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Earl M. Maltz

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INTRODUCTION

If asked about the Fourteenth Amendment,[1] most Americans—even those well-versed in constitutional history—would think only of Section 1.[2] In many ways, the focus on Section 1 is entirely understandable. The Privileges or Immunities, Due Process, and Equal Protection Clauses of Section 1 are the source for much of modern constitutional law. By contrast,

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* Distinguished Professor of Law, Rutgers University School of Law at Camden. The author gratefully acknowledges the assistance and encouragement of William Wiecek.

1. U.S. CONST. amend. XIV.

2. *Id.* § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Sections 2, 3, and 4 of the Amendment have had almost no discernible impact on the post-Reconstruction world.

As students of Reconstruction Era history know, however, those who actually debated the Fourteenth Amendment at the time that it was drafted and ratified had a quite different view of the relative importance of its various sections. To be sure, Section 1 generated significant opposition and debate in both the Thirty-ninth Congress and the country at large.[3] However, Sections 2 and 3 were generally viewed as equally important and controversial.[4] Furthermore, although the operation of Section 3 by its terms was limited to the immediate aftermath of the Civil War, Section 2—though never implemented—was designed to create a significant, permanent change in the manner in which representation in the House of Representatives was distributed among the states.[5]

This article will discuss the forces that shaped Section 2 and the process by which the provision was drafted. After briefly recounting the origins of the Three-Fifths Clause of the original Constitution, the Article will situate the impetus for the adoption of Section 2 in Republican unwillingness to have the political power of white Southerners enhanced by virtue of the Thirteenth Amendment, which by its terms would have had the effect of increasing the representation of the ex-slave states in the House of Representatives without requiring those states to allow the freedmen to vote. The Article will then describe the complex political struggle that ultimately led to the adoption of the current form of Section 2. The Article will conclude with some observations about the implications of the debates over Section 2 on our understanding of the structure of the Constitution as a whole.

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3. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866) (remarks of Rep. Shanklin).

4. *See, e.g.*, *Representation Under the Constitutional Amendment*, DAILY MINERS' REG. (Central City, Colo.), July 14, 1866, at 1 (noting that Section 2 will be the main complaint of Southerners); *The Precise Import of the Constitutional Amendment*, DAILY NAT'L INTELLIGENCER (Wash.), Sept. 18, 1866, at 2 ("The real point in the [proposed Fourteenth Amendment] is . . . the clause which deprives the South of all representation for the negro population.").

5. Scholars have given great attention to the evolution of Section 2 of the Fourteenth Amendment. *See, e.g.*, George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 W. POL. Q. 829 (1970); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961). Political forces also shaped Section 2. *See* JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869 (1974); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1867 (1988).

I. REPRESENTATION IN THE HOUSE OF REPRESENTATIVES UNDER THE CONSTITUTION OF 1789

The problem that ultimately led to the adoption of Section 2 of the Fourteenth Amendment[6] was, in large measure, a byproduct of the terms of Article I, Section 2 of the Constitution of 1789, which established the basis of representation for the newly created House of Representatives.[7] Although George Mason of Virginia described the House of Representatives as "the grand depository of the democratic principle of the [government],"[8] the structure of the House in fact reflected only a limited commitment to the ideal of what modern Americans would consider democracy. First, rather than enshrining the principle of one person, one vote into the original Constitution, the delegates to the Philadelphia convention left each state free to establish its own voting qualifications, with the sole proviso that the qualifications for participating in the elections for the House of Representatives be the same as those for electing the most numerous branch of the state legislature.[9] In addition, rather than being based on the number of eligible voters, the number of representatives to which each state was entitled was based upon population, which consisted of the state's free population plus three-fifths of "all other Persons," a euphemism for slaves.[10]

Indeed, neither the idea of constitutionalizing universal adult suffrage nor the concept of basing representation on eligible voters seems to have occurred to the convention delegates. Instead, the supporters of the basic idea of proportional representation were split between those who believed that population *per se* was the proper metric for determining representation,

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6. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

7. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

8. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., photo. reprint 1937) (1911).

9. U.S. CONST. art. I, § 2, cl. 1, *amended by* U.S. CONST. amend. XIV.

10. *Id.* § 2, cl. 3.

those who contended that wealth should be considered in the equation,[11] and those who argued for the concept of quotas of contribution.[12] Ultimately, the drafters chose population in part because a number of delegates believed that population was an adequate surrogate for wealth as well.[13] The idea that wealth should be considered in the basis of representation played an important role in the debate over the Three-Fifths Clause, as some delegates suggested that the consideration of slaves was a means by which the greater wealth of the South could be included in the calculations of representation.[14]

However, the Three-Fifths Clause was ultimately even more directly connected to the idea of quotas of contribution—one of the alternatives originally suggested by the Virginia plan.[15] The basis of this concept was that representatives should be apportioned according to the amount that the residents of each state would be required to contribute to the federal government. The Three-Fifths Clause was first proposed at the Philadelphia convention in the midst of the discussion of the basis of representation on June 11.[16] At that time, in proposing the Clause, Charles Pinckney of South Carolina and James Wilson of Pennsylvania observed that the same formula for taxation had been proposed under the Articles of Confederation.[17] Moreover, when the drafters ultimately approved the idea that three-fifths of the number of slaves be counted for purposes of determining representation on July 12, the provision was explicitly connected to the same formula for allocating "direct taxes."[18] Thus, this debate demonstrates that the two concepts were linked in the minds of the framers.

In any event, the theoretical underpinnings of the Three-Fifths Clause were irrelevant to antislavery Northerners during the antebellum era. These Northerners often complained bitterly that the clause unfairly inflated Southern representation in the House of Representatives and thereby contributed to the domination of the federal government by what was sometimes described as "the slave power."[19] Republicans, however, faced a quite different problem during the Reconstruction era.

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11. *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 8, 179–80.
12. *See, e.g.*, *id.* at 180.
13. *See, e.g.*, *id.* at 587.
14. *See, e.g.*, *id.* at 562 (remarks of Rufus King).
15. *Id.* at 200.
16. *Id.* at 201.
17. *Id.*
18. *Id.* at 597.
19. *See, e.g.*, LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860 (2000).

II. EMANCIPATION AND REPRESENTATION

While the passage of the Thirteenth Amendment was a great political victory for the Republican Party, the emancipation of the slaves also threatened to change the sectional balance of power in the House of Representatives. Once the erstwhile slaves became free, the Constitution of 1789 mandated that the newly-freed men be counted fully in the basis of representation. But at the same time, none of the ex-Confederate states allowed free African Americans to vote.[20] Thus, unless Congress took some further action, freeing the slaves would have had the ironic effect of substantially enhancing the political power of white Southerners in the House of Representatives—the very group who had led the secession movement. As one Republican congressman explained, if the Constitution remained unchanged, "[t]he reward of treason will be an increased representation in this House, an increased influence in the Government to the traitors who have sworn and striven to destroy it."[21] Understandably, this prospect was anathema to the Republicans who controlled the Thirty-ninth Congress. Republicans proposed a variety of different solutions to this problem.

