WHY MARYLAND DID NOT RATIFY THE FOURTEENTH AMENDMENT (UNTIL 1959)

by John J. Connolly

The possible disqualification of former President Trump from the 2024 presidential election has kindled interest in the original public meaning of the Fourteenth Amendment. Unfortunately, Maryland's consideration of the amendment in the aftermath of the Civil War cannot serve as a national proxy for its original meaning. As a border state caught geographically and politically between North and South, Maryland *might* have served as a proxy for the median position among all states, including those in the defeated Confederacy whose representatives had not yet been re-seated in Congress (and whose views presumably did not contribute to the original public meaning). But by the time the proposed amendment came to Maryland, the state's leadership had tilted decidedly conservative. As a result, the Maryland experience probably illuminates how the Confederate States would have treated the proposed amendment had they been given free reign.[1] Maryland's leaders opposed the amendment on a variety of technical and legal grounds, perhaps disingenuously when the likely motivating objection for many was flagrant racism. Their substantive concerns lay not so much with the soaring language in § 1, which would gradually recalibrate race relations over the next 150 years, but with the more obscure provisions in §§ 2 through 5, which were targeted at the Confederacy but which collaterally damaged border States, at least insofar as Maryland's all-white (and all-male) ruling class at the time was concerned.

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The Fourteenth Amendment came to Maryland in the usual way, by letter dated June 16, 1866, from Secretary of State William Seward to Governor Thomas Swann.[2] Seward stated tersely that Congress had proposed a new amendment and "[t]he decisions of the several Legislatures upon the subject are required by law to be communicated to this Department."[3]

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[1] In fact, most of the Confederate states initially rejected the Fourteenth Amendment (Tennessee being the exception), often on grounds similar to those recited by Maryland's leadership. See generally Horace Flack, The Adoption of the Fourteenth Amendment 161-210 (1908).

[2] See Md. General Assembly, Report of the Joint Committee on Federal Relations at 4 (Mar. 19, 1867) (available at Internet Archive) [hereafter, Joint Committee Report].

[3] Id.

Swann, born into a prominent Virginia slave-holding family, became a railroad executive in Baltimore and later rode the whipsaw of mid-century Maryland politics.[4] He won election during the closing days of the Civil War as a member of the Union Party, but he served in the post-war period dominated in Maryland by Democrats, with whom Swann would align. He came to support abolition during the War as a Union-saving measure but ardently opposed most civil rights for the rest of his life, including his ten years' service in Congress after his gubernatorial term.[5]

On January 4, 1867, Swann gave an address to a new session of the General Assembly, now controlled by Democrats.[6] He began with a mostly optimistic assessment of the state's post-war prospects, including its finances and its attractions for European immigrants, before turning to the more unpleasant topic of race relations. Like many of his colleagues in Maryland's ruling class, Swann's basic demeanor was petulance with Radical Republicans and other northerners who failed to appreciate that Maryland had stayed loyal to the Union during the war and had even freed its slaves. He typified the sentiment in the South that northern whites did not understand race relations because the North had no appreciable population of Black people. Swann insisted that race relations in Maryland were good and getting better—just ask Maryland's Black people if you did not believe him.[7]

And how did the federal government thank Maryland for its loyalty? With a proposed new constitutional amendment that would punish the state as though it had joined the Confederacy. Swann's chief complaint was not with § 1, which contained three or four of the most important and expansive clauses in American law, but with § 2. Section 2 was a much narrower provision that would count Black (and other nonvoting) residents for purposes of apportioning representatives to Congress—unless a state denied Black men the right to vote, in which case the state's representation would be proportionately reduced. Swann knew that § 2

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[4] See Archives of Maryland (Biographical Series), Thomas Swann (1809-1883); Aimee Robertson, The Swann Family: Builders of Morven Park, 2004 Bull. Loudon Cty. Hist'l Soc'y 8.

[5] Robertson, supra n.4 at 18-19.

