

# BEYOND THE SUPERMAJORITY: POST-ADOPTION RATIFICATION OF THE EQUALITY AMENDMENTS

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*Although an amendment to the Constitution is effective when ratified by three-fourths of the states, the states in the Union at the time of adoption unanimously ratified the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, as well as the Bill of Rights. Ratification of an already effective provision at first blush appears pointless, but it serves an important function: Post-adoption ratifications moot legal and political infirmities with earlier ratifications when, as was the case with the Fourteenth, Fifteenth, and Nineteenth Amendments, one or more of the*

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*first three-fourths of the states to ratify did so in a procedurally questionable manner. Post-adoption ratification has also served as an important symbol; for example, several states ratified the Fourteenth and Fifteenth Amendments during the Civil Rights Era to show support for racial integration.*

## INTRODUCTION

The impact and legitimacy of *Brown v. Board of Education*<sup>1</sup> flowed in part from the Court's unanimous rejection of segregation;<sup>2</sup> the reaffirmation of segregation's unconstitutionality in *Cooper v. Aaron*<sup>3</sup> is celebrated because every member of the Supreme Court individually signed the opinion.<sup>4</sup> Although the achievement has gone unnoticed, another landmark set of policies has won unanimous support: The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have been ratified by all of the states in the Union at the time each became effective.<sup>5</sup>

The unanimous ratification of these amendments is at one level surprising. Multi-member courts and legislatures typically vote collectively (that is, every member of the Supreme Court or Senate<sup>6</sup> present ordinarily votes on every matter), so popular or uncontroversial matters are routinely decided unanimously. By contrast, states considering amendments act independently,<sup>7</sup> and

1. 347 U.S. 483 (1954).

2. See, e.g., Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1018 (2005) ("*Brown* gave civil rights activists courage by signaling that one branch of the national government was unanimously in favor of their cause.") (book review).

3. 358 U.S. 1 (1958).

4. Abner J. Mikva, *Reason, Passion & the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan*, 33 HARV. C.R.-C.L. L. REV. 325, 326-27 (1998) (noting that Brennan was "the author of most of the opinion in *Cooper v. Aaron*, a unanimous opinion of the Court which was physically signed by every member of the Court to emphasize that the Court considered the school desegregation case *Brown v. Board of Education* the permanent and enforceable law of the land").

5. The semi-official compilation of the Constitution published by the Senate is inaccurate, omitting many ratifications. See CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-19, at 25-44 (2004), available at <http://www.gpoaccess.gov/constitution/browse2002.html#2002>. A more complete source, relied on here, is Emory Law School, Electronic Reference Desk, Amendments to the Constitution, <http://www.law.emory.edu/law-library/research/ready-reference/us-federal-law-and-documents/historical-documents-constitution-of-the-united-states/amendments-to-the-constitution.html> (last visited Jan. 15, 2008).

6. See, e.g., Standing Rules of the Senate, Voting Procedure, R 12(1), S. DOC. NO. 110-9, at 8 (2007), available at <http://rules.senate.gov/senaterules/Rules091407.pdf> ("When the yeas and nays are ordered, the names of Senators shall be called alphabetically; and each Senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate; and no Senator shall be permitted to vote after the decision shall have been announced by the Presiding Officer, but may for sufficient reasons, with unanimous consent, change or withdraw his vote.").

7. Cf. DENYS P. MYERS, THE PROCESS OF CONSTITUTIONAL AMENDMENT, S. DOC. NO. 76-314, at 36 (3d sess. 1940) ("The freedom of the states to exercise the power of

Article V of the United States Constitution provides that ratification by three-quarters of the states makes an amendment proposed by Congress part of the Constitution.<sup>8</sup> Accordingly, it would be reasonable to predict that after the required number of states ratify, the remaining legislatures would not bother to ratify or reject an amendment that would be binding regardless of their support or opposition. When it came to these foundational amendments, however, even after the amendments became effective, over the centuries states have continued to go on the record in support of the equal rights of all citizens.

Part I of this Essay explains why states ratified after enactment. There were two major rounds of post-adoption ratifications of the Reconstruction Amendments, each designed in different ways to demonstrate state support for civil rights. Some former Confederate states ratified the Fourteenth and Fifteenth Amendments after they became effective because Congress required them to do so; the ratifications were in effect a loyalty oath designed to formalize willingness to comply with the Constitution.<sup>9</sup> In the twentieth century, most ratifications were demonstrations of support for civil rights,<sup>10</sup> for example, when the amendments were perceived to be under attack following *Brown*.<sup>11</sup>

As Part II explains, post-adoption ratifications serve a critical, practical function: although challenges to the validity of particular ratifications are a common feature of the post-ratification legal landscape, post-adoption ratifications render them moot. The Fourteenth, Fifteenth, and Nineteenth Amendments, among others, may be subject to non-frivolous arguments that at least one necessary ratification was irregular. Post-adoption ratifications completely or partially mooted any such objections to these amendments; even without the disputed ratification, there were enough concededly legitimate ratifications to validate each amendment. The cushion of excess ratifications disposed of legal challenges to questionable ratifications—and demonstrated the amendments' legitimacy to the people of the nation.<sup>12</sup>

Part II also addresses a doctrinal question arising from the existence of post-adoption ratifications: whether and when the views of states ratifying an already-effective amendment can be taken into account by courts construing that amendment. Surprisingly, the Supreme Court frequently looks at the views of late

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ratification precludes simultaneous action by them, as would be the case in ordinary balloting.”).

8. U.S. CONST. art. V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

9. See *infra* notes 29–31 and accompanying text.

10. See *infra* notes 32–74 and accompanying text.

11. See *infra* notes 39–57 and accompanying text.

12. See *infra* notes 80–105 and accompanying text.

ratifiers, sometimes under the mistaken view that they had contemporaneously ratified.<sup>13</sup> Although at some remove of time it would make little sense to canvas the views of those who ratified an amendment decades or centuries later, a reasonably contemporaneous ratifier should be counted even if acting after a proposal has become part of the Constitution.<sup>14</sup>

### I. POST ADOPTION RATIFICATION

Ratification of a constitutional amendment after it has apparently become effective is a routine part of American constitutional practice. This phenomenon is particularly routine with respect to the equality amendments, which the states continued to ratify decades after they came into force. The Thirteenth Amendment became effective in 1865; Oregon, California, Florida, Iowa, New Jersey, and Texas ratified the Thirteenth Amendment before 1870; Delaware and Kentucky ratified it in the Twentieth Century. Mississippi perfected the amendment with its 1995 ratification.<sup>15</sup>

Alabama, Georgia, Virginia, Mississippi, and Texas ratified the Fourteenth Amendment within two years of effectiveness in 1868; Delaware, Maryland, California, and Kentucky ratified it in the Twentieth Century. Another group of states re-ratified because they had rescinded their earlier ratifications during the amendment's original consideration: Oregon in 1973<sup>16</sup> and Ohio<sup>17</sup> and New Jersey in 2003.<sup>18</sup>

Nebraska, Texas, and New Jersey ratified the Fifteenth Amendment shortly after it became effective in 1870; Delaware, Oregon, California, Kentucky, Maryland, and Tennessee<sup>19</sup> did so in the Twentieth Century. Rescinder New York re-ratified in 1970.

The Nineteenth Amendment was adopted in 1920; Connecticut and Vermont ratified within a few months after effectiveness. Delaware acted in 1923, and Maryland, Virginia, Alabama, Florida, South Carolina, Georgia, Louisiana, and North Carolina ratified beginning in 1941. Mississippi was the forty-eighth ratifier in 1984. Only Hawaii and Alaska, the only new states admitted since adoption of the Nineteenth Amendment, have not gone on the record.

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13. See *infra* notes 107–113 and accompanying text.

14. See *infra* notes 119–124 and accompanying text.

15. Finally, Mississippi Officially Abolishes Slavery, ALBANY TIMES UNION, Mar. 17, 1995, at A2.

16. 1973 Or. Laws 2865-66. See generally Cheryl A. Brooks, Comment, *Race, Politics, and Denial: Why Oregon Forgot To Ratify The Fourteenth Amendment*, 83 OR. L. REV. 731 (2004).