A. The Black Suffrage Option

In theory, one reaction to this problem might have been to leave the basis of representation unchanged but to require the defeated Southern states to enfranchise the newly-freed slaves—a group of people whose natural inclination would almost certainly be to support the Republican Party and thus provide a counterweight to the voting power of white Southerners. This approach would have dovetailed well with the increasing support within the Republican Party for the principle of African-American suffrage more generally. In 1864, the Republican establishment had supported measures that would have enfranchised free blacks in a number of Northern states.[22] Similarly, in early January of 1866, the Republican-dominated House of Representatives passed a bill extending the right to vote to African Americans in the District of

20. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 50 (1990).

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

22. *See, e.g.*, MALTZ, *supra* note 20, at 11–12.

Columbia.[23] Radical Republicans also pressed for measures that would have imposed a nationwide ban on racial qualifications for voting.[24]

Such proposals, however, faced a variety of different obstacles. Not surprisingly, Democrats generally were adamantly opposed to all efforts to enfranchise free blacks.[25] But in addition, more moderate and conservative Republicans also had a variety of concerns. First, for those committed to the maintenance of states' rights, any federal effort to define qualifications for suffrage was even more worrisome than the provision of federal protection for civil rights. Moreover, the defeat of Northern states' referenda that would have enfranchised African Americans clearly indicated that support for black suffrage carried major political risks for Republicans who could foresee being involved in hotly-contested races. Finally, there was no guarantee that newly-enfranchised blacks as a group 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 that:

> 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 right of the individual and his equality before the law are loudly proclaimed and speciously enforced. The whole history of Southern politics exhibits this.[26]

Against this background, all of the Republican members of the Joint Committee on Reconstruction except Republican Senators William Pitt Fessenden of Maine and Jacob Howard of Michigan initially rejected the idea that the Committee should propose a constitutional amendment that required states to allow African Americans to vote.[27] Instead, the committee Republicans, joined by Democratic Representative Henry Grider of Kentucky, coalesced around the idea of a constitutional amendment that did not interfere directly with state control over suffrage but instead reduced the number of House seats allocated to states that prohibited African Americans from voting.[28]

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

24. *See, e.g.*, BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEENTH ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 44 (Faculty of Political Sci. of Columbia Univ. ed., 1914).

25. *See generally*, JOEL H. SIBLEY, A RESPECTABLE MINORITY: THE DEMOCRATIC PARTY IN THE CIVIL WAR ERA, 1860–1868 (1977) (describing the position of Democratic Party).

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

27. KENDRICK, *supra* note 24, at 12.

28. *Id.* at 53.

B. Changing the Basis of Representation—Initial Considerations

Even before the Joint Committee was created, the basic concept of a constitutional amendment changing the basis of representation had been endorsed by officials as diverse as Andrew Johnson and Thaddeus Stevens, both of whom advocated amendments that would have based representation on legal voters.[29] However, when Reverdy Johnson moved that the committee adopt an amendment embodying this principle on January 12, this motion was rejected on an eight-to-six vote that did not reflect any clear ideological pattern.[30]

The committee then considered a variety of different formulations on January 12 and January 16 before finally settling on a proposal that began by tracking the original language of Article I with respect to the allocation of representatives and direct taxes by population, but eliminated the Three-Fifths Clause and instead provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[31] Only Democratic Representative Andrew Rogers of New Jersey dissented from the committee vote that approved this language.[32] Both Jacob Howard and Henry Grider, however, served notice that they reserved the right to advocate different language during consideration of the committee proposal by the full Senate and House, respectively.[33]

On January 22, 1866, Stevens introduced the committee proposal on the House floor.[34] However, it was Republican Representative Roscoe Conkling of New York, another member of the Joint Committee, who provided the most complete and coherent account of the reasoning that underlay the committee's proposal.[35] Conkling asserted that the structure of the House of Representatives generally was based on the principle that "[t]he government of a free political society belongs to its members, and does not belong to others" and that "political representation does not belong to those who have no political existence."[36] He brushed aside the objection that, under that formulation, aliens should not be counted in the basis of apportionment, contending that "[t]he political disability of aliens was not for this purpose counted at all against them, because it was certain

29. *The Negro Suffrage Bill*, N.Y. HERALD, Jan. 28, 1866, at 1.
30. KENDRICK, *supra* note 24, at 43–45.
31. *Id.* at 53.
32. *Id.* at 52–53.
33. *Id.* at 53.
34. CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).
35. *Id.* at 356–59.
36. *Id.* at 356.

to be temporary, and they were admitted at once into the basis of apportionment."[37] By contrast, he characterized the treatment of slaves as the sole exception to the basic principle, describing the Three-Fifths Clause as "[a] purely arbitrary agreement [that] was made and inserted in the Constitution, an agreement with nothing to support it but the consent of the parties, based upon the facts as they then stood."[38] With the end of slavery, Conkling argued that it was unfair for the basis of representation to include "four million beings . . . who are pronounced by their fellow beings unfit to participate in administering government in the States where they live . . . who are pronounced unworthy of the least and most paltry part in local political affairs."[39]

1. The Joint Committee Proposal in the House of Representatives

Democrats, who generally opposed all changes to the Constitution in 1866, interposed a variety of different objections to the representation amendment. Some of these objections were explicitly linked to the dispute over the Republican approach to reconstruction more generally. Unlike Republicans, Democrats contended that the representatives of the ex-Confederate states should immediately be seated in Congress.[40] Democrats argued that the idea of amending the Constitution with almost no Southern representation in Congress was particularly offensive. For example, Democratic Representative Myer Strouse of Pennsylvania complained that:

> The resolution now before the House is intended to affect the Southern states principally, and we are asked to legislate for a people and country designated here by the leaders of the [Republican] party as aliens and foreign, as conquered territory under the law of nations. . . .
>
> There shall be no taxation without representation is a fundamental principle of American law. We tax the people of the South, subject them to the laws of the United States, and hold them to all the duties and responsibilities of citizens of the States in the Union, while at the same time we deny the right of representation in both Houses of Congress. It would much more comport with the dignity and the sense of justice of the American Congress to let the legally elected members from the southern States be admitted and

37. *Id.*
38. *Id.*
39. *Id.* at 357.
40. *See id.* at 426.

