ARTICLES

Did Berkeley County and Jefferson County Constitutionally Vexit in the 1860s? —Part 3

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V. The Supreme Court Decides

A. Virginia Prepares to Go to Court

The Virginia legislature did not sit by idly as it waited for Congress to pass the transfer resolution. On February 28, 1866, it approved a joint resolution stating:

> That the people of Virginia deeply lament the dismemberment of the "Old State," and are sincerely desirous to establish and perpetuate the reunion of the states of Virginia and West Virginia; and that they do confidently appeal to their brethren of West Virginia to concur with them in the adoption of suitable measures of co-operation in the restoration of the ancient commonwealth of Virginia, with all her people, and up to her former boundaries.[1]

Not expecting a warm reception for this proposal, the resolution also authorized the commissioners Virginia appointed to negotiate "a proper adjustment of the public debt of the state of Virginia, due or incurred previous to the dismemberment of the state, and of a fair division of the public property."[2]

Anticipating congressional approval of the transfer resolution, on February 23, 1866, the Virginia Senate unanimously approved a bill directing the governor, in case of such congressional approval, "at once to institute such legal proceedings as may be proper."[3] Further, the bill directed the governor:

> to adopt and carry out all other measures as may be necessary on the part of this commonwealth, to secure, as soon as possible, a decision, by the appropriate legal tribunals, of any and all

1 Virginia Acts 1865–1866, *supra* note 302, at 453.

2 § 3, *id.* at 454. The resolution of Virginia's public debt would involve nine cases before the Supreme Court between 1907 and 1918, all denominated *Virginia v. West Virginia*. 206 U.S. 290 (1907), 209 U.S. 514 (1908), 220 U.S. 1 (1911), 222 U.S. 17 (1911), 231 U.S. 89 (1913), 234 U.S. 117 (1914), 238 U.S. 202 (1915), 241 U.S. 531 (1916), 246 U.S. 565 (1918).

3 The vote was 27-0. Journal of the Senate of the Commonwealth of Virginia: Begun And Held at the Capitol in the City of Richmond, on Monday, the Fourth Day of December in the Year One Thousand Eight Hundred and Sixty-Five Being the Eighty-Ninth Year of the Commonwealth 260 (James E. Goode 1865). Available at https://babel.hathitrust.org/cgi/pt?id=uc1.b2884402&view=1up&seq=7. Last visited May 22, 2020.

> questions arising out of the attempt to annex said counties of Jefferson and Berkeley to the state of West Virginia, or of said state to exercise jurisdiction over them.[4]

Six days later the House approved the bill by a vote of sixty-four to ten.[5] The bill explicitly directed the governor to hire Reverdy Johnson to assist the State's attorney general in the proceedings.[6]

The Virginia legislature could not have known that Reverdy Johnson would vote for the transfer resolution a few days later.[7] However, Johnson's long history representing Maryland's leading engine of industry, the Baltimore and Ohio Railroad, should have indicated Johnson's intent, especially since the Railroad was the driving force behind the inclusion of Berkeley and Jefferson counties in West Virginia.[8] Virginia should not have been surprised that Johnson ended up representing West Virginia. In his place, the Old Dominion hired former Supreme Court Justice Benjamin Curtis, one of the two dissenters in the infamous *Dred Scott* case, to represent it.[9]

B. The Initial Arguments and Hearing

In its complaint, filed on December 11, 1866, Virginia asked the Supreme Court "to determine . . . whether the counties of Jefferson and Berkeley are included within the boundaries of the Commonwealth of Virginia, or within the boundaries of the State of West Virginia."[10] In their brief former Justice Curtis and Andrew Hunter echoed many of the arguments that New Jersey Democrat Andrew Rogers had made in his lonely defense of Virginia's claim during the House debate on the transfer resolution.[11]

In support of its claim to the two counties at issue, Virginia argued the counties were not included in the West Virginia Statehood Act.[12] Although the Virginia legislature had given its consent to transferring the two counties to West Virginia, that consent had been conditioned on their voters approving the transfer in a referendum in May 1863. Virginia argued that referendum had been held at a time when it was "impracticable to open the polls at all the places, or at any considerable part of the places of voting in the last-named

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4 *Id*.

5 Virginia House Journal 1865–1866, *supra* note 291, at 437.

6 For the statutory enactment *see* Virginia Acts 1865–1866, *supra* note 302, at 195–96.

7 *See supra* text accompanying note 358.

8 For Johnson's long association with the railroad *see* Lewis *Great Case*, *supra* note 33, at 13, 18; Bernard Christian Steiner, Life of Reverdy Johnson 11 (Norman, Remington Company 1914). Available at https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t7xk8rh76&view=1up&seq=9. Last visited May 22, 2020. For a summary of the railroad's influence *see supra* note 33.

9 60 U.S. 393, 529 (1857) (McClean, J., dissenting).

10 "Complainant's Brief," *Virginia v. West Virginia*, 1 (December Term, 1866). Available at http://galenet.galegroup.com/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW111216651. Last visited May 24, 2019.

11 *See supra* text accompanying notes 339 through 345.

12 *Id.* at 2

counties."[13] Although Virginia Governor Pierpont had certified the results of the referendum, he had been "wholly ignorant" of the problems getting to the polls.[14]

Virginia argued that even if Pierpont's certification of the vote had been legitimate when it was issued it was insufficient to affect the transfer. The issue was closed when the Virginia Legislature withdrew its consent to the transfer of Berkeley and Jefferson counties on December 5, 1865.

> The legislation of Virginia, as to the cession of the counties of Jefferson and Berkeley to the State of West Virginia, was only a proposal, to become operative as a transfer of territory upon certain conditions; ...
>
> But no proposal by one State to another can amount to a concluded compact or agreement, until the assent of Congress is given to it. Prior to the assent, any action of the State must be deemed a proposal only, which it may withdraw or continue, according to its own sense of right.[15]

Not surprisingly, West Virginia's response brief repeated many of the arguments that had been made earlier in the year in House Report 6.[16] The core of West Virginia's argument was that Congress *had* given its consent in the Statehood Act. The Act insisted the Legislature amend the proposed West Virginia Constitution to hasten the abolition of slavery. Therefore, Congress had given its implicit approval to the rest of the constitution, especially Article I, section 2, which made the offer of inclusion to Berkeley and Jefferson counties, and Article IV, sections 13 and 14, and Article VI, section 2, which implemented the offer.[17] Virginia's acts of January 31 and February 4, 1863, had given its unrepealable consent.[18] Moreover, even if these acts were repealable, the purported repeal of December 5, 1865, had been made by a legislature not organized in conformance with Virginia's 1864 constitution.[19] That Constitution had denied suffrage and the right to hold office to anyone who had "voluntarily given aid or assistance, in any way, to those in rebellion

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13 *Id.* at 3. Representative Rogers had made no claim concerning the validity of the transfer vote in the two counties.

14 *Id.* at 4.

15 *Id.* at 7.

16 *See supra* text accompanying notes 314 through 325.

17 "Brief by Charles J. Faulkner," *Virginia v. West Virginia*, 2–3 (December Term, 1866). (Hereinafter cited as "West Virginia Brief 1866.") Available at http://galenet.galegroup.com/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW109970427. Last visited May 24, 2019. Faulkner's brief explicitly cites *these* provisions of the Constitution. Article I, section 2 makes the inclusion offer to Berkeley, Jefferson, *and Frederick* counties. 7 Thorpe, *supra* note 40, at 4014. Article IV, sections 13 and 14 extends legislative apportionment to these counties as whole. *Id.* at 4019–20. Article VI, section 2 places these counties into judicial districts. *Id.* at 4023. For Faulkner's abandonment of the Article I, section 2 based argument when the case was reheard *see infra* text accompanying notes 449–456.

18 West Virginia Brief 1866, *supra* note 407, at 3.

19 *Id.* at 4.

against the Government of the United States."[20] However, in contravention of that provision, former rebels took control of the Legislature and repealed the provision.[21]

Reverdy Johnson extended West Virginia's argument when the Supreme Court first heard argument in *Virginia v. West Virginia* on May 7 and 8, 1867.[22] In addition, Johnson reiterated the core argument that Congress consented to the transfer of Berkeley and Jefferson counties,[23] in the opening of his argument.[24] He stated that Virginia was not presently a state and therefore had no right to invoke the Court's original jurisdiction.

