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The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era

*Earl Maltz**

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ABSTRACT

The year 2020 marked the 150th anniversary of the ratification of the Fifteenth Amendment, the last of the three Reconstruction Amendments that fundamentally transformed both the structure of the Constitution and the nature of American federalism. The Fifteenth Amendment differed

from its predecessors in a number of important ways. First, it was the only one of the Reconstruction Amendments and remains the only part of the entire Constitution to focus explicitly on race. In addition, the amendment became the first provision of the Constitution to limit the power of the state governments to establish the qualifications for voters in elections for state office, providing that “[t]he right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude”¹ and vesting Congress with the authority to enforce this command by adopting “appropriate legislation.”² Thus, among other things, the Fifteenth Amendment provided the most plausible source of congressional authority for the passage of the Voting Rights Act of 1965—a statute which was and continues to be, by any standard, one of the most important civil rights measures that Congress ever adopted.

Nonetheless, unlike the Thirteenth and Fourteenth Amendments, legal scholars have shown relatively little interest in exploring the background of the Fifteenth Amendment. This Article describes both the sequence of events that led to the passage and ratification of the Fifteenth Amendment and the forces that shaped the amendment itself.

INTRODUCTION

For more than 50 years, the Supreme Court has relied primarily on the Fourteenth Amendment in providing constitutional protection for voting rights. Beginning with the decisions in *Reynolds v. Sims*³ and *Harper v. Virginia State Board of Elections*,⁴ the Court has consistently held that the right to vote is fundamental for purposes of equal protection analysis and that any state action that infringes upon that right is unconstitutional unless the action is necessary to further a compelling governmental interest. Thus, for example, in the recent decision in *Alabama Legislative Black Caucus v. Alabama*,⁵ the majority relied on the Equal Protection Clause in concluding that strict scrutiny should be applied whenever a court finds that race was the predominant factor in determining the boundaries of even a single legislative district.

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* I gratefully acknowledge the assistance of Travis Crum, who read an earlier draft of this Article and provided a variety of useful suggestions.

1. U.S. CONST. amend. XV, § 1.
2. *Id.* § 2.
3. *Reynolds v. Sims*, 377 U.S. 533 (1964).
4. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).
5. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015).

The framers of the Reconstruction Amendments would have found this approach to be puzzling at best. The Republicans who were responsible for drafting the Fourteenth Amendment made a conscious decision to delete protection for voting rights from the text of the amendment⁶ and during the congressional debates explicitly stated that the amendment would not impose any new limitations on state control of the electoral process.⁷ Instead, it was not until after the Fourteenth Amendment was ratified that congressional Republicans united around the Fifteenth Amendment, which they viewed as the source of constitutional protection for voting rights.

This Article will describe the complicated dynamic that ultimately led to the passage and ratification of the Fifteenth Amendment.⁸ The Article will begin by discussing the role that the issue of African-American suffrage played in the debates over Reconstruction policy in 1866 and the considerations that shaped the decision to remove explicit protections for the right to vote from the Fourteenth Amendment. The Article will then describe the conflict over the issue within the Republican party in the period between 1866 and 1869, which culminated in the creation of a consensus among Republicans regarding the need for either a federal statute or a constitutional amendment that would require states to allow African-Americans to vote. At the same time, however, Republicans

6. See BENJAMIN KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 101 (1914).

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

8. WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1969) is the only modern book-length treatment of the evolution and ratification of the Fifteenth Amendment. However, Gillette makes only passing reference to the discussions of the issue of African-American suffrage that took place during the crafting of the Fourteenth Amendment and also pays little attention to the debate over women's suffrage during the late 1860s. Other, less detailed discussions of the background of the Fifteenth Amendment include MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869*, at 325–38 (1974); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 93–125 (2019); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 75–82 (2009); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869*, at ch. 9 (1990); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at ch. 1 (1997) and Travis Crum, *The Superfluous Fourteenth Amendment*, 114 *Nw. U.L. REV.* 1549, 1592–1617 (2020).

continued to have widely differing views on the precise form that federal action should take.

Delving deeply into the complex congressional debates that produced the final draft of the Fifteenth Amendment, the Article will describe these differences, focusing, among other things, on the unsuccessful efforts to prohibit discrimination on the basis of sex as well as race, as well as the equally unsuccessful attempt to ban only discrimination against African-Americans, which would have left the states free to explicitly deny the right to vote to Asian-Americans and other racial minorities on the basis of race. After chronicling the brief but intense struggle over ratification, the Article will conclude by describing the impact that the Fifteenth Amendment has had on the electoral process in the United States.

I. THE DISPUTE OVER AFRICAN-AMERICAN SUFFRAGE IN THE EARLY RECONSTRUCTION ERA

The passage of the Fifteenth Amendment was the culmination of one of the major political struggles of the early Reconstruction era. By the end of the Civil War, most mainstream Republicans had embraced the idea that African-Americans should be allowed access to the right to vote under the same conditions as their white counterparts. Republican support for the basic concept of African-American suffrage was based in part on ideological convictions that transcended purely sectional considerations. Thus, for example, in 1864 a majority of congressional Republicans supported an unsuccessful effort to enfranchise African-Americans in the territory of Montana,⁹ and in early January 1866, the Republican dominated House of Representatives passed a bill extending the right to vote to African-Americans in the District of Columbia.¹⁰ However, the primary impetus for broader federal action was created largely by the need to deal with fundamental issues related to Reconstruction.

The issue of political power was at the core of the debate over Reconstruction policy. In simple terms, Republicans believed that the ex-Confederate states should not be restored to their former status as full partners in the Union without some assurance that the governments of those states would be in the hands of forces that were loyal to the federal government.¹¹ The difficulty was that the vast majority of the white population in the states that had seceded had been Confederate

9. CONG. GLOBE, 38th Cong., 1st Sess. 1361, 1651 (1864).

10. CONG. GLOBE, 39th Cong., 1st Sess. 310 (1866).

11. See, e.g., CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH (1865), https://wnorton.com/college/history/america9/brief/docs/Schurz_Carl_Report_on_the_Condition_of_the_South_1865.pdf [<https://perma.cc/6BV9-BXPG>].

sympathizers, whom most Republicans believed could not be trusted with control of the institutions of state and local government.

Republicans were also gravely concerned about the potential impact of the restoration of the ex-Confederate states on the balance of power in the federal government. Even before the war, Republicans had argued that the policies adopted by the federal government had too often been designed to protect the interests of Southern slaveowners. In particular, Republicans had complained bitterly that the formula for determining representation in the House of Representatives, which included three-fifths of the number of slaves in each state in the basis of representation, had given an unfair advantage to the South.¹²

Ironically, the Thirteenth Amendment, which was the capstone of the long struggle against the institution of slavery itself, also had the potential to further enhance the political influence of what Republicans described as the “slave power.”¹³ Once freed from bondage, under the rules established by the original Constitution, all former slaves would be counted fully in determining the number of representatives to which the states in which they lived were entitled in the House of Representatives. But at the same time, unless the rules that had been in place in the ex-Confederate states prior to the war were changed, only the white citizens would have a voice in choosing the congressional delegations in those states. Thus, the influence of these citizens—most of whom had been Confederate sympathizers—would actually be greater than it had been prior to the Civil War. Moreover, the vast majority of those who were chosen to represent the ex-Confederate states under this regime would have almost certainly aligned themselves with Northern Democrats, making it far more difficult for Republicans to keep control of the House of Representatives. For obvious reasons, this prospect was anathema to most, if not all, mainstream Republicans.

Many Republicans believed that these problems could be ameliorated by enfranchising the newly-freed slaves. In addition to supporting the concept of race-blind suffrage as a matter of principle, these Republicans reasoned that the ex-slaves would be likely to support Republican candidates and would thus provide a political counterweight to Confederate sympathizers in elections for both state office and the House

12. See, e.g., Letter from John Quincy Adams to Uriah Tracy (1804), in *Digital History*, UNIV. HOUS., http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtID=3&psid=215 [<https://perma.cc/Q4HZ-NSXU>] (last visited June 19, 2021).

13. For a detailed discussion of the concept of the slave power, see LEONARD RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860* (2000).

of Representatives. Further, some Republicans argued that if African-Americans were given the means to protect themselves through the state political process, the need for additional federal action designed to provide such protection might be obviated. Thus, for example, in December 1865, one Republican newspaper predicted that even “‘conservative’ [Republicans] . . . will be willing that some general Constitutional amendment shall be adopted, looking to an equalization of suffrage everywhere, without regard to color.”¹⁴

However, in 1866 some Republicans did not share the belief that federal action designed to enfranchise African-Americans was either appropriate or desirable. One problem was ideological. During the early Reconstruction period, many moderate and conservative Republicans remained committed to the concept of federalism and believed that any measure that established national standards for voting would unduly impinge on the prerogatives of individual state governments. For example, on January 5, 1866, in his annual address to the state legislature, Samuel Cony, the Republican Governor of Maine, observed that “‘the states of the American Union are not under the surveillance of the general government . . . except in a very limited degree, and the regulation of the right of suffrage rests with [the states] exclusively.”¹⁵

In addition, not all Republicans were convinced that, if granted the right to vote, the newly-freed slaves would in fact effectively counter the voting power of white Southerners. For example, arguing against the imposition of a constitutional mandate for race-blind suffrage, the conservative *New York Times* observed:

Everybody knows how easy it is for a wealthy and intelligent class, though small in numbers, to hold in subjection a poor and ignorant majority, even when the rights of the individual and his equality before the law are loudly proclaimed and speciously enforced. The whole history of Southern politics exhibits this.¹⁶

Finally, moderate Republicans in particular also recognized that the idea of making African-American suffrage a centerpiece of the party’s reconstruction program carried substantial political risk. Although most Republicans favored African-American suffrage, in a number of Northern states crucial swing voters were adamantly opposed to the concept. As a

14. *Admission of Rebel States*, BANGOR DAILY WHIG & COURIER (Me.), Dec. 11, 1865, at 2.

15. *The Governor’s Address*, BANGOR DAILY WHIG & COURIER (Me.), Jan. 5, 1866, at 3.

16. *The Suffrage Question*, N.Y. TIMES, Feb. 13, 1866, at 4.

result, during the fall of 1865, supporters of African-American suffrage suffered a number of important defeats in local elections in Northern states.¹⁷ The most significant setback came in Connecticut, the last New England state to deny African-Americans the right to vote, where a measure that would have removed the racial qualification was defeated in a referendum conducted in October 1865.¹⁸ Thus, it appeared that the aggressive promotion of African-American suffrage had the potential to undermine the political fortunes of the Republican party in jurisdictions where the electorate was closely divided between Republicans and Democrats. Against this background, one Republican senator worried privately that “if I vote for a negro suffrage bill . . . the opposition journals will open their guns on me, and if possible make me and my party unpopular.”¹⁹ The impact of these considerations was clearly reflected in the treatment of the issue of African-American suffrage during the process of the drafting of the Fourteenth Amendment.

A. African-American Suffrage and the Drafting of the Fourteenth Amendment

The Fourteenth Amendment as we know it emerged only after a long and complex drafting process. The ratification of the Thirteenth Amendment in December 1865 had permanently abolished slavery. Nonetheless, when the first session of the Thirty-Ninth Congress convened in the same month, most congressional Republicans believed that additional changes in the Constitution were necessary to adequately address issues related to Reconstruction. Initially, however, they did not envision the creation of the kind of multifaceted amendment that ultimately became part of the Constitution. Instead, they focused their attention on the creation of amendments that were more narrowly tailored to deal with specific problems.

The Republican members of the Joint Committee on Reconstruction²⁰ quickly took the lead in drafting these amendments. Congress created this

17. JOSEPH JAMES, *THE DRAFTING OF THE FOURTEENTH AMENDMENT* 16–17 (1956).

18. *Id.* at 17.

19. *Notes from the Capitol*, CONGREGATIONALIST, Jan. 12, 1866, at 6.

20. The Joint Committee on Reconstruction was composed of twelve Republicans—Sens. William Pitt Fessenden of Maine, James W. Grimes of Iowa, Ira Harris of New York, Jacob M. Howard of Michigan and George H. Williams of Oregon and Reps. John A. Bingham of Ohio, Henry T. Blow of Missouri, George S. Boutwell of Massachusetts, Roscoe Conkling of New York, Justin S. Morrill of Vermont, Thaddeus Stevens of Pennsylvania and Elihu B. Washburne

committee in December 1865 with a mandate to “inquire into the condition of the [ex-Confederate] [s]tates . . . and report whether they, or any of them, are entitled to be represented in . . . Congress.”²¹ Soon after they first convened, committee members focused their attention on the problem of determining the proper allocation of political power in a reconstructed Union.

On January 15, 1866, the committee considered a proposal that would have barred the states from making “any distinction . . . in political . . . rights or privileges, on account of race, creed, or color.”²² However, all of the Republican members of the committee except Republican Sens. William Pitt Fessenden of Maine and Jacob M. Howard of Michigan rejected this proposal.²³ Instead, the committee Republicans, joined by Democratic Sen. Reverdy Johnson of Maryland, coalesced around the idea of a constitutional amendment that would not have interfered directly with state control over voter qualifications, but instead would have reduced the number of seats in the House of Representatives allocated to states that prohibited African-Americans from voting.²⁴

When this proposed amendment reached the floor of the House of Representatives, radical Republicans such as George W. Julian of Indiana, Thomas D. Eliot of Massachusetts, and Frederick A. Pike of Maine contended that the measure was fatally flawed because it would have allowed states to continue the practice of restricting the right to vote to white people.²⁵ They contended that the governments of states with large populations of free African-Americans were constitutionally required to enfranchise the erstwhile slaves by Article IV, section 4, which requires states to maintain a “republican” form of government, and insisted that the Constitution already vested Congress with authority to enforce this mandate.²⁶ Republican Rep. William D. Kelley of Pennsylvania would have found the same authority in the congressional power to regulate the “time, place and manner” of elections to the House.²⁷ Some Republicans who took this view also contended that the joint committee proposal might in fact be counterproductive because it implicitly recognized the authority

of Illinois—and three Democrats—Sen. Reverdy Johnson of Maryland and Reps. Henry Grider of Kentucky and Andrew J. Rogers of New Jersey.

21. KENDRICK, *supra* note 6, at 38.

22. *Id.* at 50.

23. *Id.* at 51–52.

24. *Id.* at 52.

