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## A Critical Guide to Using the Legislative History Of The Fourteenth Amendment to Determine The Amendment's Original Meaning

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## Article

### A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning

GREGORY E. MAGGS

*Judges, lawyers, and scholars often look to the Fourteenth Amendment's legislative history for evidence of the Amendment's original meaning. Members of the Supreme Court, for instance, have cited floor statements, committee records, preliminary proposals, and other documents relating to the drafting and approval of the Fourteenth Amendment in many important cases. The documents containing this legislative history, however, are difficult to use. As explained in this Article, the Amendment came about through a complex process, in which Congress rejected several prior proposals for constitutional amendments before settling on a markedly different proposal that became the Fourteenth Amendment. Although the primary sources containing the legislative history are widely available online, some of them lack useful indexes and are only partially electronically searchable. In addition, statements made during the drafting and debate over the Fourteenth Amendment do not always yield clear answers to modern questions. Aggravating the situation, most lawyers, judges, law clerks, and legal scholars receive little or no instruction on how to use the documents containing the legislative history of the Fourteenth Amendment. Accordingly, they may feel unequipped either to use the legislative history to make claims about the Amendment's original meaning or to evaluate the claims of others. Even the Supreme Court appears to have difficulty with the details. This Article seeks to improve the situation by providing a critical guide to the Amendment's legislative history.*

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# A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning

GREGORY E. MAGGS\*

## INTRODUCTION

Judges, lawyers, and scholars often look to the Fourteenth Amendment's legislative history for evidence of the Amendment's original meaning. Members of the Supreme Court, for instance, have cited floor statements, committee records, preliminary proposals, and other documents relating to the drafting and approval of the Fourteenth Amendment in at least twenty-five cases.<sup>1</sup> For example, in an extremely influential dissent in *Adamson v. California*,<sup>2</sup> Justice Hugo Black relied on statements made by Congressman John Bingham in concluding that "one of the chief objects" of the Due Process Clause was "to make the Bill of Rights, applicable to the states."<sup>3</sup> In his separate opinion in *Oregon v. Mitchell*,<sup>4</sup> Justice John Marshall Harlan relied on various actions by the congressional committee that proposed the Fourteenth Amendment in concluding that Congress could not rely on its power to enforce the Equal Protection Clause in enacting a law to lower the voting age in the states.<sup>5</sup> More recently, in his separate opinion in *McDonald v. City of Chicago*,<sup>6</sup> Justice Clarence Thomas relied on floor statements, committee reports, and similar congressional sources in concluding that the Privileges or Immunities Clause of the Fourteenth Amendment required the Supreme Court to invalidate a state law restricting gun ownership.<sup>7</sup> This reliance on

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\* Professor of Law & Co-Director, National Security and U.S. Foreign Relations Law LL.M. Program, The George Washington University Law School. The author thanks his research assistants Frank Chang and Zachary Tyree for their many improvements to this Article and The George Washington University Law School for a generous research grant that helped to complete this Article. This is the sixth in a series of articles by the author on sources of the original meaning of the Constitution. The five other articles are *A Concise Guide to Using the Articles of Confederation to Determine the Original Meaning of the Constitution*, 84 GEO. WASH. L. REV. 397 (2017) (forthcoming); *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014); *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as Evidence of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707 (2012); *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the United States Constitution*, 2009 U. ILL. L. REV. 457 (2009); and *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).

<sup>1</sup> The author conducted a Westlaw search of the Supreme Court database using the search term "adv: '39th Cong!' /40 (14th or Fourteenth)" and individually reviewed the cases identified.

<sup>2</sup> 332 U.S. 46 (1947).

<sup>3</sup> *Id.* at 71–72 (Black, J., dissenting) (footnote omitted).

<sup>4</sup> 400 U.S. 112 (1970).

<sup>5</sup> *Id.* at 154–55 (Harlan, J., concurring in part and dissenting in part).

<sup>6</sup> 561 U.S. 742 (2010).

<sup>7</sup> *Id.* at 805–06, 827 (Thomas, J., concurring in part and concurring in the judgment).

the legislative history of the Fourteenth Amendment is not new; courts have referred to it continuously since the Amendment's adoption.<sup>8</sup>

Interest in the legislative history of the Fourteenth Amendment is not limited to the courts either. For example, in the 2016 presidential election campaign, proponents and opponents of birthright citizenship looked to statements by members of the 39th Congress in 1866 about whether the first sentence of the Fourteenth Amendment makes anyone born in the United States automatically a U.S. citizen.<sup>9</sup> Academic writers, meanwhile, recently have argued about what the legislative history of the Fourteenth Amendment says with respect to issues such as same sex-marriage,<sup>10</sup> affirmative action,<sup>11</sup> and even the recent brinksmanship between Congress and the President in setting the federal budget.<sup>12</sup>

The documents containing the legislative history of the Fourteenth Amendment are difficult to use. As explained in this Article, the Amendment came about through a complex process, in which Congress rejected several prior proposals for constitutional amendments before settling on a markedly different proposal that became the Fourteenth Amendment.<sup>13</sup> Although the primary sources containing the legislative history are widely available online, some of them lack useful indices and are only partially electronically searchable. In addition, statements made during the drafting and debate over the Fourteenth Amendment do not always yield clear answers to modern questions.

Aggravating the situation, most lawyers, judges, law clerks, and legal scholars receive little or no instruction on how to use the documents containing the legislative history of the Fourteenth Amendment.

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<sup>8</sup> See *Slaughter-House Cases*, 16 Wall. (U.S.) 36, 67 (1872) (“The most cursory glance at [the three Amendments added after the Civil War] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning . . . their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history . . . .”); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 5–8 (1949) (discussing the willingness of Supreme Court justices to “make decisions turn upon their reading of the historical record [sic]” in the context of Fourteenth Amendment jurisprudence).

<sup>9</sup> See Mark Pulliam, *What Did the 14th Amendment Congress Think about ‘Birthright Citizenship’?*, AM. SPECTATOR (Aug. 24, 2015, 12:54 PM), [http://spectator.org/63860\\_what-did-14th-amendment-congress-think-about-birthright-citizenship/](http://spectator.org/63860_what-did-14th-amendment-congress-think-about-birthright-citizenship/) (crediting Donald Trump for “advancing a national conversation on a critically important issue”).

<sup>10</sup> See, e.g., Steven G. Calabresi & Hannah M. Begley, *Originalism and Same Sex Marriage*, 70 U. MIAMI L. REV. 648, 651–52 (2016) (“We think these sources all suggest that just as the word ‘person’ in the Due Process Clause protects LGBTQ people, so too does the word ‘person’ in the Equal Protection Clause.”).

<sup>11</sup> See, e.g., Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1028 (2014) (“Some scholars and lawyers have sought a ‘true’ and certain original meaning of the Amendment, often with a self-conscious political agenda to undermine integration, affirmative action, and even substantive racial fairness.”).

<sup>12</sup> See, e.g., Jack M. Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, BALKINIZATION (June 30, 2011), <http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html> (“[T]he language of the Amendment went beyond this particular historical concern. It was stated broad terms in order to prevent future majorities in Congress from repudiating the federal debt to gain political advantage . . . .”).

<sup>13</sup> See *infra* Section III.

Accordingly, they may feel unequipped either to use the legislative history to make claims about the Amendment's original meaning or to evaluate the claims of others. Even the Supreme Court appears to have difficulty with the details.<sup>14</sup> This Article seeks to improve the situation by providing a critical guide to the Amendment's legislative history.

The remainder of this Article consists of five sections. Section I describes the primary sources containing the legislative history of the Fourteenth Amendment, all of which are now available on the Internet for free. Section II provides background for understanding the concerns that prompted Congress to seek a constitutional amendment. Section III describes various proposals for constitutional amendments that the 39th Congress considered, beginning with House Resolution ("H. Res.") No. 9, which addressed only Confederate debts, and culminating in House Resolution No. 127, which ultimately became the Fourteenth Amendment. Section IV discusses different definitions of the term "original meaning" and explains that legislative history is useful mostly for showing the original intent of Congress as opposed to other types of original meaning. Section V identifies and discusses five typical ways in which writers rely on the legislative history of the Fourteenth Amendment in making claims about its original meaning. Section VI then discusses three general problems to avoid in using legislative history. The Article then states a brief conclusion: jurists and scholars can and should use the legislative history of the Fourteenth Amendment to make certain kinds of claims about its original meaning but must exercise caution and recognize the limits of their claims.