Johnson based this claim on the logic of the recently enacted First Reconstruction Act. This Act declared, "that no legal State governments or adequate protection for life or property exist[ed]" in Virginia or nine other "rebel States."[25] These states would merely have provisional state governments, subject to the paramount authority of the United States until they were entitled to representation in Congress[26] and that would only happen after they ratified the Fourteenth Amendment.[27] With that logic to assist him Johnson argued

> The Union consists of States equal in all respects in dignity, and possessing the same rights. *The most important of these rights,* the one upon which all its other rights and interests depend for protection and enjoyment, *is the right of representation in Congress*. . . . If, therefore, Virginia is now not entitled to representation in Congress she is not a State within the meaning of the Constitution. . . . If this view be correct then the complainant is not a State competent to sue in this Court. For such a purpose she must be a State for every other under the Constitution[.][28]

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20 Va. Const. (1864), Art. III, § 1. 7 Thorpe, *supra* note 40, at 3854–55.

21 Eckenrode, *supra* note 301, at 41; Lowe, *supra* note 301, at 44.

22 Charles Fairman, Reconstruction and Reunion, 1864–88, Part One, History of the Supreme Court of the United States, Volume VI, Part One 622 (Macmillan 1971).

23 *Virginia v. West Virginia*, "Argument of the Honorable Reverdy Johnson in the Supreme Court of the United States," May 8, 1867, 11 (Globe Office 1867). (Hereinafter cited as "Johnson Argument 1867.")

24 *Id.* at 3.

25 "An Act to provide for the more efficient Government of the Rebel States." 15 Stat. 428. March 2, 1867.

26 § 6. *Id.* at 429.

27 § 5. *Id.*

28 Johnson Argument 1867, *supra* note 413, at 15, 17. (Emphasis added.) The portion represented by the first ellipsis reads "This is given to secure the State and its people against unjust and oppressive legislation, especially against that particular oppression to resist which our fathers separated from England – the being taxed without being represented in Parliament." Of course, if Johnson's argument were valid, by denying representation to ten states formerly in rebellion Congress exposed them to "unjust and oppressive legislation."

In making this argument, Johnson effectively advocated for his client rather than an exponent of his own political views. Johnson had voted against the Fourteenth Amendment.[29] Although he was the lone Senate Democrat voting to override President Johnson's veto of the First Reconstruction Act,[30] he had told the Senate he "held from the first to the last, and maintain the opinion still, that the States are now States of the Union, entitled to all the rights and bound by all the obligations which the Constitution confers and imposes upon States and citizens."[31]

C. A Divided Court

The Court adjourned a week after it heard argument in *Virginia v. West Virginia*.[32] Shortly after the Court adjourned, Justice James Wayne, the last of Andrew Jackson's appointees, died.[33] That left the Court with only eight members to vote on the case. On January 21, 1868, Chief Justice Chase reported that the Court was equally divided.[34] As this was an original case before the Supreme Court there was no lower court decision to affirm.[35] The Court would need to rehear the case with a different roster of Justices in order to render a decision. The rehearing would take time to set up.

In its waning days, the Thirty-Seventh Congress had added a tenth seat to the Supreme Court, ostensibly to provide a Justice to ride circuit for the newly created Tenth Circuit comprising California and Oregon.[36] By enlarging the Court, Congress also gave President Lincoln an opportunity to nominate a friendly Justice to the Court.[37] Within a week President Lincoln nominated and the Senate confirmed Stephen J. Field to fill the newly created seat.[38]

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29 Cong. Globe, 39th Cong., 1st Sess., 3042. June 8, 1866.

30 Cong. Globe, 39th Cong., 2nd Sess., 1976. March 2, 1867. Johnson did not vote on the initial passage of the bill. *Id.* at 1469. February 16, 1867. He would later be the only Democrat to vote for the initial passage of the Second Reconstruction Act and to override yet another veto by President Johnson. Cong. Globe, 40th Cong., 1st Sess., 171. March 16, 1867. *Id.* at 303. March 23, 1867.

31 Cong. Globe, 39th Cong., 2nd Sess., 1379. February 15, 1867. Johnson may not have believed in the efficacy of his own argument in front of the Court. During debate on the Third Reconstruction Act of 1867 he told the Senate "I do not know certainly what the opinion of any one of the judges is upon that particular question, but I have reason to believe that again they are unanimous in believing that there is nothing in the point; that Virginia is as much a State now as she was on the day she passed her ordinance of secession, and is, consequently, as much entitled now to claim the original jurisdiction of the Supreme Court as she would have been if she had never gone into rebellion." Cong. Globe, 40th Cong., 1st Sess., 580. July 11, 1867.

32 Fairman, *supra* note 412, at 625.

33 *Id.*

34 *Id.* The *New York Times* reported the following vote on the case. For West Virginia: Chase, Grier, Miller, and Swayne. For Virginia: Clifford, Davis, Field, and Nelson. "Affairs at the National Capital: Supreme Court Decisions," *The New York Times*, January 24, 1868. Available at https://timesmachine.nytimes.com/timesmachine/1868/01/24/78906239.pdf?pdf_redirect=true&ip=0. Last visited May 22, 2020.

35 Fairman, *supra* note 412, at 625.

36 "An Act to provide Circuit Courts for the Districts of California and Oregon and for Other Purposes,"12 Stat. 794. March 3, 1863.

37 "Important from Washington: ... Another Supreme Court Judge ...," *New York Times,* March 4, 1863. Available at http://www.nytimes.com/1863/03/04/news/important-washington-closing-hours-congress-great-crowds-spectators-capitol.html. Last visited May 22, 2020. David M. Silver, Lincoln's Supreme Court 86–87 (Illinois 1956).

38 For the nomination see Senate Executive Journal, 38th Cong., Special Sess., 223. March 7, 1863. For the confirmation see *id.* at 275. March 10, 1863.

Justice John Catron died on May 30, 1865, leaving the Court's tenth seat vacant. By the time President Johnson nominated Henry Stanberry to be Catron's replacement[39] the House had already passed a bill reducing the Court's roster to nine.[40] During the House's extremely brief debate on the bill its sponsor, Iowa Republican James Wilson, suggested that he would be in favor of further reducing the size of the Court if further vacancies should occur.[41]

However, the Senate realized that Andrew Johnson might still have the opportunity to appoint Supreme Court Justices who could invalidate Reconstruction Legislation. Thus, the Senate acted on Wilson's suggestion, and amended the bill to reduce the size of the Supreme Court to seven by attrition.[42] New appointments would have to wait for the Court's roster to fall below seven, or for the end of Andrew Johnson's administration and subsequent legislation increasing the size of the Court back to nine. That would happen in the first days of the Grant administration.[43] Justice Robert Grier's resignation on January 31, 1870, created the next change in the Court's roster. President Grant quickly filled that vacancy and the recreated ninth seat with William Strong and Joseph Bradley.[44]

In the meantime, the Supreme Court heard and decided *Texas v. White* in 1868–1869.[45] This case was originally brought by Texas which sought an injunction to stop White and others from receiving payment by the United States for redemption of bonds issued to Texas as part of the Compromise of 1850.[46] In response to Texas's argument counsel for White et al. posed the same threshold issue that Reverdy Johnson had raised in *Virginia v. West Virginia*: Texas was not a state of the Union constitutionally authorized to bring such an original suit before the Supreme Court.[47]

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39 Senate Executive Journal, 39th Cong., 1st Sess., 720.

40 H.R. 334 introduced on February 26, 1866. Cong. Globe, 39th Cong., 1st Sess., 1035.

41 *Id.* at 1259. March 8, 1866.

42 For the Senate debate on the bill such as it was *see id.* at 3697–99. July 10, 1866. The Senate spent more time debating a proposal to create the office of Marshal of the Supreme Court than it did debating the reduction in the Court's size. When the bill got back to the House New Jersey Democrat Edwin Wright asked James Wilson for the source of Congress's power to reduce the size of the Court. Wilson immediately demanded the previous question and the House approved the Senate amendments by a vote of 78-41. *Id.* at 3909. July 18, 1866. West Virginia's three Unconditional Unionists joined nineteen Republicans and all nineteen voting Democrats to vote against the amendment. For the statute as enacted *see* "An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits," 14 Stat. 209. July 23, 1866. This act placed each of the states but none of the territories in one of the nine circuits. For example, the Fifth Circuit consisted of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. Virginia, and the Carolinas were part of the Fourth Circuit and Arkansas was part of the Eighth Circuit. Apparently these states were not so dead as to leave them outside a federal judicial circuit.