17. See *supra* note \*.

18. S.J. Res. 16, 210th Leg., 2d Reg. Sess. (N.J. 2002).

19. The Tennessee resolution ratified the Fifteenth Amendment, repealed the resolution rejecting it, and stated that the rationale for ratification was that “the General Assembly agrees with the principles of the Fifteenth Amendment.” H.R.J. Res. 32, 100th Gen. Assem. (Tenn. 1997); see also Karin Miller, *Tennessee Becomes Last State to Formally Back 15th Amendment*, CHARLOTTE OBSERVER, April 3, 1997, at 14A.

The practice is not limited to the equality amendments.<sup>20</sup> The first post-adoption ratifier was Kentucky, which in 1792 ratified the Bill of Rights, already in force, the amendment which became the Twenty-Seventh Amendment, and a failed congressional apportionment amendment.<sup>21</sup> Most recently, in 2003 Mississippi ratified the Twenty-seventh Amendment,<sup>22</sup> which had crossed the finish line over a decade before. Every one of the twenty-seven Amendments has been ratified by at least one state since coming into force; at least thirty-five states have ratified one or more amendments after they became effective. Unanimity, however, is reserved for a handful of particularly treasured amendments: the equality amendments and the Bill of Rights, which was made unanimous in 1939 with the ratifications of Connecticut, Georgia, and Massachusetts.

Post-adoption ratifications sometimes occur when the principles of the amendments are not particularly contested. Kentucky ratified the Reconstruction Amendments in 1976, apparently as part of the bicentennial celebration.<sup>23</sup> Connecticut,<sup>24</sup> Georgia,<sup>25</sup> and Massachusetts<sup>26</sup> made ratification of the Bill of Rights unanimous in 1939, the sesquicentennial of the Constitution's ratification and of the Bill of Rights' submission to the states.<sup>27</sup> The 1939 ratifications were apparently ceremonial: while the specific meaning of the amendments might have been debated, their desirability and legitimacy seem to have been uncontroversial since adoption. Many other ratifications of the Reconstruction Amendments,

20. MYERS, *supra* note 7, at 38 ("There has usually been a surplus of ratifications to bring an amendment into effect.").

21. 1 Stat. 97-98 (1789).

22. H.R. Con. Res. 68, 2003 Leg., Reg. Sess. (Miss. 2003).

23. *Kentucky Ratifies 3 Old Amendments*, WASH. POST, Mar. 20, 1976, at A11.

24. H.R.J. Res. 292 (Conn. 1939).

25. 1939 Ga. Laws 1414 (1939); *see also Georgia Ratifies Bill of Rights*, N.Y. TIMES, Mar. 19, 1939, at 14.

26. J. MASS. SENATE Mar. 2, 1939, at 369; *see also Bill of Rights Finally Ratified: Massachusetts Acts on Constitution after 150 Years*, L.A. TIMES, Mar. 4, 1939, at 6 (noting that Governor Saltonstall "asked ratification by March 4, 'the birthday of the Bill of Rights,' to remind the nation of the need for vigilance in guarding liberties and to 'fill a blank page' in Massachusetts' history").

27. *See* MYERS, *supra* note 7, at 10-20; Donald O. Dewey, *A Vote of Confidence for the Bill of Rights*, 7 AM. J. LEGAL HIST. 137 (1963). Thus, all of the original 13 colonies, plus Vermont, gave them their support. Indeed, the Bill of Rights are apparently the only Amendments to have been approved more than unanimously. When Kentucky was admitted to the Union in 1792, it ratified the already-effective Amendments along with two pending ones. Ky. Acts 1792. Accordingly, there were fourteen states when the Bill of Rights became law in 1791, but the Bill received fifteen affirmative votes. No other state seems to have ratified the Constitution or any amendment which was in effect when the state was admitted to the Union. Even so, since Kentucky ratified the amendments in a single document, and two of the twelve were still pending, Kentucky's ratification is arguably not an exception to the tradition that new states accept the Constitution as it exists when they are admitted to the Union.

which have faced bitter debates since their proposal,<sup>28</sup> represent more serious policy decisions.

### A. *Compelled Support for Civil Rights*

A number of pre- and post-adoption ratifications of the Fourteenth and Fifteenth Amendments were accomplished through congressional compulsion.<sup>29</sup> After the Civil War, with the exception of Tennessee, which was “reconstructed” early, the former Confederate states were required to ratify the Fourteenth Amendment as a condition to regaining representation in Congress.<sup>30</sup> Those states not restored by the time the Fifteenth Amendment was proposed were required to ratify that as well. Accordingly, Alabama, Georgia, Mississippi, Texas, and Virginia ratified the Fourteenth Amendment in the eighteen months after it became effective; Texas ratified the Fifteenth Amendment shortly after that amendment came into force.

These ratifications were not purely symbolic: Congress could have provided that ratification by unreconstructed rebel states would be required if necessary to make the Fourteenth or Fifteenth Amendment effective, but it did not so limit the requirement. Instead, every former Confederate state was required to ratify to regain its representation. Accordingly, the ratifications had important legal consequences for the states involved, which would have been excluded from Congress had they persisted in their opposition to the amendments. And, although the last handful of ratifications was not required to bring the amendments into force, the ratifications were designed to protect the amendments from being undermined by the states.

This compulsion presents an example of a situation where just saying something carries significance.<sup>31</sup> With respect to the Fourteenth and Fifteenth

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28. *E.g., Assails 15th Amendment*, N.Y. TIMES, Dec. 12, 1916, at 9 (discussing Mississippi Senator’s challenge to Fourteenth and Fifteenth Amendments); “*Hideous Mistake*,” *15th Amendment*, N.Y. TIMES, Aug. 10, 1907, at 6.

29. There is little question that this condition was lawful. See Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378 (1966); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

30. See Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004).

31. It was significant, for example, when the U.S. Senate apologized for its inaction on lynching. See 151 Cong. Rec. S6364–88 (June 13, 2005), 2005 WL 1413977. It was equally significant when the Chairman of the Republican National Committee apologized for the “Southern Strategy,” gaining white voters in the South in the 1960s and 1970s by generating fear and resentment of civil rights gains by African-Americans. Edwin Chen, *GOP Rejects Its Past in Courting Black Support*, L.A. TIMES, July 15, 2005, at A22. Imagine a purely hortatory declaration with the following text: “The sense of Congress is that we [support] [oppose] *Roe v. Wade* and the legal protection of a woman’s right to abortion,” or “The sense of Congress is that the United States is [a Christian nation] [a nation in which no religious belief, faith, or tradition has primacy].” Such resolutions formally adopted by both houses of Congress would be momentous even if they imposed no rights, obligations, or penalties, appropriated not a penny, and left intact every word of

Amendments, Congress assumed, perhaps naively, that white supremacists would obey the law if they agreed to do so and therefore required each rebel state to formally voice support for the amendments.

### *B. Voluntary Support for Civil Rights*

A number of twentieth century ratifications of the Reconstruction Amendments were also intended as substantive support for civil rights and principles of equality. They differed from the Reconstruction-era ratifications in that they were entirely voluntary political acts of the states.

#### *1. Delaware's 1901 Ratification*

The first year of the twentieth century brought the first post-adoption ratification of the Reconstruction Amendments meant as a vote of support for civil rights based on Democratic influences. Delaware stayed in the Union during the Civil War, but it had been a slave state and continued to be controlled by Democrats.<sup>32</sup> The Thirteenth, Fourteenth, and Fifteenth Amendments became law over Delaware's objection.