This Article also contains three appendices. Appendix A contains the text of the Fourteenth Amendment and other proposed constitutional amendments that Congress considered in 1865 and 1866. Appendix B provides a timeline of the drafting of the Fourteenth Amendment. Appendix C provides a table identifying the members of Congress who made speeches concerning the proposed constitutional amendments.

Before going further, three limitations require mention. First, this Article uses the term "legislative history of the Fourteenth Amendment" to refer only to congressional records revealing how the House, Senate, and the Joint Committee on Reconstruction drafted and considered proposals leading to the Fourteenth Amendment. This Article does not cover the records of the state legislatures that ratified the Fourteenth Amendment.<sup>15</sup> Those records are important, but must be the subject for a

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<sup>14</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (describing H.R. Res. 63 as the "first draft" of the Fourteenth Amendment when it was in fact one of several proposals that Congress considered but rejected before it drafted, amended, and approved H.R. Res. 127, which became the Fourteenth Amendment).

<sup>15</sup> The process by which the state legislatures approved and ratified the Fourteenth Amendment was controversial. See, e.g., Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 555-59 (2002) (describing and questioning the legitimacy of the Fourteenth Amendment's ratification). The issues involved are beyond the scope of this Article, which concerns only what happened in Congress.

different article.

Second, this Article addresses only the question of how the legislative history of the Fourteenth Amendment might provide evidence of the Amendment's original meaning. It makes no claims about when or whether courts should or must follow that original meaning. Other works thoroughly address that question.<sup>16</sup> Suffice it to say, researchers may wish to use the legislative history of the Fourteenth Amendment to discover the Amendment's original meaning even if they do not believe the original meaning should determine the outcome of contemporary cases.

Third, this guide primarily explains *how to use* sources of the legislative history to determine the meaning of the Fourteenth Amendment. It makes no substantive claims about *what the legislative history shows* with respect to particular disputed issues. For example, it does not purport to resolve questions such as whether the Fourteenth Amendment's Privileges or Immunities Clause protects a right to possess firearms or whether the Due Process Clause guarantees a liberty of contract. Instead, this guide seeks to help others make or evaluate substantive claims of this type.

## I. PRIMARY SOURCES OF THE LEGISLATIVE HISTORY

Researchers can find most of the legislative history of the Fourteenth Amendment in six primary sources, all of which are available on the Internet for free. The following discussion describes these sources and how to access them.

### A. *Volume 36 of the Congressional Globe*

The 39th Congress drafted and approved the Fourteenth Amendment during its first session, which ran from December 4, 1865, through July 28, 1866.<sup>17</sup> Volume 36 of the *Congressional Globe* contains a transcription of the floor debates in Congress during this period.<sup>18</sup> The Supreme Court, accordingly, has cited Volume 36 in numerous Fourteenth Amendment decisions.<sup>19</sup> Researchers can access Volume 36 online without cost at the Library of Congress's *Century of Lawmaking* website.<sup>20</sup> Unfortunately, except for the indices, the online version is not stored in an electronically

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<sup>16</sup> See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 8–9 (2d ed. 1997) (arguing that the courts should interpret the Fourteenth Amendment according to its original meaning); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U.L. REV. 1627, 1629–30 (2013) (arguing that the case for following the original meaning of the Fourteenth Amendment is weaker than arguments for following the original meaning in the rest of the Constitution because of the highly controversial manner in which the states ratified the Amendment).

<sup>17</sup> For the dates upon which the 39th Congress convened and adjourned, see *Congressional Globe: Debate and Proceedings, 1833–73*, LIBR. OF CONG., <http://www.memory.loc.gov/ammem/amlaw/lwcglink.html> [<https://perma.cc/EV4N-V879>] (last visited Jan. 29, 2017). Prior to its “first” session, Congress also met in a “special session” from March 4, 1865 to March 11, 1865. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* note 1 (describing Westlaw search).

<sup>20</sup> LIBR. OF CONG., *supra* note 17.

searchable format.

The *Congressional Globe* is an accurate and reliable source. It was a non-partisan journal funded and published by Francis Preston Blair and John C. Rives from 1833 until 1873, with funding from the Senate starting in 1848 and funding from the House starting in 1850.<sup>21</sup> Its goal was to report all Congressional floor debates, much like the *Congressional Record* does today.<sup>22</sup> The *Congressional Globe* started the practice of “printing debates as first-person narratives rather than third-person summations.”<sup>23</sup> In addition, despite the lack of electronic recording equipment in the 1860s, the *Congressional Globe* achieved almost verbatim accounts of the floor debates by employing “a corps of reporters trained in the latest stenographic techniques.”<sup>24</sup>

Starting in 1865, the *Congressional Globe* was published on a daily basis.<sup>25</sup> Each member of Congress received twenty-four copies.<sup>26</sup> Accordingly, the *Congressional Globe* was widely available almost immediately after every debate. The debates over the Fourteenth Amendment were therefore neither secret nor difficult for interested outsiders to follow.

Volume 36 of the *Congressional Globe* contains four parts relevant to researching the legislative history of the Fourteenth Amendment: the main body of the volume, the index to the main body, the appendix, and the index to the appendix. The main body, which occupies pages 1 to 4,312, contains the Senate and House debates from the entire first session. In these pages, readers can learn exactly what congressional leaders said about proposals to amend the Constitution. For example, on May 23, 1866, Senator John Howard famously gave a section-by-section explanation of H.R. Res. 127, the five-part joint resolution that ultimately became the Fourteenth Amendment.<sup>27</sup>

The 104-page index to the main body of Volume 36 is located on

<sup>21</sup> *Historical Events*, BLAIR HOUSE, <http://www.blairhouse.org/history/historical-events/globe-and-congressional-globe> [https://perma.cc/BP6T-8RAS] (last visited Jan. 29, 2017); *Reporters of Debate and the Congressional Record*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Reporters\\_Debate\\_Congressional\\_Record.htm](https://www.senate.gov/artandhistory/history/common/briefing/Reporters_Debate_Congressional_Record.htm) [https://perma.cc/2GDG-NTHY] (last visited Feb. 5, 2017) [hereinafter SENATE REPORTERS OF DEBATE].

<sup>22</sup> See *An Overview of the Congressional Record and Its Predecessor Publications: A Research Guide*, L. LIBR. SOC'Y OF WASH., D.C., <http://www.llsdc.org/congressional-record-overview> [https://perma.cc/R2S7-AN26] (last updated Jan. 2016) [hereinafter *Overview of Congressional Publications*] (“The *Congressional Record* contains House and Senate floor proceedings, substantially verbatim transcripts of floor debates and remarks, notice of all bills introduced, full text of all conference committee reports, notices of committee and Presidential actions and communications, and statements or documents submitted by members of Congress for publication.”).

<sup>23</sup> SENATE REPORTERS OF DEBATE, *supra* note 21; see also *Overview of Congressional Publications*, *supra* note 22, at n.11 (“After the introduction and adoption of the phonetic shorthand . . . near verbatim reporting of congressional debate became a reality for the first time . . .”).

<sup>24</sup> SENATE REPORTERS OF DEBATE, *supra* note 21.

<sup>25</sup> Act of Mar. 2, 1865, ch. 73, § 7, 13 Stat. 460 (1865).

<sup>26</sup> See MISCELLANEOUS DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR SECOND SESSION OF THE THIRTY-NINTH CONGRESS 48 (1867), <https://books.google.com/books?id=rHBHAQAAIAAJ> [https://perma.cc/ERN7-EDH8] (detailing the statement of disbursements).