43 "An Act to amend the Judicial System of the United States," 16 Stat. 44. April 10, 1869. The act took effect on the first Monday in December in 1869. § 6, *Id.* at 45.

44 President Grant nominated Justices Strong and Bradley on February 8, 1870. Senate Executive Journal, 41st Cong., 2nd Sess., 359–60. Ten days later the Senate confirmed Strong. *Id.* at 369. A month later it confirmed Bradley. *Id.* at 402.

45 74 U.S. (Wall.) 700 (1869).

46 *Id.* at 702–03. "An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to Said Boundaries, and all of her Claims upon the United States, and to establish a territorial Government for New Mexico," 9 Stat. 446, 447. September 9, 1850.

47 Fairman, *supra* note 412, at 636.

Writing for a five-member majority, Chief Justice Chase rejected White's threshold argument.[48] "The Constitution," he held, "in all its provisions, looks to an indestructible Union composed of indestructible States."[49] Although the Constitution often considered a State in terms of its territory, its government, or its people, it made "a plain distinction . . . between a State and the government of the State."[50]

> The primary conception is that of a people or community.[51]
>
> When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State.[52]

If Texas passed the threshold challenge and had the right to bring an original suit before the Supreme Court so did Virginia.[53]

Later that year, while riding circuit in Virginia, Chief Justice Chase further narrowed the possible range of arguments for West Virginia in *Griffin's Case*.[54] In this case, Caesar Griffin sought to have his September 1868 murder conviction in a Virginia state court vacated. His grounds to vacate was that the presiding Judge, Hugh Sheffey, a Confederate state legislator in Richmond had immediately lost his judgeship upon ratification of the Fourteenth Amendment.[55] Chase held that in the absence of legislation implementing Section 3 of the Fourteenth Amendment Sheffey had not lost his judgeship.[56]

In the course of his opinion, Chase noted the political branches of the national government recognized the Restored Government of Virginia in Wheeling. Without that recognition, West Virginia would not have existed.[57] Upon West Virginia's creation the seat of the Restored Government moved to Alexandria

> and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred from Alexandria

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48 Justices Nelson, Clifford, Davis, and Field sided with Chief Justice Chase leaving Justices Grier, Swayne, and Miller in dissent. The remnants of this line up held two years later when the Court decided *Virginia v. West Virginia*. The exceptions were that Justice Grier had retired and Chief Justice Chase and Justice Nelson were too ill to hear *Virginia v. West Virginia*. Fairman, *supra* note 412, at 620. With newly appointed Justices Strong and Bradley joining Justices Swayne and Miller West Virginia won the case by a narrow four to three majority. *See infra* Part V.E.

49 *Texas v. White*, at 725.

50 *Id.* at 721.

51 *Id.* at 720.

52 *Id.* at 726.

53 In dissent Justice Grier disagreed with the majority on both the threshold question and the merits of the case. *Id.* at 737, 739. Justices Swayne and Miller disagreed with the majority on the threshold question but agreed with the majority on the merits of the case. *Id.* at 741.

54 Griffin's Case, 11 F. Cas. 7 (C.C.C.D. Va. 1869).

55 *Id.* at 22–23.

56 *Id.* at 26.

57 *Id.* at 23.

> to Richmond, it became in fact what it was before in law, the government of the whole state. As such it was entitled, under the constitution, to the same recognition and respect, in national relations, as the government of any other state.[58]

This government appointed Hugh Sheffey to the bench, and enacted the Repeal Acts of December 5, 1865.

D. West Virginia Focuses on Congress's Consent

The Court heard reargument between February 13 and 16, 1871.[59] Owing to the illnesses of Chief Justice Chase and Justice Nelson, only seven Justices heard the case.[60] For the rehearing Charles J. Faulkner joined Reverdy Johnson on West Virginia's behalf. Faulkner described himself as "not merely as one of the counsel of the State of West Virginia, but more particularly and specially as the counsel for the counties of Berkeley and Jefferson."[61]

During his argument Faulkner gave a fair description of the issue before the Court.

> This is not a question of disputed or controverted boundary in any fair meaning of that term or within the spirit of any of the numerous adjudications of this court. It is a question of a cession or territory with well-established, thoroughly recognized, and accurately defined boundaries. ... But the real and controlling question here is, *Was there, or was there not, a compact existing between the States of Virginia and West Virginia on the 10th of March, 1866, when Congress in the exercise of its constitutional functions, acted upon the subject and gave its formal and specific consent to the transfer of these two counties to West Virginia.*[62]

Faulkner, of course, held that there was such an agreement in place when Congress confirmed the transfer in 1866.

Recognizing that Chase's opinions in *Texas v. White* and *Griffin's Case* had narrowed his field of battle, Faulkner focused on the open-ended nature of Congress's consent in the West Virginia Statehood Act.[63] After recounting the

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58 *Id.*

59 Fairman, *supra* note 412, at 626.

60 *Id.* at 620.

61 Argument of Charles J. Faulkner," *Virginia v. West Virginia*, 3 (December Term, 1870). (Hereinafter cited as "West Virginia Argument 1871.") Available at http://galenet.galegroup.com/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW109967881. Last visited May 24, 2019.

62 *Id.* at 19–20. (Original emphasis.)

63 Faulkner did argue that the Virginia Repeal Act of 1865 had been enacted by an illegitimate legislature. *Id.* at 13, 21–22. He also noted that when Congress readmitted Virginia to representation it reviewed the Virginia Constitution of 1868 and this constitution mentioned neither Berkeley not Jefferson county. *Id.* at 24–25. For the apportionment of Delegates to counties *see* Va. Const. (1870), Art. V, § 2. 7 Thorpe, *supra* note 40, at 3880–82. For the combination of counties to form Senate districts *see* Art. V, § 3. *Id.* at 3882–83. For the combination of counties to form judicial circuits *see* Art. VI, § 9. *Id.* at 3887–88. For the readmission to representation *see* "An Act to admit the State of

relevant Virginia and West Virginia legislative history from 1861 to 1863,[64] Faulkner turned his attention to the *additional territory admittance* power in the West Virginia constitution.

> Additional territory may be admitted into and become part of this State, with the consent of the Legislature.[65]

Faulkner's argument merits reproduction.

> This clause is a very novel one in State constitutions, and is perhaps the only instance of its occurrence in any similar instrument in this country. The reason of its insertion in the State constitution of West Virginia is obvious. The constitution of that State, in three of its articles, contemplated that Berkeley and Jefferson, with some other counties named, might, by a future vote of their people, become included in that State, and this clause was inserted to authorize the legislature to receive those counties as a part of the State whenever the people expressed by their votes, a willingness to be incorporated into her political organization.[66]

Article I, § 2 was the first of the three articles cited by Faulkner. It enumerates the counties comprising West Virginia.

> And if a majority of the votes cast at the election or elections held, as provided in the schedule hereof, ... in the district composed of the counties of Berkeley, Jefferson and Frederick shall be in favor of the adoption of this Constitution, then the three last mentioned counties shall also be included in, and form part of, the State of West Virginia.[67]

Article IV, §§ 13, 14 was the second article cited by Faulkner. The first of these created the eleventh Senatorial district for these *three* counties if they "become part of this State."[68] The latter joined Frederick and Jefferson counties to Hampshire County to form one Delegate district and Berkeley County

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Virginia to Representation in the Congress of the United States," 16 Stat. 62. January 26, 1870. In his brief on behalf of West Virginia Reverdy Johnson raised the threshold issue of Virginia's ability to bring the suit. He noted "This question was adjudged by a majority of the Court, in the case of Texas v. White. But it is submitted, that the question cannot be considered as conclusively settled." Respondent's Brief," *Virginia v. West Virginia*, 3 (December Term, 1870). Available at http://galenet.galegroup.com/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW109967373. Last visited May 24, 2019.

64 West Virginia Argument 1871, *supra* note 451, at 5–7.

65 W.Va. Const. (1863), Art. IV, § 16. 7 Thorpe, *supra* note 40, at 4020. For Faulkner's reference *see* West Virginia Argument 1871, *supra* note 451, at 8. Faulkner had *not* cited this provision in an earlier brief. *See supra* text accompanying note 407.