Like many other former slave states at the turn of the twentieth century, Delaware adopted a Jim Crow constitution. The 1897 constitution provided for separate but equal schools, almost in so many words; with respect to funding, "no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."<sup>33</sup> Throughout this period, at the national level some Republicans challenged conservative efforts to suppress the African-American vote in the former Confederate states; in January 1901, for example, headlines reported a debate on a congressional proposal to "investigate the abridgement of the suffrage in certain Southern states."<sup>34</sup>

In the midst of this controversy, Delaware ratified the Reconstruction Amendments. Several factors contributed to the drive for ratification after four decades of inaction. First, in 1900, Delaware elected Republican John Hunn Jr. as Governor. Quaker John Hunn Sr. had been called the "Chief Engineer of the Underground Railroad." Hunn had been bankrupted after being found liable in 1848 for helping fugitive slaves escape; *Dred Scott* author Justice Roger Taney presided over the trial. The elder Hunn moved his family to South Carolina to

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existing law. See generally Brent White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006).

32. PATIENCE ESSAH, *A HOUSE DIVIDED: SLAVERY AND EMANCIPATION IN DELAWARE, 1638-1865* (1996).

33. DEL. CONST. art. X, § 2 (1897) (amended by 1995 Del. Laws ch. 277 (removing the words "and separate schools for white and colored children shall be maintained")). This provision was invalidated in *Brown v. Board of Education*, in the only affirmance among the consolidated cases; Delaware courts had found the schools for African-Americans to be unequal on the facts. *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch.) (finding separate schools unequal on the facts), *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

34. *House Debates Suffrage*, N.Y. TIMES, Jan. 5, 1901, at 5.

participate in the Port Royal Experiment,<sup>35</sup> and the governor-to-be lived there as a child.<sup>36</sup> With this direct experience of the effects of racial inequality, Hunn took office on January 15, 1901; less than a month later, Delaware ratified the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>37</sup>

There was also a broader political context: this ratification was the vindication of a battle over African-American rights in Delaware that had been ongoing for more than half a century. As one historian explained:

Delaware's belated ratification of these amendments ensued not from a moral stance but out of political considerations. After decades of political struggle, Delaware republicans finally gained complete control of state government by the beginning of the twentieth century. However, because republican control of state politics was in its infancy, only by using the black vote could the Republican party maintain its tenuous hold on state politics. It was within this context that the Republicans proposed the ratification of the Civil War amendments.<sup>38</sup>

Delaware's ratification, therefore, was not merely symbolic but an acknowledgement of the reality of African-American political power in that state.

## 2. *Backing Brown*

Resistance to *Brown* was exemplified by the *Southern Manifesto*, a statement published in the *Congressional Record* signed by southern Senators and Representatives who unabashedly supported segregation.<sup>39</sup> In contrast, many states supporting civil rights publicly responded to the challenges to *Brown* by ratifying the Reconstruction Amendments. In 1959, California<sup>40</sup> and Maryland<sup>41</sup> ratified the Fourteenth Amendment, and Oregon ratified the Fifteenth.<sup>42</sup> Both California and Maryland rejected the Fourteenth Amendment when proposed, and Oregon did not vote on the Fifteenth Amendment when it was pending in 1869–70.

35. WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (U. Ga. 1998) (1964).

36. HENRIETTA BUCKMASTER, LET MY PEOPLE GO: THE STORY OF THE UNDERGROUND RAILROAD AND THE GROWTH OF THE ABOLITION MOVEMENT (1992); JAMES A. MCGOWAN, STATION MASTER ON THE UNDERGROUND RAILROAD: THE LIFE AND LETTERS OF THOMAS GARRETT (rev. ed. McFarland & Co. 2004) (1977); WILLIAM STILL, THE UNDERGROUND RAILROAD (1872).

37. 235 Del. Laws 524 (1901).

38. ESSAH, *supra* note 32, at 187.

39. 102 CONG. REC. 4459–60 (1956).

40. 1959 Cal. Stat. 5695; *see also California Takes Its Time*, N.Y. TIMES, Apr. 17, 1959, at 17 (noting that bill was introduced by Republican Bruce F. Allen).

41. 1959 Or. Laws 1511.

42. 1959 Md. Laws 1458 (stating that the amendment “should be ratified by the State of Maryland to show the concurrence of this great State with the principles therein enunciated”).



These states had changed their views by 1959, a momentous year for civil rights. In the wake of *Brown*, both legislators<sup>43</sup> and scholars<sup>44</sup> attacked the validity of the Fourteenth and Fifteenth Amendments. Plaintiffs in a Maryland lawsuit challenging desegregation insisted that the Fourteenth Amendment was void.<sup>45</sup> The 1957 Little Rock crisis was a fresh trauma, as was *Cooper v. Aaron*,<sup>46</sup> holding that integration could not be delayed on the pretext that compliance with the law risked violence. In addition to delay of school integration, officials in many parts of the South struggled bitterly to prevent African-Americans from registering to vote and sought to block federal officials from even investigating the nature of the Southern way of life,<sup>47</sup> to say nothing of changing it. In 1959, the United States Commission on Civil Rights reported on "the great stubborn fact that many people have not yet accepted the principles, purposes or authority of the Fourteenth or Fifteenth Amendments."<sup>48</sup>

In the face of this controversy, Oregon's ratification of the Fifteenth Amendment, said one supporter, "is a token of our sincerity to the downtrodden peoples of all of the Americas"; another said that the vote "would strengthen the United States Commission on Civil Rights in its effort to guarantee the right of Negroes to vote in the South."<sup>49</sup> California's resolution stated that the amendment "should be ratified by the State of California to show the concurrence of this great state with the principles therein enunciated."<sup>50</sup>

Newspaper editorials explicitly recognized that Maryland's action was a vote of support for *Brown*. The *Washington Post* said:

The Maryland legislators could have used this opportunity to express disapproval and indignation over the Supreme Court's decision in the school desegregation cases decided under the Fourteenth Amendment. Instead, they made a point voting

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43. E.g., *Georgians "Void" U.S. Amendments*, N.Y. TIMES, Feb. 9, 1957, at 21 (discussing resolution of Georgia Senate to U.S. Congress asking for declaration of invalidity).

44. E.g., Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that it Poses to Our Democratic Government*, 11 S.C. L.Q. 484 (1959).

45. *Maryland Parents Argue 14th Amendment Invalid*, WASH. POST & TIMES HERALD, Feb. 3, 1957, at B4.

46. 358 U.S. 1 (1958).

47. For example, the struggle against the U.S. Commission on Civil Rights led to *Hannah v. Larche*. *Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959) (three judge court), *rev'd*, 363 U.S. 420 (1960).

48. *Excerpts from Report and Recommendations of Commission on Civil Rights*, N.Y. TIMES, Sept. 9, 1959, at 44. See generally UNITED STATES COMMISSION ON CIVIL RIGHTS: REPORTS ON VOTING (Gabriel J. Chin & Lori Wagner eds., 2005).

49. *Oregon Senate Ratifies 15th U.S. Amendment*, N.Y. TIMES, Feb. 3, 1959, at 26.

50. 1962 Cal. Stat. 131.

overwhelmingly for the Amendment, which must necessarily constitute an endorsement of its current interpretation.<sup>51</sup>

The *Chicago Daily Tribune* noted that the Fourteenth Amendment was already in effect without Maryland's vote, and the Fifteenth Amendment was in force without Oregon's, but that "it is good to have these fresh evidences of approval of the Constitution of the United States." After bragging about Illinois' early ratification, the paper optimistically stated that "[t]he implications of these amendments still constitute a major issue in American politics, nowhere is there any significant demand for their repeal. Oregon and Maryland have climbed on a bandwagon that is in motion."<sup>52</sup> The symbolic importance of these actions was reflected in the American Jewish Congress's 1958–59 survey of civil rights legislation, which highlighted the actions of Oregon and California and noted that those states had enacted other sorts of civil rights laws in the period as well.<sup>53</sup>

California's 1962 ratification of the Fifteenth Amendment likely occurred for similar reasons. In 1961–62, the Freedom Riders faced violence in bus stations in the South.<sup>54</sup> James Meredith integrated Ole Miss only because he was backed by 30,000 U.S. troops who battled armed insurrectionists.<sup>55</sup> The Twenty-fourth Amendment, which would help enfranchise African-American voters by banning poll taxes in federal elections, was pending before Congress.<sup>56</sup> According to the *Los Angeles Times*, Senator Albert S. Rodda, the ratification bill's author, "thought it was time California went on record" for the amendment.<sup>57</sup> Three years before the Voting Rights Act, California's ratification constituted a clear statement in a current and heated debate.