[6] See Message of Governor Swann to the General Assembly of Maryland, 1867 Md. Sen. J App. Doc. A (Jan. 4, 1867), reprinted in 133 Md. Archives 1071. Citations to "Md. Archives" are to the online version of the Archives of Maryland Series.

[7] See id. at 1086, 1093.

would impel states toward "manhood suffrage,"[8] as it was sometimes called, and he considered that prospect unfair to Maryland. States to Maryland's north could deny suffrage to Black people without materially affecting their congressional representation. But Maryland had a significant population of Black people[9] and it would lose representation if it continued its policy of limiting the vote to white men.

Swann relied partly on legalistic arguments. He insisted that "[t]he regulation of suffrage belongs to the States," magnanimously conceding that "it is no business of ours" if another state found it "proper to confer upon the negro race the right of suffrage, and the right to hold office."[10] But Swann left no doubt that manhood suffrage was not the preferred course in his state:

> … Constitutional Amendments, to force equality between the races, can only result in the ultimate annihilation of the weaker race. Some time ago, the absorbing topic among political agitators, was amalgamation: now it is "manhood suffrage," which means amalgamation, and the power to hold office, without regard to race or color, and every other attribute of perfect equality between the races. This will all do very well for the States of the North, where the colored race have never lived, and cannot be induced to emigrate. With the Southern border States, it is a question of social and political existence. In Maryland the negro would anon hold the balance of power, if in a few years, from the swelling current of immigration alone, he did not command the numerical ascendancy.[11]

Swann closed his 1867 address to the General Assembly with a call for a new state constitutional convention to replace the 1864 "Republican" Constitution that was already in disfavor. His call was successful and by the fall of 1867

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[8] See generally John J. Connolly, Republican Press at a Democratic Convention at xvii-xviii, xxvii, 26-27, 485-87 (2018) [hereafter, "Republican Press"].

[9] According to the 1860 census, Maryland had roughly 84,000 free Blacks and 87,000 slaves out of a total population of 687,000, so roughly 25 percent of the State's population was Black. See Legacy of Slavery in Maryland, Black Marylanders 1860, Archives of Maryland Electronic Publication.

[10] Message of Gov. Swann, supra n.6, at 25, reprinted in 133 Md. Archives at 1093.

[11] Id.

Maryland had a new constitution that enacted many of Swann's sentiments on race relations.[12]

Of course, Swann was not a member of the General Assembly and could not vote on ratification of the Fourteenth Amendment. But Swann's opening address proved prescient when the General Assembly assigned ratification to a Joint Committee on Federal Relations, which later issued a majority report signed by three delegates and four senators.[13] All the signatories were Democrats. Several had been slaveholders, including Oden Bowie, who would succeed Swann as governor and who had been one of the state's largest slaveholders.[14] Several members had been incarcerated by the federal government during the War, typically for real or perceived Confederate sympathies.[15] The Committee's chair was Isaac D. Jones, an Eastern Shore lawyer and politician. Shortly after the 1867 session, Jones would serve in a prominent role as a delegate to the state's constitutional convention, and immediately afterward he became the state's attorney general under the new constitution. In each of these roles Jones made clear his antipathy for the federal government's efforts to restrict states' rights, and his support for a state's power to exclude Black people and others from political rights.[16]

On March 19, 1867, a majority of the Joint Committee issued a detailed report recommending that the General Assembly decline to ratify the Fourteenth Amendment.[17] The report begins with an extraordinary statement that the

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[12] See generally Republican Press, supra n.8, at i-xxxiii; see also The Aegis (Hartford Co., Md.), Oct. 28, 1864, at 2 (polemic of the Democratic State party, under the signature of Oden Bowie, criticizing the new state constitution and the alleged oppression that led to its adoption and ratification).

[13] The full committee consisted of Delegates Jones, Hammond, Thomas (later replaced by Knott), Carmichael, Evans, Buhrman, and Bruce, see 1867 Md. House J. 22 (Jan. 7, 1867), reprinted in 133 Md. Archives 1848, and Senators Bowie, Vickers, Waters, Tome, and Ohr. See 1867 Md. Senate J. 11 (Jan. 3, 1867), reprinted in 133 Md. Archives 11. Alfred Spates contested the election of Ohr, a radical member, and prevailed. The Sun (Baltimore), at 2 col. 2 (Jan. 23, 1867).

