Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment

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Introduction

Any list of the most significant dates in American constitutional history must include April 28, 1866. On that day, a majority of the members of the Joint Committee on Reconstruction, which was considering the measure that was to become the Fourteenth Amendment, voted to replace a provision that by its terms was focused solely on racial discrimination with the current language of section one, which more generally bars states from abridging the "privileges or immunities of citizens of the United States" or depriving any person of "life, liberty or property without due process of law" or "equal protection of the laws."[1]

To illustrate the import of this decision, one need look no further than the ongoing dispute over the constitutionality of state laws that discriminate on the basis of sexual orientation. Thus, in 2003, in *Lawrence v. Texas*,[2] the Court overruled its 1986 decision in *Bowers v. Hardwick*[3] and relied on the Due Process Clause in concluding that the state of Texas could not constitutionally bar people from engaging in sexual activity with others of the same gender. Subsequently, relying on both due process and equal protection arguments, a variety of judges and commentators have argued that the Fourteenth Amendment requires state governments to give legal recognition to

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1. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39th Cong., 1865-1867 106–07 (1914); U.S. CONST. amend. XIV, § 1.

2. Lawrence v. Texas, 539 U.S. 558 (2003).

3. Bowers v. Hardwick, 478 U.S. 186 (1986).

marriages between members of the same gender.[4] Obviously, if by their terms, the strictures of section one were limited to racial discrimination, the Court would have had no plausible basis for its decision in *Lawrence* and constitutional challenges to nonracial limitations on the ability to enter into legally recognized marriages would be equally unavailing. The decision to adopt race-neutral language has had equally dramatic implications for the Court's jurisprudence on issues such as abortion,[5] gender discrimination,[6] reapportionment,[7] criminal procedure,[8] and free speech.[9]

The action of the Joint Committee was in many respects a personal triumph for Republican Representative John A. Bingham of Ohio, who was a prominent member of the committee. Bingham—whom Justice Hugo L. Black famously described as the "Madison of the first section of the Fourteenth Amendment"[10]—was the author of the language that the committee adopted on April 28th and had championed the concept of a race-neutral constitutional amendment throughout the committee's long and tortuous consideration of a variety of civil rights proposals. Thus, not surprisingly, legal scholars have devoted considerable time and effort to the task of parsing Bingham's views on the meaning of the language that was adopted.[11]

But at the same time, an undue emphasis on Bingham's views can easily distort our view of the dynamic that ultimately produced the final version of section one. For all of his passion, the choice of the final wording of section one did not rest with Bingham alone. Instead, no formulation of either section one in isolation or the Fourteenth Amendment as a whole could be adopted without the support of the other mainstream Republicans who served with Bingham on the Joint Committee. Moreover, only three days before, a majority of those Republicans had voted to remove Bingham's

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4. *E.g.*, Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Daniel O. Conkle, *Evolving Values, Animus, and Same Sex Marriage*, 89 IND. L.J. 27 (2014); Heather Gerken, *Larry and Lawrence*, 20 TULSA L. REV. 843 (2006).

5. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

6. *E.g.*, United States v. Virginia, 518 U.S. 515 (1996).

7. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

8. *E.g.*, Miranda v. Arizona, 384 U.S. 486 (1966).

9. *E.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

10. Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

11. *E.g.*, GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 108 (2013); Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003).

language from the Fourteenth Amendment.[12] In addition, they had *unanimously* voted to reject Bingham's attempt to have his proposal reported as a separate constitutional amendment.[13] Bingham was ultimately successful in having his race-neutral proposal included in the Fourteenth Amendment only because a number of those who had opposed him on April 25th supported his effort to change the language of section one on April 28th.[14] But despite the enormous historical significance of the change in language, the committee's motivation for making the change has remained something of a mystery.[15]

Seeking to unravel the mystery, this article traces the development of the Fourteenth Amendment and discuss the forces that ultimately led to the decision to adopt the current language of section one. Unlike studies which analyze the legislative history of section one in isolation or relate the drafting process to the dispute over the constitutionality the Civil Rights Act of 1866,[16] this article seeks to place the evolution of section one in the larger context of the political dispute over Reconstruction policy more generally and will argue that the decision to embrace the race-neutral formulation was driven primarily by a desire to remove explicit references to race from the Fourteenth Amendment as a whole. The article concludes by discussing the implications of this conclusion for efforts to divine the original meaning of section one.

I. The Problem of Reconstruction[17]

The passage of the Fourteenth Amendment was a byproduct of the struggle over reconstruction that dominated the proceedings of the first session of the 39th Congress. Although Congress had been grappling with the problem of reconstruction for some time prior to

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12. KENDRICK, supra note 1, at 98–99.

13. *Id.* at 99.

14. *Compare id.* at 106-107 *with id.* at 98–99.

15. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 57 (1988) (noting possible explanations).

16. *See, e.g.*, KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1997).

17. For more detailed discussions of the problem of reconstruction as it was perceived by the members of the 39th Congress, see, e.g., MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974); JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 3–37 (1958); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960). The discussion in this section is taken primarily from these works.

the end of the Civil War,[18] the issue took on new urgency after the surrender of Robert E. Lee at Appomattox on April 9, 1865. With the collapse of the Confederate war effort, it became clear that the eleven Southern states whose governments had sought to leave the Union and form a separate national entity would remain part of the United States in some form. However, the representatives of the victorious Northern states were deeply divided over the question of when and under what circumstances the ex-Confederate states should be allowed to reacquire the status of equal partners in the Union.

For a significant number of Northerners, the resolution of this issue posed no difficulties. All parties to the controversy understood that white Southerners were natural political allies of the Northern Democrats, many of whom had opposed the prosecution of the Civil War itself. Thus, not surprisingly, congressional Democrats consistently argued that the Southern states should immediately resume control of their local affairs and also be allowed to select members of both Houses of Congress. In theoretical terms, Democrats observed that the Civil War had been prosecuted on the theory that the ex-Confederate states had no right to leave the Union. Thus, Democrats reasoned, whatever actions individual Southerners may have taken, the Southern states as corporate entities must be viewed as having remained in the Union, with the ability to resume active participation as full partners whenever they so chose.

But whatever the merits of this position in the abstract, in practical terms, congressional Democrats were in no position to enact their views into law. Republicans held overwhelming majorities in both the Senate and the House of Representatives when the Thirty-Ninth Congress convened in December 1865, and few Republicans members of Congress were prepared to allow the ex-Confederate states to completely regain their prewar status without preconditions. In general terms, these preconditions included repudiation of the Confederate war debt, security for the fundamental rights of the ex-slaves who had been freed by the Thirteenth Amendment, and some adjustment in the political structure. But within these parameters, Republicans differed sharply among themselves on the precise nature of the measures that were necessary.

The situation was further complicated by uncertainty about the position of President Andrew Johnson of Tennessee. Johnson, an erstwhile Jacksonian Democrat, had been chosen as the Republican

18. *See* HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR (1969) (providing a detailed account of the early disputes over reconstruction policy).

Vice Presidential candidate in 1864 in an effort to provide political balance to the ticket and had succeeded to the presidency after the assassination of Abraham Lincoln. While Johnson's early actions on Reconstruction suggested that he was in favor of quickly restoring the Southern states to their pre-war status, early in the session many Republicans remained hopeful that they could reach some accommodation with the President.

Against this backdrop of uncertainty, when the first session of the 39th Congress convened on December 4, 1865, the representatives that had been elected from the ex-Confederate states were present in the chamber. However, by prearrangement, Edward McPherson, the Clerk of the House, dealt with their presence by simply omitting their names when he called the roll.[19] Thus, Republicans remained firmly in control of both houses of Congress.

