SECTION THREE OF THE FOURTEENTH AMENDMENT FROM THE PERSPECTIVE OF SECTION TWO OF THE FOURTEENTH AMENDMENT

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Section Three of the Fourteenth Amendment is better interpreted from the perspective of Section Two of the Fourteenth Amendment than, as in *Trump v. Anderson*, from the perspective of Section One. Apportionment was the heart of constitutional reform when the Fourteenth Amendment was framed and ratified. Section Two was the centerpiece of a tripartite scheme that proponents of congressional reconstruction designed to punish treason, reward loyalty, and realize their constitutional commitment to free labor and racial equality, in part by preventing "oathbreaking insurrectionists" from holding office. Black suffrage was the first line of defense. The persons responsible for the Fourteenth Amendment assumed that if most men of color in former Confederate states voted, former "oathbreaking insurrectionists" would not be elected and those persons who were elected would be committed to national union, free labor, and racial equality. Congress was the second line of defense. The persons responsible for Fourteenth Amendment assumed that, should states not enfranchise black men, Congress would still be staffed by persons committed to passing legislation, when necessary, that prevented oathbreaking insurrectionists from holding office and securing Republican commitments to national union, free labor, and racial equality. Federal courts were the last and weakest line of defense. The persons responsible for the Fourteenth Amendment did not think courts were a necessary or proper primary means of advancing constitutional purposes. Courts were expected to step in, if at all, only when both states and Congress failed to function as Section Two (or any other section) anticipated.

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INTRODUCTION

The Supreme Court in *Trump v. Anderson*[1] interpreted state power to disqualify candidates for federal office under Section Three of the Fourteenth Amendment from the perspective of Section One of the Fourteenth Amendment. Section Three disqualifies from present and future federal or state office anyone who participates in an insurrection after taking an oath to support the Constitution of the United States.[2] The text states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[3]

The last sentence of Section One explicitly restricts only state power. The text famously declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[4]

The words "No State shall" apparently express a constitutional understanding that the Privileges and Immunities, Due Process, and Equal Protection Clauses limit only state governments, although the Due Process Clause of the Fifth Amendment limits the federal government and has been held in almost all circumstances to protect the rights protected by the Equal Protection Clause of the Fourteenth Amendment.[5] The conventional assumption that the last sentence of Section One

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1. 144 S. Ct. 662 (2024).
2. U.S. CONST. amend. XIV, § 3.
3. *Id.*
4. *Id.* § 1.
5. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995).

articulates the primary concern of the Fourteenth Amendment[6] helps explain the structure of *Trump.* The Justices in *Trump* interpreted what they perceived as a secondary concern of the Fourteenth Amendment with disqualifying "oathbreaking insurrectionists"[7] from office in light of the apparent framing desire to limit "wicked states"[8] from subverting newly fundamental constitutional rights.

The per curiam opinion in *Trump* regarded the Privileges and Immunities, Due Process, and Equal Protection Clauses of Section One as crucial to understanding the Disqualification Clause of Section Three. The constitutional analysis in *Trump* began by quoting the last sentence of Section One for the proposition that "the Fourteenth Amendment 'expand[ed] federal power at the expense of state autonomy.'"[9] Constitutional disqualification, in the per curiam's eyes, is another manifestation of this effort to reshape American federalism.[10] The absence of the words "No State shall" in Section Three (or in any other provision of the Fourteenth Amendment) did not deter any Justices from interpreting Section Three as another Fourteenth Amendment limitation on state power. Without quoting any constitutional language, the *Trump* opinion blithely asserted that "Section 3 of the [Fourteenth] Amendment likewise restricts state autonomy."[11]

The Supreme Court's discussion of the enforcement mechanisms for constitutional disqualification was rooted in the judicial understanding that the entire Fourteenth Amendment transfers power from the state governments to the federal government. States before the ratification of the Fourteenth Amendment lacked the power to disqualify presidential candidates who had participated in an insurrection after taking an oath of office.[12] Therefore, *Trump* concluded, a constitutional amendment that "restricts state autonomy" should not be interpreted as empowering states to disqualify presidential candidates who participate in insurrections. The Justices insisted that "nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and

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6. *See* Mark A. Graber, *Strolling Down Memory Lane, Touring an Historical Restoration, and the Constitution of December 11, 1865*, 33 WM. & MARY BILL RTS. J. 591, 598–601 (2024) [hereinafter Graber, *Strolling Down Memory Lane*].

7. *Trump*, 144 S. Ct. at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

8. *See* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 3 (2009) (noting that the framers of the Constitution in 1789 intended to limit the power of "wicked states").

9. *Trump*, 144 S. Ct. at 666 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996)).

10. *Id.*

11. *Id.*

12. *Id.*

candidates."[13] Given that the Fourteenth Amendment "embod[ies] significant limitations on state authority,"[14] the Court repeated, this time paraphrasing the second sentence of Section One, "it would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office."[15]

The following pages interpret state power to disqualify candidates for federal office under Section Three of the Fourteenth Amendment from the perspective of Section Two of the Fourteenth Amendment. This approach is more consistent with the original spirit of the Fourteenth Amendment. Apportionment was the heart of constitutional reform when the Fourteenth Amendment was framed and ratified. Section Two was the centerpiece of a tripartite scheme that proponents of congressional reconstruction designed to punish treason, reward loyalty, and realize their constitutional commitment to free labor and racial equality,[16] in part by preventing "oathbreaking insurrectionists" from holding office.

Black suffrage was the first line of defense. Leading Republicans insisted that apportionment reform would compel former Confederate states to abandon racial restrictions on voting. The persons responsible for the Fourteenth Amendment assumed that if most men of color in former Confederate states voted, former "oathbreaking insurrectionists" would not be elected, and those persons who were elected would be committed to national union, free labor, and racial equality. Congress was the second line of defense. The persons responsible for the Fourteenth Amendment assumed that, should states not enfranchise black men, Congress would still be staffed by persons committed to passing legislation, when necessary, that prevented oathbreaking insurrectionists from holding office and securing Republican commitments to national union, free labor, and racial equality. The more prone states were to elect oathbreaking insurrectionists because former enslaved persons were not permitted to vote, the stronger the congressional majority in favor of legislation and legislative actions that prevented oathbreaking insurrectionists from holding office. Federal courts were the last and weakest line of defense. The persons responsible for the Fourteenth Amendment did not think courts were a necessary or proper primary

13. *Id.* at 668.

14. *Id.* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

15. *Id.*

16. For the constitutional commitments of the Republican Party, see MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 133–63 (2023) [hereinafter GRABER, PUNISH TREASON, REWARD LOYALTY]; ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION, at xix–xxix (2019) [hereinafter FONER, THE SECOND FOUNDING]; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 1–10 (1995).

means of advancing constitutional purposes. Courts were expected to step in, if at all, only when both states and Congress failed to function as Section Two (or any other section) anticipated.

Trump v. Anderson perverts the framing scheme for preventing oathbreaking insurrectionists from holding federal or state office.[17] Republicans during Reconstruction thought state governments elected by a biracial electorate were the best means for securing the substantive goals of the postwar Constitution. The Supreme Court in *Trump* barred such states from engaging in Section Three vetting for federal office no matter how biracial the state electorate, loyal the state officials, fair the state procedures, and correct the state determination that a candidate is disqualified under Section Three. Republicans during Reconstruction thought Congress was best positioned to supervise states, particularly states whose disenfranchisement practices suggested untrustworthy implementation of the post-Civil War Amendments. The Supreme Court in *Trump* insisted courts must aggressively supervise states, even when no reason exists for thinking that congressional supervision of the states has broken down, and that courts must as aggressively supervise Congress, again even in the absence of evidence that Congress is constitutionally flawed in the manner set out by the Fourteenth Amendment. Republicans during Reconstruction were suspicious of a judiciary staffed by many holdovers from the Taney Court that decided *Dred Scott v. Sandford*.[18] The Roberts Court, often in the name of originalism,[19] nevertheless insisted on exercising primary powers of supervision that no Reconstruction framer would have entrusted to the federal judiciary.[20]

The following pages consider the altered perspective on state power to disqualify candidates for federal office once Section Two is properly placed at the core of the constitutional amendment drafted and ratified during the 1860s. Part I details the problems with placing Section One at the core of the Fourteenth Amendment. The conventional claim that the Fourteenth Amendment was designed to empower the national government at the expense of the states is belied by the other provisions of the Fourteenth Amendment, almost all of which either limit both the federal government and state governments or limit only the federal

17. For more detailed critiques of *Trump v. Anderson*, see generally Mark A. Graber, *Originalism as Novelty and Originalism as Authentic:* Trump v. Anderson *v. The Reconstruction's Fourteenth Amendment*, 93 GEO. WASH. L. REV. ARGUENDO 41 (2025) [hereinafter Graber, *Originalism as Novelty*], https://www.gwlr.org/wp-content/uploads/2025/05/93-Geo.-Wash.-L.-Rev.-Arguendo-41.pdf [https://perma.cc/8J4D-RDN2]; William Baude & Michael Stokes Paulsen, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 HARV. L. REV. 676 (2025).

18. 60 U.S. (19 How.) 393 (1856).

19. *See* Graber, *Originalism as Novelty*, *supra* note 17, at 41.

20. *See infra* notes 156–157 and accompanying text.

government. Part II lays out the overwhelming evidence that Section Two was the constitutional reform Republicans considered most vital after the Thirteenth Amendment was ratified. Proponents of national union, free labor, and racial equality sought to reconstruct rather than enfeeble the former Confederate states. The primary goal of constitutional reform after the Thirteenth Amendment was ratified was to transform constitutional politics by permanently abolishing the slave power. Part III details how Section Two would permanently abolish the slave power by either compelling former states to adopt black suffrage or enfeebling them politically in Congress. Reconstruction would obviate the need for Republicans in Congress to rule over former Confederate states by fashioning a constitutional politics in the former Confederate states that would ensure a powerful local Republican presence. Part IV lays out the structure of the Fourteenth Amendment through the eyes of Section Two. Section Two was designed to give former Confederate states the option of enfranchising formerly enslaved persons or becoming a permanent minority in the national government. Former Confederate states that enfranchised persons of color could be trusted to implement the other provisions in the Fourteenth Amendment that guaranteed fundamental rights, Confederate leaders, and secured financial security. The Republican majorities in Congress that would inevitably occur should former Confederate states not enfranchise persons of color could be trusted to correct the unjust legislation and practices of the states.