[14] See David Terry, A Statement on the History of Oden Bowie as a Slaveholder, in Md. State Archives Special Collection 3520-1465.

[15] See generally Republican Press, supra n.8, at 2 n.65 (Richard B. Carmichael); id. at 765 n.453 (Alfred Spates); The Civilian and Telegraph (Cumberland, Md.), Sep. 24, 1863, at 2 col. 3 (Spates); The Sun (Baltimore), Dec. 12, 1864, at 1 col. 7 (Levin Waters); The Sun (Baltimore), Jan. 31, 1866 at 4 col. 2 (Waters).

[16] See generally Republican Press, supra n.8, at xxxii, 117-118 & n.126, 163 & n.161, 262 & n.230.

[17] The printed report is dated March 19, 1867, but Jones introduced the majority report on March 18, 1867. See 1867 Md. House J. 971, reprinted in 133 Md. Archives 2797.

Committee, although a supporter of the "great objects of the Federal Constitution" as recited in its Preamble, was "unable to discover any possible tendency in the proposed amendment to promote" those objects.[18] *Any possible tendency*. The Committee then set forth lawyerly objections to perceived irregularities in the procedure that led to the proposed amendment. The chief procedural problem was Congress's refusal to seat representatives from most of the eleven states of the Confederacy. In essence, the Committee believed that the Confederate states had not legally forfeited their place in the Union by engaging in rebellion—or at least that they were restored to their former position once the war had concluded and its principal aims, including the ratification of the Thirteenth Amendment, had been achieved. The Committee rejected the Republican Congress position that the law of nations gave Congress a right to control the post-war South. Thus, the Committee concluded the amendment had not been proposed by the requisite two-thirds of both houses of Congress, and "that fact, of itself, presents an insuperable obstacle to the ratification of the amendment by the Legislature of Maryland."[19]

On the merits, the Committee's big objection was the likely disruption of the balance between state and federal power. This was an intended consequence of the Fourteenth Amendment, but the Committee feared that ratification would give the federal government power to destroy the states. That fear inflected the Committee's section-by-section analysis of the amendment.

As to § 1, the Committee believed the privileges and immunities clause was superfluous, as Justice Story's treatise had already declared that every citizen of a state "is *ipso facto* a citizen of the United States."[20] Similarly, the due process clause created rights that already existed in all state constitutions. The real problem was § 5, which gave Congress the power to enforce the due process clause, when enforcement was "the sole and exclusive right of every State."[21] Giving Congress the power to enforce the due process clause "is virtually to enable Congress to abolish the State

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[18] Joint Committee Report, supra n.2, at 5.

[19] Joint Committee Report supra n.2, at 13; see also U.S. Const. art. V.

[20] Joint Committee Report, supra n.2, at 13.

[21] Id. at 14. Neither the Committee nor any other primary commentator from Maryland mentioned the equal protection clause in § 1, suggesting that they did not understand how significant the clause would become. Maryland's Constitution had no equal protection clause—and still does not, although case law has found a state constitutional right of equal protection through Maryland's due process clause. See generally Republican Press, supra n.8, at 204 n.190.

governments."[22] That proposition was so clear that no further explanation was provided.

The Committee provided more detailed criticism of § 2, which impelled but did not require manhood suffrage. Like Swann, the Committee believed the states had an inherent right to regulate the qualifications of voters. And like Swann, the Committee knew and hated the ulterior purpose of § 2:

> The object of this second section is unmistakable. There are fifteen States of the Union having a large negro population, most of whom have been recently set free from domestic servitude. The object is to require these States to confer upon the negro the right of suffrage, or to deprive them of a large number of their present Constitutional representation. Otherwise, it is said, the Southern States will be great gainers by the rebellion.[23]