25. CONG. GLOBE, 39th Cong., 1st Sess. app. 56–58 (Julian), 406–07 (Eliot), 407 (Pike) (by implication) (1866).

26. *Id.*

27. *Id.* at 408–09.

of the states to indirectly disenfranchise African-Americans through the use of devices such as property and literacy qualifications for voting.²⁸ For these reasons, they argued that Congress should propose a constitutional amendment that would explicitly bar racial discrimination in suffrage qualifications.²⁹

Republican Rep. Roscoe Conkling of New York, the floor manager of the joint committee proposal, responded by recapitulating the arguments against such a constitutional amendment. He contended that the radical proposal

trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way. It takes away a right which has been always supposed to inhere in the States and transfers it to the General Government.³⁰

In addition, noting that most Northern states did not allow African-Americans to vote and that “some of them have repeatedly and lately pronounced against it,” Conkling observed that many state legislatures would almost certainly refuse to ratify a constitutional amendment that banned racial discrimination in voting rights.³¹ Most of Conkling’s Republican colleagues were convinced by these arguments, and, with only minor modifications, the joint committee proposal passed the House with the requisite two-thirds majority on January 31, 1866.³²

The obstacles to the passage of the committee measure proved to be greater in the Senate. There, the Republicans who favored an amendment that would have explicitly prohibited the states from limiting access to the ballot on the basis of race quickly took a prominent role in the debates. Republican Sen. Charles Sumner of Massachusetts, well-known for his advocacy of extreme radical positions, took the lead in attacking the proposal that had been passed by the House of Representatives. In a lengthy speech that, depending on one’s perspective, might be described as either erudite or pretentious, Sumner reviewed not only American constitutional history but also French and classical precedents as well.³³ Insisting that the right to vote was a natural right,³⁴ Sumner argued that

28. *E.g., id.* at 407, 426.

29. *E.g., id.* at app. 57.

30. *Id.* at 358.

31. *Id.*

32. *Id.* at 538.

33. *Id.* at 673–87.

34. *Id.* at 677.

both the Guarantee Clause and Section 2 of the Thirteenth Amendment had already vested Congress with the authority to ban such discrimination by statute.³⁵ Despite these contentions, Sumner pressed for the adoption of a constitutional amendment that would have provided “that there shall be no Oligarchy, Aristocracy, Caste or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political on account of color or race anywhere within the United States.”³⁶

Predictably, Sumner used the occasion to attack the white power structure in the ex-Confederate states. But he was equally unsparing in his assault on the proposal being considered by the Senate. Describing the joint committee proposal as “nothing else than another Compromise of Human Rights”³⁷ and declaring that “a moral principle cannot be compromised,”³⁸ Sumner declared that the proposal reported by the joint committee would “admit in the Constitution the twin idea of Inequality in Rights”³⁹ and, comparing the supporters of the proposal to Pontius Pilate, declared that they would be “partak[ing] in the wrong.”⁴⁰

Although they phrased their alternatives to the committee formulation in simpler language and were less openly contemptuous than Sumner of their more moderate colleagues, a number of other Republican senators were equally committed to the passage of a constitutional amendment that would directly outlaw racial discrimination in voting rights. Thus, for example, Republican Sen. John B. Henderson of Missouri asserted:

Every consideration of peace demands it. It must be done to pluck out political disease from the body-politic, and restore the elementary principles of our Government; it must be done to preserve peace in the States and harmony in our Federal system; it must be done to assure the happiness and prosperity of the Southern people themselves; it must be done to establish in our institutions the principles of universal justice; it must be done to secure the strongest possible guarantees against future wars.⁴¹

Most Republicans, however, continued to support the measure that had passed the House. Although William Pitt Fessenden had voted for a

35. *Id.* at 683, 687.

36. *Id.* at 674.

37. *Id.* at 673.

38. *Id.*

39. *Id.*

40. *Id.* at 674.

41. *Id.* at app. 125; *see also id.* at 736–42 (statement of Sen. Henry Lane), 831–35 (statement of Sen. Daniel Clark), 915 (statement of Sen. Jacob Howard), app. 98–105 (statement of Sen. Richard Yates).

proposal much like Henderson's during the deliberations of the committee itself, both he and fellow Republican committee member George H. Williams of Oregon now suggested that the newly freed slaves were in fact not yet ready to be trusted with the right to vote. Fessenden asserted:

I take it no one [including Sumner] contends . . . that now at this time the whole mass of the population of the recent slave States is fit to be admitted to the exercise of the right of suffrage. I presume no man who looks at the question dispassionately and calmly could contend that the great mass of those who were recently slaves . . . and who have been kept in ignorance all their lives, oppressed, more or less forbidden to acquire information, are fit at this day to exercise the right of suffrage, or could be trusted to do it, unless under such good advice as those better able might be prepared to give them.⁴²

Similarly, Williams pleaded:

[G]ive these men a little time, give them a chance to learn that they are free, give them a chance to acquire some knowledge of their rights as freemen; give them a chance to learn that they are independent and can act for themselves; give them a chance to divest themselves of that feeling of entire dependence for subsistence and the sustenance of their families upon the land holders of the South to which they have been so long accustomed . . . and I will go with [Sumner and Henderson] to give them the right of suffrage.⁴³

However, the supporters of the joint committee formulation continued to rely primarily on the argument that proposals to directly ban racial discrimination in voting qualifications had no chance of being ratified. Fessenden in particular made no effort to disguise his disdain for Sumner's insistence that Republicans maintain ideological purity at all costs, declaring:

I do not think it my duty as a legislator in [the Senate] to trouble myself much about what are called abstractions. My constituents did not send me here to philosophize. They sent me here to act, to find out, if I could, what is best for the good of the whole, and to do it, and they are not so short-sighted as to resolve that if they

42. *Id.* at 704.

43. *Id.* at app. 95.

cannot do what they would, therefore they will do nothing.⁴⁴

Fessenden also observed:

The argument that addressed itself to the committee was, what can we accomplish? What can pass? If we report [an African-American suffrage amendment] is there the slightest possibility that it will be adopted by the States and become a part of the Constitution of the United States? It is perfectly evident that there could be no hope of that description.⁴⁵

Most Republicans agreed with this assessment of the political situation. On a number of different occasions, the Senate voted on language such as that which was proposed by Sumner and Henderson, but none of these proposals received the votes of more than ten Republican senators.⁴⁶ However, at this stage in the process, Fessenden and his allies were also unsuccessful in obtaining the support necessary to pass a constitutional amendment that would have changed the basis of representation. While the measure proposed by the joint committee received a slim majority in the Senate when the roll call vote was taken on March 9, 1866, Sumner and four other radicals joined a group of conservative Republicans and the united Democrats to deny supporters of the measure the two-thirds majority necessary for passage.⁴⁷

However, the political situation changed dramatically on March 27, when President Andrew Johnson vetoed the Civil Rights Act of 1866. The terms in which the veto message was couched made it clear that Johnson and the mainstream Republicans would never be able to come to an agreement on the conditions under which the ex-Confederate states would be allowed to regain their status as full partners in the Union.⁴⁸ Thus, it became almost certain that the issue of reconstruction would dominate the upcoming elections in the fall of 1866 and that Republicans would need a coherent plan for reconstruction to present to the voters.

44. *Id.* at 705.

45. *Id.* at 704.

46. *Id.* at 1284, 1287, 1288.

47. *Id.* at 1289. The debates over the committee proposal are described in detail in Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 153–68 (2015).

48. BENEDICT, *supra* note 8, at 164; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 250–52 (1988) [hereinafter FONER, RECONSTRUCTION]; ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 326 (1960).

Such a plan had been devised by Republican activist Robert Dale Owen of Indiana. The Owen plan included both a five-part constitutional amendment and a bill that would have provided that once the amendment had become part of the Constitution, any of the ex-Confederate states that ratified the amendment would be entitled to regain its status as a full partner in the Union. Among other things, the Owen amendment would have outlawed racial distinctions in qualifications for voters after July 4, 1876, and in the interim would have excluded those who were denied the right to vote on racial grounds from the calculations used to determine representation in the House of Representatives.⁴⁹

All of the provisions of the Owen plan were initially approved by the joint committee over the unanimous opposition of committee Democrats on April 21. The eight Republicans who were present for the initial committee vote were almost united in support of these sections. Among Republicans, the only dissenter was Rep. George S. Boutwell of Massachusetts, who consistently supported immediate imposition of a race-blind suffrage requirement.⁵⁰

However, as details of the Owen plan became publicly known, it became clear that many mainstream Republicans continued to oppose the idea of providing direct constitutional protection of the right of African-Americans to vote. Thus, for example, the *Cleveland Daily Herald* reported that many Republicans had concluded that “the attempt to force negro suffrage upon the States by Congressional action must . . . be abandoned.”⁵¹ Similarly, the New York congressional delegation produced a reconstruction plan that notably omitted any reference to a requirement of race-blind suffrage but was similar to the Owen proposal in all other relevant respects. A correspondent of the *New York Times* observed, “The question of a negro-suffrage condition, either immediate or remote, was received with very little favor.”⁵²

Faced with this reality, the joint committee did an about-face on the suffrage issue. On April 25, Republican Sen. George H. Williams of Oregon moved that the committee reconsider its decision to submit the Owen amendment to the full House of Representatives and the Senate, and the motion was passed over the dissents of Jacob Howard of Michigan and

49. KENDRICK, *supra* note 6, at 83–84.

50. *Id.* at 86.

51. *The Reconstruction Question*, DAILY CLEVELAND HERALD, Apr. 27, 1866, at 2, https://go.gale.com/ps/i.do?p=NCNP&u=lln_alsu&id=GALE|GT3005197827&v=2.1&it=r&sid=NCNP&asid=492d5b97 [<https://perma.cc/ZD9M-49VE>].

52. *Action of the New-York Delegation on Reconstruction*, N.Y. TIMES, Apr. 27, 1866, at 1.

Republican Rep. Thaddeus Stevens of Pennsylvania.⁵³ Three days later, only Howard and Republican Rep. Elihu B. Washburne of Illinois demurred when Stevens moved to have the prohibition on racial qualifications for voting removed from the proposed constitutional amendment.⁵⁴ Instead, the only suffrage-related proposals in the five-part amendment that was ultimately reported were section two, which provided that, with certain exceptions, the number of representatives to which a state was entitled in the House of Representatives would be reduced if the state refused to extend the right to vote to some groups of adult males, and section three, which disenfranchised those who had supported the rebellion.⁵⁵

Despite the deletion of the explicit prohibition on racially discriminatory qualifications for voters, opponents of the proposed Fourteenth Amendment argued that section one of the proposal, which prohibited states from “abridg[ing] the privileges or immunities of citizens of the United States” or “deny[ing] to any person . . . the equal protection of the laws,” would have the same effect as the deleted provision.⁵⁶ Republicans, however, denied this claim. Thus, speaking in the capacity of official representative of the joint committee itself, Jacob Howard insisted that “[t]he right of suffrage is not . . . one of the privileges or immunities . . . secured by the Constitution” and thus that section one “does not give . . . the right of voting [to anyone].”⁵⁷ Against this background, the requisite majorities in both houses of Congress⁵⁸ passed the five-part committee proposal and sent it to the states for ratification.

B. The Debate over African-American Suffrage, 1866-1868

The debate over the Fourteenth Amendment was the centerpiece of the political campaign that led up to the election of 1866. During the campaign, Republicans argued that the proposed amendment should provide the basis for reconstruction, and generally indicated that any of the ex-Confederate states that ratified the amendment would be entitled to be reinstated to the Union. Based on this platform, Republicans won an

53. KENDRICK, *supra* note 6, at 100.

54. *Id.* at 101.

55. *Id.* at 116.

56. CONG. GLOBE, 39th Cong., 1st Sess. 2397, 2538 (1866).

57. *Id.* at 2766.

58. *Id.* at 3042, 3149.

overwhelming victory in the election, gaining two-thirds majorities in both houses of Congress.⁵⁹

Emboldened by this triumph, Republicans moved more aggressively against racial discrimination in voting rights during the lame-duck session of the 39th Congress that convened following the election. Both houses of Congress quickly passed a bill enfranchising African-Americans in the District of Columbia,⁶⁰ and on January 8, 1868, overrode President Andrew Johnson's veto of the measure.⁶¹ In addition, the Senate agreed to a measure previously passed by the House of Representatives that enfranchised African-Americans in the territories controlled by the federal government,⁶² and both houses passed a bill that required the Nebraska legislature to accept a prohibition on racial discrimination in voting rights as a "fundamental condition" of having statehood granted to the territory.⁶³

However, once again it was the need to deal with the problem of reconstruction that prompted the most significant action on the suffrage issue. By 1867, the hopes of those Republicans who believed that the Fourteenth Amendment alone could provide the basis for a final settlement of the issue of reconstruction had been dashed by subsequent events. Despite the defeat of the supporters of Andrew Johnson in the election of 1866, with the exception of Tennessee, the governments of the ex-Confederate states had refused to ratify the amendment. As a result, even the most moderate mainstream Republicans had no choice but to concede the necessity of adopting additional reconstruction measures in the lame-duck session of the 39th Congress that convened in early 1867.⁶⁴ The Military Reconstruction Act that emerged from that session required, among other things, that as a prerequisite for resumption of full status in the Union, the constitutions of the unreconstructed states be rewritten to enshrine the principle of universal manhood suffrage in state law.⁶⁵

The decision to force color-blind suffrage on the South by federal action created both a philosophical and a political dilemma for many Republicans. Despite the ambiguous position of the former members of

59. See, e.g., BENEDICT, *supra* note 8, at 188–209; FONER, RECONSTRUCTION, *supra* note 48, at 264–71.

60. CONG. GLOBE, 39th Cong., 2d Sess. 109, 138 (1867).

61. *Id.* at 313–14, 344.

62. *Id.* at 382–99.

63. *Id.* at 481–87.

64. BENEDICT, *supra* note 8, at 212.

65. For descriptions of the complex dynamic that ultimately produced the Military Reconstruction Act, see, for example, BENEDICT, *supra* note 8, at 210–43; FONER, RECONSTRUCTION, *supra* note 48, at 271–91; and MCKITRICK, *supra* note 48, at 473–85.

the Confederacy, most Americans were accustomed to viewing those states as members of the Union. Indeed, the claim that the ex-Confederate states had never lost this status had been the foundation of the political theory upon which the Union effort in the Civil War had been based. Thus, the passage of the Military Reconstruction Act left Republicans open to the charge that they were asserting an authority that might be used to control the electoral process even in states that had never purported to secede.

Initially, some Republicans believed that the emergence of a national consensus on the issue of African-American suffrage might resolve the problem. Their hopes were fed by a suggestion by the *Chicago Times*—a Democratic organ—that the opposition party should accept and embrace the inevitability of impartial suffrage.⁶⁶ It soon became clear, however, that most Democrats did not share the sentiments expressed by the *Times* and that failure to effectively address the seeming inconsistencies in the Republican position on African-American suffrage could have adverse political consequences.

