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CONSTRUCTING CONSTITUTIONAL POLITICS: THE RECONSTRUCTION STRATEGY FOR PROTECTING RIGHTS

I. Introduction

Contemporary constitutional theory has difficulty fully comprehending the relationship between *Dred Scott v. Sandford*² and the post-Civil War Amendments. The connection seems simple. Republicans proposed and ratified the Thirteenth and Fourteenth Amendments in part to reverse the Supreme Court's decision in *Dred Scott*. The Thirteenth Amendment's declaration that "Neither slavery nor involuntary servitude . . . shall exist in the United States" overturns the sections in Chief Justice Roger Taney's opinion holding that the due process clause of the Fifth Amendment vests persons with a constitutional right to bring their slaves into American territories.³ The declaration in Section 1 of the Fourteenth Amendment that "all persons born or naturalized in the United States are citizens of the United States and of the State where they reside" overturns the passages in the *Dred Scott* majority opinion holding that former slaves are constitutionally barred from becoming citizens of the United States.⁴ The problem with this conventional view is that Republicans in 1866 had good reasons for thinking that passing constitutional amendments was not an effective means for achieving those antislavery and

¹ Sandy Levinson, Jack Balkin, Howard Gillman, Gerard Magliocca, Cynthia Nicoletti, Maxwell Stearns, Brandon Garrett, and Kenneth Kersch all generously commented on previous versions of this manuscript.

² 60 U.S. 393 (1856).

³ *Dred Scott*, at 432-52.

⁴ *Dred Scott*, at 403-27.

egalitarian ends. The most common Republican explanation for why the judicial majority reached proslavery and racist conclusions in *Dred Scott* suggests that antislavery advocates should have regarded constitutional amendments aimed at altering judicial practice as a waste of legislative energy.

Republicans to a person insisted that the justices in *Dred Scott* unreasonably interpreted the Constitution of 1789 when they ruled that Congress had no power to ban slavery in American territories.⁵ Virtually all antislavery activists believed that Article IV, Section 3 plainly entitled the national legislature to prohibit human bondage in the western regions.⁶ The phrase “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” in their view, obviously vested federal authorities with the same power over slavery in national territories as state authorities had to regulate human bondage within their jurisdictional boundaries. The legitimacy of this constitutional power to forbid human bondage was buttressed by more than a half century of federal governance in the territories. Abraham Lincoln and other Republicans maintained that Congress without serious objection in 1789 banned slavery in the Northwest Territories⁷ and in 1820 banned slavery in all territories north of the 36°30' parallel line.⁸ Many Republicans thought the due process clause of the Fifth Amendment affirmatively prohibited slavery in the

⁵ Prominent Republicans before the Civil War were publicly more divided on the citizenship status of free blacks. See Abraham Lincoln, “Seventh and Last Debate with Stephan A. Douglas at Alton Illinois,” *The Collected Works of Abraham Lincoln* (edited by Roy P. Basler) (Rutgers University Press: New Brunswick, NJ, 1953), p. 299 (declaring that he had never “complained especially of the *Dred Scott* decision because it declared . . . that a negro could not be a citizen).”

⁶ A few radical abolitionists claimed that the Constitution was a pro-slavery “covenant with death and an agreement with hell” that provided extensive protections for human bondage. “Covenant with Death,” *Liberator*, March 13, 1863, p. 1. See Wendell Phillips, *The Constitution a Pro-Slavery compact, or Extracts from the Madison Papers, etc.* (American Antislavery Society: New York, 1856).

⁷ 1 Stat. 50, 50-53 (1789).

⁸ 2 Stat. 545, 548 (1820). Contrary to Republican claims, many Southerners during the Missouri Compromise debates insisted that Congress had no power to ban slavery in the territories. See Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press: New York, 2006), pp. 121-22.

territories.⁹ Few if any before the Civil War confessed that the status of slavery in the territories was a close constitutional question upon which persons in good faith might disagree. Lincoln described *Dred Scott* as an “obvious mistake.”¹⁰ Senator William Pitt Fessenden of Maine in 1858 declared that the judicial decision was “utterly at variance with all truth . . . , utterly destitute of all legal logic . . . , found on error, and unsupported by anything like argument.”¹¹

These antebellum Republican claims that no constitutional decision maker could conclude in good faith that slaveholders had a right to bring their human property into the territories make problematic the apparent post-bellum Republican decision to reverse *Dred Scott* by ratifying better constitutional language. The same Jacksonian justices whom Republicans condemned before the Civil War for ignoring or perverting the plain meaning of Article IV, Section 3 had the same incentives after the Civil War to ignore or pervert the plain meaning of the Thirteenth and Fourteenth Amendments. Both broadly shared constitutional principles and Chase Court practice provided plausible legal grounds for a justice committed to white supremacy to sustain as consistent with equal protection and the constitutional ban on slavery southern Black Codes and other state measures designed to control an “unruly” black labor force. If, as Howard Gillman details, antebellum constitutional authorities thought state and federal laws could make distinctions between classes of persons when the legislation was based on real differences between affected groups and served the public welfare,¹² then racist justices might without much legal difficulty hold constitutional state laws making racial discriminations that were based on what most people living at the end of the Civil War thought were real differences

⁹ Abraham Lincoln’s speech at Cooper Union is the best known example of this defense of federal power to ban slavery in the territories. See Abraham Lincoln, “Address at Cooper Institute, New York City,” 4 *Collected Works*, pp. 523-35.

¹⁰ Lincoln, “Cooper Institute,” p. 546.

¹¹ *Congressional Globe*, 35th Cong., 1st Sess., p. 617.

¹² Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Duke University Press: Durham, NC, 1993), pp. 61-62.

between the races. An 8-1 judicial majority in 1873 sustained state bans on women practicing law in part because “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.”¹³ *Bradwell v. Illinois*, with little effort, might have been extended to cover laws prohibiting persons of color from practicing law on the basis of perceived natural differences between members of different races.¹⁴

The persons who framed the post-Civil War Amendments had no good reason for thinking that racist, pro-slavery constitutional authorities, whom they thought had repeatedly ignored the plain meaning of the antebellum Constitution, would behave better when interpreting the plain meaning of the post-bellum Constitution. Republicans did not regard *Dred Scott* as the unfortunate consequence of a few aberrant justices. They asserted that the Supreme Court’s proslavery rulings were part of a broader Slave Power plot against the Constitution. Lincoln in his debates with Douglas claimed that the *Dred Scott* decision was a product of a conspiracy between Democrats in all three branches of the national government.¹⁵ Senator John Hale of New Hampshire was one of many antislavery advocates who maintained that “The Supreme Court has been a part of the machinery of the old Democratic party.” “This court,” he continued, “have not been careful to study and find out and declare the law; but they have been careful to declare what was agreeable to the party in power.”¹⁶ Much evidence indicated that the constitutional future would resemble the constitutional past should the Fourteenth Amendment be interpreted by the members of the same political coalition who thought *Dred Scott* correctly

¹³ See, i.e., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (claiming that real differences between men and women justified a state law prohibiting women from practicing law).

¹⁴ Cite to Stephenson, *Racial Distinctions*. More creative constitutional decisions makers might claim that the Thirteenth or Fourteenth Amendments have never been ratified, see Bruce Ackerman, *FIND*, or that they were unconstitutional constitutional amendments. See *Leser v. Garnett*. *FIND*. On unconstitutional constitutional amendments in general, see Murphy; Graber.

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¹⁶ *Congressional Globe*, 37th Cong., 2nd Sess., p. 26

decided . The leaders of the Thirty-Ninth Congress were familiar with accounts from northern visitors to the southern states describing in detail how a revived Slave Power was planning on regaining control of the national government and rendering practical nullities those constitutional amendments passed during the short interregnum of Republican rule. In a widely circulated analysis of conditions in the former Confederate states in the wake of the Civil War, Carl Schurz reported “a desire to preserve slavery in its original form as much and as long as possible.”¹⁷ A prominent Northern journalist on a southern journey observed former slave state elites committed to do what was political necessary

to obtain the exclusive control of the freedmen and to make such laws for them as shall embody the prejudices of the late slave-holding society; to govern not only their own states but to regain their forfeited leadership in the affairs of the nation; to effect the repudiation of the national debt or to get the Confederate debt and the Rebel state debts assumed by the whole country; to secure payment for their slaves, and for all injuries and losses occasioned by the war.

Combatting this threat to the fruits of the Union victory in the Civil War merely by adding more, perhaps clearer, words to the Constitution of the United States, from the perspective of Republicans on the eve of the Thirty-Ninth Congress, was as likely to be as effective as the behavior of the lost American tourist in outer Slobobia who attempts to get a local resident to understand English by repeating more slowly and at greater volume the sentence “where is the nearest gas station.”

This paper maintains that Republicans when drafting the Fourteenth Amendment sought to avoid a repeat of such constitutional perversions as *Dred Scott* by constructing a constitutional politics that guaranteed to the extent feasible that the persons who remained loyal to the Union during the Civil War, white and black, would control the meaning of the post-Civil War

¹⁷ Carl Schurz, “Report on the Condition of the South,” Senate Document No. 2, 39th Cong., 1st Sess. (1865). Other northerners travelling south at this time reached the same conclusion. See notes ---, below, and the relevant text.

Constitution. The Thirteenth Amendment had already abolished slavery. The Fourteenth Amendment was designed to prevent the rebirth of the Slave Power. Sections 2 and 3 the Fourteenth Amendment were the texts most crucial to this constitutional mission. Members of the Thirty-Ninth Congress thought these provisions would most likely compel the South to enfranchise persons of color and, if not, sharply reduce the influence of former slave states and slaveowners on national policy and constitutional decision making. Republicans cheerfully endorsed the more substantive provisions in Section 1 (and Section 4). Nevertheless, the Republican leadership in the House and Senate understood that the rights, restrictions and powers enumerated in Section 1, 4, and 5 of the Fourteenth Amendment, as well as those enumerated in Sections 1 and 2 of the Thirteenth Amendment, would be interpreted and implemented in good faith only if Sections 2 and 3 successfully reconstructed American constitutional politics so as to ensure the continued hegemony of the political party of the people who remained loyal during the Civil War. We can understand the vital role Section 2 and 3 played in Republican constitutional thought and fully comprehend the relationship between *Dred Scott* and the post-Civil War constitutional amendments, however, only if we turn away from a constitutional theory obsessed constitutional law and interpreting what constitutional provisions mean and focus on a constitutional theory devoted constitutional politics and the study of how constitutions work and might be made to work better.

Constitutional commentators fail to appreciate Section 2 and 3 of the Fourteenth Amendment in particular and how constitutions work more generally because they think of constitutions as devices that create and restrict official power. Constitutional analysis in most universities is largely confined to the study of constitutional law. Leading scholars define constitutionalism as a system of legal constraints on official power. Giovanni Sartori regards a

constitution as “a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited government.’”¹⁸ Chief Justice John Roberts in *National Federation of Independent Business v. Sebelius* declared, “The Federal Government is acknowledged by all to be one of enumerated powers,” and this “enumeration of powers is also a limitation of powers, because ‘[t]he enumerated presupposes something not enumerated.’”¹⁹

Constitutional provisions in constitutions that work primarily by creating and constraining government power are framed to address some inadequacy in preexisting constitutional rights, powers and restrictions. The Fourteenth Amendment, from this perspective, was motivated by Republican concerns with Black Codes and related southern efforts to preserve previous labor relationships and racial hierarchies in the former Confederate states. Justice Samuel Miller expressed what has become common wisdom when in his opinion in the *Slaughter-House Cases* he declared, “circumstances . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.”²⁰ The appropriate constitutional response to southern attempts to retain powerful racial hierarchies, Miller and those who accept his history assume, was a constitutional amendment that restricted state power to create racial hierarchies and vested Congress with more power to achieve the constitutional commitment to equality

¹⁸ Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” 56 *American Political Science Review* 853, 855 (1962). See Walter F. Murphy, James E. Fleming, Sotorios A. Barber, and Stephen Macedo, *American Constitutional Interpretation* (3rd ed.) (Foundation Press: New York, 2003), pp. 48-49. On liberal constitutionalism in general, see Mark A. Graber, *A New Introduction to American Constitutionalism* (Oxford University Press: New York, 2013), pp. 35-37.

¹⁹ *National Federation of Independent Business v. Sebelius*, at 2577.

²⁰ *Slaughter-House Cases*, 83 U.S. 36, 70 (1873).

under law. Section 1 of the Fourteenth Amendment prohibits Black Codes and related measures. Section 5 of the Fourteenth Amendment authorizes the federal government to enforce those limitations on state power.

Contemporary constitutional theory's emphasis on interpretation follows from contemporary constitutional theory's understanding of how constitutions work. Constitutions that work by constraining and creating official power must be interpreted (or constructed)²¹ in order to determine the scope of the enumerated rights, restrictions and powers. What Republicans did when they drafted Section 1 depends on what such phrases as "equal protection of the laws" mean. What Republicans thought they were doing depends on what they thought the language they used meant. Through interpretation, originalist or otherwise, we learn how the Fourteenth Amendment changed constitutional law by enumerating new constitutional rights, new federal powers, and new restrictions on state power. Working from this legal perspective, the voluminous literature on the Fourteenth Amendment asks such questions as "Does the equal protection clause prohibit segregated schools" and "Which branch of the national government has the final authority to determine the meaning of the equal protection clause."

Sections 2 and 3 of the Fourteenth Amendment are better conceptualized as means for constructing constitutional politics than as constraints on constitutional politics. The main concern that animated the Fourteenth Amendment was the Republican fear that a united south would combine with the Democratic Party to undo the fruits of the Civil War, most notably the newly minted constitutional ban on slavery. Republican members of the Thirty-Ninth Congress were more concerned with ensuring that existing constitutional rights would be respected and existing constitutional powers exercised appropriately than with enumerating additional

²¹ See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press: Cambridge, MA 2001).

constitutional rights and powers. The persons responsible for drafting the Fourteenth Amendment discussed numerous means for ensuring that the persons who remained loyal to the Union during the Civil War would control the interpretation of existing constitutional rights, powers, and restrictions. Section 2, they believed, would force southerners to choose between empowering black voters who would vote Republican or losing substantial representation in both Congress and the Electoral College. Proposed versions of Section 3 placed sharp limits on the capacity of former Confederates to participate in national affairs.

The shift from how constitutions create and constrain politics to how constitutions construct politics alters the focus of constitutional analysis from what constitutional provisions mean to how they work. The Fourteenth Amendment provides an easy illustration of the difference between these two modes of constitutional analysis. Most Republican members of the Thirty-Ninth Congress did not believe that any provision of the Fourteenth Amendment legally compelled states to grant male persons of color the right to vote. Nevertheless, most believed that if the Fourteenth Amendment was ratified, southern states would grant male persons of color the ballot when the alternative was a state delegation in Congress and in the Electoral College reduced by forty percent. Rather than making dramatic changes in the texts constitutional decision makers interpreted, Republicans sought to influence the selection of the constitutional decision makers who would interpret the post-bellum constitution. The post-bellum Constitution would work because Republicans rather than Democrats or former slaveholders would control the meaning of the Thirteenth Amendment and other constitutional texts that articulated a commitment to equality under law.

The primary purpose of the Fourteenth Amendment was to construct the constitutional politics that would guarantee the fruits of the northern victory and ensure meaningful

implementation of the Thirteenth Amendment. Reconstruction Republicans were far more concerned with constructing a politics that would guarantee the enduring ascendancy of the victorious northern majority than with placing any particular limits on what that majority would do. This explains why the persons responsible for the Fourteenth Amendment debated at length the precise language of Sections 2, which concerned the allocation of representation in the House of Representatives and votes in the Electoral College, and 3, which concerned restrictions on the political rights of former Confederates, while devoting very little attention to various versions of Section 1, which enumerates constitutional rights and powers. Republicans settled intra-party disputes over how best to restructure constitutional politics. They agreed to disagree on the precise rights protected by the post-bellum Constitution.²²

The following pages detail the Republican effort to construct a constitutional politics that privileged the rights and interests of those Americans, white and black, who were loyal to the Union during the Civil War. Part II provides context by offering a brief history of the Fourteenth Amendment in Congress and discussing the various strategies open to Republicans and other constitutional framers for privileging fundamental rights, important interests and favored policies. These strategies, which include efforts to create, constrain, construct, and constitute constitutional politics, are connected. The creation and maintenance of a constitutional order requires self-conscious efforts to align a particular set of values, particular institutions that can achieve those values, and a people who must share those values and be capable of operating the institutions.²³

Part III focuses on the constitutional misalignments that animated the Fourteenth Amendment, in particular the threats that emerged after the Civil War to the continued hegemony

²² See notes ---, below, and the relevant text

²³ This is the central thesis of Stephen L. Elkin, *Reconstructing the Commercial Republic: Constitutional Design after Madison* (University of Chicago Press: Chicago, 2006).

of the Republican Party. During the mid-nineteenth century, Martin Van Buren, Abraham Lincoln and others came to regard the legitimate party of the people as the institution ultimately responsible for preserving constitutional commitments and resolving constitutional disputes. The Republican Party was the means by which antislavery advocates sought to preserve what they perceived as the original antislavery commitments of the Constitution. Republicans drafted the Fourteenth Amendment because they perceived a dire threat to their party's capacity to control the meaning of the Thirteenth Amendment. Most thought that Congress under the Thirteenth Amendment already had the constitutional powers necessary to promote the constitutional commitment to equality under law. They feared that the Thirteenth Amendment, by permitting southern states to count disenfranchised persons of color as full persons for purposes of allocating representatives in Congress and votes in the Electoral College, might privilege the election of Democrats. Democrats in power would repeal laws Republicans had passed under the Thirteenth Amendment, restore to a fair degree antebellum labor relations in the South and, when challenged, interpret in bad faith constitutional provisions intended to articulate a national commitment to equality under law.

Part IV discusses how Republicans responded to the threat of a revived Slave Power by proposing various Fourteenth Amendments that they believed would construct a constitutional politics that privileged the Republican Party. Thaddeus Stevens and his political allies in 1866 did not distinguish between constitutional right and partisan advantage. As good partisan supremacists, they believed that only Republicans were committed to the Union and fundamental constitutional values. Republicans were also confident that their party would retain control of the national government as long as constitutional politics was structured to privileged the choices made by a majority of the people who remained loyal to the Union during the Civil War. More

concerned with the constitutional politics necessary to sustain egalitarian constitutional commitments than with providing precise legal limits on state action or making clear the legal meaning of such phrases as “equal protection,” “due process,” and “privileges and immunities,” Republicans devoted almost all of their attention during the debates over the Fourteenth Amendment to the language of Section 2, which they thought would secure black suffrage or minimize southern representation, and Section 3, which was originally designed to limit the influence of former Confederates on national legislation. John Bingham aside, very few members of Congress thought Section 1 contributed much more than a restatement of existing constitutional commitments. Fewer thought those egalitarian commitments would survive in the absence of a constitutional politics structured to privilege the political party that championed equality under law. Even fewer members discussed the judicial authority to interpret the Fourteenth Amendment. No member of Congress commented on the proper resolution of a constitutional dispute between the elected branches of the national government and federal judges over the meaning of Sections 1 or 5. The Republicans who framed the Fourteenth Amendment sought to establish and maintain control over all national institutions. Twenty-first century concerns with resolving constitutional disputes between different branches of the national government were not on their agenda, at least when the Fourteenth Amendment was on the table.

Part V details when and why Sections 1 and 5 replaced Sections 2 and 3 as the crucial provisions of the Fourteenth Amendment. Crucial Republican representatives even before the Fourteenth Amendment was ratified began to lose interest in building a strong Republican Party in the South and limiting the influence of southern whites on national policy. The new constitutional rules for allocating representatives and restricting the power of former

Confederates faded into desuetude as more moderate and conservative Republicans maintained that the party of the people who remained loyal during the Civil War would better secure the voting majorities in the North necessary to retain sufficient control of the national government by admitting unpopulated western states that supported Republican candidates and servicing those white constituencies rather than by aggressively defending racial equality. As both the Republican Party and Democratic Party lost their ideological edges, a new constitutional regime emerged. In this political order, eventually entrenched by the New Deal, courts rather than parties became the institution most responsible for preserving constitutional commitments and resolving constitutional ambiguities. Sections 1 and 5 thrived as constitutional authorities interpreted the Fourteenth Amendment as raising legal questions about fundamental rights and national powers rather than more basic questions about the construction of constitutional politics.

Part VI concludes by briefly exploring the hold John Bingham has on contemporary American constitutionalism. John Bingham's Fourteenth Amendment is our Fourteenth Amendment. His influence explains how Americans think about what the Fourteenth Amendment means, how we think about the way the Fourteenth Amendment is supposed to work, and why American constitutionalism is seeming committed to the very bizarre view that the best way to change such bad constitutional decisions as *Dred Scott* is by changing the constitutional text rather than changing the constitutional decision makers. Thaddeus Stevens knew otherwise, but too much constitutional history regards him as either a visionary committed to "forty acres and a mule"²⁴ or a radical bent "upon a policy of revenge and self-perpetuation,"²⁵

²⁴ See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (Harper Perennial: New York, 2002), pp. 235-36.

²⁵ Robert G. McCloskey, *The American Supreme Court* (Revised by Sanford Levinson) (5th ed.) (University of Chicago Press: Chicago, IL, 2010), p. 73.

rather than as the framer most concerned with the constitutional politics necessary to realize the post-bellum constitutional commitment to equality under law.

The following pages compare and contrast how Bingham and Stevens thought the Fourteenth Amendment should work. Both supported similar texts. Both agreed that the Constitution should include a substantive commitment to equality under law, enumerate certain fundamental rights, and empower the federal government to prevent rights violations in the states. Both agreed that original scheme for allocating members of the Electoral College and House of Representatives needed to be adjusted in light of the Thirteenth Amendment, although Stevens pushed far harder than Bingham for black suffrage and restrictions on participation by former Confederates in national policy making. Bingham and Stevens disputed the mechanisms by which the post-Civil War constitutional order would best secure an egalitarian, free labor regime. Bingham consistently maintained that persons of color and southern Unionists were best protected by enumerating new rights and new federal powers. Stevens insisted that former slaves and Southern unionists were best protected by a reconstructed constitutional politics. John Bingham invented the Fourteenth Amendment of contemporary constitutional theory.²⁶ Scholars interested in how the Fourteenth Amendment has actually worked for almost one-hundred and fifty years might nevertheless find Thaddeus Stevens more insightful, particularly if they want the Fourteenth Amendment to work differently in the future than at present.

Stevens teaches essential, but limited lessons. His speeches on the floor of Congress serve as vital constitutional reminders that no scheme of constitutional rights and powers is likely to function unless complemented by a constitutional politics that privileges the values underlying those rights and powers. The American constitutional experience in general and the particular

²⁶ See especially, Gerard M. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York University Press: New York, 2013).

history of the Fourteenth Amendment nevertheless highlight the problems inherent in any effort to entrench any constitutional politics. The scheme may not be adequate from the outset. Members of the Electoral College never deliberated.²⁷ Section 3 of the Fourteenth Amendment never had any practical effect.²⁸ Constitutional politics inevitably changes in ways that confound the hopes of constitutional framers. Both Madison's vision of a partyless Constitution and Steven's vision of a Constitution operated by an ideological Republican party began to fall apart within a decade.²⁹ The central problem of American constitutional theory, these examples suggest, is not to determine the ideal alignment between constitutional commitments and constitutional politics, but to provide adequate governance during the numerous periods in which constitutional commitments and constitutional politics are out of phase.