This Essay is part of a broader study of the Fourteenth Amendment that remains incomplete. Preliminary, but substantial, research indicates that Section Two remained the heart of constitutional reform from the time the Thirty-Ninth Congress met to when the Fourteenth Amendment was ratified in 1868. Present research has focused on the first session of the Thirty-Ninth Congress,[21] newspapers in December 1865,[22] and the ratification debates in Tennessee,[23] all of which highlight the importance of Section Two and the relative indifference to Section One. Preliminary research suggests the same is true at other times and other places

21. *See generally* GRABER, PUNISH TREASON, REWARD LOYALTY, *supra* note 16 (focusing on what debates in the first session of the Thirty-Ninth Congress said about the various provisions in the Fourteenth Amendment).

22. *See generally* Mark A. Graber, *John Bingham's "Important" Amendment: The View from December 1865*, 94 MISS. L.J. 1329 (2025) [hereinafter Graber, *Bingham's "Important" Amendment*] (using newspaper articles to assess the public reaction to John Bingham's proposed rights amendment); Graber, *Strolling Down Memory Lane*, *supra* note 6 (using newspaper articles to assess Republican constitutional priorities in December 1865).

23. *See generally* Mark A. Graber, *Tennessee and the Fourteenth Amendment*, LOY. L. REV. (forthcoming 2026) (using newspaper articles to assess how Tennesseans understood the Fourteenth Amendment at the time of ratification).

between December 1865 and July 1868.[24] Whether future research resembles past research, however, awaits that future research.

I. THE FOURTEENTH AMENDMENT AS A LIMIT ON NATIONAL AND STATE POWER

No person reading the Fourteenth Amendment without the benefit of contemporary commentary would perceive that the text is devoted to transferring power from the states to the national government. The last sentence of Section One is the sole provision in that amendment explicitly limiting only state power. Every other sentence crafted by the Reconstruction framers in 1866 and ratified in 1868 limits the national legislature and national executive. A fair case can be made that Section Two and the first sentence of Section Four limit only the federal government.

The Supreme Court's claim in *Trump* that Section One limits federal power[25] is at best half-right. The second sentence of Section One explicitly limits only state power, with the proviso that the federal government was previously limited by the Due Process Clause of the Fifth Amendment and most framers thought other Section One limits already restricted the federal government.[26] The definition of state and federal citizenship in the first sentence, which is never referred to in *Trump*, is not so limited. That text declares that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[27] The Citizenship Clause facially restricts both the federal and state governments. Neither the states nor the federal government may treat a person born in Kansas who was then subject to the jurisdiction of the United States as a non-citizen. Given the federal government has exclusive control of national citizenship at present,[28] the first sentence of Section One of the Fourteenth Amendment arguably limits only the federal government. The litigants challenging President Trump's

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24. The Report of the Joint Committee on Reconstruction, for example, discusses apportionment at far greater length than any other proposed constitutional reform. *See* H.R. REP. NO. 39-30, at xiii–xiv (1866).

25. *See supra* note 9 and accompanying text.

26. *See* Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State"*, 10 CONST. COMMENT. 87, 89–90 (1993).

27. U.S. CONST. amend. XIV, § 1.

28. States had far more control over national citizenship before the Civil War. *See* ANNA O. LAW, THE ORIGINS OF AMERICAN CITIZENSHIP AND MIGRATION: AFRICAN AMERICANS, NATIVE AMERICANS, AND IMMIGRANTS (forthcoming 2026) (manuscript at 170–71) (on file with author).

executive order denying citizenship to some persons born in the United States[29] regard the Citizenship Clause as a major limit on federal power.[30]

Trump's treatment of Section Three as a limit on federal power is textually problematic and misleading at best. The first sentence of the Disqualification Clause does not distinguish between federal and state offices, federal and state officers, or the persons responsible for staffing federal and state offices.[31] Any person who is not qualified under Section Three to be a state attorney general is not qualified under Section Three to be the Attorney General of the United States. Section Three provides identical limitations on federal and state power. The President of the United States has no more power to appoint a person disqualified from holding office than does the governor of Michigan.[32] Section Three does vest Congress, but not state legislatures, with the power to remove that constitutional disability.[33] So understood, Section Three empowers the federal government, but not at the expense of the states. Neither national nor federal offices may be staffed by persons disqualified under Section Three. The only difference between national and state power is that Congress is authorized to remove the disability. State legislatures are not.

Section Four of the Fourteenth Amendment, not discussed by the *Trump v. Anderson* Court, belies claims that the Fourteenth Amendment transfers power from states to the national government. That Section declares:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.[34]

The first sentence of Section Four is directed only at the federal government. The national executive and national legislature are responsible for servicing the federal debt and paying federal pensions. States have and never had any say in the matter. The second sentence explicitly limits both the United States and the states. "[N]either the

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29. *See* Proclamation No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (Protecting the Meaning and Value of American Citizenship).

30. *See Trump v. CASA, Inc.*, No. 24A884, slip op. at 3–4 (U.S. June 27, 2025) (Sotomayor, J., dissenting).

31. *See* U.S. CONST. amend. XIV, § 3.

32. *See id.*

33. *Id.*

34. *Id.* § 4.

United States nor any State" may compensate former enslavers for the loss of their human chattel or service any debt undertaken to finance an insurrection against the United States.[35] Republicans were more concerned that the post-Thirteenth Amendment Constitution includes financial securities rather than additional rights securities, but they were at least as concerned with limiting federal action as they were state action.[36]

The *Trump* opinion briefly and erroneously treated Section Two of the Fourteenth Amendment as another limit on state governments. Section Two provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[37]

The *Trump* Court insisted that "[u]nder the Amendment, States cannot . . . deny male inhabitants the right to vote (without thereby suffering reduced representation in the House)."[38] Even as interpreted by the Supreme Court, Section Two provides stricter restrictions on the federal government than state governments. Section Two changes the consequences for actions states are constitutionally permitted to take. The more male citizens states permit to vote, the greater the number of state representatives Congress must allocate to that state in the House of Representatives and Electoral College. States are free to distribute the ballot as they see fit. They may choose to enfranchise persons of color or not. The federal government has no analogous discretion. Congress is constitutionally forbidden from allowing male citizens, innocent of crime

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35. *Id.*

36. *See* Graber, *Bingham's "Important" Amendment*, *supra* note 22, at 1345–59.

37. U.S. CONST. amend. XIV, § 2.

38. *Trump v. Anderson*, 144 S. Ct. 662, 668 (2024).

or insurrection, who are denied the ballot in a particular state from being represented in the House of Representatives or the Electoral College.

Proponents of apportionment reform emphasized that Section Two did not restrict the states. The *Illinois Weekly State Journal*, on December 20, 1865, when discussing a resolution that would eventually become Section Two, pointed out that "[t]his proposed amendment . . . still leaves the matter of suffrage entirely with the several States, and they can regulate the qualifications of electors just as they please."[39] All Section Two does is eliminate a windfall benefit for states that disenfranchises adult males. Section Two restricts state behavior only in the sense that closing a tax loophole restricts individual behavior. States and persons who have derived unjust benefits from their actions must now consider whether to change their behavior in light of a fairer scheme of rewards and punishments.

II. SECTION TWO'S PLACE AT THE CORE OF THE FOURTEENTH AMENDMENT

Section Two was the core of the Fourteenth Amendment as framed by Republican members of the Thirty-Ninth Congress. Apportionment was the central constitutional problem that proponents of congressional reconstruction sought to address after the constitutional ban on slavery became part of the official constitutional law of the land. The Washington correspondent for *The Galveston Daily News* reported that "[t]he ratio of representation is regarded as the most important feature to be regarded in the reconstruction of the States."[40] The *Lewisburg Chronicle* spoke of the "necessity of a Constitutional amendment, basing representation in Congress upon voters rather than population."[41] Commentary on

39. *Equalization of the Basis of Representation*, ILL. WKLY. STATE J., Dec. 20, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/757337400).

40. *From Washington*, GALVESTON DAILY NEWS, Dec. 24, 1865, at 5 [hereinafter *From Washington*, GALVESTON] (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/21835427); *see also Black Republican Requirements*, CLARKSVILLE WKLY. CHRON., Dec. 15, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/76258495/) (same); *From Washington*, MEM. DAILY COM., Dec. 14, 1865, at 1 [hereinafter *From Washington*, MEM.] (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/585887242) (same); *Proceedings of Congress*, VT. REC. & FARMER, Dec. 15, 1865, at 8 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/488960234) ("Among the important resolutions offered, one demands that the representation in the lower House be based on the qualified number of voters in each State.").

41. *The Basis of Representation*, LEWISBURG CHRON. (Pa.), Dec. 1, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/310622247) ("The first work of Congress should be to pass such an Amendment, and it would be ratified in one year.").

apportionment reform dwarfed commentary on rights reform and other constitutional reforms when the Thirteenth Amendment was ratified in December 1865—when Congress considered the standalone amendments that eventually became Sections One and Two of the final Fourteenth Amendment, and during the ratification debates in Tennessee, the first state for which substantial newspaper commentary exists on the proposed Fourteenth Amendment.[42]

Apportionment reform grabbed congressional attention at the opening of the Thirty-Ninth Congress. Members had barely taken their seats on December 4, 1865, when Senator Charles Sumner of Massachusetts proposed a constitutional amendment changing the basis of representation in the House of Representatives and Electoral College.[43] Four more members proposed constitutional amendments on apportionment in the next ten days.[44] Thaddeus Stevens, when opening debate on Reconstruction, informed Congress that the "first" amendment that had to be passed would "change the basis of representation . . . to actual voters."[45] The House Judiciary Committee, on December 19, 1865, informed members that the Committee would present an amendment making voters the basis of apportionment when Congress returned from adjournment in January 1866.[46]

Apportionment reform featured prominently in journals' calls for constitutional reform. More than seventy-five Republican journals published editorials endorsing apportionment reform.[47] *The New York Herald* proposed to settle sectional matters by constitutional amendments, extending a general amnesty "to all parties involved in the late rebellion," prohibiting "the recognition of the rebel Confederate or State debts," and providing for "[a] new basis of federal representation, viz: the number of actual voters in each State."[48] The Union State Central Committee of Pennsylvania proposed constitutional amendments prohibiting payment of the rebel debt, guaranteeing payment of the federal debt, repealing the

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42. *See* Graber, *Bingham's "Important" Amendment*, *supra* note 22, at 1370–71.

43. CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865).

44. *See id.* at 9 (statement of Rep. Schenck); *id.* at 10 (statement of Rep. Broomall); *id.* at 74 (statement of Rep. Stevens). Representative Godlove Orth also proposed an amendment reforming apportionment that was not recorded by the Congressional Globe. *See Thirty-Ninth Congress*, DAILY UNION & AM. (Nashville), Dec. 9, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/50655557).

45. *See* CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

46. *See* NILES REPUBLICAN, Dec. 30, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1101391808).

47. *See* Graber, *Bingham's "Important" Amendment*, *supra* note 22, at 1370.

48. *Southern Reconstruction—A Short Method for a Fair and Final Settlement*, N.Y. HERALD, Dec. 24, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/843835828).

ban on export taxes, changing apportionment, and outlawing secession.[49] Personal and property rights were nowhere to be seen. The *Raftsman's Journal* noted that proposals to change the basis of representation from population to voters "expresses the outspoken sentiments of nearly all the Union Conventions held in 1865."[50] The *Portland Daily Press* noted four proposals to amend apportionment, but omitted Representative John Bingham's proposed rights/powers amendment when discussing "sixteen joint resolutions" for constitutional reform in Congress.[51] The *Springfield Weekly Republican*, when discussing proposed constitutional amendments, insisted that apportionment reform "ought to pass," but declared that "none of which are needed" with respect to proposed amendments on export duties, the rebel debt, Bingham's equal protection, and anti-secession.[52]

The December commentary on the Bingham proposal that would empower Congress to protect personal and property rights was light.[53] A few Democratic newspapers condemned the proposal. Hardly any Republican newspaper endorsed either Bingham's proposal or a similar proposal made by Representative Columbus Delano of Ohio. Newspapers commented extensively on legislation protecting personal and property rights, but the proposal that morphed into Section One of the Fourteenth Amendment appeared to be "stillborn from the press" in the wake of the ratification of the Thirteenth Amendment.

Apportionment reform occupied substantial congressional time and attention after the Joint Committee on Reconstruction in the winter of 1866 proposed a constitutional amendment limited to changing the basis of representation in the House of Representatives and Electoral College. The House debate took ten days, encompassing over 85 pages in the

49. *Summary of Congress*, UNION (Del.), Dec. 22, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/36886168).

50. *Congressional Proceedings*, RAFTSMAN'S J. (Pa.), Dec. 20, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/79123996).

51. The Federal Capital, Letter to the Editor, *Proposed Amendment to the Constitution—The Stevens Resolution—The Predicted Quarrel—Free Suffrage*, PORTLAND DAILY PRESS, Dec. 21, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/875129527).

52. *Congress, and Matters at Washington*, SPRINGFIELD WKLY. REPUBLICAN (Mass.), Dec. 16, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1055944604); *see also Congress, Matters at Washington*, SPRINGFIELD DAILY REPUBLICAN (Mass.), Dec. 16, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1061901995) (same).

53. This paragraph summarizes Graber, *Bingham's "Important" Amendment*, *supra* note 22, at 1351–59.

Congressional Globe.[54] Thirty-nine representatives made speeches.[55] Representatives offered numerous amendments to or substitutes for the apportionment resolution.[56] The Senate debate began on February 5 and, with a break to consider a resolution excluding from Congress representatives of former Confederate states, ended on March 8, encompassing 135 pages of the *Congressional Globe*.[57] Sixteen senators gave speeches.[58] As in the House, senators offered numerous amendments to or substitutes for the apportionment resolution.[59] The final day of debate in the Senate highlighted the scope of participation and the range of alternatives. Senator William Pitt Fessenden gave a long speech, followed by substantive remarks of varying lengths by Charles Sumner of Massachusetts, Henry Wilson of Massachusetts, John B. Henderson of Missouri, John Conness of California, Daniel Clark of New Hampshire, Lyman Trumbull of Illinois, John Sherman of Ohio, John A.J. Creswell of Maryland, Henry B. Anthony of Rhode Island,

54. *See* CONG. GLOBE, 39th Cong., 1st Sess. 351–59 (1866) (statements of Reps. Rogers & Conkling); *id.* at 376–89 (statements of Reps. Blaine, Donnelly, Sloan, Orth, Chanler, Farnsworth, Baker, Jenckes & Trimble); *id.* at 403–12 (statements of Reps. Lawrence, Shellabarger, Eliot, Pike, Kelley, Bromwell, Cook & Marshall); *id.* at 422–35 (statements of Reps. Eldridge, Strouse, Higby, Bingham, Broomall, Davis & Nicholson); *id.* at 447–60 (statements of Reps. Harding, McKee, Kerr, Kasson & Wright); *id.* at 482–93 (statement of Rep. Raymond); *id.* at 508–09, 535–38 (statements of Reps. Stevens, Schenck & Benjamin); CONG. GLOBE, 39th Cong., 1st Sess. App. 55–64 (1866) (statements of Reps. Johnson, Julian, Thomas & Hogan); *id.* at 296–300 (statement of Rep. Schenck). This number of pages increases to 97 if all speeches discussing the basis of apportionment are included. *See* CONG. GLOBE, 39th Cong., 1st Sess. 144–42 (1866) (statement of Rep. Blaine); *id.* at 278 (statement of Rep. Conkling).

55. *See* sources cited *supra* note 54.

56. *See id.* at 377 (statement of Rep. Kelley); *id.* at 380–81 (statement of Rep. Orth); *id.* at 385 (statement of Rep. Lawrence); *id.* at 386 (statements of Reps. Baker & Ingersoll); *id.* at 405 (statement of Rep. Shellabarger); *id.* at 406 (statement of Rep. Eliot); *id.* at 407 (statement of Rep. Schenck); *id.* at 429–33 (statement of Rep. Bingham & Broomall); *id.* at 434 (statement of Rep. Davis); *id.* at 535 (statement of Rep. Schenck).

57. *See id.* at 644, 673–87 (statement of Sen. Sumner); *id.* at 702–08 (statement of Sen. Fessenden); *id.* at 736–42 (statement of Sen. Lane); *id.* at 763–70 (statement of Sen. Johnson); *id.* at 810–11, 831–35 (statement of Sen. Clark); *id.* at 852–53, 876–86 (statement of Sen. Hendricks); *id.* at 915, 957–65 (statements of Sens. Buckalew & Wilson); *id.* at 1180–84 (statement of Sen. Pomeroy); *id.* at 1203, 1224–33 (statements of Sens. Sumner & Doolittle); *id.* at 1254–58 (statement of Sen. Wilson); *id.* at 1275–89; CONG. GLOBE, 39th Cong., 1st Sess. App. 91–124 (1866) (statements of Sens. Williams, Yates & Henderson); *id.* at 145–56 (statements of Sens. Saulsbury & Morrill).

58. *See* sources cited *supra* note 57.

59. *See* CONG. GLOBE, 39th Cong., 1st Sess. 673 (1866) (statement of Sen. Doolittle); *id.* at 674 (statement of Sen. Sumner); *id.* at 702 (statement of Sen. Henderson); *id.* at 810–11 (statement of Sen. Sumner); *id.* at 915 (statement of Sen. Howard); *id.* at 1284 (statement of Sen. Clark); *id.* at 1287 (statements of Sens. Yates & Doolittle); *id.* at 1287–88 (statement of Sen. Sumner); *id.* at 1289 (statement of Sens. Clark & Doolittle); CONG. GLOBE, 39th Cong., 1st Sess. App. 98 (1866) (statement of Sen. Yates); *id.* at 115 (statement of Sen. Henderson).

James A. MacDougall of California, Reverdy Johnson of Maryland, Edgar Cowan of Pennsylvania, James R. Doolittle of Wisconsin, and Garrett Davis of Kentucky.[60] Henderson, Clark, Sumner, Doolittle, Yates, and Sherman proposed amendments to the apportionment resolution or offered substitutes.[61]

The Joint Committee's proposed constitutional amendment, limited to congressional power to protect fundamental rights, that eventually morphed into Section One of the Fourteenth Amendment occupied far less congressional time and attention. The House debate took three days, encompassing approximately 27 pages in the *Congressional Globe*.[62] Eight representatives made speeches; some opposed the amendment, some were favorable, and some proposed alternative political guarantees.[63] No one offered any amendments or substitutes for the rights resolution. Representative Bingham aside, no prominent member of Congress participated at any length.

Section Two was the subject of the most commentary of any provision in the Fourteenth Amendment during the ratification process in Tennessee. Newspapers maintained that Section Two was the centerpiece of the Fourteenth Amendment. The *Memphis Daily Post* declared that Section Two was the "great guarantee" that "will, in the future secure a peaceable and just settlement of all our difficulties" by which "each State secures its just proportion of power in the Congress of the Union."[64] Representative Horace Maynard declared the adjustment in the basis of representation to be of "greater importance."[65] Opponents of the Fourteenth Amendment in Tennessee agreed. "The point in this scheme of greatest interest," *The Nashville Daily Union* stated, "is that which relates to the basis of representation."[66] David Patterson, Senator-elect, informed his fellow citizens that:

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60. CONG. GLOBE, 39th Cong., 1st Sess. 1275–89 (1866).

