of the Thirty-Ninth Congress should be seen not as hypocrisy and coercion but as a constitutionally legitimate means of protecting republicanism and the Republic.

APPENDIX

The Republican Guarantee

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4.

The Fourteenth Amendment

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.

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.

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.

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

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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.

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

U.S. CONST. amend. XIV.