II. Context

Republicans when the Thirty-Ninth Congress met in December 1865 were presented with numerous options for protecting the fundamental rights of former slaves and preserving the fruits of the Union victory in the Civil War. Some options were textual. Republicans debated at length the precise language of proposed Fourteenth Amendments. Other options were functional. Republicans considered the various ways that constitutional language might achieve the goals of the successful antislavery movement. The Fourteenth Amendment that the Joint Committee on Reconstruction first proposed sought to construct constitutional politics by

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²⁸ See notes ____, below, and the relevant text.

²⁹ On the collapse of the Constitution of 1787, see Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Harvard University Press: Cambridge, MA, 2005). See also Elaine K. Swift, *The Making of an American Senate: Reconstitutive Change in Congress, 1787-1841* (University of Michigan Press: Ann Arbor, 1996).

depriving former slave states of substantial representation in Congress and the Electoral College unless they enfranchised persons of color. The second Fourteenth Amendment that the Joint Committee proposed sought to constrain and create constitutional politics by enumerating additional congressional powers to restrict state legislatures from violating certain fundamental rights, most notably the right to equality before law. The final version of the Fourteenth Amendment both constrained and constructed constitutional politics. Section 1 and Section 4 limited official power. Section 2 and, to a lesser extent, Section 3 reconstructed constitutional politics. The precise relationship between all five sections of the Fourteenth Amendment was not entirely clear, at least from a simple reading of the text.

A. A Brief History of the Framing of the Fourteenth Amendment³⁰

The Thirty-Ninth Congress recognized that the Thirteenth Amendment did not provide an adequate constitutional foundation for Reconstruction. Within days, House and Senate Republicans agreed to establish a Joint Committee on Reconstruction, chaired by Senator William Pitt Fessenden of Maine. The Committee, which was composed of nine members of the House and six Senators was officially charged only with “inquir[ing] into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress.”³¹ Although members spent some time determining whether and when such states as Tennessee would be represented in Congress, the primary task of the Joint Committee was to serve as a clearinghouse for the

³⁰ The best narrative history of the Fourteenth Amendment is Joseph B. James, *The Framing of the Fourteenth Amendment* (University of Illinois Press: Urbana, 1956). See also Benjamin Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867* (Negro Universities Press: New York, 1969).

³¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 46.

numerous constitutional amendments being proposed by House and Senate Republicans. Republicans understood that, Tennessee aside, former Confederate states would not be represented in the national legislature until they approved whatever constitutional amendments the Joint Committee drafted and both houses of Congress approved.

The Joint Committee during the winter of 1866 unsuccessfully proposed two single-issue constitutional amendments. The first Fourteenth Amendment the Joint Committee framed would adjust on the basis of representation in the House of Representatives and the Electoral College. That proposal declared,

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, or color, all persons of such race or color, shall be excluded from the basis of representation.³²

After more than a month of debate, this Fourteenth Amendment was approved by the House of Representatives, but did not obtain the constitutionally mandated two-thirds vote in the Senate. Several prominent radicals, most notably Charles Sumner, objected to the inference that states could constitutionally disenfranchise persons of color.³³ The proposed text, in their view, implicitly repealed preexisting voting rights protected by the Thirteenth Amendment and the Guaranty Clause of Article IV.³⁴ While that proposal was being debated in the Senate, the Joint Committee presented Congress with a more substantive amendment, which declared:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.³⁵

³² Benjamin B. Kendrick, "The Journal of the Joint Committee of Fifteen on Reconstruction," p. 53

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³⁵ *Congressional Globe*, 39th Cong., 1st Sess., p. 1034.

That proposal was tabled after two days of full debate in the House of Representatives.³⁶

Rather than continue framing constitutional amendments piecemeal, the Joint Committee in the early spring, inspired by a draft put together by former congressman Robert Dale Owen,³⁷ combined various proposals into an omnibus constitutional amendment. After a good deal of tinkering by the committee, members on April 30, 1865 presented the following Fourteenth Amendment to the House and Senate.

Sec. 1. 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.

Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Sec. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress, and for electors for President and Vice President of the United States.

³⁶ *Congressional Globe*, 39th Cong., 1st Sess., p. 1095.

³⁷ The original Owen plan declared:

Section 1: No discrimination shall be made by any State, not by the United States, as the civil rights of persons, because of race, color, or previous condition of servitude.

Section 2. From and after the fourth day of July, eighteen hundred and seventy-six, no discrimination shall be made in any State nor by the United States, as to the enjoyment, by classes of persons, of the right of suffrage, because of race, color, or previous condition or servitude.

Section 3. Until the fourth day of July, eighteen hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage, discrimination, shall be made by any State, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

Section 4. Debts incurred in aid of insurrection, or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any State nor by the United States.

Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sec. 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.³⁸

The House approved this Fourteenth Amendment on May 10, 1866, but the Senate balked in large part because of objections to Section 3. In late May, after lengthy meetings of the Senate Republican caucus, the Joint Committee presented a rewritten omnibus amendment. The Senate tinkered a bit with Section 2 and 4. More serious revisions were made to Section 3. Congress abandoned efforts to disenfranchise former Confederates and instead accepted a weaker provision restricting office holding. On June 8, 1866, the upper house of Congress ratified the final version of the Fourteenth Amendment.³⁹ The House followed suit on June 13, 1866.⁴⁰ The final version of the Fourteenth Amendment declares:

SECTION 1. All 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. 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.

SECTION 2. 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.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military,

³⁸ *Congressional Globe*, 39th Cong., 1st Sess., p. 2286. See *Congressional Globe*, 39th Cong., 1st Sess., p. 2265.

³⁹ *Congressional Globe*, 39th Cong., 1st Sess., p. 3042.

⁴⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 3148.

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.

SECTION 4. 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.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

B. Meaning and Doing in Constitutional Politics

1. Constitutional Politics and Constitutional Interpretation

Members of the Thirty-Ninth Congress were engaged in constitutional politics when they drafted, revised, rejected and approved different Fourteenth Amendments. They made choices between various means for privileging fundamental rights, vital interests and desired policies. These choices were informed by high political ideals and the political realities of American politics at the end of the Civil War. While some debates in Congress were over the best interpretation of preexisting and proposed constitutional language, what Republicans did from December 1865 to June 1866 cannot be reduced to what the words they approved meant or mean. All participants in constitutional politics, be they post-bellum Republicans, American revolutionaries or leaders of various Iraqi factions, seek to create or reconstruct a feasible politics that will faithfully implement enumerated constitutional rights and restrictions, as well as realize numerous other values that may or may not be set out explicitly in the text. The study of

constitutional politics examines how constitutions were intended to work, actually work, and can be made to work better.

The study of constitutional politics inevitably involves more traditional concerns about constitutional interpretation.⁴¹ How the Constitution was intended to work depends in part on what framers thought the text meant and how they expected that text to be interpreted. How the Constitution actually works at the turn of the twenty-first century depends in part on what contemporary Americans think crucial constitutional provisions mean and on presently accepted methods of constitutional interpretation. Section 2 of the Fourteenth Amendment could not influence on the constitutional regime if the language was gibberish. The way judicial adherence to precedent helps structure constitutional decision making plays an important role in the present working of the Constitution.⁴² How the Constitution should work also depends in part on theories of constitutional interpretation. The best method for interpreting a constitution designed to preserve the hard-won gains of the past differs from the best method for interpreting a “militant” constitution aimed at achieving some national aspiration.⁴³

Nevertheless, theories of constitutional politics encompass more phenomena than theories of constitutional interpretation⁴⁴ or, for that matter, constitutional authority.⁴⁵ What people do when they create, maintain, modify, or abandon constitutions differs from the meaning of the words they use when changing constitutional texts. Constitutional reformers may be motivated by desires to pacify political opposition or gain international aid. The Republicans who debated the Fourteenth Amendment were concerned with being reelected as well as with protecting

⁴¹ For a more elaborate discussion of the way constitutions work, see Graber, *A New Introduction to American Constitutionalism*, chapter 8.

⁴² See Herbert M. Kritzer & Mark J. Richards, “Jurisprudential Regimes and Supreme Court Decisionmaking: The *Lemon* Regime and Establishment Clause Cases,” 37 *Law & Soc’y Rev.* 827 (2003); Mark J. Richards & Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” 96 *Am. Pol. Sci. Rev.* 305 (2002).

⁴³ Cite to Scalia, Jacobsohn and *New Introduction*

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former slaves and southern unionists.⁴⁶ Constitutional reformers consider basic facts about the political and cultural life of their society when anticipating how enumerated rights will be interpreted and enumerated powers will be exercised. Constitutional protections for freedom of religion in constitutional theocracies often transfer authority from sectarian prelates to secular judges.⁴⁷ Madison thought Congress more likely to protect religious freedom than a state legislature.⁴⁸ In sharp contrast to persons engaged in constitutional interpretation, persons thinking about constitutional politics consider the possibility that constitutional provisions will be misinterpreted. Republicans made certain decisions when framing the Fourteenth Amendment, we shall see, because they feared a future constitutional politics in which a revived Democratic Party majority did not interpret in good faith the Thirteenth Amendment.

Expectations play a different role in constitutional politics than in constitutional theory. Disputes rage among originalists over the precise role of original constitutional expectations when determining the meaning of constitutional provisions,⁴⁹ but no one thinks that the common expectation that George Washington would become the first president gave Washington a constitutional right to that office. Nevertheless, commentary on how the framers thought the presidency would work routinely notes the uniform expectation that George Washington would be the first president.⁵⁰ This expectation had constitutional consequences. The framers made constitutional choices in light of their expectation that George Washington would be the first

⁴⁶ Foner; Nelson, *The Fourteenth Amendment*, p. 58.

⁴⁷ Hirschl

⁴⁸ *Federalist* 10.

⁴⁹ Balkin; McGuinness and Rappaport.

⁵⁰ See Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Johns Hopkins University Press: Baltimore, MD, 1922), p. 169. (“The fact that the first President was to be Washington had an undoubted effect”); Saikrishna Bangalore Prakash, “Hail to the Chief Administrator: The Framers and the President’s Administrative Powers,” 102 *Yale Law Journal* 991, 995 (1993) (“Delegates at the Constitutional Convention understood that George Washington would be the first President under the new Constitution. The Framers were eminently satisfied with that impending selection and debated Article II with this in mind. The first chief executive would not be a tyrant whom the populace would have to fear, and the Constitution reflected this sanguine belief”).

president. Pierce Butler, a delegate to the Constitutional Convention of 1787, asserted, “I do [not] believe they [the executive powers] would have been so great, had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Powers to be given a President, by their opinions of his Virtue.”⁵¹ Had George Washington died in 1788, a fair probability exists that constitutional institutions would not have worked as the framers originally expected. The problem would not be that office holders interpreted the Constitution wrongly, but that a crucial office holder making major constitutional decisions and establishing vital constitutional precedents lacked the expected values, interest, or stature.

2. Strategies for Privileging Fundamental Rights, Vital Interests and Favored Policies

Enumeration is one constitutional strategy framers use for privileging fundamental rights, vital interests and cherished policies. The Constitution seeks to prevent an aristocracy and forbid persons from being boiled in oil in part through specific constitutional provisions that declare “No Title of Nobility shall be granted by the United States,” “No State shall , , , grant any Title of Nobility,” and “nor cruel and unusual punishments inflicted.” Constitutional provisions privilege certain rights, interests and policies by enumerating powers as well as enumerating rights. Such provisions create rather than constraint constitutional politics. The Constitution seeks to promote economic prosperity and the property rights of ocean travelers in part by constitutional provisions that authorize Congress to “regulate interstate commerce” and “punish Piracies and Felonies committee on the high Seas.”⁵² Enumerations may constrain or empower private actors as well as government officials. The Thirteenth Amendment forbids one

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⁵² FIND EXACT TEXT

individual from enslaving another. Joseph Story interpreted the Fugitive Slave Clause as authorizing slaveholders to exercise the common law right of recaption.⁵³

The persons responsible for the Constitution of the United States preferred to privilege what they perceived to be fundamental rights, vital interests and favored policies by constructing constitutional politics rather than by enumerated constitutional constraints or constitutional powers.⁵⁴ Prominent framers insisted that well-designed constitutional institutions were a better means for preserving liberty than precise descriptions of constitutional powers and limits. As arguably the single most important assertion in the *Federalist* states, “all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”⁵⁵ *Federalist* 10 famously asserts that an extended republic is the best constitutional means for securing proper rights and protecting religious freedom. “Extend the sphere,” Madison declared, “and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”⁵⁶

Constitutional reformers have various goals in mind when proposing constitutional provisions that construct constitutional politics. Some constitutional provisions are best understood as vital companions to enumerated rights and restrictions. They are designed to construct a constitutional politics in which those constitutional constraints are obeyed and enforced. The Supreme Court may be structured to ensure that governing officials respect clear

⁵³ *Prigg v. Pennsylvania*

⁵⁴ This paragraph summarizes Mark A. Graber, “Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791,” *University of Pennsylvania Journal of Constitutional Law* 357, 361-66 (2007); See also Levinson, “Rights and Votes,” pp. 1293-97.

⁵⁵ FIND.

⁵⁶ *The Federalist Papers*, p. 83.

constitutional limits on their powers. Other constitutional provisions help construct a constitutional politics that privileges certain outcomes among choices constitutionally open to government officials. The Constitution permits Congress to set whatever income tax rates the national legislators think best. Nevertheless, to the extent that business has a privilege position in constitutional politics,⁵⁷ Congress is unlikely to choose tax rates unduly burdensome to the investor class. Still, other constitutional provisions influence how ambiguous constitutional provisions are interpreted. Framers may not agree among themselves on what constitutes a regulation of commerce or the free exercise of religion. Rather than resolve their differences through clearer language, they may prefer to structure government institutions so that crucial future constitutional-decision makers will interpret broad constitutional commands consistently with the best theory of justice or those values that unite members of the Blue Party. Rather than provide many constitutional protections for slavery, the persons responsible for the Constitution designed a political system they believed in practice would guarantee a united coalition of slave states a veto on national policy.⁵⁸

Constitutional reformers may also seek to realize their goals by constituting constitutional politics. They do so when championing constitutional provisions that they believe will help fashion a citizenry with certain values and interests. Madison was seeking to constitute constitutional politics when he informed the First Congress that constitutional declaration of rights “have a tendency to impress some degree of respect for them, to establish the public opinion in their favor.”⁵⁹ The Constitution, in this view, plays a crucial role in the process by which Americans are socialized to respect such rights as the freedom of religion. To the extent popular majorities and political leaders by habit do not even think of burning heretics,

⁵⁷ See Lindblom and Elkins

⁵⁸ See Graber, *Dred Scott and the Problem of Constitutional Evil*.

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institutional precautions against an American Inquisition are unnecessary. Madison in the *Federalist* maintained other basic constitutional goals could be achieved only if constitutional practices promoted deep, widespread, and often unthinking, constitutional commitments. Constitutional change should be difficult, he asserted, because “as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.”⁶⁰

The way constitutions work by constraining, creating, and constructing constitutional politics does not map neatly on to common distinctions between rights, powers, and procedures. Some rights both constraint and construct politics. The framers thought jury trials were vital means for privileging property and speech rights.⁶¹ Some procedures may be valued for their own sake rather than any tendency to bias politics in any way. People may favor majority rule solely because they believe majorities have a right to rule, and not because they believe that institutions yoked to majoritarian sentiment in their society are more likely to make particular policies than other institutional arrangements.⁶²

With the important exception of façade constitutions whose framers have little interest in actually implementing textual declarations⁶³ constitutions typically privilege favored rights, important interests, and desired policies through a combination of enumeration and institutional

⁶⁰ *Federalist* 49.

⁶¹ Cite to Stuntz

⁶² Cite to Waldron. The way in which constitutions constraint, create and construct politics also does not map neatly on to Sandy Levinson’s important distinction between the “Constitution of Conversation” and the “Constitutional of Settlement.” See *Framed*. Constitutional provisions designed to construct constitutional politics have a tendency to be more definite than enumerated constitutional rights, restrictions and powers, but numerous exceptions exist. The constitutional clause prohibiting titles of nobility has generated little if any conversation. The judicial power to interpret the Constitution is perhaps the most discussion feature of the “Constitution of Conversation.”

⁶³ For a discussion of façade constitutions, see Sartori, “Constitutionalism,” p. FIND

design. Constitutional politics is created, constrained and constructed. The way in which the Constitution protects the independent influence of state governments illustrates this interaction of constitutional text and constitutional politics. Article I, Section 3 requires state equality in the Senate. The framers assumed that senators interested in preserving their power and the power of their home states would have the interests necessary to act consistently to preserve the vital interests of states as states (including state equality in the Senate).⁶⁴ *Federalist* 45 details how by constructing a constitutional politics in which states were involved in the selection of every national elected official, the Constitution provided additional security for state governments. Traditional state functions were safe in the new constitutional order, Madison wrote, because “each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”⁶⁵ Madison was confident that a similar combination of text and institutional design would construct a rights-protecting constitutional politics. In his speech introducing the Bill of Rights, Madison pointed to several features of constitutional politics that he believed would make enumerated rights effective. In his view, both the federal judiciary and state governments were structured in ways conducive to protecting enumerated constitutional rights. “If they are incorporated into the constitution,” Madison argued on the floor of Congress, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.”⁶⁶

⁶⁴ Cite to 51

⁶⁵ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New American Library: New York, 1961).

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The Bill of Rights, he continued, would also enable “state legislatures . . . to resist with more effect every assumption of power.”⁶⁷

The persons responsible for the Constitution derisively referred to as “parchment barriers” enumerated rights and restrictions that had no foundation in the underlying constitutional politics. Their past experience demonstrated that clear constitutional guidelines, standing alone, did not restrain officials bent on unconstitutional usurpations. Roger Sherman informed New Englanders that “[n]o bill of rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights.” Government officials and popular majorities were free to rescind parchment barriers to their preferred policies. “Neither would a general declaration of rights be any security,” Civic Rusticus wrote, “for the sovereign who made it could repeal it.”⁶⁸

Parchment is hardly worthless or a unique to enumeration. Constitutional provisions detailing the “composition and structure of government” have the same potential to become parchment barriers as constitutional provisions protecting the freedom of speech. The crucial point is that the framers in 1787 and the Republican members of the Thirty-Ninth Congress recognized that constitutions do not function by pure textual fiat. Enumerated constitutional restrictions are respected and enumerated constitutional powers are exercised only when they are supported by the underlying constitutional politics. What constitutions mean in practice is a function of text, institutions or and the political culture. The Thirteenth Amendment was likely to abolish slavery only to the extent that the textual ban on human bondage provided antislavery activists who controlled crucial government institutions with powers they believed they formerly lacked, enabled antislavery activists to control crucial government institutions by fostering a

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⁶⁸ FIND Citations

constitutional culture increasingly committed to the abolition of slavery, or compelled persons who favored slavery to nevertheless act consistently with this new constitutional provision.

Stephen Elkin provides the fundamental matrix for studying constitutional politics when he observes that constitutional orders consist of a set of basic values, institutions that are designed to realize those values, and a people who share those values and are capable of operating the institutions.⁶⁹ Constitutional reformers seek to align these values, institutions, and people. In some cases, constitutional reforms are directed either at introducing new constitutional values or emphasizing preexisting constitutional commitments that advocates are confident have or will soon have broad popular and institutional support. The Thirteenth Amendment, which committed the United States to the immediate abolition of slavery, reformed or reasserted fundamental constitutional values. At least as often, constitution reformers attempt to construct a constitutional politics that will better achieve what they perceive as preexisting constitutional commitments. The Eleventh Amendment reflected preexisting commitments to state sovereignty that proponents believed were abandoned in *Chisholm v. Georgia*.⁷⁰ Reformers may prefer informal constitutional changes to amending the constitutional text as the means for constructing a better constitutional politics.⁷¹ Martin Van Buren and the founders of mass party politics in the United States invented the legitimate party of the people to be a substitute for checks and balances as a vital means for preserving the constitutional regime they believed was founded in 1787.⁷²

The Republican members of the Thirty-Ninth Congress were well aware that constitutions could malfunction because of misalignments between constitutional values and

⁶⁹ Elkin again

⁷⁰ Ackerman

⁷¹ For a discussion of informal constitutional change, see Graber, *A New Introduction*, chapter 5.

⁷² See notes ____, below and the relevant text.

constitutional politics. They had witnessed such a malfunction during the decades immediately before the Civil War. Antislavery advocates routinely complained about an aristocratic Slave Power they believed was governing the United States in defiance of constitutional commitments to majoritarianism and the eventual abolition of slavery. Charles Sumner and others accused the Slave Power of transforming into a parchment barrier the constitutional right alleged fugitive slaves enjoyed to a jury trial. Many Republicans charged that Slave Power aristocrats and their northern doughface sycophants were perverting national powers, most notably the congressional power to govern the territories, by adopting policies designed to entrench slavery rather than to place human bondage on the “path of ultimate extinction” as intended by the Constitution. During and immediately after the Civil War, Republicans took advantage of the absence of southern representatives in Congress and the Electoral College first to recommit the Constitution to the ultimate abolition of slavery and then to commit the Constitution to the actual abolition of slavery. The challenge Republicans faced in the first winter after the end of the Civil War was how constitutional politics could be reconstructed so that when southern officials returned to Congress and the Electoral College, the Thirteenth Amendment did not become another parchment barrier.

III. Constitutional Failures: Past and Future

The Fourteenth Amendment’s Constitution was built on the ruins of the Constitution of 1789. Republicans before the Civil War celebrated what they perceived was the original constitutional commitment to the “ultimate extinction in slavery.”⁷³ The problem, in their view, was that constitutional politics was no longer structured to achieve that end. A mismatch had

⁷³ Lincoln. See generally Foner.

developed between constitutional purposes and constitutional institutions that explained why crucial national decisions during the 1840s and 1850s entrenched human bondage in the United States. Antislavery advocates condemned such decisions as *Dred Scott v. Sandford*, which forbade legislation banning slavery in American territories, as outrageous denials of the fundamental antislavery norms of the Constitution. Horace Greeley maintained the decision was “entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington barroom.”⁷⁴ Greeley and other Republican critics of Taney Court jurisprudence in slavery cases recognized that the problem was not simply that a few aberrant justices were not being constrained by constitutional rules. Rather, they insisted that such pro-slavery rulings as *Dred Scott* and *Prigg v. Pennsylvania*⁷⁵ were rooted in a constitutional politics constructed to privileged the interests of a southern aristocracy. A Slave Power had arisen that was taking advantage of constitutional forms to pervert both the majoritarian and antislavery commitments of the Constitution. Slave Power agents in the judicial decided *Dred Scott*, in the legislature passed the Kansas-Nebraska Act, and in the executive fought to make Kansas a slave state. In order to combat this constitutional conspiracy, antislavery advocates had to organize a political party dedicated to restoring the original constitutional understanding of slavery. Americans would become recommitted to the animating purpose of the Constitution of 1787, Republicans realized, only by imitating Democrats who had abandoned the antipartisan constitutional politics the framers had thought necessary for achieving vital constitutional ends.