61. *Id.*

62. *See id.* at 1033–35 (statement of Rep. Bingham); *id.* at 1054–67 (statements of Reps. Higby, Kelley, Hale & Price); *id.* at 1083–95 (statements of Reps. Davis, Woodbridge, Bingham & Hotchkiss).

63. *See* sources cited *supra* note 62.

64. *The Great Guarantee*, MEM. DAILY POST, June 2, 1866, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/587474338); *see also The Political Prospect*, MEM. DAILY POST, June 4, 1866, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/587474867) (calling Section Two "a great and unquestionable act of justice").

65. *Fourth of July: Radical Omnium Gatherum*, DAILY UNION & AM. (Nashville), July 6, 1866, at 3 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70797362).

66. *The Caucus Constitutional Amendment*, NASHVILLE DAILY UNION, June 6, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/78700320); *see also* NASHVILLE DAILY UNION, June 12, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com

> [Y]ou are now gravely called upon by the majority in Congress, and his Excellency the Governor, to sanction an amendment to the Federal Constitution which, if ratified by the States, will deprive you of your recognized political power, and lessen the number of your representatives in the national Legislature, unless you shall at their bidding clothe the negro with the right of suffrage.[67]

Some commentary reduced the entire Fourteenth Amendment to Section Two. The *Daily Union and American* summarized the Fourteenth Amendment as forcing the South "to admit the negroes to the ballot-box, or give up part of her right to representation."[68] Three days earlier, the newspaper asked readers: "Are our legislators prepared to answer to their constituents, and particularly in East Tennessee, for this reduction in our representation—for this loss in our strength in Congress? Or are they prepared to give the negro the right to vote and give us the full benefit of the Radical programme?"[69]

/image/78700733) (stating that "the feature of this proposition of most importance is the second section").

67. David T. Patterson et al., *Address to the People of Tennessee*, REPUBLICAN BANNER (Nashville), July 17, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/604875361); *see also* David T. Patterson et al., *To the People of Tennessee*, PULASKI CITIZEN, July 20, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70862088) (same); David T. Patterson et al., *Address to the People of Tennessee*, CLARKSVILLE WKLY. CHRON., July 27, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/76258704) (same); David T. Patterson et al., *To the People of Tennessee*, DAILY UNION & AM. (Nashville), July 17, 1886, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70797977) (same); David T. Patterson et al., *Address to the People of Tennessee*, HOME J. (Tenn.), July 21, 1886, at 3 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/174801560) (same).

68. *Items of General News*, DAILY UNION & AM. (Nashville), July 7, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70797407); *see also The Proposed Amendment*, HOME J. (Tenn.), July 14, 1866, at 3 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/174801421) (claiming that the point of Section Two was "to keep out of the national councils all persons from any State which has been heretofore declared an insurrection, loyal or disloyal").

69. *The Amendments*, DAILY UNION & AM. (Nashville), July 4, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70797258). Wendell Phillips spoke only of Section Two specifically in a speech that received substantial coverage in Tennessee. *Wendell Phillips*, REPUBLICAN BANNER (Nashville), July 11, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/119319451). The other papers that covered the speech, however, did not include the discussion of Section Two. *See Fanatico-Philosophic View*, DAILY UNION & AM. (Nashville), July 11, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70797632); *Fanaticism*, MEM. DAILY ARGUS, July 12, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/585890981).

Section Two was the only provision of the final Fourteenth Amendment that merited lengthy analysis in Tennessee. Every newspaper opinion piece on the Fourteenth Amendment longer than a paragraph was devoted to Section Two.[70] The *Memphis Daily Post*, in a column entitled "The Great Guarantee," defended the "great principle of Equality of Representation for the States."[71] *Brownlow's Knoxville Whig* published an essay entitled "What the Union People Want" that was focused almost entirely on apportionment reform.[72] "If the basis of representation is changed from that which now exists, so as to prevent a non-voting population from being represented in Congress," the essay pointed out, "why then the sectional power of the South as a political body will be gone; and even without abolishing the Electoral College we might hereafter reasonably hope for a perpetual Union triumph."[73] Apportionment was the centerpiece of Fourth of July speeches devoted to the Fourteenth Amendment. Representative Samuel Arnell's speech on July 4, 1866, focused entirely on Section Two.[74] "The second section, to which some object, simply places a white and colored man on the same footing in Illinois and New York or any other State," he said, and "[i]t also does away with the three-fifths privilege."[75]

The citizens of Tennessee learned that national elites shared this common understanding that apportionment reform was the heart of the Fourteenth Amendment. Attorney General Joshua Speed pointed to Section Two when explaining why he could not join a movement to support President Johnson and to oppose ratification of the Fourteenth Amendment. His letter, published in Tennessee papers, stated:

> The persistent attempt to keep in the Constitution the rule of an unequal and unfair basis of representation is perilous to the future peace of the country, and will surely cause a chafing sense of injuries as long as it is continued. . . . Earnestly

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70. *See, e.g.*, *The Reconstruction Scheme of the Radical Caucus*, NASHVILLE DAILY UNION, June 7, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/78700488).

71. *The Great Guarantee*, MEM. DAILY POST, June 2, 1866, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/587474338).

72. *See What the Union People Want*, BROWNLOW'S KNOXVILLE WHIG, July 11, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/50653753).

73. *Id.*

74. *See Fourth of July: Radical Omnium Gatherum*, *supra* note 65, at 3.

75. *Id.* For a slightly different transcription and editing of that speech, see *Speech of Hon. S.M. Arnell*, MEM. DAILY POST, July 11, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/586556206) ("Fairness says that we must lose the three-fifth negro representation or let them vote. . . . Under the new order of things, tell me what shadow of claim have we to represent the colored people, unless we let them have a voice in the matter.").

> sympathizing with the men who look upon a law of equal representation as the only guaranty for popular rights, I should feel myself out of place in a party that showed a basis of representation giving peculiar and unjust advantages to a portion of the body politic, to the detriment and dissatisfaction of the whole.[76]

Speed did not think any other provision of the Fourteenth Amendment was worthy of commentary. The case for constitutional reform in 1866 rested on the apportionment provision in Section Two, not the list of rights in Section One or any other provision crafted by the Thirty-Ninth Congress.

Section One did not occupy the place of pride when Tennesseans discussed the Fourteenth Amendment. No newspaper item surveyed longer than a paragraph was devoted to discussing that provision. Two of the three prominent Tennessee politicians who gave speeches at a Union Party Fourth of July program did not comment on citizenship or the rights pertaining to citizenship.[77] The other made only a brief allusion to Section One before providing a more detailed account of Sections Two and Three.[78] Several multi-paragraph discussions of various provisions in the Fourteenth Amendment left out Section One.[79] Those who discussed Section One did not devote nearly as much attention to that provision as they devoted to Sections Two and Three of the final Fourteenth Amendment.[80] Many commentaries suggested that Section

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76. *Letter of ex-Attorney General Speed*, DAILY UNION & AM. (Nashville), July 18, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/70798078); *see also Powerful Letter from Attorney General Speed: A Blow at the Johnson Convention*, MEM. DAILY POST, July 21, 1866, at 1 (emphasis omitted) (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/586556625) (same); *Powerful Letter from Attorney General Speed: A Blow at the Johnson Convention*, BROWNLOW'S KNOXVILLE WHIG, July 25, 1866, at 3 (emphasis omitted) (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/73652658) (same).

77. *See Fourth of July: Radical Omnium Gatherum*, *supra* note 65, at 3.

78. *Speech of Judge Houk*, BROWNLOW'S KNOXVILLE WHIG, July 18, 1866, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/73652616). Readers of the transcription of that speech in the *Daily Union and American* would not have known that Houk spoke at all about Section One. *See Fourth of July: Radical Omnium Gatherum*, *supra* note 65, at 3.

79. *See, e.g.*, James A. Butler, Letter to the Editor, *The Duties and Responsibilities of the Hour—How They Should Be Met*, MEM. DAILY POST, July 31, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/586557034) (discussing Sections Two and Three).

80. *See, e.g.*, N. A. Patterson, Letter to the Editor, BROWNLOW'S KNOXVILLE WHIG, July 18, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/73652623).

One accomplished little.[81] Tennesseans would have been stunned to learn that their descendants considered the Citizenship, Privileges and Immunities, Equal Protection, and Due Process Clauses to make a Second Founding.[82] Their Section One was a footnote.

III. SECTION TWO AS THE FOURTEENTH AMENDMENT

The Republican emphasis on apportionment reform after the ratification of the Thirteenth Amendment was grounded in intrinsic and consequential reasons. The intrinsic justification was that states should not gain representatives for men who did not vote. The vote of an Ohio citizen for Congress should be worth as much as a congressional vote of a Mississippi citizen for Congress. The more central consequential justification was that apportionment reform would place former Confederate states in a dilemma, either horn of which would provide protection for the rights and interests underlying other proposed constitutional reforms. To the extent former Confederate states sought to increase their representation by enfranchising men of color, those men of color would provide the votes necessary to protect their interests and broader goals such as staffing government with loyal officials, protecting Union finances, and preventing secession. To the extent former Confederate states sought to preserve the status quo by restricting voting to white men, northern Republican majorities would have the power to pass federal legislation that protected the rights of persons of color in the South, staffed governments with loyal officials, secured northern finance, and prevented secession. *The New York Herald* explained this dilemma to readers: "Make the basis of representation in the popular branch of Congress the number of voters in each State," an editorial stated, "and the Southern States will be reduced to the alternative of admitting the blacks to the rights of suffrage, or to the sacrifice of twenty-five or thirty members of Congress."[83] The *West-Jersey Pioneer* similarly explained that apportionment reform would "compel" former slave states "either to do justice to their disfranchised freedmen, or else derive no political benefit whatever from them."[84]

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81. *See e.g.*, *The News*, REPUBLICAN BANNER (Nashville), June 9, 1866, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/119316910) (suggesting that with the possible exception of Section Three, "[t]he other sections of the proposed amendment are unimportant, and propose no changes in the existing condition of things").