### 3. African-American Legislators

The growth of African-American political power was another factor leading to the modern ratification of the Reconstruction Amendments. The success of the Civil Rights movement led to diversification of state legislatures. Some of the first African-American political leaders to hold office made it a priority to ratify the amendments.

Maryland's 1959 ratification of the Fourteenth Amendment was clearly driven by the arrival of elected African-American legislators. The *Washington Post* noted that "[i]t is especially significant that the resolution of ratification was sponsored by Sen. J. Alvin Jones, a Negro."<sup>58</sup> Jones represented Baltimore and was

51. Editorial, *Refreshing Gesture*, WASH. POST & TIMES HERALD, Apr. 7, 1959, at A16.

52. Editorial, *Ratifications*, CHI. DAILY TRIB., Apr. 28, 1959, at 24.

53. *Civil Rights Gain Reported by A.J.C.*, N.Y. TIMES, Aug. 5, 1959, at 17.

54. See RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2006).

55. See WILLIAM DOYLE, AN AMERICAN INSURRECTION: THE BATTLE OF OXFORD, MISSISSIPPI, 1962 (2001).

56. California was an early ratifier of this Amendment in 1963; it became law in January 1964.

57. *State Asked to Cure Hangover From Civil War*, L.A. TIMES, Mar. 23, 1962, at 20.

58. See *supra* note 51.

the only African-American in the Maryland Senate.<sup>59</sup> The Associated Press reported that “[f]or the last four years, the Maryland Legislature had firmly resisted the efforts of its first Negro members to have the amendment officially ratified. Resistance finally crumbled.”<sup>60</sup>

Maryland ratified the Fifteenth Amendment in 1973.<sup>61</sup> As in 1959, the leader was an African-American, Senator Clarence Mitchell, III, a member of a distinguished political family.<sup>62</sup> Clarence Mitchell, Jr., had been called the “101st Senator” and was a civil rights leader from the 1930s through the 1970s.<sup>63</sup>

Also in 1973, Oregon re-ratified the Fourteenth Amendment. The bill’s sponsor was William McCoy, the first African-American elected to the Oregon legislature.<sup>64</sup>

Ohio re-ratified the Fourteenth Amendment in 2003, due in significant part to the work of Mark Mallory, then the Assistant Senate Minority Leader. In 2005, Mallory became the first African-American elected Mayor of Cincinnati.<sup>65</sup> Mayor Mallory is the son of legendary Cincinnati official William Mallory, who served in the Ohio House of Representatives for 28 years.<sup>66</sup> Without leadership from prime movers Mitchell and Mallory, these states’ march toward ratification would have been much slower.

#### 4. Ratifying After Rescission

Several post-adoption approvals of the Reconstruction Amendments occurred in states that had first approved, then attempted to reject, the amendments during the Reconstruction era. Since 1970, all of the states rescinding their ratifications concluded that the rescissions were mistakes that had to be formally rectified.

New Jersey was uniquely indecisive, changing its mind on all three Reconstruction Amendments. It initially rejected the Thirteenth Amendment, but then approved it in 1866. It rejected the Fifteenth Amendment, but approved it in

59. Hal Willard, *Vets Bonus Bill Killed at Annapolis by Adjournment of the Legislature*, WASH. POST & TIMES HERALD, Apr. 5, 1959, at A19.

60. *Amendment of 1868 Ratified by Maryland*, N.Y. TIMES, Apr. 5, 1959, at 71.

61. 1973 Md. Laws 1849.

62. *Md. Urged to Ratify 15th Amendment*, WASH. POST & TIMES HERALD, Mar. 9, 1973, at C6 (quoting Senator Mitchell as saying “[i]t is a disgrace that the state of Maryland has not formally recognized this provision of the United States Constitution”).

63. DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS*, at xiii (2002).

64. See *supra* note 16 and accompanying text.

65. See *supra* note \*; Gregory Korte, *Mallory Wins Mayor*, CINCINNATI ENQUIRER, Nov. 8, 2005, available at <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20051108/NEWS01/311080014>.

66. See Mayor’s Biography, <http://www.cincinnati-oh.gov/mayor/pages/-3052/> (last visited Jan. 15, 2008) (“In 2003, Mallory achieved his greatest legislative accomplishment by passing a resolution in the Ohio General Assembly that finally ratified the 14th Amendment, 135 years after it became part of the U.S. Constitution.”).

1871, which, as was the case with the Thirteenth Amendment, was already effective because of the action of other states.

New Jersey's voting record with respect to the Fourteenth Amendment was particularly tortuous. The legislature approved the Fourteenth Amendment on September 11, 1866, then rescinded its approval in 1868 before the amendment became effective. This rescission was vetoed by the governor, but the legislature re-rescinded in 1868. The legislature "expressed support" for the Amendment in 1980.<sup>67</sup> In 2003, New Jersey repealed the 1868 rescission resolution.<sup>68</sup> Legislator Leonard Lance explained: "This is a matter of symbolism, but symbolism is important as it relates to the Fourteenth Amendment."<sup>69</sup> Presumably, this is the end of the story of New Jersey and the Fourteenth Amendment, and that great state can be counted as an unambiguous ratifier.

Ohio also initially approved the Fourteenth Amendment in 1867 but rescinded in 1868 before the Amendment became effective. The state re-ratified in 2003.<sup>70</sup>

Oregon ratified the amendment in 1866, then rescinded in 1868. Unlike New Jersey and Ohio, which had rescinded before three-fourths of states acted, Oregon rescinded months after the Amendment had been declared adopted. Whatever might be said about changing a vote before final passage,<sup>71</sup> once the Constitution has been amended, changing the Constitution thereafter requires another amendment. Nevertheless, Oregon's rescission was not merely symbolic, because in 1868, controversy raged about the validity of the amendment; rescission of ratification could be understood as an appeal from the congressional determination that the Fourteenth Amendment had been ratified, or as formal support for the arguments against the validity of enactment. In addition, the 1868 legislature challenged the validity of the 1866 ratification itself. To eliminate these arguments, the Oregon legislature re-ratified in 1973.<sup>72</sup>

New York first ratified and then rescinded the Fifteenth Amendment. After years of efforts,<sup>73</sup> it re-ratified the Fifteenth Amendment in 1970.<sup>74</sup> As is suggested in Part II.C, these re-ratifications suggest that the states believed that rescissions were meaningful political acts, reflecting the view of the state until superseded by re-ratifications.

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67. Assemb. Con. Res. No. 128 (N.J. 1980); see also Martin Waldron, *New Jersey Journal*, N.Y. TIMES, May 4, 1980, at NJ3.

68. S.J. Res. 16, 210th Leg., 2d Reg. Sess. (N.J. 2002).

69. John Sullivan, *Up Front: Worth Noting; Enacting in Haste, Repenting at Leisure*, N.Y. TIMES, Apr. 7, 2002, at NJ14.

70. See *supra* notes 65–66 and accompanying text.

71. See *infra* notes 127–135 and accompanying text.

72. See *supra* note 16 and accompanying text.

73. See Laymond Robinson, *State is Haunted by an 1870 Ghost*, N.Y. TIMES, Jan. 28, 1962, at 68 (discussing 1962 ratification effort).

74. J. N.Y. SENATE 451–52 (Mar. 30, 1970) (Senate vote).

### C. *The Nineteenth Amendment*

The Nineteenth Amendment became law in 1920 after thirty-six of the forty-eight states in the Union ratified. Twelve states<sup>75</sup> ratified after adoption; Connecticut, Vermont, and Delaware did so within a couple of years. Nine states waited at least two decades, beginning with Maryland in 1941 and ending with Mississippi in 1984.<sup>76</sup> Virginia and Alabama ratified in the early 1950s, roughly contemporaneously with serious consideration of an Equal Rights Amendment ("ERA").<sup>77</sup> Florida, Georgia, Louisiana, North Carolina,<sup>78</sup> and South Carolina ratified from 1969–71, around the Fiftieth Anniversary of the Nineteenth Amendment, and again roughly contemporaneously with congressional consideration of the proposed but failed ERA.<sup>79</sup>

There is no obvious connection between late ratification of the Nineteenth Amendment and ERA rejection; that is, no direct proof that these states ratified the Nineteenth Amendment as political cover for a decision to reject the ERA (and indeed, no version of the ERA was pending before the states when these states ratified the Nineteenth Amendment). Yet, there is some correlation. Of the nine states that did not ratify the Nineteenth Amendment before or shortly after it passed, only Maryland ratified the ERA; the other eight rejected it.