The Republican Party was the main vehicle by which antislavery advocates before and after the Civil War sought to reconstruct a more favorable constitutional politics. By organizing

⁷⁴ Horace Greeley, “Editorial,” *New York Tribune* (March 7, 1857).

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a political party and maintaining party discipline, antislavery advocates confirmed the most important constitutional innovation of the mid-nineteenth century. The framers believed that individual rights and the public interest could be secured only if government was rooted in a complex system of checks and balances that prevented the rise of political parties. Jacksonians, by comparison, insisted that individual rights and the public interest could be secured only if ordinary Americans united in a political party that gave them the strength to resist various oligarchies bent on perverting constitutional forms and values. Martin Van Buren understood that what he perceived to be the original constitutional commitments to limited government and federalism could be restored only if ordinary citizens in the all sections of the country united in a political party and gained control over all national institutions. Abraham Lincoln understood that what he perceived to be the original constitutional commitment to the end of slavery could be restored only if the free citizens of the North united in a political party and gained control over all national institutions. These united parties, Van Buren and Lincoln thought, were both the main vehicle by which constitutional values were preserved and the main vehicle by which constitutional disputes among the faithful were resolved.

Post-Civil War constitutional politics threatened the Republican majority that gained control of the national government in 1860. Prior to the Civil War, the Slave Power was able to dominant the national government in part because the three-fifths clause augmented southern representation in the House of Representatives and the Electoral College. The Thirteenth Amendment, which abolished slavery, promised to increase southern representation in Congress and the Electoral College, as disenfranchised persons of color would now count as full persons when seats in the House and votes in the Electoral College were allocated. Republicans who journeyed south heard former slaveowners publicly brag about how, with the aid of this

enhanced representation and northern Democrats, they would soon again control the national government, establish near slave-like systems of labor, and force northern taxpayers to assume southern debts incurred during the Civil War.

The Fourteenth Amendment was designed to alleviate Republican fears that post-Civil War constitutional politics might privilege a revived Slave Power rather than Republican concerns that the national government lacked the constitutional power to prohibit the Black Codes that were being enacted throughout the post-Civil War South. As the passage and defense of both the Civil Rights Act of 1866 and the Second Freedman's Bureau Act demonstrate, the vast majority of Republicans in the Thirty-Ninth Congress believed Congress was authorized by the Thirteenth Amendment and other constitutional provisions, most notably the Guaranty Clause of Article IV, to prohibit most if not all forms of race discrimination. Republicans knew, however, that Democrats in power would either prevent anti-discrimination legislation from becoming law or repeal such legislation on the books. The problem they faced when the Thirty-Ninth Congress met was that the same Thirteenth Amendment that gave Republicans who controlled the national government the power to promote equality under law also provided Democrats with a golden opportunity to regain control over the national government and dismantle the Republican program. With the very important exception of John Bingham, Republicans in and out of Congress consistently regarded the threat to their constitutional vision as coming from the way the Thirteenth Amendment altered structure of constitutional politics rather than any inadequacies in the rights and powers to protect those rights enumerated by the Thirteenth Amendment.

The Fourteenth Amendment was the culmination of a constitutional transformation from a regime designed to rely on a constitutional politics that prevented the rise of parties to preserve

fundamental constitutional commitments to a regime that relied on a particular political party to preserve those values. The transformation began in the 1820s, when Jacksonian political thinkers began to legitimate a permanent political party as the best means to parry aristocratic threats to the democratic and substantive commitments of the original Constitution.

Republicans, while rejecting the pro-slavery commitments of the Democracy, nevertheless endorsed Martin Van Buren's claim that a permanent political party was the only means to parry aristocratic threats to the democratic and substantive commitments of the original Constitution.

Democrats and Republicans differed only in their understanding of the aristocratic threats to the constitutional order. Van Buren and Andrew Jackson fought the Money Power. Lincoln and Thaddeus Stevens fought the Slave Power. A constitutional amendment was necessary in 1866, the Republican members of the Thirty-Ninth Congress agreed, in order to thwart renewed aristocratic threats to the capacity of rightful sovereigns of the United States, the party of the people who remained loyal during the Civil War, to maintain basic constitutional values and to interpret constitutional ambiguities in light to these commitments.

A. Parties and the Mid-Nineteenth Constitutional Order

Americans during the mid-nineteenth century increasingly regarded party as a necessary means for preserving the Constitution and the appropriate vehicle for resolving constitutional disputes. By forming a political party and accepting party discipline, such partisans as Martin Van Buren and Abraham Lincoln insisted, ordinary citizens could prevent elite factions from gaining control of the national government and perverting the constitutional order. In contrast to

the framers, who believed a sharp separation of powers necessary for preventing the tyranny of the majority, leading constitutional practitioners after 1830 maintained that concentrated power within a legitimate political party was necessary for preventing powerful minorities from seizing control of the national government and subsequently exercising national power to advance their narrow self-interest. Mass parties composed of ordinary citizens inhibited a constitutional politics that favored either “the Money Power” or “the Slave Power.” These aristocratic cabals in late Jacksonian America were seen as far greater threats to the constitutional order than the popular majorities Madison feared might redistribute property or impose a religious orthodoxy.

Martin Van Buren, Abraham Lincoln, and other partisan activists substituted a legitimate party, not a two-party system, for the separation of powers as the means for preserving American constitutional commitments. As Gerald Leonard and Stephen Engel in particular have pointed out,⁷⁶ the Jacksonian leaders who abandoned the founding commitment to a “Constitution Against Parties”⁷⁷ defended the legitimate party of the people. They did not wax eloquent on the virtues of competition between two or more parties for public offices. Democrats explained why the Democracy was the only means for preventing the Money Power from controlling the national government. Whigs explained why a counter coalition was the only means for preventing Jacksonian spoilsmen from controlling the national government. Several decades later, Republicans explained why their sectional party was the only means for preventing the Slave Power from controlling the national government. Although a few prominent politicians during the mid-nineteenth century praised two-party politics,⁷⁸ the legitimacy of competition

⁷⁶ See Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (University of North Carolina Press: Chapel Hill, 2007). This section relies heavily on Professor Leonard’s fine work.

⁷⁷ Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (University of California Press: Berkeley, 1970), p. 40.

⁷⁸ See *Debates in Congress*, 19th Cong., 1st Sess., p. 1545 (speech of Representative Churchill Cambreleng of New York) (“Party is indispensable to every Administration—it is essential to the existence of our institutions. . . . Our

between political parties or a party system was, at most, unclear when the Fourteenth Amendment was being framed.⁷⁹

1. The Constitutional Mission of Parties

Martin Van Buren, the acknowledged architect of the nineteenth century American constitutional order, had a profound, unrecognized influence on the Fourteenth Amendment. Van Buren is well known as the founder of permanent political parties in the United States. The primary mission of those parties was not, as sometimes supposed, “to solve the knotty operational problems of governing under the Constitution.”⁸⁰ Rather, Van Buren regarded a permanent party as the best means for preserving the Constitution. Unless ordinary people organized, he and the other founders of party politics in the United States believed, elites would gain power, substitute minority rule for the perceived constitutional commitment to majoritarianism, and frustrate more substantive constitutional purposes. The Republicans who framed the Fourteenth Amendment were animated by this partisan vision, even as they revised Van Buren’s conceptions of the popular majority, the aristocratic threat to that majority, and the most vital constitutional purposes.

public affairs were never better administered than during the [Jefferson administration] when measures were proposed and advocated by the majority, under the vigilance and correction of the minority. . . . [T]he conflict of parties is a noble conflict—of mind to mind, genius to genius”).

⁷⁹ Professor Leonard asserts with great force that Americans in the Jacksonian Era did not support a party system or accept the legitimacy of rival parties. Leonard correct notes that both Jacksonian Democrats and Whigs sought to obliterate the other and frequently called rival parties illegitimate. The same could be said, however, about contemporary Democrats and Republicans. At the very least, both Whigs and Jacksonians seemed to accept, often very grudgingly, that contrary constitutional visions enacted by duly elected or appointed officials were the law of the land. The important distinction between contemporary politics and that of the mid-nineteenth, on which Leonard is an exceptional guide is that the dominant justifications in Jacksonian Era focused on the legitimacy of a particular political party. Jacksonians were far less interested, if interested at all, in praising a party system.

⁸⁰ Skowronek, *Building a New American State*, p. 24.

A legitimate political party, before and after the Civil War, was entrusted with related procedural and constitutional missions. By mobilizing ordinary citizens, the legitimate party of the people prevented constitutional politics from being controlled by a political, economic or sectional aristocracy. By keeping that aristocracy out of power, the legitimate party of the people ensured that the Constitution was interpreted consistently with the goals of the founders. Party organization and party discipline fostered a constitutional politics in which Americans were governed by the persons or combination of persons that the Constitution authorized to govern and consistently with the values the Constitution was designed to promote.

Martin Van Buren's Democratic Party was organized on the basis of these constitutional principles. Van Buren and his allies regarded the Democracy as the only means by which "the Money Power" could be prevented from perverting the constitutional order. Through organization, Democrats ensured that public offices remained in the hands of those persons who had the best interests of ordinary persons at heart rather than those who sought to advance the interest of the investor class. Democrats in power could be trusted to resist aristocratic attempts to entrench the "latitudinarian" construction of the Constitution underlying federal support for the national bank and internal improvements, legislation that further enriched the affluent class and enfeebled those institutions, most notably local government, that best enabled ordinary citizens to maintain control of the national government.

The Whig Party over time adopted this Jacksonian interpretation of the constitutional mission of political parties. Party organization was necessary, such prominent Whigs as Abraham Lincoln believed,⁸¹ in order to alleviate the threat that elite Democrat office-holders presented to the constitutional order. Whigs would preserve constitutional order by replacing Jacksonian placemen, who were concerned only with gaining office and enjoying the spoils of

⁸¹ For Abraham Lincoln as a Whig party organizer, see Leonard, ____.

government, with virtuous, independent statespersons who would govern as the framers intended, in the public interest. Those who governed in the public interest, in turn, would adopt a generous construction of national powers in order to fulfill constitutional commitments to an improved citizenry.⁸²

The antislavery advocates who formed the Republican Party wholeheartedly adopted the Jacksonian understanding of a legitimate political party, while substituting “the Slave Power” for “the Money Power” as the central threat to constitutional politics and making the free people of the North, later the people who remained loyal to the Union during the Civil War, as the rightful sovereigns in the United States. Political organization was necessary because the Slave Power rejected the fundamental majoritarian commitments of the Constitution. Slaveholders governed the south undemocratically and controlled the national government only because a combination of this undemocratic rule at home, the three-fifths clause, northerners bent on receiving spoils and various other schemes inimical to popular government had generated a constitutional politics that privileged southern interests. Slaveholders in control of the national government, in turn, warped the original constitutional commitment to restraining the spread of slavery. Every good Republican connected the procedural and substantive dots that held the Slave Power together. If through organization the Republican Party restored the original constitutional commitment to majority rule, they were convinced, then that procedural success would result in a constitutional politics that again privileged the original antislavery commitments of the constitutional order.

2. Constitutional Authority in the Partisan Regime

⁸² See Howe

The partisan theory of constitutional authority that Van Buren developed and Lincoln advanced in his first inaugural diverged from the antipartisan theory of constitutional authority that Jefferson championed and made famous. Although Jefferson and Lincoln's works are commonly cited as the canonical expressions of departmentalism,⁸³ their challenges to judicial theory were rooted in different conceptions of constitutional politics. Jefferson was a departmentalist. His theory of constitutional authority was rooted in the Madisonian understanding that liberty was best preserved by constitutional arrangements that enabled different governmental institutions to check each other. Lincoln was not a departmentalist. His theory of constitutional authority was rooted in the Van Burenite understanding that liberty was best preserved by constitutional arrangements that enabled the legitimate party of the people to control the entire government.

The Constitution of 1789 sought to privilege the public interest and minority rights through institutional arrangements that guaranteed the independence of distinctive governing institutions. Madison in *Federalist* 51 maintained that constitutional commitments could be secured only if each branch of national government had the capacity to resist the other branches. "The several constituent parts" of the federal government, he wrote, must have "the means of keeping each other in their proper places."⁸⁴ In his view, national power would be limited in practice only if the Constitution was designed so "that each department should have a will of its own."⁸⁵ Jefferson was as committed to the separation of powers as the bulwark of freedom. His *Notes on the State of Virginia* criticized the new Constitution of Virginia because "all the powers of government, legislative, executive, and the judiciary result to the legislative body." In his view, "The concentrating these in the same hands is precisely the definition of despotic

⁸³ See, even, GGW!

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government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.”⁸⁶

Fragmenting political power was crucial to the founding effort to prevent the rise of political parties, which they believed would undermine vital constitutional commitments. Both Madison and Jefferson celebrated the separation of powers in part because they believed competition between balanced government institutions for power would inhibit competition between political parties for power.⁸⁷ Madison thought large republics promoted liberty by inhibiting cooperation between potential members of a faction.⁸⁸

Jefferson and Madison opposed judicial supremacy because they believed a judicial monopoly violated the institutional independence they thought vital for security republican liberty. Both relied extensively on separation of powers logic when defending departmentalism. Jefferson informed Abigail Adams:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.⁸⁹

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⁸⁷ See Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, Not Powers,” 119 *Harvard Law Review* 2311, 2316-24 (2006).

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Madison's departmentalism was similarly yoked to the separation of powers. Responding to suggestions during the First Congress to refer questions about the power of the president to cashier cabinet members to the Supreme Court, Madison declared,

I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.⁹⁰

Constitutional authority, for Jefferson and Madison, was rooted in office-holding rather than elections. Members of Congress, the president and Supreme Court justices had the right to interpret the Constitution independently because their offices were designed to be independent. Elections played, at most, a secondary role in the means by which constitutional disputes were resolved. Jefferson did observe that “when the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity.”⁹¹ Nevertheless, Jefferson when defending departmentalism never claimed that an official had constitutional authority because that official was elected and, hence, might be trusted to act consistently with popular interpretations of constitutional provisions. Madison explicitly rejected popular constitutionalism. After declaring in *Federalist 49* that “The several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evidence, can pretend to an exclusive or superior right to settling the boundaries between their respective powers,” he promptly raised “insuperable objections against . . . recurrence to the people” as the appropriate

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means for resolving constitutional controversies between the different branches of the national government.⁹²

Martin Van Buren accepted some elements of the separation of powers logic underlying the Madisonian understanding of constitutional politics. His analysis of constitutional authority in his *Inquiry into the Origins and Course of Political Parties in the United States* began by endorsing Jefferson's conception of departmentalism.⁹³ After quoting Jefferson at length, Van Buren argued that President Andrew Jackson's famous message vetoing the national bank bill⁹⁴ had justified presidential authority to interpret the Constitution on classical separation of powers logic. Van Buren maintained that Jackson's message asserted the following core propositions of departmentalism:

That the Congress, the Executive, and the Court must each for itself be guided by its own opinions of the Constitution. . . . That the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and that on that point the President is independent of both. . . . That the authority of the Supreme Court should not therefore be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁹⁵

Other passages of the *Inquiry* repeated this Jeffersonian departmentalist understanding of constitutional authority. Van Buren asserted, "The provisions of the Constitution will be searched in vain for any which indicate a design on the part of its framers to give to one of the departments power to control the action of another in respect to its departmental duties under that instrument."⁹⁶

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⁹⁵ Martin Van Buren, *Inquiry into the Origins and Course of Political Parties of the United States* (Augustus M. Kelley: New York, 1967), pp. 315-16.

⁹⁶ Van Buren, *Inquiry*, p. 333.

Van Buren broke from Jefferson and Madison when discussing the role parties and elections played resolving constitutional disputes between the different branches of the national government. Madison and Jefferson assumed that government could function when the legislature, executive and judiciary acted on distinctive constitutional understandings. Van Buren insisted these disputes be resolved and that popular majorities were the ultimate constitutional decision makers when governing officials could not settle constitutional controversies. “The true view of the Constitution,” he declared, was

If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.⁹⁷

More so than Jefferson or Madison, Van Buren emphasized that judicial supremacy was inconsistent with the constitutional commitment to majoritarianism. Placing constitutional authority “under the supervision” of federal courts, he stated, “is nothing less than to divest the Government of its republican features and to substitute in its place the control of an irresponsible judicial oligarchy—to make the Constitution a lie, and turn to mockery its most formal provisions, designed to secure to the people a control over the action of the Government under its authority.”⁹⁸

Lincoln’s discussions of constitutional authority in his debates with Douglas and first inaugural relied entirely on party, cutting out all references to the separation of powers. His challenge to judicial authority in 1858 was issued as a member of the Republican Party, not as an office holder or potential holder of a particular federal office. Lincoln’s analysis of constitutional authority in his sixth debate with Stephen Douglas occurred during when he

⁹⁷ Van Buren, *Inquiry*, p. 330 (quoting Senator White). FIND

⁹⁸ Van Buren, *Inquiry*, p. 315.

discussed the “principles”⁹⁹ of the Republican Party. Speaking as a member of the Republican Party, he stated,

We oppose the Dred Scott decision in a certain way, upon which I ought perhaps to address you a few words. We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.¹⁰⁰

This passage defends the right of Republican Party members to campaign on a platform committed to prohibiting slavery in the territories and act on that platform if elected to office.

While Lincoln spoke about members of Congress and the President exercising independent judgment on constitutional questions, that independence stemmed from their status as elected officials rather than holders of a particular office. At no point when campaigning for the Senate or presidency did Lincoln invoke separation of powers logic as justifying congressional or executive challenges to the Supreme Court’s decision in *Dred Scott*. His Republican Party was organized for the purpose of making their contrary constitutional vision the law of the land by controlling all three branches of government, thus obviating separation of powers as a meaningful constraint on national authority or conception for thinking about constitutional authority.

Lincoln’s analysis of constitutional authority in the Lincoln-Douglas debates was consistent with the Republican critique of *Dred Scott* as an instance of constitutional

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¹⁰⁰ 255.

partisanship. Republicans rarely criticized *Dred Scott* for being countermajoritarian.¹⁰¹ Instead, antislavery advocates sought to link the judicial decision that slavery could not be banned in American territories with the Slave Power and northern doughfaces. The antislavery *New York Herald*, when commenting on *Dred Scott* asserted, “At present, the South is strongly fortified. It has the administration, both houses of Congress and the Supreme Court as its constitutional defenses.”¹⁰² Lincoln connected the Jacksonian majority in the federal judiciary with the Jacksonian majority in the elected branches of the national government. “The *Dred Scott* decision,” he asserted, “never would have been made in its present form if the party that made it had not been sustained previously by the elections.”¹⁰³ Republicans who regarded *Dred Scott* as a consequence of Slave Power control of the national government thought pointless the Jeffersonian commitment to having each branch of the national government exercise independent constitutional authority. If, as Lincoln declared, “James” Buchanan, “Roger” Taney, and “Stephen” Douglas were involved in a conspiracy to pervert the constitutional commitment to the end of slavery,¹⁰⁴ adjusting the allocation of constitutional authority would change nothing. Instead, antislavery advocates claimed that persons committed to reversing *Dred Scott* should attempt to replace Democratic Party officials in all three branches of the national government with members of the Republican Party. Lincoln’s speech during the fifth debate with Douglas endorsed Van Buren’s understanding that majority rule was the means by which constitutional disputes were appropriately settled. He stated, “My own opinion is, that the new *Dred Scott*

¹⁰¹ Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy,” 73 *New York University Law Review* 333, 415-18 (1998).

¹⁰² *New York Herald*, March 12, 1857, p. 4.

¹⁰³ Abraham Lincoln, “Mr. Lincoln’s Speech, Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois,” 3 *Basler*, p. 232.

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decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections.”¹⁰⁵

Lincoln’s first inaugural address built on his previous commitments to party as the main vehicle of constitutional authority. That speech began by noting that the Constitution did not explicitly resolve certain questions, most notably questions about the constitutional status of slavery in the territories. Lincoln then observed that Americans formed parties when attempting to gain favorable resolution of these open constitutional questions. “From questions of this class spring all our constitutional controversies,” he asserted, “and we divide upon them into majorities and minorities.” After articulating the constitutional mission of political parties, Lincoln insisted on majority rule as the proper means for resolving constitutional disputes. Lincoln made no reference to the power of the president or the right of any person holding a particular government office to challenge Supreme Court decisions or engage in independent constitutional decision-making. Constitutional authority rested in the hands of the majority party. Lincoln’s first inaugural asserted:

A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.

Lincoln’s famous attack on judicial supremacy came immediately after he insisted that popular majorities were the ultimate constitutional authority in the United States. *Dred Scott* did not permanently settle the constitutional status of slavery in the territories because “the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are

¹⁰⁵ Lincoln, “Fifth Debate,” p. 232.

made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.” Following Van Buren, Lincoln in his first inaugural referred to “the people” as the ultimate constitutional authority. At no point in his debates with Douglas, in his first inaugural, or in any other public remark delivered previous to the First Inaugural, did Lincoln claim that Article II or the constitutional separation of powers justified an executive decision to act inconsistently with the principles underlying the judicial decision in *Dred Scott*. Lincoln, if elected Senator or President, was constitutionally authorized to support bans on slavery in American territories because he was a member of the majority party that had gained office campaigning on a platform dedicated to the principle that national officials had the constitutional power and the constitutional obligation to ban slavery in the territories.

The theory of constitutional authority Lincoln articulated in the first inaugural and debates with Douglas differed sharply from that espoused by Jefferson and Madison. Lincoln believed constitutional authority vested in the party of the people, while Jefferson and Madison maintained that constitutional authority was vested in governing institutions. Elections played a far more crucial role in Lincoln’s understanding of constitutional authority than in Jefferson’s departmentalism. Jefferson maintained that he had a right to independent constitutional authority solely because he was president. His departmentalist conception of constitutional authority was rooted in the framing understanding that elections were about electing the best men for public office rather than making fundamental policy choices.¹⁰⁶ When justifying his decision to pardon persons convicted under the Alien and Sedition Acts, Jefferson never claimed authority to do so because he and other Democratic-Republicans in 1800 had successfully campaigned on a platform committed to repealing Federalist restrictions on free speech. By comparison, elections

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are at the center of the theory of constitutional authority Lincoln inherited from Van Buren. Andrew Jackson when claiming constitutional authority to remove deposits from the national bank emphasized that his constitutional opposition to the national bank had been sustained by popular majorities in the 1832 Presidential election.¹⁰⁷ Lincoln similarly insisted that Republicans were constitutionally authorized to ban slavery in the territories because they had campaigned on that issue and won the 1860 national election. Justifying his decision not to abandon campaign pledges to restrict the expansion of slavery, Lincoln stated, “when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections.”¹⁰⁸ “Electoral winners, Lincoln and Andrew Jackson agreed, were constitutionally authorized to interpret the Constitution consistently with their advertised constitutional vision.