82. *See* FONER, THE SECOND FOUNDING, *supra* note 16, at 72–80.

83. *Southern Reconstruction—A Short Method for a Fair and Final Settlement*, *supra* note 48, at 4.

84. *Congress*, WEST-JERSEY PIONEER, Dec. 23, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/844426824). Democratic journals agreed that Section Two was designed to place former slave states

Apportionment reform was a matter of simple justice. "Justice would thus be done to all sections," the *Daily Richmond Whig* stated, "for voters alone are entitled to representation."[85] *The Daily North-Carolina Standard* agreed that "[t]he just and proper plan would be to base the number of representatives in the lower House *upon the actual number of voters in each State*."[86] Having former enslavers represent persons they enslaved and then disenfranchised was particularly unfair. The *Richmond Weekly Palladium* asserted that "the old slaveholders of the South shall not represent freedmen in Congress without their consent; and if the South (the *white* South, of course) will not permit black men to vote, then it shall not send representatives to Congress to misrepresent them."[87] "This provision," the *Illinois Weekly State Journal* asserted, "will entirely obviate the present monstrous inequality, by which the ruling class in the Southern States now obtain additional votes in Congress for their negro population, at the same time that they are unwilling to give them the privileges of citizens."[88] White Southerners who represented a third of the voters that some northerners represented

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in a dilemma, both horns of which would promote Reconstruction goals. *See The Change in Representation*, MEM. DAILY APPEAL, Dec. 17, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/39794322) ("The only reason of this pet scheme is to drive the South into negro suffrage, or else cause them to lose a large portion of their Representatives in Congress.").

85. *Representation in Congress*, DAILY RICHMOND WHIG, Dec. 28, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/904411244) (as reprinted from *The New York Herald*); *see also The Basis of Representation*, *supra* note 41, at 2 (accusing the present system of "'rotten borough' imposition" and concluding that "[v]otes in Congress and the Electoral College must be founded upon voters and not upon non-voters").

86. *Representation in Congress*, DAILY NORTH-CAROLINA STANDARD, Dec. 28, 1865, at 4 [hereinafter *Representation in Congress*, N.C.] (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/59133564) (as reprinted from the *Washington Chronicle*); *see also Amendments to the Constitution*, NEB. REPUBLICAN, Dec. 22, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/739376240) ("This basis would be far nearer equal and just than the present one because voters, more nearly than population, truly represent interest.").

87. *Gen. Schenck's Amendment*, RICHMOND PALLADIUM (Ind.), Dec. 28, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/465033319); *see also Representation in Congress*, N.C., *supra* note 86, at 4 (as reprinted from the *Washington Chronicle*) ("[I]f the Southern States refuse the suffrage to the colored people, they have no right to represent three-fifths of them in Congress."); *Amendments to the Constitution*, *supra* note 86, at 2 ("If a negro cannot represent himself, he should not be misrepresented by anybody else."); *A Lesson from Alabama*, MORNING OREGONIAN, Dec. 21, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/19449097) ("If the ex-rebels . . . refuse to allow the loyal blacks to vote, then we say they shall not steal the votes of those loyal blacks to weigh down thirty-three congressional districts of the North.").

88. *Equalization of the Basis of Representation*, *supra* note 39, at 2.

before the Thirteenth Amendment[89] might enjoy an even greater advantage after emancipation. Noting proposals in Alabama to apportion representation in the state legislature by voters rather than population, the *Morning Oregonian* asserted that "[i]f one man in South Alabama is not the equal of two men in North Alabama, neither is one man in Alabama equal to two men in Illinois."[90] Republicans regarded apportionment by population as a relic of slavery that ought not to survive emancipation. The *Morning Oregonian* stated that "[t]he apportionment of representatives in Congress and electors of Presidents and Vice Presidents upon the basis of persons instead of voters, was one of the compromises of slavery, and is no more applicable to a condition of freedom than a fugitive slave law or a human auction block."[91]

Republicans more often emphasized the beneficent consequences of apportionment by voters in states with significant disenfranchised black populations. Former slave states that did not mandate black suffrage, they observed, would lose substantial political power.[92] The *West-Jersey Pioneer* estimated a loss of between thirty and forty seats in the House of Representatives.[93] A popular analysis concluded that former slave state representation would drop from eighty-four to sixty-six under Section Two if persons of color were disfranchised, but would increase to one hundred if non-voting black citizens were counted in the apportionment.[94] Many western newspapers enthusiastically pointed out that their states would gain at the expense of the South[95] and New England.[96] Bipartisan agreement existed that the Republican Party would be the major beneficiary of Southern decisions to deny black suffrage. *The New York Herald* claimed apportionment reform was motivated by "the fear of a decisive balance of power against the republican party."[97]

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89. *Gen. Schenck's Amendment*, *supra* note 87, at 2.

90. *A Lesson from Alabama*, *supra* note 87, at 4.

91. *Id.*

92. *From Washington*, GALVESTON, *supra* note 40, at 5 ("This will very considerably diminish the number of Congressmen accorded to the Southern States under the last apportionment.").

93. *Congress*, WEST-JERSEY PIONEER, *supra* note 84, at 2; *see also Black Republican Requirements*, *supra* note 40, at 2 ("This will very considerably diminish the number of Congressmen accorded to the Southern States under the last apportionment."); *From Washington*, MEM., *supra* note 33, at 1 (same).

94. *The Basis of Representation*, *supra* note 41, at 2.

95. *See, e.g.*, *Congress and the Administration*, GOLD HILL DAILY NEWS (Nev.), Dec. 22, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/622473182).

96. *See Amendments to the Constitution*, *supra* note 86, at 2.

97. *Progress and Prospects of Reconstruction—A Short Method for a Complete Settlement*, N.Y. HERALD, Dec. 20, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/843835428).

Many proponents of apportionment reform thought making voters the basis of representation would facilitate black suffrage. "Let the Southern States allow only their voting population to be represented," Solomon Afterwit wrote in the *Daily National Republican*, "then we may look with considerable confidence to see the unrepresented non-voters admitted peaceably and without serious opposition."[98] "Who can doubt that the blacks, under this constitutional provision, would be admitted to the ballot boxes?," *The New York Herald* confidently proclaimed.[99] Democrats agreed and made that point when opposing the amendment.[100]

Proponents of black suffrage agreed with proponents of apportionment reform on the consequences of black voting. Representative Stevens informed Congress that, "[i]n a country where political divisions will always exist," the power of black voters, "joined with just white men, would greatly modify, if it did not entirely prevent,

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98. Solomon Afterwit, Letter to the Editor, *Some Reminiscences of the Censor—"The Things that Make for Peace"—The Reconstruction Question in Tennessee—History of Political Action in Louisiana*, DAILY NAT'L REPUBLICAN (D.C.), Dec. 29, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/46396771); *see also Representation and Franchise*, PITT. COM., Dec. 23, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/85266380) (arguing that changing the basis of representation would induce black suffrage).

99. *Southern Reconstruction—A Short Method for a Fair and Final Settlement*, *supra* note 48, at 4; *see also Amendments to the Constitution*, *supra* note 86, at 2 ("It would prove the entering wedge to an ultimate suffrage that would be just and safe."); *Suffrage—The President's Logic*, SPRINGFIELD WKLY. REPUBLICAN (Mass.), Dec. 16, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1055944606) ("[L]et voters instead of population be made the basis of representation in Congress, and we shall see equal suffrage extending in the South by the voluntary act of the white citizens."); *Negro Suffrage in the District of Columbia*, BURLINGTON TIMES, Dec. 16, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/364922651) (same); *Governor Low's Message*, PETALUMA WKLY. ARGUS (Cal.), Dec. 14, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/624364120) (implying that apportionment reform will result in "impartial suffrage").

100. *See The Effect of the Bill Basing Representation Upon Voters*, PORTLAND PRESS HERALD (Me.), Dec. 29, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/846377782) ("[T]heir object being to compel the South to make the negroes voters . . . ."); *The Change in Representation*, SELMA MORNING TIMES, Dec. 23, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/571073219); *Constitutional Amendments*, DET. FREE PRESS, Dec. 15, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1048526892); *The Negro Rump Congress*, WKLY. PATRIOT & UNION (Pa.), Dec. 14, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1085661277). Eastern Democrats also complained that making voters the basis of representation would benefit the west at the expense of New England and the Atlantic seaboard. *See The Effect of the Bill Basing Representation Upon Voters*, *supra*, at 2.

the injustices of majorities."[101] The *Chicago Tribune* insisted that suffrage reform was the best solution for the black codes. If Congress when legislating for the former Confederate states and territories "prescribe[ed] a new and more democratic basis of suffrage, which shall include all intelligent tax-paying citizens without distinction of color as voters," the paper opined, "it will work a vast change in the Southern sentiment on the question whether the negro can own or lease and, have a home, work at a mechanical trade, keep a story or learn to read."[102] Henry C. Wright, writing in *The Liberator*, asked: "Shall we now give them power over our destiny to destroy us, while we refuse the ballot to our friends to save us?"[103]

Proponents of a constitutional amendment mandating black suffrage or at least forbidding race discrimination in the suffrage agreed that suffrage rights were the best means for protecting other rights. *The Brooklyn Union* declared that after a constitutional amendment mandating black suffrage, "the nature of all future State legislation . . . can be left to take care of itself," that formerly enslaved persons would become "an integral part of the community, deserving of respect, endowed with power, and capable of asserting his political individuality."[104] Black suffrage would be as successful a means for securing northern financial interests. Robert Dale Owen, in an often-republished letter to the New York *Evening Post*, maintained:

> We may safely calculate upon the vote of the negro population, in mass, being cast for national representatives who will vote with us on all great national questions: as against repudiation of our debt or assumption of the rebel debt. They will sustain us on such questions, not because they have financial knowledge or political experience, but because they have

101. CONG. GLOBE, 39th Cong., 1st Sess. 74–75 (1866); *see also An Unwise Measure*, BROOK. UNION, Dec. 23, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/541728165) (noting black suffrage as "the means of protecting themselves").