The Committee agreed that "freeing the slaves [should] enlarge[] the basis of representation in the former slave States," because that "was an incident which it was well known constitutionally attached to the fact of freedom."[24] But that legal proposition did not mean that states were required to give Black people the right to vote. After all, women and minors had no right of suffrage, but they were counted for purposes of congressional representation.[25]

Section 3 of the Fourteenth Amendment, which disqualifies from government office those who took an oath to support the constitution and then engaged in insurrection or rebellion, is currently in the consciousness of many Americans after a long period of dormancy. That section was also politically volatile in the post-war period, and the Committee dedicated more argument to it than any other section. Its argument, however, is based on legal concepts and history rather than policy. The Committee argued that § 3 was an *ex post facto* law and a bill of attainder in violation of the federal constitution, and of the state constitution's prohibition of *ex post facto* laws.[26] Although Confederates were legally wrong to secede, they had a good-faith basis for believing the law supported their decision, and their acts comported with a tradition of dissent throughout the nation's brief history. They might be punished for treason, but only after trial and upon proof of the requisite mental state. Notably, the Committee was not concerned at all

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[22] Joint Committee Report, supra n.2, at 14.
[23] Joint Committee Report, supra n.2, at 15.
[24] Id.
[25] See id at 14.
[26] Joint Committee Report, supra n.2, at 16-17.

about the consequences of allowing oath-breakers to serve in national or state office—which would seem to be the fundamental purpose of § 3, and which is animating the national conversation today about former President Trump's qualification for a second term after the events of January 6, 2021.

The Committee's arguments against § 3 largely disregarded two legal points. First, Congress had proposed an *amendment* to the Constitution, so most pre-existing provisions in the federal constitution, like the prohibitions on bills of attainder and ex post facto laws, were not necessarily impediments.[27] Second, the Fourteenth Amendment, if ratified, would become the supreme law of the land and would displace contrary laws in state constitutions.

Section 4 of the Fourteenth Amendment would confirm the validity of the public debt of the United States, but would bar the United States and any State from paying debts incurred in the Confederate war effort or any "claim for the loss or emancipation of any slave." The Committee saw no need for § 4 at all, but the latter provision was especially repugnant to many Marylanders. In the state constitutional Convention that would commence in a few months, convention delegates (including Jones and Carmichael) would rage about the federal government's unwillingness to compensate Maryland's former slaveholders. And in one of many disquieting enactments to emerge from a deeply regressive convention, the delegates would propose, and Maryland's electorate would ratify, a constitutional provision that confirmed the abolition of slavery—which had already been abolished first by the 1864 Maryland Constitution and then by the Thirteenth Amendment—but added falsely that slavery had been abolished in Maryland "under the policy and authority of the United States" and, therefore "compensation, in consideration therefor, is due from the United States."[28] And as the report of the Joint Committee explained, the Committee itself earlier in the session had asserted "the claim of this State, on behalf of her citizens, upon the Government of the United States, for compensation." As a result, "[o]f

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[27] An exception would be the two-thirds requirement for proposing amendments, as set forth in Article V. The already-famous law review article by Professors Baude and Paulsen has an extensive explanation of why § 3 supersedes the prohibition against *ex post facto* laws and bills of attainder. See William Baude & Michael Stokes Paulsen, The Sweep and Force of Section Three, 172 U. Pa. L. Rev. (forthcoming 2024).

[28] In fact, Maryland's 1864 "Republican" constitution had abolished slavery before ratification of the Thirteenth Amendment, and the Emancipation Proclamation did not apply to Maryland. See Republican Press, supra n.8, at xv-xvii, 159 n.155.

course this Legislature could not be expected to ratify a Constitutional amendment repudiating that claim."[29]

The report concludes by proposing a resolution that "the Legislature of this State, doth hereby refuse its ratification of the said proposed amendment to the Constitution of the United States."