These differences between Lincoln and Jefferson help explain why the first inaugural does not neatly map on to a theory of judicial supremacy, of departmentalism, or of any other contemporary model of constitutional authority. These common theories of constitutional authority are all grounded in claims that the separation of powers is vital for the maintenance of liberty.¹⁰⁹ Proponents of departmentalism, legislative supremacy, judicial supremacy, and compact theory assign distinctive functions to the different branches of the national government. They debate what balance of constitutional authority best maintains these distinctive functions, so that a separation of powers system may promote constitutional commitments and uphold constitutional restrictions.¹¹⁰ Mid-Nineteenth century Americans who defended partisan supremacy believed that constitutional commitments were best secured when the legitimate party

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¹⁰⁸ 4 Basler 439.

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of the people gained control of all three branches of the national government. Effective constitutional politics required coordination between party members in different branches of the national government rather than sharp functional separation. Little need existed for serious thinking about how to allocate constitutional authority between governing institutions in a system in which the President, judicial majority, and majority in both Houses of Congress shared a common constitutional vision. Van Buren and other partisans tended to be very pragmatic when disputes arose between different institutions controlled by different parties, more often defending the particular institution their party controlled than advocating a general theory of constitutional authority.¹¹¹ One consequence of this emphasis on party as the vehicle for resolving constitutional disputes is that Republicans in general and Abraham Lincoln in particular had no well thought out theory of the separation of powers when Republicans gained control of the elected branches of the national government in 1860.¹¹² The theory of constitutional authority Lincoln advanced in his debates with Douglas and during the First Inaugural was designed to explain why Republicans in power could challenge constitutional decisions previously made by the Supreme Court. As of March 5, 1861, Lincoln had said nothing about the allocation of constitutional authority when Republicans in different branches of the national government disputed the meaning of some constitutional provision.

Committed to the legitimate party of the people as the institution responsible for resolving constitutional disputes, Republicans immediately after the Civil War were more concerned with which party controlled the meaning of existing enumerated powers, rights, and restrictions than with resolving controversies of the meaning of the Constitution of 1865. Republicans in both 1860 and in 1865 recognized that intra-party disputes existed over the

¹¹¹ Engel

¹¹² See Brian R. Dirck, *Lincoln and the Constitution* (Southern Illinois University Press: Carbondale, 2012), p. 52.

constitutional status of persons of color. The main goal of the Republican Party in the late 1850s was to find a way within the structure of existing constitutional politics to ensure that popular majorities, rather than an oligarchic Slave Power, resolved those disputes. The main goal of the Republican Party in 1865 was to construct a constitutional politics that made sure that disputes over the meaning of the Thirteenth Amendment were decided by the persons who remained loyal during the Civil War rather than traitors and copperheads.

B. Two Threats

The Republican Party when the Thirty-Ninth Congress met confronted two potential threats to their constitutional commitment to a broad interpretation of the Thirteenth Amendment. The first possible threat was that Republicans lacked the constitutional authority to combat a southern resurgence. In this view, championed by John Bingham, the Constitution needed amendment in order to provide Congress with the legal power necessary to prevent persons of color in the South from being practically enslaved and to protect southern Unionists from gross rights violations. The second possible threat was that Republicans lacked the political strength necessary to combat a southern resurgence. In this view, championed by Thaddeus Stevens, the Constitution needed amendment to prevent a revived Slave Power from regaining control of the elected branches of the national government and then repealing the constitutional legislation Republicans had passed that prevented persons of color in the south from being practically enslaved and protected the rights of southern Unionists.

1. John Bingham's Perceived Threat

Bingham maintained that Republicans majorities in Congress lacked the legal authority to prevent the South from practically reenslaving persons of color. When opposing the Civil Rights Act of 1866, Bingham declared, “The Constitution does not delegate to the United States the power to punish offenses against the life, liberty or property of the citizen in the States, nor does it prohibit that power to the States, to be by them exercised.” In his view, “The prohibitions of power by the Constitution to the States are express prohibitions, as that no State shall enter into any treaty, &c., or emit bills of credit, or pass any bill of attainder, &c.”¹¹³ Unlike many Democrats, who opposed on the merits laws granting rights to freed slaves, Bingham emphasized that he personally favored providing substantial legal protections to persons of color. His objection to the Civil Rights Act went solely to the constitutionality of the bill, not to the policies being enacted. He informed fellow members of the Thirty-Ninth Congress,

The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.¹¹⁴

Until a constitutional amendment added the relevant enumerated powers, rights and restrictions, Bingham maintained, Congress had no legal authority to interfere when former Confederate states enacted Black Codes and otherwise sought to restore the antebellum status quo within their jurisdictions. Bingham during the debates over the stand-alone version of Section 2 announced he would “tremble for the future of my country,” unless Congress passed “another general amendment to the Constitution which looks to the grant of express power to the Congress of the

¹¹³ *Congressional Globe*, 39th Cong., 1st Sess., p. 1291.

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United States to enforce in behalf of every citizen of every State and every Territory in the Union the rights which were guaranteed to him from the beginning.”¹¹⁵

Bingham stood almost alone in both the Joint Committee on Reconstruction and in Congress when he repeatedly insisted that Republicans lacked the constitutional authority to implement their constitutional commitment to “the absolute equality of all citizens of the United States politically and civilly before the law.”¹¹⁶ His fellow Republicans in Thirty-Ninth Congress, almost unanimously, believed that the Thirteenth Amendment and other constitutional prohibitions vested Congress with more than adequate legal powers to combat racial discrimination and rights violations in the postwar South. Congressional majorities in the House and Senate while the Fourteenth Amendment was being debated first passed the Civil Rights Act of 1866 and then reenacted the bill over President Johnson’s veto. That measure declared persons of color to be citizens of the United States and guaranteed that those persons would enjoy “the same rights as white persons” in the civil and criminal law.¹¹⁷ Conservative Republicans when defending the constitutionality of these new legal rights and restrictions on state power interpreted broadly the rights and congressional powers to protect those rights enumerated by the Thirteenth Amendment. Senator Lyman Trumbull of Illinois maintained

[U]nder the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a freeman; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not

¹¹⁵ *Congressional Globe*, 39th Cong., 1st Sess., p. 429.

¹¹⁶ *Congressional Globe*, 39th Cong., 1st Sess., p. 431.

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allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.¹¹⁸

Many Radical Republicans interpreted the Constitution of December 1865 as empowering the national government to protect political, as well as civil rights. Charles Sumner and others insisted that some combination of the Thirteenth Amendment, the guarantee clause of Article IV, and the congressional power to regulate federal elections authorized Congress to prohibit racial discrimination in voting. Sumner during the debates over the Civil Rights Act of 1866 stated,

Beyond all question, the protection of the colored race in civil rights is essential to complete the abolition of Slavery; but the protection of the colored race in political rights is not less essential, and the power is as ample in one case as in the other. In each you legislate for the maintenance of that Liberty so tardily accorded, and the legislation is just as "appropriate" in one case as in the other. Protection in civil rights by Act of Congress will be a great event. It will be great in itself. It will be greater still, because it establishes the power of Congress, without further amendment of the National Constitution, to protect every citizen in all his rights, including of course the elective franchise.¹¹⁹

Bingham endorsed this conclusion. Although he denied that the Thirteenth Amendment empowered Congress to pass legislation protecting civil or political rights, Bingham thought two provisions in the Constitution of 1789, the guarantee clause and the elections clause, enabled Congress to pass legislation enfranchising persons of color.¹²⁰

Republicans were internally divided over whether the Constitution before or after the ratification of the Thirteenth Amendment permitted Congress to grant political rights to persons of color. Radicals insisted that Congress had the right and duty to enfranchise persons of color. Moderate and conservative Republicans disagreed. Although most insisted that the Constitution vested Congress with the power to protect the civil rights of former slaves and southern

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¹²⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 430-31.

Unionists, many denied that the Constitution vested Congress with the power to enfranchise any one. Fessenden, the chair of the Joint Committee on Reconstruction, declared, “the States have, as the Constitution stands today, the perfect right to fix the qualifications of voters.”¹²¹ Bingham appears to be the only member of the Thirty-Ninth Congress who thought Congress in December 1865 had the power to protect political rights, but not civil rights.

Politics and policy considerations, however, loomed larger than constitutional concerns when members of the 39th Congress rejected legislation and constitutional amendments enfranchising persons of color. Crucial Republican members of the Thirty-Ninth Congress believed that neither legislation nor a constitutional amendment prohibiting racial discrimination in voting was timely or appropriate. Some opposed black suffrage on the merits.¹²² Others insisted a constitutional amendment prohibiting racial discrimination in voting could not be passed. Senator Williams spoke for a crucial bloc of Republican Senators when he declared, “the evidence before our eyes that the people of these United States are not prepared to surrender to Congress the absolute right to determine as to the qualifications of voters in the respective States, or to adopt the proposition that all persons, without distinction of race or color, shall enjoy political rights and privileges equal to those now possessed by the white people of the country.”¹²³

Had Republicans the will to enfranchise persons of color throughout the United States, most would have found the constitutional way. When members of the Thirty-Ninth Congress debated questions of congressional power, constitutional opinions lined up neatly with policy preferences. With the prominent exception of Senator John Henderson of Missouri,¹²⁴ those

¹²¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1278.

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¹²³ *Congressional Globe*, 39th Cong., 1st Sess., App., p. 95.

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Republican members of the Thirty-Ninth Congress who favored legislation granting voting rights to persons of color also believed the Constitution permitted Congress to pass legislation granting voting rights to persons of color. Bingham on civil rights and Henderson on political rights aside, no Republican in 1866 perceived that a constitutional constraint on congressional power to provide what they believed were adequate or, at least, politically feasible legal protections to persons of color in the South. At most, as one legal historian states, “some residual doubt” remained as to the scope of federal power under the Thirteenth Amendment.¹²⁵

Republicans were aware that Democrats did not believe Congress had much power under the Thirteenth Amendment or other constitutional provisions to protect persons of color in the South. Andrew Johnson spoke for virtually all Democrats when he vetoed both the Civil Rights Act of 1866 and the Second Freedmen’s Bureau Bill as unconstitutional. His veto of the Civil Rights Act declared,

It cannot . . . be justly claimed that, with a view to the enforcement of [the Thirteenth Amendment], there is at present any necessity for the exercise of all the powers which this bill confers. Slavery has been abolished, and at present nowhere exists within the jurisdiction of the United States; nor has there been, nor is it likely there will be, any attempt to revive it by the people or the States. If, however, any such attempt shall be made, it will then become the duty of the General Government to exercise any and all incidental powers necessary and proper to maintain inviolate this great constitutional law of freedom.¹²⁶

Still, Republicans in December 1865 were not confronting the problems that would result when a Democrats in control of the national government had the power to control the meaning of the Thirteenth Amendment and other constitutional provisions that the party of the people who remained loyal during the Civil War intended to secure freedom and equality under law. Democratic understandings of the Thirteenth Amendment did not matter as long as Republicans were united and Democrats the minority party. The issue that occupied most Republicans when

¹²⁵ Nelson, *The Fourteenth Amendment*, p. 48

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the Thirty-Ninth Congress met was what could be done to modify those constitutional provisions that might enable a revived Democratic/Slave Power coalition to reassert control over the meaning of the Thirteenth Amendment and other provisions that the party of the people who remained loyal during the Civil War intended to secure freedom and equality under law.

2. Thaddeus Stevens's Perceived Threat

The Republican members of the Thirty-Ninth Congress had good reason to believe that postwar constitutional politics might transform the Thirteenth Amendment into a parchment barrier in much the same way that antebellum constitutional politics, as manifested most notably by the *Dred Scott* decision and Kansas-Nebraska Act, had perverted what they perceived to be the antislavery commitments of the original Constitution. Republicans regularly heard reports from the South detailing how former slaveowners planned to dominate the country by renewing their previous alliances with Northern Democrats. This alliance, if successfully consummated, would enable former Confederates to make the Thirteenth Amendment a dead letter and otherwise prevent Union states from enjoying the fruits of their battlefield victory. Republicans learned to their horror that they had inadvertently empowered this conspiracy when ratifying the constitutional ban on slavery. The Thirteenth Amendment, by gutting the three-fifths clause of the Constitution, threatened to undermine the constitutional politics necessary to make the Thirteenth Amendment a living reality.

Republicans shortly after ratifying the Thirteenth Amendment were deluged by on-the-ground bulletins from sympathetic journalists about how the Slave Power intended to win in the peace what was lost in the war. Northern reporters who toured the South, Garrett Epps details, observed that “the Slave South, though vanquished, was unbowed, and . . . its people intended to

recreate its prewar system as closely as they could, and then return to dominate the Union.”¹²⁷

Prominent Southerners when interviewed made such claims as “We’ll unite with the opposition up North, and between us we’ll make a majority. Then we’ll show you who’s going to govern this country.”¹²⁸ Southern elites expected that this revived coalition of former slaveholders and Northern Democrats in office would repudiate the debt the United States incurred when fighting the Civil War, or at least exempt southerners from paying the taxes needed to service that debt, assume slave state government debts incurred during the Civil War, compensate southerners for emancipated slaves, restrict speech critical of southern practices, and, most important, develop a labor system similar to slavery that would maintain white supremacy. Carl Schurz, who was sent south on a fact-finding mission by President Johnson, noted a southern “desire to preserve slavery in its original form as much and as long as possible . . . or to introduce into the new system that element of physical compulsion which would make the negro work.” This revised system of labor, Schurz declared, would be “intermediate between slavery as it formerly existed in the South, and free labor as it exists in the North, but more nearly related to the former than the latter.”

Northern journalists observed that slaveholders and their potential Northern Democratic coalition partners were celebrating one unanticipated consequence of the Thirteenth Amendment, a consequence that threatened to structure a constitutional politics that privileged a revived Slave Power’s efforts to nullify in practice, if not as a matter of fundamental law, the constitutional ban on slavery. The Thirteenth Amendment repealed the three-fifths clause of Article I. Antebellum northerners had railed against this provision as the primary means by which an undemocratic

¹²⁷ Garrett Epps, “The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment,” 13 *Temple Political & Civil Rights Law Review* 411, 413 (2004)

¹²⁸ See Epps, pp. 418-19.

Slave Power ruled the country.¹²⁹ The additional votes that slave states gained because slaves were counted as three-fifths of person when allocating seats in the House of Representatives and members of the Electoral College provided the margin of difference in the presidential election of 1800, on the congressional vote on the Kansas-Nebraska Act and on other matters on which antebellum Americans were divided by section. Republicans before the Civil War insisted that enslaved persons of color ought not be counted at all when allocating seats in the House of Representatives and members of the Electoral College. Former slaveholders after the ratification of the Thirteenth Amendment, however, recognized that disenfranchised persons of color now counted as full persons when allocating seats in the House of Representatives and members of the Electoral College. Instead of losing representation and political power, as antislavery advocates had demanded, the Thirteenth Amendment promised to increase southern influence on national policy. This boost to white southern political power, in their view, might be sufficient to enable the former slave states to regain control over the national government. The *Richmond Examiner* summarized these southern hopes when asserting,

Universal assent appears to be given to the proposition that if the States lately rebellious be restored to rights of representation according to the federal basis, or to the basis of numbers enlarged by the enumeration of all the blacks in the next census, the political power of the country will pass into the hands of the South, aided it will be, by Northern alliances.”¹³⁰

The threat Republicans faced in December 1865 was that, on the near certain assumption that southern states would not allow persons of color to vote, the Thirteenth Amendment, by requiring that southern blacks count as full persons for representational purposes, significantly augmented the power of southern whites to control the meaning of any enumerated constitutional right and determine the exercise of any enumerated power designed to implement the

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¹³⁰ “News from Washington,” *Richmond Examiner*, January 9, 1866, p. 1.

constitutional commitment to equality under law. Robert Dale Owen informed President Johnson,

By the constitution the representative population is to consist of all free persons and three-fifths of all other persons. If, by next winter, slavery shall have disappeared, there will be no "other persons" in the South. Her actual population will then coincide with her representative population. She will have gained, as to Federal representation, 1,600,000 persons. She will be entitled, not as now to eighty-four members, but to ninety-four; and her votes for President will be in proportion; Congress, if it intends that the Constitutional rule shall prevail, will have to alter the apportionment so as to correspond to the new order of things. Now, if the negro is admitted to vote, the constitutional rule will operate justly; for then each voter in the South will have precisely the same political influence as a voter in the North. The unjust three-fifths principle will have disappeared forever. On the other hand, if color be deemed cause of exclusion, then all the political power which is withheld from the emancipated slave is gained by the Southern white if freed slaves were denied the ballot, each Southern white voter would exercise three times the political power of a Northern voter.¹³¹

Instead of having an 18 vote bonus in the House of Representatives and Electoral College, as was the case before the Civil War, Republicans estimated that the Thirteenth Amendment gave southern whites a thirty vote bonus in their quest to regain control of the national government.¹³²

Thaddeus Stevens and other Republican leaders lived in fear that the South would rise again. They repeatedly asserted that the Thirteenth Amendment was likely to become a parchment barrier and Appomattox a hollow victory if constitutional politics, as transformed by the Thirteenth Amendment, was not immediately reconstructed. Stevens when introducing the first version of the Fourteenth Amendment warned the Republican majority in the House of Representatives that

With the basis unchanged, the eighty-three southern members, with the Democrats that will in the best times be elected from the North, will always give them a majority in Congress and in the Electoral College. They will at the very first election take possession of the White House and the halls of Congress. I need not depict the ruin that would follow. Assumption of the rebel debt or

¹³¹ "Letter from Robert Dale Owen: Negro Suffrage and Representative Population," *New York Tribune*, June 24, 1865, p. 8.

¹³² See generally, Nelson, *The Fourteenth Amendment*, p. 46.

repudiation of the Federal debt would follow. The oppression of the freedmen; the reamendment of their State constitutions, and the reestablishment of slavery would be the inevitable result.¹³³

Representative John Thomas of Maryland agreed that the constitutional politics necessary to enforce Republican constitutional commitments was in jeopardy. He observed that southerners “have the determination to seize hold of the political power, and to use it if possible to punish those who have made them submit to the laws.”¹³⁴

Stevens and other Republicans bluntly maintained that constitutional change was necessary to preserve the Republican Party. A constitutional amendment was needed, Stevens stated, “to secure perpetual ascendancy to the party of the Union; and so as to render our republican Government firm and stable forever.”¹³⁵ Other Republicans were as direct. In a speech celebrating partisanship, Representative Samuel McKee of Kentucky declared, “I would like so to amend the Constitution that no man who had raised his arm against the flag should ever be allowed to participate in any of the affairs of the Government.”¹³⁶ Senator Henry Wilson of Massachusetts waxed eloquent on the need for constitutional change that entrenched the party of Union. His speech on March 2, 1866 asserted,

Mr. President, the House, the Senate, the Cabinet, the President, each and all should not now forget to remember that they were clothed with authority by a party inspired by patriotism and liberty, a party that proclaims as its living faith the sublime creed of the equal rights of man and the brotherhood of all humanity, embodied in the New Testament and the Declaration of Independence. Let Representatives, Senators, Cabinet ministers, and the President amid the trials and temptations of the present, fully realize that the great Republican party, embracing in its ranks more of moral and intellectual worth than was ever embodied in any political organization in any age or in any land, was created by no man or set of men, that it was brought into being by Almighty God to represent the higher and better sentiments of Christian America, to bear the flag of patriotism and liberty, of justice and humanity. Brought into being in 1854 to resist the repeal of the

¹³³ *Congressional Globe*, 39th Cong., 1st Sess., p. 74.

¹³⁴ *Congressional Globe*, 39th Cong., 1st Sess., App., p. 61.

¹³⁵ *Congressional Globe*, 39th Congress, 1st Sess., p. 74.

¹³⁶ *Congressional Globe*, 39th Cong., 1st Sess., p. 451.

prohibition of slavery in Kansas and Nebraska, the further expansion of slavery into the depths of the continent, and the longer domination of the slaver power, it has for twelve years, in defeat and in victory, ever been true to country, ever faithful to its flag, ever devoted to the rights of struggling humanity. No political party in any country or in any age has fought on a plain so lofty, or achieved so much for country, republican institutions, the cause of freedom, of justice, and of Christian civilization. If it should perish now in the pride of strength and of power, by the hands of suicide, or by the follies or treacheries of men it has generously trusted, it will leave to after times a brilliant record of honor and of glory. The enduring interests of the regenerated nation, the rights of man, and the elevation of an emancipated race alike demand that the great Union Republican party, the outgrowth and development of advancing civilization in America, shall continue to administer the Government it preserved, and frame the laws for the nation it saved.¹³⁷

Republican journalists agreed. The *Springfield Republican* asserted that Republican Party had a “duty . . . to retain power as long as it can by honorable means, for the good of the country.”¹³⁸

Virtually every Republican speech on various proposed Fourteenth Amendments emphasized the need to combat the threat of a revived Slave Power, augmented by the extra representation gained by the ratification of the Thirteenth Amendment and the implicit repeal of the three-fifths clause. Many spoke of the specific threat to the Republican Party.¹³⁹ Others emphasized the way in which an augmented representation from the south would threaten the both the constitutional commitment to equality under law and the national economy.

Representative Rufus Spaulding of Ohio worried that the a Democratic Party majority, augmented by the Thirteenth Amendment would “repeal many, if not all, of the measures which we have adopted for the welfare and salvation of the country.”¹⁴⁰ Representative George Boutwell of Massachusetts claimed that maintaining the existing ratio of representation “would portend the destruction of the public credit, the repudiation of the public debt, and the

¹³⁷ *Congressional Globe*, 39th Cong., 1st Sess. App., p. 142.

¹³⁸ Nelson, *The Fourteenth Amendment*, p. 46.

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¹⁴⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 2509.

disorganization of society?”¹⁴¹ Still others focused on the inequities and incongruities of a system in which voters in the south gained political power as a result their defeat in the civil war. Senator John Sherman of Ohio spoke of the “anomaly of allowing the rebel States an increased political power in Congress.”¹⁴² “I would not allow this additional number of ten Representatives to the late slave States as the reward of treason,” Representative Lawrence of Ohio declared.¹⁴³

The consistency with which Republicans expressed immediate concern with the structure of constitutional politics contrasts sharply with their attitude toward the state of constitutional law. Republicans who disagreed over the proposed Fourteenth Amendment that included only a version of Section 2 agreed that unless the basis of representation changed, Republicans might lack the political power necessary to implement the constitutional commitment to equality under law.¹⁴⁴ John Bingham was the only participant in the brief debate over the stand-alone version of what became Section 1 who claimed that Republicans in power lacked the legal authority necessary to implement that constitutional commitment. When the Joint Committee combined into an omnibus constitutional amendment proposals to enumerated additional rights and powers and proposals to alter the structure of constitutional politics, Republican speeches on the floor of Congress continued to focus almost exclusively on threats to Republican political hegemony.¹⁴⁵ As noted above, Republicans in 1866 thought that the Constitution “as it was” placed few legal barriers on the capacity of a political coalition committed to equality under law to reconstruct the south. Bingham was performing solos when he gave speeches declaring that Republicans lacked

¹⁴¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 2509.

¹⁴² *Congressional Globe*, 39th Cong., 1st Sess., p. 982.

¹⁴³ *Congressional Globe*, 39th Cong., 1st Sess., p. 404.