> participate in the proceedings and debates, especially in matters of so great importance as a change in our organic law.[41]

Other opponents of the proposal made similar points. For example, Democratic Representative Aaron Harding of Kentucky complained that "this is not open, fair political warfare. You are proposing to take advantage of the absence of Representatives of eleven States and the feeble power of the minority here to engraft your peculiar political dogmas on the Constitution."[42] Similarly, Representative Godlove S. Orth of Indiana noted that in 1787, the basis of representation had been established by a committee including one representative from every state.[43]

In addition, Democrats such as Representative Andrew J. Rogers of New Jersey—one of the two House Democrats who were members of the Joint Committee—attacked the substance of the proposed constitutional amendment.[44] Rogers asserted that the committee proposal "saps the very foundation and principles upon which the genius and institutions of this country have rested from the commencement of its political existence."[45] In part, this assessment focused on the impact of the proposal on states' rights. For example, Democratic Representative Laurence S. Trimble of Kentucky declared that "this proposition and all kindred propositions, in my judgment, are in direct opposition to the plain provisions of the Constitution itself, to the reserved right of the States, which are sacred, and should be so regarded by the Congress and the people"[46] and Democratic Representative John A. Nicholson of Delaware further asserted that "[t]his is but part of the favorite scheme of New England to take away, one by one, all of the powers now exercised by the several States, and make this a consolidated Government, a centralized despotism."[47]

But at the same time, Democrats also frankly acknowledged the racist underpinnings of their opposition to the committee proposal. Thus, Rogers complained that the proposal "attempts, in an indirect manner, to have passed upon by the Legislatures of the different States a question which the [Republican Party] dare not boldly and openly meet before the people of this country . . . to force the States to adopt unqualified negro suffrage."[48] Further, Rogers argued that:

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41. *Id.*
42. *Id.* at 450.
43. *Id.* at 381–82.
44. *See id.* at 353.
45. *Id.*
46. *Id.* at 388.
47. *Id.* at 435.
48. *Id.* at 353.

> [B]ecause there are in certain States negroes, men of an inferior race, men who by the laws of God are stamped with an inferiority so indelible that nothing can wipe it out, it is proposed that such States shall only enjoy their full right to representation [in the House] on the condition that they will allow to these negroes the unqualified right of suffrage on a perfect equality with the white citizen.[49]

Similarly, Nicholson proclaimed that "I firmly believe that [white Americans] will never consent to share the Government of this country with a race of beings whom the Almighty himself has declared shall be the 'servant of servants,' and upon whom He has stamped the indelible mark of inferiority."[50] In addition, Rogers contended that the proposed constitutional amendment would exclude all African Americans from the basis of representation even if they were denied the right to vote only because they failed to satisfy the same criteria applied to potential white voters[51]—a claim that Conkling vigorously denied.[52]

Conkling was also faced with the problem of explaining why his rationale for the proposed amendment would not also imply that the denial of the right to vote to women should result in the reduction of a state's representation in Congress. Noting that Elizabeth Cady Stanton, Susan B. Anthony, and their allies had petitioned Congress to propose a constitutional amendment to require states to allow women to vote, Democratic Representative James Brooks of New York asked "why not, in a resolution like this, include the fair sex too, and give them the right to representation? Will it be said that this sex does not claim a right to representation?"[53] Brooks then facetiously moved to amend the committee proposal to equate exclusions on the basis of sex with exclusions on the basis of race. When Thaddeus Stevens asked if Brooks was actually in favor of this proposal,[54] Brooks responded that "I am in favor of my own color in preference to any other color, and I prefer the white women of my country to the negro."[55] The only immediate effort to provide a coherent response to Brooks came from Republican Representative Henry P. H. Bromwell of Illinois, who adverted to what was known as the principle of virtual representation, asserting that "[l]adies are part of the family with most of us. The head of

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49. *Id.* at 353–54.
50. *Id.* at 435.
51. *Id.* at 353 (Rogers cited literacy tests as one example).
52. *Id.* at 354.
53. *Id.* at 380.
54. *Id.*
55. *Id.*

the family does the voting for the family."[56] Criticism of the committee proposal was not limited to House Democrats. The proposed constitutional amendment also came under fire from a variety of Republicans as well. The nature of their objections was, however, quite different from those of the Democrats.

Radical Republicans such as George W. Julian of Indiana, Thomas D. Eliot of Massachusetts, and Frederick A. Pike of Maine asserted that the proposed amendment was fatally flawed because the proposal would allow states to continue the practice of restricting the right to vote to whites.[57] These Republicans contended that states with large populations of free African Americans were constitutionally required to enfranchise the erstwhile slaves by Article IV, Section 4, which required states to maintain a "republican" form of government and observed that Congress was already vested with authority to enforce this mandate by the Constitution.[58] Republican Representative William D. Kelley of Pennsylvania would have derived the same authority from congressional power to regulate the "time, place and manner" of elections to the House.[59]

Against this background, the radicals contended that the Joint Committee proposal might, in fact, be counterproductive. They reasoned that, by providing that representation would be reduced if states adopted race-based restrictions on the right to vote, the proposed amendment implicitly recognized the power of the states to impose such restrictions.[60] Instead, radicals pressed for a constitutional amendment that would explicitly bar racial discrimination in suffrage qualifications.[61]

Conkling responded by recapitulating the arguments against such a constitutional amendment.[62] He contended that the radical proposal:

> [T]renches 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.[63]

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 passing a constitutional

56. *Id.* at 410.
57. *See id.* at 406–07.
58. *Id.*
59. *Id.* at 409.
60. *Id.* at 427.
61. *Id.*
62. *Id.* at 358.
63. *Id.*

amendment prohibiting racial discrimination in suffrage that the states ratified would almost certainly be impossible.[64] Gender-related issues played an especially prominent role in the debate over another alternative to the Joint Committee proposal that had significant Republican support. A group of Republicans including Representatives Robert C. Schenck, William Lawrence, and Samuel Shellabarger of Ohio argued that representation should be based on the number of adult male citizens over twenty-one years of age with the necessary qualifications for electors of the most numerous branch of the state legislature.[65] Lawrence asserted that this proposal "has the crowning merit of a perfect representative democracy, that for all purposes of representation every voter in this broad land of ours is equally potential in its councils,"[66] while Schenck emphasized that his was "a plain, practical proposition" that "leaves nothing open for discussion, or wrangling, or difficulty."[67]

Unlike the 1789 Constitution and the Joint Committee formulation, the focus on the number of eligible voters—all of whom would have been adult males in 1866—would have explicitly excluded aliens, children, and women from the basis of representation. Lawrence observed that the laws of the states declared unnaturalized foreigners unsafe or unnecessary "depositaries of political power" and that "children never can be qualified and competent depositaries of political power, and therefore should not enter into the basis of representation."[68] He also asserted that "[i]t never has been deemed necessary for the protection of females that they should be regarded as an element of political power."[69] Similarly, Schenck averred that "by common consent of civilized countries, including our own, the whole subject being considered, especially the sphere of the two sexes, it has been held that Government should be in the hands of the male part of the population and not the female."[70] Indeed, Lawrence apparently viewed the exclusion of women as a positive good. Adverting to the possibility that Mormon-dominated Utah might well become a state, he observed that, unless the basis of representation was altered, "[t]he dominions of Brigham Young, if incorporated in the Union, would become the paradise of politicians, rich in unequal political power, because of the multitudinous wives and children of the Saints of Utah."[71]

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64. *Id.*
65. *Id.* at 535 (Schneck), 403–04 (Lawrence), 405 (Shellabarger).
66. *Id.* at 404.
67. *Id.* at 535.
68. *Id.* at 405.
69. *Id.*
70. *Id.* app. at 297.
71. *Id.* at 404–05.