<sup>27</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2764–68 (1866) (recording Sen. Howard, speaking with interruptions by others).



pages iii-cvi. The Library of Congress has retyped the index to Volume 36 to make it electronically searchable.<sup>28</sup> Unfortunately, using the index is difficult. Searching the index for what might seem like important terms, such as “equal protection” or “privileges or immunities,” yields no results. Instead, the search terms that produce the most relevant passages are “H. R. No. 9,” “H. R. No. 51,” “H. R. No. 63,” and “H. R. No. 127.” These terms refer to four joint resolutions proposing amendments to the Constitution that, as explained below, the House and Senate seriously considered in its first session.<sup>29</sup> The House and Senate ultimately approved H.R. Res. 127, and it became the Fourteenth Amendment.<sup>30</sup>

Volumes of the *Congressional Globe* contained appendices in which members of Congress could have the text of speeches and other documents printed.<sup>31</sup> The 444-page appendix to Volume 36 includes many important comments on the proposed constitutional amendments during the spring of 1866 which researchers definitely should not overlook. For example, the appendix contains a speech by Representative Andre Jackson Rogers on February 26, 1866, in which he predicted that the constitutional amendment proposed in H.R. Res. 63 would require school desegregation.<sup>32</sup> The Solicitor General of the United States later cited this statement in *Brown v. Board of Education* as important evidence of the original intent of Congress in approving the Fourteenth Amendment.<sup>33</sup>

Sometimes the record of the main body of Volume 36 contains explicit references to the appendix. For instance, on June 13, 1866, the records of the debates show that Representative Joseph H. DeFrees asked permission “to print some remarks upon this question [of whether to approve H.R. Res. 127], which I had not had an opportunity of delivering.”<sup>34</sup> Representative DeFrees’s remarks then appear in the appendix.<sup>35</sup> In other instances, the appendix includes speeches for which there is no reference in the main body of Volume 36. As a result, the extent of Congress’s knowledge of what was in the appendix is not always clear. Volume 36 also includes a five-page index to the appendix. Although the Library of Congress has retyped this index to make it electronically searchable, it is still difficult to use. The index is organized by speaker rather than by topic, and many of the entries are described simply as “incidental remarks”

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<sup>28</sup> LIBR. OF CONG., CONGRESSIONAL GLOBE, 1833-1873: INDEX TO 39TH CONG., 1ST SESS. (last visited Jan. 29, 2017), <https://memory.loc.gov/ammem/amlaw/lwoclink.html> [<https://perma.cc/NHX3-W6MU>].

<sup>29</sup> See *infra* Section III.

<sup>30</sup> *Fourteenth Amendment and Citizenship*, LIBR. OF CONG., [https://www.loc.gov/law/help/citizenship/fourteenth\\_amendment\\_citizenship.php](https://www.loc.gov/law/help/citizenship/fourteenth_amendment_citizenship.php) (last visited Feb. 20, 2017) [<https://perma.cc/P7DB-RBUM>].

<sup>31</sup> *Overview of Congressional Publications*, *supra* note 22.

<sup>32</sup> CONG. GLOBE, *supra* note 27, at app. 134 (comments of Rep. Rogers on H.R. Res. 63).

<sup>33</sup> See Supp. Brief for the United States on Reargument at 38–41, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 78291, at \*38–40 (quoting Joint Committee members in support of equal protection, including with respect to education, where the majority “did not deny that charge”).

<sup>34</sup> CONG. GLOBE, *supra* note 27, at 3148.

<sup>35</sup> *Id.* at app. 226–28.

without further elaboration on the subject. As a result, researchers need to read the entire appendix to find what they are looking for.

The Uniform System of Citation (the “*Bluebook*”) recommends that writers cite the *Congressional Globe* according to the Congress number and session number but not volume number.<sup>36</sup> Accordingly, a citation of page 3,148 of Volume 36 of the *Congressional Globe* would be “CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).” In writing about the legislative history of the Fourteenth Amendment, using a parenthetical phrase to indicate the date, the speaker, and the subject is also usually a helpful practice.

### B. *The Journal of the Joint Committee of Fifteen on Reconstruction*

A second primary source containing important legislative history is “The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867” (hereinafter “Journal of the Joint Committee”).<sup>37</sup> Researchers can find the full text of this official congressional document reprinted in a 1914 book of the same name by Benjamin Burks Kendrick.<sup>38</sup> The Journal of the Joint Committee documents the proceedings of the congressional committee that drafted and introduced the proposed constitutional amendments designated as H.R. Res. 51, 63, and 127 but not H.R. Res. 9, which was proposed by the House Committee on the Judiciary. The Kendrick book, which is available online for free in searchable form, contains the text of the Journal, a helpful introduction, and eight chapters about the history of the Joint Committee.<sup>39</sup> Members of the Supreme Court have cited the Journal of the Joint Committee in a number of cases interpreting the Fourteenth Amendment.<sup>40</sup>

Congress created the “Joint Committee of Fifteen on Reconstruction” (hereinafter the “Joint Committee”) on December 14, 1865.<sup>41</sup> The Joint Committee included nine members of the House of Representatives and six Senators. The chair was Representative Thaddeus Stevens (R-PA) and the other House members were John A. Bingham (R-OH), Henry Blow (R-MO), George Boutwell (R-MA), Roscoe Conkling (R-NY), Henry Grider (D-KY), Justin Morrill (R-VT), Andrew Jackson Rogers (D-NJ),

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<sup>36</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 130 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

<sup>37</sup> 39TH CONG., THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1865–1867), reprinted in BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 39–129 (1914).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 17–36 (introduction), 138–415 (chapters I–VIII).

<sup>40</sup> See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 827 (2010) (Thomas, J., concurring in part and concurring in the judgment) (citing the JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION as evidence that the Committee’s Report was widely circulated); City of Boerne v. Flores, 521 U.S. 507, 521 (1997) (relying on the same to describe objections expressed before the final adoption of the Fourteenth Amendment); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 151 (1994) (Kennedy, J., concurring in the judgment) (citing to the Journal to quote initial drafts of the Fourteenth Amendment); Richardson v. Ramirez, 418 U.S. 24, 44 (1973) (“[T]he Journal . . . enables us to trace the evolution of the draft language in the Committee . . .”).

<sup>41</sup> CONG. GLOBE, *supra* note 27, at 57.

and Elihu Washburne (R-IL). The Senate members were William Fessenden (R-ME), James W. Grimes (R-IA), Ira Harris (R-NY), Jacob Howard (R-MI), Reverdy Johnson (D-MD), and George Henry Williams (R-OR).<sup>42</sup> All of the members of the Committee were from states that had not joined the Confederacy because, as discussed in depth below, the 39th Congress refused to seat members from the former Confederate states even though President Johnson had reconstructed their governments.<sup>43</sup>

The Republicans outnumbered the Democrats on the Joint Committee by a majority of 12-3, and they generally supported stronger measures than the Democrats. Important differences also existed among the Republicans, with some Republicans being moderate and others self-described as “radical.” Good examples of the difference between these Republicans can be seen in Senator Jacob M. Howard and Representative Thaddeus Stevens, who each led the drive for approval of H.R. Res. 127 in their respective chambers of Congress. Senator Howard, one of the founders of the Republican Party and a close ally of President Lincoln, was a moderate. In reading his speeches in the *Congressional Globe*, it is impossible not to observe his calm reasonableness. For instance, whenever an opponent suggested a change to weaken the Fourteenth Amendment, his typical, patient reply was: “I hope, sir, that this amendment will not be adopted.”<sup>44</sup> Representative Stevens was a radical. Throughout the Civil War, he was impatient with President Lincoln’s slow action on emancipation. He was markedly more expressive when addressing those who disagreed with proposed amendments. A typical illustration was his comment on section 4, which prohibited payment of Confederate debts—a provision that, he insisted, “will secure the approbation of all but traitors.”<sup>45</sup>

As described in Section III below, the Joint Committee drafted three key proposals for constitutional amendments in the spring of 1866: H.R. Res. 51, H.R. Res. 63, and H.R. Res. 127.<sup>46</sup> (The House Committee on the Judiciary drafted H.R. Res. 9, another important proposal discussed below.<sup>47</sup>) H.R. Res. 127, which closely resembled the other proposals, ultimately became the Fourteenth Amendment. For this reason, the Joint Committee’s records are a key part of the Amendment’s legislative history.

The Journal of the Joint Committee describes the drafts that were before the Joint Committee, the proposed amendments to those drafts, and the votes that the Joint Committee took on the drafts. Although the Journal of the Joint Committee does not contain speeches or debates by its members regarding the proposal that became the Fourteenth Amendment,

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<sup>42</sup> See KENDRICK, *supra* note 37, at 38–39 (listing members in the JOURNAL OF THE JOINT COMMITTEE); see also *id.* at 155–97 (describing the committee members).