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the legal power to reconstruct the south, while ignoring the possibility that in the very near future Republicans might not have the political power to reconstruct the south.

IV. The Rise and Partial Fall of Thaddeus Steven's Fourteenth Amendment

Thaddeus Stevens won the immediate battle over the thrust of the Fourteenth Amendment, but lost both the war over how the Fourteenth Amendment would weaken the Slave Power and the longer struggle over how the Fourteenth Amendment would structure American constitutional politics. As Stevens repeatedly demanded, Republicans in the Thirty-Ninth Congress designed constitutional provisions that they believed would construct an American constitutional politics able to parry the threat a revived Slave Power presented to the implementation of the Thirteenth Amendment. Contrary to John Bingham's concerns, Republicans spent very little energy debating new enumerated powers and rights. Members of the Thirty-Ninth Congress rarely broached the subject of judicial review, the primary means by which legal constraints are enforced. Stevens was less successful controlling the precise means by which Republicans reconstructed American constitutional politics. Instead of provisions enfranchising persons of color and disfranchising disloyal southerners, the final version of the Fourteenth Amendment merely imposed a weakened penalty for states that disfranchised male voters for any reason and forbade some former confederates from holding government office. The end result was a Fourteenth Amendment Stevens doubted would protect either persons of color or the Republican majority.

A. Reconstructing Constitutional Politics

Stevens set out the vital importance of reconstructing American politics in his speech introducing the Joint Committee’s first proposed Fourteenth Amendment, the Fourteenth Amendment that included only a version of what eventually became Section 2.¹⁴⁶ As noted above, Stevens insisted that a constitutional amendment was necessary to “secure perpetual ascendancy to the party of the Union; and so render our Republican Government firm and stable forever.” Such dire consequences as “the repudiation of the Federal debt” and the “reestablishment of slavery,” he opined, would “be the inevitable result” of a constitutional politics played under the rules mandated in 1789. The Joint Committee’s proposal to penalize severely states that disfranchised persons of color would prevent these outcomes. Former slave states seeking the political power necessary to influence national policy would face a dilemma. Stevens asserted,

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 ascendancy. 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.

Stevens endorsed additional constitutional revisions in the pipeline that were more concerned with constraining than with reconstructing constitutional politics. He informed Congress, “Other proposed amendments—to make all laws uniform; to prohibit the assumption of the rebel debt—are of vital importance, and the only thing that can prevent the combined forces of copperheads and secessionists from legislating against the interests of the Union whenever they may obtain an accidental majority.”¹⁴⁷ Nevertheless, throughout the debate over various versions

¹⁴⁶ See note ____, above, and the relevant text.

¹⁴⁷ *Congressional Globe*, 39th Cong., 1st Sess., p. 74.

of the Fourteenth Amendment, Stevens repeatedly asserted the primacy of those provisions that promised to construct a favorable constitutional politics rather than centrality of provisions that directly made better constitutional law.

Stevens made his preference for reconstructing constitutional politics clear when introducing and defending the omnibus constitutional amendment that the Joint Committee proposed in the spring of 1866. His speech presenting the revised, five section, Fourteenth Amendment to Congress stated, “The second section I consider the most important in the article. . . . The effect of this provision will be either to compel the States to grant universal suffrage or so shear them of their power as to keep them forever in a hopeless minority in the national government.”¹⁴⁸ Immediately before that version of the Joint Committee’s handiwork was put to a vote in the House of Representatives, Stevens gave a speech emphasizing how the clause that disenfranchised former Confederates privileged both the constitutional commitment to equality under law and the continued hegemony of the party committed to equality under law.

I should be worried to find that that provision was stricken out, because before any portion of this can be put into operation there will be, if not a Herod, a worse than Herod elsewhere to obstruct our actions. That side of the House will be filled with yelling secessionists and hissing copperheads. Give us the third section or give us nothing. Do not balk us with the pretense of an amendment which throws the Union into the hands of the enemy before it becomes consolidated.

Gentleman say I speak of party. Whenever party is necessary to sustain the Union I say rally to your party and save the Union. I do not hesitate to say at once, that section is there to save or destroy the Union by the salvation or destruction of the Union party.¹⁴⁹

That speech also emphasized the importance of the proposed provision disenfranchising former Confederates. “Without Section 3, it amounts to nothing,” Stevens stated. “I do not care the snap of my finger whether [the Fourteenth Amendment] be passed or not if that be stricken

¹⁴⁸ *Congressional Globe*, 39th Cong., 1st Sess., p. 2459.

¹⁴⁹ *Congressional Globe*, 39th Cong., 1st Sess., p. 2544.

out.”¹⁵⁰ Stevens in these discussions also praised what had become section 1. He referred to that provision as “excellent.”¹⁵¹ Nevertheless, Stevens thought that Section 1 of the Fourteenth Amendment merely protected by constitutional amendment what Congress had already protected when legitimately exercising its Thirteenth Amendment powers.¹⁵² Section 1 was useful both as a statement of principle and because the Civil Rights Act of 1866 was “repealable by a majority,”¹⁵³ but Stevens continued to impress upon Congress that, unless constitutional politics was reconstructed, a revived Slave Power was likely to horribly mistreat persons of color, no matter what the textual constraints on state and national power. His last speech on the proposed Fourteenth Amendment declared, “I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition precedent.”¹⁵⁴

The Joint Committee on Reconstruction shared Stevens’s priorities and concerns, even as committee majorities often weakened his proposals. “The question uppermost in every mind,” Fessenden’s son and biographer noted, “was the adjustment by constitutional amendment of the basis of representation of the South in Congress.”¹⁵⁵ The Joint Committee’s report to Congress placed particular emphasis on the pressing need to alter the way in which the Constitution allocated political power in light of the implicit repeal of the three-fifths clause: “The increase of representation necessarily resulting from the abolition of slavery,” Fessenden reported, “was considered the most important element in the questions arising out of the changed condition of

¹⁵⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 2544

¹⁵¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 3144.

¹⁵² *Congressional Globe*, 39th Cong., 1st Sess., p. 2459.

¹⁵³ *Congressional Globe*, 39th Cong., 1st Sess., p. 2459.

¹⁵⁴ *Congressional Globe*, 39th Cong., 1st Sess., p. 3148.

¹⁵⁵ Francis Fessenden, *Life and Public Services of William Pitt Fessenden* (Vol. II) (Houghton, Mifflin and Company: Boston, MA, 1907), p. 36.

affairs, and the necessity for some fundamental action in this regard seemed imperative.”¹⁵⁶ The first version of the Fourteenth Amendment the committee approved adjusted representation in the House of Representatives and voting in the Electoral College and did not enumerate any new powers or rights¹⁵⁷ As did Stevens, Joint Committee members favored adding explicit legal constraints on government as well as reconstructing constitutional politics. Nevertheless, nothing in the committee’s deliberations or report indicated that Section 1 or Section 5 as a means for implementing only Section 1 occupied a particular place of pride. The final report of the Joint Committee presented equality under law as one of many goals the Fourteenth Amendment was designed to secure.

The conclusion of your committee therefore is that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that before allowing such representation, adequate security for future peace and safety should be required; that this can be found only in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions.¹⁵⁸

In sharp contrast to the fairly lengthy treatment the Report of the Joint Committee gave to the threat a revived Slave Power presented to existing legal protections for persons of color, the report documented no weaknesses in existing enumerated powers, rights, and restrictions that needed constitutional correction.¹⁵⁹

Stevens and the Joint Committee set the tone for the debates on the Fourteenth Amendment. Republican members of the House and Senate celebrated versions of Section 2 and, less often, Section 3 for their capacity to prevent disloyal southerners from influencing

¹⁵⁶ “Report of the Joint Committee on Reconstruction,” in Francis Fessenden, *Life and Public Services of William Pitt Fessenden* (Vol. II) (Houghton, Mifflin and Company: Boston, MA, 1907), p. 81.

¹⁵⁷ Kendrick, *Join Committee*, p. 53.

¹⁵⁸ “Report of the Joint Committee,” pp. 98-99.

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American constitutional politics. “One object I have in supporting this resolution,” Senator George Williams of Oregon asserted, “is to deprive the rebel States . . . of as much power in Congress as the Constitution and circumstances of the country demand and allow, so that the men who saved the Union can provide lasting securities for the future integrity, honor, and peace of the nation.”¹⁶⁰ Representative Francis Thomas of Maryland insisted that disloyal southerners should not be allowed to participate in politics until their participation would have no political impact. He informed other representatives, “I shall never consent that such men shall be enfranchised till the foundation of this Government have been so firmly established as that no man once tainted with treason can ever exert any influence in unsettling it.”¹⁶¹

Many Republicans bluntly maintained that the Fourteenth Amendment was designed to construct a constitutional politics favorable to the Republican Party. “If we are a revolutionary party,” Representative Robert Schenck of Ohio declared when defending an early version of Section 2, “we are only revolutionary in the direction of freedom or equality.”¹⁶² Republicans when debating legislation or a constitutional amendment enfranchising persons of color openly considered which policy best preserved Republican rule. “The time may arrive when the southern slaveholders and their northern sympathizers may come so near having the control of the Government,” such proponents of enfranchising persons of color as Senator Richard Yates of Illinois warned, “that the loyal black vote may be the balance of power and cast the scale in favor of Union and liberty.”¹⁶³ Williams, who opposed black suffrage, stated “Put it before the country and commit the Union party to it, the amendment will be defeated and the Union party

¹⁶⁰ *Congressional Globe*, 39th Cong., 1st Sess., App. p. 96.

¹⁶¹ *Congressional Globe*, 39th Cong., 1st Sess., App., p. 60.

¹⁶² See *Congressional Globe*, 39th Cong., 1st Sess., App., p. 297.

¹⁶³ *Congressional Globe*, 39th Cong., 1st Sess., App., p. 105

overwhelmed in its support—and the control of this Government would pass into the hands of men who have more or less sympathy with the rebellion.”¹⁶⁴

Proponents of the Fourteenth Amendment often connected more abstract notions of political equality with partisan or sectional advantage. Their Section 2 was the means by which the party of the legitimate majority of loyal voters would gain office and govern consistently with the majoritarian commitments of the Constitution, and not a gerrymander that would provide Republicans with more political power than their support among loyal voters warranted. Representative William Kelley of Pennsylvania offered a variation on a very common theme when he asked Democrats, “whether there is any reason that when our Government shall be reconstructed, one pardoned rebel of South Carolina who may not be able to read and write, and who may have fought for four years against the Government, shall in political power, alike on the floor of Congress and in electing a President, outweigh three or five intelligent returned soldiers of New Jersey, who throughout the same four years fought for the Union.”¹⁶⁵ Just as Martin Van Buren’s Democrats believed that their legitimate party of the people would gain office in a fair majoritarian election,¹⁶⁶ so Thaddeus Stevens’s Republicans thought that structuring national elections (other than for the Senate) consistently with the principle one person/one vote would be sufficient to thwart the ambitions of a revived Slave Power.

Representative William Lawrence of Ohio was one of many Republicans who emphasized that Republicans, as the legitimate party of the people who remained loyal during the Civil War, were

¹⁶⁴ *Congressional Globe*, 39th Cong., 1st Sess., App., p. 96. Thomas continued, “it is of more consequence . . . that the control of this Government should remain in the hands of the men who stood up for the Union during the late war than that any constitutional amendment should be adopted by which the right of suffrage should be extended to any person or persons not now enjoying it.” *Ibid.*

¹⁶⁵ *Congressional Globe*, 39th Cong., 1st Sess., pp. 344-45.

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merely seeking to construct a constitutional politics that would prevent an aristocratic faction from exercising undue political power.

If this injustice can be tolerated and perpetuated, and the late rebel States shall soon be admitted to representation, they will enjoy as the reward of their perfidy and treason increased political power. This will reward traitors with a liberal premium for treason. I am unwilling that this gross inequality should continue, so that when the representative of South Carolina return to these Halls, each rebel voter by them represented will enjoy a political power more than double that of every loyal voter of my district.

Sir, I would not allow this additional number of ten Representatives to the late slave States as the reward of treason. But I would strike down the political power heretofore wielded by the eighteen Representatives of slavery, and make the political power of every voter precisely equal all over the land.¹⁶⁷

“The question,” Representative Ithamar Sloan of Wisconsin asserted, is “whether we shall amend the Constitution so as to make a loyal man at least equal to a disloyal one in political rights and power.”¹⁶⁸

Members of the Thirty-Ninth Congress spent far more time discussing what became Sections 2 and 3 of the Fourteenth Amendment than they did commenting on Sections 1 or 5.¹⁶⁹ The debate over the first version of Fourteenth Amendment, the version that included only an early draft of Section 2, took more than a month. The debate over the stand-alone version of Section 1 took two days. Thaddeus Stevens did not even bother participating. When both proposals were combined, Republicans on average devoted approximately five to ten times as many words debating the sections on constitutional politics than the sections on constitutional law.¹⁷⁰ Most important perhaps, Republicans expressed far more concern with the details of Sections 2 and 3 than with the precise language or meaning of Sections 1 and 5.

¹⁶⁷ *Congressional Globe*, 39th Cong., 1st Sess., p. 404.

¹⁶⁸ *Congressional Globe*, 39th Cong., 1st Sess., p. 379.

¹⁶⁹ Section 4 was also not discussed at great length.

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Antislavery advocates were determined to get the provisions on constitutional politics “right.” If we measure a speech’s influence by citation counts, the speech Representative James Blaine of Maine gave on January 8, 1866 was by a wide margin the most important and influential address on the proposed Fourteenth Amendment. That speech vigorously objected to proposals to allocate seats in the House of Representatives by the number of voters in a state. That ratio of representation was unsatisfactory and unfair, Blaine insisted, because the ratio of voters to population was much higher in Western states than in New England.¹⁷¹ Blaine’s comments touched off a major dispute between Republicans in Congress over precisely how post-Civil War constitutional politics should be reconstructed. “Western” Republicans fought for allocating representation by voters.¹⁷² New Englanders demanded that population be maintained as the basis for representation.¹⁷³ Radicals insisted that persons of color be enfranchised.¹⁷⁴

These matters and many more were carefully scrutinized and decisively resolved when Republican minds were focused on the structure of constitutional politics. The issues relevant to the precise language of Section 2 that Republicans debated for almost six months included:

1. Should the Constitution prohibit race discrimination in voting?
2. If not, should the basis for allocating seats in the House of Representatives be voters or population?
3. Should representation continue to be tied to taxation, as was the case before the Civil War?
4. Should states lose a proportion of their representation only if voters were denied the ballot on the basis of race, or should other laws denying voting rights be factored into the constitutional equation?
5. If a state denied some voters or some voters of color access to the ballot, should the Constitution subtract all voters in the disenfranchised class from the basis of

¹⁷¹ The reason was two-fold. First, New England had a higher percentage of women than western states. Second, New England states had more restrictions on the ballot than Western states.

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- apportionment or merely the percentage of voters in the disenfranchised class denied the ballot?
6. Should state decisions to enfranchise women factor into the representation calculus?
 7. If a state permitted some people to vote in some elections, but not others, which elections mattered for the representation calculus?

The Thirty-Ninth Congress settled every one of these controversies over constitutional politics.

The final version of the Fourteenth Amendment did not include a provision enfranchising persons of color, based representation on population, cut the tie between representation and taxation, reduced state representation when any one was denied the ballot, reduced state representation in proportion in which eligible men were denied the ballot, and used federal elections as the basis for determining who was denied the franchise.

The persons responsible for the Fourteenth Amendment as carefully scrutinized the language of Section 3 and as decisively resolved all disputes over how that provision should reconstruct American constitutional politics. The issues Republicans debated at length included:

1. Should former Confederates be disenfranchised or merely denied the right to hold office?
2. Which former Confederates should be disenfranchised or denied the right to hold office?
3. Should the disability cover all offices, all federal offices, or specific federal offices?
4. Should the disability be permanent or have an end date?
5. Could the disability be removed and, if so, how?

All of these controversies were settle by June 1866. The final version of the Fourteenth Amendment did not disenfranchise anyone, declared that Confederates who had previously held federal or state offices were barred from holding all federal or state offices, and allowed that ban to be removed only by a two-thirds vote from both Houses of Congress.

Section 1 and Section 5 were not nearly as carefully scrutinized and little attempt was made to resolve seeming differences over their coverage. Section 1 is far less specific than

Sections 2 and 3.¹⁷⁵ Published speeches in the *Congressional Globe* suggest no consensus existed within the Republican Party over the precise scope of the rights enumerated in Section 1 or the powers enumerated in Section 5. Bingham and Senator Jacob Howard of Michigan maintained that Section 1 gave Congress the power to enforce the Bill of Rights. Their speeches should be given considerable weight, given that both were on the Joint Committee on Reconstruction and Howard was the Senator who presented the omnibus Fourteenth Amendment to the Senate.¹⁷⁶ Some congressmen maintained that Section 1 enshrined in the Constitution the central principles of the Declaration of Independence.¹⁷⁷ Still others briefly declared that the purpose of Section 1 was to remove all doubts about the constitutionality of the Civil Rights Act of 1866.¹⁷⁸ These seeming differences may have been resolved in closed-door meetings of the Republican caucus, but they were not publicly settled. As William Nelson notes, “the massive quantity of material in the *Congressional Globe*, in congressmen’s papers, in the state ratification debates, and in the newspapers makes it clear that the amendment’s proponents reached no agreement even on the issues they did consider.”¹⁷⁹

The brief debate over the stand-alone version of Section 1 highlights several unresolved ambiguities in the rights and powers enumerated by the Fourteenth Amendment. Three Republicans in the House discussed that provision during the two days of debate. Each defined the scope what became Section 1 somewhat differently. On February 27, 1866, Representative William Higby of California declared that the purpose of the first version of Section 1 was to give Congress the power to enforce the privileges and immunities clause of Article I, Section 4.

¹⁷⁵ See Nelson, pp. 51-52, 55-57, p. 60 (“Section one simply fails to specify at all the particular rights to which it applies”).

¹⁷⁶ FIND. Howard, however, indicated he disagreed with some aspects of the committee’s handiwork. Hence, one should not necessarily regard his analysis of the Fourteenth Amendment as the official analysis of the Joint Committee. Stevens, who was on the Joint Committee, never asserted that Section 1 incorporated the Bill of Rights.

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¹⁷⁹ Nelson, *The Fourteenth Amendment*, p. 61,

He did not mention whether the Joint Committee's proposal would empower Congress or federal courts to enforce any provision in the Bill of Rights in the states.¹⁸⁰ Representative William Kelley of Pennsylvania then took the floor and maintained that the primary purpose of Section 1 was to enable Congress to enfranchise persons of color, a power he believed Congress already possessed under Article I, Section 4. The next day, Bingham insisted that the proposed constitutional amendment gave Congress power to enforce the Bill of Rights. He said nothing about voting rights.¹⁸¹

These differences over the scope of Section 1 may be more apparent than real. Most Republicans spoke only briefly about Section 1 on the floor of Congress. Far more extensive debates took place on the Fourteenth Amendment in the meetings held by the Joint Committee on Reconstruction and in the Republican caucus. The possibility exists that at these meetings a consensus developed on what rights Section 1 protected and the precise scope of congressional power to enforce Section 1. Nevertheless, what evidence we have indicates that Republicans did not reach or even try to reach a consensus on the scope of Section 1 when framing the Fourteenth Amendment. No Republican attempted to reconcile different understandings of Section 1, even when Democrats pointed out that the text was ambiguous.¹⁸² The ink was hardly dry on the Fourteenth Amendment when Republicans began to fight bitterly over precisely what rights they had sought to protect a few years earlier.¹⁸³

Bingham hardly clarified the meaning of section 1 when, in response to a question asked by Representative Andrew Rogers of New Jersey on the meaning of the due process clause, he declared, "the courts have settled that long ago, and the gentleman can go read their

¹⁸⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 1054.

¹⁸¹ *Congressional Globe*, 39th Cong., 1st Sess., pp. 1057-63.

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decisions.”¹⁸⁴ Bingham was correct that a substantial body of state constitutional law existed on the meaning of due process,¹⁸⁵ but that law was hardly settled. To take an issue dear to many reformers’ hearts, some state courts had declared laws prohibiting the sale of intoxicating liquors violated due process rights.¹⁸⁶ Others sustained such measures under state due process clauses.¹⁸⁷ Bingham informed Congress that his proposed Fourteenth Amendment had no bearing on state laws granting property rights to married women.¹⁸⁸ The Court of Appeals of New York in *White v. White*, however, declared one such law violated the due process clause of the state constitution.¹⁸⁹

Republicans may have legally resolved debates over the rights enumerated in Article I and the powers enumerated in Article V, even if they were consciously seeking to resolve only disputes over how to construct a constitutional politics that would entrench the Republican Party. Just as constitutional provisions may not always mean what they were intended to mean,¹⁹⁰ so the persons responsible for constitutional debates may settle controversies they did not intend to settle. Most contemporary citizens believe that the text of the Fourteenth Amendment forbids discrimination against Asian-Americans, even if such Republicans as William Higby insisted that the scope of equal protection was limited to African-Americans.¹⁹¹ The discussion in this section, standing alone, does not refute originalist interpretations that rely on the public meaning of the language Republicans used in Section 1, as opposed to their conscious intentions.¹⁹²

¹⁸⁴ *Congressional Globe*, 39th Cong., 1st Sess., p. 1089.

¹⁸⁵ See Ely, GGW2

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¹⁸⁷ See also Compton

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¹⁹⁰ Cite to literature on the distinction between original meaning and original intention, most notably Rakove and Barnett

¹⁹¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1056.

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Section 1 was nevertheless tangential to the original animating purpose of Fourteenth Amendment. The Republican members of the Thirty-Ninth Congress focused their attention on the best, political feasible, means for reconstructing a constitutional politics that would privilege Republican interpretations of the Thirteenth Amendment and prevent the revival of the Slave Power. Their goal was to make sure Republicans controlled the rights and powers enumerated by the post-Civil War Constitution. Nelson notes, “What was politically essential was that the North’s victory in the Civil War be rendered permanent and the principles for which the war had been fought rendered secure, so that the South, upon readmission to full participation in the Union, could not undo them.”¹⁹³ This emphasis on constitutional politics explains why members of the Thirty-Ninth Congress made little attempt to resolve disputes among Republicans over the meaning of those clauses in the Thirteenth and Fourteenth Amendments that enumerated rights and powers. Indeed, as the near complete absence of any discussion about judicial enforcement of the Fourteenth Amendment suggests, Republicans in 1866 were also not interested in resolving future debates over the meaning of such phrases as “equal protection of the law” between Republicans in one branch of the national government and Republicans in another branch of the national government.

B. The Missing Judiciary

Federal courts and judicial review are as absent from the debates over the framing of the Fourteenth Amendment as the Republican Party is present. Members of the Thirty-Ninth Congress maintained a deafening silence on the constitutional authority of the federal judiciary. No prominent framer emulated James Madison, who when introducing the Bill of Rights to the

¹⁹³ Nelson, *The Fourteenth Amendment*, p. 61,

First Congress declared, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.”¹⁹⁴ With one exception, no Republican explicitly claimed that courts had any direct authority to enforce the Fourteenth Amendment, as opposed to enforcing statutes that Congress passed under the Fourteenth Amendment. That exception was an obscure member of Congress, Representative Giles Hotchkiss of New York, who spoke early in the debate and, contrary to some scholarship, appears to have had no influence on the evolution of either Section 1 or Section 5.