Other Republicans, however, had a different view of the desirability of removing women and children from the basis of representation. For example, when others had made similar proposals earlier in the session, Republican Representative James G. Blaine of Maine had complained bitterly that they would reallocate political power from the New England states to the West, where the ratio of men to women was much higher.[72] In addition, Blaine argued that basing representation on the voting population "would tend to cheapen suffrage everywhere" by creating the danger of "an unseemly scramble in all the States during each decade to increase by every means the number of voters"[73]—an assessment with which Conkling agreed.[74] Blaine asserted that:

> [A]ll conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. Foreigners would be invited to vote on a mere preliminary "declaration of intention," and the ballot, which cannot be too sacredly guarded, and which is the great and inestimable privilege of the American citizen, would be demoralized and disgraced everywhere.[75]

With Democrats firmly opposed to any constitutional change and Republicans in apparent disarray, the proposal to change the basis of representation was recommitted to the Joint Committee on Reconstructions without instructions on January 29.[76] On January 31, after rejecting two motions by Democratic Senator Reverdy Johnson of Maryland to significantly alter the original text,[77] the committee voted to eliminate the references to direct taxes and return the measure to the full House without other changes. Only Republican Senator William Pitt Fessenden joined the Democratic members of the committee in opposing this motion.[78]

When the House resumed consideration of the issue the same day, Stevens explained that the reference to direct taxes had been deleted to avoid entangling the issue of the basis of representation with a debate over tax policy.[79] Further, because Article I, Section 9 independently required that direct taxes be apportioned according to population, the removal of the reference to the taxation from the representation provision had no

72. *Id.* at 141.
73. *Id.*
74. *Id.* at 357.
75. *Id.* at 141.
76. *Id.* at 493–94.
77. KENDRICK, *supra* note 24, at 59.
78. *Id.* at 60.
79. CONG. GLOBE, 39th Cong., 1st Sess. 535 (1866).

practical import.[80] Nonetheless, the change in language was of considerable theoretical significance. By breaking the link between representation and taxes, the Joint Committee also implicitly abandoned the concept of quotas of contribution, which had clearly been reflected in the original configuration of the House of Representatives.

Because of these changes, Robert Schenck immediately renewed his call to base representation on the adult male voting population.[81] Republican Representative John F. Benjamin of Missouri, however, raised a new objection to this concept, noting that this proposal would reduce the representation of any state that disfranchised former Confederate sympathizers, who formed a substantial part of the potential voting population in loyal states such as Missouri, Kentucky, and Maryland, and an even larger portion of the population of all of the ex-Confederate states that might subsequently be readmitted.[82] In addition, Stevens observed that the Schenck proposal would for the first time introduce the word "male" into the Constitution and declared, "I do not think we ought to disfigure the Constitution with such a provision."[83] These objections persuaded most Republicans; when put to a vote, Schenck's substitute language received the support of only 29 Republicans.[84] The Joint Committee language was then adopted on an almost straight party-line vote. [85]

2. The Joint Committee Proposal in the Senate

When the proposed constitutional amendment reached the Senate floor, conservative Republican Senator James R. Doolittle of Wisconsin immediately proposed a substitute that was similar to the Schenck

80. *See* U.S. CONST. art. I, § 9.
81. CONG. GLOBE, 39th Cong., 1st Sess. 535 (1866).
82. *Id.* at 535–36.
83. *Id.* at 537. Not surprisingly, supporters of women's suffrage took a similarly dim view of proposals such as Schenck's. *See, e.g.*, ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE 58–62 (1978); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 146–48 (1959).
84. CONG. GLOBE, 39th Cong., 1st Sess. 538 (1866).
85. *Id.* The measure that passed the House provided that:

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

EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 104 (1871) (emphasis in original).

proposal that had been rejected by the House.[86] Those Republicans who favored an amendment that would have explicitly banned racial discrimination in voter qualifications, however, quickly took a more prominent role in the debates. Republican Senator Charles Sumner of Massachusetts, well-known for his extreme radical positions, launched the first salvo from this group. 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 French and classical precedents as well.[87] He insisted that the right to vote was a natural right, and argued that both the Guarantee Clause and Section 2 of the Thirteenth Amendment had already vested Congress with the authority to ban racial discrimination at the ballot box by statute.[88] Nonetheless, he advocated a constitutional amendment that would have provided "that there shall be no Oligarchy, Aristocracy, Caste, or Monarchy 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 limits of the United States."[89]

Although Sumner sharply criticized the white power structure in the ex-Confederate states, he was equally unsparing in his assault on the proposal that had passed the House of Representatives. Describing the Joint Committee proposal as "nothing else than [a] Compromise of Human Rights" and declaring that "a moral principle cannot be compromised,"[90] Sumner asserted that the proposal would "admit in the Constitution the twin idea of Inequality in Rights"[91] and, comparing the supporters of the proposal to Pontius Pilate,[92] he declared that they would be "partaking in the wrong."[93]

Although phrasing their proposals in simpler language and less openly-contemptuous than Sumner or their more moderate colleagues, a number of

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86. CONG. GLOBE, 39th Cong., 1st Sess. 673 (1866). The Doolittle Amendment stated:

> Representatives shall be apportioned among the several States which may be included within this Union according to the number in each State of male electors over twenty-one years of age qualified by the laws thereof to choose members of the most numerous branch of its Legislature. And direct taxes shall be apportioned among the several States according to the value of the real and personal taxable property situation in each State not belonging to the State or to the United States.

Id.

87. *Id.* at 673–87.
88. *Id.* at 674.
89. *Id.*
90. *Id.* at 673.
91. *Id.*
92. *Id.* at 674.
93. *Id.*

other Republican senators were equally emphatic in pressing for a constitutional amendment that would directly outlaw racial discrimination in voting rights. Thus, for example, Republican Senator John B. Henderson of Missouri asserted that:

> 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.[94]

Most Republicans, however, continued to support the formulation of the Joint Committee. Although Representative William Pitt Fessenden had supported a 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 that:

> I take it that no one contends [including Sumner], 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.[95]

Similarly, Williams pleaded:

> [G]ive these men a little time, give them a chance to learn 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

94. *Id.* app. at 125; *see also id.* at 736–42 (remarks of Sen. Lane), 831–35 (remarks of Sen. Clark), 915 (remarks of Sen. Howard); *id.* app. at 98–105 (remarks of Sen. Yates).