These problems were particularly acute for Republicans in the ex-Confederate states—a region in which the party hoped to develop and maintain substantial political power. White Southern Democrats could claim that their region was being singled out for unduly oppressive federal action and could also contend that the absence of African-American suffrage requirements in the North demonstrated that Republicans were not in fact actually concerned about the welfare of the freedmen but were instead simply using the former slaves as pawns to further Republican political goals. Both of these claims provided effective ammunition for assaults on Republican organizing efforts in the South.⁶⁷

Republicans made a variety of familiar arguments in an effort to blunt the force of these attacks. First, they emphasized the fact that, in constitutional terms, the position of the ex-Confederate states could still be conceptualized as different from that of their Northern counterparts. From this perspective, federal power to regulate suffrage in the South might conceivably be justified by reference to the war power—a rationale that would not be available with respect to federal action requiring the Northern states to allow African-Americans to vote.⁶⁸ In addition, Republicans constantly stressed the need to create a class of African-American voters that would provide a counterweight to the political power

66. MCKITRICK, *supra* note 48, at 463.

67. CONG. GLOBE, 39th Cong., 2d Sess. 1372 (1867) (statement of Sen. John Henderson); *Equal Suffrage*, HARPER'S WKLY., Apr. 27, 1867, at 258.

68. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 1365 (1867) (statement of Sen. Jacob Howard).

of rebellious whites, a need that obviously did not exist in the states that had adhered to the Union cause.⁶⁹ Finally, Republicans argued that the social and legal climate in the erstwhile slave states placed African-Americans at particular risk, and that granting the freedmen the ballot was the best and least intrusive means of protecting them from the predations of their former masters.⁷⁰

In addition to relying upon the special circumstances that they claimed justified federal action on African-American suffrage in the South, Republicans also responded more directly to the charge of hypocrisy by redoubling their efforts to have African-Americans enfranchised in the North through the process of state constitutional reform, and in 1867, Republican-controlled state legislatures succeeded in having the issue placed on the ballot for fall elections in Kansas, Minnesota, and Ohio. However, reform on a state-by-state basis was by its nature a gradual, drawn-out process and in any event could not resolve the federal constitutional issues that were raised by the suffrage provision of the Reconstruction Act. Thus, for many Republicans, the idea of taking federal action that would require states to allow African-Americans to vote throughout the nation became increasingly attractive.

Radical Republicans continued to press for a statute that would outlaw racial discrimination in suffrage throughout the nation. With the Fourteenth Amendment not yet ratified, radicals reiterated their contention that Congress could derive the requisite authority to pass such a statute from either the Guarantee Clause or the enforcement provision of the Thirteenth Amendment. The most persistent and vociferous supporters of this view were Sens. Charles Sumner and Henry Wilson, both of whom sponsored national impartial suffrage bills that were introduced during the first session of the 40th Congress.⁷¹

However, many mainstream Republicans did not share the broad conception of federal power that underlaid the Sumner and Wilson proposals. The counterargument of Republican Sen. Lyman Trumbull of Illinois was among those that received the widest circulation. While noting his support for the basic principle of impartial suffrage and state constitutional amendments embodying this principle, Trumbull averred that “even to do a right thing in a wrong way is often fraught with greater danger than to leave the thing undone, and is never justifiable when there is a right way by which it may be accomplished.”⁷² He warned against

69. See, e.g., *Kentucky Politics*, CINCINNATI COM., Apr. 27, 1867, at 2.

70. *The Last Veto*, N. AM. & U.S. GAZETTE (Phila.), Mar. 25, 1867, at 2.

71. CONG. GLOBE, 40th Cong., 1st Sess. 292, 345 (1867).

72. *THE SUFFRAGE QUESTION: Can Congress Regulate Suffrage in the States—Views of Hon. Lyman Trumbull*, N.Y. TIMES, Sept. 2, 1867, at 2.

constitutional theories that granted Congress unlimited discretion, asserting that “to allow [Congress] to exercise powers not granted would be to make [the legislators] the masters instead of the servants of the people, and such a representative Government would be little better than a despotism.”⁷³ Turning specifically to the Guarantee Clause, Trumbull declared that permitting Congress to control voter qualifications in the loyal states would be “a sacrifice of the obvious meaning and spirit of [the Constitution]”⁷⁴ and that the adoption of a statute requiring states to allow African-Americans to vote “would be the subversion instead of the guarantee of republican forms of government, and would necessarily abrogate all existing State Governments.”⁷⁵

Against this background, the key test of support for a suffrage bill during the first session of the 40th Congress came on July 12, 1867. On that date, in apparent contravention of a previous resolution limiting the business of the session to matters related to Reconstruction, Sumner attempted to bring his suffrage bill to the Senate floor for consideration. However, on the question of whether his motion was in order, Sumner was able to garner the support of only twelve of his Republican colleagues, as fifteen Republicans joined seven Democrats in opposition.⁷⁶

The refusal of conservative and moderate Republicans to countenance federal suffrage legislation should not be taken as evidence that they opposed a national guarantee of impartial suffrage in principle. Indeed, by mid-1867, a consensus favoring such a guarantee seems to have emerged among mainstream Republican leaders of all stripes. The crucial difference was that, unlike more radical Republicans who generally believed that the guarantee could be provided by statute, their more conservative and moderate compatriots believed that a constitutional amendment was necessary. While the supporters of this approach understood that such an amendment would constitute an unprecedented federal intervention into the affairs of state government, the nature of that encroachment would be limited by its terms and would not imply that the scope of federal power should be interpreted broadly in other contexts. Thus, African-Americans could be provided with access to the ballot while leaving the traditional distribution of power between the state and federal governments otherwise undisturbed.

With these considerations no doubt in mind, even before the passage of the Reconstruction Act of 1867, important moderate journals such as

73. *Id.*

74. *Id.*

75. *Id.*

76. CONG. GLOBE, 40th Cong., 1st Sess. 615 (1867).

the *Springfield Republican* and the *Chicago Tribune* expressed the view that the adoption of a suffrage amendment would provide a simple, final solution to the problem of reconstruction more generally.⁷⁷ The subsequent imposition of universal suffrage on the ex-Confederate states provided further impetus to the movement for such an amendment. For example, the *Republican* asserted that for the northern states to demand universal suffrage as a precondition for readmission while not recognizing the right of African-Americans to vote in their own states was “contemptible.”⁷⁸ Similarly, in the same editorial in which it attacked the attempt to pass a national suffrage bill, the *New York Times* declared that it was necessary to “strengthen [the principle of impartial suffrage] with constitutional forms so that no single State shall have the power to disturb it.”⁷⁹

Seeking to give these sentiments more concrete form, on March 7, 1867, John Henderson reintroduced his proposal for a constitutional amendment prohibiting racial discrimination in voting rights.⁸⁰ Perhaps because Congress was preoccupied with the adoption of more general reconstruction measures, no real effort was made to press for the adoption of the Henderson amendment during the short sessions of March and July 1867. Initially, the prospects for passage of the amendment during the long session scheduled to begin in early 1868 seemed to be brighter. However, in the interim, the elections of 1867 intervened and dramatically changed the political dynamic.

These elections did not involve the selection of national officials. Rather, voters were being called upon to choose the officers who would serve at the state and local levels. Nonetheless, the elections were also in part seen as a referendum on issues of national policy. African-American suffrage was one such issue. While voters were being asked to approve measures that would have allowed African-Americans to vote in several different states, the state of Ohio was generally considered to be the most important barometer of sentiment on this issue. For example, the *Cincinnati Commercial* averred that, in that state, “if the [impartial suffrage] amendment does not prevail, the Republican party will be

77. *No More Floundering*, *SPRINGFIELD REPUBLICAN*, Jan. 1, 1867, at 2; *Universal Suffrage*, *CHICAGO TRIB.*, Feb. 17, 1867, at 2.

78. *How the South Should Look at it*, *SPRINGFIELD REPUBLICAN*, Mar. 13, 1867, at 4.

79. *Universal Suffrage—Congress and the States*, *N.Y. TIMES*, July 5, 1867, at 4.

80. *CONG. GLOBE*, 40th Cong., 1st Sess. 13 (1867).

substantially defeated” even if party members were able to claim all other state offices.⁸¹

When the votes were tallied, it became clear that Republicans had suffered a stunning defeat. The suffrage amendment in Ohio not only received less than 46 percent of the votes that were cast, but also proved to be a formidable drag on Republican candidates, as the party lost control of the state legislature and barely retained the governorship. The news for Republicans was no better elsewhere, as the efforts to give African-Americans access to the ballot box were also defeated in both Kansas and Minnesota, and the party lost ground in virtually every state in which elections were contested, including California, New York, and Pennsylvania.⁸²

The potential implications of this debacle went well beyond the diminution of Republican power in the states that had held local elections in 1867. The national elections of 1868 were fast approaching, and Republicans were well-aware that African-American suffrage might be a key issue in that election. Against this background, the responses of the different elements of the party to their defeat in 1867 varied widely.

Radical Republicans blamed the defeat on the moderate wing of the party and continued to argue that Congress should immediately act on impartial suffrage legislation.⁸³ Yet despite their defiant rhetoric, radicals were clearly disheartened by the results of the 1867 elections. Thus, even the normally indefatigable Charles Sumner was forced to recognize that “times haven’t been propitious” for African-American suffrage legislation.⁸⁴

Nonetheless, in March 1868, Republican Rep. John H. Broomall of Pennsylvania brought just such a bill to the floor of the House of Representatives for debate.⁸⁵ In expressing his opposition, Republican Rep. Rufus P. Spalding of Ohio not only condemned the measure as unconstitutional but also declared that passage of such a bill would be “the death-knell of our hopes . . . in the approaching presidential canvass.”⁸⁶ Similarly, the *Republican* predicted that the enactment of a national suffrage law would “give [almost] every state in the Union to the

81. *The Constitutional Amendment*, CINCINNATI COM., Sept. 18, 1867, at 4. To the same effect, see *Suffrage for Women*, NAT’L ANTI-SLAVERY STANDARD, Oct. 5, 1867, at 3.

82. BENEDICT, *supra* note 8, at 272.

83. See, e.g., *The Thirty-Fourth National Anti-Slavery Subscription Anniversary*, NAT’L ANTI-SLAVERY STANDARD, Jan. 18, 1868, at 2.

84. *Washington Letter*, CINCINNATI COM., Jan. 1, 1868, at 2.

85. CONG. GLOBE, 40th Cong., 2d Sess. 1955 (1867).

86. *Id.* at 1971.

Democrats.”⁸⁷ With sentiment so strongly against it, the Broomall bill never even came to a vote, and by March 19 it was reported that no Republican had “the slightest idea” that any such measure would be voted on, let alone adopted, during that session of Congress.⁸⁸

The defeat in Ohio also severely weakened the moderate/conservative drive for a constitutional amendment dealing with suffrage. Some moderate Republicans remained committed to the passage of such an amendment. For example, *The Republican* argued that “the Republican party must stand for equal suffrage, or confess that it has no basis at all on which it can stand”⁸⁹ and contended that, given the course that the process of reconstruction had already taken, “[t]here is really only one thing to be done now, and that is to propose the establishment of equal suffrage in the Constitution.”⁹⁰ However, the *Commercial* disagreed, asserting that the election of 1867 had settled the point and that Republicans should not press the suffrage issue in the upcoming campaign.⁹¹ It was reported that some mainstream Republicans were even willing to abandon the requirement that the ex-Confederate states guarantee impartial suffrage as a condition for readmission.⁹²

Given these circumstances, the local elections that were held in the spring of 1868 took on special significance. In March, a smashing Republican success in New Hampshire gave the pro-suffrage element of the party a major boost. However, the hopes of this group of Republicans were dashed by the results of the April election in Connecticut, which were inconclusive, and by those in Michigan, where the inclusion of an African-American suffrage provision led to the rejection of a proposed new state constitution. As the *New York Times* noted, the results of these elections demonstrated that the Republican party “has no strength to throw away, and that it has good reason for behaving itself just as well as it can.”⁹³ The *Commercial* concurred, reiterating its position that “the Party cannot risk success this fall by a conspicuous recognition of the doctrine . . . of negro suffrage in the North.”⁹⁴ Even the *Republican* was forced to retreat, conceding bitterly that the Connecticut and Michigan results

87. *Untitled*, SPRINGFIELD REPUBLICAN, Oct. 15, 1867, at 2.

88. *From Washington*, SPRINGFIELD REPUBLICAN, Mar. 19, 1868, at 2.

89. *Untitled*, SPRINGFIELD REPUBLICAN, Oct. 14, 1867, at 2.

90. *Party Issues for 1868*, SPRINGFIELD REPUBLICAN, Jan. 3, 1868, at 2.

91. *The Democratic Platform of the Eighth of January*, CINCINNATI COM., Jan. 10, 1868, at 4.

92. *Untitled*, SPRINGFIELD REPUBLICAN, Oct. 12, 1867, at 4.

93. *The Spring Elections*, N.Y. TIMES, Apr. 13, 1868, at 4.

94. *The Republican National Convention*, CINCINNATI COM., May 14, 1868, at 4.

[i]ndicate beyond a doubt that the rank and file of the republican party . . . are yet so far from being unanimous in favor of black suffrage, that the more immediate interests of reconstruction might be jeopardized by forcing the issue at this juncture, and it is therefore certain that the party leaders and party press will only be too ready to ignore or postpone it.⁹⁵

The Republicans who wished to downplay the issue of African-American suffrage dominated proceedings when the party convention assembled to choose a presidential candidate in Chicago on May 19 and 20. By the time that the convention opened, the presidential ambitions of Benjamin Wade and Chief Justice Salmon P. Chase—both of whom were prominently associated with the radical pro-suffrage position—had evaporated. Instead, the nomination of Ulysses S. Grant, the favorite of the conservative and moderate wings of the party, was a foregone conclusion.⁹⁶ Wade was also shunted aside for the vice presidency in favor of Schulyer Colfax of Indiana, the less ideologically committed Speaker of the House.⁹⁷ Finally, although radicals continued to demand that the party irrevocably bind itself to the pursuit of impartial suffrage,⁹⁸ the convention deliberately evaded that key issue. While supporting the power of Congress to require universal suffrage in the ex-Confederate states, the party platform also declared that “the question of suffrage in all the loyal States properly belongs to the people of those States.”⁹⁹

Although the adoption of this provision of the platform infuriated many radicals, in fact the action of the convention had aptly captured the mood of a majority of Republicans. For example, although expressing regret that the party could not bring the country to accept the concept of impartial suffrage, the *Republican* nonetheless concluded that “since it has been distinctly proved that it cannot, there is no reason why it should go so far ahead as to lose the nation in a vain effort to achieve an impossible good.”¹⁰⁰ Thus, while leaving the way open for individual Republican candidates to express support for the idea of taking federal action to

95. *Untitled*, *SPRINGFIELD REPUBLICAN*, Apr. 9, 1868, at 2.