This silence reflects the Republican preoccupation with constitutional politics rather than strong commitments to legislative supremacy. Republicans in the Thirty-Ninth Congress were drafting a constitutional amendment that they believed would entrench Republicans in all three branches of the national government. Most expected that Republicans in Congress would continue to play the leading role implementing the post-Civil War Constitution, but, at least when the Fourteenth Amendment was being debated, Republicans did not detail how they expected disputes between Republicans in Congress and Republicans on the Supreme Court over the proper interpretation of any constitutional provision to be resolved. Just as Lincoln when criticizing *Dred Scott* focused exclusively on the right of the majority party to resolve constitutional ambiguities and did not offer a theory about the separation of powers,¹⁹⁵ so Stevens and his partisan allies concentrated on creating a constitutional politics that would enable Republicans to control the meaning of the Thirteenth Amendment rather than a constitutional politics that allocated constitutional authority in any particular way between the governing institutions Republicans controlled. That was a subject for post-Fourteenth Amendment debates.

¹⁹⁴ *Annals of Congress*, 1st Cong., 1st Sess., p. 439.

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The persons responsible for the Fourteenth Amendment did not publicly debate the extent to which Section 1 empowered federal courts to protect fundamental rights. From April 30, 1866, the day members of the Joint Committee on Reconstruction introduced the omnibus five section draft of the Fourteenth Amendment to Congress,¹⁹⁶ to June 13, 1866, the day the House passed the final version of that five section draft,¹⁹⁷ no Representative or Senator stated on the floor of Congress that the federal judiciary could directly enforce any provision of that amendment. References to the judiciary in the Thirty-Ninth Congress were largely limited to occasional attacks on the majority opinions in *Dred Scott v. Sandford*¹⁹⁸ and more recent opinions discussing the status of the seceding states.¹⁹⁹ Republicans who commented on various iterations of what eventually became Section 1 discussed how that provision authorized Congress to pass legislation sanctioning states and state officials who violating fundamental rights. They emphasized the need for adding to the enumerated powers of Congress rather than holes in the scope of existing enumerated rights. Hotchkiss aside, no one explicitly asserted that the Fourteenth Amendment was self-executing, that the Supreme Court could declare a state law unconstitutional under any clause of Section 1, even if that law was consistent with all congressional measures on the books implementing the Fourteenth Amendment.

The first version of what became Section I of the Fourteenth Amendment enumerated only additional federal powers. That stand-alone proposal declared:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the several States equal protection in the rights of life, liberty, and property.²⁰⁰

¹⁹⁶ *Congressional Globe*, 39th Cong., 1st Sess., pp. 2265 (Senate), 2286 (House).

¹⁹⁷ *Congressional Globe*, 39th Cong., 1st Sess., p. 3149.

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²⁰⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 1088.

Bingham, who aggressively championed this language, interpreted the phrase “Congress shall have the power” literally. His speech to the House of Representatives on February 28, 1866 championing this provision focused entirely on the need to augment congressional power to protect fundamental rights. Bingham informed fellow representatives, “The question is, simply whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by the Constitution? That is the question, and the whole question.”²⁰¹ In his view, no need existed to enumerate additional constitutional rights. Bingham maintained, “there never was even colorable excuse . . . for . . . claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States . . . in the rights of life, liberty, or property.” What was needed was only an “addition grant of power . . . to secure enforcement of these provisions of the bill of rights in every State.”²⁰²

Bingham spoke of the first version of Section 1 as empowering only Congress even when he directed legislative attention to past Supreme Court precedents on judicial power to protect individual rights. Citing *Barron v. Baltimore*,²⁰³ the Marshall Court decision refusing to enforce the Fifth Amendment against the states, Bingham reminded Republicans that “the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied.”²⁰⁴ Bingham did not, however, propose to reverse *Barron* by a constitutional amendment that directly empowered federal courts to enforce the bill of rights. Rather, after noting that federal courts presently had no power to prohibit states from violating certain individual rights, Bingham declared that his proposed Fourteenth

²⁰¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1090.

²⁰² *Congressional Globe*, 39th Cong., 1st Sess., p. 1090.

²⁰³ 32 U.S. 243 (1833).

²⁰⁴ *Congressional Globe*, 39th Cong., 1st Sess., p. 1089

Amendment remedied that deficiency by authorizing the national legislature to empower the federal judiciary to enforce the bill of rights in the states. He asserted, “but in the event of the adoption of this amendment, if [state officials] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with the power to hold them to answer before the bar of the national courts for the violation of their oaths of office.”²⁰⁵

Bingham’s speech on February 28 repeatedly declared that a constitutional amendment was necessary to give Congress the power to protect fundamental rights.²⁰⁶ At no point did he state or imply that judges would interpret what became Section 1 of the Fourteenth Amendment as overruling *Barron* or otherwise construe those provisions as enumerating judicially enforceable rights, except to the extent that Congress exercising the new enumerated powers granted by the Fourteenth Amendment passed a federal statute authorizing courts to strike down state violations of fundamental rights.²⁰⁷ Bingham’s audience understood that the stand-alone

²⁰⁵ *Congressional Globe*, 39th Cong., 1st Sess., p. 1090.

²⁰⁶ See *Congressional Globe*, 39th Cong. 1st Sess., p. 1089 (opponents of his proposal “say ‘We are opposed to its enforcement by an act of Congress under an amended Constitution’”); 1090 (“it is surprising that the framers of the Constitution omitted to insert an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens”); 1093 (“And when the State shall be restored, and the troops of the Government withdrawn, they will have no security in their future except by force of national laws giving them protection against those who have been in arms against them”), 1093 (“Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal statutes . . . under which people have suffered in those States during the last four years”); 1093 (“but where is the express power to define and punish crimes committed in any State by its official officers in violation of the rights of citizens and persons as declared in the Constitution”), 1094 (“Is [South Carolina] to be restored without the power in Congress to protect the few loyal white men there against State statutes of confiscation and statutes of banishment? And for the emancipated slaves of South Carolina are you to have no power save to prohibit their reduction again to slavery?”).

²⁰⁷ Bingham continued to emphasize the congressional responsibility for implementing Section 1 of the Fourteenth Amendment when defending the Enforcement Act of 1871. His speech made such assertions as “Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combination of persons?” *Congressional Globe*, 42nd Cong., Spec. Sess., App., p. 84. As in 1866, Bingham never spoke of federal judicial power to enforce the restrictions on state power in the absence of enabling federal legislation. His remarks when discussing the Enforcement Act of 1871 nevertheless differed from his remarks in 1866 in one important respect. In 1866, Bingham claimed that state officials under the privileges and immunities clause were obligated to respect the provisions of the Bill of Rights, but that the federal government lacked the power to enforce that obligation. *Congressional Globe*, 39th Cong., 1st Sess., pp. 1090 (“With these provisions in the Constitution for the enforcement in every State of its requirements, is it surprising that the framers of the Constitution omitted to insert an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law”). In 1871, Bingham insisted that state power before the

version of Section 1 enumerated only additional congressional power. Representative Robert Hale of New York interrupted Bingham to ask “whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal.”²⁰⁸

Immediately after Bingham finishing his speech defended the first version of what became Section 1, Hotchkiss made the only speech on the floor of the Thirty-Ninth Congress that clearly, though not explicitly, asserted that the Fourteenth Amendment should be self-executing, that courts should be vested with the power to protect fundamental rights in the absence of a federal statute. Hotchkiss’s very short speech observed that, as Bingham had stated, 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.”²⁰⁹ The New York Republican criticized that draft for leaving fundamental rights to the “caprice of Congress.” Bingham’s Fourteenth Amendment, Hotchkiss feared, did not “restrict the power of the majority” or “protect the rights of the minority.” 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.” For this reason, Hotchkiss advocated deleting the reference “to Congress shall have the power” in Bingham’s proposed constitutional amendment.

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

Civil War was not restricted by the Bill of Rights. *Congressional Globe*, 42nd Cong., Spec. Sess., App., p. 84 (“these eight articles, I have shown, never were limitations upon the power of the States, until made so by the fourteenth amendment”).

²⁰⁸ *Congressional Globe*, 39th Cong., 1st Sess., p. 1094.

²⁰⁹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1095.

amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?²¹⁰

Hotchkiss did not straightforwardly declare that his proposed equal protection clause was directly enforceable by the judiciary. Still, when previously criticizing Bingham's language choices, he asserted, "Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them."²¹¹ Given Hotchkiss's concern that the rights set out in the Fourteenth Amendment not depend on legislation for implementation and his reference to judicial interpretation, his speech on February 28 plainly called for a judicially enforceable Fourteenth Amendment. Representative Roscoe Conkling of New York also apparently endorsed a judicial enforceable Fourteenth Amendment when, immediately after Hotchkiss finished, he stated, he "agreed with" the sentiments Hotchkiss expressed.²¹²

Whether, as many contemporary commentators maintain, Hotchkiss's very short speech²¹³ was "influential"²¹⁴ is doubtful. The Joint Committee on Reconstruction in late April 1866 revised what eventually became Section 1 of the Fourteenth Amendment as Hotchkiss prescribed, directly stating "No State shall" rather than "Congress shall have power."²¹⁵ Nevertheless, no direct evidence exists that Hotchkiss or his concerns influenced this alteration. The change in language was animated by a proposal former Congressman Robert Dale Own of Indiana made to Thaddeus Stevens in mid-March.²¹⁶ Whether Owens was even aware of Hotchkiss's speech is not known and no member of the Joint Committee publicly or privately

²¹⁰ *Congressional Globe*, 39th Cong., 1st Sess., p. 1095.

²¹¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1095.

²¹² *Congressional Globe*, 39th Cong., 1st Sess., p. 1095.

²¹³ The speech takes up less than a column and a half of page 1095.

²¹⁴ Michael Kent Curtis, "The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, A Brief Historical Overview," 11 *University of Pennsylvania Journal of Constitutional Law* 1381, 1390 (2009). See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard University Press: Cambridge, MA, 1988), p. 55.

²¹⁵ See Kendrick, pp. 83-4, 106.

²¹⁶ See note ____, above, and the relevant text.

declared that Hotchkiss or his concerns influenced the revised version of what became Section 1. Bingham did not cite Hotchkiss or discuss independent judicial authority when he explained to Congress why the Joint Committee revised the Fourteenth Amendment five years later during the debate over the Enforcement Act of 1871.²¹⁷ More significantly, both Owens and the Joint Committee had a very good reason for changing the language of Bingham’s proposed amendment that had nothing to do with authorizing direct judicial enforcement of the Fourteenth Amendment. Owens proposed and the Joint Committee drafted an omnibus constitutional amendment that incorporated provisions that had originally been debated as separate constitutional amendments. Section 1 of the Joint Committee’s late April draft declared “No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.” Section 5 stated, “Congress shall have power to enforce by appropriate legislation, the provisions of this article.”²¹⁸ If Section 1 of the newly revised proposed Fourteenth Amendment retained the words “Congress shall have power” and Section 5 was omitted, a fair inference could be made that Congress had no power enforce Sections 2, 3 and 4. This was clearly not how members of the Joint Committee expected the Fourteenth Amendment to work. Senator Jacob Howard of Michigan, when introducing the Joint Committee’s handiwork to the Senate, asserted that Section 5 “gives to Congress power to enforce by appropriate legislation *all the provisions* of this article of amendment”²¹⁹ (emphasis added). Representative George Miller of Pennsylvania made the same use of the plural noun when stating that Section 5 “is required to enforce the foregoing *sections*” (emphasis added). That speech specifically noted that legislation was necessary to implement

²¹⁷ *Congressional Globe*, 42nd Cong., Spec. Sess., App., pp. 84-84. See note ____, above.

²¹⁸ Benjamin Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, pp. 83-84.

²¹⁹ *Congressional Globe*, 39th Cong., 1st Sess., p. 2768.

more than one section of the Fourteenth Amendment.²²⁰ In short, the decision to divide Bingham’s original amendment into Section 1 and Section 5 of the new Fourteenth Amendment was probably made to ensure that Congress had the power to enforce all provisions of the Fourteenth Amendment. No evidence exists that the members of the Joint Committee gave any thought as to whether the new omnibus amendment made any provision of the Fourteenth Amendment self-executing.

No member of the Thirty-Ninth Congress who spoke after the Joint Committee revised the language of Section 1 asserted that the revised Fourteenth Amendment empowered federal courts to protect fundamental rights. Bingham in his subsequent speeches evinced no awareness that the Joint Committee, of which he was a member, made any change in the institutional authority for enforcing the Fourteenth Amendment. Section 1 of the newly revised Fourteenth Amendment, he indicated, was identical to the stand-alone constitutional amendment that he had previously stated would empower Congress to pass legislative prohibiting state violations of fundamental rights. Bingham’s speech of May 10, 1866 asserted,

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not attempted to do: that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.²²¹

Other prominent members of Congress who had special insight into the Joint Committee’s handiwork agreed with Bingham’s interpretation of the revised Section 1. Stevens, when introducing the Joint Committee’s proposal to the House, stated that Section 1 “allows Congress

²²⁰ *Congressional Globe*, 39th Congress, 1st Sess., p. 2511.

²²¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 2542. See *Congressional Globe*, 39th Cong., 1st Sess., p. 2543 (“the great want of the citizen and stranger, protection by national law against unconstitutional State enactments, is supplied by the first section of this amendment.”).

to correct the unjust legislation of the States, so far that the law which, operates upon one man shall operate equally upon all.”²²² Senator Howard, when introducing the Joint Committee’s proposal to the Senate echoed Bingham and Stevens by focusing entirely on how Section empowered Congress. He declared,

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that “the Congress shall have power to enforce by appropriate legislation the provisions of this article.” Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.²²³

Howard did diverge from Bingham in one potentially important respect. Bingham never intimated that Section 1 of the Fourteenth Amendment had any legal consequences in the absence of a federal statute enforcing that provision. Howard, by comparison, made comments suggesting that Section 1 had immediate legal consequences. The equal protection clause, he claimed, “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.”²²⁴ Nevertheless, when Howard discussed how the Fourteenth Amendment would be implemented, he spoke only of federal legislation, and did not hint at direct enforcement by federal courts. Section 5, he concluded,

casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons and property. I look upon this claim as indispensable for the reason that it thus imposes upon Congress this power and

²²² *Congressional Globe*, 39th Cong., 1st Sess., p. 2459.

²²³ *Congressional Globe*, 39th Cong., 1st Sess., p. 2766.

²²⁴ *Congressional Globe*, 39th Cong., 1st Sess., p. 2766. See *Congressional Globe*, 39th Cong., 1st Sess., p. 2765 (“It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States.”)

this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.²²⁵

No member of the Joint Committee even intimated that the language of what was now Section 1 had been changed to permit direct judicial enforcement of certain fundamental rights.

Republicans came close, perhaps very close, to asserting that federal courts could treat the Fourteenth Amendment as self-executing only when debating how Section 1 would work should Democrats return to power. Several Republicans celebrated the constitutional protections enumerated in Section 1 for fundamental rights because they acknowledged that the Civil Rights Act and other exercises of congressional power under Section 2 of the Thirteenth Amendment were “repealable by a majority.”²²⁶ Representative John Broomall of Pennsylvania claimed that Section 1 of the Fourteenth Amendment would “prevent[] a mere majority from repealing the [Civil Rights Act].”²²⁷ A fair case can obviously be made that the representatives who made this claim assumed that Republicans in the federal judiciary would protect Fourteenth Amendment rights directly should Democrats in the elected branches of the government pass legislation repealing statutory protections for fundamental rights. Nevertheless, this judicial power was never explicitly asserted. No Republican took the floor of Congress and declared that the proposed Fourteenth Amendment empowered the federal judiciary to protect rights in the absence of legislation.

²²⁵ *Congressional Globe*, 39th Cong., 1st Sess., p. 2768. See *Congressional Globe*, 39th Cong., 1st Sess., p. 2766 (“section one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction”).

²²⁶ *Congressional Globe*, 39th Cong., 1st Sess., p. 2459. See *Congressional Globe*, 39th Cong., 1st Sess., p. 2462 (speech of Representative James Garfield of Ohio).

²²⁷ *Congressional Globe*, 39th Cong., 1st Sess., p. 2498 (speech of Representative John Broomall of Pennsylvania)

That judicial enforcement of the Fourteenth Amendment was so obvious as to go unsaid seems unlikely. Thousands of pages in the *Congressional Globe* report the debate over various proposed Fourteenth Amendments and related measures. Members of Congress left very little, if anything, either unsaid or to the imagination. Given the sheer number of words devoted to Republican proposals to amend the Constitution, that no member of Congress even casually stated that persons could vindicate constitutional rights by bringing a lawsuit based solely on Section 1 seems astonishing.

The constitutional authority of the federal judiciary was not so entrenched or settled in 1866 as to make claims analogous to Madison's assertion about "independent tribunals of justice" unnecessary during the debates over the Fourteenth Amendment.²²⁸ Republicans in 1866 shared no common understanding about judicial power that could be taken for granted by all members of the Thirty-Ninth Congress. Some leaned toward judicial supremacy, while others believed constitutional authority was vested in the national legislature.²²⁹ Many adjusted understandings of constitutional authority in light of rapidly changing political circumstances.

One strand of Republican thought before, during, and after the Civil War was sharply critical of judicial authority. Many Republicans supported resolutions nullifying the Supreme Court's decisions in fugitive slave cases.²³⁰ Abraham Lincoln declared he would not be bound by the principles underlying the Supreme Court's decision in *Dred Scott* and he flagrantly ignored a writ of habeas corpus issued by Chief Justice Roger Taney.²³¹ Defying *Dred Scott*, the Lincoln Administration treated persons of color as citizens of the United States and Republicans

²²⁸ See especially, Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press: New York, 2004), pp. ____.

²²⁹ Cit to Kulter

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in 1862 passed legislation banning slavery in American territories.²³² Prominent Republicans during the second session of the Thirty-Ninth Congress defended legislative supremacy. Thaddeus Stevens maintained, “The legislative power is the sole guardian of [constitutional] sovereignty.”²³³ Many Republicans in the late 1860s supported bills stripping the Supreme Court of jurisdiction, overruling judicial decisions in constitutional cases, and sharply limiting or abolishing the Supreme Court’s power to declare laws unconstitutional.²³⁴

Another powerful strand of Republican thought endorsed judicial authority. Most Republicans were former Whigs, the antebellum party that tended to favor judicial supremacy.²³⁵ Republican majorities consistently rebuffed radical attempts to curtail judicial power. When some Republicans moved to weaken particular federal judiciary capacities, other and sometimes the same Republicans moved to strengthen different federal judicial capacities. The Civil Rights Act of 1866, the Removal Act of 1866 and the Removal Act of 1867 all expanded federal judiciary authority to hear claims of federal right.²³⁶ As Stanley Kutler and others have pointed out, many Republicans during Reconstruction looked forward to a reconstructed federal judiciary that would promote Republican constitutional visions in some unspecified way.²³⁷

The presence of these strong anti-court and pro-court strands in Republican thought counsels again using any master principle when trying to glean Republican attitudes towards judicial enforcement of the Fourteenth Amendment from the sparse record. Republicans became united on the need for judicial power only in late 1874, after Democrats had regained control of

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²³³ *Congressional Globe*, 39th Cong., 2d Sess., p. 252. See *Congressional Globe*, 39th Cong., 2d Sess., p. 255 (speech of Representative James Ashley of Ohio). See generally, Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (University of Chicago Press: Chicago, 1968), p. 66.

²³⁴ See Kutler, pp. ____.

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²³⁶ See Kutler, pp. 148-52.

²³⁷ Kutler; Lasser

the House of Representatives.²³⁸ Until then, inferences from silence and ambiguity about prominent Republicans attitudes toward the constitutional authority of federal courts are treacherous.

The dearth of discussion better supports the conclusion that Republicans did not think seriously about federal judicial enforcement when they considered how the post-Civil War Amendments would work than the view that Republicans had an implicit commitment to a particular allocation of constitutional authority between the branches of the national government. The same Republicans who never uttered a sentence of the form, “federal courts may directly enforce the Fourteenth Amendment,” also never made an assertion of the form “federal courts may not directly enforce the Fourteenth Amendment.” The federal judiciary was largely missing in action, not an enemy combatants or a loyal ally, during the debates over the Fourteenth Amendment. For various reasons, the possibility of judicial review was simply not relevant to the major problems Republicans faced when the Thirty-Ninth Congress in December 1865 debated proposed constitutional amendments.

From Republican perspectives, independent judicial authority to interpret the Fourteenth Amendment seemed unnecessary or unlikely for the foreseeable future. Many Republicans believed that the Civil Rights Act of 1866 put in place powerful protections for persons of color. They were prepared to pass additional legislation securing rights in the south should the perceived need arise. As long as those laws remained on the books, federal judges could secure fundamental rights solely by implementing federal statutes. Sections 1 and 5 would do sufficient if they alleviated judicial doubts about the constitutionality of the Civil Rights Act and related measures. Radical Republicans who believed much more was immediately needed to protect former slaves had good reason to be focused almost exclusively on the national legislature rather

²³⁸ See Gillman

on than federal courts. Many proposals for implementing the Thirteenth (or Fourteenth) Amendment required legislation. Congress could pass legislation providing all freedmen with the proverbial forty acres and a mule,²³⁹ but nothing in nineteenth century legal thinking permitted a court to enact Thaddeus Steven's preferred means for achieving freedom and racial equality. Nothing in Republican experience suggested that members of the national judiciary were likely to lead a crusade for racial justice. Federal courts, structured by the Judiciary Act of 1837, were bastions of pro-slavery constitutionalism before the Civil War.²⁴⁰ A few state courts declared Fugitive Slave Acts unconstitutional, but on matters of black citizenship and segregation, state legislatures in the free states were far more egalitarian than state courts.²⁴¹ The Judiciary Act of 1862 shifted the balance of judicial power northward by locating seven of the nine reconstructed federal judiciary circuits entirely within states that remained loyal to the Union.²⁴² Nevertheless, Democrats in 1866 exercised far more influence in the national judiciary than in the national legislature. Five of the nine justices on the Supreme Court in December 1865 were Democrats.²⁴³ Four, Justices Nelson, Wayne, Grier, and Clifford, were either in the majority in *Dred Scott* or were on record as supporting that decision.²⁴⁴ The recent judicial decision in *ex parte Milligan*²⁴⁵ sharply restricting congressional power to impose martial law, hardly gave Republicans cause for optimism that the justices were preparing to be to active participants on the side of the angels in the fight for racial justice in the south. Given this recent practice, the best Republicans could hope for in the foreseeable future was that the federal

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²⁴⁰ Cite to Justin Crowe.

²⁴¹ Morris

²⁴² Crowe; Engel

²⁴³ See Graber, Jacksonian Origins

²⁴⁴ Grier and Wayne supported Taney's claim that Congress could not ban slavery in the territories. Clifford endorsed that decision before joining the Supreme Court. Nelson agreed with the result in *Dred Scott*, but did not discuss the congressional powers issues.