102. *Land for the Freedman*, CHI. TRIB., Dec. 29, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/466094214). The *Daily National Intelligencer,* the house journal for the Johnson administration, insisted that former slaves would vote with the past masters. *The Factious Stevens*, DAILY NAT'L INTELLIGENCER (D.C.), Dec. 21, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1039959016).

103. Henry C. Wright, Letter to the Editor, *The Ballot—Is it a Natural Right? Shall it be Withheld from the Loyal, and Given to the Disloyal?*, THE LIBERATOR (Boston), Dec. 15, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/32254125).

104. *The Golden Mean*, BROOK. UNION, Dec. 18, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/541727974).

> sagacious instincts. They understand that their safety depends in voting with their friends, and they will do it.[105]

By the time the Thirteenth Amendment was ratified, apportionment had become the preferred alternative to black suffrage, at least among the vast majority of white Republicans. Apportionment was the more politically realistic means of obtaining Republican goals. *The Burlington Times* and Springfield's *Republican* agreed that a constitutional amendment on apportionment "will stand a better chance of approval by the requisite three-fourths of the States than any other of the amendments proposed to secure equal suffrage."[106] As important, apportionment would create pressures for black suffrage in the former Confederate states, while providing no grounds for changing the racial status quo in the North. *The Chicago Republican* pointed out that many union states "do not desire to have negro voters among them, and they have a perfect right to determine the question as they choose."[107] Rebel states were different. In such jurisdictions, "we are bound to secure freedom and the most ample protection to the blacks, and that duty is effectually performed by making them voters."[108]

IV. SECTION TWO'S FOURTEENTH AMENDMENT

Section Two of the Fourteenth Amendment promised to reconfigure the state governments and the federal government. The goal of apportionment reform was to ensure either that former Confederate states permitted persons of color to vote or that northern majorities controlled the federal government. Ideally, both would result. If states enfranchised persons of color, state governments would be transformed. State governments staffed by officials elected partly by black voters could be trusted to protect the personal and property rights of formerly enslaved persons and white unionists, select loyal persons to state and federal office, repudiate the rebel debt, honor the federal debt, and refuse to compensate former enslavers. If former confederate states did not enfranchise persons of color, the federal government would be

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105. *The Constitutional Guaranty of a Republican Form of Government*, EVENING POST (N.Y.), Nov. 25, 1865, at 1 (on file with NYS Historic Newspapers, https://www.nyshistoricnewspapers.org/?a=d&d=evpo18651125-01.1.1&e=); *see also Robert Dale Owen's Plan*, BURLINGTON TIMES, Dec. 1, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/406450124) (as reprinted from New York's *Evening Post*).

106. *Robert Dale Owen's Plan*, *supra* note 105, at 1 (discussing the Springfield *Republican*'s support of the amendment).

107. *Consistency*, CHI. REPUBLICAN, Dec. 1, 1865, at 4 (on file with Newsbank, Readex).

108. *Id.*

transformed, at least as the federal government was staffed before secession. Overwhelming northern Republican majorities could be trusted to protect the personal and property rights of formerly enslaved persons and white unionists, select loyal persons to state and federal office, repudiate the rebel debt, honor the federal debt, and refuse to compensate former enslavers in part by prohibiting any state law or official action to the contrary. The constitutional reform instantiated by Section Two altered the course of state governments and/or the federal government by changing their staffing, not by limiting their powers. Reconstruction was just that—an effort to reconstruct the former Confederate states, not an effort to limit the powers of black majorities and near black majorities in the formerly slave jurisdictions.

Section Two was far more central than Section One to the Republican Party's Fourteenth Amendment for three reasons. First, Republicans in December 1865 thought constitutional reform was necessary to change the apportionment, but not to empower Congress to protect certain fundamental rights.[109] Almost all proponents of free labor and white supremacy when the constitutional ban on slavery was ratified maintained that Section Two of the Thirteenth Amendment empowered Congress to protect the personal and property rights of formerly enslaved persons and persons of color more generally.[110] No one claimed that Congress under the Thirteenth Amendment's Constitution could mandate that the number of voters in each state would provide the basis of representation. Second, Republicans thought rights were best protected by well-designed institutions rather than by parchment declarations. Republicans repeatedly declared that, despite the Thirteenth Amendment, former confederates were determined to reinstitute slavery under another name.[111] No good reason existed for thinking that after a constitutional amendment mandating racial equality, the same former confederates would not be determined to reinstitute white supremacy under another name. Section One of the Thirteenth Amendment and Section One of the Fourteenth Amendment, if not redundant, would work, Republicans believed, only if Section Two (and Three) of the Fourteenth Amendment worked. Third, Section Two was designed to ensure that the national government achieved the entire Republican program. Republicans were committed to free labor and racial equality, but they also favored preventing secession in the future, repudiating of the confederate debt, and honoring the federal debt.[112] Many favored export taxes.[113] Shortly

109. See *infra* notes 115–119 and accompanying text.

110. *See* Mark A. Graber, *The Second Freedmen's Bureau Constitution*, 94 TEX. L. REV. 1361, 1372–90 (2016).

111. *See* GRABER, PUNISH TREASON, REWARD LOYALTY, *supra* note 16, at 92.

112. *Id.* at 133–63.

113. Graber, *Bingham's "Important" Amendment*, *supra* note 22, at 1351–53.

after Representative Bingham proposed amendments repealing the constitutional ban on export taxes, repudiating the rebel debt, and empowering the federal government to protect personal and property rights, several newspapers noted that Bingham had proposed an "important constitutional amendment," namely the repeal of the ban on export taxes.[114]

In short, Republicans after ratification of the Thirteenth Amendment were committed to ensuring that formerly enslaved persons enjoyed personal and property rights, but they did not think an explicit constitutional amendment was necessary to achieve that goal. The *Congressional Globe* and the newspapers of the time are saturated with proposals for racial equality, particularly in the former Confederate states. Representative Eliot of Massachusetts introduced a resolution stating that Congress "declare[d] it to be our indisputable condition for the reorganization of the said States, that their Constitutions should secure to all the inhabitants thereof equal rights before the law without distinction of color or race."[115] *The New York Nation* declared:

> Give him effectual protection in his contracts, his labor, his family, his education, his freedom of locomotion, his right to bear arms, to sue and to testify in all courts, and the right of suffrage will not be long withheld from him, even if it cannot be secured along with those other rights.[116]

Debates over constitutional reform in the Thirteenth Congress were more over the means of achieving racial equality and other Republican goals than over the actual goals. Section Two was the center of Republican attention because almost all party members believed reconfiguring state and federal politics was a better means of securing those goals than more explicit assertions of constitutional commitments to racial equality. A correspondent from the *Springfield Weekly Republican* captured the dominant spirit of the times when predicting that the Thirty-Ninth Congress would pass constitutional amendments on apportionment, rebel debt, and exports, and enact legislation protecting

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114. *See id.* at 1350–51 (cleaned up).

115. *Constitutional Amendments*, NEW BERNE DAILY TIMES (N.C.), Dec. 19, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/53883834).

116. *Conditions Precedent to Suffrage*, SPRINGFIELD DAILY REPUBLICAN (Mass.), Dec. 18, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1061902043) (as reprinted from New York's *The Nation*).

the rights of formerly enslaved persons.[117] The *Clarksville Weekly Chronicle* reported that Republicans were committed to ensuring "perfect protection and equality with white men in the courts for freedmen in the South, and some modification of the ratio of representation."[118] Only the latter, however, did the paper think would be embodied in a constitutional amendment.[119]

Republican priorities when the Fourteenth Amendment was being debated were structured by a sharp difference between proposals to empower Congress to protect the personal and property rights of formerly enslaved persons and others, on the one hand, and proposals to mandate black suffrage either explicitly or by a constitutional amendment that banned all race discrimination, on the other. Ohio representative Bingham's proposal that eventually morphed into Section One of the Fourteenth Amendment was of the former kind. *The New York Times* observed that Bingham's proposal "to secure to all persons, in every State of the Union, equal rights of life, liberty and property . . . is intended to secure equal personal, not political, rights to all persons, without distinction of race or color, and without which no man can look for security in any rebel State during this generation."[120] That *New York Times* commentary was one of the very few commentaries on that proposal made in December 1865 or afterward. Pennsylvania representative Stevens's proposal to make all laws uniform was an example of the latter. Stevens and others would have banned laws that restricted suffrage by race.[121] An extensive debate occurred over the merits of these proposals.

Distinguishing proposals limited to personal and property rights from proposals banning discrimination in political rights is sometimes difficult. Representatives George Boutwell and Thomas Jenckes made life easy for future historians by specifying in the proposed amendment

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117. *Reconstruction--The Sweep of Events*, SPRINGFIELD WKLY. REPUBLICAN (Mass.), Dec. 30, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1055944651).

118. *Black Republican Requirements*, *supra* note 40, at 2; *see also From Washington*, MEM., *supra* note 40, at 1 (same).

119. *Black Republican Requirements*, *supra* note 40, at 2.

120. *Our Washington Correspondence*, N.Y. TIMES, Dec. 18, 1865, at 1 (on file with N.Y. Times, TimesMachine, https://timesmachine.nytimes.com/timesmachine/1865/12/18/issue.html); *see also Proposed Constitutional Amendment*, BUFFALO WKLY. EXPRESS, Dec. 26, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/494790951) (same); CHI. EVENING POST, Dec. 21, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/668327736) (same).