Neither chamber of the General Assembly considered ratification of the Fourteenth Amendment until it arose in the House on March 25, 1867, at approximately 11:30 a.m., when one-half hour remained in the General Assembly's 1867 session.[30] The delay seemed intentional and it annoyed Republican members who were already suspicious of the majority's procedural maneuvers. Delegate Upton Buhrman, a Republican member of the Joint Committee, stated that he had been excluded from Committee meetings.[31] The question of ratification was raised on the House floor not by the Democratic majority, but by Republican delegate L.M. Gorsuch, who complained that "the entire session of eighty-one days had now almost passed, and he had waited in vain in the expectation that some action would be had upon the most important subject broached in the General Assembly of this year."[32] In response, Jones immediately moved to adopt the "resolutions of the majority report rejecting the amendment." Buhrman offered a substitute resolution that would ratify the amendment.

The debate thereafter focused on whether ratification of the amendment would mean that the former Confederate states would be readmitted as full participants in Congress and the Union. Democrats strongly doubted that it would, and indeed they alleged that the Radical Republicans intended to continue military rule in the South regardless of the outcome on ratification. Some Democratic speakers claimed they would vote for the amendment if their Republican colleagues would confirm that Congress would recognize the Confederate states upon ratification. Republican delegates responded that they had no control over Congress, but they observed that Tennessee's delegation had been seated in Congress after Tennessee ratified the amendment.[33] Democrats suggested

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[29] Joint Committee Report, supra n.2, at 24.

[30] The American and Commercial Advertiser (Baltimore), Mar. 25, 1867, at 4 col. 3. During the debate the delegates extended the session for a couple of hours.

[31] See The American and Commercial Advertiser (Baltimore), Mar. 25, 1867, at 4 col. 3.

[32] Joint Committee Report, supra n.2, at 24.

[33] Id. at col. 3-4.

that the link between Tennessee's ratification and its admission was not clear.

Richard Carmichael, a Democrat and former slaveholder who would be the president of Maryland's 1867 constitutional convention, brought the debate back to its racial subtext: he complained that the amendment had hardly been proposed when "there came up a cry … that this was not acceptable and would not be accepted; and that nothing would be accepted but the condition of manhood suffrage."[34]

Fittingly, Isaac Jones had the last word. He agreed with Carmichael that the Radical Republicans had already declared that "ratification of the amendment by the other Southern States, without 'manhood suffrage,' would be insufficient." He reiterated his view that Congress had incorrectly asserted power to control the Confederate states under the law of nations, on the theory that the Union had conceded belligerent rights to the Confederate states, "thereby converting a rebellion into a civil war." In Jones's view, Congress could not justify its military domination of the South under the existing Constitution, and that was now "the real issue before the country." Jones moved for a vote. The House voted first to reject the minority report and resolutions (12-45), and then to adopt the majority resolutions (47-10).[35] Whether the Senate acted is not entirely clear, but it certainly did not vote to ratify the amendment. [36]

One additional document illuminates the thinking of Maryland's leadership concerning ratification. On November 15, 1867, U.S. Senator Reverdy Johnson, a Maryland Democrat and one of the nation's most prominent lawyers,

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[34] Id. at col. 4.

[35] See 1867 Md. House J. 1140-41 (Mar. 23, 1867), reprinted in 133 Md. Archives 2966. See also 1867 Md. Senate J. Joint Res. No. 18 (Mar. 18, 1867), reprinted in 133 Md. Archives 5091.

[36] According to contemporaneous reports in The Baltimore Sun and other newspapers (who at that time sometimes relied on one another without attribution), the amendment "was rejected in the House, but not acted on in the Senate." The Sun (Baltimore), Mar. 25, 1867, at 2 col. 2; see also The Democratic Advocate (Westminster, Md.), Mar. 28, 1867 at 2 col. 2; The Kent News (Chestertown, Md.), Mar. 30, 1867, at 2 col. 4. According to Horace Flack's treatise published in 1908, the Senate voted 13-4 against the amendment. Flack cites to page 808 of the Senate Journal, which does record a vote in that ratio on "the report of the Committee on Federal Relations." Horace Flack, The Adoption of the Fourteenth Amendment 204 (1908); 1867 Md. Senate J. 808 (Mar. 23, 1867), reprinted at 133 Md. Archives 808. An ambiguity arises because the Committee issued more than one report in the 1867 session. A second report demanded compensation by the federal government to Maryland slaveholders. See Report of the Committee on Federal Relations (Feb. 25, 1867), reprinted in 133 Md. Archives 4115. See also 1867 Md. Senate J. Joint Res. No. 18 (Mar. 18, 1867), reprinted in 133 Md. Archives 5091.