96. MARTIN MANTELL, *JOHNSON, GRANT AND THE POLITICS OF RECONSTRUCTION* 69–70 (1973).

97. *Id.* at 98–99.

98. *The Republican Party—Suffrage*, *NAT’L ANTI-SLAVERY STANDARD*, May 9, 1868, at 2.

99. 1 DONALD JOHNSON, *NATIONAL PARTY PLATFORMS* 38 (1978).

100. *Our Platform*, *SPRINGFIELD REPUBLICAN*, May 23, 1868, at 4; *see also The Political Situation*, *CINCINNATI COM.*, May 23, 1868, at 4; *The Platform and the Nominations*, *NATION*, May 28, 1868, at 425.

enfranchise African-Americans, the platform sought to dispel the notion that the party as an institution was committed to the idea that such action was necessary.

However, this effort was hampered by a number of different factors. First, the platform plank could not erase the memory of the forceful position on the issue that the party's candidates had taken only a year before. In addition, the platform language failed to deal effectively with the tension between the party's refusal to endorse a nationwide suffrage measure and its insistence that the ex-Confederate states enfranchise their African-American populations as a precondition to readmission. This tension was only exacerbated in the period between the convention and the election when, over the objection of some moderate representatives and senators, provisions requiring the maintenance of universal suffrage were included as "fundamental conditions" in the bills that restored seven different southern states to full participation in the Union.¹⁰¹

The debate over fundamental conditions highlighted the constitutional issues involved in federal regulation of access to the ballot. In addition, the debate provided the Democrats with a new weapon that they could use in the presidential campaign. After an extremely contentious convention and a dalliance with the idea of selecting Chase as their candidate on a platform that endorsed impartial suffrage, the Democrats ultimately chose Horatio Seymour of New York to be their standard bearer and Francis A. Blair, Jr. of Missouri to be his running mate. Although the party platform did not explicitly take the position that African-Americans should not be allowed to vote, the platform did declare that "any attempt by congress, on any pretext whatever, to deprive any State of [the right to regulate access to the ballot], or interfere with its exercise, is a flagrant usurpation of power, which can find no warrant in the Constitution."¹⁰²

During the presidential campaign that followed, Republicans generally tried to avoid the suffrage issue altogether. By contrast, Democrats focused on the issue from a variety of different perspectives. Reminding voters of the positions that the Republican party had taken in the 1867 elections, Democrats sought to portray the Republicans as the champion of voting rights for African-Americans¹⁰³ and described the Republican platform plank on this issue as a "cowardly . . . evasive

101. The debate surrounding the imposition of fundamental conditions is described in BENEDICT, *supra* note 8, at 315–22.

102. Democratic Party Platform of 1868, in JOHNSON, *supra* note 99, at 38.

103. *Speech of Daniel Voorhees*, CINCINNATI COM., June 13, 1868, at 1; *Speech of John Reid*, CINCINNATI COM., June 20, 1868, at 2; *Speech of Allan Thurman*, CINCINNATI COM., July 20, 1868, at 2–3.

dodge”¹⁰⁴ which covered the true Republican position with “the thin veil of expediency.”¹⁰⁵

Building on the same theme, the *Philadelphia Age* urged voters to dismiss the disclaimers in the platform for two reasons. First, the *Age* reminded voters that during the 1866 campaign Republicans had promised not to impose African-American suffrage on the Southern states and had promptly broken that promise immediately after returning to office.¹⁰⁶ Second, the *Age* asserted that the imposition of fundamental conditions on the readmitted states demonstrated that the platform plank was a “humbug.”¹⁰⁷ Taking the same idea further, Democrats suggested that the plank showed a more general Republican propensity for political hypocrisy and cowardice.¹⁰⁸

But despite Democratic efforts to exploit the suffrage question and other issues, Grant’s personal popularity and the Republican pledge to bring a speedy end to reconstruction proved too much for the Democrats to overcome in the election of 1868. Republicans swept to victory in the presidential election, and despite losing twenty seats in the House of Representatives, also maintained a substantial majority in both houses of Congress. This victory provided the backdrop for a renewed struggle over African-American suffrage in the lame-duck session of the 40th Congress that convened in early 1869.

II. THE DRAFTING OF THE FIFTEENTH AMENDMENT

A. *The Aftermath of the Election*

Within weeks of the election, representatives of a variety of different viewpoints within the Republican party renewed the call for a constitutional amendment that would finally settle the suffrage issue.¹⁰⁹ Several factors influenced the reinvigoration of the drive for such an amendment. First, the election itself had reduced the political problems attendant to the aggressive pursuit of African-American suffrage. No matter what the public reaction, the presidency would be in Republican

104. *Speech of Michael Kerr*, CINCINNATI COM., June 13, 1868, at 1.

105. *Speech of A. K. Bradley*, CINCINNATI COM., July 22, 1868, at 2.

106. *Not Twice*, PHILA. AGE, May 23, 1868, at 2.

107. *Arkansas*, PHILA. AGE, June 3, 1868, at 2.

108. *Speech of George Pendleton*, PHILA. AGE, Aug. 1, 1868, at 2.

109. *Some Considerations Why Impartial Suffrage Should be Made Universal*, CINCINNATI COM., Nov. 9, 1868, at 4; *Amending the Constitution*, HARPER’S WKLY., Nov. 28, 1868, at 754; *Our Washington Correspondence*, NAT’L ANTI-SLAVERY STD., Nov. 14, 1868, at 3.

hands for four years and both the House of Representatives and the Senate would be safely Republican for at least two years. Of course, advocacy of race-blind suffrage could still hurt the party in state and local elections, but that problem would always remain. Thus, the political dangers surrounding the issue were at their nadir in early 1869.

In addition, despite their victory, the election of 1868 had engendered within Republican ranks a sense that the lame-duck session of the 40th Congress might be the last opportunity to pass a suffrage amendment. During that session, mainstream elements of the party would have a clear two-thirds majority in both houses of Congress. Indeed, Republican strength had been enhanced with the arrival of senators and representatives from a number of newly readmitted Southern states. At the same time, although the situation was not entirely clear, some Republicans feared that the necessary two-thirds majority might be lacking in the House of Representatives in the 41st Congress that was to convene in March 1869.¹¹⁰ Others expressed the concern that the party might soon lose control of some state legislatures whose concurrence would be necessary for ratification of any proposal for a constitutional amendment that might emerge from Congress.¹¹¹

In short, the elections of 1868 provided the Republican party with its best opportunity to resolve the tension that had been inherent in its position on the issue of African-American suffrage since early 1867. On one hand, Republicans insisted that the ex-Confederate states allow the newly freed slaves to vote as a precondition for readmission to the Union. But on the other hand, despite being in firm control of Congress, Republicans had failed to adopt any measure that would impose a similar mandate on the states that had adhered to the Union.

There can be little doubt that Republicans felt this apparent dissonance acutely. As already noted, the situation made Southern Republicans particularly uncomfortable. For example, Republican Sen. Frederick A. Sawyer from the recently reconstructed state of Tennessee complained that “[we] have for two years been subject to the charge . . . that the Republican party of the northern States put the negro on one platform in the loyal States and upon another platform in the lately disloyal States.”¹¹² But the sources of Republican dissatisfaction went beyond simple sectional discontent. For example, Rep. James G. Blaine later recalled that

110. CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869); *Now Is the Time*, NAT'L ANTI-SLAVERY STANDARD, Nov. 28, 1868, at 1.

111. *Now Is the Time*, *supra* note 109, at 1; *The Constitutional Amendment*, N. AM. & U.S. GAZETTE (Phila.), Feb. 6, 1869, at 2.

112. CONG. GLOBE, 40th Cong., 3d Sess. 1628 (1868).

Republicans believed that it was “obviously unfair and unmanly”¹¹³ to impose impartial suffrage on the South without requiring similar action from the North and that most party members “became heartily ashamed of [the platform position on the suffrage issue] long before the political canvas had closed.”¹¹⁴ Thus, Blaine observed that there was a “desire and a common purpose among Republicans to correct the unfortunate position in which the party had been placed by the National Convention” and take action on a suffrage measure that would have nationwide applicability.¹¹⁵ Similarly, during the debate over the Fifteenth Amendment, Republican Sen. James W. Nye observed that “[although] [a]ll of my education and my sympathies are with [the Northern] States . . . they are not strong enough to make me desire any rule of conduct or any privilege for them that is not granted to the southern states” and that “[m]y desire in the passage of the [constitutional amendment is] to secure uniformity, to stop this bickering about one law for one locality and another law for another.”¹¹⁶

Other considerations also influenced the near-unanimous belief among congressional Republicans that such a measure should be adopted in 1869. Examining the words and deeds of mainstream Republicans in the period from 1866 through 1868, one cannot help but conclude that most party members agreed with the sentiments expressed by Republican Sen. Edmund G. Ross of Kansas, who declared in 1869 that “[t]he first great and sufficient reason why the negro should be admitted to the right of suffrage in all the States is that it is right.”¹¹⁷ Admittedly, during this period many party leaders had at times felt compelled to mute their support for impartial suffrage for reasons of political expediency. But when political conditions permitted, Republican advocacy of color-blind voting had been consistent and forceful. Indeed, Republicans had sometimes supported the cause of African-American suffrage even when that support carried with it substantial political dangers.¹¹⁸

By proceeding through the medium of a federal constitutional amendment, Republicans could avoid the problems that in a number of

113. JAMES BLAINE, *TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD WITH A REVIEW OF THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860*, at 412 (1884).

114. *Id.*

115. *Id.*

116. CONG. GLOBE, 40th Cong., 3d Sess. 1306 (1869).

117. *Id.* at 983.

118. LaWanda Cox and John Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J.S. HIST. 303 (1967).

cases had thwarted their efforts to enfranchise African-Americans on a state-by-state basis. While the individual states would still have to ratify any amendment, the ratification process would not require that Republicans triumph in the kind of popular referenda that had often rejected state constitutional amendments designed to provide African-Americans with access to the ballot. Instead, a proposed federal amendment would need to attract only the support of state legislatures—bodies in which Republicans had great success in gaining majority support for race-blind suffrage.

But states that had not yet enfranchised African-Americans in 1869 were not the only Republican concern. Many Republicans also doubted the security of the political rights of the former slaves in the ex-Confederate states, notwithstanding the mandate that those states provide for African-American suffrage in their state constitutions. Thus, for example, even before the elections of 1868, *The Nation* had presciently expressed the fear that after the southern states were restored to their pre-Civil War status, whites would seize control of the state governments and disenfranchise African-Americans.¹¹⁹ While the imposition of fundamental conditions was designed to obviate this danger, many Republicans had doubts regarding the enforceability of these conditions.

The events of late 1868 had done little to ease Republican concerns on this score. In Louisiana, attempts by African-Americans to vote for Republican candidates had been met with violence and intimidation, while in Georgia, the state legislature had refused to seat duly elected African-Americans. Incidents such as these fueled the apprehensions of Republicans who saw the need for a continuing federal commitment to protect the voting rights of the freedmen.¹²⁰

In addition, some Republicans saw the potential for long-term political gains in the loyal states from a federal requirement that African-Americans be granted the right to vote. Their calculations on this issue were obviously complicated, for the elections of 1867 had clearly demonstrated the unpopularity of the concept of African-American suffrage with a critical portion of the electorate. Thus, for example, the *Philadelphia North American* observed that vigorous advocacy of such an amendment would bring with it the loss of some white votes.¹²¹

119. *The Platform and the Nomination*, NATION, May 28, 1868, at 425.

120. *The Platform and the Nomination*, NATION, Jan. 28, 1869, at 124; *A Constitutional Amendment*, NAT'L ANTI-SLAVERY STANDARD, Oct. 17, 1868, at 1; *Georgia and Its Colored Legislators*, N.Y. TIMES, Nov. 16, 1868, at 4.

121. *Passage of the Suffrage Amendment*, N. AM. & U.S. GAZETTE (Phila.), Feb. 1, 1869, at 2.

But throughout the two-year debate over the question, other pro-suffrage Republicans contended that newly enfranchised African-Americans would vote for party candidates in sufficient numbers to offset any loss of white support. In the loyal former slave states of Kentucky, Delaware, and Maryland, votes from large numbers of freedmen were regarded as the best hope for overcoming the power of the state Democratic parties. Although in the free states the number of potential new votes was much smaller, Republicans also needed far fewer additional votes to gain firm control of those state governments. Thus, some argued that a constitutional amendment mandating race-blind suffrage would have a salutary effect on Republican fortunes in those states as well.¹²²

Finally, by dealing conclusively with African-American suffrage, Republicans hoped to remove two volatile issues from the national political debate. The first of these was the issue of race itself. Ever since the formation of the Republican party, Democrats had attempted to use that issue to appeal to a racist white populace. Republicans hoped that by irrevocably granting African-Americans the right to vote, they could finally put the issue of race behind them. Thus, for example, Republican Sen. Oliver H. P. T. Morton of Indiana declared:

The Democratic party for more than twenty years has lived upon the negro question. It has been its daily food, and if the negro question shall now be withdrawn from politics the Democracy, as a party, will literally starve to death. [The adoption of an African-American suffrage amendment] will forever withdraw the subject from politics, and will strike down that prejudice to which the Democratic party has appealed for years.¹²³

Republicans also viewed the adoption of a constitutional amendment granting African-Americans the right to vote as a means to put the issue of reconstruction behind them. The Republican slogan in 1868 had been “let us have peace,”¹²⁴ and Republican Sen. William M. Stewart of Nevada asserted, “Let [impartial suffrage] be made the immutable law of the land; let it be fixed; and then we shall have peace. Until then there is no peace.”¹²⁵ Stewart later observed that in 1869 many Republicans believed that an irrevocable federal guarantee of enfranchisement would “save [the ex-slaves] from peon laws and [allow them to] obtain powerful friends

122. GILLETTE, *supra* note 8, argues that this perception provided the primary impetus for Republican advocacy of an African-American suffrage amendment.

123. CONG. GLOBE, 40th Cong., 3d Sess. 991 (1869).

124. *Let Us Have Peace*, N.Y. TIMES, Aug. 23, 1868, at 4.