<sup>43</sup> See *infra* Section II.C.

<sup>44</sup> CONG. GLOBE, *supra* note 27, at 2895.

<sup>45</sup> *Id.* at 3148.

<sup>46</sup> See *infra* Section III.B–D.

<sup>47</sup> See *infra* Section III.A.

looking at the revisions and amendments gives clues as to what the Committee members were thinking. For example, on April 21, 1866, the original version of the proposal that became H.R. Res. 127 had a provision saying: “Debts incurred in aid of insurrection . . . shall not be paid by any state nor by the United States.”<sup>48</sup> The same day, Representative Rogers moved to strike the words “by any state nor.”<sup>49</sup> But the motion was rejected, receiving a vote of three yeas and nine nays.<sup>50</sup> This action shows that the Joint Committee considered a proposal to bar only the United States from paying former Confederate debts, but specifically rejected the idea.

### C. *The Report of the Joint Committee on Reconstruction*

A third primary source of the legislative history is the “Report of the Joint Committee on Reconstruction” (hereinafter the “Report of the Joint Committee”).<sup>51</sup> Members of the Supreme Court have cited this 800-page document in several cases interpreting the Fourteenth Amendment.<sup>52</sup> The Report of the Joint Committee is also available for free on the Internet in a searchable format.<sup>53</sup>

During the spring of 1866, in addition to drafting and proposing constitutional amendments, the Joint Committee on Reconstruction also investigated conditions in the former Confederate states. The members of the Joint Committee called scores of witnesses to testify. The Committee’s Report sharply criticized President Johnson’s efforts to reconstruct the former Confederate states,<sup>54</sup> made recommendations for how Congress

<sup>48</sup> KENDRICK, *supra* note 37, at 84.

<sup>49</sup> *Id.* at 86.

<sup>50</sup> *Id.*

<sup>51</sup> JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (1st Sess. 1866), <https://books.google.com/books?id=dUgWAAAAYAAJ> [<https://perma.cc/SYX4-FDD4>] [hereinafter REPORT OF THE JOINT COMMITTEE].

<sup>52</sup> *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 772–73 nn.19, 21 (2010) (using information in the REPORT OF THE JOINT COMMITTEE to provide the historical context behind the Fourteenth Amendment); *id.* at 3071 (Thomas, J., concurring in part and concurring in the judgment) (stating that the Joint Committee’s Report recommended the adoption of the Fourteenth Amendment and noting that it “justif[ied] its recommendation” by cataloguing cases where former slave states abused civil rights); Patterson v. McLean Credit Union, 491 U.S. 164, 194 n.4 (1989) (citing the REPORT OF THE JOINT COMMITTEE, which speaks about incidences of violence against freedmen), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008); Oregon v. Mitchell, 400 U.S. 112, 268–69 (1970) (Harlan, J., concurring in part and dissenting in part) (noting that the Joint Committee submitted the Fourteenth Amendment to Congress “in the hope its imperfections may be cured”), *superseded by constitutional amendment*, U.S. Const. amend. XXVI; Adamson v. California, 332 U.S. 46, 68–69, 108–09 (1947) (Black, J., dissenting) (citing the REPORT OF THE JOINT COMMITTEE in an analysis of whether the Fourteenth Amendment should be interpreted as applying the Bill of Rights to the states), *overruled in part*, Malloy v. Hogan, 378 U.S. 1 (1964).

<sup>53</sup> REPORT OF THE JOINT COMMITTEE, *supra* note 51.

<sup>54</sup> *See id.* at VIII–IX (criticizing President Johnson’s decision to reorganize and stating that “[a]s President of the United States, he had no power, except to execute the laws of the land as Chief Magistrate”).

should proceed with reconstruction,<sup>55</sup> and faulted the former Confederate states for their generally abysmal treatment of emancipated slaves.<sup>56</sup> The Joint Committee completed this report and voted to send it to the House and Senate on June 6, 1866.<sup>57</sup> Members of the Committee then introduced the Report into the House and Senate on June 8, 1866.<sup>58</sup>

The Report of the Joint Committee may be relevant to claims about the original meaning of the Fourteenth Amendment for two reasons. First, the Report explains why the Committee thought Congress should pass H.R. Res. 127. A key passage of the Report says:

The conclusion of your committee therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States . . . .<sup>59</sup>

Second, the Report provides background regarding the problems that Congress perceived in 1866 and therefore presumably wished to address with the Fourteenth Amendment. As Benjamin Kendrick put it, “the testimony taken by the joint committee on reconstruction served as the *raison d’être* of the fourteenth amendment.”<sup>60</sup>

The Report of the Joint Committee, however, did not have much direct influence on the House and Senate as they considered H.R. Res. 127. The Joint Committee did not complete the Report until June 6, 1866,<sup>61</sup> and the

<sup>55</sup> *Id.* at XXI (noting that the Joint Committee made specific recommendations, which are the “result of mutual concession, after a long and careful comparison of conflicting opinions”).

<sup>56</sup> *Id.* at XVI–XVII (stating that the insurgent states are responsible for showing that they “accept the results of the war” and “extend[] to all classes of citizens equal rights and privileges,” and noting that “[t]he feeling in many portions of the country towards emancipated slaves, especially among the uneducated and ignorant, is one of vindictive and malicious hatred. . . . There is no general disposition to place the colored race . . . upon terms even of civil equality”).

<sup>57</sup> See KENDRICK, *supra* note 37, at 120 (“*The Chairmen* of the Senate and House portions of the Joint Committee were instructed to submit the report just adopted to their respective houses.”).

<sup>58</sup> See CONG. GLOBE, *supra* note 27, at 3051 (“Mr. Stevens, from the joint committee on reconstruction, submitted a written report . . . .”); see also *id.* at 3038 (report introduced into the Senate by Sen. Fessenden).

<sup>59</sup> REPORT OF THE JOINT COMMITTEE, *supra* note 51, at XXI.

<sup>60</sup> KENDRICK, *supra* note 37, at 264.

<sup>61</sup> *Id.* at 120.

Report was not introduced into the House and Senate until June 8, 1866.<sup>62</sup> This was too late because, as described below, the House initially approved the original version of H.R. Res. 127 on May 10, the Senate approved an amended version on June 8, and the House then also approved the amended version on June 9.<sup>63</sup> But members of Congress may have anticipated what the Report would say even before it was formally introduced.

On June 21, 1866, Congress passed a resolution directing the Government Printing Office to print 100,000 copies of the Report.<sup>64</sup> Members of Congress distributed this Report widely in the fall of 1866 in support of their re-election campaigns.<sup>65</sup>

#### D. *The House Journal, Senate Journal, and the Bills and Resolutions of the 39th Congress*

Three additional primary sources containing the legislative history of the Fourteenth Amendment are the House Journal, the Senate Journal, and the Library of Congress' collection of Congress' bills and resolutions. Under the Constitution, the House and Senate each have a duty to keep a "Journal of [their] Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."<sup>66</sup> The House and Senate fulfilled this duty in 1866 with official journals, the full text of which are available in a searchable format at the Library of Congress's website.<sup>67</sup> Although the House and Senate Journals do not contain floor debates, they record all of the official proceedings of the House and Senate, such as the introduction of resolutions, the votes on resolutions, and so forth. It is often easier to determine the progress of resolutions, such as H.R. Res. 127, by searching the Journals instead of trying to follow the index to the *Congressional Globe*.

The Library of Congress's website also contains a collection of most (but not all) of the 39th Congress' bills and resolutions.<sup>68</sup> This collection is useful because the *Congressional Globe* includes the full text of bills and resolutions only if they were read on the House or Senate floors, and

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<sup>62</sup> CONG. GLOBE, *supra* note 27, at 3038, 3051.

<sup>63</sup> See *infra* Section III.D (describing the approval of H.R. Res. 127, the joint resolution that became the Fourteenth Amendment).

<sup>64</sup> CONG. GLOBE, *supra* note 27, at 3325–26 (adopting the resolution to "[l]et one hundred thousand copies of the majority and minority reports be printed together").