The House then turned to the more general issue of reconstruction. The day before, acting on the recommendation of a committee charged with considering the question, the House Republican Caucus had endorsed a resolution to establish a joint committee consisting of nine members of the House and six members of the Senate that would be charged with the duty to "inquire into the condition of the States which formed the so-called Confederate States of America and report whether they or any of them are entitled to be represented in [Congress.]"[20] After some wrangling with the Senate over the precise wording of the resolution, it was adopted by the Senate on December 12, 1865.[21] The next day, the House concurred in the Senate amendments, thereby setting the stage for the formation of the Joint Committee on Reconstruction.[22]

The members of Congress who were chosen to serve on the Joint Committee brought with them a wide variety of different perspectives on the issues related to reconstruction.[23] The committee was chaired by Republican Senator William Pitt Fessenden of Maine, a moderate whom one noted scholar has described as "Mr. Republican."[24] In addition, the Republican delegation to the committee included not only Senator Jacob M. Howard of Michigan and Representatives Thaddeus Stevens of Pennsylvania and George S. Boutwell of

19. CONG. GLOBE, 39th Cong., 1st Sess. 3•4 (1865).

20. *Id.* at 6.

21. *Id.* at 30.

22. *Id.* at 30, 46.

23. Short biographical sketches of the Joint Committee members can be found in JAMES, *supra* note 17, at 41–45.

24. MCKITRICK, *supra* note 17, at 269.

Massachusetts, all of whom were generally regarded as Radicals, but also Senator Ira Harris of New York and Representatives Henry T. Blow of Missouri and Roscoe Conkling of New York, who represented the more conservative elements of the Republican mainstream. The Republican Party was also represented by a number of members whose views defied simple characterization, including Senators James W. Grimes of Iowa and George H. Williams of Oregon and Representatives John A. Bingham of Ohio, Justin Morrill of Vermont and Elihu Washburne of Illinois. Conversely, Democratic members of the Joint Committee included Representatives Henry Grider of Kentucky and Andrew J. Rogers of New Jersey, both of whom were orthodox Democrats, as well as Senator Reverdy Johnson of Maryland, who was slightly more flexible than his compatriots from the House of Representatives. Ultimately, the interaction among the views of these widely disparate individuals played a major role in producing the basic structure of the Fourteenth Amendment.

II. Early Actions

The Joint Committee on Reconstruction convened for the first time on January 9, 1866. In less than a week, a set of subcommittees had been created to take evidence about the conditions in the Southern states.[25] But even before these subcommittees had been established, the full committee had begun consideration of a number of proposed constitutional amendments whose potential impact extended throughout the nation.

In the abstract, the mandate of the Joint Committee might not have seemed to be broad enough to cover the proposal of significant constitutional amendments at all. By the terms of the resolution that brought it into existence, the committee was not directed to consider changes in the basic structure of the government of the nation as a whole, but simply to evaluate the situation in the ex-Confederate states to determine if Congress should admit the representatives that had been selected from those states. Thus, one could plausibly have argued that the Judiciary Committees of the House and Senate were the appropriate bodies for the initial consideration of constitutional amendments. And indeed, less than a week after the formation of the Joint Committee, the House Judiciary Committee had reported a proposed amendment that would have barred the payment of the

25. KENDRICK, *supra* note 1, at 48–49.

Confederate war debt, and that proposal passed the full House with the necessary two-thirds majority on December 19, 1865.[26]

But in fact, the Republicans on the Joint Committee viewed constitutional change as an indispensable element of the reconstruction process. In particular, it quickly became clear that Republicans were firmly committed to the idea that the Constitution should be amended to either mandate the extension of the right to vote to the ex-slaves or to change the basis of representation in the House of Representatives in order to reduce the representation of states that did not allow African-Americans to vote. From a Republican perspective, such changes were needed to address an issue that had arisen because of the abolition of slavery.

Prior to the Civil War, antislavery Northerners had often complained bitterly that the three-fifths clause of Article I, section two had unfairly inflated Southern representation in the House of Representatives and thereby contributed to the domination of the federal government by what was sometimes described as the slave power.[27] However, in this context, the ratification of the Thirteenth Amendment created a quite different problem for Republicans. Once the erstwhile slaves became free, the Constitution of 1789 required that they be counted fully in the basis of representation. But at the same time, none of the ex-Confederate states allowed free African-Americans to vote. Thus, unless the some further action was taken, freeing the slaves would have had the ironic effect of substantially increasing the number of representatives chosen by white Southerners, and thereby increasing the influence of the very group of people who had led the secession movement. As one Republican congressman saw it, if the Constitution remained unchanged, the reward of treason will be an increased representation in the House, an increased influence in the Government of the traitors who have sworn and striven to destroy it.[28] In addition, Republicans feared that enhanced Southern representation would make it far more likely that a combination of representatives of the ex-Confederate states and Northern Democrats would be strong enough to control the national government.[29]

Many Republicans believed that the best response to this situation was to require the enfranchisement of the newly freed

26. CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865).

27. *See, e.g.*, LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860 (2000).

28. CONG. GLOBE, 39th Cong., 1st Sess. 410 (1866) (remarks of Rep. Cook).

29. JAMES, *supra* note 17, at 22.

slaves. To be sure, the representation of the Southern states in the House of Representatives would still be increased. However, if Southern African-Americans were granted the right to vote, Republicans hoped that they would exercise their political power to ensure that at least some of the representatives from the South would support the Republican cause. In addition, Republicans argued that enfranchisement of the ex-slaves was necessary in order to provide them with the political power that was necessary to protect themselves from hostile state legislation.[30]

Given these considerations, it should not be surprising that there was widespread support for the concept of African-American suffrage within the Republican Party. But at the same time, a number of recent events had also demonstrated that advocacy of African-American suffrage carried with it substantial political risks. During the fall of 1865, supporters of African-American suffrage suffered a number of important defeats in local elections in Northern states. The most significant setback came in Connecticut, the last New England state to deny African-Americans the right to vote, where a measure that would have removed the racial qualification was defeated in a referendum conducted in October 1865.[31] Thus it appeared that the aggressive promotion of African-American suffrage had the potential to undermine the political fortunes of the Republican Party in localities where the electorate was closely-divided between Republicans and Democrats.

On the other hand, a measure that specifically targeted the basis of representation held out the possibility of advancing Republican policy objectives while at the same time avoiding the political dangers associated with the outright endorsement of African-American suffrage. Republicans hoped that the desire to avoid of a reduction of representation in the House of Representatives would induce Southern state governments to allow the ex-slaves to vote. But in the event that the state governments continued to restrict the right to vote to white citizens, Republicans could at least take comfort in the diminution of the political power of the ex-Confederate states in the House itself.

By contrast, initially at least, Republicans were less enamored by the idea that the Constitution should be amended to explicitly protect the freedmen from racial discrimination more generally. To be sure, mainstream Republicans were united in their belief that the federal

30. *Id.* at 11–15; MCKITRICK, *supra* note 17, at 55–59.

31. JAMES, *supra* note 17, at 16–17.

government should take *some* action to ensure that the ex-slaves were not denied basic civil rights. But at first, most Republican committee members apparently believed that the necessary protection was best provided by the enactment of new federal statutes. And indeed, two such statutes were introduced on January 5, 1866 by Republican Senator Lyman Trumbull of Illinois, the chairman of the Senate Judiciary Committee.[32]

The priorities of the Republicans on the Joint Committee emerged clearly in the committee's early deliberations. On January 9th—the first day on which the committee engaged in substantive discussions—committee members offered a variety of different proposals to change the basis of representation, and a number of other such proposals were put forward on January 12th. January 12th also saw the introduction of a constitutional amendment that would have banned racial discrimination in voting rights on account of race or color,[33] as well as a motion by Thaddeus Stevens to require more generally that "[a]ll laws, both state and national, shall operate impartially and equally on all persons without regard to race or color."[34] The same day, a subcommittee was appointed to consider all of the proposals for constitutional amendments.[35]

On January 16th, the subcommittee submitted a report calling upon the full committee to choose between two very different measures, both of which specifically referred to race.[36] One of the options presented by the subcommittee was to adopt an amendment that would have banned all racial discrimination in "political or civil rights or privileges."[37] However, with three dissents, the full committee rejected this proposal.[38] More than three months would pass before the committee once again seriously considered the concept of providing an explicit constitutional protection for civil and political rights.

By contrast, committee Republicans pressed forward with the idea of changing the basis of representation in the House of Representatives. They unanimously endorsed a formulation that had been introduced by Roscoe Conkling on January 12th.[39] Under the

32. *Id*. at 78–80.

33. KENDRICK, *supra* note 1, at 44.

34. *Id*. at 46.