125. CONG. GLOBE, 40th Cong., 3d Sess. 668 (1869).

who would prevent [their] reenslavement” and thereby avoid the need for a permanent federal presence to protect the freedmen in the ex-Confederate states.¹²⁶ Similarly, Republican Rep. George Boutwell of Massachusetts predicted that a constitutional amendment guaranteeing African-Americans the right to vote would be “the last . . . of [the] great measures growing out of the rebellion, and necessary for the reorganization and pacification of the country.”¹²⁷

In short, by the time that the lame-duck session of the 40th Congress convened on December 7, 1868, virtually all mainstream Republicans believed that the federal government should take some action that would require the states to allow African-Americans to vote. However, they did not agree on the precise form that the action should take.

B. The Congressional Debate

Initially, the proposed constitutional amendments that were reported to the floors of the House and the Senate by their respective judiciary committees were very similar. In both cases, the language of the proposal mandated that the right to vote shall not be “denied or abridged” on account of race, color, or previous condition of servitude. The major difference was that, in an apparent effort to deal with situations such as that of Georgia, the Senate version would also have prohibited the same kinds of discrimination with respect to the right to hold office.¹²⁸ During the initial consideration of the Senate proposal on January 23, Stewart observed that “I do not think that it will involve long discussion.”¹²⁹ However, this prediction proved to be wildly optimistic. The amendment was not finally approved by Congress until February 26,¹³⁰ and only after a long, complicated series of debates that featured, among other things, an all-night session of the Senate on February 8.

In part, the length of the deliberations reflected the need for mainstream Republicans to deal with the objections raised by Democrats and their allies. Not surprisingly, Democratic complaints were at times couched in openly racist terms. For example, describing African-Americans as morally and intellectually inferior to whites, Democratic Sen. Thomas T. Hendricks of Indiana asserted, “I do not believe that the negro race and the white race can mingle in the exercise of political power

126. WILLIAM STEWART, REMINISCENCES OF SENATOR WILLIAM M. STEWART OF NEVADA 232 (1908).

127. CONG. GLOBE, 40th Cong., 3d Sess. 555 (1869).

128. *Id.* at 286, 668.

129. *Id.* at 541.

130. *Id.* at 1641.

and bring good results to society.”¹³¹ In addition, Democrats sometimes sought to characterize the effort to amend the Constitution as nothing more than a cynical attempt to gain political advantage, with Democratic Sen. James A. Bayard of Delaware declaring that “[t]he intent is, and the sole intent [of the amendment is] to maintain the dominance of the [Republican] party by . . . degradation of the suffrage.”¹³²

However, opponents of the proposed amendment more often cited other reasons for objecting to the Republican initiative. Opponents frequently raised issues of federalism. Thus, contending that the amendment would undermine the position of the states within the federal structure, Sen. James Dixon of Connecticut—a former Republican who by 1869 had joined the Democrats—declared that “it is utterly impossible that any state should be an independent republic which does not entirely control its own laws with regard to the right of suffrage.”¹³³ Building on the same theme, Democrats at times argued that the amendment process could not be used to limit state authority over suffrage, with Thomas Hendricks contending that “the power of amendment is limited to the correction of defects in the practical operations of the Government; but the power of amendment does not carry with it the power to destroy one form of government and establish another”¹³⁴ and that the proposed amendment would “take away from the States a power which they retained and which is necessary to that independence and sovereignty of the States which the original compact contemplated they should enjoy.”¹³⁵

But perhaps the most common Democratic complaint was that the effort to mandate African-American suffrage by federal law was inconsistent with the terms of the party platform on which the Republicans had stood during the election of 1868, and thereby broke an implicit commitment made in that platform. Democrats contended that, in the words of Democratic Rep. Charles A. Eldridge of Wisconsin, “if it be possible that the Republican party can commit itself to anything . . . by its action in national convention, [the party] committed solemnly to the doctrine that the people of the several States have properly the right to control the question of suffrage in their respective States.”¹³⁶ Eldridge declared that “the Republican members [of Congress] cannot force this

131. *Id.* at 989.

132. *Id.* at 1303–04.

133. *Id.* at 705.

134. *Id.* at 988.

135. *Id.*

136. *Id.* at 645.

measure upon the country at this time without covering their party with . . . dishonor, without a shameful violation of party pledges and party faith.”¹³⁷

Democrats also argued that the declaration in the Republican platform should be an important factor in establishing the ratification procedure for any suffrage amendment that might be proposed. They reasoned that voters had chosen the existing state legislatures with the understanding that no such amendment would be put forward by Congress, and that if voters who were opposed to African-American suffrage had been aware that the issue would be presented to the legislature, they might well have chosen to vote for different candidates. Given this problem, Democrats insisted that any amendment should provide that ratification would be accomplished either through the medium of state conventions or by legislatures selected *after* the amendment was proposed by Congress.¹³⁸

Republicans struggled to provide a convincing answer to the claim that the effort to require the states to allow African-Americans to vote was inconsistent with the position that the party had taken during the recently concluded election campaign. One response came from Jacob Howard, who insisted that the statement in the party platform was nothing more than a recognition of the existing state of affairs and did not in any way foreclose the possibility of pressing for a constitutional amendment that would limit the power of the states to regulate access to suffrage.¹³⁹

In any event, this debate was largely academic. As already noted, during the third session of the 40th Congress, mainstream Republicans were uniformly committed to the principle that African-Americans should be allowed to vote. Moreover, they possessed the majorities necessary to pass a constitutional amendment establishing that proposition in both the House of Representatives and the Senate. The only remaining question was whether they could agree on the precise form of the action that should be taken.

1. The Rejection of Statutory Change

Some radical Republicans continued to press for the passage of a statute instead of or in addition to a constitutional amendment. In the House of Representatives, George Boutwell argued that Congress should both pass an impartial suffrage statute and approve a constitutional amendment,¹⁴⁰ while in the Senate, Charles Sumner was the most prominent advocate of the position that Congress should pass *only* a

137. *Id.*

138. *See, e.g., id.* at 673 (statement of Sen. Thomas Hendricks).

139. *Id.* at 986–87.

140. *Id.* at 904.

statute.¹⁴¹ Radicals cited a number of different considerations in arguing for statutory change.

First, supporters of a suffrage statute noted the complexity of the process necessary to produce constitutional change. They observed that while a statute could become effective immediately upon passage by Congress and approval by the President, a constitutional amendment would have to await “the uncertain concurrence of state legislatures.”¹⁴² Thus, at best the effective date of any such amendment would be postponed, and at worst the amendment might never receive the necessary support from state legislatures at all.

In addition, Sumner and other radical Republicans expressed concerns founded in constitutional theory. They feared that by resorting only to a constitutional amendment, Congress would be implicitly conceding that, in the absence of such an amendment, the federal government lacked authority to regulate elections for state offices. This position was anathema to some radicals; indeed, Sumner was so fearful of this possibility that he opposed the passage of any constitutional amendment designed to enfranchise African-Americans. He also suggested that a struggle over ratification in the states would allow the Democratic party to use the issue “as the pudding-stick with which to stir the bubbling mass.”¹⁴³ By contrast, Boutwell, like most radicals, believed that Congress should adopt a constitutional amendment in addition to a statute focusing on the suffrage issue.

In offering their proposal, advocates of the suffrage statute faced the perennial problem of identifying the source of congressional power to address the issue. Sumner took the most extreme ground, reiterating his oft-repeated assertions that “*anything for Human Rights is constitutional*”¹⁴⁴ and that “there can be no State Rights against Human Rights.”¹⁴⁵ More temperate radicals relied on their standard claims related to the scope of the guaranty of a republican form of government in Article IV¹⁴⁶ and the enforcement clauses of both the Thirteenth¹⁴⁷ and Fourteenth Amendments.¹⁴⁸

141. *Id.*

142. *Id.* at 504; *see also id.* at 561, 1001.

143. *Id.* at 904.

144. *Id.* at 902 (emphasis in original).

145. *Id.*

146. *Id.* at 721 (statement of Rep. William Kelley).

147. *Id.* at 1004 (statement of Sen. Richard Yates).

148. *Id.* at 558–59 (statement of Rep. George Boutwell), 1000 (statement of Sen. George Edmunds).

But despite their best efforts, the radical Republicans found relatively little support for their broad conception of federal power. Their arguments were rejected not only by Democrats, but also by a variety of mainstream Republicans, including Sens. Jacob M. Howard of Michigan and Frederick T. Frelinghuysen of New Jersey.¹⁴⁹ Howard emphasized the language of Section 2 of the Fourteenth Amendment,¹⁵⁰ which, Howard asserted, “[p]lainly and in the clearest possible terms recognize[d] the right of each State to regulate the suffrage and to impart or to declare the necessary qualifications of voters.”¹⁵¹

Against this background, it soon became obvious that no suffrage bill could gain the approval of Congress. Sumner’s proposal garnered only nine votes in the Senate,¹⁵² while Boutwell’s bill was never even brought to a vote in the House. Thus, any effort to require states to allow African-Americans to vote would have to take the form of a constitutional amendment. However, the precise form of the amendment to be proposed was determined only after an intense debate among mainstream Republicans over a variety of different options.

2. *Initial Consideration by the House of Representatives*

In the House of Representatives, it was the question of whether the language of Boutwell’s initial proposal provided sufficiently expansive protections that provoked the greatest discord among Republicans. Republican Reps. Samuel Shellabarger and John A. Bingham of Ohio both introduced proposals that were founded on the basic principle of universal manhood suffrage.¹⁵³ Both formulations would have generally required states to allow adult males “of sound mind” access to the ballot but would have allowed states to exclude those who had been convicted of serious crimes. In addition, Shellabarger’s proposal would have allowed the states to deny the ballot to those who had engaged in “insurrection or rebellion against the United States.”¹⁵⁴

Bingham, on the other hand, would have allowed the states to impose a one year residency requirement, observing that “each year there are landed upon our shores hundreds of thousands of adult persons who are

149. *Id.* at 979–80 (statement of Sen. Frederick Frelinghuysen), 1003 (statement of Sen. Jacob Howard).

150. *Id.* at 1003.

151. *Id.*

152. *Id.* at 1041.

153. *Id.* at 638–39 (statement of Rep. Samuel Shellabarger), 638 (statement of Rep. John Bingham).

154. *Id.* at 639.

aliens [and] by the modern invention of forged naturalization papers [allowing] the pollution of the ballot box by thousands who are not entitled to vote, and yet control the elections of the people.”¹⁵⁵ More importantly, unlike Shellabarger’s proposal, Bingham’s formulation would not have allowed the states to exclude men simply because they had participated in the rebellion. Instead, essentially embracing the principles of universal suffrage and universal amnesty, Bingham asserted that “[t]he interests of this great country demand that we shall so frame the fundamental law of the country that we will take not vengeance for the past, but security for the future” and that “[w]e should so amend our Constitution as to summon back to the standard of the country and to the support of its Government the whole multitude of men who but yesterday were in arms against us.”¹⁵⁶

Both proposals drew a variety of criticisms from other mainstream Republicans. For example, Republican Rep. Benjamin F. Butler of Massachusetts contended that the language of both proposals would call into question the ability of the states to require that voters register prior to casting ballots¹⁵⁷ and indicated that he supported the imposition of educational requirements as well.¹⁵⁸ In addition, the idea of universal amnesty that underlaid Bingham’s formulation drew the ire of Republicans such as Rep. Glenn W. Scofield of Pennsylvania, who characterized the concept as “an undeserved . . . act of grace to the cruel men, who for four years drenched the land with blood, and whose implacable hate still pursues the unforgiven Unionist [in the South] with persecution, banishment, and murder.”¹⁵⁹ Ultimately, Shellabarger’s amendment was defeated on a vote of 126–61¹⁶⁰ and Bingham was able to garner only 24 votes in support of his proposal.¹⁶¹ After the defeat of these alternatives, Boutwell’s original proposal was adopted by a vote of 150–42.¹⁶²

3. *Initial Consideration by the Senate*

The Senate began its work on a suffrage amendment even before the House had completed the consideration of its version of the amendment. In his speech introducing the proposal of the Senate Judiciary Committee

155. *Id.* at 722.

156. *Id.* at 723.

157. *Id.* at 724.

158. *Id.* at 724–25.

159. *Id.* at 725.

160. *Id.* at 744.

161. *Id.*

162. *Id.* at 745.

on January 28, William Stewart pressed for quick action. He noted that “[e]very person in the country has discussed it; it has been discussed in every local paper, by every local speaker; [and] it has been discussed at the firesides.”¹⁶³ Thus, he declared, “I cannot add to the many eloquent speeches that have [already] been made on this great question . . . I want a vote . . . I hope we shall soon have a vote upon the question.”¹⁶⁴

However, the liberal Senate rules left Stewart powerless to attain his wish. The Judiciary Committee proposal was the subject of seemingly endless discussions, including an all-night session on February 8, and a wide variety of amendments were offered. For example, on January 29, seeking to prohibit discrimination on the basis of sex as well as discrimination on the basis of race, Republican Sen. Samuel C. Pomeroy of Kansas moved to amend Stewart’s proposal to provide that “the right of citizens . . . to vote and hold office shall not be denied or abridged . . . for any reasons not equally applicable to all citizens of the United States.”¹⁶⁵ Asserting that “human nature, claiming its rights, has no sex” and that “the mind and the soul have no gender,”¹⁶⁶ Pomeroy insisted that “[t]here are no reasons for giving the ballot to a man that do not apply to a woman with equal force.”¹⁶⁷

By making this proposal, Pomeroy raised an issue that divided Republicans throughout the early Reconstruction era. Feminists and their allies had been infuriated by the language of section two of the Fourteenth Amendment, which reduced the representation of states that denied the right to vote to certain classes of men but allowed states to exclude women from voting rights without suffering any penalty.¹⁶⁸ However, prior to 1869 the most complete congressional discussion of the issue of whether women should be allowed to vote had taken place in December 1866, in connection with the Senate’s consideration of the bill that was designed to extend the right to vote to African-Americans in the District of Columbia.

163. *Id.* at 668.

164. *Id.*

165. *Id.* at 708.

166. *Id.* at 709.

167. *Id.* at 710. For other discussions of the debate over the issue of women’s suffrage during the early Reconstruction era, see, e.g. FAY E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* (2011); ELLEN C. DU BOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA 1848-1869*, at 71–72 (1978); FONER, *RECONSTRUCTION*, *supra* note 48, at 112–15 and sources cited therein.

168. Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 *YALE L.J.* 1153, 1155–57 (1988).

In an effort to embarrass supporters of the bill, Sen. Edgar Cowan of Pennsylvania—a nominal Republican who by late 1866 had become a consistent supporter of the Democrats on race-related issues—proposed an amendment that would have extended the right to vote to women in the District.¹⁶⁹ During the debate that followed, some mainstream Republican senators, including Sens. Henry B. Anthony of Rhode Island, B. Gratz Brown of Missouri, and Benjamin Wade of Ohio,¹⁷⁰ expressed their support for the Cowan amendment. Nonetheless, it soon became clear that most Republicans opposed the amendment.