## II. THE FUNCTION OF POST-ADOPTION RATIFICATION

Post-adoption ratifications were of tremendous symbolic importance, reflecting states' desires to participate in a great national accomplishment. But at times they have been more than symbolic. Occasionally, they have performed a legal function, mooting challenges to questionable ratifications. The views of states

75. Hawaii and Alaska, the only states admitted since 1920, have followed the tradition of not ratifying amendments already in effect when they joined the Union.

76. *Mississippi OKs 19th Amendment; Women Equal—64 Years Late*, L.A. TIMES, Mar. 22, 1984, at A2 (noting that bill passed was introduced by two female legislators). Representative Frances Savage noted that "[s]ome of the men in the House have been telling me my votes on the floor will now be legal." *Campaign Notes; Balloting by Women Backed in Mississippi*, N.Y. TIMES, Mar. 23, 1984, at D16. A male Senator, asked if ratification "might be a little late," replied: "We gave it due consideration." *Id.*

77. *Women Optimistic for Equal Rights*, N.Y. TIMES, July 2, 1953, at 26.

78. The legislator who proposed the 1971 ratification reports that ratification failed in 1920 because "an antisuffrage senator, Lindsay Warren (later Comptroller General of the United States), locked a prosuffrage senator in the restroom; in that imprisoned senator's absence, the bill was defeated by a single vote." Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 62 N.C. L. REV. 287, 312 (1985).

79. The version that went to the states was passed in 1972. See 86 Stat. 1523 (1972). However, it had been percolating in Congress for several years prior. See, e.g., Robert Sherrill, *That Equal-Rights Amendment—What, Exactly, Does It Mean?*, N.Y. TIMES, Sept. 20, 1970, at 241. There is some debate about whether the ERA should be regarded as "failed"—some argue that it should be understood as still pending before the states, notwithstanding the expiration of the time limit, as extended, set forth in the proposing congressional resolution. Compare Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997), with Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT. 593 (2000).

ratifying after adoption have sometimes been canvassed when exploring the meaning of amendments. Finally, the practice of post-rescission re-ratification offers some evidence that rescissions of ratifications are valid.

### A. Perfecting Questionable Amendments

After Maryland ratified the Fourteenth Amendment in 1959, the *Washington Post* urged the last two non-ratifiers, California and Kentucky, to ratify as well (which they did in 1959 and 1976 respectively). The *Post* opined: “[i]f they should make approval of the Fourteenth Amendment unanimous, it would at least help to silence the tiresome and threadbare argument that it is not really the law of the land because it was not properly ratified.”<sup>80</sup>

Post-adoption ratifications, unanimous or not, stabilize and legitimize amendments that otherwise might be doubtful because of shenanigans associated with particular ratifications. If forty or forty-two states ratify, it matters not if a parliamentary trick (or worse) was used to get one or two of the bare minimum thirty-eight (three-fourths of fifty).

As with other legislative matters, in the heat of a ratification battle, things can happen that call into question the validity of the proceedings under the Constitution or state law.<sup>81</sup> As mentioned briefly above,<sup>82</sup> several states rescinded their ratifications of the Fourteenth<sup>83</sup> and Fifteenth<sup>84</sup> Amendments.<sup>85</sup> There was a litigated rescission controversy over Tennessee’s ratification of the Nineteenth Amendment: A motion for reconsideration was made after passage and never acted

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80. See *supra* note 51.

81. Certain objections based on highly improbable principles of law are not covered here. See, e.g., *Benson v. Hunter*, 45 P.3d 444 (Okla. Civ. App. 2002) (rejecting claim that typographical errors invalidated Oklahoma’s ratification of the Sixteenth Amendment).

82. See, e.g., Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 551–71 (1997).

83. Some question the validity of the Amendment in part on this ground. See, e.g., *Dyett v. Turner*, 439 P.2d 266, 272 (Utah 1968) (noting that “Ohio . . . withdrew its prior ratification, as also did New Jersey”); cf. Douglas H. Bryant, Note, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 575 (2002) (noting Ohio’s rescission); Gene Healy, *Roger Pilon and the 14th Amendment*, at <http://www.lewrockwell.com/healy/healy3.html> (last visited Jan. 15, 2008); Judge L. H. Perez, *The Fourteenth Amendment Is Unconstitutional*, <http://www.sweetliberty.org/fourteenth.amend.htm> (last visited Jan. 16, 2008).

84. See MYERS, *supra* note 7, at 26–27. In addition to New York’s rescission of the Fifteenth Amendment, Missouri’s ratification of the Fifteenth Amendment covered only Section 1, omitting Section 2’s enforcement provision. *Id.* at 24. But a state’s ratification is not a dialogue; since this was something less than a ratification of the resolution as proposed, it is arguably technically defective.

85. Rescission of ratifications of the ERA is also well known. See Marlene Cmons, *Can States Rescind ERA Ratification?*, L.A. TIMES, Mar. 21, 1973, at G1. Legislators in Kentucky were successfully lobbied to rescind their ratification of the ERA with “gifts of homemade cookies and jam.” Frank Ashley, *Ky. ERA Foes Gain in Rescission Drive*, WASH. POST, Feb. 24, 1976, at A7.

on,<sup>86</sup> and anti-suffrage forces obtained an injunction against state officials prohibiting them from certifying ratification.<sup>87</sup>

The equality amendments are not unique in that some ratifications were potentially questionable. There were efforts to rescind ratifications of the Sixteenth<sup>88</sup> and Eighteenth<sup>89</sup> Amendments and there has been litigation or other controversy about the validity of the ratifications of the failed Child Labor Amendment<sup>90</sup> and the Twelfth,<sup>91</sup> Eighteenth,<sup>92</sup> Nineteenth,<sup>93</sup> Twenty-first,<sup>94</sup> and Twenty-sixth Amendments.<sup>95</sup> The Twenty-seventh Amendment is subject to continuing controversy because of its especially long and winding path to ratification.<sup>96</sup> No challenge to the validity of any amendment has succeeded, but this is due at least in part to post-adoption ratifications, which ensure that amendments have the necessary support of three-fourths of the states, even if one or two ratifications are invalid.

86. See *Holds up Suffrage*, WASH. POST, Aug. 22, 1920, at 1; *May Upset Suffrage*, WASH. POST, Aug. 20, 1920, at 1; *Colby Rejects Plea to Retract Suffrage Fiat*, CHI. DAILY TRIB., Sept. 22, 1920, at 12; *Tennessee 'Antis' To Call On Colby*, N.Y. TIMES, Sept. 13, 1920, at 13; *Tennessee House Fights On*, N.Y. TIMES, Sept. 5, 1920, at 5; *Votes for Women Tied in Hard Knot by Injunctions*, ATLANTA CONST., Aug. 24, 1920, at 1.

87. *Clements v. Roberts*, 230 S.W. 30 (Tenn. 1921).

88. J. Hampden Dougherty, Letter to the Editor, *States Ratifying Income Tax Bound*, N.Y. TIMES, Mar. 28, 1911, at 12; Editorial, *New York and the Income Tax*, N.Y. TIMES, Feb. 2, 1912, at 8 (objecting to the idea that states are bound "even though meanwhile public sentiment may have undergone a marked change, and the great preponderance of opinion may be against the amendment, not in favor of it"); *Wrangle Over Income Tax*, N.Y. TIMES, Mar. 7, 1912, at 5.