66 *Id.* (Original emphasis.)

67 7 Thorpe, *supra* note 40, at 4014. Faulkner conveniently neglected to mention that the constitution offered inclusion to these three counties in the aggregate and not individually.

68 *Id.* at 4019.

to Morgan County to form another.[69] Article VI, § 2 was the third of the three articles cited by Faulkner. It divided West Virginia into judicial districts. Additionally, the Article specified "if the counties of Frederick, Berkeley and Jefferson become a part of this State, they shall constitute the eleventh Circuit."[70]

As we have argued,[71] the provisions relating to legislative apportionment extended to Berkeley and Jefferson (and Frederick) counties; however, Article IV, § 16 was not concerned with Berkeley or Jefferson County. Instead, the Article impliedly granted the legislature the power to incorporate additional territory into West Virginia, *especially the part quoted by Faulkner* when he claimed in his argument before the Court.

> The fair inference from it is this: that if Congress, by the admission of West Virginia as a State *under that constitution*, consented to her acquiring *additional territory*, ... that the additional territory *particularly named* and set forth in that instrument (these counties), might be acquired.[72]

According to Faulkner, section 16 particularly applied to the acquisition of Berkeley and Jefferson counties. It also gave West Virginia's Legislature the power to acquire new territory from not only Virginia but also Maryland, Pennsylvania, Ohio, and Kentucky!

E. The Court's Opinions

Writing for himself and Justices Swayne, Strong, and Bradley, Justice Samuel Miller opened his majority opinion by asserting that the question before the Court was not simply political. Instead, "the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute."[73] With the jurisdictional issue resolved Miller boiled the case down to three questions:

1. did the State of Virginia ever give a consent to this proposition, which became obligatory on her;
2. did the Congress give such consent as rendered the agreement valid; and
3. if both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized

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69 *Id.* at 4020.

70 *Id.* at 4023.

71 *See supra* text accompanying notes 141 to 145.

72 West Virginia Argument 1871, *supra* note 451, at 8. (Original emphasis.)

73 *Virginia v. West Virginia*, 78 U.S. 39, 53 (1871).

> Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.[74]

Miller answered the first of these questions affirmatively.[75]

As for the second question, there was no dispute that Congress had given its consent to the inclusion of Berkeley and Jefferson counties no later than March 10, 1866. The real question was when Congress had *initially* given its consent. Miller claimed that Congress had given its consent to their inclusion in the Statehood Act of 1862.

> Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement. ...
>
> The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the constitution framed by that convention, and in the act of the Virginia legislature, must have received the attentive consideration of Congress.
>
> It is, therefore, an inference clear and satisfactory that Congress by that statute, intended to consent to the admission of the State with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing it necessarily consented to the agreement of those States on that subject.[76]

Given Congress's apparent consent in the Statehood Act, Virginia had no right to rescind its consent once the voters in Berkeley and Jefferson counties chose to join West Virginia.[77] As a result, Miller's opinion never reached the legitimacy of the Virginia legislature that had enacted the Repeal Acts of 1865.

Justice David Davis commented solely on Miller's second question in dissent for himself and Justices Clifford and Field. He agreed with Justice Miller that "the point of time when Congress may give its consent is not material." However, he continued, "when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract."[78]

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74 *Id.* at 56.

75 *Id.* at 58–59.

76 *Id.* at 59–60.

77 *Id.* at 61, 63.

78 *Id.* at 63 (Davis, J., dissenting.)

Davis found that tripartite consent was not present when Congress debated, and President Lincoln signed the West Virginia Statehood in 1862.

> The second section of the first article of the constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan) accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.[79]

Justice Davis was mistaken in one respect only. The people of Jefferson, Berkeley, and Frederick counties *never considered inclusion as a district*. Frederick County never voted on joining West Virginia. He continued:

> In this state of things, the first district became a part of the new State, so far as its constitution could make it so, and the legislature of Virginia included it in its assent, and Congress included it in its admission to the Union. But neither the constitution of West Virginia, nor the assent of the legislature of Virginia, nor the consent of Congress, had any application whatever to the second district. For though the second section of the first article of the new constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with; and when that constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.[80]

From this, Davis concluded "nothing is clearer, than that Congress never did undertake to give its consent to the transfer of Berkeley and Jefferson counties to the State of West Virginia until March 2, 1866."[81]

Justice Davis's dissent gave a better account of Congress's intent in the West Virginia Statehood Act than Justice Miller's majority opinion. Davis could have given a better argument for his reading by citing the congressional debates on the matter.

When Senator Carlile proposed adding Berkeley, Jefferson, and thirteen other counties to the first forty-eight, he was the only member of Congress to speak in favor of the addition.[82] Senators Willey and Wade specifically and vigorously

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79 *Id.* at 64–65.

80 *Id.* at 65.

81 *Id.* at 64. March 2, 1866 is clearly a scrivener's error. On that date the Senate spent most of its session debating southern representation in Congress. Cong. Globe, 39th Cong., 1st Sess., 1131–47. At the other end of the capitol the House devoted most of its time to the Civil Rights bill. *Id.* at 3147–62. The correct date is March 10, 1866.

82 *See supra* text accompanying notes 166 and 181–183. For Representative Colfax's claim that the new state had forty-eight counties *see supra* text accompanying note 188.

spoke against the proposal.[83] When Senator Willey removed Carlile's fifteen additional counties from the statehood bill he also specified that the new State was entitled to exactly three seats in the House of Representatives rather than the more open-ended "as many . . . as the population thereof will authorize."[84] Even Attorney General Bates, no fan of the process by which the new State had been created,[85] had recognized that the Statehood Act embraced only forty-eight counties.[86] Neither President Lincoln's opinion on the matter not any of the of the memoranda from his cabinet members suggested otherwise.[87] Moreover, the contingent boundary contemplated by Article I, section 2 of the Constitution considered by Congress embraced Berkeley, Jefferson, *and Frederick* counties. However, this view was not how Justice Miller and three of his brethren understood the matter.

There is no reason to believe that Chief Justice Chase or Justice Nelson would have changed their original 1867 votes had they participated in the rehearing. However, we may ask whether Chase should have recused himself from the case. As Lincoln's Treasury Secretary, Chase, offered an opinion on the constitutionality of the Statehood bill.[88] Presumably, he was present for a discussion the Executive branch might have had on the geographic scope of the bill. If Chase had recused himself from the case's first hearing the Court would have upheld Virginia's claim to the two counties by a four to three margin.

VI. When Did Berkeley County's and Jefferson County's Vexits Become Constitutional?

The Supreme Court got it wrong in *Virginia v. West Virginia*. In December 1865 the Virginia legislature in Richmond rescinded *Virginia*'s consent to the counties vexiting[89] before Congress gave its consent in March 1866.[90] Thus, Berkeley County and Jefferson County did not vexit in the 1860s.

The Court handed down its decision and opinion on March 6, 1871. Wrong as the decision may have been, on that date the vexits of Berkeley County and Jefferson County became law.[91] Their vexits in the 1860s were unconstitutional; however, subsequent vexits in 1871 were constitutional.

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83 *See supra* text accompanying notes 172 and 173.

84 *See supra* text accompanying note 178.

85 Bates made the following entry in his diary on February 15, 1864. "I have warned one Member of W.[est] V.[irginia] of the fate preparing for his misbegotten, abortive State. These Jacobins, as soon as they get, by the Alexandria juggle, an anti-slavery constitution for *Virginia*, will discover that *West Virginia* was created without authority – and then, having no further use for the political bantling, will knock their blocks from under, and let it slide. For, already, they begin to be jealouse [*sic*] of the double representation in the Senate[.]" Howard K. Beale (ed.), *Diary of Edward Bates, 1859–1866*, 4 American Historical Association Review 1, 335 (1930).

86 *See supra* text accompanying note 193.

87 For Lincoln's opinions on the extent of West Virginia *see supra* text accompanying notes 192–196. For the complete set of opinions from Lincoln's cabinet *see* Woodward, *supra* note 193.

88 *Id.* at 177–79.

89 *See supra* text accompanying notes 302–303.

90 *See supra* Part IV.B.1, especially the text accompanying notes 353, 358, and 359.

91 "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (Cranch) 137, 177.