A number of Republicans argued that intrinsic differences between men and women justified the policy of restricting the right to vote to men. For example, observing that “the women of America are not called upon to serve the Government as the men of America are,”¹⁷¹ Frederick T. Frelinghuysen noted that “[t]hey do not bear the bayonet, and have not that reason why they should be entitled to the ballot”¹⁷² and that “it seems to me as if the God of our race has stamped upon them a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life.”¹⁷³ Similarly, Republican Sen. Lot Morrill of Maine declared that the right to vote “associates the wife and mother with policies of state, with public affairs, with making, interpreting, and executing the laws, with police and war, and necessarily disseverates [sic] her from purely domestic affairs, peculiar care for and duties of the family; and, worst of all, assigns her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood.”¹⁷⁴

Assertions such as these were often linked with appeals to what was known as the theory of “virtual representation”—the idea that women had no need for the right to vote because, unlike African-Americans, their interests could be adequately represented by the men to whom they were related. Thus, Frelinghuysen asserted that “the women of America vote by faithful and true representatives, their husbands, their brothers, their sons; and no true man will go to the polls and deposit his ballot without remembering the true and loving constituency that he has at home.”¹⁷⁵

169. CONG. GLOBE, 39th Cong., 2d Sess. 46 (1866).

170. *Id.* at 55–56 (statement of Sen. Henry Anthony), 76–78 (statement of Sen. B. Gratz Brown), 62–63 (statement of Sen. Benjamin Wade).

171. *Id.* at 66.

172. *Id.*

173. *Id.*

174. *Id.* at 40.

175. *Id.* at 66.

Other Republicans spoke frankly in terms of expediency in explaining the reasons that they opposed the Cowan amendment. They worried that attaching the amendment to the District of Columbia suffrage bill would result in the defeat of the bill and that the opportunity to enfranchise the African-American residents of the city would thereby be lost. The statement of Republican Sen. Henry Wilson of Massachusetts reflected this view. Wilson asserted, “I am for enfranchising the black man, and then if [the women’s suffrage] question shall come up in due time and I have a vote to give I shall be ready to give my vote for it.”¹⁷⁶ But at the same time, he also declared that “to vote [for women’s suffrage] now is to couple it with the great measure now pressing upon us, to weaken that measure and to endanger its immediate triumph, and therefore I shall vote against the [Cowan] amendment.”¹⁷⁷

Taken together, these considerations led most Republicans to oppose the Cowan amendment. When the Senate took the final vote on December 12, 1866, it rejected the amendment by a vote of 37–9.¹⁷⁸ Moreover, four of those who supported the amendment were Democrats who no doubt hoped to use the issue of sex discrimination to undermine the entire suffrage bill. Thus, Senate Republicans overwhelmingly rejected the idea that the party should commit itself to the principle of sex-blind suffrage.

Less than three years later, Pomeroy’s proposal also generated little enthusiasm among his Republican colleagues. Although Pomeroy himself attacked the theory of virtual representation,¹⁷⁹ Republicans such as Sen. Frederick A. Sawyer of South Carolina continued to insist that men could be trusted to protect the interests of their wives and daughters.¹⁸⁰ Conversely, Republican Sen. Willard Warner of Alabama took a position similar to that which had underlain Henry Wilson’s opposition to the Cowan amendment in 1866. While declaring that if the decision were his alone he would grant women the right to vote, Warner also observed, “I know that woman’s suffrage is not now attainable” and declared, “I would not, as a practical legislator, jeopardize [African-American suffrage] by linking with it that which is impossible.”¹⁸¹ Against this background, the Senate never even put Pomeroy’s proposal to a vote.

Republicans were more closely divided over the question of whether a constitutional amendment should prohibit racial discrimination generally or should instead focus only on African-Americans, leaving the states free

176. *Id.* at 63.

177. *Id.* at 64.

178. *Id.* at 84.

179. *Id.*; CONG. GLOBE, 40th Cong., 3d Sess. 709–10 (1869).

180. CONG. GLOBE, 40th Cong., 3d Sess. 998 (1869).

181. *Id.* at 862.

to deny the right to vote to other racial and ethnic minorities. A number of Republicans who took the latter position represented states from the far west that were home to a substantial number of Chinese immigrants. Although only white immigrants were eligible for naturalization at the time that the constitutional amendment was being considered, these senators expressed the fear that this aspect of the naturalization statute might be changed at some later date and wished to guard against the possibility that the states might then be required to enfranchise natives of China who took advantage of the opportunity to become American citizens in the future. For example, asserting that natives of China “bring with them institutions of paganism which they are establishing here” and observing that “in San Francisco they now have their places of worship in which idols are set up,” Republican Sen. Henry W. Corbett of Oregon declared that “the question is whether you desire to allow this class of people to come in and overthrow the Christian institutions established on the Pacific coast by the American people, a Christian people.”¹⁸²

Those who shared Corbett’s sentiments proposed a number of different formulations that were designed to achieve the objective of leaving Asian immigrants outside the scope of the protection of any constitutional amendment.¹⁸³ However, the most important of the proposals that were designed to limit the effect of the constitutional amendment only to the situation faced by African-Americans was engendered by an idiosyncratic concern that was expressed by Jacob Howard. Howard does not seem to have been particularly concerned with the possibility that natives of China might at some point be allowed to vote. Instead, he repeatedly insisted that both the Boutwell and Stewart formulations would, by negative implication, vest the federal and state governments with the authority to impose religious qualifications for voters. Seeking to eliminate this problem, he proposed an amendment that would have provided that “citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other citizens [who are] electors of the most numerous branch of their respective Legislatures.”¹⁸⁴ Voicing his support for Howard’s proposal, Orrin Ferry declared that “when we propose to amend the Constitution we should carry our actions just so far as the evil [to be addressed] extends [and] the amendment [that Howard proposes] reaches to the full extent of

182. *Id.* at 1035.

183. *E.g., id.* (proposing to add language prohibiting naturalization of immigrants from China).

184. *Id.* at 1008.

the evil, the wrong done to a certain class of citizens which is now proposed to be remedied.”¹⁸⁵

However, other Republicans decried the effort to limit protection to African-Americans. Thus, Willard Warner asserted that “to single out one race is unworthy of the country and unworthy of the great opportunity now presented to us”¹⁸⁶ and George Edmunds declared that “there is nothing republican in [the Howard proposal].”¹⁸⁷ Despite arguments such as these, at one point Howard seems to have convinced a majority of his mainstream Republican colleagues in the Senate that his proposal was superior to that which the judiciary committee had produced. While on February 17 the effort to substitute the Howard language failed on a vote of 27–22, the margin of victory was provided by Democrats who were no doubt anxious to keep the issue of the status of Chinese immigrants alive in any potential dispute over ratification and voted unanimously to leave the committee language intact.¹⁸⁸

Other Republicans raised a very different objection to the language of the Stewart proposal. Just as they had in the House, advocates of universal manhood suffrage played a major role in the Senate discussions of the proposed constitutional amendment. Willard Warner delivered a particularly passionate plea in support of universal suffrage.¹⁸⁹ Taking direct aim at those who contended that the proposed constitutional amendment would unduly infringe on state’s rights, Warner asserted that “it is a proposition too clear for argument that to . . . the whole people [of] the nation belongs the decision of the question [of] who shall exercise political power”¹⁹⁰ and that

to allow States to determine who of the citizens of the nation shall have political power is to give away the most essential and vital attribute of sovereignty—to concede a power which may be used to build up an aristocracy or to change and destroy our system of government.¹⁹¹

He also contended that

[the idea] that a citizen living in Massachusetts should lose his right to vote for President by moving to Connecticut, or that

185. *Id.*

186. *Id.* at 1009.

187. *Id.* at 1008.

188. *Id.* at 1311.

189. *Id.* at 861–62.

190. *Id.* at 862.

191. *Id.*

different qualifications for voting for President, for instance, should be required in different parts of the country, is . . . manifestly wrong and . . . clearly at variance with [the Privileges and Immunities Clause of Article IV].¹⁹²

Warner also took issue with the narrowness of the Stewart proposal on policy grounds. He observed that while the fundamental purpose of the proposed constitutional amendment was to enfranchise African-Americans, “without any violation of its letter or spirit, nine tenths of them might be prevented from voting . . . by . . . an intelligence or property qualification.”¹⁹³ He also contended more generally that such qualifications would effectively disenfranchise those who were most in need of the ballot, observing that

“[t]he millionaire in his money, and the man of education in his knowledge and brain, have each a power . . . greater than a hundred ballots [while] [i]t is the poor, unlearned man, who has nothing but the ballot, to whom it is a priceless heritage, a protection and a shield.”¹⁹⁴

In an effort to address these issues, Warner, like Bingham before him, put forth a proposal that would have effectively provided for universal suffrage and universal amnesty.¹⁹⁵ However, when this formulation came to a vote on February 9, it garnered the support of only five Republicans.¹⁹⁶

By contrast, the universal suffrage amendment supported by Henry Wilson gained far more traction in the Senate. In framing his proposal, Wilson took a somewhat different tack than Bingham, Shellabarger, and Warner. Rather than including sweeping language that abolished by its terms virtually all limitations on access to the ballot, Wilson moved to change the language of the proposed constitutional amendment to specifically prohibit discrimination based on race, color, nativity, property, education, or creed.¹⁹⁷ In supporting this proposal, Republican Sen. John Sherman of Ohio asked:

Why should we protect the African in the enjoyment of suffrage when in certain States of the Union even naturalized citizens cannot vote? Why should we protect the descendant of the African

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 861.

196. *Id.* at 1041.

197. *Id.* at 1029.

when in certain States of the Union a man who has the misfortune not to be able to read and write cannot vote? Why should we apply this supreme remedy of the Constitution only in favor of this particular class of citizens? Senators must see at once that to rest this constitutional amendment up on so narrow a ground is not defensible.¹⁹⁸

Responding to these arguments, the Republican opponents of the Wilson formulation raised two different types of objections. First, some suggested that an education requirement was in fact a desirable prerequisite for the exercise of the franchise. Thus, in the view of Roscoe Conkling of New York, such a stipulation would limit the right to vote to those who possessed “a standard of intelligence above the most groveling and besotted ignorance.”¹⁹⁹ Others were concerned with the impact of the Wilson proposal on states’ rights. For example, in sharp contrast to Warner, Jacob Howard complained that the adoption of a universal suffrage requirement would “overthrow and uproot the very foundations of the State constitutions.”²⁰⁰

When the Wilson proposal first came to a vote on February 9, it failed by a margin of 24–19.²⁰¹ However, later that same day, the Senate reversed itself and approved the proposal on a 31–27 vote.²⁰² A number of senators who had been absent for the first roll call ultimately voted to support the Wilson proposal. Nonetheless, his language could not have been adopted without the support of three Republican senators—Joseph C. Abbott of North Carolina, Thomas Robertson of South Carolina, and Waitman T. Willey of West Virginia—all of whom switched sides on the second vote. Thus, the Senate became at least tentatively committed in principle to the concept of universal suffrage for adult men.

However, before final Senate approval of the proposed constitutional amendment, the addition of a provision that was designed to reform the electoral college muddied the waters even further. This amendment was the brainchild of Democratic Sen. Charles R. Buckalew of Pennsylvania, who introduced the proposal on January 28. Buckalew’s ire was directed at the prevalence of the so-called general ticket in presidential elections, whereby the person receiving a majority of the popular vote in any state would receive all of the electoral votes from that state. Buckalew characterized the use of the general ticket as “unjust and unfair” and

198. *Id.* at 1039.

199. *Id.* at 1038.

200. *Id.* at 1037.

201. *Id.* at 1029.

202. *Id.* at 1040.

argued that the use of that device rendered the electoral college “worse than a sham [but rather] positively pernicious.”²⁰³

In 1842, Congress outlawed the use of the general ticket in elections for the House of Representatives, requiring instead that individual members of Congress be chosen by district.²⁰⁴ The difficulty was that while Article I, Section 4 of the Constitution vests Congress with the authority to prescribe the “Times, Places and Manner of holding Elections for [the House],”²⁰⁵ Article II, Section 1 provides that electors shall be chosen “in such Manner as the [state] Legislature [shall] direct.”²⁰⁶ Buckalew proposed to remedy this situation by requiring that electors be chosen by a vote of the people qualified to vote in elections for the House of Representatives and vesting Congress with the power to prescribe the procedures to be used in the selection of the electors.

After some discussion, the Buckalew amendment was referred to the Committee on Representative Reform, where it received unanimous approval. On February 9, shortly after the Senate had adopted the Wilson formulation, Oliver Morton moved to have the Buckalew initiative appended to the proposed constitutional amendment.²⁰⁷ During the brief debate that followed, Buckalew presciently emphasized the fact that the regime then in place created the real possibility that a presidential candidate might emerge victorious despite receiving fewer popular votes than some other candidate—a possibility that would come to fruition in the presidential elections of 1888, 2000, and 2016.²⁰⁸ Several senators also noted that under the existing Constitution, states were not even required to select electors by popular vote, and both Morton and Democrat Thomas Hendricks noted that in South Carolina and Florida the state legislatures had chosen electors in 1868.²⁰⁹

Against this background, the Senate initially rejected the Buckalew/Morton proposal by a narrow margin.²¹⁰ However, on a second vote the electoral college reform measure was appended to the proposed

203. *Id.* at 671.

204. The evolution of the Apportionment Act of 1842 is described in detail in Robert Ross, *Recreating the House: The 1842 Apportionment Act and the Whig Party's Reconstruction of Representation*, 49 *POLITY* 408 (2017).

205. U.S. CONST. art. I, § 4.

206. *Id.* art. II, § 1.

207. CONG. GLOBE, 40th Cong., 3d Sess. 1041 (1869).

208. *E.g., id.* at 1042 (statement of Sen. Oliver Morton), 1043 (statement of Sen. George Edmunds).

209. *Id.* at 1042.

210. *Id.* at 1041.