89. See *Governor Calls for a Referendum on Dry Amendment*, N.Y. TIMES, Jan. 8, 1920, at 1 ("Governor Smith in his annual message urged that the lawmakers rescind their action of last year ratifying the amendment . . ."); *Root and Guthrie Discuss Prohibition, Believe a State May Rescind Ratification if Done Before Two-thirds Have Ratified*, N.Y. TIMES, Dec. 22, 1919, at 14; *To Ask Rescinding of Dry Ratification*, N.Y. TIMES, Feb. 8, 1923, at 21; *Wets Again Lose in Assembly Vote*, N.Y. TIMES, Mar. 27, 1923, at 23; *Unable to Reverse 'Dry' Ratification*, N.Y. TIMES, Jan. 25, 1919, at 18.

90. See *Chandler v. Wise*, 307 U.S. 474 (1939); *Coleman v. Miller*, 307 U.S. 433 (1939).

91. See MYERS, *supra* note 7, at 34 (noting that New Hampshire's governor vetoed that state's ratification of the Twelfth Amendment).

92. *Rhode Island v. Palmer*, 253 U.S. 350 (1920); *Copeland v. Knapp*, 162 N.E. 508, 508 (N.Y. 1928) (per curiam); see also *Ex parte Gilmore*, 228 S.W. 199, 205 (Tex. Crim. App. 1920) (Davidson, J., dissenting) (stating that the author "does not agree that the Eighteenth Amendment is valid, nor was it properly ratified, so far as Texas is concerned").

93. *Leser v. Garnett*, 114 A. 840 (Md. 1921), *aff'd*, 258 U.S. 130 (1922); *Fairchild v. Hughes*, 258 U.S. 126 (1922).

94. *Chase v. Billings*, 170 A. 903 (Vt. 1934); see also *Vermont Answers Repeal Suit*, N.Y. TIMES, Jan. 4, 1934, at 5.

95. *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1973).

96. See *United States v. Emerson*, 270 F.3d 203, 251 n.59 (5th Cir. 2001) (Twenty-seventh Amendment "(at least arguably) ultimately ratified"); *Schaffer v. Clinton*, 240 F.3d 878, 880 n.3 (10th Cir. 2001) (citing scholars debating validity of Twenty-seventh Amendment, but not addressing issue because not briefed by parties).

Assent of twenty-eight of the thirty-seven states in the Union was necessary to adopt the Fourteenth Amendment. By the time twenty-eight states had ratified on July 9, 1868, Ohio and New Jersey had rescinded their earlier ratifications. These rescissions were at least arguably valid, and, in any event, made it impossible to state that on July 9, 1868, three-fourths of the state legislatures then formally and actually supported the Fourteenth Amendment. But before Congress promulgated the amendment on July 28, 1868, Alabama and Georgia ratified. A Joint Resolution stated that the amendment had been approved by “three fourths and more” of the states, implying that Congress rejected the validity of the rescissions.<sup>97</sup>

The Fifteenth Amendment reached the three-fourths mark with Iowa’s ratification on February 3, 1870, but by then New York had rescinded its earlier ratification. However, by February 18, Nebraska, and Texas had ratified the amendment. Accordingly, when ratification was proclaimed on March 30, the three-fourths supermajority had been reached even without New York. The proclamation of ratification noted both New York’s rescission and the additional ratifications.<sup>98</sup>

The disputed ratification of the Nineteenth Amendment made it to the courts. The Maryland Court of Appeals deflected as moot a challenge to a questionable ratification of the Nineteenth Amendment: “Inasmuch as it appears that, in addition to the 36 states already referred to as having ratified the Nineteenth Amendment, the state of Connecticut has also ratified it, it becomes unnecessary to consider at length the effect of the action of the Legislature of Tennessee in regard to it.”<sup>99</sup> The Supreme Court agreed: “The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other states . . . have adopted resolutions of ratification.”<sup>100</sup>

In the case of the Nineteenth Amendment, the Supreme Court offered a broader reason for not exploring the validity of rescissions. Because the legislatures of the states where the disputed ratifications occurred “had power to adopt the resolutions of ratification,” the Court explained, “official notice to the Secretary [of State], duly authenticated, that they had done so, was conclusive upon him, and, being certified to us by his proclamation, is conclusive upon the courts.”<sup>101</sup> Ratification, the Court said, was a political question.

It may be that for pragmatic reasons the Court was correct in deciding not to look behind certified documents to explore the underlying legislative acts.

97. 15 Stat. 708, 710 (1868).

98. Cong. Globe, 41st Cong., 2d Sess. at 2289–90 (Mar. 30, 1870).

99. *Leser v. Garnett*, 114 A. 840, 848 (Md. 1921), *aff’d*, 258 U.S. 130 (1922). Years later, the Tennessee Supreme Court recognized that a challenge to the ratification of the Twenty-sixth Amendment “had been rendered moot . . . because thirty-eight other states have ratified the amendment.” *Walker*, 498 S.W.2d at 104 (but rendering an advisory opinion in spite of mootness).

100. *Leser*, 258 U.S. at 137.

101. *Id.*; see also *United States ex rel. Widenmann v. Colby*, 265 F. 998 (D.C. Cir. 1920), *aff’d sub nom. United States ex rel. Widenmann v. Hughes*, 257 U.S. 619 (1921).



However, the people of a state or nation are unlikely to respect an amendment that became law on a technicality, contrary to the will of the people. Major consequences to life and property cannot legitimately flow from an untrue certificate signed by a rogue Secretary of State or state governor or even as the result of party chicanery in the dead of night in the absence of a quorum, or otherwise in clear violation of valid state legislative rules. In short, that something is a “political question” to the Court in no way prevents the people from concluding that it is illegitimate, perhaps even non-binding.

Even courts might hesitate to give a questionably ratified amendment full weight. Professors Denning and Vile, in their paper objecting to arguments that the ERA remains validly pending before the states, argue that because of its “suspect pedigree, the courts and most members of Congress have tended to treat the Twenty-Seventh as a ‘demi-amendment,’ lacking the full authority of the twenty-six that preceded it . . . . A jury-rigged ratification of the ERA might result in its similar evisceration . . . .”<sup>102</sup> The practice of post-adoption ratification legitimately moots difficult questions that could otherwise lead to bitter legal and political controversies.

Of course, post-amendment ratification does not cure every sort of defect alleged in the ratification process. Because so many of the ratifications of the Twenty-seventh Amendment are ancient, for example, some of the old states would have to re-ratify now to satisfy those who claim that an amendment should require a contemporaneous consensus.<sup>103</sup>

The compelled ratifications of the Reconstruction Amendments also cannot be rectified, according to those who object to them,<sup>104</sup> by later ratifications of other states. With respect to the Fourteenth Amendment, there were thirty-seven states in the Union in 1868; rounding up, twenty-eight states were necessary to achieve a three-fourths majority. All thirty-seven have now ratified. The three rescissions, whether or not valid, have been rectified by re-ratification. But that still leaves ten southern states that had to ratify the Amendment to re-join the Union; if all of them are considered opponents, there are only twenty-seven valid ratifications, one short of the necessary three fourths.<sup>105</sup>

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102. See Denning & Vile, *supra* note 79, at 598–99.

103. For a discussion of the “contemporaneous consensus” idea articulated by the Supreme Court, see *infra* notes 120–124.

104. The argument that some ratifications are invalid because compelled appears in Oregon’s 1868 rescission of the Fourteenth Amendment. S.J. Res. 4, 5th Leg., Reg. Sess. (Or. 1868); see also David Lawrence, *There Is No 14th Amendment*, U.S. NEWS & WORLD REP., Sept. 27, 1957, at 140, available at [http://www.texasls.org/reading\\_room/constitution/constitution0024.shtml](http://www.texasls.org/reading_room/constitution/constitution0024.shtml).

105. However, while the former Confederate states were compelled to ratify, democratically elected governments supported the amendments. At least in Louisiana, Mississippi, and South Carolina, where African-Americans were a majority of the population, there is no reason to doubt the majoritarian nature and popular support for the amendments. See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008).