Table 5. Popular Vote Totals - 1876 Presidential Election in Virginia and West Virginia

	Polity	Tilden	Hayes
Actual	Virginia	141,225	95,764
	West Virginia	56,546	41,997
	Berkeley County	1,897	1563
	Jefferson County	2,023	975
	Berkeley + Jefferson	3,920	2,538
Revised	Virginia (enlarged)	145,145	98,302
	West Virginia (reduced)	52,626	39,459

VII. Epilogue: The Impact of Berkeley County and Jefferson County on the Presidential Election of 1876

Bush v. Gore,[92] was not the first Supreme Court case to determine the outcome of a presidential election. *Virginia v. West Virginia* determined the election of 1876. Had it been decided in Virginia's favor, Samuel Tilden, not Rutherford B. Hayes, would have been elected the nineteenth President of the United States in 1876.[93] Both states voted for Tilden, so shifting any group of popular votes from one state to the other could benefit Hayes but not Tilden. Table 5 presents the actual popular votes and the result of shifting Berkeley and Jefferson counties back to Virginia.[94]

If Virginia had retained these two counties it would have received an additional Representative in the final apportionment of 1872.[95]

The Forty-Second Congress passed *two* apportionment acts in 1872. The first Act increased the size of the House from 243 to 283 members, but reduced the representation of Vermont and New Hampshire from three seats to two seats each.[96] The second Act added nine additional seats[97] and, in so doing, preserved the representation of these two northern New England states by employing the *ad hoc, augmented Vinton* method of apportionment[98] to avoid New Hampshire's potential loss of representation. In the process Florida received a second seat that had not been apportioned to it in the first Act.[99]

92 531 U.S. 98 (2000).

93 For the impact of the recent Vexit movement had it been successful on Virginia's 2021 gubernatorial election *see infra* APPENDIX B.

94 Spreadsheet on file with the author. Data from Walter Dean Burnham, Presidential Ballots, 1836–1892 817, 853, 857 (Johns Hopkins 1955).

95 *See infra* APPENDIX C for how shifting Berkeley and Jefferson counties from West Virginia back to West Virginia would have impacted the interstate apportionment of the House between 1880 and 2020.

96 17 Stat. 28. February 2, 1872.

97 17 Stat. 192. May 30, 1872.

98 For an explanation of the Vinton method *see infra* APPENDIX D.

99 Spreadsheet and analysis on file with the author. James Evan Shaw first noticed this in 1979. *See* James Evan Shaw, *The Electoral College and Unstable Apportionment, A Summary*, in *Direct Popular Election of the President and Vice President of the United States:* in Hearings on S. J. Res. 28, 96th Congress, 1st session, March 27, 30, April 3, and 9, 1979 463, 469–70 (Government Printing Office 1979), available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015083099633&view=1up&seq=471&skin=2021, last visited July 23, 2021. For Shaw's analysis of the 1876 election *see* Census Activities and the Decennial Census: Hearing Before the Subcommittee on Census and Population of the Committee on Post Office and Civil Service, House of Representatives, Ninety-seventh Congress,

In both apportionment acts, Virginia received nine House seats. Without Berkeley or Jefferson County, Virginia was not in contention for a tenth. If Virginia had retained Berkeley and Jefferson counties, it would have received a tenth seat as Congress preserved the representation of the Green Mountain State and the Granite State[100] and West Virginia's apportionment of three seats would have been unaffected.[101]

The 1870 census showed a combined population of 28,119 in Berkeley and Jefferson counties.[102] Shifting this number (or any number) from West Virginia to Virginia has no effect on:

- the total apportionment basis of the United States,
- the ratio of representation for a given House size computed by dividing the total apportionment basis by the target House size, and
- any state other than Virginia and West Virginia.[103]

However, shifting this number from West Virginia to Virginia may impact their initial apportionment, i.e. their apportionment basis divided by the ratio of representation *rounded down*, and it always impacts *their* remainders. As a result, the remainder rank of several states will change. With Virginia's population augmented and its remainder increased it may overtake another state for one of the last seats apportioned by the Vinton method.

The shift of population from West Virginia to Virginia has no impact on the apportionment of seats in the Vinton-style 283 seat apportionment embodied in the First Apportionment Act of 1872.[104] However, the shift in population dramatically reveals how Virginia moves up and West Virginia moves down in the remainder rankings. Table 6 presents all of the states with positive remainders[105] starting with Arkansas, the last state to receive an additional seat, ranked by remainder order for a Vinton-style 283 seat apportionment.

The Forty-Second Congress kept Vermont and New Hampshire whole by employing an augmented Vinton-style apportionment that began with a proper 290 seat Vinton-style apportionment awarding the 290th seat to

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First Session on H.R. 1990 a Bill to Amend Title 13, United States Code, to Require the Secretary of Commerce to Prepare Certain Reports with Respect to Census Activities and the Decennial Census, and for Other Purposes June 11, 1981 71–72 (Government Printing Office 1981), available at https://catalog.hathitrust.org/Record/011343148, last visited July 23, 2021.

100 Virginia would have received a tenth seat even if it had retained only Jefferson County. (Spreadsheet on file with the author.)

101 Without Berkeley and Jefferson counties West Virginia's quotient – its apportionment basis divided by the ratio of representation – ranges from 3.07 at 283 seats to 3.23 at 297 seats.

102 1 The Statistics of the Population of the United States from the Original Returns of the Ninth Census (June 1, 1870) 71 (Government Printing Office 1872). Available at http://www2.census.gov/prod2/decennial/documents/1870a-04.pdf. Last visited June 23, 2020. This shift reduces West Virginia's population from 442,014 to 413,895. It increases Virginia's from 1,225,163 to 1,253,282.

103 Spreadsheet on file with the author.

104 17 Stat. 28.

105 States with populations less than the ratio of representation have a negative remainder. In 1872 Delaware, Nebraska, Oregon, and Nevada had populations less than the ratios of representation for the range of House sizes being considered.

Table 6. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 283 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Arkansas	4	80,419	283	Arkansas	4	80,419
New York	32	72,871	284	New York	32	72,871
Indiana	12	64,429	285	Indiana	12	64,429
Vermont	2	61,183	286	Vermont	2	61,183
Alabama	7	54,204	287	Alabama	7	54,204
Louisiana	5	53,495	288	Louisiana	5	53,495
Florida	1	53,064	289	Florida	1	53,064
New Hampshire	2	48,932	290	New Hampshire	2	48,932
Tennessee	9	46,364	291	Tennessee	9	46,364
West Virginia	***3***	***37,962***	292	***Virginia***	***9***	***41,126***
Minnesota	3	35,654	293	Minnesota	3	35,654
South Carolina	5	32,186	294	South Carolina	5	32,186
California	4	21,511	295	California	4	21,511
Pennsylvania	26	20,167	296	Pennsylvania	26	20,167
Mississippi	6	19,818	297	Mississippi	6	19,818
Virginia	***9***	***13,007***	298	Texas	6	10,475
Texas	6	10,475	299	***West Virginia***	***3***	***9,843***

Table 7. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 290 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Tennessee	10	75,623	288	Tennessee	10	75,623
Louisiana	6	69,750	289	***Virginia***	***10***	***70,385***
Vermont	***3***	***67,685***	290	Louisiana	6	69,750
Florida	***1***	***56,315***	291	***Vermont***	***2***	***67,685***
New Hampshire	***2***	***55,434***	292	***Florida***	***1***	***56,315***
South Carolina	5	48,441	293	***New Hampshire***	***2***	***55,434***
West Virginia	3	47,715	294	South Carolina	5	48,441
New York	33	45,470	295	New York	33	45,470
Minnesota	3	45,407	296	Minnesota	3	45,407
Illinois	19	42,664	297	Illinois	19	42,664
Virginia	***9***	***42,266***	298	Mississippi	6	39,324
Mississippi	6	39,324	299	Ohio	20	36,600
Ohio	20	36,600	300	California	4	34,515
California	4	34,515	301	Texas	6	29,981
Texas	6	29,981	302	North Carolina	8	19,897
North Carolina	8	19,897	303	West Virginia	3	19,596

Vermont, the 291st seat to Florida, and the 292nd seat to New Hampshire. Table 7 presents the remainder rankings for a Vinton-style 290 seat apportionment showing the last three states to receive an additional seat based on their remainders as well as the following thirteen (down to West Virginia).