121. Representative George Boutwell of Massachusetts specifically proposed that no state discriminate by race when determining voters. *See* WHEELING DAILY INTELLIGENCER (W.V.), Dec. 19, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/171170058).

that states could not make race a criterion for voting.[122] When proposing a constitutional right "securing to them the enjoyment of civil rights, . . . in short, '*no distinction on account of color*,'" Representative John Farnsworth of Illinois made clear that this general equality right included "the right to the elective franchise when sufficiently intelligent."[123] As the Farnsworth speech indicates, more radical Republicans insisted that voting was a civil right to which persons of color could not be denied on account of race under the Thirteenth Amendment[124] or Guarantee Clause.[125] Other bans on race discrimination were not as explicit. The *Raftsman's Journal* noted proposals that "aim at the establishment of equal civil rights for all men, without distinction of color."[126] Although that text does not make clear whether the amendment included political rights, the article was devoted to "important bills and resolutions introduced into the two houses of Congress on the 11th."[127] Stevens proposed his amendment that covered political rights on December 11.[128] The Bingham proposal was made on December 6.[129] No congressman on December 11 proposed an anti-discrimination bill that covered only personal and property rights.[130] Consider also in this vein an essay in the *Burlington Weekly Free Press* that indicated that Congress was likely to adopt as amendments to the Constitution:

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122. *See* SPRINGFIELD WKLY. REPUBLICAN (Mass.), Dec. 16, 1865, at 4 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1055944611).

123. *An Illinois Congressman*, PANTAGRAPH (Ill.), Dec. 27, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/897600811).

124. *The President and the Negro*, ADVOCATE (N.Y.), Dec. 28, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/254513117); *see Unwise Measure*, *supra* note 101, at 2; VT. WATCHMAN & STATE J., Dec. 22, 1865, at 1 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/73686961) (discussing the "resolution adopted by our Legislature, in favor of securing 'equal rights without respect to color, to all citizens, including the right of elective franchise.'").

125. *See Negro Suffrage and the Constitution*, SEYMOUR TIMES (Ind.), Dec. 21, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/706952642); *Negro Suffrage and the Constitution*, LAFAYETTE WKLY. J., Dec. 15, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1050064552); *see also Negro Suffrage*, INDIANAPOLIS SENTINEL, Dec. 20, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/167570161) (noting Republicans who believed emancipated persons became citizens with the right to vote).

126. *Congressional Proceedings*, *supra* note 50, at 2.

127. *Id.*

128. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). See *id.* at 18 for where Stevens detailed the contents of his amendments proposed on December 11.

129. *Id.* at 14.

130. *See id.* at 16–23.

> [P]ropositions which look to the entire abolition of privilege and inequality throughout the Union; to the empowering of Congress to enforce this provision, by fitting legislation for the rights of whites and blacks;—to the precluding the repudiation of our, or the assumption of the rebel debt,—to a change of the basis of representation from "Federal numbers" to actual voters—to the authorization of export duties, and provisions for universal education.[131]

The reference to "the entire abolition of privileges and inequality" strongly suggests that the *Burlington Weekly Free Press* was endorsing some version of the Stevens uniformity amendment, but the text does not authoritatively rule out the possibility that the Vermont newspaper meant to champion Bingham's more narrow amendment. In any case, even if all ambiguities are interpreted as references to personal and property rights only, the commentary on the proposals that became Section One still dwarfs the commentary on proposals that became Section Two.

The heated contests over black suffrage that structured the final version of the Fourteenth Amendment help explain the centrality of Section Two to the post-Civil War Constitution. Apportionment reform was the fallback position once Republicans concluded that black suffrage lacked the support necessary to become the official law of the land. Rather than mandate black suffrage directly, Republicans sought to achieve black suffrage by politically neutering any state with a substantial black population that sought to restrict the vote to white men.[132] Representative Bingham aside, no proponent of racial equality thought a constitutional amendment was necessary to empower Congress to protect personal and political rights.[133] An amendment providing more explicit protection was unobjectionable and of symbolic significance,[134] but hardly as vital as the need to prevent proponents of slavery under other names and white supremacy from taking advantage of existing constitutional apportionment rules to regain control of the federal and state governments.[135]

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131. *From Washington*, BURLINGTON WKLY. FREE PRESS, Dec. 29, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/47621279).

132. *See infra* notes 139–145 and accompanying text.

133. *See* Mark A. Graber, The Constitution of the Civil Rights Act of 1866, at 1–2 (Sep. 28, 2025) (unpublished manuscript) (on file with author).

134. *Id.* at 3.

135. *Id.* at 4–11.

V. SECTION THREE FROM THE PERSPECTIVE OF SECTION TWO

The Fourteenth Amendment, with Section Two at the core, offered a threefold strategy for protecting the equal personal and property rights of formerly enslaved persons, preventing oathbreaking insurrectionists from holding office, prohibiting payment of the rebel debt, barring compensation for emancipated slaves, and guaranteeing the federal debt. The first level of protection was structural: reconstructed states that permitted black suffrage. States that allowed persons of color to vote would not violate their fundamental rights, elect oathbreaking insurrectionists to office, pay the rebel debt, compensate former enslavers, or repudiate the federal debt. The second level of protection was also structural: the overwhelming northern Republican majority in Congress that would result should former Confederate states refuse to enfranchise persons of color. That majority would pass federal laws—vigorously enforced by a President representing that overwhelming northern majority—that protected the equal personal and property rights of formerly enslaved persons, disqualified oathbreaking insurrectionists from office, prohibited payment of the rebel debt, barred compensation for former enslavers, and guaranteed the union debt. The third and least important level of protection was legal: a federal judiciary staffed by Justices, appointed by a President elected by an overwhelmingly northern Republican constituency and confirmed by a Senate with an overwhelmingly northern Republican constituency, that could be trusted to temporarily enforce a barebones version of the post-Civil War Amendments. In what Republicans thought would be the very rare and brief circumstance where a temporary Democratic majority gained control of Congress and some former Confederate states, the President could still enforce constitutional norms. And in the case of a rare and brief Democratic presidency (I'm looking at you, Grover Cleveland), an unreconstructed (by Democrats) federal judiciary would strike down unjust state and federal policies that failed to protect the equal personal and property rights of formerly enslaved persons, disqualify oathbreaking insurrectionists from office, prohibit payment of the rebel debt, bar compensation for former enslavers, and guarantee the union debt.

Reconstructed states were the first structural vehicle for achieving Republican commitments to free labor, racial equality, national union, loyal officials, and secure finances. As noted above, proponents of Section Two believed that the measure was likely to compel black suffrage and that former Confederate states in which former enslaved persons voted could be trusted to pursue what Republicans regarded as constitutional ends.[136] A state electorate composed of substantial numbers

136. *See supra* notes 101–107 and accompanying text.

of black citizens would not discriminate against persons of color, would secure Union finances, and would certainly not elect the former plantation elite to office. Horace Greeley stated that "[w]henever the blacks vote, the South will be preponderantly loyal [Republican], and hearty unionists will have efficient protection!"[137] Republicans expected that Georgia would resemble loyal Ohio or Iowa when Section Two's Constitution was fully implemented. Paul Herron details how Southern framers copied free state constitutions in the hope of reconstructing their former Confederate state in the image of the North.[138]

The initial returns provided substantial evidence that black suffrage was a structural reform in the states that made national efforts to protect civil rights, disqualify oathbreaking insurrectionists, and secure union finances unnecessary. The state constitutions adopted in the wake of Reconstruction vigorously protected racial equality.[139] Persons of color were granted all the rights granted by the Civil Rights Act of 1866 and more.[140] Former Confederate state constitutions included clauses declaring federal supremacy that had not existed in any state constitution before the Civil War.[141] Former Confederate states vested former enslaved persons with the right to vote. Many sanctioned interracial marriage.[142] Legislatures elected by black votes built schools, some of which were attended by children of all races.[143]

States reconstructed by black suffrage sent loyal delegations to Congress. Many states placed a version of Section Three in their reconstructed state constitutions.[144] The Tennessee provision clearly indicated that persons barred from state and federal office by Section Three were also barred from federal office by the State Constitution.[145]

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137. *The Radical Crusade against Reconstruction*, HUDSON CNTY. DEMOCRAT-ADVERTISER, Dec. 16, 1865, at 2 (on file with Ancestry, Newspapers.com, https://www.newspapers.com/image/1010140353).

138. PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902, at 133–36 (2017).

139. *See id.* at 154–56, 173–82; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 316–33 (1988) [hereinafter FONER, AMERICA'S UNFINISHED REVOLUTION].

140. *See* HERRON, *supra* note 138, at 154–56, 173–82; FONER, AMERICA'S UNFINISHED REVOLUTION, *supra* note 139, at 316–33.

141. *See* HERRON, *supra* note 138, at 158–62.

142. *See* JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA 1865–1954, at 40–48 (2008).

143. *See* FONER, AMERICA'S UNFINISHED REVOLUTION, *supra* note 139, at 365–69.

144. *See* HERRON, *supra* note 138, at 182.

145. *See* Henry Ishitani, *State Enforcement of Section Three Disqualification: What McConnell Gets Right on* Trump v. Anderson *and Why He's Still Wrong*, HARV. L. REV. BLOG (Sep. 13, 2025), https://harvardlawreview.org/blog/2025/09/state-

No member of Congress raised an eyebrow when states so restricted federal elections to ensure compliance with the Federal Constitution. Members of the Fortieth and Forty-First Congresses from the former Confederate states were overwhelmingly Republican (and many on the radical side).[146] Twenty-eight members of the Fortieth Congress had served in some capacity in the Union Army. Fifty of the fifty-five members of the Fortieth Congress from former Confederate states were Republicans. Thirty-seven members of the Forty-First Congress served in some capacity in the Union Army. Sixty-six of the eighty-four members of Congress in the Forty-First Congress from former Confederate states were Republicans. A few did not seem eligible by Section Three standards. No one seemed to care, as long as they did not represent the slave power, and Republican rule remained secure.[147]

Congress was the primary backup for state failure. Section Two contributed to Congress as an effective backup by textually guaranteeing that the more probable the state failure, the more likely a congressional response. States were likely to adopt policies inconsistent with Republican priorities only when persons of color did not vote.[148] The more states that denied black suffrage under Section Two, the greater the majority of free state representatives in Congress committed to Republican priorities.[149] The history of Reconstruction demonstrates how a Congress whose southern wing was either absent or elected by black votes would function. The Fortieth and Forty-First Congresses passed strong measures protecting formerly enslaved persons and white

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enforcement-of-section-three-disqualificationwhat-mcconnell-gets-right-on-trump-v-anderson-and-why-hes-still-wrong/ [https://perma.cc/W9UN-PE5Q].