*B. Should Post-Adoption Ratifiers Have A Voice?*

The Supreme Court treats the views of ratifying states as meaningful to the interpretation of the Constitution and its amendments.<sup>106</sup> Surprisingly, perhaps even shockingly, the Court has regularly examined the practices of states ratifying amendments decades after adoption when interpreting the meaning of particular amendments. For example, in *Bowers v. Hardwick*,<sup>107</sup> the Court noted: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven states in the Union had criminal sodomy laws."<sup>108</sup> For the meaning of the Fourteenth Amendment, adopted in 1868, it counted the historical practices of twentieth century ratifiers California, Delaware, Kentucky and Maryland, as well as of rescinders New Jersey and Oregon.<sup>109</sup> Further, in construing the Bill of Rights,

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106. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995) (interpreting Fourth Amendment in part based on practices "of the States that ratified the Fourth Amendment"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 278 n.28 (1985) (Brennan, J., dissenting) (considering statements of state ratifying conventions); *id.* at 295 n.50 (Brennan, J., dissenting) (discussing Chief Justice Marshall's statements at the Virginia Ratifying Convention); *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974) (looking to "understanding of those who framed and ratified the Fourteenth Amendment"); *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (finding no support for race-based distinctions in punishment in "the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment"); *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (per curiam) (ordering reargument on questions including: "What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"); *Bridges v. California*, 314 U.S. 252, 264-65 (1941) (looking to understanding when "the First Amendment was framed and adopted"); *Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934). Of course, the argument based on the ratifiers' intent does not always win and is sometimes advanced in dissents. See, e.g., *Granholt v. Heald*, 544 U.S. 460, 517-20 (2005) (Thomas, J., dissenting); *City of Boerne v. Flores*, 521 U.S. 507, 552-53 (1997) (O'Connor, J., dissenting) ("[I]t is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."); *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (plurality opinion) (looking to "what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights as well as the floor debates in the First Congress which proposed it"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting) ("[T]he States' ratification of the Constitution was predicated on [a particular] understanding of federalism."); *Marsh v. Chambers*, 463 U.S. 783, 815 (1983) (Brennan, J., dissenting) ("Both the Constitution and its amendments, however, became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress.").

107. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

108. *Bowers*, 478 U.S. at 192-93, nn.5-6; see also *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (citing this portion of *Bowers*).

109. *Bowers*, 478 U.S. at 193 n.6.

ratified in 1791, the Court canvassed the colonial-era views of Connecticut, Georgia, and Massachusetts, which ratified the Bill of Rights in 1939.<sup>110</sup>

Similarly, *Richardson v. Ramirez*<sup>111</sup> upheld felon disenfranchisement provisions, in part based on a survey of state constitutions in effect at the time of the adoption of the Fourteenth Amendment. The Court observed: “Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment . . . by the fact that at the time of the adoption of the Amendment, 29 states had [felon disenfranchisement] provisions in their constitutions.”<sup>112</sup> Among the states on the Court’s list were seven states that ratified in the twentieth century; although these states did not support the Fourteenth Amendment when it was adopted, their laws were used to help interpret its meaning. Other cases similarly rely on the views of late ratifiers as evidence of the meaning of constitutional amendments.<sup>113</sup>

No plausible theory of statutory interpretation relies centrally on the understanding of those who opposed, did not support, or ignored a particular piece of legislation. There might be some logic in assuming that operation of an amendment is likely to be consistent with the law or policy of the states supporting it, but there is no reason to infer that an amendment was shaped by, or is likely to be congenial to, states that opposed or did not support it.

Of course, over the centuries, all of the states mentioned by the Court in these cases ultimately ratified the amendments at issue. Perhaps these decisions imply that, say, California’s 1959 ratification of the Fourteenth Amendment is entitled to just as much interpretive weight as an 1867 ratification.<sup>114</sup> However, this seems not to be what the Court was getting at; even for the late ratifying states,

110. *Id.* at 192 n.5.

111. 418 U.S. 24 (1974).

112. *Id.* at 48 n.14.

113. *See, e.g.*, *United States v. Marion*, 404 U.S. 307, 314 n.6 (1971) (“Most of the States that ratified the Bill of Rights had either adopted the British Act [regarding speedy trial] or passed a similar law . . .”) (citing *In re Provoo*, 17 F.R.D. 183, 197 n.6 (D. Md.) (listing practices of states, at time of adoption of Bill of Rights, including Massachusetts and Georgia), *aff’d sub nom.* *United States v. Provoo*, 350 U.S. 857 (1955)); *United States v. Barnett*, 376 U.S. 681, 702–13 (1964) (discussing practices of Connecticut, Georgia, and Massachusetts among other original thirteen states regarding meaning of jury trial provision of Bill of Rights); *id.* at 741, 742 nn.9 & 14 (Goldberg, J., dissenting) (referring to practices of Connecticut and Massachusetts as evidence of meaning of jury trial clause); *Jones v. City of Opelika*, 319 U.S. 105, 123 n.5 (1943) (Reed, J., dissenting). *But see, e.g.*, *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 294 (1990) (Scalia, J., concurring) (distinguishing between ratifiers and non-ratifiers of Fourteenth Amendment); *Bartkus v. Illinois*, 359 U.S. 121, app. (1959) (surveying state practice; carefully segregating post-adoption ratifiers of Fourteenth Amendment).

114. Indeed, the Massachusetts ratification resolution purported to explain the long-ago inaction: “This failure to act was not due to opposition to the amendments proposed by Congress but to a desire to enlarge the rights of the people by framing further amendments.” J. MASS. SENATE, Mar. 2, 1939, at 369. But the 1939 legislature is not a particularly reliable reporter of the views of the 1790 legislature; their recapitulation of history cannot retroactively turn a state that did not ratify the Bill of Rights in 1790 into one that did.

the Court cited relevant statutes and constitutional provisions in effect around the time the amendments became effective, not the state's practice decades later at the time of ratification. Thus, the citation in these cases of non-ratifying states must be chalked up as an error; the Court must have mistakenly assumed that the states it discussed had ratified contemporaneously with adoption of the amendment.

In other cases, however, at least some members of the Court have deliberately relied on post-adoption ratifications. Although Justice Harlan knew well that the Fourteenth Amendment was adopted in 1868, in his dissent in *Reynolds v. Sims*,<sup>115</sup> he drew upon evidence from "the 23 loyal states which ratified the [Fourteenth] Amendment before 1870."<sup>116</sup> In *Baker v. Carr*,<sup>117</sup> to understand the constitutionality of malapportionment under the Fourteenth Amendment, he engaged in "an examination of the apportionment provisions of the thirty-three States which ratified the Amendment between 1866 and 1870, at their respective times of ratification."<sup>118</sup> Justice Harlan treated reasonably contemporaneous but post-adoption ratifications as probative of the meaning of the provision.

The Court's practice of considering the views of at least some post-adoption ratifiers seems correct. The possible and actual number of post-adoption ratifications is large, so to ignore them would be to ignore the views of a large number of actors in the constitutional process. There is also no particular evidence that post-adoption ratifications are taken less seriously by legislatures than pre-adoption ratifications. There is no suggestion that post-adoption ratifications are designed to create a misleading legislative history.<sup>119</sup> Nor is it necessarily the case that post-adoption ratifiers are less interested or supportive of legislation than are earlier adopters. A failure to ratify earlier, for example, might be explainable by the mere fact that not all legislatures are in session on a continuous or year-round basis.

The strongest justification for taking into account the views of post-adoption ratifiers exists when a state ratifies before it is clear that an amendment has succeeded—prior to the federal government's announcement that the amendment is adopted, or even after, if there are questions about the validity of one or more ratifications. When a state believes it is, or could be, part of the necessary three-fourths majority necessary to bring the amendment into force, its understanding of what it did is as probative as if it had ratified earlier.

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115. 377 U.S. 533 (1964).

116. *Id.* at 601–02.

117. 369 U.S. 186 (1962).

118. *Id.* at 310–11.

119. And, as in any other case, if there is reason to be suspicious of a particular piece of evidence bearing on the construction of a statute, the Court can take that into account. *Cf.* *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.* 474 U.S. 361, 372 (1986) (passage in an article entered into Congressional Record "is not 'legislative history' in any meaningful sense of the term"). For example, if a legislature rejected an amendment and then ratified it only after it became effective, evidence of its narrow views about the scope of the amendment might be entitled to less, or no, weight.