Table 8. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 291 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Louisiana	6	72,010	289	***Virginia***	***10***	***74,453***
Vermont	***3***	***68,589***	290	Louisiana	6	72,010
New York	34	60,386	291	***Vermont***	***3***	***68,589***
Florida	***1***	***56,767***	292	New York	33	60,386
New Hampshire	***2***	***56,338***	293	***Florida***	***1***	***56,767***
Illinois	19	51,252	294	***New Hampshire***	***2***	***56,338***
South Carolina	5	50,701	295	Illinois	19	51,252
West Virginia	3	49,071	296	South Carolina	5	50,701
Minnesota	3	46,763	297	Minnesota	3	46,763
Virginia	***9***	***46,334***	298	Ohio	20	45,640

In the actual 290 seat apportionments, Virginia was not in the running for an additional seat. However, boosting its population by 28,119 increased its remainder by the same amount and propels it into eleventh place in the remainder ranking. This boost pushed Vermont from twelfth place to thirteenth place in the ranking and resulted in Vermont being denied an additional seat.

The Forty-Second Congress could have dealt with this scenario in just the same fashion as it dealt with the actual scenario. It could have augmented to proper the 290 seat Vinton-style apportionment by *three* and awarded additional seats to Vermont, Florida, and New Hampshire. That would have kept them whole in a 293 member House. Additionally, the apportionment would have added an additional electoral vote, from Virginia, for Samuel Tilden in the 1876 election. The additional electoral vote would have resulted in a 185-185 split vote, and thrown the election into the hands of the Forty-Fourth House, which was controlled by the Democrats.[106]

Table 8 through Table 14 present the remainder rankings for proper Vinton-style apportionments of 291 to 297 seats respectively in the regions that include Florida, New Hampshire, Vermont, and Virginia. A brief comment on possible outcomes of the 1876 election *with an enlarged Virginia*, follows each table. Two of Hayes's electoral votes came from the additional *augmented* seats awarded to Florida and New Hampshire. With a proper 290 seat Vinton apportionment in 1872 Hayes would have lost the electoral vote to Tilden 184-183. If an enlarged Virginia rather than Vermont received the 290th seat, the electoral vote would have been 185-182 in favor of Tilden.

106 The election would have gone to the House of Representatives if the electoral vote had been tied. One distinguished commentator has written "The Democrats controlled the House, and surely they would elect [Tilden]." William H. Rehnquist, Centennial Crisis: The Disputed Election of 1876 116 (Random House 2004).

Table 9. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 292 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
New York	34	75,170	289	***Virginia***	***10***	***78,485***
Louisiana	6	74,250	290	New York	34	75,170
Vermont	***3***	***69,485***	291	Louisiana	6	74,250
Illinois	20	59,764	292	***Vermont***	***3***	***69,485***
New Hampshire	***2***	***57,234***	293	Illinois	19	59,764
Florida	***1***	***57,215***	294	***New Hampshire***	***2***	***57,234***
Ohio	20	54,600	295	***Florida***	***1***	***57,215***
South Carolina	5	52,941	296	Ohio	20	54,600
West Virginia	3	50,415	297	South Carolina	5	52,941
Virginia	***9***	***50,366***	298	Minnesota	3	48,107

Table 10. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 293 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Louisiana	6	76,480	290	***Virginia***	***10***	***82,499***
Vermont	***3***	***70,377***	291	Louisiana	6	76,480
Illinois	20	68,238	292	***Vermont***	***3***	***70,377***
Ohio	21	63,520	293	Illinois	20	68,238
New Hampshire	***2***	***58,126***	294	Ohio	20	63,520
Florida	***1***	***57,661***	295	***New Hampshire***	***2***	***58,126***
South Carolina	5	55,171	296	***Florida***	***1***	***57,661***
Virginia	***9***	***54,380***	297	South Carolina	5	55,171

A proper 291 seat Vinton-apportionment awards the 291st seat to Vermont. That would result in a 185-183 Tilden victory with an enlarged Virginia. Keeping New Hampshire whole by augmenting this apportionment by three seats would have resulted in a 296 seat House in 1873 and a 297 seat House following Colorado's admission in 1876. It would have added two electoral votes to the Hayes column *and one to the Tilden column* for New York, resulting in a 186-185 Tilden victory.

A proper 292 seat Vinton-apportionment awards New York an additional seat, with Vermont getting the 292nd seat. That would result in a 186-183 Tilden victory with an enlarged Virginia. Keeping New Hampshire whole by augmenting this apportionment by two seats would have resulted in a 296 seat House in 1873 and a 297 seat House following Colorado's admission in 1876. Once again, it would have added two electoral votes to the Hayes column and one to the Tilden column resulting in a 186-185 Tilden victory. Even adding a seat for Florida is of no avail to Hayes since that would result in a 186-186 electoral vote tie.

Table 11. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 294 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Rhode Island	2	87,708	289	***Virginia***	***10***	***86,477***
Louisiana	6	78,690	290	Louisiana	6	78,690
Illinois	20	76,636	291	Illinois	20	76,636
Ohio	21	72,360	292	Ohio	21	72,360
Vermont	***3***	***71,261***	293	***Vermont***	***3***	***71,261***
New Hampshire	***3***	***59,010***	294	***New Hampshire***	***2***	***59,010***
Virginia	***9***	***58,358***	295	***Florida***	***1***	***58,103***
Florida	***1***	***58,103***	296	South Carolina	5	57,381

Table 12. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 295 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Rhode Island	2	88,148	289	***Virginia***	***10***	***90,437***
Illinois	20	84,996	290	Rhode Island	2	88,148
Ohio	21	81,160	291	Illinois	20	84,996
Louisiana	6	80,890	292	Ohio	21	81,160
Vermont	***3***	***72,141***	293	Louisiana	6	80,890
Virginia	***10***	***62,318***	294	***Vermont***	***3***	***72,141***
New Hampshire	***3***	***59,890***	295	***New Hampshire***	***3***	***59,890***
South Carolina	5	59,581	296	South Carolina	5	59,581
Florida	***1***	***58,543***	297	***Florida***	***1***	***58,543***

Illinois receives the 293rd and last seat in a proper 293 seat Vinton-apportionment with an enlarged Virginia. That adds an electoral vote for Hayes, but still leaves Tilden a 186-184 winner. Preserving New Hampshire's representation adds an additional Representative for Hayes's home state of Ohio but leaves Florida unaugmented. This addition results in another 186-186 electoral vote tie. Thus, Hayes wins the Electoral College only if the Forty-Second Congress looks benevolently on Florida and apportions it an additional Representative.

With an enlarged Virginia a proper 294 seat apportionment boosts the outcome for Ohio but not New Hampshire. Without augmentation, Tilden wins the electoral vote by 186-185. Only by adding seats for New Hampshire *and Florida* would the Forty-Second Congress have given Hayes a 187-186 vote margin in the Electoral College. If they had merely augmented this apportionment to preserve New Hampshire's representation, the result would have been a tie at 186-186.

A proper 295 seat apportionment finally keeps New Hampshire's representation whole with an enlarged Virginia. However, that results in a 186-186 tie in the Electoral College. Only a Forty-Second Congress concerned

Table 13. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 296 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Illinois	20	93,280	6	***Virginia***	***10***	***94,361***
Ohio	21	89,880	7	Illinois	20	93,280
Rhode Island	2	88,584	8	Ohio	21	89,880
Louisiana	6	83,070	9	Rhode Island	2	88,584
Vermont	***3***	***73,013***	10	Louisiana	6	83,070
Virginia	***10***	***66,242***	11	***Vermont***	***3***	***73,013***
South Carolina	6	61,761	12	South Carolina	6	61,761
New Hampshire	***3***	***60,762***	13	***New Hampshire***	***3***	***60,762***
Florida	***1***	***58,979***	14	***Florida***	***1***	***58,979***

Table 14. Impact of Shifting Berkeley and Jefferson Counties on Proper Vinton Apportionment 297 Seat House following 1870 Census

Actual, Counties Unshifted			Seat	Changed, Counties Shifted		
State	Seats	Remainder		State	Seats	Remainder
Rhode Island	2	89,018	8	***Virginia***	***10***	***98,267***
Louisiana	6	85,240	9	Rhode Island	2	89,018
Vermont	***3***	***73,881***	10	Louisiana	6	85,240
Virginia	***10***	***70,148***	11	***Vermont***	***3***	***73,881***
South Carolina	6	63,931	12	South Carolina	6	63,931
New Hampshire	***3***	***61,630***	13	***New Hampshire***	***3***	***61,630***
Florida	***2***	***59,413***	14	***Florida***	***2***	***59,413***

with the prospects of Florida could have given the victory to Hayes. In this situation, Hayes wins by a margin of 188-186 because South Carolina, which voted for Hayes, would stand ahead of Florida in the remainder rankings.