35. *Id*. at 46–47.

36. KENDRICK, *supra* note 1, at 50–51.

37. *Id*.

38. *Id.* at 51–52.

39. *Id*. at 53.

Conkling proposal, both direct taxes and representation were to be apportioned among the states based on the "whole number of citizens of the United States in each State" but if a state abridged the right to vote on the basis of "race, color or creed," no member of the excluded group would be included in the basis of representation.[40]

It was against this background that the Joint Committee proposal came to the floor of the House of Representatives on January 22nd, 1866. Predictably, the proposal faced criticism from a number of different perspectives. While House Democrats opposed all changes in the basis of representation,[41] some Republicans continued to press for a measure that would have directly enfranchised African-Americans.[42] Others, such as Republican Representative Robert Schenck of Ohio, argued that rather than being based on population *per se*, the number of representatives to which a state was entitled should be determined by the number of legal voters in the state.[43] Schenck was strenuously opposed by representatives who pointed out that his formulation would disadvantage states that had a relatively high percentage of women in their population,[44] as well as border states such as Missouri, where significant numbers of otherwise eligible voters had been disqualified because they had supported the Confederacy during the Civil War.[45] Ultimately, despite their differences, Republicans in the House united around the proposal that had been reported from the Joint Committee, and that measure passed with the requisite two-thirds majority on January 31, 1866.[46]

While the House was debating the change in the basis of representation, the Joint Committee itself was considering another, unrelated proposal to expand the power of the federal government. Republican Representative John A. Bingham had first proposed such a constitutional amendment on December 6th, 1865,[47] and had described what he saw as the need for the amendment in a speech on the House floor on January 9th, 1866[48] as part of the discussion of the import of Andrew Johnson's State of the Union message. During this

40. *Id*. at 44.

41. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 353, 381–82, 388, 435, 450, 453 (1866).

42. *Id.* at app. 56–58 (remarks of Rep. Julian), 406 (remarks of Rep. Eliot), 407 (remarks of Rep. Pike).

43. *Id.* at 535.

44. *E.g.*, *id*. at 404–05.

45. *Id*. at 535–36.

46. *Id*. at 538.

47. *Id*. at 14.

48. *Id*. at 157–58.

discussion, Bingham argued that states were already required to respect the "privileges and immunities" of American citizens by Article IV, section 2 of the original Constitution, but that prior to the Civil War the Southern states had often ignored this guarantee. In specifying the type of abuses that concerned him, Bingham made no mention of the treatment of slaves or free African-Americans. Instead, asserting that the Southern states had often ignored their obligations to Northern whites, Bingham cited the case of Samuel Hoar, a white citizen of Massachusetts who had been expelled from South Carolina after going there to launch an assault on the state's Negro Seaman's Act.[49] According to Bingham, the problem was that the original Constitution had not armed Congress with the authority to force states to meet their obligations under Article IV. His proposal was designed to remedy this perceived problem by granting Congress the power to "secure to all persons . . . equal protection in the rights of life, liberty and property."[50]

Most Republican members of the Joint Committee apparently shared Bingham's view that the Constitution should be amended to enhance federal authority. On January 16, 1866, the same subcommittee of the Joint Committee that reported the proposal to change the basis of representation also reported a measure designed to expand the authority of Congress to protect individual rights.[51] At the time that the subcommittee made its report, the federal power amendment was not viewed as being in any sense an alternative to a constitutional amendment that explicitly outlawed discrimination against the freedmen on the basis of race. Indeed, the subcommittee recommended that the federal power amendment be adopted even if the committee also reported a constitutional amendment explicitly aimed at racial discrimination.[52] Instead, the subcommittee proposal was clearly designed to give Congress the power to prevent abuses that did not involve racial discrimination as well.

Like the measure that Bingham had discussed in his January 9th speech on the floor of the House of Representatives, the subcommittee formulation also would have armed Congress with the power to guarantee "equal protection in the rights of life, liberty and property." But in addition, the subcommittee formulation would have provided Congress with the power to "secure to all citizens of the United States, in every state, the same political rights and

49. *Id.* at 158.

50. *Id.*

51. KENDRICK, *supra* note 1, at 51.

52. *Id.* at 50.

privileges."[53] If this language had ultimately become a part of the Constitution, such an amendment would have dramatically altered the structure of American federalism. By its terms, the amendment would have vested Congress not only with the authority to protect the fundamental rights of all persons—white or African-American—but also to exercise effective control over the structure of the political process in each state. However, before it was approved by the Joint Committee as a whole, the language of the proposed congressional power amendment had been changed significantly.

The discussion of the federal power amendment began on January 22nd. On that day, after briefly considering and rejecting two proposed changes in the text, committee members voted to have the form of the proposal reconsidered by a new subcommittee.[54] Five days later, this subcommittee issued its report, which proposed that the Joint Committee endorse a constitutional amendment whose wording differed slightly from that which had been reported on January 16th. Rather than empowering Congress to adopt laws securing "*equal* protection in the enjoyment of life, liberty and property," and "the same political rights and privileges," the January 27th formulation would have vested Congress with the authority to guarantee "*full* protection in the enjoyment of life, liberty and property," and also to the citizens of each state "the same immunities and also equal political rights and privileges."[55] Democrat Reverdy Johnson then moved to delete the last clause. However, with only ten members present, the motion was defeated, as Johnson was able to gain the support of only fellow Democrat Henry Grider and Republicans Ira Harris and Roscoe Conkling of New York, while six other Republicans were opposed to the change.[56] But when Thaddeus Stevens moved to report the proposed amendment to the Senate, his motion was defeated, as George Boutwell joined those who had supported Johnson to create a 5-5 tie.[57]

Despite this setback, on February 3rd, Bingham pressed for a far more significant change in the language of the amendment, moving to eliminate all reference to political rights from the proposal. Instead, the February 3rd formulation would have vested Congress with the power to make laws that would be necessary and proper to secure to the citizens of each state "all privileges and immunities of citizens in

53. *Id*. at 51.
54. *Id.* at 55.
55. *Id*. at 56.
56. *Id*. at 57.
57. *Id.*

the several states" and to all persons "equal protection in the rights of life, liberty and property."[58]

As presented in Bingham's motion, each of the two clauses also parenthetically referenced parts of the existing Constitution. The language of Bingham's privileges and immunities clause tracked that of Article IV, section 2, to which he had referred in his January 9th speech. By contrast, although the Fifth Amendment does not discuss the concept of equal protection *per se*, Bingham cited the Due Process Clause as the source of the equal protection language in his proposed amendment. Against this background, by a narrow 7-6 margin with no clear ideological orientation, the committee approved Bingham's motion to substitute his language for that which it had considered on January 27th.[59]

The conservatives who had formed the core of the resistance six days earlier were not mollified by the decision to remove the references to political rights from the proposed constitutional amendment. Once again, Harris and Conkling joined committee Democrats in voting against adopting the proposed amendment. However, George Boutwell now joined all other committee Republicans in supporting the Bingham proposal, and on February 4th, the committee voted 9-5 to report the proposal to both houses of Congress.[60]

However, events soon proved that the misgivings that had led Harris and Conkling to oppose the Bingham amendment in the Joint Committees were shared by a significant number of other Republicans as well. Even before the House began its formal consideration of the proposal, the *Springfield Republican* asserted that it was doubtful that the amendment could gain the necessary two-thirds majority because "the people are not likely to give any such general power to Congress."[61] Events soon proved this assessment to be prescient.

The strength of the opposition became clear during debates on the House floor on February 26th, 27th, and 28th. Although Republican Representative Giles Hotchkiss of New York urged an amendment that would have directly required states to respect fundamental rights,[62] there is no indication that, taken alone, such objections would have been fatal to the prospects of the Joint

58. *Id*. at 61.

59. *Id*.

60. *Id.*

61. SPRINGFIELD REPUBLICAN, Jan. 26, 1866, at 2.

62. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

Committee proposal. For example, Thaddeus Stevens, who had proposed just such an amendment during the Joint Committee deliberations only the month before, also supported the Bingham formulation.