At the opposite end of the spectrum, at some remove of time, a late ratifier's views clearly must be regarded as irrelevant to the "intent of the framers." The Ohio legislature's construction of the Fourteenth Amendment in 2003 might be persuasive or not, but the fact that it comes in the form of a resolution ratifying an amendment gives it little special credibility. That legislature is simply not part of the group of states whose support resulted in the passage of the amendment.

More difficult is when a ratification takes place reasonably close to proposal and within months or a year or so of enactment, as illustrated by Justice Harlan's approach. This is a significant category because frequently there are ratifications immediately following enactment. Nine states ratified the Eighteenth, Twentieth, and Twenty-fifth Amendments within four months of ratification and within two years of the amendments' submission to the states, for instance.

Taking into account post-adoption ratifiers who act close to when an amendment is proposed and enacted is not inconsistent, at least, with the Court's description of how the amendment process is supposed to work. In *Dillon v. Gloss*,<sup>120</sup> the Court rejected a bootlegger's challenge to his conviction on the ground that the Eighteenth Amendment was void because Congress limited the time for the Amendment's ratification. The Court upheld the time limit, reasoning that ratifications should represent "the approbation of the people" and that Article V implies that ratifications "must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period."<sup>121</sup> In *Coleman v. Miller*,<sup>122</sup> the Court reiterated the *Dillon* Court's idea that ratification must be sufficiently contemporaneous to reflect the will of the people,<sup>123</sup> although it also held that the question was political and not subject to judicial review.<sup>124</sup> Recently proposed constitutional amendments are open for ratification for seven years, suggesting the view of Congress that if three-quarters of the states agree within seven years, that is a sufficiently contemporaneous consensus. If this view is right, post-adoption ratifiers who join the consensus within two or three years of proposal should be regarded as part of the winning majority and thus counted in the legislative history.

### C. The Validity of Rescission

Since debates over passage of the Fourteenth Amendment, the power of a state to rescind an earlier ratification of a pending amendment has been persistently controversial.<sup>125</sup> Although the post-adoption ratifications do not

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120. 256 U.S. 368 (1921).

121. *Id.* at 375.

122. 307 U.S. 433 (1939).

123. *Id.* at 452–53.

124. *Id.* at 454.

125. See *Can a State Withdraw or Repeal Its Ratification of a Constitutional Amendment?*, N.Y. TIMES, Dec. 19, 1868, at 6; Editorial, *Tragic Era Strategy*, WASH. POST, June 7, 1939, at 10 ("Nor is it logical to permit a state legislature to change their action from negative to affirmative but not from affirmative to negative during the period when a constitutional change is an active issue."); *The Fourteenth Amendment—Validity of Its Ratification*, N.Y. TIMES, July 25, 1868, at 4; *To Change Amending of Constitution*, N.Y.

dispose of the controversy over the validity of rescission, they do offer some support for the idea that rescission is valid.

The debate over rescission is heated but inconclusive. Article V states that an amendment becomes part of the Constitution "when ratified by the Legislatures of three fourths of the Several States."<sup>126</sup> When counting ratifications, the Constitution could contemplate that both approvals and rejections are final, neither is final, or one is and the other is not.<sup>127</sup> Few seriously argue for the idea that rejection is final.<sup>128</sup> The debate is between those who contend that ratification can be reconsidered before three-fourths of the states ratify and those who contend ratification is final and irrevocable even if a state legislature changes its views.

Those who deny state power to rescind before ratification argue that the text of Article V gives the power to ratify, but not to rescind. Defenders of state authority respond that the text is equally consistent with the power to reconsider and a state has not "ratified" if it properly rescinds prior legislative action.

As a policy matter, some argue that ratification induces reliance that should lead to estoppel precluding rescission. In other words, ratification by one state may encourage action by others.<sup>129</sup> This argument is implausible. The principle that a vote, once cast, is permanent even in the face of changed views is inapplicable to other constitutional decision makers, such as legislators, who may change votes even after they are cast, or jurors, who may change their minds until the final verdict is reached. Before three-fourths of the states have acted, an amendment is merely potential, and no more the basis for reasonable reliance than would be knowing the action of one house of Congress, or a few members of a jury of twelve. In any event, it is arguable that each state should not delegate its decision to other states but rather act based on its own judgment, and therefore any claimed reliance is unreasonable for this reason as well.

Judicial precedents on this point are inconclusive. In *Coleman v. Miller*,<sup>130</sup> the Court refused to invalidate the rescission of Kansas's ratification of the failed Child Labor Amendment, but no opinion commanded a majority.<sup>131</sup> The most that can be said is that the Court held rescission a political question.<sup>132</sup> More recently, a 1981 district court opinion held that Idaho's rescission of the Equal

TIMES, Jan. 17, 1923, at 16 (discussing proposed amendment which would specifically allow states to withdraw their ratifications).

126. U.S. CONST. art V.

127. See Ishikawa, *supra* note 82, at 557-71.

128. Held et al., *supra* note 79, at 132. In addition, there is a real question of what constitutes a rejection. Would failure in a committee count? Moreover, a resolution might be rejected based on words in a "whereas" clause or because it was introduced by an unpopular legislator, even if the substance was supported by an overwhelming majority.

129. Held et al., *supra* note 79, at 131.

130. *Coleman v. Miller*, 307 U.S. 433, 449-50 (1939).

131. See Ishikawa, *supra* note 82, at 560; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 708 (1993).

132. See Opinion of the Justices, 413 A.2d 1245 (Del. 1980) (validity of rescission is federal political question).

Rights Amendment was valid notwithstanding *Coleman*, but the United States Supreme Court vacated the decision as moot.<sup>133</sup>

Political precedent in the form of congressional action is equally inconclusive. Congress did not accept the validity of the rescissions of the earlier ratifications of the Fourteenth and Fifteenth Amendments, but by the time those amendments were promulgated, the issue was mooted by additional ratifications. More fundamentally, if the validity of rescission is a political question, then Congress can come out whichever way it wants, whenever it wants;<sup>134</sup> that the rescissions were invalid leaves open the possibility that a future Congress will uphold a new set of rescissions of ratifications of a future amendment. Thus, text, precedent, and practice offer no final verdict on the validity of rescission.

Post-adoption ratifications add one modest data point to the controversy over rescission because it has been treated as meaningful by the states. All of the states rescinding their ratifications of the Fourteenth and Fifteenth Amendments later re-ratified. New Jersey, Ohio,<sup>135</sup> and Oregon re-ratified the Fourteenth Amendment, and New York re-ratified the Fifteenth Amendment. They, at least, apparently considered the rescissions to be significant.

### CONCLUSION

Even though the United States is politically diverse, many great events have won unanimous support: for example, the Declaration of Independence is titled “The Unanimous Declaration of the Thirteen United States of America,”<sup>136</sup> and every elector voted for George Washington as the first president.<sup>137</sup> The Reconstruction Amendments and the Nineteenth Amendment were equally important to the majority of Americans who, before they became law, could not participate in the political system. The ratification of these amendments by all of the states shows that they reflect particularly valuable and important principles.

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133. *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom.* Nat’l Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982); *cf.* *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731, 749 n.4 (Conn. 2002) (Vertefeuille, J., dissenting) (understanding ERA rescissions as valid).

134. *Ishikawa*, *supra* note 82, at 568–70. That is, a Congress hostile to an amendment can accept rescissions as valid; a Congress friendly to an amendment can reject rescissions under precisely the same conditions. Allowing Congress to enjoy such authority, which is probably not what the Framers intended, would be inconsistent with the state-protective purposes of Article V, which grants states final authority over the ratification process. This alone is a powerful argument for having some consistent answer to the question of the validity of rescission; either it is always good, or it is always bad.

135. S.J. Res. 2, 125th Gen. Assem., Reg. Sess. (Ohio 2003).

136. 1 Stat. 1 (1776).

137. 1 ANNALS OF CONG. 17 (Joseph Gales ed., 1834).

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