With a 297 seat proper Vinton-apportionment with an enlarged Virginia, South Carolina legitimately receives a sixth seat. This is the smallest size House generated by a proper Vinton apportionment resulting in a Hayes victory, by 187-186, in 1876. Adding another seat for Florida makes the electoral vote 188-186 Hayes.

If the Republican leadership in the Forty-Second Congress had been concerned to augment Florida's representation in the House they would have needed to expand the size of the House to 297 seats. That would have resulted in a 188-186 Hayes victory in the Electoral College.

However, the Forty-Second Congress was concerned about New Hampshire's representation, not Florida's representation. Table 15 presents the range of outcomes for the 1876 election with an enlarged Virginia and Congress accommodating New Hampshire but not Florida in the 1872 apportionment.

Table 15. Likely Electoral Vote Outcomes in 1876, Berkeley and Jefferson Counties Shifted to Virginia – New Hampshire, not Florida a Strategic Consideration in 1872 Apportionment

House Size, 1876 (including Colorado)	Vinton Basis (1872)	Augmentation (1872)	Hayes Electoral Votes	Tilden Electoral Votes	Augmented by
294	290	3	185	185	Vermont, Florida, New Hampshire
295	291	3	185	186	New York, Florida, New Hampshire
295	292	2	185	186	Illinois, New Hampshire
296	293	2	186	186	Ohio, New Hampshire
296	294	1	186	186	New Hampshire
296	295	0	186	186	None

Table 16. Best Case Electoral Vote Outcomes for Hayes in 1876, Berkeley and Jefferson Counties Shifted to Virginia – New Hampshire, and Florida Strategic Considerations in 1872 Apportionment

House Size, 1876 (including Colorado)	Vinton Basis (1872)	Augmentation (1872)	Hayes Electoral Votes	Tilden Electoral Votes	Augmented by
294	290	3	185	185	Vermont, Florida, New Hampshire
295	291	3	185	186	New York, Florida, New Hampshire
296	292	3	186	186	Illinois, New Hampshire, Florida
297	293	3	187	186	Ohio, New Hampshire, Florida
297	294	2	187	186	New Hampshire, Florida
298	295	2	188	186	South Carolina, Florida
298	296	1	188	186	Florida
298	297	0	188	186	None

(The column labeled "augmented by" lists the states receiving an additional representative beyond the proper Vinton basis in the order of their remainder rank.)

If Florida's representation had been a concern, the Forty-Second Congress would have needed to increase the size of the House to at least 296 (with a Vinton basis of 293 augmented by three) to project a Hayes victory in 1876. As events actually unfolded in 1872, the Congress that could have legitimately preserved New Hampshire's representation by increasing the size of the House to 294 seats instead chose to limit the growth to only 292 seats (with a Vinton basis of 290 augmented by two).

If the Supreme Court had decided *Virginia v. West Virginia* differently, the Forty-Second Congress would not have increased the size of the House to 296 seats. Without the increase, Samuel Tilden, not Rutherford B. Hayes, would have been elected the nineteenth President of the United States.

Appendices

Table 17. Gun Control Legislation Enacted by Virginia Legislature in 2020

Chap.	Bill	Description
191	SB268	Retail Sales and Use Tax; exemption for certain gun safes.
390	HB264	Concealed handgun permits; demonstration of competence, effective date.
426	HB160	License plates, special; bearing the legend STOP GUN VIOLENCE, revenue-sharing provi...
507	HB888	Retail Sales and Use Tax; exemption for certain gun safes.
818	SB248	Virginia Gun Violence Intervention and Prevention Fund; created.
828	SB543	Firearms shows; mandatory background check.
887	HB674	Firearms; removal from persons posing substantial risk of injury to himself, etc., pe...
888	SB240	Firearms; removal from persons posing substantial risk of injury to himself, etc., pe...
910	HB600	Family day homes, licensed, etc.; storage of unloaded firearms in a locked container,...
911	SB593	Family day homes, licensed, etc.; storage of unloaded firearms in a locked container,...
991	HB812	Handguns; limitation on purchases, penalty.
992	SB69	Handguns; limitation on purchases, penalty.
1037	HB1080	Firearms or other weapons; unauthorized to possess on school property.
1111	HB2	Firearm transfers; criminal history record information checks, penalty.
1112	SB70	Firearm transfers; criminal history record information check, penalty.
1129	HB1499	Virginia Gun Violence Intervention and Prevention Fund; created.
1130	SB263	Concealed handgun permits; demonstration of competence, effective date.
1173	SB436	Virginia Voluntary Do Not Sell Firearms List; established, penalty.
1175	SB684	Firearms; mental health as disqualifier for possession, etc.
1205	HB421	Firearms, ammunition, etc.; control by localities by governing possession, etc., with...
1221	HB1004	Protective orders; possession of firearms, surrender or transfer of firearms, penalty...
1247	SB35	Firearms, ammunition, etc.; control by localities by governing possession, etc., with...
1249	SB71	Firearms; possession on school property.
1260	SB479	Protective orders; possession of firearms, surrender or transfer of firearms, penalty...

Table 18. Gun Control Legislation Enacted by Virginia Legislature in 2021

Chap.	Bill	Description
31	HB2128	Firearms, certain; sale, etc., criminal history record information check delay increase
85	HB2310	Concealed handgun permits; demonstration of competence.
432	HB2298	Muzzleloading rifle and shotgun; clarifies definitions.
439	HB1909	School board building or property, certain; establishment of gun-free zone permitted.
459	HB2081	Polling places; prohibited activities, unlawful possession of a firearm, penalty.
527	SB1381	Firearm; carrying within Capitol Square and the surrounding area, state-owned bldgs.
548	HB2295	Firearm; carrying within Capitol Square and the surrounding area, state-owned bldgs.
555	HB1992	Firearms; purchase, etc., following conviction for assault and battery of a family member

Appendix A. Gun Control Legislation Enacted by the Virginia Legislature in 2020 and 2021

Table 17 lists all bills enacted into law by the Virginia legislature in 2020 containing one of the following keywords: gun, firearm, or ammunition.

Table 18 lists all bills enacted into law by the Virginia legislature in 2021 containing one of the following keywords: gun, firearm, or ammunition.

Appendix B. VEXIT 2020 and Virginia's 2021 Gubernatorial Election

VEXIT 2020 has run its course. The Wayback Machine at archive.org last copied the home page of www.vexit2020.org on December 3, 2020.[107] The greatest beneficiary of VEXIT's failure may well be none other than Glenn Youngkin, who was elected governor of Virginia on November 2, 2021, with a statewide margin of 63,688.[108]

The VEXIT movement never quite jelled so we can't be sure exactly which counties (and independent cities) might have left Virginia for West Virginia. But let's suppose they were the thirteen counties on the West Virginia border (except for Loudon) plus the independent cities they enclose. These counties (and independent cities) gave Youngkin a margin of 88,032. If, the VEXITeers in western Virginia had managed to succeed in their efforts to shift the Virginia-West Virginia boundary eastward in time for this election, they would have denied Youngkin the governorship.

Moreover, with all eleven House of Delegates districts bordering the West Virginia line electing Republicans, including a flipped seat in the Twelfth District, a successful VEXIT would have almost certainly guaranteed the Democratic Party a majority in the next House of Delegates.

Had Democrats retained control of the Governorship and the House of Delegates, they would have undoubtedly continued to enact policies the VEXITeers abhor. Instead, Youngkin's victory (or control of the House of Delegates) will likely put a stop to what the VEXITeers saw as objectionable policy shifts in the Old Dominion in 2020 and 2021.

The only reason the VEXIT movement failed to shift control of the Virginia State Senate is that that body was not on the ballot in 2021. It will be in 2023 when reestablishment of a Republican majority will once again depend on a solid Republican showing in the seven districts along the West Virginia line. If that happens–and Republicans gain control of both chambers of the legislature and the governor's office–VEXITeers can hope to see their policy preferences enacted.