95. *Id.* at 704.

> 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] to give them the right of suffrage.[96]

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

> 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 cannot do what they would, therefore they will do nothing.[97]

Fessenden also observed:

> [T]he argument that addressed itself to the committee was, what can we accomplish? What can pass? If we report a [black 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.[98]

But even the more moderate Joint Committee proposal faced formidable obstacles in the Senate. Democrats remained united in their opposition to any change in the basis of representation, often continuing to defend their position in overtly racist terms. For example, Democratic Senator Thomas A. Hendricks of Indiana declared that:

> I am not in favor of giving the colored man a vote, because I think we should remain a political community of white people. I do not think it is for the good of either race that we should attempt to make the Government a mixed Government of white and black. . . . I want to see the white race kept a white race, and the power in this country without mixture and without an attempt at mixture.[99]

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96. *Id.* app. at 95.
97. *Id.* at 705.
98. *Id.* at 704.
99. *Id.* at 880.

Discussions of gender-related issues also continued to play a significant role in the debate. George Williams sought to portray the Joint Committee language as more respectful of women than Doolittle's proposal to base representation on adult male voters, asserting that the Doolittle language "positively and absolutely strikes women and minors out of political existence, while the proposition reported by the [joint] committee does no such thing."[100] More often, however, Democrats were the ones who sought to put Republicans on the defensive for consistently acknowledging that the right to vote need not be extended to women while at the same time arguing that Southern refusal to enfranchise the ex-slaves was wrong and, at the very least, should result in a reduction of representation in Congress.

Some Republicans had difficulty in formulating coherent responses to these Democratic attacks. When Democratic Senator Reverdy Johnson of Maryland asked "is there any difference in principle . . . between counting [the women of Iowa] and counting blacks in ascertaining the number of Representatives to which Iowa is entitled,"[101] Republican Senator Samuel J. Kirkwood of Iowa sputtered "we would feel some objection . . . to having our women balanced off all the time by negroes in Maryland."[102] William Pitt Fessenden, on the other hand, drew laughter from the gallery by declaring that "I could hardly stand here easily if I did not suppose I was representing the ladies of my State" and "I know, or fancy I know, that I have received considerable support from some of them, not exactly in the way of voting, but in influencing voters."[103]

By contrast, Republican Senator Richard Yates of Illinois, took a different tack, appealing to what he saw as innate differences between the sexes as justification for denying women the right to vote:

> I know that we are met on every hand by the argument that women are excluded from the right of suffrage. The answer to that is very easy and very plain . . . .When it is asked why may she not vote since she is often a tax-payer, I answer that there are restrictions which are inevitable. . . . Woman is excluded by the inevitable proprieties of the case. The ballot is in politics what the bayonet is in war. Those only who wield the sword are . . . supposed capable of wielding the ballot. We should most certainly violate the proprieties of humanity were we to compel the softer sex to take part in the bloody work of physical warfare. And yet . . . to thrust woman into the arena of political strife is quite as abhorrent, and

100. *Id.* app. at 96.
101. *Id.* at 767.
102. *Id.*
103. *Id.* at 705.

> would be as destructive of her womanly qualities, as to compel her to take part in the shock of arms.[104]

Democrats also added a variety of new twists to their attacks on the proposed constitutional amendment. A number of Democrats observed that the version of the proposal that had ultimately passed the House severed the link between taxation and representation that had been a cornerstone of the original Constitution.[105] Democratic Senator Charles R. Buckalew of Pennsylvania observed that the proposal would not only reduce the representation of ex-slave states but also that of the states of the far West that had a large population of Asian immigrants—immigrants who were counted in the basis of representation under the original Constitution.[106] This group of immigrants was not eligible to become naturalized citizens and thus could not have voted in any event. But because the state constitutions limited suffrage to "white" citizens, Buckalew argued that under the committee language, all nonwhites in those states would be excluded from the basis of representation[107]—a point conceded by Republican Senator William D. Stewart of Nevada.[108]

In addition, Senate Democrats attacked the theoretical foundations of the committee proposal on a far more fundamental level. Republican supporters argued that a change in the Constitution was necessary to prevent Southern whites from exercising political influence that was out of proportion to their numbers.[109] As Hendricks and Buckalew pointed out, however, residents of the New England states, in particular, exercised analogous outsized influence in the Senate.[110] To illustrate this point, Hendricks cited the extreme example of the comparison between Indiana and Rhode Island, each of which was represented by two Senators, notwithstanding the fact that Indiana had more than seven times the population of Rhode Island.[111] He asserted that the composition of the Senate skewed national policy in favor of manufacturing interests and against those of the agricultural sector.[112] Thus, both he and Buckalew

104. *Id.* app. at 102.
105. *Id.* at 877.
106. *Id.* at 962.
107. *Id.* at 961 ("Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers. counting [sic] the whole number of persons in each State, excluding Indians not taxed: *Provided.* That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.").
108. *Id.* at 766.
109. *See infra* Part II.B.2.
110. CONG. GLOBE, 39th Cong., 1st Sess. 878–79 (Hendricks); 958 (Buckalew).
111. *Id.* at 878.
112. *Id.*

contended that if the basis of representation in the House was changed, the makeup of the Senate should be altered as well.[113]

In purely theoretical terms, these complaints had no clear answer. Theoretical arguments, however, would not primarily determine the fate of the proposed constitutional amendment. Instead, the course of the political struggle over the reconstruction process more generally—in particular, the ever-widening chasm between mainstream congressional Republicans and President Andrew Johnson—largely determined its fate. On February 19, 1866, in the midst of the ongoing debate over the proposed representation amendment, Johnson's veto of the Freedmen's Bureau Bill had greatly exacerbated the tensions between him and the mainstream Republican leadership.[114]

In late 1865, Johnson himself had suggested that the Constitution should be amended along the lines suggested by Schenck and Doolittle.[115] By February of 1866, however, the President had become firmly opposed to any new constitutional amendments.[116] Faced with this reality, when the vote was taken on March 9, six conservative Republicans decided to side with the President and vote against the Joint Committee proposal.[117] They were joined by a united Democratic Senate contingent and five radical Republicans, who refused to accept the committee proposal after the Sumner amendment was overwhelmingly defeated.[118] Thus, although a narrow majority of the Senate voted in favor of the proposed constitutional amendment, supporters fell well short of the two-thirds majority necessary to send the proposal to the states for ratification.[119]

Despite this defeat, mainstream Republicans remained determined to adopt some sort of measure that would change the basis of representation to limit the power of white Southerners in the federal government. Shortly after the March 9 vote, Republican senators proposed a variety of different formulations that would have accomplished that goal.[120] Thus, it became almost certain that the issue of reconstruction would dominate the elections that were upcoming in the fall of 1866.