By contrast, complaints about the potential impact of the proposed amendment on the structure of American federalism gained more traction during the debates. Predictably, Democrat Andrew Rogers took the floor to condemn any expansion of federal power.[63] By contrast, Republican foes of the amendment were more selective in their attacks. These Republicans found no fault with the grant of authority to secure the privileges and immunities of citizenship.[64] Instead, their criticisms were aimed specifically at the equal protection component of the Bingham proposal.

Some Republicans contended that the amendment would give Congress the authority to force all states to grants identical protections to life, liberty and property. However, the main Republican critique, delivered by Representative Robert S. Hale of New York took a slightly different tack. Hale asserted that:

> The language [of the proposal] in its grammatical and legal construction . . . is a grant of the fullest and most ample power to Congress to make all laws "necessary and proper to secure to all persons in the several States equal protection in the rights of life, liberty, and property," with the simple proviso that such protection shall be equal. It is not a mere provision that when the States undertake to give protection which is unequal, Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty and property, simply qualified with the condition that it shall be equal legislation.[65]

To illustrate this point, Hale suggested that the committee proposal would arm Congress with the power to override the property rights of married women.

The same basic theme was reflected in all of the Republican denunciations of Bingham's proposal. Even Hotchkiss was uneasy with the potentially broad scope of the equal protection element of

63. *Id.* at app. 133–35.

64. *Id.* at 1064, 1082, 1095.

65. *Id.* at 1063–64.

the Bingham amendment and indicated he favored protecting only a defined list of fundamental rights.[66] Thus, the key issue in the debate was whether the proposal would unduly expand the powers of Congress.

Stevens and Bingham sought to deflect Republican criticisms, arguing that the powers granted to Congress would be far more limited than Hale had suggested.[67] Bingham also emphasized what he saw as the need for his amendment, asserting that the states had defaulted in their obligation to provide protection of the law for rights derived from the Constitution, natural law and state law and declaring that:

> The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their legislatures; they enact their laws for the punishment of crimes against life, liberty or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty or property, the Congress is thereby vested with power to hold them to answer before the bar of the nation courts for the violation of their oaths and of the rights of their fellow-men.[68]

But in addition, Bingham reiterated the point that the powers granted to Congress by the proposed amendment would not be limited to the prevention of racial discrimination. When Hale asserted that "the whole intended practical effect" of the amendment was to protect ex-slaves from being persecuted by state governments, Bingham shot back that "it is proposed as well to protect the [many] loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment."[69]

Ultimately, however, Bingham and Stevens were unable to unite the Republican Party behind the proposed constitutional amendment. The amendment received substantial support from more radical Republicans. However, a significant number of mainstream moderates were apparently persuaded by arguments such as Hale's

66. *Id.* at 1095.
67. *E.g.*, *id*. at 1064 (Stevens), 1076 (Rep. Bingham).
68. *Id*. at 1090.
69. *Id*. at 1065.

and opposed Bingham. Thus, for example, Senator William M. Stewart of Nevada joined Conkling, Hale and Representative Thomas T. Davis of New York in openly criticizing the committee formulation.[70] In order to avoid outright defeat, on February 28th Bingham joined in voting to postpone final consideration of his proposal. Commenting on the result, the *Republican* asserted that "no sane man supposes that the states would ratify such an amendment" and that "the people welcome every indication that Congress discards this policy and the leaders who urge it."[71]

At the same time that the House of Representatives was considering the Bingham amendment, the Senate was discussing the proposal to change the basis of representation. On this issue, the debate over the committee amendment in the Senate featured a recapitulation of many of the same arguments that had been made on the House floor.[72] However, the amendment ultimately met a different fate than in the House, largely because a group of radical Republicans such as Senator Charles Sumner of Massachusetts remained steadfastly committed to the idea that the states should be required to allow African-Americans to vote and refused to support the proposal to simply change the basis of representation. Thus, while a narrow majority of the Senate voted in favor of the proposed constitutional amendment on March 9, supporters fell well short of the two-thirds majority necessary to send the proposal to the states for ratification.[73]

In the wake of the rejection of the Joint Committee resolution, Republicans continued to negotiate among themselves on the formulation of a measure dealing with the issue of the basis of representation. They appeared confident that they could craft a compromise that would attract near-unanimous support from mainstream Republicans in both houses of Congress.[74] But on March 27th, before any such compromise was openly debated in either the House or the Senate, Johnson's veto of the Civil Rights Bill of 1866 intervened and dramatically changed the political context of the debate.

70. *Id.* at 1082 (Rep. Stewart), 1095 (Rep. Conkling) (by implication), 1095 (Rep. Davis).

71. SPRINGFIELD REPUBLICAN, Mar. 2, 1866, at 2.

72. These debates are recapitulated in George David Zuckerman, *A Consideration of The History and Current Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 99–101 (1961).

73. CONG. GLOBE, 39th Cong., 1st Sess. 1289 (1866).

74. N.Y. TIMES, Mar. 13, 1866, at 1.

III. The Dispute Over the Civil Rights Bill of 1866

As already noted, the Civil Rights Bill had been introduced in early January by Republican Senator Lyman Trumbull, the chair of the Senate Judiciary Committee. As initially considered by the Senate, the bill declared that African-Americans were citizens, prohibited racial discrimination in "civil rights or immunities" and also provided a list of specific rights that were to be equally enjoyed by "citizens of every race and color, without regard to any condition of slavery or involuntary servitude." Democrats unanimously opposed the bill, arguing that the Constitution did not arm Congress with the power to pass such a measure into law. However, mainstream Republicans disagreed, citing the Thirteenth Amendment and the naturalization clause[75] as the sources of the necessary authority, and the bill passed the Senate by a wide margin on February 2nd.[76]

Initially, the Civil Rights Bill encountered more difficulty in the House of Representatives as a number of conservative mainstream Republicans including John Bingham joined the Democrats in raising constitutional objections.[77] In response, the supporters of the bill made a number of changes designed to address conservative objections, including the elimination of the reference to the concept of "civil rights and immunities." Although Bingham remained unmoved, the changes gained the support of almost all of the other mainstream Republicans who had previously voiced concerns, and the bill was overwhelmingly approved by the House on March 13th.[78] The Senate quickly adopted the House amendments,[79] and the bill was then sent to President Johnson for his consideration.

All parties to the dispute understood that Johnson's action on the Civil Rights Bill would be the litmus test of his willingness to cooperate with mainstream Republicans on the issue of reconstruction policy more generally. To be sure, a month earlier, Johnson had vetoed the Freedmen's Bureau Bill—another bill adopted by Congress that was designed to aid the newly freed slaves—that had been passed by Congress and seen an effort to override his veto fail in the Senate.[80] But even in the wake of that

75. *E.g.*, *id*. at 323 (Thirteenth Amendment), 475 (naturalization power).
76. *Id*. at 594–607.
77. *E.g.*, *id*. at 1265, 1267, 1291–92.
78. *Id*. at 1367.
79. *Id*. at 1416.
80. *Id*. at 943.

controversy, some party leaders such as Senator John Sherman had continued to maintain the conviction that mainstream Republicans might be able to reach an agreement with the President over the terms of reconstruction.[81]

However, these hopes were dashed on March 27th when President Johnson vetoed the Civil Rights Bill and issued a harshly worded veto message that made it clear to mainstream Republicans that no compromise was possible.[82] Although congressional Republicans in Congress were able to override the veto,[83] the realization that the relationship between Johnson and congressional Republicans was irrevocably broken caused their leaders to rethink their basic approach to the question of reconstruction more generally.

IV. The Owen Plan and the Drafting of the Fourteenth Amendment

In the wake of the struggle over the Civil Rights Bill, the formulation of a coherent position on reconstruction became an even higher priority for mainstream Republicans. The task of preparing for the upcoming midterm elections of 1866 was at the heart of the problem. It was clear to all concerned parties that, in these elections, the question of reconstruction policy would be the central issue in the campaigns for seats in the House of Representatives. The position of the Democratic Party on reconstruction had been consistent and unequivocal—Democrats advocated the restoration of the ex-Confederate states to full participation in the Union without preconditions. After his veto of the Freedmen's Bureau and Civil Rights bills, it had become clear that Andrew Johnson also favored restoration based on the requirements that he had outlined in his 1865 proclamations. By contrast, Republicans had not articulated any definitive criteria for readmission of the Southern states; indeed, the political struggles of early 1866 had only highlighted the deep divisions within the party over the nature of the requirements to be imposed. Moreover, even assuming that Republicans could somehow reach compromises on issues such as those presented by the Bingham amendment and the amendment dealing with the basis of representation, passage of piecemeal measures dealing with specific constitutional issues would not solve the political problem. Instead,

81. *See* MCKITRICK, *supra* note 17, at 298–303.