Fifteenth Amendment by a vote of 37–19²¹¹ and the decision to add the proposal survived a motion to reconsider by a margin of 28–26.²¹² Almost immediately thereafter, by a vote of 39–16, the combination of the Wilson and Buckalew formulations was approved as a substitute for the amendment that had been adopted by the House of Representatives and this substitute was sent to the House for its consideration.²¹³

4. *Response of the House of Representatives*

The House of Representatives discussed the Senate language on February 15. John Bingham quickly moved to concur with the Senate and send the proposal to the state legislatures for their consideration.²¹⁴ George Boutwell, however, argued that both portions of the Senate amendment were fatally flawed. Boutwell contended that the Wilson formulation left a giant loophole because it failed to explicitly prohibit discrimination based on previous condition of servitude. Thus, he reasoned that the ex-Confederate states would remain free to disenfranchise virtually all free African-Americans by simply denying the right to vote to all those who had previously been enslaved.²¹⁵ In addition, Boutwell observed that the proposed reform of the electoral college system did not include a requirement that the regulations adopted by Congress be uniform throughout the nation, and that whatever party was in control of Congress would therefore apparently be left free to manipulate the rules to their advantage.²¹⁶

After Boutwell voiced these objections, the House considered the Wilson language separately from the Buckalew amendment. Although Bingham vigorously disputed Boutwell's assessment of the significance of the failure to prohibit discrimination based on previous condition of servitude,²¹⁷ the mere possibility that Boutwell was correct was sufficient to convince many supporters of universal manhood suffrage of the need for a conference on this issue, and Bingham's motion to concur in this part of the Senate amendment garnered only 37 votes.²¹⁸ Immediately thereafter, the motion to concur in the electoral college reforms failed

211. *Id.* at 1042.

212. *Id.* at 1044.

213. *Id.*

214. *Id.* at 1224.

215. *Id.* at 1225.

216. *Id.*

217. *Id.*

218. *Id.*

without even a roll call vote.²¹⁹ Under these circumstances, the rules of the House of Representative required that the House request a conference with the Senate, and Speaker Schuyler Colfax designated Boutwell, Shellabarger, and Democrat Charles Eldridge to represent the House on the conference committee.²²⁰

5. *Senate Action*

When the notice of the House request reached the Senate on February 17, William Stewart immediately moved to have the Senate accede to the request.²²¹ However, after both George Williams and Charles Buckalew contended that the issue was too important to refer to a conference committee,²²² Stewart withdrew this motion. Instead, mindful that the end of the session was rapidly approaching and anxious to obtain the passage of some form of suffrage amendment, Stewart sought to have the Senate recede from its own proposal and concur in the measure that had originally passed the House.²²³

Not surprisingly, Democrats and their allies were adamantly opposed to this motion.²²⁴ But the main problem that Stewart faced was that some mainstream Republicans were also dissatisfied with the formulation that had passed the House. For these Republicans, the main problem did not lie with the lack of a provision reforming the presidential selection process. For example, Oliver Morton, who had championed the proposal that dealt with this issue, declared, "I am not willing . . . to risk the adoption of a constitutional amendment on the main question even by attaching to it [a proposal] so good [as the Buckalew amendment]."²²⁵ Nor were most Senate Republicans adamant about the need to provide for universal manhood suffrage rather than simply outlawing discrimination based on race. Thus, Henry Wilson regretfully observed, "My [proposal], I am sorry to find, is too broad, comprehensive, and just to be sustained by the country."²²⁶

Instead, the main sticking point was the failure of the House language to address the issue of racial discrimination in eligibility for office. This

219. *Id.*

220. *Id.* at 1226.

221. *Id.* at 1284.

222. *Id.* at 1284–85.

223. *Id.* at 1285.

224. *See, e.g., id.* at 1285–86 (statement of Sen. Charles Buckalew), 1299 (statement of Sen. Willard Saulsbury, Sr.).

225. *Id.* at 1292.

226. *Id.* at 1291.

issue formed the backdrop of a bitter exchange between Wilson and Stewart, with Wilson accusing Stewart of abandoning the African-Americans who had been excluded from the state legislature in Georgia²²⁷ and Stewart responding that if Wilson himself had not insisted on expanding the prohibitions embodied in the original Senate provision that had dealt with officeholding, the latter provision would have had a much better chance of passage in the House of Representatives.²²⁸ Stewart also noted that “[s]ome of our leading Republican journals have objected to” the idea of dealing with the right to hold office²²⁹ and asserted that “[t]he only hope for getting anything is to vote for [the House] proposition.”²³⁰ In contrast, Frederick Sawyer declared, “I had rather have nothing than to have this.”²³¹

When the votes were counted, it became clear that Stewart had stepped into a parliamentary trap of his own creation. In order for Stewart’s maneuver to succeed, he would have had to prevail on two separate votes. The first step was for the Senate to agree to abandon the proposal that had passed that chamber on February 9. Approval of this proposal required only a simple majority, and the motion carried by a margin of 33–24.²³² But in addition to receding from its own version of the suffrage amendment, the Senate was also required to affirmatively vote to adopt the Boutwell language, and on this point a two-thirds majority was necessary. Thus, while a majority of those voting supported Stewart on this point, the motion failed on a vote of 31–27.²³³ As a result, Stewart’s effort to break the legislative logjam brought the Senate back to square one in the amendment process.

At this point, the senators began anew the consideration of Stewart’s original language, which would have barred racial discrimination with respect to both the right to vote and the right to hold office. As the Senate remained in session for twelve consecutive hours, the tempers of the exhausted senators became increasingly frayed. Republican Sen. James W. Nye of Nevada summed up the mood of the entire body when he exclaimed, “I am sick of hearing [this discussion]. It has become painful to listen to it.”²³⁴ In a war of attrition, Stewart ultimately prevailed. After the Senate considered and rejected a number of efforts to change the

227. *Id.* at 1296.

228. *Id.*

229. *Id.* at 1299.

230. *Id.* at 1298.

231. *Id.* at 1299.

232. *Id.* at 1295.

233. *Id.* at 1300.

234. *Id.* at 1306.

language of the amendment, on February 17 mainstream Republicans united around the Stewart proposal and sent it back to the House on a 35–11 vote.²³⁵

6. *The House of Representatives Changes Course*

When the amendment that the Senate had passed reached the House floor, in parliamentary terms the proposal occupied a position that was very different from that of the Wilson formulation that had arrived only five days before. Rather than being styled as an amended version of legislation that had already been passed by the House, the Stewart amendment had the status of an entirely new proposal. Therefore, before the House could even consider the idea of a conference committee, it was required to approve either the Stewart amendment itself or some variation thereof by a two-thirds vote. Against this background, Republican Rep. Benjamin F. Butler of Massachusetts pleaded with his colleagues to adopt the Senate proposal without change, observing that Senate rules would allow renewed, extended debate over any alterations and declaring that “if we do not take this I fear we shall get nothing.”²³⁶ However, a number of his Republican colleagues were undeterred by this possibility and sought to make changes in the proposed amendment before a final vote on passage by the House.

Republican Rep. John A. Logan of Illinois moved to remove the references to the right to hold office from the proposed constitutional amendment. Drawing on principles of federalism, Logan argued that the authority to determine which persons were qualified to make crucial governmental decisions “has been properly left [to the states themselves] by the Constitution.”²³⁷ He also contended that direct constitutional protection for the right to hold office was unnecessary, arguing that once African-Americans were granted the right to vote, they “will take care of the right to hold office [for themselves].”²³⁸ But lurking beneath the surface was also the fear of a political backlash against an amendment that dealt with officeholding. To ask voters to give African-Americans the right to vote was one thing, but explicitly suggesting to whites that they should agree to be ruled by people of color was quite another.²³⁹ However, most

235. *Id.* at 1318.

236. *Id.* at 1426.

237. *Id.*

238. *Id.*

239. *The Jeopardized Amendment*, GERMANTOWN TEL., Mar. 3, 1869, at 3.

Republicans in the House found these arguments unconvincing, and Logan's proposal was defeated on a 95–70 vote.²⁴⁰

In sharp contrast to Logan's measure, both Samuel Shellabarger and John Bingham once again sought to broaden the constitutional protections established by the Stewart amendment. While Shellabarger reintroduced the same universal suffrage proposal that he had advocated when the House had first considered Boutwell's formulation in early February,²⁴¹ Bingham put forth language that in some ways resembled the Wilson proposal that had originally passed the Senate. Bingham's formulation would have prohibited discrimination not only on the basis of race and previous condition of servitude, but also nativity, property, and creed.²⁴² However, unlike the original Wilson amendment, the Bingham proposal made no mention of discrimination based on education.

Despite being opposed by a substantial number of mainstream Republicans, Bingham's alternative was adopted by the House on a vote of 92–70.²⁴³ The margin of victory was provided by 20 Democrats who no doubt supported the proposal in the hope that its adoption would undermine the entire effort to have the 40th Congress pass a suffrage amendment. Shellabarger then withdrew his universal suffrage proposal.²⁴⁴ Nonetheless, when the House passed the amended version of the suffrage measure on a vote of 140–37,²⁴⁵ the two houses of Congress had, in the words of William Gillette, “performed a legislative somersault.”²⁴⁶ The House of Representatives, rather than the Senate, was now proposing the more radical version of the suffrage amendment.

7. *The Approval of the Conference Committee Proposal*

When the action of the House was reported to the Senate on February 22, Stewart did not repeat his earlier tactical error. He immediately moved to convene a conference committee, and with little discussion the motion carried by a vote of 32–17 over the objections of six Southern Republicans who no doubt feared that a conference committee might delete the protection for officeholding.²⁴⁷ Stewart, Roscoe Conkling, and George Edmunds were then chosen to represent the Senate. The following day, the

240. CONG. GLOBE, 40th Cong., 3d Sess. 1428 (1869).

241. *Id.* at 1426.

242. *Id.* at 1425.

243. *Id.* at 1428.

244. *Id.*

245. *Id.*

246. GILLETTE, *supra* note 8, at 69.

247. CONG. GLOBE, 40th Cong., 3d Sess. 1481 (1869).

House reciprocated by also approving a conference and appointing John Bingham, George Boutwell, and John Logan to act on behalf of its interests.²⁴⁸

The report that emerged from the conference committee confirmed the worst fears of the Southern Republican senators. The conferees decided not only to have the amendment focus solely on discrimination based on race, color, or previous condition of servitude, but also to eliminate all reference to officeholding from the text. The moving forces behind the decision were apparently John Bingham and John Logan, both of whom had opposed the officeholding provision in the House. During the deliberations of the conference committee itself, Bingham and Logan were able to persuade Stewart and Conkling to accept their position as well.²⁴⁹ According to George Edmunds, the choice to delete the provision was not based on a philosophical objection to the idea of providing federal protection for the right to hold office. Instead, a majority of the committee members based their decision on a political calculation, believing that the “people will not be satisfied to give the negro the right to run against themselves for some office, but they are willing to confer upon him the boon of voting for them.”²⁵⁰

Some Republicans, however, believed that these fears were overblown. While on February 25 the House of Representatives passed the conference committee measure without debate by a vote of 144–44,²⁵¹ in the Senate the situation was different. Led by Edmunds, who had refused to sign the conference committee report, more radical Republicans vigorously objected to the terms of the proposed amendment. For example, Samuel Pomeroy assailed the actions of the committee as “unparliamentary and almost unprecedented,”²⁵² while a number of others relied on the example of the situation in Georgia to refute any claim that the right to vote would automatically carry with it the right to hold office.²⁵³

However, such complaints failed to move most Senate Republicans. Although a majority of Republicans favored the idea of protecting the right to hold office in principle, they were willing to sacrifice this concept in order to ensure the passage of a suffrage amendment. Some continued to express the hope that once African-Americans were securely enfranchised,

248. *Id.* at 1495.

249. STEWART, *supra* note 126, at 236.

250. CONG. GLOBE, 40th Cong., 3d Sess. 1626 (1869).

251. *Id.* at 1563–64.

252. *Id.* at 1623.

253. *Id.* at 1627 (statement of Sen. Henry Wilson), 1629 (statement of Sen. Frederick Sawyer).

the officeholding problem would eventually take care of itself. Speaking earlier, James Nye had given voice to this view in particularly colorful language, stating:

Give me the majority of the ballots, and I will fix who shall hold offices in a State. [African-Americans] will fix it; and they are not . . . so stupid that they will not fix it in opposition, if need be, to the Senators who represent them on this floor.”²⁵⁴

In the end, those who opposed the committee formulation were helpless. With the session rapidly drawing to a close, it was clear that the choice was between adopting the conference committee report and having no constitutional amendment protecting African-American suffrage at all. Henry Wilson summed up both the dilemma facing those who preferred broader language and the conclusion ultimately reached by most Republican senators, declaring:

“I have asked always for what was right and taken on all occasions what I could get. I have acted upon the idea that one step taken in the right direction made the next step easier to be taken. I suppose . . . I must act upon that idea now.”²⁵⁵

Thus, when the Senate took the final vote on February 26, it passed the conference committee proposal on a vote of 39–13. While a number of more radical Republicans abstained, only one mainstream Republican—John Pool of North Carolina—was sufficiently incensed to vote against the acceptance of the committee report.²⁵⁶ Thus, after long and tortuous consideration, Congress had finally approved a constitutional amendment to send to the state legislatures for their consideration.

III. THE BATTLE OVER RATIFICATION

After the House of Representatives and the Senate approved the final version of the Fifteenth Amendment, the Republican effort to obtain ratification by the requisite three-quarters of the state legislatures began almost immediately. During the campaign for ratification, Republicans generally emphasized two points that had figured prominently in the congressional debates. First, they contended that allowing African-Americans to vote was a matter of simple justice, with one Republican newspaper proclaiming that disenfranchisement of African-Americans

254. *Id.* at 1306; *see also id.* at 1625 (statement of Sen. Jacob Howard).

255. *Id.* at 1626.

256. *Id.* at 1641.

“cannot now be regarded . . . as anything less than monstrous [symbolizing] a hideous system of caste, and making badges of servitude where none should exist,”²⁵⁷ and another insisting that “[t]he experience of the past is sufficient to convince all candid and impartial men that the colored citizens will never be able to enjoy their civil rights as long as the right to vote is denied them.”²⁵⁸ In addition, the supporters of ratification argued that granting African-Americans the right to vote was “the surest and speediest method of attaining general peace and tranquility and freedom from the turmoil and anarchy which the suffrage question has already provoked in many localities.”²⁵⁹

Opponents of ratification also relied on familiar arguments. Thus, invoking the concept of federalism, Democratic Gov. John W. Stevenson of Kentucky insisted that “[t]he question is not, what upon principles of right, each state should adopt as the elements of suffrage, but whether the Government is to be changed, and the states to be deprived practically of their stateship,”²⁶⁰ while the *Providence Journal* asserted that “[i]f [the amendment is ratified], it will only be an overthrow of state institutions under the spurious guise of a constitutional amendment in favor of freedom.”²⁶¹ In addition, the *Daily Intelligencer* complained that, by proposing the Fifteenth Amendment, Republicans were “[f]alsifying . . . the pledge given at the Chicago Convention.”²⁶²

Against this background, the effort to have the amendment ratified faced a variety of different challenges. First, while some leaders of the

257. *The Constitutional Amendment*, N. AM. & U.S. GAZETTE (Phila.), Oct. 5, 1869, at 2.