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judiciary, particularly in light of clearer constitutional language, would more consistently sustain legislation granting civil rights to persons of color. Congress in 1866 was the far better vehicle for expanding the legal rights persons of color might enjoy after ratification of the Fourteenth Amendment.

The precise constitutional authority of federal courts was tangential to the concerns that animated the Fourteenth Amendment. As noted above,²⁴⁶ the Fourteenth Amendment was designed to create a constitutional politics that privileged government by those people who remained loyal during the Civil War, the Republican Party being the instrument of those people who remained loyal during the Civil War.²⁴⁷ The threat Republicans faced in 1866 was the possible return of the Slave Power augmented by 30 extra seats in the House of Representatives and 30 extra votes in the Electoral College gained from an amended Constitution that permitted former Confederate states to have disenfranchised persons of color counted as full persons when representation was allocated. Republicans in the Thirty-Ninth Congress vigorously debated the best means for combating this threat that would be acceptable to most loyal free state citizens. Section 2 and Section 3 of the Fourteenth Amendment were the consequences of that debate. Republicans were also aware that loyal citizens did not agree on all matters concerning the fruits of the northern victory in the Civil War, most notably on the best means for implementing the promise of the Thirteenth Amendment. They were also no doubt aware that Republicans in one institution of government might in the future disagree with Republicans in another institution of government. The Fourteenth Amendment, however, was not directed at resolving present or future disputes among Republicans. The goal of the Thirty-Ninth Congress was to ensure Republicans controlled the meaning of the Thirteenth Amendment. What Republicans did with

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²⁴⁷ This is the gist of other sections of this paper.

that power and the precise distribution of power between Republicans in the elected branches of government and Republicans in the federal judiciary was for the future to decide.

C. The Original Design of the Fourteenth Amendment

The Fourteenth Amendment was intended to construct a constitutional politics that privileged the people who remained loyal, white and black, during the Civil War. Republicans thought Section 2 the most crucial provision for securing their goal of retaining the partisan control of the national government necessary for preserving and achieving the constitutional commitment to majority rule and equality under law. Section 2 was designed to place white southerners in a dilemma. Former Confederates could limit the ballot to white persons, in which case they would not enjoy the representation necessary to reverse Republican policies on race relations and other matters. Alternatively, they could grant the ballot to persons of color, in which case a substantial number of southern representatives in Congress would support Republican policies on race relations and other matters. If Section 2 of the Fourteenth Amendment worked as Republicans expected, Republicans would control all three branches of the national government because a majority of the people who remained loyal during the Civil War would vote for Republicans. Republicans in control of all three branches of the national government would determine the scope of federal power to enforce the constitutional prohibition on slavery and the constitutional commitment to equality under law. No reprise of *Dred Scott* would occur because the representatives of the Slave Power who decided *Dred Scott* would not have the power to implement the post-Civil War Constitution.

The Republicans who framed the Fourteenth Amendment did not think they were settling previous debates between party members over the precise scope of congressional power to enforce the Thirteenth Amendment or the differences that emerged in 1866 between party members over the proper interpretations of “privileges and immunities” and other clauses in Section 1.²⁴⁸ Republicans after the Fourteenth Amendment was ratified tended to interpret Sections 1 and 5 as enumerated the same rights and vesting Congress with the same powers as they had claimed when debating the Civil Rights Act of 1866 and the Second Freedmen’s Bureau Act in 1866 were enumerated by Sections 1 and 2 of the Thirteenth Amendment.²⁴⁹ Thaddeus Stevens, before and after the Fourteenth Amendment was drafted, insisted that Congress had the power to provide persons of color with a homestead.²⁵⁰ Charles Sumner, before and after the Fourteenth Amendment was drafted, insisted that the Constitution empowered Congress to enfranchise persons of color.²⁵¹ More conservative Republicans, before and after the Fourteenth Amendment was drafted, disagreed with these claims.²⁵² Nevertheless, when making these arguments, Republicans did not assert that intra-party squabbles over the meaning of the Thirteenth Amendment were settled by the Fourteenth Amendment. Prominent members of the Joint Committee on Reconstruction repeatedly denied that they were providing representatives on either side of internal party debates over what policies promoted equality under law with increased rhetorical ammunition for their constitutional vision. The “compromise of principle”²⁵³ in 1866 was that the Fourteenth Amendment would be neutral on such controversies as whether the Constitution in December 1865 entitled persons of color to

²⁴⁸ See notes ___ above, and the relevant text.

²⁴⁹ See Graber, Columbia

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vote. Responding to Charles Sumner's charge that the first version of Section 2 prohibited Congress from enfranchising former slaves, Fessenden asserted,

It is not necessary that I should discuss the question; for my purpose here, whether Congress has this power of legislation or not; whether it has it under the clause guarantying a republican form or not. Opinions differ upon that subject; but for the sake of the argument, admit that Congress has the power, how in the world does this proposition deprive them of any power they have?²⁵⁴

Stevens concurred. He informed the House of Representatives that the Joint Committee had no intention of resolving intra-party debates over the constitutional status of black suffrage.²⁵⁵

Contemporary claims that Republicans constitutionally committed Americans to the concept of equality under the law rather than any particular conception²⁵⁶ do not fully capture how the Constitution framed in 1866 was designed to work. Some Republicans did assert that the Fourteenth Amendment established or confirmed a constitutional commitment to the principles of the Declaration of Independence. Miller declared Section 1 was "so clearly within the spirit of the Declaration of Independence of the 4th July, 1776, that no member of this House can seriously object to it."²⁵⁷ Nevertheless, Stevens and his partisan allies recognized that the Devil could also quote scripture. Slave state constitutions before the Civil War included equal protection clauses that provided no balm for slaves or free blacks. The way in which the Taney Court and other jurists manipulated the antebellum Constitution left no doubt in Republican minds that a Fourteenth Amendment controlled by former slaveholders could easily be interpreted/manipulated to sanction the Black Codes. If, as noted in the introduction, many Republicans thought laws forbidding woman to become attorneys were consistent with equal

²⁵⁴ *Congressional Globe*, 39th Cong., 1st Sess., p. 1280. Stevens has similar quote.

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²⁵⁶ See Dworkin

²⁵⁷ *Congressional Globe*, 39th Cong., 1st Sess., p. 2510.

protection clause,²⁵⁸ then former Confederates might easily insist that the “fitness of persons of color for field labor” supported state laws limiting the legal profession to white males.²⁵⁹ In short, to use Ronald Dworkin’s terminology anachronistically, Section 2 was designed to ensure that only Republican conceptions of equality under law were candidates for the official law of the land.

Many Republicans hoped that the Constitution of 1866 would constitute constitutional politics. Several indicated that Section 2 was likely to have positive effects on racial attitudes in the South. Carl Schurz believed that once southerners experienced the benefits of the free labor system, they would soon acknowledge that system to be far superior to the antebellum slave labor system. “A general improvement will take place,” he wrote, “as soon as southern men learn what free labor is and how to manage it in accordance with its principles.”²⁶⁰ Senator Henry Wilson of Massachusetts thought once southerners were forced to allow persons of color to vote, whites and blacks would soon find common causes and racial hostility would disappear. Politics would no longer be a contest between Republican egalitarians and Democratic white supremacists, but between different factions all of whom accepted the basic constitutional commitment to equality under law. Wilson maintained, that the “practical effect” of Section 2

would be this, and only this: it would raise up a party in every one of these States immediately in favor of the enfranchisement of the colored race. . . . The advocates of negro enfranchisement would themselves speedily grow up to believe the justice, equity, and right of giving the ballot to the black men.²⁶¹

Republicans expected that the Constitution of 1866 would constrain, as well as construct and constitute, constitutional politics, although the occasional confidence they expressed in parchment barriers is puzzling given the overall thrust of their constitutional thought. As noted

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²⁵⁹ Cite to Stephenson, *Racial Distinctions*

²⁶⁰ Schurz, “Report on the Conditions of the South,” p. 28.

²⁶¹ *Congressional Globe*, 39th Cong., 1st Sess., p. 1254.

above,²⁶² several members of the Thirty-Ninth Congress claimed that the Fourteenth Amendment would prevent the Civil Rights Act of 1866 from being repealed should Democrats return to power. Republicans who expressed this confidence in constitutional words, however, often made arguments that cast out on enumeration, standing alone, as a constitutional strategy for protecting fundamental rights. Stevens minutes before asserting that the Fourteenth Amendment would make the Civil Rights Act “unrepealable” warned Congress that Democrats in power would reinstitute slavery in disregard of the Thirteenth Amendment. No Republican on the floor of Thirty-Ninth Congress explained why the text of the Fourteenth Amendment or alternative constitutional language might prevent Republican measures promoting racial equality from being repealed the day after Democrats took office.

Van Buren’s writings offer one solution to this apparent incongruity. The legitimate party of the people, Van Buren acknowledged occasionally lost control of the national government. He attributed the election of 1840, a Whig landslide, “mainly to a mistake in the public mind, which it has since magnanimously acknowledged.”²⁶³ Nevertheless, the legitimate party of the people might be able to sufficiently entrench fundamental constitutional principles so as to prevent the minority party from doing much damage during brief tenures of office. “The long-continued support of a majority of the people,” Van Buren observed, “has secured a preference for its principles of which it may well be proud.”²⁶⁴ Thick governing arrangements are neither easy to dismantle nor establish in two years. Whig fails to establish their cherished American system during their very short periods in power. Their example may have given Republicans confidence that the a complex reconstruction program developed by a secession of Republican Congresses and presidents that was dedicated to realizing the principles of the

²⁶² See notes ____, and the relevant text

²⁶³ Van Buren, *Inquiry*, p. 349.

²⁶⁴ Van Buren, *Inquiry*, p. 370.

Thirteenth and Fourteenth Amendments could not be undone by Democrats only temporarily in public office, particularly when Democrats did not control all branches of the national government or crucial veto points within the national legislature.

In the long run, however, whether the Fourteenth Amendment worked depended on whether Section 2 worked. If Section 2 privileged the party of the people, white and black, who remained loyal during the Civil War, then previous congressional legislation securing the rights of freedman and southern Unionists would remain on the books, congressional majorities would be sufficiently nimble to pass new legislation in response to more creative southern efforts to reinstitute slavery and white supremacy, the Union war debt would be redeemed, but not the Confederate war debt, and no one would receive a penny as compensation for an emancipated slave. Sections 1 and 4 might remain vital constitutional provisions, even if Republicans occasionally lost their governing majority. Nevertheless, Republicans considered Section 2 the most crucial provision in the Fourteenth Amendment. That proposal to alter the basis of representation was the basis of the first constitutional amendment presented to Congress by the Joint Committee and the provision in the omnibus Fourteenth Amendment that received the most careful scrutiny and debate. Section 2 occupied this place of pride in 1866 because, Bingham aside, no Republican claimed that the legal constraints on constitutional politics in Sections 1 and 4 would work unless the way in which Section 2 proposed to construct and eventually constitute constitutional politics worked.

Many Republicans were nevertheless not convinced that Section 2 would work by the time the substantially revised Fourteenth Amendment passed both Houses of Congress. Prominent Republicans had sought far stronger measures for empowering persons of color and Republicans in the south. Robert Dale Owen's proposed omnibus Fourteenth Amendment

contained muscular provisions constructing constitutional politics. That proposal, which excited Thaddeus Stevens,²⁶⁵ excluded all persons of color in any state from the state's basis of representation in the House and Electoral College whenever that state prohibited any black person from voting. After July 4, 1876, the Owens proposal forbade all voting laws that discriminated against persons of color. Section 3, as originally proposed by the Joint Committee on Reconstruction, disfranchised all persons who supported the Confederacy until July 4, 1870. Both the Owens proposed Section 2 and the Joint Committee's proposed Section 3 were significantly weakened in part because of fears they would not be stomached by the Northern electorate. The final Fourteenth Amendment enfranchised no person of color, disenfranchised no former Confederate, and contained a weaker sanction for states that did disenfranchise some persons of color.

More radical Republicans feared the new Fourteenth Amendment would not work. Many claimed that proposed sanctions for race discrimination in voting would not lead former slave states to enfranchise persons of color.²⁶⁶ Others insisted that the constitutional failure to disenfranchise former Confederates would enable a revived Slave Power to control southern politics.²⁶⁷ Stevens, who enthusiastically introduced the stand-alone Section 2 amendment to Congress, far more wearily spoke of the final version of the Fourteenth Amendment immediately before the House ratified. Section 2, he complained, "has not half the vigor of the amendment which was lost in the Senate." Worse, Stevens thought, the revised Section 3 "endangers the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels."²⁶⁸ Nevertheless, Republican radicals towed the line.

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²⁶⁸ *Congressional Globe*, 39th Cong., 1st Sess., p. 3148.

Stevens concluded his final speech on the Fourteenth Amendment by declaring: “let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions.”²⁶⁹

V. The Collapse of the Constitution of Thaddeus Stevens

Thaddeus Stevens’s attempt to construct a constitutional politics controlled by the party of the people who remained loyal during the Civil War proved no more enduring than James Madison’s “Constitution Against Parties.” Both suffered almost immediately from misalignments between expectations about how constitutional politics would work and the way constitutional politics actually worked. Madison’s “Constitution Against Parties” proved almost impossible to operate in the absence of political parties.²⁷⁰ Stevens’s Constitution, designed to entrench the rule of the party constitutionally committed to racial equality, was soon being operated by a Republican Party whose crucial western constituency cared far more about economic development than persons of color. By 1900, national constitutional politics in the United States was marked by vigorous competition between two non-ideological parties and a federal judiciary staffed by judges inclined to interpret Section 1 as authorizing courts to in the absence of federal legislation to declare unconstitutional various state restrictions on the free labor of white persons,²⁷¹ but less concerned with imposing legal constraints on state power to maintain a racial hierarchy.²⁷²

²⁶⁹ *Congressional Globe*, 39th Cong., 1st Sess., p. 3148.

²⁷⁰ Cite to Milkis and Skowronek

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A. The Fourteenth Amendment and the New Republican Majority

The Republican Party fared better than the Constitution of Thaddeus Stevens during and after Reconstruction. With the exception of the Fifty-Third Congress, Republicans between 1866 and 1913 either controlled every elected branch of the national government or controlled at least one elected branch of the national government. The judicial majority on the Supreme Court until 1941 was appointed by a Republican President. In this political environment, Republicans either enjoyed the power to promote their party's interests and constitutional vision or, at the very least, were sufficiently ensconced in the federal government to prevent contrary Democratic measures from becoming the law of the land. Neither the Fourteenth nor Fifteenth Amendment helped construct this constitutional politics that so favored the Republican Party. Congress never passed legislation implementing Section 2 of the Fourteenth Amendment. Section 3 was a dead letter before the end of Reconstruction. The Fifteenth Amendment, which many Republicans insisted substituted for Section 2 of the Fourteenth Amendment as a means for promoting African-American suffrage and preserving partisan hegemony, was throughout the late nineteenth century interpreted very narrowly and implemented only sporadically. Republicans in the late nineteenth and early twentieth centuries retained control of the national government because Congress routinely granted statehood to low population Western territories with Republican majorities long before granting statehood to higher population Western territories with Democratic majorities. The party of the people who remained loyal during the Civil War became the party of the sparsely populated West.

This substitution of western voters for voters of color as a means for maintaining a constitutional politics that privileged the Republican Party was doubly ironic. Republicans in

1866 repeatedly criticized constitutional arrangements that privileged the south by vesting voters in slave or white supremacist South Carolina with far more power than voters in free or egalitarian Massachusetts. Representative Kelley of Pennsylvania was one of many champions of what became Section 2 who asked Democrats whether they could

tell the men of the boroughs of Norristown and Allentown that one red-handed rebel in South Carolina is of right and ought to be the equal of three of the best and most patriotic of them on the floor of Congress or in the college for the election of President and Vice President?²⁷³

The strategy Republicans adopted to maintain power after 1866 was based on constitutional arrangements that vested voters in underpopulated Republican Nevada with far more power over national affairs than voters in well-settled South Carolina. As ironically, the constitutional politics of western statehood enabled the Republican Party to redeem that coalition's pre-Civil War commitment to a west developed for white settlers while abandoning Thaddeus Stevens's vision of a Republican Party committed to racial equality.

Neither Section 2 nor Section 3 of the Fourteenth Amendment exercised any influence on American constitutional development.²⁷⁴ By June 1866 when the Fourteenth Amendment passed Congress, Republicans had concluded that Section 2 would bear the onus for maintaining a constitutional politics that privileged rule by the persons who remained loyal during the Civil War. The Section 3 originally proposed by the Joint Committee on Reconstruction practically guaranteed strong Republican representation from the south by prohibiting former Confederates from voting in federal elections until 1870. Many Republicans called for permanent

²⁷³ *Congressional Globe*, 39th Cong., 1st Sess., p. 2468. FIND OTHER CITATIONS OR INCLUDE A SEE ABOVE REFERENCE

²⁷⁴ For a good summary of the debate over Section 3, see Richard M. Re and Christopher M. Re, "Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments," 121 *Yale Law Journal* 1584, 1616-24 (2012)

disfranchisement.²⁷⁵ The final version of Section 3, which limited the right of some former Confederates to hold federal office, promised only to affect the identity of the white supremacists former Confederates sent to Congress. The General Amnesty Act of 1872 reduced Section 3 to a dead letter for all practical purposes by opening all federal offices to all Confederates who had not served in the national government before the Civil War.²⁷⁶ By 1895, Republicans acknowledged, “There are no longer any persons living on whom the provisions of section three can operate.”²⁷⁷ Section 2 of the Fourteenth Amendment did no more work than Section 3. As one of the few histories of that constitutional provision concludes, “There never has been a successful implementation of the full provisions of section 2 of the fourteenth amendment. No state has ever suffered a reduction in congressional representation through its disfranchisement of adult male citizens.”²⁷⁸

Section 2 played no role in constructing a constitutional politics that privileged the Republican Party partly because that provision was not immediately needed to promote African-American voting in the South and partly because that provision was almost immediately superseded by the Fifteenth Amendment. While the Fourteenth Amendment was being ratified, Congress passed the Military Reconstruction Act²⁷⁹ and a series of readmission measures that required former Confederate states to permit freedman to vote.²⁸⁰ These statutes enfranchising

²⁷⁵ See *Congressional Globe*, 39th Cong., 1st Sess., p. 2535 (statement of Representative Ephraim Eckley of Ohio) (“I would disfranchise them forever”); *Congressional Globe*, 39th Cong., 1st Sess., p. 2463 (statement of Representative James A. Garfield of Ohio).

²⁷⁶ 17 *U.S. Stat.* 142 (1872).

²⁷⁷ George S. Boutwell, *The Constitution of the United States at the End of the First Century* (D.C. Health & Co.: Boston, 1895, p. 389.

²⁷⁸ George David Zuckerman, “A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment,” 30 *Fordham Law Review* 93, 124 (1961). See Gabriel J. Chin, “Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment,” 92 *Georgetown Law Journal* 259, 260 (2004) (“no discriminating state lost even a single seat in the House of Representatives when Congress reapportioned itself”).

²⁷⁹ 14 *U.S. Stat.* 428, 429 (1867); Chin, “Section Two,” p. 270 n. 67 (citing various admission acts). See generally, Chin, Section Two,” pp. 270-71.

persons of color left the Fourteenth Amendment without partisan bite when the Ninth Census was taken in 1870. Largely because African-Americans in 1870 were eligible to vote in southern states, the Fourteenth Amendment entitled former Confederate States to representation based on their entire population. As Gabriel Chin notes, Section 2 did not “offer() coverage broader than other laws in force.”²⁸¹ The Secretary of Interior, after examining disenfranchisement throughout the United States, informed Congress that legislation implementing Section 2 would make only trivial changes in how representatives were allocated by state. Rather than strip Rhode Island and Arkansas of one representative each, Congress allowed representation to be based entirely on population.²⁸²

Section 2 was further neutered when, shortly thereafter, Americans ratified the Fifteenth Amendment, which forbade states from passing voting restrictions that discriminated on the basis of race or color. Some prominent Republicans insisted that Section 2 of the Fourteenth Amendment was now either repealed or obsolete. Representative George Boutwell of Massachusetts stated,

By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court of the United States could not do otherwise than declare a State statute void which should disenfranchise any of the citizens described, even if accompanied with the assent of the State to a proportionate loss of representative power in Congress.²⁸³

Other Republicans, most notably Representative James Garfield of Ohio, disagreed.²⁸⁴

Nevertheless, for the rest of the nineteenth century, Republican inspired legislative proposals and

²⁸¹ Chin, “Section Two,” p. 261.

²⁸² See Zuckerman, “Section 2,” pp., 113-14.

²⁸³ Boutwell, *The Constitution*, p. 389. For assertions by other prominent Republicans, see Chin, “Section Two,” pp. 272-73.

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litigation aimed at empowering persons of color were based almost entirely on the Fifteenth Amendment.²⁸⁵

Those efforts failed miserably. A series of Supreme Court decisions in the late nineteenth century sharply narrowed congressional power to implement the Fifteenth Amendment and the Fifteenth Amendment rights courts could protect in the absence of federal legislation. *Reese v. United States* held that federal statutes and indictments had to specify that persons of color were denied the ballot because of their race.²⁸⁶ *Williams v. Mississippi* held that state statutes were constitutional if the statute did not explicitly deny voting rights on the basis of race, even when those measures were enacted for the purpose of preventing African-Americans from voting.²⁸⁷ A Congress committed to racial equality might have been able to work within the narrow confines of judicial interpretation,²⁸⁸ but Republicans after 1876 no longer had the power or interest in passing strong laws enforcing Fifteenth Amendment rights. The Lodge Elections Bill of 1890 failed when western Republicans abandoned efforts to provide substantial oversight over southern elections.²⁸⁹ When Democrats briefly regained control of all three elected branches of government in 1892, they immediately repealed many voting rights laws passed during Reconstruction.²⁹⁰ *Giles v. Harris* subsequently ruled that courts were impotent to deal with state practices that disenfranchised the vast majority of black citizens in the absence of supportive federal legislation. Justice Oliver Wendell Holmes declared that if “the great mass of the white population intends to keep the blacks from voting . . . , relief from [that] great political

²⁸⁵ Cite to Lodge Election bill and see notes ---, below and the relevant text.

²⁸⁶ *United States v. Reese*, 92 U.S. 214, 218 (1875).

²⁸⁷ *Williams v. Mississippi*, 170 U.S. 213, 223 (1898).

²⁸⁸ See Brandwein.

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wrong . . . must be given . . . by the legislative and political department of the government of the United States.”²⁹¹

Republicans made a tepid effort revive Section 2 as a vehicle for that relief during the first decade of the twentieth century.²⁹² The Republican Party Platform in 1904 asserted, “We favor such Congressional action as shall determine whether, by special discriminations the elective franchise in any State has been unconstitutionally limited, and if such be the case, we demand that representation in Congress and in the Electoral College shall be proportionately reduced, as directed by the Constitution of the United States.”²⁹³ Republican members of Congress in 1904 and in 1906 proposed legislation implementing Section 2 that would substantially reduce Southern representation in Congress and in the Electoral College unless persons of color were enfranchised. No proposal got out of committee.