82. The text of President Johnson's veto message can be found in JAMES D. RICHARDSON, ED., A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, vol. VIII, 3603–11 (1896-99).

83. CONG. GLOBE 39th Cong., 1st Sess. 1809 (Senate), 1861 (House) (1866).

what was needed was agreement on some plan that would provide a coherent statement of the terms on which Republicans were willing to allow the ex-Confederate states to resume their status as full partners in the Union. Samuel Bowles, the influential moderate Republican editor of the *Springfield Republican*, aptly summarized the problem that the party faced:

> That part of Congress which is not passionate but reflective, confronts the fact that it has utterly failed in dealing with the questions of reconstruction. It has foundered in technical and theoretical debate for three months, but has agreed upon no action, formed no policy, established no terms of reconstruction. It can go on so no longer. Whether it agrees or disagrees with the President it must have a policy; it must do some practical thing.[84]

By this time, a variety of Republicans seem to have concluded that whatever else was to be included in the party's blueprint for reconstruction, a constitutional amendment that guaranteed civil rights to African-Americans should be one aspect of that plan. Thus, while Republican Senator William M. Stewart argued that the dual principles of universal amnesty and universal suffrage should be the cornerstone of Reconstruction, he also called for the adoption of an amendment which would have provided that "no discrimination in civil rights or disabilities, nor in the exercise of the elective franchise, shall exist among the population of the United States . . . on account of race, color, or previous condition of servitude."[85] Although Stewart's proposal quickly lost momentum,[86] a plan devised by Republican activist Robert Dale Owen and brought before the Joint Committee by Thaddeus Stevens on April 21st initially seemed to provide a more promising solution to the Republican dilemma.[87]

As early as 1864, Owen had argued that post-war plans for reconstruction should be founded not only on the abolition of slavery, but also on a constitutional amendment which provided that "no discrimination shall be made, as to the civil or political rights of

84. SALT LAKE CITY SEMI WEEKLY TELEGRAPH, Apr. 12, 1866, at col. A.

85. CONG. GLOBE, 39th Cong., 1st Sess. 1754 (1866).

86. The reaction to Stewart's plan is described in MCKITRICK, *supra* note 17, at 341–42.

87. The original text of the Owen plan can be found in KENDRICK, *supra* note 1, at 83–84.

persons, because of color."[88] The scheme that he put forward on April, 1866, built on this idea. As initially proposed, the Owen plan included both a five part constitutional amendment and a bill that would have provided that once the amendment had become part of the Constitution, any of the ex-Confederate states that ratified the amendment would be entitled to regain its status as a full partner in the Union. With the exception of a provision prohibiting the payment of the Confederate war debt, the Owen amendment focused solely on race. Section one of the proposal prohibited racial discrimination "as to the civil rights of persons," while section two provided that, after July 4, 1876, qualifications for voting must be race-blind as well. In addition, section three provided that until that date, those who were denied the right to vote because of race would be excluded from the basis of representation. Finally, the proposal included a section that explicitly armed Congress with the authority to enforce the strictures of the other provisions of the amendment.

The proposed Owen amendment can be evaluated from a variety of different perspectives. In structural terms, the amendment was very unusual, combining a variety of widely disparate concepts in a single proposal. But at the same time, since each of the first three sections focused specifically on race, the legal import of each of these sections was unclear only at the margins, as was the prohibition on the payment of either the Confederate war debt or compensation for the ex-slaves who had been freed by operation of the Thirteenth Amendment.

But while all parties to the dispute over reconstruction were acutely aware of the formal legal ramifications of the Owen amendment, for mainstream Republicans the proposal was equally important as a political document. Taken as a whole, the Owen plan provided the Southern states with a clear explication of the terms under which Republicans would accede to the restoration of their status in the Union. Under the plan, Republicans would essentially have agreed to once again accept the ex-Confederate states as full partners if and only if the governments of those states publicly embraced the principles that had formed the basis of the Republican position on reconstruction since the end of the war itself. While it was far from clear that the Southern states would be willing to accept these terms, the Owen plan at least had the potential to provide Republican candidates with the kind of detailed blueprint for

88. ROBERT DALE OWEN, THE WRONG OF SLAVERY, THE RIGHT OF EMANCIPATION, AND THE FUTURE OF THE AFRICAN RACE IN THE UNITED STATES 197–98 (Philadelphia: J.B. Lippincott & Co. 1864).

reconstruction that would be needed to compete effectively in the upcoming political campaign.

From the time that Thaddeus Stevens introduced the Owen proposal on April 21st,[89] the Republicans on the Joint Committee remained committed to the idea of using a multifaceted constitutional amendment as the vehicle for defining the official position of the party on Reconstruction. Indeed, at one point it appeared that committee Republicans would be willing to endorse the terms of Owen's proposed amendment *in toto*. Ultimately, however, the formulation reported by the committee diverged from the Owen plan in a variety of different ways. The changes that were adopted substantially altered the basic message that was conveyed by the proposed constitutional amendment.

Taken together, the first three sections of the Owen proposal that was presented to the committee on April 21st were connected by a single theme. Although Republicans had significant concerns about the fate of Southerners who had remained faithful to the Union during the Civil War, nothing in the amendment that was initially proposed addressed those concerns directly. Instead, sections one through three unmistakably conveyed the message that the ex-Confederate states would be readmitted to full participation in the Union if and only if they acceded to the idea that African-Americans were entitled to constitutional guarantees against unfair treatment by state governments that might be controlled by their former masters. By contrast, only one week later, the committee would vote to report an amendment that did not explicitly refer to race at all.

Initially, much of the debate within the committee focused on the terms of section one. Although the initial formulation of section one would clearly have obviated his constitutional objections to the Civil Rights Bill, John Bingham once again took the lead in pressing his Republican colleagues to amend this part of the Owen plan to address other issues in addition to racial discrimination. Despite the setback that he had suffered in the House of Representatives, Bingham remained determined to press for a measure that would address the issues that he had discussed earlier in the session. However, the form of the proposals that he made during the deliberations over the Owen plan differed significantly from those that had been rejected two months before. First, after the earlier debates, Bingham had concluded that it was not enough to simply arm Congress with the authority to protect the rights of the citizenry

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89. *Id.*

through legislation. Instead, he now believed that these rights should be protected by the terms of the Constitution itself, with Congress being vested with the power to adopt ancillary legislation providing additional protections.[90] But in addition, Bingham had also apparently taken heed of the specifics of the Republican objections to the earlier proposal that had been discussed on the House floor in February.

During those debates, the complaints of the Republican critics had focused on what they saw as the potentially open-ended nature of congressional authority to guarantee "equal protection in the rights of life, liberty and property." Bingham continued to press for the inclusion of equal protection language during the committee deliberations over the Owen plan. However, rather than "equal protection *in the rights of life, liberty and property*," the measures that he advocated in late April invoked the concept of "equal protection *of the laws*."

Bingham began his campaign to amend section one almost immediately after Stevens introduced the Owen plan on April 21st. Bingham first proposed to add language to the prohibition on racial discrimination to provide that "nor shall any state deny to any person within its jurisdiction equal protection of the laws, nor take private property for public use without just compensation."[91] This proposal was rebuffed on a vote of seven to five, gaining the support of only Thaddeus Stevens and the three committee Democrats in addition to that of Bingham himself.[92] With only two Democrats dissenting, the unaltered text of section one was then approved.[93] This approval marked the first time in its nearly three months of existence that the Joint Committee had voted to recommend the adoption of a constitutional provision that was designed to guarantee civil rights.