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113. *Id.* (Hendricks); *id*. at 960 (Buckalew).
114. *See* ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 290–93 (1960).
115. MALTZ, *supra* note 20, at 50–51.
116. MCKITRICK, *supra* note 114, at 351–52.
117. CONG. GLOBE, 39th Cong., 1st Sess. 1289 (1866).
118. *Id.*
119. *Id.*
120. *Id.* at 1289, 1320–21.

C. The Fourteenth Amendment and the Basis of Representation

On March 27, Andrew Johnson's veto of the Civil Rights Act of 1866 dramatically changed the political dynamic of the struggle over reconstruction.[121] By emphatically denying that Congress had any authority to protect the civil rights of the freedmen, the veto message erased any lingering hopes that Johnson and the mainstream Republicans could find common ground for dealing with the reconstruction issue.[122] Thus, that the issue of reconstruction would dominate the elections that were upcoming in the fall of 1866 became a certainty.

Johnson's position on this point was clear—he was committed to rapid restoration of the ex-Confederate states to full participation in the Union without further preconditions. But although Republicans were successful in overriding Johnson's veto of the Civil Rights Act itself, [123] in April of 1866, they had not yet coalesced around a coherent reconstruction policy that they could present to the voters. Samuel Bowles, the influential moderate Republican editor of the *Springfield Republican*, highlighted the problem that the party faced:

> That part of Congress which is not passionate but reflective, confronts the fact that it has utterly failed in dealing with the questions of reconstruction. It has foundered in technical and theoretical debate for three months, but has agreed upon no action, formed no policy, established no terms of reconstruction. It can go on so no longer. Whether it agrees or disagrees with the President, it must have a policy; it must do some practical thing.[124]

1. The Owen Plan

Against this background, on April 21, the Joint Committee took up a detailed legislative program for reconstruction that had been formulated 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.[125]

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121. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 405–11 (James D. Richardson ed., 1897).
122. *Id.*; *see also* MCKITRICK, *supra* note 114, at 315.
123. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).
124. *Signs of Giving In*, SEMI-WEEKLY TELEGRAPH (Great Salt Lake City, Utah), Apr. 12, 1866, at 4.
125. KENDRICK, *supra* note 24, at 83–84.

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 basis of representation.[126]

The Joint Committee initially approved all of these provisions over the unanimous opposition of committee Democrats on April 21.[127] The eight Republicans who were present for the initial committee vote were almost united in support of these sections.[128] Among Republicans, the only dissenter was Representative George S. Boutwell of Massachusetts, who consistently supported immediate imposition of a race-blind suffrage requirement.[129]

As details of the Owen plan became publicly known, however, many mainstream Republicans made clear that they did not share the committee's enthusiasm for direct constitutional protection of the right of African Americans to vote. 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."[130] 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. As 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."[131]

2. The Abandonment of Black Suffrage

As a result, the Joint Committee did an about-face on the suffrage issue. On April 25, Republican Senator George H. Williams of Oregon moved that the committee reconsider its decision to submit the proposed constitutional amendment to the full House of Representatives and Senate, and the committee passed the motion over the dissents of Thaddeus Stevens and Jacob Howard.[132] Three days later, only Howard and Republican Representative Elihu B. Washburne of Illinois demurred when Stevens moved to have the prohibition on racial qualifications for voting removed from the proposed constitutional amendment.[133]

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126. *Id.*
127. *Id.* at 85–86.
128. *Id.*
129. *Id.* at 86.
130. *The Reconstruction Question*, DAILY CLEVELAND HERALD, Apr. 27, 1866, at 1.
131. *Action of the New York Delegation*, N.Y. TIMES, April 27, 1866, at 1.
132. KENDRICK, *supra* note 24, at 100.
133. *Id.* at 101.

Williams then moved to replace the Owen provision on the basis of representation with a formulation that Republican Senator James W. Grimes of Iowa, a member of the Joint Committee itself, had previously proposed in the Senate soon after the defeat of the original committee proposal.[134] On its face, this proposal seemed to be something of a hybrid between the race-focused provision that had previously been defeated in the Senate and included in the original Owen plan and the Schenck-Doolittle proposal to base representation on eligible voters. The Williams formulation retained the basic idea that representation would be based upon the number of inhabitants in each state. Thus, the proposal was not subject to the objection that it would reduce the power of states with disproportionate numbers of women and aliens, or states such as Missouri in which large numbers of potential voters had been disfranchised for presumed sympathy with the Confederacy. But unlike the language that the Senate had rejected, the Williams proposal did not simply reduce the representation of states that excluded nonwhites from voting. Instead, the proposal provided that representation would be reduced when any adult male citizen was denied the access to the ballot, except for "participation in rebellion or other crime."[135] Thus, like formulations based on eligible voters, the Williams proposal penalized states that did not allow universal manhood suffrage for loyal citizens.

Additionally, the new language assuaged at least some of the concerns that Charles Sumner voiced in connection with the race-focused provision that was rejected in the Senate. Sumner strongly supported the adoption of a constitutional amendment that would have directly prohibited racial discrimination in voting rights. But, in the alternative, he took the view that the Grimes/Williams formulation that the Joint Committee adopted on April 28 was superior to the race-specific language that had originally been reported for three reasons: (1) it was "not open . . . to any evasions," (2) "it contain[ed] no words which can imply any recognition of inequality of rights," and (3) "it contain[ed] no words which can imply any recognition of any right of a State to disfranchise on account of color or race."[136] Similarly, James Garfield recalled several years later:

> In the spirit of a similar criticism made by Madison in the constitutional Convention, that the word 'servitude,' or 'slavery,' ought not to be named in the Constitution as existing or as exercising any influence in the suffrage; and hence this negative form was adopted to avoid the use of an unpleasant word.[137]

134. CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866).
135. KENDRICK, *supra* note 24, at 102.
136. CONG. GLOBE, 39th Cong., 1st Sess. 1321 (1866).
137. CONG. GLOBE, 42d Cong., 2d Sess. 82 (1871).