The Fourteenth Amendment also “failed” because many Republicans found the admission of underpopulated western states to be an effective alternative for fashioning a constitutional politics that privileged the values and interests of the white persons who remained loyal during the Civil War. Before the Civil War, a general consensus existed that territories would be granted statehood only when their population entitled them to one Representative in the House of Representatives. Republicans during and after the Civil War abandoned this practice when successfully admitting many Republican leaning territories with populations substantially below this “ratio of representation” while delaying the admission of several Democratic leaning territories that met antebellum statehood requirements. Nevada, which consistently supported Republicans for the White House and consistently sent two Republicans to the Senate, was admitted in 1864, despite having less than a fifth the population of the next least populous state.

²⁹¹ See *Giles v. Harris*, 189 U.S. 475, 488 (1903).

²⁹² This paragraph summarizes Zuckerman, “Section 2,” pp. 119-120.

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Democratic leaning Utah, which in 1864 had seven times the population of Nevada, joined the Union only in 1896. The lame duck Republican majority in Congress on March 3, 1875 passed a Colorado statehood bill that, by expediting the territorial referendum on statehood, ensured that Colorado would be in the Union in time for state residents to vote in the 1876 national election.²⁹⁴ That state's 3 electoral votes provided Republican Rutherford Hayes with his margin of victory.

The way in which Republicans manipulated western statehood had substantial electoral and political consequences. Had states been admitted according to pre-Civil War norms, Democrats would have either controlled the national government from 1877-1889 or had the power to prevent Republicans from repealing laws passed in the years within this time frame when Democrats did have control of the national government. In fact, aided by Republican Senators and Electoral College votes from underpopulated western states, Republicans controlled the Senate for all but 2 years during this time period and the presidency for all but four years. Only in 1893 and only for two years, did Democrats during this time have the control over national institutions necessary to repeal Republican measures and enact Democratic substitutes. Such Republican policies first enacted during the Civil War and Reconstruction as high tariffs, Civil War pensions, aid to railroads and federal internal improvements survived the nineteenth century because the votes cast by Republican Senators from underpopulated states prevented Democrats from realizing their constitutional visions and preferred policies.

This turn to the west belied the majoritarian pretensions underlying the original Republican attack on the Slave Power. As noted above,²⁹⁵ Republicans before and during the Civil War complained that the three-fifths clause and the imminent disfranchisement of persons

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of color would enable one voter in such states as South Carolina to exercise the same influence on the partisan composition of the national government as several voters in such states as New York. During the debates over admitting western territories, Democrats complained that one voter in such underpopulated states as Nevada would exercise the same influence over national policy as several voters in South Carolina. President Andrew Johnson, when vetoing a bill authorizing statehood for Colorado, stated,

The population, it will be observed, is but slightly in excess of one-fifth of the number required as the basis of representation for a single congressional district in any of the States--the number being 127,000.

I am unable to perceive any good reason for such great disparity in the right of representation, giving, as it would, to the people of Colorado not only this vast advantage in the House of Representatives, but an equality in the Senate, where the other States are represented by millions. With perhaps a single exception, no such inequality as this has ever before been attempted. I know that it is claimed that the population of the different States at the time of their admission has varied at different periods, but it has not varied much more than the population of each decade and the corresponding basis of representation for the different periods.²⁹⁶

Republicans were unsurprisingly indifferent to majoritarian concerns or the principle, one person/one vote when western statehood was on the table. Senator Benjamin Wade of Ohio, defending statehood for Nevada, asserted that “In enabling the Territories to come into the Union as States, I believe it will be found that the history of the Government is that very little attention has been paid to the number of inhabitants at the time the people have been authorized to form a State government.”²⁹⁷

This effort to construct a constitutional politics that privileged the values and interests of the white voters who remained loyal to the Union during the Civil War resurrected Republican Party commitments announced immediately before the Civil War. Antislavery advocates during the 1840s and 1850s bitterly complained that slaveholders exercised disproportionate power in

²⁹⁶ Find in Richardson

²⁹⁷ *Congressional Globe*, 37 Cong., 3rd Sess., p. 1510.

the national government in general and over territorial policies in particular. Van Buren Democrats and Northern Whigs/Republicans sharply criticized the Polk Administration for settling the Oregon boundary dispute with Great Britain and failing to support internal improvement projects in the northwest.²⁹⁸ The Wilmot Proviso, which prohibited slavery in all territories acquired from Mexico after hostilities, was advertised as an attempt to populate the west with free white settlers.²⁹⁹ These white settlers, antislavery advocates agreed, would return control over national policy to free state citizens.³⁰⁰ "We will engage in competition for the virgin soil of freedom," William Seward declared after the passage of the Kansas-Nebraska Act, "and God give the victory to the side which is stronger in numbers as it is in right."³⁰¹ In sharp contrast to Thaddeus Stevens and other Radical Republicans in the immediate wake of the Civil War, the vast majority of Republicans immediately before the Civil War declaimed any immediate interest in race relations in the Southern states. Abraham Lincoln spoke for almost the entire Republican Party when his First Inaugural Address declared he had neither the power nor the interest in emancipating slaves in existing states.³⁰² Lincoln thought a policy of confining slavery to existing states would eventually lead to the ultimate extinction of slavery in the distant future. The future, however, was distant. Lincoln admitted that if Republicans governed consistently with their 1856 and 1860 platform, a Republican Supreme Court in 1954 would still recognize the existence and legality of human bondage.³⁰³

By 1896, the Republican Party had achieved every one of that coalition's pre-Civil War goals (and more). Antislavery advocates during the 1850s maintained they were in a race with

²⁹⁸ Foner essay

²⁹⁹ Wilmot quote

³⁰⁰ Seward quote

³⁰¹ *Congressional Globe*, 33rd Cong., 1st Sess., App., p. 769. See Potter, *Impending Crisis*, p. 199.

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the south to settle and control the west.³⁰⁴ Republicans won. Republican congressional majorities during and after the Civil War determined the boundaries of western states, the conditions under which western states would be admitted, and the timing of western state admission. The resulting territorial and statehood policies ensured that at the turn of the twentieth century most western states had more in common politically, economically and culturally with Republican midwestern states than with Democratic former Confederate states. Antislavery advocates before the Civil War maintained that control over the west was an essential means for ensuring that voters in the free states determined national policy. National policy after the Civil War on such matters as the tariff and internal improvements promoted northern interests in large part because Republicans representatives from underpopulated western states cast crucial votes for tariffs and aid for economic development.³⁰⁵ As Lincoln promised when running for president, Southern racial policies did not spread through the country. Racism was prevalent in the north and west in 1860 and at the turn of the twentieth century.³⁰⁶ Nevertheless, no state or territory in which slavery was banned before the Civil War disfranchised most male citizens of color or adopted comprehensive racial segregation policies.

Each western state admitted to the Union pushed the Republican Party further toward that coalition's original pre-Civil War commitments to white voters and away from the egalitarian commitments that animated most party members, Thaddeus Stevens in particular, immediately after the Civil War. While some western Republicans during Reconstruction initially supported the radical wing of the Republican Party,³⁰⁷ most in the following decades lost interest in

³⁰⁴ Potter

³⁰⁵ See Stewart and Weingast, "Stacking the Senate," pp. 260-64.

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³⁰⁷ Stewart and Weingast, "Stacking the Senate," pp. 235-36. CHECK BENEDICT

protecting persons of color in the south.³⁰⁸ Republican members of Congress from new states preferred championing policies that promoted western economic development. Such former Republican radicals as Senator William Stewart of Nevada proved quite willing to make deals with southerners to achieve those ends. The final nail in Reconstruction's coffin was laid in 1890, when western Republicans, after inducing increased southern opposition to the gold standard, abandoned Senator Henry Cabot Lodge's effort to push through Congress a bill protecting black voting rights.³⁰⁹

B. The Second Transformation of American Constitutional Politics

The Republican Party that depended on votes from underpopulated western states to maintain control over national policy was not the Republican Party that framed the Fourteenth Amendment. The Republican Party of Thaddeus Stevens and Abraham Lincoln was committed to first preventing the extension of slavery and then to securing equality before the law for all persons. Disagreements over such questions as the tariff were submerged so that the party could present a united front on slavery and racial equality.³¹⁰ The Republican Party at the turn of the twentieth century was committed to the protective tariff and national policies promoting economic development. The failed Lodge Bill of 1890 demonstrated the willingness of crucial Republican factions to submerge disagreements over racial equality when they threatened the economic interests of vital Republican constituencies.³¹¹ The Republican Party of Thaddeus Stevens (and Martin Van Buren) maintained that the free people of the north needed to organize

³⁰⁸ See *Farewell to the Bloody Shirt*; Benschel, *Sectionalism*, Valleley, *The Two Reconstructions*, Calhoun book.

³⁰⁹ See Paul Finkelman, "Civil Rights in Historical Context: In Defense of *Brown*," 118 *Harvard Law Review* 973, 887-88 (2005). Read Kessler, Lousser, and Xi Wand, *The Trial of Democracy: Black Suffrage and Northern Republicans*

³¹⁰ Cite to Lincoln and non-majoritarian difficulty

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and maintain a permanent political coalition in order to preserve the Constitution's majoritarian and substantive commitments from an aristocratic Money/Slave Power. The Republican Party at the turn of the century had become one of two major political parties that competed for the spoils of government. Professor Stephen Skowronek describes this American regime that developed during the late nineteenth century as a "state of courts and parties."³¹² Courts established the legal constraints on government power and made policy by interpreting vague statutory commands. Parties distributed patronage and other economic benefits.³¹³

American constitutional politics adjusted as a constitutional order designed to be run by the party of the people who remained loyal during the Civil War was replaced by a constitutional order run by a two far less ideological parties. Political parties were the most important development in American constitutional politics that took place during the decades before the Civil War. Administrative agencies and the Australian ballot were the most important developments in American constitutional politics at the turn of the twentieth century. The former was a means to reduce the influence of political parties on public policy.³¹⁴ The latter was a means to reduce the influence of political parties on elections.³¹⁵

The federal judiciary was a prominent beneficiary of a constitutional politics structured by two non-ideological parties concerned primarily with distributing economic benefits. Republicans after suffering defeat in national elections sharply increased federal judicial capacity in order to entrench partisan commitments when passing the Judiciary Act of 1875 and the

³¹² Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge University Press: New York, 1982), p. 24.

³¹³ Skowronek, *Building a New American State*, pp. 39-41 (Check Pages)

³¹⁴ See Laura M. Weinrib, "The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech," 30 *Law & History Review* 325, 331 n.16 (2012).

³¹⁵ See Bradley A. Smith, "Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply," 28 *Harvard Journal on Legislation* 167, 172-73 (1991).

Judiciary Act of 1891.³¹⁶ Both measures dramatically expanded federal jurisdiction and federal judicial power.³¹⁷ By the turn of the century, both Republican and Democratic legal elites were committed to the “cult of the court,” an understanding of American constitutional politics in which judges rather than the legitimate party of the people were primarily responsible for preserving the constitutional order and resolving constitutional ambiguities. Party lost influence on the course of judicial decision-making. The course of constitutional law in 1900 seemed largely impervious to the elections.³¹⁸ Justices appointed by Democrats and justices appointed by Republicans were as committed to dual federalism and the freedom of contract.³¹⁹ Democrats and Republicans shared the animus to class legislation that structured judicial thought at the turn of the twentieth century.³²⁰

The New Deal Constitutional Revolution institutionalized the constitutional transformations in constitutional politics that had been taking place during the seventy years after the Civil War. Constitutional developments during the 1930s and 1940s aligned American constitutional commitments and institutional responsibilities consistently with the way two party politics had been functioning since the turn of the twentieth century. The result was a liberal version of the state of courts and parties.³²¹ Parties in the New Deal regime were responsible for making economic policy and determining the precise balance of power between different governing institutions. These responsibilities reflected common understandings that parties were

³¹⁶ Gillman

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³¹⁸ Finley Peter Dunne’s Mr. Dooley famously concluded an essay on the *Insular Cases* by asserting that “the Supreme Court follows the election returns, CITE, but Justice White, a Democrat, provided the crucial fifth vote for the majority in *Downes v. Bidwell*. Two of the six Republicans on the Court dissented.

³¹⁹ See Stewart and Weingast.

³²⁰ TCB

³²¹ The Carolene Products footnote belongs here somewhere.

well-suited for these tasks³²² and the widespread belief among New Dealers that the framers, as good pragmatists, vested the national government with the power to regulate the national economy and determine the allocation of power among governing institutions in whatever ways elected officials thought best promoted the national welfare.³²³ Federal courts were responsible for protecting civil rights and civil liberties,³²⁴ the most important constitutional constraints on governmental power. These responsibilities developed in part because the federal judiciary was thought to be the “forum of principle” in American constitutional politics³²⁵ and, less esoterically, because that institution was staffed by Republican and Democratic elites who were far more committed to liberal notions of civil rights and civil liberties than the average member of either the Democratic or the Republican party.³²⁶ In this transformed constitutional politics, constitutional theory was reduced to constitutional interpretation with a dollop of constitutional authority. Constitutional politics was largely irrelevant to constitutional theory because the judiciary, the one institution New Deals thought committed to constitutional principle, was expected to transcend the party politics of the day.³²⁷

As was the case with both Madison’s “Constitution Against Parties,” and Stevens’s “Constitution of the One Legitimate Party,” the New Deal “Two-Party Constitution” began to fall apart almost as soon as that constitutional order was institutionalized. Once again, a mismatch developed between the theory of constitutional politics underlying the constitutional regime and the way constitutional politics actually worked. The constitutional politics of the New Deal was rooted in relatively non-ideological parties whose elite wings were more

³²² See David Truman and Crisis of Democratic Theory literature. See also, Robert McCloskey, *The American Supreme Court* (5th edition) (revised by Sanford Levinson) (University of Chicago Press: Chicago, 2010), p. 10-11.

³²³ Cite to Wickard and related cases. Also Stern essay

³²⁴ Cite to Carolene Products

³²⁵ Dworkin. See Hart, Wechsler; McCloskey, *American Supreme Court*, p. 10-11.

³²⁶ See Graber, Howard essay. See also Lovell on how ordinary conceptions of civil liberties diverged from elite conceptions.

³²⁷ Wechsler, Bickel, Graber essay in LSI

committed to liberal notions of civil rights and civil liberties than their mass bases. By the late twentieth century, these parties had been replaced by two ideological parties, whose elites were more polarized than ordinary citizens. The result was a constitutional order many described as dysfunctional.³²⁸ A full account of this story, Scheherazade reminds us, awaits another day.³²⁹

VI. The Triumph of John Bingham's Constitution

Professor Gerard Magliocca titled his excellent biography *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment*. That biography credits Bingham with the authorship of “the most important sentence in the Constitution,”³³⁰ the provision in the Fourteenth Amendment declaring:

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.

Magliocca meticulously documents how Bingham tirelessly championed including these words in the Fourteenth Amendment.³³¹ The Ohio Republican consistently prodded the Joint Committee on Reconstruction to propose the privileges and immunities, the due process and the equal protection clauses, and he fought for these provisions on the floor of Congress. Much of what scholars know about the original meaning of Section 1 is derived from Bingham's speeches. Bingham was the only member of the House of Representatives who defended Section 1 at length,³³² one of two members of Congress who defended Section 1 at length,³³³ and the

³²⁸ See Levinson; BU symposium.

³²⁹ See Mark A. Graber, *Forged in Failure* (on file in the author's mind)

³³⁰ Magliocca, *American Founding Son*, p. 2.

³³¹ Magliocca, *American Founding Son*, pp. 108-127.

³³² Cite

only member of Congress who gave more than one lengthy speech on the merits of Section 1.³³⁴ “Lincoln.” Magliocca concludes, “was our greatest constitutional poet, but Bingham was the man who turned that poetry into prose.”³³⁵

John Bingham’s Fourteenth Amendment is our Fourteenth Amendment.³³⁶ That Fourteenth Amendment consists almost entirely of Section 1 and Section 5 as a means for implementing Section 1. With the notable exception of cases involving whether convicted felons have a right to vote,³³⁷ the constitutional law of the Fourteenth Amendment is the constitutional law of Section 1 and Section 5. Scholarly analysis of the Fourteenth Amendment is devoted almost entirely to the proper interpretation of Section 1 and Section 5. Michael Kent Curtis, for example, relied heavily on Bingham’s speeches when he demonstrated that the persons responsible for the Fourteenth Amendment intended to prohibit state officials from violating the Bill of Rights. Books and articles with “The Fourteenth Amendment” in the title are almost exclusively devoted to Section 1 and Section 5.³³⁸ Sections 2, 3 and 4 are regarded as constitutional afterthoughts. Magliocca describes as “anticlimatic” Bingham’s last speech championing the Fourteenth Amendment, the one speech Bingham gave in the Thirty-Ninth Congress that focused on Section 3 and Section 4.³³⁹

A new biography of Thaddeus Stevens might be titled *American Founding Orphan: Thaddeus Stevens and the Lost Fourteenth Amendment*. Stevens fought tirelessly for strong

³³³ Senator Jacob Howard, when introducing the Joint Committee’s five section Fourteenth Amendment to the Senate, was the only other member of Congress who defended Section 1 at length. Cite

³³⁴ The other lengthy speeches on Section 1 were delivered by Democrats opposed to a national constitutional commitment to racial equality. CITE.

³³⁵ Magliocca, *American Founding Son*, p. 4.

³³⁶ See Michael W. McConnell, “The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?” 25 *Loyola of Los Angeles Law Review* 1159, 1164 (1992) (declaring that Bingham was “the principle author of the [Fourteenth] amendment”).

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³³⁸ Cite to Nelson’ McConnell, “The Fourteenth Amendment.”

³³⁹ Magliocca, *American Founding Son*, p. 123. Readers of *American Founding Son* might conclude that the original Section 2 was deleted and Congress simply did not bother renumbering the other provisions of the Fourteenth Amendment.

versions of what became Section 2 and Section 3 of the Fourteenth Amendment. In his view, persons of color could achieve racial equality in the United States only if a Republican Party committed to racial equality controlled the national government and that Republican “ascendancy,” he insisted, would continue only if persons of color voted and traitors were disenfranchised. Stevens failed on all accounts. The final version of Section 2 neither directly nor indirectly fostered racial equality at the ballot box. Section 3 was far weaker than Stevens thought necessary to construct a constitutional politics that privileged racial equality. When Stevens died in 1868, his Republican understanding that constitutional commitments were best preserved by the political party of those who remained loyal during the Civil War was already in the process of being by his former allies now increasingly more concerned with gaining votes from white citizens from the north and west than from persons of color in the south.³⁴⁰

The generation of racial egalitarians who successfully championed the second Reconstruction in the 1960s³⁴¹ were more inspired by the constitutional provision Bingham drafted than by the constitutional provisions that Stevens shepherded through Congress. The liberal justices and litigators who successfully challenged Jim Crow relied entirely on Section 1, which provided legal constraints on the states,³⁴² and Section 5, which empowered the federal government to pass legislation implementing the constitutional commitment to racial equality.³⁴³ When liberals in the elected branches of government concluded that Sections 1 and 5 were too weak a reed to attack some forms of segregation, they turned to the commerce clause of Article

³⁴⁰ See Benedict on the influence of the Election of 1867.

³⁴¹ Cite to Vallely

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I.³⁴⁴ The rare mid-twentieth century commentaries on Section 2³⁴⁵ “fell stillborn from the press.”³⁴⁶

The prominent debate held on the pages of the *Virginia Law Review* over whether originalists can defend *Brown v. Board of Education*³⁴⁷ highlights the hold Bingham’s Fourteenth Amendment has on the contemporary American constitutional imagination. Michael McConnell published a lengthy essay asserting that the persons responsible for the Fourteenth Amendment intended to prohibit racially segregated schools.³⁴⁸ Michael Klarman at lesser length insisted that most persons responsible for the Fourteenth Amendment accepted the constitutionality of segregated schools.³⁴⁹ Although neither essay cited Bingham, Bingham might have been pleased by the way the authors framed the constitutional question at issue. McConnell and Klarman assumed that the persons responsible for the Fourteenth Amendment thought their efforts were directly primary toward providing new legal constraints on state governments and empowering Congress to implement those legal constraints. Both assumed prominent Republicans intended to settle the constitutional status of racial segregation in public schools when they drafted and ratified the equal protection clause. McConnell purported to “demonstrate that the belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment.”³⁵⁰ Klarman asserted, “It is inconceivable that most -- indeed even very many -- Americans in 1866 - 68 would have

³⁴⁴ CRA of 1964; *Heart of Atlanta*; Schmidt.

³⁴⁵ cite

³⁴⁶ Cite to Hume

³⁴⁷ 347 U.S. 487 (1954).

³⁴⁸ Michael W. McConnell, “Originalism and the Desegregation Decisions,” 81 *Virginia Law Review* 947 (1995).

³⁴⁹ Michael J. Klarman, “*Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell,” 81 *Virginia Law Review* 1881 (1995).

³⁵⁰ McConnell, “Originalism,” p. 953.

endorsed a constitutional amendment to forbid public school segregation.³⁵¹ We may not know what Bingham thought about Jim Crow education, but he, McConnell and Klarman agreed that what the framers of the Fourteenth Amendment did about segregated schools depends on the proper interpretation of the words used in Section 1.

Thaddeus Stevens might think the debate misguided. His Fourteenth Amendment was not designed to resolve differences among Republican Party members or the people who remained loyal during the Civil War over such specific applications of the constitutional commitment to equality under law as the constitutional status of segregated schools. Rather, the Fourteenth Amendment Stevens championed was designed to ensure that Republicans, the party of the people who remained loyal during the Civil War, controlled the meaning of the Thirteenth Amendment for the foreseeable future. If Republicans decided that freedoms protected by the Thirteenth Amendment entailed a racial equality inconsistent with segregated schools, then the constitutional politics constructed by the Fourteenth Amendment would empower Republicans in Congress to pass legislation prohibiting segregated schools and Republicans in the federal judiciary to declare segregated schools unconstitutional. That, however, was for Republicans to decide in the future. The Fourteenth Amendment Stevens championed did not purport to settle any existing disagreement between Republicans in Congress or Republicans in different branches of the national government.

Stevens would also have thought the debate between McConnell and Klarman irrelevant. The Fourteenth Amendment Stevens championed that the security of fundamental rights depends as much on the structure of constitutional politics as the particular legal constraints on government power enumerated in a constitution. He and most of his partisan allies believed Americans could achieve racial equality only if the party of the people who remained loyal

³⁵¹ Klarman, "*Brown*," p. 1884.

during the Civil War continued to control the national government and determine the official meaning of the Thirteenth Amendment. *Dred Scott* taught Stevens and other Republicans that in the absence of a constitutional politics that privileged the election of those persons committed to opposing the extension of slavery and promoting racial equality, sophisticated analysis of the precise intentions of the framers responsible for particular constitutional provisions is unlikely to be of much concern to constitutional decision makers. Both progressives and conservatives who presently fight over the meaning of John Bingham's Fourteenth Amendment might benefit from this lesson in constitutional politics.