But Bingham was not yet ready to give up on his pursuit of a race-blind provision. After both section one and the other parts of the Owen amendment were approved over Democratic objections, he tried again, this time moving to add a new section that embodied the language of what ultimately became section one, including not only a guarantee of equal protection of the laws, but also the familiar prohibitions on the taking of life, liberty or property without due process of law and abridging the privileges or immunities of citizens of the United States. With only Democrats Henry Grider and

90. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1872).

91. KENDRICK, *supra* note 1, at 85.

92. *Id.*

93. *Id*.

Andrew Rogers dissenting, the committee voted to add the second Bingham proposal to the Owen amendment.[94]

When the committee resumed its deliberations on April 23rd, its attention was focused entirely on the language of the bill that established the terms for the readmission of the Southern states after the ratification of the proposed constitutional amendment. By the end of the session, it appeared that the work on that bill was completed, and Elihu Washburne moved to report both the bill and the previously approved amendment to the floor of the House of Representatives and the Senate.[95] Washburne was supported by John Bingham and Thaddeus Stevens, as well as Democrat Andrew Rogers. But instead, the committee voted to adjourn and reconvene two days later.[96]

Apparently, the reason that most committee Republicans voted to adjourn rather than report the constitutional amendment that had been approved on April 21st and the statute that had been approved on April 23rd was that William Pitt Fessenden had been unable to attend either meeting due to illness, and that a number of his colleagues believed that as chair of the committee, Fessenden should be accorded the opportunity to comment on the Owen proposals before they were officially approved.[97] But in any event, by the time that the committee members gathered together on the morning of April 25th, the consensus that committee Republicans appeared to have achieved on April 21st had been shattered.

Bingham's proposal was the first victim of the renewed conflict among Republicans on the Joint Committee. By a vote of 7-5, the committee voted to remove the proposal from the Owen amendment, as Republicans Jacob Howard, George Williams and George Boutwell joined Democrat Reverdy Johnson in changing the positions that they had taken on April 21st.[98] Subsequently, Bingham made an effort to have his amendment reported separately as a proposed constitutional amendment, but was able to attract the support of only the three Democrats on the committee.[99]

In the absence of a record of the discussions of the Joint Committee, any effort to describe the forces that shaped the vote to

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94. *Id*. at 87.

95. *Id*. at 96–97.

96. *Id*. at 97.

97. TRENTON STATE GAZETTE, Apr. 24, 1866, at 2; Robert Dale Owen, *Political Results From the Varioloid*, ATLANTIC MONTHLY, Vol. XXXV, 660–70 (June 1875).

98. KENDRICK, *supra* note 1, at 98.

99. *Id*.

reverse the decision to add the Bingham language to the Owen amendment would be sheer speculation. By contrast, the explanation for the voting pattern on Bingham's effort to have his amendment reported separately is relatively clear. If the Bingham amendment had been reported separately, some Republicans in the House or the Senate might have viewed the amendment as a more attractive alternative to the omnibus Owen proposal and therefore withheld their support from the Owen proposal, thus depriving that proposal of the two-third majority necessary for passage. Given what seems to have been a near obsession with his civil rights amendment, Bingham was clearly prepared to run this risk. However, the other Republicans on the committee were understandably unwilling to cooperate with him.

But in any event, Bingham's proposal was not the major cause of Republican disunity on the terms of the Fourteenth Amendment. The debate over his formulation was not discussed in the press, and Bingham himself voted to approve the amendment even after his defeat on April 25th.[100] Instead, the issue of African-American suffrage was the major point dividing Republicans during the committee's deliberations over the structure of the proposed amendment. It was widely reported that at the April 25th meeting, Thaddeus Stevens and George Boutwell engaged in a heated debate over the issue, with Stevens vigorously supporting the terms of the Owen amendment and Boutwell asserting that such a requirement would find support only in a small number of New England states.[101]

Initially, Stevens' position prevailed. By a narrow margin of 7-6, the committee voted to report the original Owen amendment to the House of Representatives and the Senate for action, with Boutwell joining fellow Republicans Roscoe Conkling, Henry Blow and committee Democrats in dissent.[102] But almost immediately thereafter George Williams—one of those who had initially voted to report the Owen amendment to the House and Senate—moved to reconsider the vote on the motion to report the amendment. The motion carried with only Jacob Howard and Thaddeus Stevens in dissent, and the committee then adjourned and agreed to meet again three days later.[103]

In the interim, Republican frustration over the committee's inability to produce a Reconstruction plan to counter that which had

100. KENDRICK, *supra* note 1, at 99.

101. SAN FRANCISCO DAILY EVENING BULLETIN, Apr. 27, 1866, at col. G.

102. KENDRICK, *supra* note 1, at 99.

103. *Id.* at 100.

been put forth by Andrew Johnson became even more evident. For example, the *Daily Cleveland Herald* declared that "it is very important that [the Republican Reconstruction] policy be a good one, a just one, a practicable one but it is of the first importance that some policy be declared. We [would almost say] it were better to declare a bad policy than declare none at all."[104] Sounding a similar note, on April 25th, the *Albany Evening Journal* asserted that "[t]he reconstruction committee has held this important subject in its hands, already, too long" and that "each day's delay confers added power on Northern Democratic conspirators to pervert and mislead the Southern mind."[105] Three days later, the same newspaper insisted that "[c]ongress should . . . either demand a speedy and formal report [from the Joint Committee] or if it cannot be obtained it should take the various subjects referred out of its hands and begin their settlement in open House."[106]

At the same time, it was also becoming increasingly clear that Republicans could not unite around any proposal that required states to allow nonwhites to vote. In the evening following the Joint Committee's meeting on April 25th, the members of the New York congressional delegation, which included Ira Harris and Roscoe Conkling, met and were reported to have generally favored a constitutional amendment that would have simply forbidden the payment of the Confederate war debt and changed the basis of representation. The requirement of African-American suffrage was also purportedly opposed by four of the nine Republican representatives from Indiana. In short, as one Republican newspaper put it on April 28th, "[i]t is manifest that no proposition can now pass Congress which confers suffrage on colored people."[107]

Faced with these dual imperatives and with Fessenden finally able to participate, when the Joint Committee reconvened on April 28th, the committee moved swiftly to make substantial changes in the Owen amendment. With only Jacob Howard and Elihu Washburne dissenting, the committee voted to delete the provision outlawing race-based discrimination in voter qualifications.[108] George Williams then moved to replace the race-focused provision on the basis of representation with a formulation that had been proposed by James

104. THE DAILY HERALD (Cleveland, Ohio), Apr. 27, 1866, at col. C.

105. ALBANY EVENING JOURNAL, Apr. 25, 1866, at 2.

106. ALBANY EVENING JOURNAL, Apr. 28, 1866, at 1.

107. SAN FRANCISCO DAILY EVENING BULLETIN, Apr. 28, 1866, at col. A; *see generally* JAMES, *supra* note 17; MCKITRICK, *supra* note 17, at 347–48.

108. KENDRICK, *supra* note 1, at 101.

W. Grimes soon after the defeat of the original Joint Committee proposal in the Senate. Rather than specifically targeting race-based exclusion from voting, under the Grimes proposal the representation to which a state was entitled would be reduced in proportion to the percentage of adult males who were denied the right to vote for any reason other than "participation in rebellion" or "any crime."[109] Committee Democrats unanimously favored the change, as did moderate Republicans. Radical Republicans, by contrast were divided. Ultimately, over the objections of Howard, Washburne and Stevens, the Williams proposal was adopted on a vote of 12-3.[110]

While Republicans were hopeful that the change in the formula for determining representation in Congress would induce the Southern states to enfranchise the newly freed slaves, the removal of the black suffrage provision left open the possibility that state legislatures would choose to accept a reduced presence in Congress in preference to allowing African-Americans to the right to vote. Southern legislatures could thereby remove the most important political counterweight to the overwhelmingly pro-Confederate white electorate, creating the specter not only of state legislatures dominated by ex-Confederate sympathizers, but also of the selection of congressional delegations and presidential electors with similar views.