issued a 23-page pontification on what he called "the dangerous condition of the country."[37] Johnson stated at the outset that his overall purpose was "the relief of our Southern brethren and their restoration to every Constitutional right." His analysis focused on rebutting the proposition that the Guarantee Clause—guaranteeing to every State a republican form of government—permitted Congress to regulate suffrage in the States. Johnson was especially alarmed because a congressional committee of Republicans was considering whether the new Maryland constitution was sufficiently "republican" if it did not establish manhood suffrage.

Johnson pointed out that "universal suffrage" had never been the rule in the national or state government, or in any other government. Nor had any prior republican government depended on a universal "right to be voted for." Republican governments had always imposed restrictions on suffrage and eligibility for office. Nor would the Fourteenth Amendment give Congress a right to impose universal suffrage on the states. As Johnson saw it, nothing in § 1 altered the states' pre-existing right to regulate suffrage. The only meaningful clause in § 1 was the citizenship clause, which reversed the Dred Scott decision (where Johnson represented Sanford), but citizenship had never implied an indefeasible right of suffrage.

Johnson closed with a stemwinding ode to the virtues of white rule. "For it is, now, the demonstrated determination of the white men of the North, the East, the West, and the far Pacific, to have the Constitution respected, and to continue the governments, State and national, exclusively in the hands of men of their own race." This sentiment reverberated among Maryland Democrats of the era, who would not respect the Fourteenth Amendment even after Secretary Seward declared its ratification on July 28, 1868.

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In 1955, Maryland's first Black state senator, Harry A. Cole, introduced a resolution in the Maryland State Senate to ratify the Fourteenth Amendment.[38] Although Maryland no longer disputed the amendment's enforceability, Senator Cole's resolution failed. Similar resolutions introduced by Cole failed in the sessions of 1956, 1957, and 1958. Cole lost his bid for re-election in 1958, but his successor, Senator J. Alvin Jones, introduced the same resolution in the 1959 session.[39] This

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[37] Reverdy Johnson, A Further Consideration of the Dangerous Condition of the Country (Nov. 15, 1867).

[38] See The Sun (Baltimore), Apr. 4, 1955, at 12, col. 4.

[39] See The Sun (Baltimore), Mar. 11, 1959, at 26, col. 2. Cole would become the first Black judge of Maryland's high court and serve with

time it passed,[40] 91 years after the amendment became the law of the land.

Maryland's leadership today is still heavily Democratic, but it looks nothing like the Democratic leadership of 1867-68. Black people are well represented at the highest levels of all three branches of Maryland government. No one in their right mind today would look to the Maryland Democrats of 1867 to understand the original public meaning of the Fourteenth Amendment. Practitioners of originalism probably would not consider the public meaning in 1959 Maryland, when the State finally ratified the amendment. But as compared to the State's benighted and recalcitrant leadership in the post-war era, the views of Senators Cole and Jones and a host of successors are a far better expression of this State's understanding of what is perhaps the Nation's most important law.

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distinction from 1977 to 1991. Maryland's ratification may not have been entirely symbolic. A few weeks before Maryland's ratification, Sen. John Stennis entered into the Congressional Record a newspaper column by David Lawrence arguing that the Fourteenth Amendment had never been legally ratified and Congress should reconsider the amendment. 1959 Cong. Rec. A795 (Feb. 4, 1959). See also 1959 Cong. Rec. A1060 (Feb. 12, 1959) (remarks of Sen. Oren Harris regarding ratification of the Fourteenth Amendment).

[40] 1959 Md. Laws 1458 (Apr. 28, 1959), reprinted in 642 Md. Archives 1458.