<sup>65</sup> See KENDRICK, *supra* 37, at 264–65 ("[T]he testimony taken by the joint committee on reconstruction served as . . . a campaign document for the memorable election of 1866. 150,000 copies were printed in order that senators and representatives might distribute them among their constituents.").

<sup>66</sup> U.S. CONST. art. I, § 5, cl. 3.

<sup>67</sup> 39TH CONG., 1ST SESS., H. JOURNAL (1866), <https://memory.loc.gov/ammem/amlaw/lwhj.html> [<https://perma.cc/39BL-AZMW>]; 39TH CONG., 1ST SESS., S. JOURNAL (1866), <https://memory.loc.gov/ammem/amlaw/lwsj.html> [<https://perma.cc/JLT3-XDTW>].

<sup>68</sup> *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1873*, LIBR. OF CONG., <https://memory.loc.gov/ammem/amlaw/lwhbsb.html> [<https://perma.cc/98DQ-BMEN>] (last visited Feb. 1, 2017).

sometimes they were not. For example, the *Congressional Globe* records that S. Res. 9, a proposal for amending the Constitution, was introduced on January 5, 1866.<sup>69</sup> As noted briefly below,<sup>70</sup> this proposed constitutional amendment addressed the payment of Confederate debts. The *Congressional Globe*, however, does not contain the text of S. Res. 9 because the proposal was not read aloud.<sup>71</sup> The Library of Congress's website provides information about when S. Res. 9 was introduced into Congress,<sup>72</sup> and a link to the complete text of the resolution.<sup>73</sup> The website contains similar information for most of the proposed constitutional amendments that the 39th Congress considered.

## II. CONCERNS OF THE 39TH CONGRESS

A common impulse in researching the legislative history of the Fourteenth Amendment is to open Volume 36 of the *Congressional Globe* and then immediately begin looking for pertinent statements by members of the House and Senate. But many who attempt this effort soon find that reading the congressional debates is somewhat like watching a confusing play with numerous actors and a complex plot. What makes the drama especially challenging to follow is that the actors seem to have skipped the first several acts of the play; the speakers all seem to know what has happened in the past, but they do not necessarily share this history in their floor statements.

Knowing something of the context in which the Amendment arose may help. Each of the Fourteenth Amendment's five sections addresses one or more serious concerns that Congress had in 1865 and 1866.<sup>74</sup> These concerns were not entirely new. Congress had attempted to address most of them with other measures, but these other measures had proven inadequate for one reason or another. Congress ultimately concluded that amending the Constitution would provide a solution. At the risk of oversimplifying complex issues, the following discussion introduces some of the matters that concerned Congress.

### A. *Citizenship and Civil Rights*

Section I of the Fourteenth Amendment contains two sentences. The first sentence addresses citizenship:

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<sup>69</sup> See CONG. GLOBE, *supra* note 27, at 129 (“[Rep]. Sumner asked, and by unanimous consent obtained, leave to introduce a joint resolution (S.R. No. 9) proposing an amendment to the Constitution of the United States for the protection of the national debt and the rejection of any rebel debt . . .”).

<sup>70</sup> See *infra* Section III.B (discussing the 1866 proposal, S.R. No. 9, which proposed an amendment to the Constitution to address the national debt).

<sup>71</sup> See CONG. GLOBE, *supra* note 27, at 129 (noting that the proposal was “read twice by its title” and “ordered to be printed,” but was not read aloud).

<sup>72</sup> S. Res. 9, 39th Cong., 1st Sess. (1865) (available at [<sup>73</sup> \*Id.\*](https://memory.loc.gov/cgi-bin/query/D?hlaw:9:./temp/~ammem_osdk:: [https://perma.cc/3S44-LHKT])</a>).</p></div><div data-bbox=)

<sup>74</sup> See *infra* Section II (discussing the concerns that Congress was contemplating when drafting the Fourteenth Amendment).

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.<sup>75</sup>

The second sentence, broadly speaking, requires state governments to respect civil rights:

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.<sup>76</sup>

Before digging into floor statements about the meaning of these provisions, researchers may benefit from the following seven important pieces of background information about why Congress was concerned with citizenship and civil rights.

First, shortly before the Civil War, the Supreme Court had held, in *Dred Scott v. Sandford*,<sup>77</sup> that persons of African descent, whether free or slave, could never be citizens of the United States or of any state.<sup>78</sup> Although the Thirteenth Amendment had abolished slavery, and the *Dred Scott* decision was thoroughly discredited in the North,<sup>79</sup> the Court's holding on the citizenship issue loomed over efforts to reconstruct the South. For example, in an important speech on January 25, 1866, Representative Bingham cited the *Dred Scott* decision and criticized the possible exclusion of freed slaves from citizenship.<sup>80</sup> Likewise, on June 8, 1866, Senator Henderson justified section 1 of the Fourteenth Amendment by criticizing the Court's reasoning in *Dred Scott*.<sup>81</sup> In his view, section 1 would restore the correct view of the Constitution. "It makes plain," he

<sup>75</sup> U.S. CONST. amend. XIV, § 1.

<sup>76</sup> *Id.*

<sup>77</sup> 60 U.S. 393 (1856).

<sup>78</sup> *See id.* at 407 ("In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then [i.e., at the time of the Constitution's ratification] acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.").

<sup>79</sup> On June 16, 1858, Abraham Lincoln denounced the *Dred Scott* decision in his "House Divided" speech, declaring that the *Dred Scott* decision "compounded" the "machinery" that would lead to slavery becoming lawful in all states, both Northern and Southern. Abraham Lincoln, A House Divided, Address Before the Republican State Convention (June 6, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461–63 (Roy P. Basler et al. eds., 1953).

<sup>80</sup> *See* CONG. GLOBE, *supra* note 27, at 430 ("I might as well say in this connection that the majority of the Supreme Court of the United States, even in the *Dred Scott* decision, were compelled to recognize the principle for which I contend this day . . . there are none but free citizens in the Republic . . . the Constitution must be amended: I agree, if the late rebel States would make no denial of right to the emancipated citizens no amendment would be needed. But they will make denial.").

<sup>81</sup> *See id.* at 3032 ("The great error into which Chief Justice Taney falls consists in the fact that he arbitrary excluded all negroes, though free, from this sovereignty. He unfortunately rejected the text of the Constitution itself . . . In forming his opinion he abandoned the Constitution and the Declaration of Independence . . .").



said, “only what was rendered doubtful.”<sup>82</sup>

Second, after the Civil War, the Southern states were systematically denying civil rights to former slaves. One of the Joint Committee on Reconstruction’s principal tasks was to gather information about conditions in the South in order to determine the legislative measures necessary for restoring the Union. The Committee called more than 125 witnesses who testified about the social, political, and legal conditions prevailing in the former Confederate states.<sup>83</sup> Many of these witnesses provided information about the deplorable treatment of former slaves. For example, Brevet Major General Edward Hatch, who had various responsibilities in the military government, testified on January 25, 1866, that former slaves were still being forced to work in Mississippi, that poor whites of Alabama would never recognize blacks as part of the population, and that former slaves were being murdered in Georgia.<sup>84</sup> Other witnesses made similar remarks.<sup>85</sup> Based on such testimony, the Joint Committee made addressing civil rights a top priority.

Third, the Supreme Court held before the Civil War, in *Barron v. Baltimore*,<sup>86</sup> that the Bill of Rights imposes limitations only on the federal government, and not on the states.<sup>87</sup> Under the logic of this decision, the southern state governments could deny due process of law, jury trials, and so forth to former slaves (or anyone else) without violating the Constitution. Members of the 39th Congress were aware of this federalism issue and were unhappy about it. For example, on April 10, 1866, Representative John Bingham, a prominent member of the Joint Committee, spoke critically of *Barron*.<sup>88</sup> Urging Congress to take action, he said: “Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States [i.e. the states making up the Confederacy], a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.”<sup>89</sup>

Fourth, although the Emancipation Proclamation and the Thirteenth

<sup>82</sup> *Id.* at 3031.

<sup>83</sup> See KENDRICK, *supra* note 37, at 267–68 (stating that “a hundred and twenty-five persons” were questioned about their living conditions and “the treatment accorded to them by the whites”).