Faced with this possibility, George Boutwell quickly moved to add a provision that would have barred most high ranking officials of the Confederacy and all those who had joined the rebellion after having served in either the United States military or the 36th Congress from holding federal office in the future. This motion failed on an 8-6 vote, as Republicans William Pitt Fessenden, Jacob Howard, George Williams, John Bingham, and Henry Blow joined the three Democratic members of the committee in opposition.[111] Ira Harris then moved to ban all of those who had "voluntarily" participated in the rebellion from voting in federal elections until July 4th, 1870. Although Jacob Howard immediately added his vote to those of the six Republicans who had supported Boutwell's motion, the Harris proposal was initially one vote short of the majority necessary for it to be added to the proposed constitutional amendment.[112] However, after further discussion, James Grimes also

109. CONG. GLOBE, 39th Cong., 1st Sess. 1320 (1866).

110. KENDRICK, *supra* note 1, at 102.

111. *Id*. at 104.

112. *Id*. at 105.

decided to vote for the Harris proposal, and it carried by a margin of 8-5.[113]

It was at this stage that John Bingham re-entered the fray, once again pressing for the adoption of a provision including the privileges or immunities, due process and equal protection clauses. However, unlike his previous efforts to include the race neutral language *in addition* to the civil rights clause in the Owen amendment, on April 28th Bingham moved to *replace* the prohibition on race discrimination with his preferred formulation. This time he was successful; although Jacob Howard, John Grimes and Justin Morrill demurred, Bingham's motion carried on a vote of 10-3.[114] The same day, with only committee Democrats dissenting, the proposed constitutional amendment was sent to the full House and Senate for action.[115]

While Bingham himself had consistently pressed for inclusion of race-blind language in the constitutional amendment, the motivation of the other members of the Joint Committee who chose to vote for this substitution is less immediately apparent. On its face, the actions of those who opposed Bingham on April 25th but supported him on April 28th are particularly puzzling. However, a plausible rationale for their change of heart emerges fairly clearly when one considers the alteration of section one against the backdrop of the committee's contemporaneous action on the section dealing with the basis of representation.

On its face, the formulation of section two that was ultimately adopted by the Joint Committee might be viewed as something of a compromise between the language from the Owen plan (that mirrored the formulation that had been defeated in the Senate the month before) and proposals to base representation directly on the number of voters in each state. But in addition, the new language assuaged at least some of the concerns that had been voiced by Charles Sumner in connection with the race-focused provision that was rejected in the Senate. As already noted, Sumner strongly supported the adoption of a constitutional amendment that would have directly prohibited racial discrimination in voting rights. But in the alternative, he took the view that the Grimes formulation that was adopted by the Joint Committee on April 28th was superior to the race-specific language that had originally been reported for three reasons: First, it "is not open to any evasions; in the second place, it

113. *Id*. at 105–06.

114. *Id*. at 106–07.

115. *Id*. at 114.

contains no words which can imply any recognition of inequality of rights; and in the third place, it contains no words which can imply any recognition of any right of a state to disfranchise on account of race or color."[116] Similarly, James Garfield recalled several years later, "in the spirit of a similar criticism made by Madison . . . that the word 'servitude' or 'slavery' ought not to be named in the Constitution as existing or as exercising any influence in the suffrage; and hence this negative form was adopted to avoid the use of an unpleasant word."[117] In addition, Thaddeus Stevens had made a related point in connection with the dispute over African-American suffrage, observing that some Republicans had told him that "[t]hey were afraid that if [the amendment mentioned African-Americans] at all, it would be used against them as an electioneering handle."[118]

However, the change in the language of section two did not entirely resolve the problem to which Garfield referred. Even after the alteration of the provision on the basis of representation, the "unpleasant word" remained in section one. The adoption of the Bingham language eliminated this difficulty thereby creating an amendment that was, at least on its face, entirely race-blind.

Against this background, the decision to change the formulation of sections one is best understood as being part of a larger effort to alter the rhetorical message conveyed by the Fourteenth Amendment as a whole. As already noted, taken as a whole, the language of the original Owen proposal by its terms implicitly conveyed the message that Republicans viewed treatment of the ex-slaves as the central issue in the conflict over Reconstruction. By contrast, by adopting the race-blind Bingham language in its stead, Republicans could plausibly claim that their concerns transcended race and extended to the fair treatment of the populace more generally.

In fact, in this regard, the impact of the changes in the wording of sections one and two seem to have had only a limited effect on the legislative debate over the adoption of the Fourteenth Amendment. All parties to the political dispute over reconstruction policy understood that, while Republicans had concerns about the treatment of Unionists in the South, the question of the status of the ex-slaves was one of the issues that was at the heart of the problem. The discussions of section one on the floor of the House of Representatives and the Senate clearly reflected this reality.

116. CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866).

117. CONG. GLOBE, 42nd Cong., 2nd Sess. 82 (1871).

118. Owen, *supra* note 97, at 666.

V. Discussions of Section One

A. Discussions in Congress

While sections two and three of the proposed Fourteenth Amendment generated far more discussion in both the House of Representatives and the Senate, Democrats also launched a variety of attacks on section one, arguing that this provision was primarily designed to protect the rights of African-Americans and would unduly infringe upon the authority of the state governments.[119] Conversely, Republicans were united in their support of section one.

Thaddeus Stevens' explanation of the impact of section one reflected the viewpoint of many Republicans. After referring to the provisions of the Black Codes which prohibited African-Americans from testifying in court and imposed heavier penalties on African-Americans for crimes, Stevens asserted that "[u]nless the Constitution should restrain them [the ex-Confederate] states will all, I fear, keep up this discrimination, and crush the hated freedmen."[120] Similarly, responding to the claim that there was no need for section one because the Civil Rights Act of 1866 provided the necessary protections, Stevens noted that a statute could be repealed at any time and observed that "I need hardly say that the first time that the South and their copperhead allies obtain the command of Congress [the Civil Rights Act] will be repealed."[121] Others, such as Republican Representative John M. Broomall observed that John Bingham and others had expressed doubts about the constitutionality of the Civil Rights Act, and that the adoption of section one would remove those doubts.[122] But in marked contrast to the heated debate over the Bingham amendment in February, no mainstream Republican voiced any dissatisfaction with the Joint Committee's formulation of section one in the House of Representatives.

Unlike the proceedings in the House, the discussions in the Senate led to one important change in the wording of section one. Early in the debate, Republican Senator Benjamin F. Wade of Ohio complained that the privileges and immunities clause referred to

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119. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2501 (remarks of Rep. Shanklin) (section one strikes down "reserved rights of the states" and would "invest all power in the General Government."), 2538 (remarks of Rep. Rogers) (section one is "an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill") (1866).

120. *Id*. at 2459.

121. *Id.*

122. *Id.* at 2498.

citizens of the United States without defining that term.[123] In response, the Senate Republican caucus voted to add the current definition of citizenship. The change was approved by the full Senate after an intense debate which focused on issues such as the status of Native Americans and Chinese immigrants and the impact that the wording of the definition would have on that status.[124]

The only detailed analysis of the remainder of section one in the Senate came from Senator Jacob Howard who served as the official spokesman of the Joint Committee because of Fessenden's illness. Howard had been one of the three Republicans on the Joint Committee to vote against John Bingham's motion to replace the original language of the Owen amendment with the tripartite race-blind formulation. Nonetheless, Howard delivered what one progressive commentator has described as a "stirring defense" of section one.[125] After first making an effort to define the term "citizen of the United States,"[126] Howard turned to what he described as "the curious question . . . of what are the privileges and immunities of citizens of the United States."[127] Howard made no mention of race in this context. Instead, he cited the Comity Clause, the Bill of Rights and the other rights specifically described in the Constitution as those which would be protected by the privileges or immunities clause of section one.[128]

The issue of race was featured far more prominently in Howard's discussion of the due process and equal protection clauses. Treating the two clauses together, he asserted that "[section one] abolishes all class legislation and does away with the injustice of subjecting one caste of person to a code not applicable to another."[129] Specifically observing that the equal protection clause would prohibit racial discrimination in sentencing and fundamental rights, Howard asked rhetorically "[i]s it not time . . . that we extend to the black man . . . the poor privilege of equal protection of the law?"[130] He concluded

123. *Id*. at 2768.

124. *Id*. at 2890–97.

125. GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 234 (2006).

126. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

127. *Id.*

128. *Id.* at 2765–66.

129. *Id*. at 2766.