146. The following information was gleaned from: BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://bioguide.congress.gov (last visited Sep. 16, 2025); *40th United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/40th_United_States_Congress [https://perma.cc/F9LW-3TZE] (last visited Sep. 16, 2025); *41st United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/41st_United_States_Congress [https://perma.cc/7FDG-F985] (last visited Sep. 16, 2025).

147. Several examples will suffice. Oliver H. Dockery was a member of the antebellum North Carolina legislature and briefly fought in the Confederate army. DOCKERY: THE LIFE AND TIMES OF OLIVER HART DOCKERY—A COLORED NARRATIVE 1 (1888). He changed his mind, became a Republican, and was elected to Congress apparently without any Section Three fanfare. *See id.* at 2. John W. Johnson held office in both antebellum and confederate Virginia. JACK P. MADDEX, JR., THE VIRGINIA CONSERVATIVES 1867–1879: A STUDY IN RECONSTRUCTION POLITICS 87 (1970). He was elected to the Forty-First Congress and had his political disabilities removed because he had once cared for an elderly former slave. *Id.*

148. *See* CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens) ("If they should grant the right of suffrage to persons of color, I think there would always be Union white men enough in the South, aided by the blacks, to divide the representation, and thus continue the Republican ascendency.").

149. *See id.* ("If they should refuse to thus alter their election laws it would reduce the representatives of the late slave States to about forty-five and render them powerless for evil.").

loyalists. The Fortieth Congress passed three Military Reconstruction Acts[150] and sent the Fifteenth Amendment to the states.[151] The Forty-First Congress passed the Enforcement Act of 1870.[152] Each responded to problems in local failures to implement the Thirteenth and Fourteenth Amendments.[153] Those Congresses also moved to renew some traditional Whig programs, most notably internal improvements.[154]

The Enforcement Act of 1870 highlighted the original relationship between state and federal legislation, enforcing the disqualifications set out in Section Three. President Grant asked Congress to pass legislation that responded to state failures, most notably in Georgia, to ensure loyal representatives.[155] Senator Trumbull declared that proposed legislation was designed to supplement legislation already in place. He described the relevant provisions of what became the Enforcement Act of 1870 as "afford[ing] a more efficient and speedy remedy to prevent persons from holding office who are not entitled to take office under the Constitution of the United States."[156] No Republican ever even hinted that any provision in the Fourteenth Amendment preempted state action designed to achieve the goals of that constitutional reform.[157]

Federal courts were missing in action when Congress debated the omnibus Fourteenth Amendment. Federal courts and judicial review were as absent from the debates over the framing of the Fourteenth Amendment as the Republican Party was present. Members of the Thirty-Ninth Congress maintained a deafening silence on the constitutional authority of the federal judiciary, at least when amending the Constitution was on the table.[158] No prominent framer in 1866 emulated James Madison, who when introducing the Bill of Rights to the First Congress, declared, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[159] With one exception,

150. Act of Mar. 11, 1868, ch. 25, 15 Stat. 41 (1868); Act of July 19, 1867, ch. 30, 15 Stat. 14 (1867); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867).

151. CONG. GLOBE, 40th Cong., 3d Sess. 1563–64, 1641.

152. Enforcement Act of 1870, ch. 114, 16 Stat. 140.

153. *See* David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 422–32, 464–68 (2008).

154. *See id.*

155. *See* Ulysses S. Grant, *First Annual Message*, *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 28 (James D. Richardson ed., 1898).

156. CONG. GLOBE, 41st Cong., 1st Sess. 627 (1869).

157. *See* Mark A. Graber, *Section 3 of the Fourteenth Amendment: Is Trump's Innocence Irrelevant?*, 84 MD. L. REV. 1, 22 (2024).

158. Republicans discussed federal judicial authority at length when considering other matters. These discussions, however, provide no clear guide on whether Republicans thought the Fourteenth Amendment was self-executing. *See infra* notes 161–166 and accompanying text.

159. 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834).

no Republican bluntly stated that courts had any independent authority to enforce the Fourteenth Amendment, as opposed to enforcing statutes that Congress passed under the Fourteenth Amendment.[160]

That exception was an obscure member of Congress, Representative Giles Hotchkiss of New York. Hotchkiss's very short speech took place during the brief debate over the proposed amendment that eventually became Section One.[161] He began by observing that the proposed Fourteenth Amendment merely "authorize[d] Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property."[162] The New York Republican criticized that draft for leaving fundamental rights "to the caprice of Congress."[163] Bingham's Fourteenth Amendment, Hotchkiss feared, did not "restrict the power of the majority" or "protect the rights of the minority."[164] He wanted a Fourteenth Amendment that established rights "that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation."[165] For this reason, Hotchkiss advocated deleting the reference to "Congress shall have the power" in Bingham's proposed constitutional amendment. He asked:

> Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?[166]

Other Republicans during the debate over the Fourteenth Amendment made comments that appear to endorse judicial review. Several celebrated the constitutional protections for fundamental rights enumerated in Section One because they acknowledged that the Civil Rights Act and other exercises of congressional power under Section Two of the Thirteenth Amendment were "repealable by a majority."[167] Representative John Broomall of Pennsylvania was one of several members of Congress who claimed that Section One of the Fourteenth Amendment would "prevent[] a mere majority from repealing the [Civil Rights Act]."[168] A fair case can obviously be made that the

160. *See infra* notes 161–168 and accompanying text.
161. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 2459; *see id.* at 2462 (statement of Rep. Garfield).
168. *Id.* at 2498 (statement of Rep. Broomall).

representatives who made this claim were confident that Republicans in the federal judiciary would protect Fourteenth Amendment rights directly should Democrats controlling the elected branches of the national government repeal statutory protections for fundamental rights passed by the Thirty-Ninth Congress.

These comments, interpreted most favorably as endorsing judicial review, nevertheless indicate that Republicans at most considered the federal judiciary the second back-up for implementation of the Fourteenth Amendment, Section Three in particular. States in which blacks voted were the primary implementers. Such electorates could be trusted to elect persons without a taint of insurrection. Congress was the secondary implementer. Congress could correct the actions of states and supply states with uniform standards, should members of Congress think that important. Courts were the tertiary implementers. Federal justices could act only when confronted with both state and congressional failure. With respect to Section Three, Hotchkiss and others indicated that this meant judicial review was warranted only when states elected insurrectionists and when Congress refused to intervene.

CONCLUSION

Placing Section Two at the core of the Fourteenth Amendment supports but modifies two central themes of Reconstruction scholarship. Michael Les Benedict is right to insist that Republicans were committed to traditional state powers. He observes that "[t]he question was how one could change the constitutional system to fulfill the promise of the Declaration of Independence . . . and yet preserve the essentials of federalism and local democracy."[169] William Nelson is right to emphasize that the subject of constitutional reform was the former Confederate states, not the Union as a whole. "The Fourteenth Amendment," he correctly declares, "was understood less as a legal instrument to be elaborated in the courts than as a peace treaty to be administered by Congress in order to secure the fruits of the North's victory in the Civil War."[170] The goal was to reconstruct the former Confederate states so that they would be committed to free labor, racial equality, and national union, not alter the longstanding relationship between the federal government and the states. Reconstructed Confederate states would enjoy the same relationship with the national government as states had enjoyed before the Civil War. Former Confederate states that resembled Union states in their governance would need little in the way of national reform.

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169. MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA xiii (2006).

170. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 110–11 (1988).

A Georgia in which persons of color freely participated in constitutional politics was no more likely than Pennsylvania to elect disqualified rebels to office, discriminate against persons of color, or send representatives to Congress with little interest in honoring the federal debt.[171]

In keeping with their commitment to the traditional division of powers between the states and the federal government, the persons responsible for Section Two's Constitution thought Section Three made no change in the operation of elections.[172] Under Article One, Section Three, states remained primarily responsible for implementing state and federal elections, which after 1868 included the responsibility for ensuring disqualified candidates are not elected to federal or state office. When implementing election law, states remained subject to congressional oversight, particularly but not exclusively when state constitutional politics is infected by the race discrimination that makes a state an untrustworthy implementer of federal constitutional and statutory law. Section Two's Constitution, however, trusts states whose electorates are composed overwhelmingly of loyal citizens to prevent oathbreaking insurrectionists from holding office, either through election or through state laws. Federal courts operating consistently with Section Two's Congress only step in when states fail to obey constitutional rules and when Congress fails to provide a correction.

Trump v. Anderson makes a hash of Section Two's Constitution. There was no reason to think constitutional politics in Colorado made that state an untrustworthy implementer of the Civil War Amendments in general and Section Three in particular. Colorado had long adopted black suffrage, and the state has never been plagued by issues with the Voting Rights Act of 1965.[173] The Court gave no reason to think Colorado's decision to disqualify President Trump was wrong on the merits.[174] The Court gave no reason for thinking that Justices had to step in because, as Representative Giles Hotchkiss had feared,[175] Congress was derelict in failing to remedy state failures under Section Three of the Fourteenth Amendment. In short, there was no reason under Section Two's Constitution to distrust the decision of the Supreme Court

171. *See supra* notes 139–143 and accompanying text.

172. Graber, *Originalism as Novelty*, *supra* note 17, at 46–49.

173. *See generally In re Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73, 497 P.3d 493 (holding Colorado in compliance with the Voting Rights Act).

174. William Baude & Michael Stokes Paulsen, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 HARV. L. REV. 676, 683 (2025) ("The Court did not hold, on the merits, that Trump was eligible to office under the standards of Section Three—it did not say that the Colorado Supreme Court was wrong on this point.").

175. *See supra* notes 161–166 and accompanying text.

of Colorado declaring Donald Trump to be an oathbreaking insurrectionist disqualified from holding federal office.[176]

176. *Anderson v. Griswold*, 2023 CO 63, ¶¶ 4–5, 543 P.3d 283, 296–97.