<sup>84</sup> See REPORT OF THE JOINT COMMITTEE, *supra* note 51, at pt. III, 4–5, 8 (statement of Brevet Major Gen. Edward Hatch) (“I found bands of ‘regulators,’ many of them lately soldiers in the rebel army, going about the country to see that the negroes worked. . . . So far as any love, or regard, or care for the negro, or the slave, I have never seen any of it. . . . [I] have known negroes to be killed [in Georgia] without any provocation at all.”).

<sup>85</sup> See, e.g., *id.* at pt. III, 2–4 (statement of Mr. Albert Warren Kelsey) (testifying about several instances of violence towards freedmen, include an instance where a man was “shot . . . dead out of mere wantonness”); *id.* at pt. III, 8 (statement of Brevet Brigadier Gen. George E. Spencer) (“In the large slaveholding counties the treatment of the negro is terrible in the extreme. In Pickens county [Alabama] several negroes have been murdered.”).

<sup>86</sup> 32 U.S. 243 (1833).

<sup>87</sup> See *id.* at 250–51 (holding that the Just Compensation Clause in the Fifth Amendment was intended solely as a limit on the power of the federal government, not the power of state governments).

<sup>88</sup> See CONG. GLOBE, *supra* note 27, at 1089–94 (statement of Rep. John Bingham) (criticizing the decision in *Barron* for failing to hold states responsible for the provisions in the Bill of Rights).

<sup>89</sup> *Id.* at 1090.

Amendment had already outlawed slavery, these measures by themselves did not guarantee equal civil rights to former slaves. President Lincoln issued the Emancipation Proclamation on January 1, 1863, while the Civil War was still being fought.<sup>90</sup> Using his power as Commander in Chief, President Lincoln declared certain states and portions of states to be in Rebellion against the government.<sup>91</sup> And “as a fit and necessary war measure for suppressing said rebellion,” President Lincoln ordered that “all persons held as slaves within said designated states, and parts of states, are, and henceforward shall be, free . . .”<sup>92</sup> President Lincoln advised the freed slaves “to abstain from all violence, unless in necessary self-defence,” and recommended that “they labor faithfully for reasonable wages.”<sup>93</sup> But the Proclamation did not make any further provision for the welfare of freed slaves.

The Thirteenth Amendment was approved by the Senate on April 8, 1864, and the House on January 31, 1865.<sup>94</sup> On December 18, 1865, Secretary of State William H. Seward announced that twenty-seven of thirty-six states had ratified the Amendment, which was the necessary three-quarters required for amending the Constitution.<sup>95</sup> The Thirteenth Amendment declared that “[n]either slavery nor involuntary servitude . . . shall exist within the United States” and gave Congress the power to enforce this prohibition.<sup>96</sup> But ending slavery was not, by itself, sufficient to guarantee equal rights or citizenship to former slaves.

Fifth, in March 1865, Congress passed the Freedman’s Bureau Act.<sup>97</sup> Although this statute sought to aid former slaves, it did not address civil rights or citizenship. The Freedman’s Bureau Act provided that the federal government could lease or sell up to forty acres of confiscated and abandoned lands “to every male citizen, whether refugee or freedman.”<sup>98</sup> This measure was important because, at least in theory, it enabled many newly freed slaves to become independent subsistence farmers. But the Act went no further than this on issues of equality.

Sixth, at the start of its first session, the 39th Congress unsuccessfully attempted to expand the Freedman’s Bureau Act. Senate Bill No. 60, commonly called the Second Freedman’s Bureau Bill, would have required the President to extend military protection throughout a state whenever the state denied any “negroes, mulattoes, freedmen . . . on account of race [or] color” any of the “civil rights or immunities belonging

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<sup>90</sup> Presidential Proclamation No. 17, 12 Stat. 1268, 1268 (Jan. 1, 1863).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1268–69.

<sup>93</sup> *Id.* at 1269.

<sup>94</sup> H. R. JOURNAL, 38th Cong., 2nd Sess. 168–71 (1865), <https://memory.loc.gov/ammem/amlaw/lwhj.html> [<https://perma.cc/5DP4-8MD5>]; S. JOURNAL, 38th Cong., 1st Sess. 311–13 (1864), <https://memory.loc.gov/ammem/amlaw/lwsj.html> [<https://perma.cc/7N4F-JCXD>].

<sup>95</sup> 13 Stat. 774 app. 52 (1865).

<sup>96</sup> U.S. CONST. amend. XIII.

<sup>97</sup> S. Res. 90, 38th Cong. (1865) (enacted).

<sup>98</sup> *Id.* at 508.

to white persons” or denied the “full and equal benefit of all laws.”<sup>99</sup> The Bill also would have made it a crime, triable by a military court, to deprive any such person of “any civil right secured to white persons . . . .”<sup>100</sup> The Senate and House passed the bill on January 25 and February 6, 1866, respectively.<sup>101</sup> President Johnson, however, vetoed the bill on February 19, 1866.<sup>102</sup> In his veto message, President Johnson said, “I share with Congress the strongest desire to secure to the freedmen the full enjoyment of their freedom and property and their entire independence and equality in making contracts for their labor.”<sup>103</sup> But he objected to the extension of military jurisdiction and trials by military tribunals.<sup>104</sup> The Senate attempted but failed to override the veto on February 20, 1866.<sup>105</sup>

Seventh, the Civil Rights Act of 1866 addressed many of Congress’s concerns about citizenship and civil rights, but Congress worried about the Act’s constitutionality and permanence. The Senate first passed the bill that became this Act on February 2, 1866,<sup>106</sup> and the House first passed the bill on March 13, 1866.<sup>107</sup> President Johnson, however, vetoed the bill on March 27, 1866.<sup>108</sup> The Senate and House then voted to override President Johnson’s veto,<sup>109</sup> and the Civil Rights Act became law on April 9, 1866,<sup>110</sup> two months before Congress approved H.R. Res. 127, which when ratified by the states became the Fourteenth Amendment.<sup>111</sup>

Addressing citizenship in words almost identical to those of the Fourteenth Amendment, the Civil Rights Act declared: “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . .”<sup>112</sup> The Act then addressed certain specified civil rights by saying:

[S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit,

<sup>99</sup> CONG. GLOBE, *supra* note 27, at 421.

<sup>100</sup> *Id.* at 318.

<sup>101</sup> *See id.* at 421 (passing the bill in the Senate); *id.* at 688 (passing the bill in the House).

<sup>102</sup> *Veto Messages*, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 398 (1897) [hereinafter “Veto Messages”].

<sup>103</sup> *Id.*

<sup>104</sup> *See id.* at 398–99 (outlining objections to the military jurisdiction and military tribunal provisions).

<sup>105</sup> CONG. GLOBE, *supra* note 27, at 943.

<sup>106</sup> *See id.* at 606–07 (passing the bill in the Senate).

<sup>107</sup> *See id.* at 1367 (passing the bill in the House).

<sup>108</sup> *Veto Messages*, *supra* note 102, at 405.

<sup>109</sup> CONG. GLOBE, *supra* note 27, at 1861.

<sup>110</sup> Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27–29 (codified as amended at 42 U.S.C. §§ 1981–82 (1952)).

<sup>111</sup> CONG. GLOBE, *supra* note 27, at 3149.

<sup>112</sup> Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (1952)).

purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>113</sup>

President Johnson believed that making all former slaves citizens was a rash decision. In his veto message, he asked “whether, when eleven of the thirty-six States are unrepresented in Congress at the present time, it is sound policy to make our entire colored population . . . citizens of the United States.”<sup>114</sup> He objected to the non-discrimination provision on federalism grounds, arguing that “every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States.”<sup>115</sup>

Despite eventual passage of the Civil Rights Act of 1866, many in Congress may still have felt that the Constitution should address citizenship and civil rights. Doubt existed about whether Congress could overrule the Supreme Court’s decision in *Dred Scott* by statute,<sup>116</sup> and President Johnson’s veto had raised questions about the constitutionality of the Civil Rights Act.<sup>117</sup> In addition, the 39th Congress may have worried that a later Congress, with representatives from the former Confederate states, would overturn this provision. For these reasons, Congress may have felt the need to place a provision like section one of the Fourteenth Amendment in the Constitution.