130. *Id.*

his discussion of section one by emphatically denying that section one would place any restrictions on state authority over voting rights.[131]

Other than the debate over the definition of citizenship, section one generated almost no other comments in the Senate.[132] But the very lack of criticism from more mainstream Republicans in either the Senate or the House of Representatives was itself an important indicator of their view of the scope of section one. As we have already seen, conservative Republicans had vociferously attacked the Bingham amendment when it had come before the House of Representatives in February. Further, Republicans in general had shown no qualms in criticizing the language of the other provisions of the constitutional amendment reported by the Joint Committee, successfully arguing for not only the addition of the citizenship clause to section one, but also important changes in the language of sections two, three and four. Against this background, the failure to interpose *any* criticism to the invocation of the concepts of privileges and immunities, equal protection and due process can only be viewed as an indication that Republicans in general believed that Bingham's change in the wording of the equal protection clause had obviated the potential ambiguity that some had found so objectionable in the original Bingham amendment.

But in any event, the approval of the revised Fourteenth Amendment by Congress in June 1866, did not end the public debate over the meaning of the amendment. As already noted, the amendment was designed to outline the program of reconstruction that Republicans would put before the voters in the midterm elections of 1866. Thus, during the election campaign, much of the campaign rhetoric from both sides focused on the terms of the amendment. Not surprisingly, in making their political arguments, Republicans and Democrats expressed very different views about the desirability and implications of section one.

B. Discussions of Section One During the Political Campaign

In making the case in favor of section one of the Fourteenth Amendment during the summer and fall of 1866, Republicans often sought to exploit the rhetorical advantage provided by the decision to abandon the original Owen proposal in favor of race-neutral language. To be sure, Republicans at times acknowledged that section one was designed to protect the ex-slaves from racial

131. *Id.*

132. Brief exceptions can be found at *id*. at 3041 (remarks of Sen. Johnson); app. 219–20 (remarks of Sen. Howe), app. 240 (remarks of Sen. Davis).

discrimination. For example, the *New York Times* cited a state court decision that upheld a North Carolina law which prohibited African-Americans from owning guns as an illustration of the need for the constitutional amendment.[133] But at the same time, Republicans also emphasized the universality of the guarantees embodied in section one. Thus, Republican Representative Schulyer Colfax of Indiana declared that the proposed amendment required that "the civil rights of all persons, born or naturalized, shall be maintained"[134] while the *New Hampshire Statesman* asserted that section one would "insure the citizenship of all persons whatever, born or naturalized, in this country."[135] Republican Governor Richard C. Oglesby of Illinois was more expansive, contending that, by virtue of the amendment:

> I am a citizen of Illinois, to-day—tomorrow I can go to Missouri [and] the moment I plant my foot on that free soil, I am a citizen of Missouri . . . My country goes along with me, and wherever I put my foot on American soil, in any state, I am entitled to all the privileges, immunities and rights of a citizen of that state. It is for this that I love the Union.[136]

For their part, the critics of the Fourteenth Amendment attacked section one from two different angles. Despite the Republican decision to strip the amendment of explicit references to racial discrimination, some continued to emphasize the relationship between section one and African-American rights. Thus, for example, the *Richmond Whig* characterized section one as an integral part of an effort to achieve "negro equality in all respects."

But at the same time, the race-neutral formulation also left Republicans open to the familiar charge that section one would vastly expand the scope of federal power. For example, in a widely circulated letter, Orville H. Browning, the Secretary of Interior in the Johnson administration, asserted that the due process clause in particular would "annihilate totally the independence and sovereignty of State judiciaries in the administration of State laws," providing the federal courts with license to intervene not only in criminal cases involving issues such as larceny and murder, but also in civil suits as

133. N.Y. TIMES, Oct. 28, 1866, at 4.

134. BANGOR WHIG AND COURIER, July 17, 1866, Issue 13, at col. C.

135. NEW HAMPSHIRE STATESMAN, July 27, 1866, Issue 2356, at col. C.

136. WISCONSIN STATE REGISTER, July 14, 1866, Issue 18, at col. D.

mundane as disputes over the ownership of a pig.[137] Faced with such charges, Republicans at times again reverted to the concept of unjust classifications, with the *New York Commercial Advertiser* asserting that the due process clause was intended to be a "reference to the rights of the freedmen,"[138] while the *Daily Cleveland Herald* specifically referred to the Black Codes and also observed more generally that "[i]f the State passes a law that a negro, a Yankee or an Irishman shall have his pig taken from him *because* he is a negro, a Yankee or an Irishman . . . *then* he can appeal to the Federal Courts under the [proposed due process clause]."[139]

In any event, the adoption of the Fourteenth Amendment as a whole by congressional Republicans ultimately served its political purpose. With the amendment as the basis of its platform, the party won a landslide victory in the elections of 1866, further cementing its hold on both houses of Congress. By contrast, as a Reconstruction proposal, the amendment was initially a failure. With the exception of Tennessee, the governments of the ex-Confederate states at first steadfastly refused to ratify the amendment, even at the cost of continuing to remain unrepresented in Congress. Ultimately, however, more pliant state governments were established under the aegis of the Reconstruction Acts of 1867, paving the way for the ratification of the amendment by the requisite number of state legislatures.[140]

Conclusion

Placing the debate over the Fourteenth Amendment in the context of the larger dispute over Reconstruction policy provides important insights into a variety of issues related to the amendment. In purely historical terms, the broader focus clarifies the role that was played by John Bingham in the development of section one. Bingham was not solely or even primarily responsible for advancing the idea that the Fourteenth Amendment should explicitly provide constitutional protections for civil rights. Indeed, by the time that he first took such a position in the deliberations of the Joint Committee, mainstream Republicans generally were committed to that view. Instead, Bingham's unique contribution to the evolution of section one derived from his insistence that the amendment should include

137. Browning's letter is reproduced in the DAILY NATIONAL INTELLIGENCER, Oct. 24, 1866, at 2.

138. NEW YORK COMMERCIAL ADVERTISER, Oct. 24, 1866, at 2.

139. DAILY CLEVELAND HERALD, Oct. 26, 1866, Issue 257, at col. E.

140. This process is chronicled in BENEDICT, *supra* note 17.

race-neutral language either in addition to or instead of simply prohibiting racial discrimination.

Bingham's success in persuading a majority of the members of the Joint Committee to accept this position creates something of a dilemma for those seeking to divine the original meaning of section one. The decision to reject the Owen language in favor of the current tripartite formulation conclusively discredits any effort to limit the reach of section one to racial discrimination. But at the same time, the fact that the conservative Republicans who had condemned Bingham's federal power amendment in February had no difficulty with the version of section one that emerged from the Joint Committee in April provides strong evidence that they did not view the current language of section one as being susceptible to the kind of open-ended interpretation that men such as Roscoe Conkling and William Stewart feared might attend the adoption of the federal power amendment.

Jacob Howard's discussion of the relationship between section one and suffrage suggests the outlines of a partial solution to the problem. At its climactic meeting on April 28th, the Joint Committee made a conscious decision to remove the provision in the Owen amendment that would have banned racial discrimination in voting rights. The import of this decision was intended to be at least as definitive as the choice to adopt race-blind language in section one. Nonetheless, Howard recognized the possibility that some might contend that section one could easily be interpreted to provide some federal protection for the right to vote. Anticipating this argument, Howard asserted that "section one does not give [anyone] the right of voting. The right of suffrage is not, in law, one of the privileges or immunities secured by the Constitution . . . . It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of [the] fundamental rights lying at the basis of all society."[141]

While unclear at the margins, the distinction between rights explicitly guaranteed by the federal Constitution and "fundamental rights lying at the basis of all society" on one hand and rights which are "the result of local law" potentially establishes a workable framework to limit the scope of the interests that are protected by the terms of section one. By contrast, Howard's discussion of classification issues was far more amorphous. Like other Republicans, on this question Howard focused on the concepts of

141. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

"class legislation" and discrimination on the basis of "caste."[142] While evocative, on their face these terms do not provide concrete standards for distinguishing permissible from impermissible classifications. For originalists, this problem is the most enduring legacy of John Bingham's victory in the Joint Committee on Reconstruction.

142. *Id.*

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