258. *The Amendment in Kentucky*, MILWAUKEE DAILY SENTINEL, Mar. 19, 1869, at 2.

259. *The Suffrage Constitutional Amendment*, UNION & DAKOTAIAN (Yankton, S.D.), Mar. 6, 1869, at 2; see also, e.g., *Danger to the Amendment*, N. AM. & U.S. GAZETTE (Phila.), Sept. 10, 1869, at 2 (showing that adoption of amendment would “suddenly and finally terminate all struggles about negroes, and remove entirely from politics all the long continued excitement and agitations with regard to them and their rights”).

260. *Gov. Stevenson, of Kentucky, on the Fifteenth Constitutional Amendment*, CHARLESTON COURIER, TRI-WEEKLY, Mar. 20, 1869, at 2.

261. *The Fifteenth Amendment*, DAILY NAT’L INTELLIGENCER (Wash., D.C.), Apr. 12, 1869, at 2.

262. *Will General Grant Endorse the New Suffrage Amendment?*, DAILY NAT’L INTELLIGENCER (Wash., D.C.), Mar. 4, 1869; see also *Same Bad Faith and Broken Promises*, DAILY NAT’L INTELLIGENCER (Wash., D.C.), Oct. 6, 1869, at 2 (“We should really like to know how faith could be more completely and shamefully broken than the faith of the [Republican] party in proposing and endeavoring to pass [the Fifteenth Amendment].”)

women's movement supported the Fifteenth Amendment, others opposed ratification because the amendment left the states free to deny women the right to vote. Thus, for example, Elizabeth Cady Stanton asserted that "[m]anhood suffrage is national suicide and woman's destruction"²⁶³ and successfully persuaded the members of the National Woman's Suffrage Association to pass a resolution that declared, "[W]e repudiate the Fifteenth Amendment, because by its passage in Congress, the Republican party propose to substitute [for racial discrimination] an aristocracy of sex, the most odious distinction in citizenship that has ever yet been proposed since Governments had an existence."²⁶⁴

In addition, particularly in the West, the issue of the impact of the proposed amendment on the status of natives of China played an even more prominent role than it had in the debate over the amendment in the Senate. In the campaign leading up to the 1869 elections for state offices in California, Democrats contended that the Fifteenth Amendment would lead to the enfranchisement of Chinese immigrants, which in turn would create a voting bloc controlled by the railroads and eventually lead to even greater Chinese immigration.²⁶⁵ By contrast, noting that the amendment did not bar discrimination on the basis of "nativity," Sen. William Stewart argued that, even if the amendment were ratified, states could bar Chinese immigrants from voting on that basis.²⁶⁶ Supporters of the amendment also observed that under existing naturalization laws Chinese immigrants could not become citizens and could therefore be denied access to the ballot regardless.²⁶⁷ Against this background, Stewart's home state of Nevada ratified the amendment, but the California state legislature overwhelmingly voted against ratification and the Oregon legislature took no action at all on the issue.²⁶⁸

The effort to ratify the amendment met strong resistance in other parts of the nation as well. The intensity of the opposition to ratification was clearly reflected in Indiana in March 1869, when a large majority of Democratic state legislators resigned in order to leave both houses of the state legislature without the quorums necessary for the Republican

263. *Equal rights: Anniversary of the American Equal Rights Association*, N.Y. TIMES, May 13, 1869, at 1.

264. *The Aristocracy of Sex—Note From Miss Susan B. Anthony*, N.Y. TIMES, June 5, 1869, at 5.

265. GILLETTE, *supra* note 8, at 154.

266. *Id.* at 157.

267. *Id.* at 156.

268. *Id.* at 153–58.

majorities to conduct ratification proceedings.²⁶⁹ In addition, in April 1869, the issue of ratification became directly entangled with the process of reconstruction itself, as Congress considered a bill that dealt with the reconstruction of Virginia, Mississippi, and Texas. Reacting to the actions of the Democrats in his home state, Indiana Republican Sen. Oliver H.P.T. Morton moved to add a requirement that each of the three states ratify the Fifteenth Amendment as a precondition to having their representation in Congress restored.²⁷⁰ As Morton noted, Congress had previously required all of the ex-Confederate states to ratify the Fourteenth Amendment in order to regain their status as full partners in the Union.²⁷¹ However, those who opposed Morton's motion argued that a requirement that the designated states ratify the Fifteenth Amendment stood on a very different footing.

First, while the provisions of the Fourteenth Amendment applied to the entire nation, the amendment was quite clearly designed primarily to address conditions in the ex-Confederate states themselves. By contrast, all parties to the debate over the Fifteenth Amendment understood that a ban on racial discrimination in voting rights would also have a significant impact in a number of Northern states such as Indiana and Ohio, where white voters had consistently rejected efforts to enfranchise the African-Americans who formed a significant part of the population. Thus, for example, Democratic Sen. Allan G. Thurman of Ohio complained that, by coercing the named states into ratifying the Fifteenth Amendment, the Morton proposal would in essence "force that . . . amendment . . . upon Ohio, Indiana, and Illinois as well, whatever may be the opinion of [those] states."²⁷²

In addition, some Republicans opposed the Morton proposal for other reasons. While reaffirming their support for the Fifteenth Amendment in principle, Republican Sens. Lyman Trumbull of Illinois and Roscoe Conkling of New York argued that, since the Reconstruction Acts of 1867 and 1868 had established the conditions under which the ex-Confederate states would be allowed to once again become full partners in the Union, to add new conditions at this stage of the process would be unfair. Thus, for example, Trumbull contended that to impose an additional requirement would be "breaking faith on the part of the Government of the United States with these people, who have been proceeding under our acts to do those very things on the completion of which we have told them 'You shall

269. *The Democracy and the Suffrage Amendment*, N.Y. TIMES, Mar. 11, 1869, at 4.

270. CONG. GLOBE, 41st Cong., 1st Sess. 654 (1869).

271. *Id.*

272. *Id.* at 655.

be restored to your relations with the Union.”²⁷³ Similarly, Conkling asserted that

as far as [ratification] is even by inadvertence associated with unfair dealing, with a breach of faith, with an act which would be deemed overreaching between man and man . . . so far as it is associated with anything like that [ratification would be] contaminated by a stigma and a distrust which ought not to rest upon it.²⁷⁴

Objections such as these left Morton unmoved. Noting that the affected states had not yet accepted the conditions imposed by the statutes that had already been passed, he insisted that “[t]here is no faith to be violated, no promise to be taken back” and that “[i]t is our right to propose as many conditions as we see fit.”²⁷⁵ In addition, focusing on the actions of the Democrats in Indiana, Morton asserted that “the Democratic party desire[s] to keep [the issue of ratification] open as an element of political success in the elections of 1870 and of 1872” and argued that

if we shall make the ratification of the [F]ifteenth [Amendment] a condition of the reconstruction of [Virginia, Mississippi, and Texas] these states will accept it at once . . . and then [the amendment] will become a part of the Constitution [and] the question will be taken out of our politics forever.²⁷⁶

A majority of Morton’s Republican colleagues apparently found arguments such as these to be persuasive. Although thirteen Republicans joined the united Democrats in opposition, on April 9, 1869, the amendment to the reconstruction bill passed by a vote of 30–20.²⁷⁷ The same day, the House of Representatives overwhelmingly voted to accept the amendment as well.²⁷⁸ Later that year, with the prospects for ratification in doubt and despite the opposition of a majority of the members of the Senate Judiciary Committee,²⁷⁹ a similar requirement was imposed on the state of Georgia.²⁸⁰

273. *Id.* at 654.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 656.

278. *Id.* at 700.

279. CONG. GLOBE, 41st Cong., 2d Sess. 166 (1869).

280. *Id.* at 224, 293.

Not surprisingly, those who opposed the Fifteenth Amendment continued to insist that the imposition of these requirements unfairly influenced the debate over ratification. For example, one Democratic newspaper in Ohio complained that

[t]he Southern States are to be deprived of their rights under the Constitution by the Radical majority in congress, unless they adopt the negro suffrage amendment to the Federal Constitution, and then they are to be allowed a representation in Congress, and this is done to force negro suffrage on Ohio, Indiana and other states, against the consent of the people.²⁸¹

Similarly, Democratic Sen. John P. Stockton of New Jersey asserted that Southern states “are to be coerced to a vote that alters the Constitution of the United States and of New Jersey fundamentally” and declared that “the question of who votes and who does not sinks into insignificance compared with the fundamental alteration of our system of government which is proposed, and the fraud and violence by which our home born liberties are to be wrested from us.”²⁸²

Politicians in the states on which the conditions were imposed viewed the situation quite differently. Because African-Americans had already been enfranchised by virtue of the Reconstruction Acts in Virginia, Texas, Mississippi, and Georgia, in those states the ratification of the Fifteenth Amendment would not materially alter the situation, and compliance with the condition was relatively costless. Thus, as one Southern newspaper observed, since “universal suffrage is a fixed fact . . . in the South, the people of [the relevant states] are perfectly willing to do anything now to force negro suffrage on the North and the West.”²⁸³ By the end of February 1870, each of those four states had approved the proposed constitutional amendment, and the amendment had been ratified by a sufficient number of states to become part of the Constitution.²⁸⁴

281. *How Ohio Is To Be Made a Negro Voting State*, NEWARK ADVOC. (Ohio), Apr. 23, 1869, at 2.

282. *Tammany Hall on the Next Presidency*, N.Y. HERALD, July 7, 1869, quoted in DAILY ARK. GAZETTE (Little Rock), July 14, 1869, at 3.

283. *Political Affairs in Virginia*, HINDS CNTY. GAZETTE (Raymond, Miss.), May 12, 1869, at 2.

284. GILLETTE, *supra* note 8, at 84–85 tbl.2.

CONCLUSION

The adoption of the Fifteenth Amendment brought with it the end of the efforts of the Republican party to change the provisions of the Constitution dealing with the institutions of government during the Reconstruction era. The significance of these efforts can be evaluated from a variety of different perspectives. Many Republicans would have preferred an amendment that provided more sweeping protections for voting rights. However, in terms of the structure of American federalism, the adoption of even the simple prohibition on racial discrimination was by any standard a watershed, which for the first time imposed an explicit limitation on state authority to prescribe qualifications for participation in both state and national elections. Thus, for example, although at the time some feminists condemned Republicans for leaving the states free to exclude women from voting, in later years supporters of women's suffrage were able to cite the Fifteenth Amendment as precedent in responding to claims that the adoption of the Nineteenth Amendment would be inconsistent with the idea of federalism embodied in the Constitution.²⁸⁵

By contrast, an assessment of the substantive impact of the amendment on the actual functioning of the political system depends largely on the time frame on which one focuses. Together with sections one and five of the Fourteenth Amendment, the Fifteenth Amendment provided the constitutional predicate for the passage of a series of federal statutes in the early 1870s that were designed to protect the rights of the freed slaves.²⁸⁶ These statutes in turn provided the legal framework that helped facilitate the election of African-Americans to both state and federal office in the late 19th century.²⁸⁷ But as the enthusiasm of Northern Republicans for the protection of African-American rights began to recede, white Southerners regained control of the apparatus of their state governments and increasingly began to adopt draconian measures designed to prevent the freed slaves and their descendants from participating in the political process.

While the withdrawal of federal troops from the South in the wake of the disputed presidential election of 1876 is typically characterized as

285. See *Leser v. Garnett*, 258 U.S. 130 (1922) (relying on analogy to the Fifteenth Amendment to reject challenge to the validity of the Nineteenth Amendment).

286. The evolution of the enforcement acts is described in WANG, *supra* note 8, at 57–92.

287. The uneven history of enforcement of the statutes in the period between 1872 and 1891 is described in *id.* at 93–216.

signaling the end of Reconstruction,²⁸⁸ African-Americans continued to vote in substantial numbers in many parts of the South until considerably later. Against this background, the dispute over the Federal Elections Bill of 1890, which was known as the Lodge Force Bill, proved to be a crucial turning point in the struggle over political power in the South. The Force Bill—which was premised not on section two of the Fifteenth Amendment itself, but rather on the authority over federal elections embodied in Article I, Section 4—provided that, upon the request of a relatively small number of citizens in any district, the local federal court would have been authorized to appoint federal supervisors who would have been vested with a variety of powers, including attending elections, inspecting registration lists, verifying doubtful voter information, administering oaths to challenged voters, stopping illegal aliens from voting, and certifying the vote count. In addition, the bill would have empowered federal officials to overturn the results of elections that state officials had certified.

The Force Bill was ultimately defeated after a fierce political struggle in January 1891.²⁸⁹ But even the abortive effort to provide actual political power to African-Americans in the South created great concern among the members of the Southern white establishment. In response, beginning with the adoption of the Mississippi constitution of 1890, the Southern state governments adopted a variety of constitutional and statutory measures that, although race-neutral on their face, were avowedly designed to limit the access of non-whites to the ballot. In a number of states, these measures had a dramatic impact. For example, while more than 130,000 African-Americans were registered to vote in Louisiana in 1896, by 1900 that number had dropped to a mere 5,320.²⁹⁰ Similarly, the state of Georgia adopted draconian measures that had the effect of reducing the registration of adult male African-Americans from 28.3% in 1904 to 4.3% in 1910.²⁹¹ In short, during the early 20th century, despite the passage of the Fifteenth Amendment, most of the ex-Confederate states effectively excluded African-Americans from political power.

The first real harbinger of change came with the 1944 decision in *Smith v. Allwright*²⁹² where the Supreme Court relied on the Fifteenth Amendment to strike down the use of the so-called “white primary” in the state of Texas. However, the crucial breakthrough did not come until more

288. See C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1977).

289. The complex maneuvering that led to the defeat of the Force Bill is described in WANG, *supra* note 8, at 232–52.

290. *Id.* at 260.

291. *Id.*

292. *Smith v. Allwright*, 321 U.S. 649 (1944).

than 20 years later when the enforcement clause of the amendment provided the constitutional predicate for the passage of the Voting Rights Act of 1965, which not only outlawed racially discriminatory practices generally but also required a number of Southern states to have all changes in voting procedures precleared by the federal government before the changes could take effect.²⁹³

The passage and implementation of the Voting Rights Act has had a profound effect on the ability of African-Americans to participate in the election of public officials, particularly in the Southern states.²⁹⁴ Nonetheless, discrimination against minority races continues to be a problem in this context.²⁹⁵ The Fifteenth Amendment reminds us of the need to be constantly vigilant in order to ensure that state laws that regulate the political process treat members of all races equally.

293. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

294. *See* *Shelby Cnty. v. Holder*, 570 U.S. 529, 547 (2013) (showing that minority turnout in states subject to preclearance requirement has greatly increased since the passage of the Voting Rights Act).

295. *See id.*