In addition, Thaddeus Stevens had made a related point in connection with the dispute over African-American suffrage, observing that some Republicans had told him that "[t]hey were afraid that if [the amendment mentioned African Americans] at all, it would be used against them as an electioneering handle."[138]

Committee Democrats unanimously favored the change, as did moderate Republicans. Radical Republicans, in contrast, were divided. Although Jacob Howard, Thaddeus Stevens, and Elihu Washburne dissented, the committee adopted the Williams proposal, which became Section 2 of the composite constitutional amendment that was sent to the floor of the House of Representatives and the Senate for action.[139]

3. Final Maneuvering

In the House, the discussions of Section 2 recapitulated a number of the points that had been made during the previous debates over the basis of representation. For example, Andrew Rogers complained that "[t]he only object of [Section 2] is to drive the people of the South, ay, and even the people of the North, wherever there is much of a negro population . . . to allow them to come to the ballot-box and cast their votes equally with the white men,"[140] although Democratic Representatives William E. Finck of Ohio and Benjamin M. Boyer of Pennsylvania contended that any perceived overrepresentation of Southern whites in states where ex-slaves were not allowed to vote was, in principle, indistinguishable from the overrepresentation that the New England states enjoyed in the Senate relative to their population.[141]

Boyer complained bitterly that the plan the Joint Committee produced was nothing more than the scheme of "a conscious minority engaged in a conspiracy to keep the control of the Government against the will of a majority of the people of the whole country."[142] But the result of the vote in the House was almost a foregone conclusion. Although some Republicans, such as Representative James A. Garfield of Ohio, expressed regret that immediately requiring the enfranchisement of the freed slaves was not possible,[143] mainstream Republicans ultimately remained united

138. Robert Dale Owen, *Political Results From the Varioloid*, 35 ATLANTIC MONTHLY 660, 666 (1875).
139. KENDRICK, *supra* note 24, at 102.
140. CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866).
141. *Id.* at 2462 (Finck), 2467 (Boyer).
142. *Id.* at 2467.
143. *Id.* at 2462.

in support of the committee proposal, and on May 10, the proposal easily gained the necessary two-thirds majority necessary for passage.[144]

The consideration of Section 2 by the Senate produced a far more complex dynamic. Because Fessenden was ill, Jacob Howard took the lead in presenting the rationale for the Joint Committee's actions.[145] Howard had voted in committee to reduce representation only for racial denials of the right to vote and openly acknowledged that he would have preferred an amendment that would have directly required the enfranchisement of free blacks.[146] Nonetheless, conceding that no real possibility existed that such an amendment could be adopted, he delivered a forceful argument in support of the committee proposal.[147] After reviewing the alternatives, he explicitly rejected the theory of representation that many delegates to the 1787 convention advanced, asserting that "[n]umbers, not voters; numbers, not property; this is the theory of the Constitution."[148] But at the same time, Howard defended the decision to reduce a state's representation for most denials of suffrage to adult males, citing Madison for the proposition that universal manhood suffrage was the *sine qua non* of republican government.[149]

At this point, Reverdy Johnson once again injected the issue of gender into the debate, asking whether Madison would have advocated granting women the right to vote.[150] Howard brushed this query aside, noting that Madison did not refer to women specifically, and further asserted:

> I believe that Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men.[151]

Predictably, Democrats launched a variety of other attacks on the committee proposal as well. The thrust of many of these attacks was by this time familiar; however, Thomas Hendricks of Indiana added a new twist. He observed that because Republicans claimed the amendment was necessary to prevent Southern whites from benefitting by the emancipation of their slaves, the proper remedy was not to altogether exclude ex-slaves who were denied the right to vote from the basis of representation.[152] Instead,

144. *Id.* at 2545.
145. MALTZ, *supra* note 20, at 97.
146. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).
147. *See id.* at 2766–68.
148. *Id.* at 2767.
149. *Id.* at 2766–67.
150. *Id.* at 2767.
151. *Id.*
152. *Id.* at 2942.

Hendricks insisted that the proper remedy would be to count three-fifths of the number of ex-slaves in the basis of representation, leaving the balance of power the same as it had been before secession.[153]

Additionally, unlike their counterparts in the House of Representatives, a number of mainstream Republicans in the Senate pressed for widely disparate changes in the structure of the representation provision. For example, Senator William D. Stewart of Nevada advocated a reconstruction plan based on the principles of universal suffrage and universal amnesty,[154] while Senator Benjamin F. Wade of Ohio—a one-time supporter of the Sumner amendment—introduced a proposal that would have allowed states to condition voting rights on education or property without losing representation in the House.[155] Senator John Sherman of Ohio, in contrast, sought to have representation based directly on eligible voters.[156]

The basis of representation was not the only issue dividing Senate Republicans; they also differed sharply over Section 3, which temporarily disfranchised those who had supported the Confederacy.[157] Faced with the urgent need to reach consensus to secure the two-thirds majority necessary to adopt a constitutional amendment, mainstream Republican senators met behind closed doors several times beginning on May 28.[158] After a general agreement had been reached, the task of reducing the terms of the agreement to writing was delegated to a committee composed of Senators William Pitt Fessenden, James Grimes, and Jacob Howard.[159]

This process yielded a dramatic change in Section 3. Rather than disfranchising ex-rebels until 1870, the new provision disqualified them from holding government office until a two-thirds vote of both Houses of Congress removed the disability.[160] In addition, the definition of citizenship was added to Section 1.[161] Section 2, by contrast, emerged from the Republican caucus unchanged except for a minor technical alteration in language.[162]

Republican Senator Luke P. Poland of Vermont sought to provide a principled defense of the structure of Section 2. Poland described the need to change the basis of representation in frankly political terms, arguing that it was important to hinder the efforts of Confederate sympathizers and

153. *Id.*
154. *Id.* at 2798–2803.
155. *Id.* at 2768.
156. *Id.* at 2804.
157. *See, e.g.*, *id.* at 2771–72 (remarks of Sen. Clark) (criticizing committee draft of Section 3).
158. *The Plan of the Union Senators*, BOS. DAILY ADVERTISER, May 30, 1866, at 1.
159. *Id.*
160. CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).
161. *Id.* at 2890.
162. *Id.* at 2897.

their Northern allies to take control of the national government.[163] Beginning from that premise, Poland argued that a population-based system was superior to one based directly on eligible voters.[164]

In making this argument, Poland relied heavily on the theory of virtual representation. Noting that the right to vote was routinely denied to women, children, and newly-arrived aliens, Poland observed that even in those states with the most liberal access to voting rights, suffrage had always been confined to "a small minority of the whole people" and that:

> The right of suffrage is not given to a particular class because they have any greater interest in the Government . . . but is given to them as fair and proper exponents of the will and interests of the whole community, and to be exercised for the benefit and in the interest of the whole.[165]

Although conceding that this system was "wholly artificial" and that "many females are far better qualified to vote intelligently and wisely than many men who are allowed to vote," Poland seemed comfortable with the idea that "fathers, husbands, brothers and sons to whom the right of suffrage is given will in its exercise be watchful of the rights and interests of their wives [and] sisters . . . who do not vote as of their own."[166] In light of this situation, he argued that a system that based representation on eligible voters was fundamentally unfair because it devalued the interests of women and children by favoring states whose populations included disproportionately high numbers of adult males.[167]

Mainstream Republicans did not universally share this view. John Sherman of Ohio, for example, asserted that "the more I think of this question the more I am convinced that the true basis of representation . . . is the number of male citizens who under the laws of the State are allowed to vote."[168] Nonetheless, Sherman—like all other mainstream Republicans—voted against a proposal to modify the representation amendment along these lines, declaring:

> While I do not and cannot surrender my individual opinion on this subject, I shall vote against [this] amendment . . . simply because it is necessary to have an end to this controversy, and those who are expected to carry these propositions before the people must agree upon some platform, and I choose to stand by that which has

163. *Id.* at 2962–63.
164. *Id.*
165. *Id.* at 2962.
166. *Id.*
167. *Id.*
168. *Id.* at 2986.