### B. *Representation in Congress*

Congress was also concerned about representation of the former Confederate states in the House of Representatives. The first sentence of section 2 of the Fourteenth Amendment says: “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.”<sup>118</sup>

This sentence repeats the general rule of Article I, section 2, clause 3 of the Constitution on the apportionment of representatives, but it eliminates the former “Three-Fifths Compromise” under which slaves counted as three-fifths of a person for the purpose of determining the

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<sup>113</sup> *Id.*

<sup>114</sup> Veto Messages, *supra* note 102, at 406.

<sup>115</sup> *Id.* at 407.

<sup>116</sup> See Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 *DRAKE L. REV.* 1015, 1027 (2008) (“Uncertainty over Congress’s authority to legislatively overrule the *Dred Scott* decision prompted Congress to create birthright citizenship in the Fourteenth Amendment’s Citizenship Clause.”).

<sup>117</sup> See Veto Messages, *supra* note 102, at 398 (“[T]he bill before me contains provisions which in my opinion are not warranted by the Constitution . . .”).

<sup>118</sup> U.S. CONST. amend. XIV, § 2.

number of representatives of a state.<sup>119</sup> This change reflected the obsolescence of the Three-Fifths Compromise after the Thirteenth Amendment ended slavery.

The second sentence of section 2 of the Fourteenth Amendment is more complicated. It provides that states will lose some of their representation if they do not allow all “male inhabitants . . . twenty-one years of age” to vote.<sup>120</sup> The second sentence says in full:

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.<sup>121</sup>

A brief review of history is necessary to understand what Congress was concerned about in approving this provision. The Civil War essentially ended when Confederate General Robert E. Lee surrendered to Union General Ulysses S. Grant on April 9, 1865.<sup>122</sup> Just six days later, on April 15, 1865, John Wilkes Booth assassinated President Abraham Lincoln.<sup>123</sup> Vice President Andrew Johnson then became President.<sup>124</sup> Johnson immediately had to decide what to do about the eleven former Confederate states.<sup>125</sup> Loyalists in four of these states—Arkansas, Louisiana, Tennessee, and Virginia—had already formed new governments, and President Johnson recognized them as legitimate.<sup>126</sup> The other seven state governments—in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas—had either collapsed entirely or were not recognized as legitimate.<sup>127</sup>

During the summer of 1865, President Johnson issued Presidential Proclamations directing the occupying Union military authorities to hold conventions in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas for the purpose of amending the state

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<sup>119</sup> *Id.* art. I, § 2, cl. 3 (“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.”).

<sup>120</sup> *Id.* amend. XIV, § 2.

<sup>121</sup> *Id.*

<sup>122</sup> See STEPHANIE FITZGERALD, A CIVIL WAR TIMELINE 42 (2014).

<sup>123</sup> See *id.* at 43.

<sup>124</sup> See *id.*

<sup>125</sup> See REPORT OF THE JOINT COMMITTEE, *supra* note 51, at vii.

<sup>126</sup> See KENDRICK, *supra* note 37, at 17.

<sup>127</sup> See *id.*

constitutions and forming a new government.<sup>128</sup> He cited the Guarantee Clause in Article IV of the Constitution as authority for this action.<sup>129</sup> By December 1865, all of the states that previously had joined the Confederacy, except Texas, had established new governments.<sup>130</sup>

These reconstructed states desired to send representatives to Congress but northern politicians objected for two reasons. First, President Johnson's reconstruction efforts were flawed in an important way. His proclamations limited participation in the state constitutional conventions to those who were eligible to vote before the rebellion, and this restriction automatically excluded former slaves.<sup>131</sup> Meanwhile, President Johnson's proclamations allowed all but a small category of high level former confederates and confederate supporters to vote so long as they took an oath of loyalty.<sup>132</sup> The result was that the newly reconstructed states were mostly formed and led by former Confederates.<sup>133</sup> The proper solution would have been to allow former slaves to vote. But this alternative would have been very controversial—and even hypocritical—because at the time only six northern states allowed non-whites to vote.<sup>134</sup>

Second, Congress was worried about the number of representatives that the Southern States would send to the House of Representatives. Because slavery no longer existed, the Three-Fifths compromise would no longer limit the population of any state for determining representation in

<sup>128</sup> See Proclamation No. 38, 13 Stat. 760 (May 29, 1865) (reorganizing North Carolina); Proclamation No. 39, 13 Stat. 761 (June 13, 1865) (reorganizing Mississippi); Proclamation No. 41, 13 Stat. 764 (June 17, 1865) (reorganizing Georgia); Proclamation No. 42, 13 Stat. 765 (June 17, 1865) (reorganizing Texas); Proclamation No. 43, 13 Stat. 767 (June 21, 1865) (reorganizing Alabama); Proclamation No. 46, 13 Stat. 769 (June 30, 1865) (reorganizing South Carolina); Proclamation No. 47, 13 Stat. 771 (July 13, 1865) (reorganizing Florida).

<sup>129</sup> See, e.g., Proclamation No. 38, 13 Stat. 760 (May 29, 1865) ("Whereas the fourth section of the fourth article of the Constitution of the United States declares that the United States shall guarantee to every State in the Union a representative form of government . . ."); see also U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

<sup>130</sup> See KENDRICK, *supra* note 37, at 17. President Johnson did not recognize Texas as having properly created a new state government until August 1866. Proclamation No. 4, 14 Stat. 814, 817 (Aug. 20, 1866).

<sup>131</sup> See, e.g., Proclamation No. 39, 13 Stat. 761, 762 (June 13, 1865) ("[N]o person shall be qualified as an elector, or shall be eligible as a member of such convention, unless he shall have previously taken and subscribed the oath of amnesty, as set forth in the President's Proclamation of May 29, A. D. 1865, and is a voter qualified as prescribed by the constitution and laws of the State of Mississippi in force immediately before the ninth (9th) of January, A. D. 1861, the date of the so-called ordinance of secession . . .").

<sup>132</sup> See, e.g., *id.* (requiring electors to take a loyalty oath); Proclamation No. 37, 13 Stat. 758, 758–59 (May 29, 1865) (excluding fourteen categories of former Confederates from taking the loyalty oath, including civil or diplomatic agents of the Confederate government, Confederate military officers above the rank of colonel, Confederate governors, and so forth).

<sup>133</sup> See REPORT OF THE JOINT COMMITTEE, *supra* note 51, at x.

<sup>134</sup> See *Oregon v. Mitchell*, 400 U.S. 112, 156–57 (1970) (Harlan, J., concurring in part and dissenting in part) (noting that, at the time, former slaves could only vote in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York, and that referenda that would have enfranchised former slaves had been defeated in Connecticut, Wisconsin, the Territory of Colorado, and the District of Columbia), *superseded by constitutional amendment*, U.S. Const. amend. XXVI.

Congress. Accordingly, the Southern states would receive more representation in Congress because all of the former slaves would count as one person rather than three-fifths of a person. One estimate was that the South would have at least fifteen more members.<sup>135</sup> In a statement on January 24, 1866, Representative Burton C. Cook explained why this result was ironic and undesirable.<sup>136</sup> He noted that, under the Three-Fifths Compromise, “the white people in certain States were [already] granted an unequal and disproportionate number of Representatives upon this floor because they were the owners of slaves, so that in those States each voter had a greater power and influence in the Government than any voter in any free State.”<sup>137</sup> Elimination of the Three-Fifths Compromise without giving former slaves the right to vote would make the situation worse: “But by the fact that slavery is dead this inequality of representation is increased; . . . the number would be increased two fifths, the three fifths of a person has become a whole person.”<sup>138</sup> Representative Burton concluded with this characterization of the practical result of the elimination of the Three-Fifths Compromise: “The 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.”<sup>139</sup>

The issue of representation came to a head when the 39th Congress convened for its first session from December 4, 1865, to July 28, 1866.<sup>140</sup> Some of the newly reconstructed states attempted to send Senators and Representatives to Washington, but Congress refused to allow them to participate. Their exclusion took place in a dramatic manner. On the opening day of the first session, when the clerks of the House and Senate took roll, members from these Southern states were present but the clerks simply did not call their names.<sup>141</sup> For example, Horace Maynard, who had always been loyal to the United States and who had been elected as a member of the House of Representatives from Tennessee,<sup>142</sup> was present but his name was not called.<sup>143</sup> He attempted to object but he was not allowed to speak.<sup>144</sup> Representative James Brooks of New York then

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<sup>135</sup> See *id.* at 157 (Harlan, J., concurring) (“While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors.”).