There is a deep lesson to be learned here. If VEXIT had succeeded prior to this election it would have made the electorates in both Virginia and West Virginia more homogeneous: the former more liberal the latter more conservative. A successful VEXIT might well have secured the future of liberal policies in the Old Dominion. Having failed at VEXIT its proponents have stopped, and in 2023 may reverse, what they consider to be the inappropriate radicalization

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107 VEXIT 2020, Wayback Machine, https://web.archive.org/web/20201203115612/https://www.vexit2020.org/ (last visited November 10, 2021).

108 All 2021 Virginia election data from the Virginia Department of Elections website https://results.elections.virginia.gov/vaelections/2021 November General/Site/Governor.html (last visited March 23, 2022).

of the Old Dominion for many more Virginians than just the VEXITeers themselves.[109] Of course, this may be a short-term accomplishment. In hotly contested states like Virginia partisan fortunes ebb and flow. But isn't that what democracy is all about?

Appendix C. Interstate Apportionment Impact of Shifting Berkeley and Jefferson Counties From West Virginia to Virginia – 1880 to 2020

Part VII explained how shifting Berkeley and Jefferson counties from West Virginia back to Virginia would have impacted the interstate apportionment of the House based on the 1870 census. Table 19 presents the results of shifting Berkeley and Jefferson counties from West Virginia back to Virginia for the apportionments based on the 1880 to 2020 censuses.[110]

Based on the actual 2020 census, West Virginia lost its third seat while Virginia's representation in the House remained stable at eleven seats. Virginia was in line for the 442nd seat in a House based on the actual 2020 census. If Berkeley and Jefferson counties were shifted from West Virginia to Virginia, the Old Dominion would have a better claim to a twelfth seat than Minnesota to an eighth seat. Thus, shifting the two counties would have impacted a state other than Virginia's apportionment based on the 2020 census.

Ten years earlier, when Virginia received eleven seats and West Virginia three in the apportionment based on the actual 2010 census data, shifting the two counties would have shifted a seat from West Virginia to Virginia. Shifting the two counties from West Virginia to Virginia would have impacted on one other apportionment, the one based on the 1960 census. In the actual apportionment Virginia received ten seats and West Virginia five. Shifting the two counties out of West Virginia would have reduced West Virginia's representation by one. Virginia would not have been the beneficiary; it would have been Massachusetts.

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109 In late October, 2021 several Republican legislators from western Maryland suggested that their state's three westernmost counties leave Maryland for West Virginia. *See* Pamela Wood and Bryn Stole, *Western Maryland lawmakers ask West Virginia officials to 'consider adding us' to their state*, Balt. Sun, October 21, 2021, available at https://www.baltimoresun.com/politics/bs-md-pol-western-md-wv-20211021-iyugtyt72rfzjlkzt4jigs2wky-story.html (last visited November 10, 2021). Perhaps these *MEXITeer*s will learn a lesson from the governor's race in Virginia in 2021. Perhaps not. Virginia gave Joe Biden a ten percent margin. Biden won Maryland by 33 percent.

110 Spreadsheets on file with the author. Note that there was no apportionment based on the 1920 census. *See* Charles W. Eagles, Democracy Delayed: Congressional Reapportionment and the Urban-Rural Conflict in the 1920s (Georgia 1990). Congress employed Vinton's method for the apportionments based on the censuses of 1880 and 1890. It employed Webster's Method of Moieties for the apportionment based on the 1900 census. None of the enactments mention the method used. *See* 22 Stat. 5 (1882); 26 Stat. 735 (1891); 31 Stat. 733 (1901). Manuscript with analyses of methods used on file with the author. Webster's Method of Moieties begins with the choice of a ratio of representation, divides it into each state's apportionment basis, and rounds at the moiety, while making sure that each state has at least one representative. The Apportionment Act of 1941 changed the method of interstate apportionment from Willcox's Method of Major Fractions, which had been used for the apportionments based on the censuses of 1910 and 1930, to Huntington's Method of Equal Proportions. *See* 55 Stat. 761, now codified as 2 U.S.C. § 2a(a). For a description of these methods *see* Laurence F. Schmeckebier, Congressional Apportionment 13–32 (Brookings 1941) and Balinski and Young, *supra* note 122, at 46–59. The analysis presented here supposes no change in the size of the House chosen by Congress. This is a very reasonable assumption since Congress set the size of the House at 435 in the Census Act of 1929, before the shift would have had an impact in the interstate apportionment of the House. *See* § 22, 46 Stat. 21, 26, now codified as 2 U.S.C. § 2a(a).

Table 19. Impact of Shifting Berkeley and Jefferson Counties from West Virginia Back to Virginia – 1880 to 2020

Year	Population					Seats Apportioned			
	Virginia	West Virginia	Berkeley	Jefferson	Berk. + Jeff.	Actual		Revised	
						VA	WV	VA	WV
1880	1,512,806	618,443	11,380	15,005	26,385	10	4	10	4
1890	1,655,980	762,794	18,702	15,553	34,255	10	4	10	4
1900	1,854,184	958,800	19,469	15,935	35,404	10	5	10	5
1910	2,061,612	1,221,119	21,999	15,889	37,888	10	6	10	6
1920	2,309,187	1,463,701	24,554	15,729	40,283	10	6	10	6
1930	2,421,829	1,729,199	28,030	15,780	43,810	9	6	9	6
1940	2,677,773	1,901,974	29,016	16,762	45,778	9	6	9	6
1950	3,318,680	2,005,552	30,359	17,184	47,543	10	6	10	6
1960	***3,966,949***	***1,860,421***	***33,791***	***18,665***	***52,456***	***10***	***5***	***10***	***4***
1970	4,690,742	1,763,331	36,356	21,280	57,636	10	4	10	4
1980	5,346,279	1,949,644	46,775	30,302	77,077	10	4	10	4
1990	6,216,568	1,801,625	59,253	35,926	95,179	11	3	11	3
2000	7,100,702	1,813,077	75,905	42,190	118,095	11	3	11	3
2010	***8,037,736***	***1,859,815***	***104,169***	***53,498***	***157,667***	***11***	***3***	***12***	***2***
2020	***8,654,542***	***1,795,045***	***119,171***	***57,146***	***176,317***	***11***	***2***	***12***	***2***

Appendix D. A Brief Description of Vinton's Method

The Vinton method of apportionment is named for Samuel Vinton, who incorporated the method into the 1850 Census Act.[111]

1. It takes the total number of House seats as its single input parameter.
2. The nation's total apportionment basis is divided by the total number of House seats, which becomes the apportionment's ratio of representation (after rounding down).
3. After that, each state's apportionment population is divided by the ratio of representation with any remaining remainders ignored, with the proviso that each state receives the constitutional minimum of at least one seat.
4. If the total number of seats assigned falls *N* short of the total number of House seats initially chosen, assign the additional *N* seats to the *N* states with the largest remainders.

In an *augmented* Vinton-apportionment, seats are assigned *beyond* the total number of House seats initially chosen.[112]

111 § 25, 9 Stat. 428, 432–33. For additional explanations in the literature *see* Schmeckebier, *supra* note 500, at 74–75 (Brookings 1941) and Balinski and Young, *supra* note 122, at 37–45.

112 Spreadsheet on file with the author.

The First Apportionment Act of 1872 implemented a regular Vinton-apportionment.

1. It set the target House size to 283 seats.
2. Divided the nation's total apportionment basis is divided by 283 (and rounded down) to determine the ratio of representation.
3. Divided the ratio of representation into each state's apportionment basis and rounded down, while guaranteeing that each state had at least one representative. That assigned a total of 266 seats, seventeen short of the target of 283 seats.
4. Assigned these seventeen seats to the seventeen states with the largest remainders.

The second Apportionment Act of 1872 implemented an augmented Vinton Apportionment.

1. It set the target House size to 290 seats.
2. Divided the nation's total apportionment basis is divided by 290 (and rounded down) to determine the ratio of representation.
3. Divided the ratio of representation into each state's apportionment basis and rounded down, while guaranteeing that each state had at least one representative. That assigned a total of 278 seats, twelve short of the target of 290 seats.
4. Assigned these twelve seats to the twelve states with the largest remainders.
5. Assigned *two more* seats to Florida and New Hampshire, the two states with the next largest remainders, *for a total of 292.*