> been agreed upon by those who are expected to vote for some amendments to the Constitution.[169]

Prior to the final approval of the change in the basis of representation, however, Republicans came to the realization that an ambiguity in the wording of the proposed Section 2 might undermine its effectiveness. The provision was intended to encourage Southern whites to allow African Americans to participate fully in the political process and to penalize those states that continued to prevent such participation. The problem was that, as originally reported from the Joint Committee and approved by the Republican caucus, Section 2 simply provided that representation would be reduced if any adult males were denied access to the "elective franchise" without specifying which election was to be considered in determining whether access to the elective franchise had been denied.[170] As George Williams explained on June 6, the provision might conceivably have been interpreted to refer only to the right to vote for members of the House of Representatives, leaving open the possibility that white Southerners might be able to retain exclusive control over their state governments and still avoid the loss of representation by the simple expedient of allowing African Americans to vote only in elections for the House.[171] To avoid this problem, Williams moved to amend the proposal to provide that representation in the House would be reduced whenever a group of adult males was denied "the right to vote at any election held under the Constitution and laws of the United States, or of any State."[172]

Pressing for passage of the Williams amendment, Jacob Howard asserted that the change in language had been "very carefully and thoroughly considered."[173] However, both Democrat Reverdy Johnson and Republican John Henderson observed that the change created a different problem.[174] They noted that even states that provided for universal or near-universal manhood suffrage in most elections appropriately limited participation to a much smaller class of citizens in certain special purpose elections and that the proposed language by its terms would reduce the basis of representation if a state excluded groups of adult males from participation in any one of those elections.[175] Thus, if adopted, the new language might have dramatically reduced the representation of a wide variety of Northern as well as Southern states.

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169. *Id.*
170. *Id.* at 2991.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 3027 (Johnson), 3010 (Henderson).
175. *Id.* at 3027 (Johnson), 3010 (Henderson).

Seeking to avoid this problem, on June 7, Henderson proposed language that would have reduced the basis of representation only for exclusions of adult males from general elections for state offices.[176] The following day, Williams made a final effort to perfect Section 2 by offering an amendment that specified that the basis of representation would be reduced to the extent that groups of adult males were denied the opportunity to vote "at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of the Legislature thereof."[177] Williams asserted that he had formulated the change "upon consultation with the [joint] committee and other friends of [Section 2]."[178]

Despite this representation, a number of mainstream Republicans remained skeptical. Apparently having reconsidered his position, Jacob Howard suggested that states might still have idiosyncratic limitations on the right to vote for judicial officers which might, in turn, lead to unintended reductions in the basis of representation.[179] He also maintained that, in any event, the new proposal would introduce:

> [A] rule which is so uncertain, so difficult of practical application, as not only to greatly increase the expenses of ascertaining the basis of representation by Congress in procuring the necessary information, but in many cases the [information obtained] must be so inaccurate and unreliable as to be next to worthless.[180]

Howard suggested instead that the exclusion of adult male voters be measured simply by reference to the qualifications to vote for the most numerous branch of the state legislature—a standard that would also have measured eligibility to vote for members of the House of Representatives itself. When this proposal was defeated,[181] seven other mainstream Republicans and three Democrats joined Howard in voting to retain the formulation that had originally emerged from the Republican caucus.[182] But despite this opposition, Williams carried the day,[183] and it was the formulation proposed on June 8 that ultimately became Section 2 of the Fourteenth Amendment, which was ratified in 1868.

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176. *Id.* at 3011.
177. *Id.* at 3039.
178. *Id.*
179. *Id.* at 3038.
180. *Id.* at 3039.
181. *Id.* at 3040.
182. *Id.*
183. *Id.*

CONCLUSION

Ultimately, all of the effort expended in crafting Section 2 was for naught. Howard's complaint proved prescient; census takers generally did not gather the information necessary to implement the strictures of Section 2, and as a result, representation was consistently based on raw population numbers, without regard to the number of adult males who state law disfranchised.[184] Although efforts were occasionally made in Congress to reduce the representation of those states that excluded large numbers of adult males from access to the ballot, none of those efforts were ultimately successful. For example, even after the adoption of the Fifteenth Amendment, Southern states often used race-neutral devices to prevent African Americans from voting without suffering any diminution in the size of their delegations in the House of Representatives.[185]

Nonetheless, one can learn a variety of lessons from the evolution of Section 2 of the Fourteenth Amendment. The most obvious lesson is that Section 2 is based on a quite different theory of representation than that reflected in Article I of the Constitution of 1789. Article I embraced the theory of quotas of contribution, reflecting the expressed belief of many delegates that representation should be based in part on wealth or property. By contrast, the drafters of the Fourteenth Amendment explicitly eschewed the idea that representation should be based on wealth. Moreover, the Republicans who controlled the process chose to make fundamental changes in the basis of representation rather than simply making minor adjustments to prevent white Southerners from gaining political power from the emancipation of their slaves, thereby attempting to move the system much closer to the principles of democratic theory.

At the same time, characterizing Section 2 as fully embracing the modern ideal of one person, one vote would be a mistake. The conscious decision to embrace virtual representation and to countenance the exclusion of women from suffrage would be anathema to almost all modern democratic theorists. Equally important, the need to mollify New Englanders within their own party forced the advocates of a system that would have based representation solely

184. Zuckerman, *supra* note 5, at 124.

185. After the census of 1870, Congress did make a good faith effort to apply the rules established by Section 2, but ultimately determined that no adjustment for denials of suffrage was necessary. *Id.* at 108–16. Scholars have described the efforts to deploy the sanctions of Section 2 during the complex maneuvering that followed the census of 1920. *See, e.g.*, CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S (1990); Orville J. Sweeting, *John Q. Tilson and the Reapportionment Act of 1929*, 9 W. POL. SCI. Q. 434 (1956).

on voting population to accept a diluted version of that concept to obtain the votes necessary for passage.

The latter point has implications that go well beyond an understanding of Section 2 itself. In some circles, it is fashionable to suggest that the Constitution reflects a commitment to some pure theoretical construct such as democracy, liberty, or equality. But in fact, the forces that shaped the Constitution and each part thereof were far more complex than such constructs would suggest. Each of the important provisions of the Constitution was produced by individuals with a wide variety of theoretical political agendas, and the language chosen reflects the interaction among those different agendas. Those who truly seek to vindicate the authority of the framers ignore this reality at their peril.