<sup>136</sup> CONG. GLOBE, *supra* note 27, at 410 (statement of Rep. Burton C. Cook).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* For a table showing the projected increases state by state, see *id.* at app. 118.

<sup>140</sup> The 39th Congress, which had been elected in the fall of 1864, convened for a special one-week session from March 4 through March 11, 1865. See CONG. GLOBE, 39th Cong., Special Sess. 1424 (indicating that Congress convened for a special session). However, the “first session” of this Congress did not begin until December 4, 1865. See CONG. GLOBE, *supra* note 27, at 1 (indicating that Congress convened its first session).

<sup>141</sup> See CONG. GLOBE, *supra* note 27, at 1 (showing the roll call of Senators, which did not include any from former Confederate states); *id.* at 3 (showing the same for the roll call of House Members).

<sup>142</sup> See ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 258 (1988).

<sup>143</sup> See CONG. GLOBE, *supra* note 27, at 3 (failing to call Rep. Maynard at roll call, and then denying him the opportunity to speak).

<sup>144</sup> See *id.* (interrupting Rep. Maynard as he attempted to speak)

objected, arguing that it was “revolutionary” to exclude representatives in this manner.<sup>145</sup> But his protestations fell on deaf ears.<sup>146</sup>

The final result was that the 39th Congress met, and ultimately approved the Fourteenth Amendment, without including any Senators or Representatives from the former Confederate States.<sup>147</sup> Their presence surely would have affected the entire process. If at times Congress appears to have acted in haste during the spring of 1866, a likely explanation is that the Northern Senators and Representatives recognized that they had only a limited window of opportunity to approve provisions that Southern delegations might block when they reentered Congress.

### C. *Eligibility of Former Confederates to Hold Office*

Congress was also concerned about the participation of former rebels in politics. For this reason, section 3 of the Fourteenth Amendment concerns the eligibility of former Confederates to hold federal or state government offices.<sup>148</sup> The section disqualifies anyone who both previously (1) took an oath to support the Constitution as a significant federal or state government official, and (2) then engaged in rebellion.<sup>149</sup> The first sentence says:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.<sup>150</sup>

Congress, however, recognized the possible need for exceptions. Accordingly, the second sentence of section 3 says: “But Congress may by a vote of two-thirds of each House, remove such disability.”<sup>151</sup>

This provision requires a little background to understand. Having just won the Civil War and defeated the Confederacy, Congress was concerned that former leaders of the Confederacy would take over the state and federal offices. Congress rejected the approach, favored by President Johnson in his proclamations, of excluding only high level Confederate

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<sup>145</sup> *Id.*

<sup>146</sup> *See id.* (failing to respond to Rep. Brooks’ objection).

<sup>147</sup> *See id.* at 3149 (voting to pass the Fourteenth Amendment in both houses of Congress).

<sup>148</sup> U.S. CONST. amend. XIV, § 3.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*



officials.<sup>152</sup> Instead, it focused on those who had sworn to uphold the Constitution and then violated that oath.<sup>153</sup>

#### D. *Confederate Debts*

In addition to the foregoing issues, Congress was also concerned about payment of Union and Confederate debts. The first sentence of section 4 of the Fourteenth Amendment provides assurance that the federal government will honor its own obligations, saying:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.<sup>154</sup>

The second sentence, however, prohibits both the federal government and the state governments from paying Confederate debts or paying for emancipated slaves:

But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.<sup>155</sup>

These two provisions arose because of the great cost of the Civil War to both sides of the conflict. The North and South each borrowed huge sums, at home and abroad, to finance their military operations. The public debt of the United States in 1860 was \$64.8 million; at the end of 1865, it was \$2.2 billion.<sup>156</sup> Jefferson Davis estimated that the Confederate debt in late 1864 was more than \$1.1 billion.<sup>157</sup> Senator Howard, however, thought that the amount was much larger and that any attempt to pay it would invite all manner of claimants to emerge.<sup>158</sup> He said:

The amount of that debt is probably not less than five billion dollars. We do not know its exact amount, and I am not sure that it is possible ever to ascertain it; but if there should ever be a fair prospect of its assumption by the United States or by the States it is perfectly certain that the evidences of it

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<sup>152</sup> See Proclamation No. 37, 13 Stat. 758, 758–59 (May 29, 1865) (excluding only fourteen categories of former Confederates from taking the loyalty oath, including civil or diplomatic agents of the Confederate government, Confederate military officers above the rank of colonel, Confederate governors, and so forth).

<sup>153</sup> See U.S. CONST. amend. XIV, § 3 (rendering ineligible for public service any person who violated a prior oath of office by participating in the rebellion).

<sup>154</sup> *Id.* § 4.

<sup>155</sup> *Id.*

<sup>156</sup> *Historical Debt Outstanding, The 19th Century*, TREASURYDIRECT, [https://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt\\_19cent.htm](https://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_19cent.htm) [<https://perma.cc/KE44-F2Q2>] (last visited Jan. 25, 2017).

<sup>157</sup> JEFFERSON DAVIS, 1 *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 493 (1881).

<sup>158</sup> CONG. GLOBE, *supra* note 27, at 2768 (statement of Sen. Jacob Howard).

would multiply . . . .<sup>159</sup>

Congress believed that the federal government should not disavow the Union debt because the debt was legitimate, and defaulting on the debt might make future borrowing difficult and more expensive. But Congress felt that neither the federal government nor any of the former Confederate states should repay the Confederate debts; these debts were huge and illegitimate, the former Confederate states were penniless, and repudiating the debts should dissuade anyone from making loans to future rebels. Section 4 embodies these principles. Representative Thaddeus Stevens thought that the provision was so obviously just that it did not even require discussion.<sup>160</sup>

The position of many southerners was different. Many southerners held Confederate notes that had been issued as currency. Others had bought confederate bonds. Still others had performed contracts or worked for the Confederate government and had not received payment. Southern creditors felt that it was unfair to deny them payment and then to force them to rejoin the Union and be responsible—along with everyone else—for paying the Union debts. This thinking may seem unrealistic for the losers of a war to hold, but it is often the case that a defeated enemy does not pay the victor's costs.<sup>161</sup>

The Joint Committee heard numerous witnesses testify that the feeling in the South was that the federal government should either assume both the Union and Confederate debts or repudiate both of them. For example, Senator Howard asked John Hawkshurst, a union loyalist from Virginia, what Virginians thought about the state's debt:

Question. Suppose they cannot repudiate it; what then would they do; would they then ask to have their own debt assumed by the United States government?

Answer. Yes; I think there is a strong feeling that their own obligations should be paid as well as ours; I think, however, there is a strong feeling in favor of repudiation of the whole; but failing in that, would endeavor to throw in their own.<sup>162</sup>

Others made similar comments. One witness explained that a prevailing view was “if they [are] going now to [re]establish the Union they should repudiate both debts or pay both debts.”<sup>163</sup> Congress, however, ultimately decided that the Union debts should be paid and the Confederate debts

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<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 3148 (allocating only one short sentence to section 4 before moving on).

<sup>161</sup> For example, the United States decided not to insist on financial reparations from Japan after World War II based on “strategic considerations in the context of the Cold War and the growing concern of the United States to prevent a course of action which would have required it to in effect finance Japanese reparation payments to third states.” Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296, 312 (2002).

<sup>162</sup> REPORT OF THE JOINT COMMITTEE, *supra* note 51, pt. II, at 21.

<sup>163</sup> *Id.* at 62.

should not be paid.

Another question before Congress was whether the federal government would pay compensation to the former owners of emancipated slaves. As discussed below, several proposed constitutional amendments concerned this question.<sup>164</sup> In the end, Congress addressed this point in section 4 of the Fourteenth Amendment.

### E. *Congress's Limited Powers*

Finally, Congress was concerned about its legislative power. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>165</sup> As noted above, President Johnson vetoed the Civil Rights Act of 1866 on grounds that Congress lacked the power to enact the provision. In his veto message, President Johnson explained: "[A]s to the States no . . . provision exists vesting in Congress the power 'to make rules and regulations' for them."<sup>166</sup> Although Congress overrode President Johnson's veto, Congress knew that without an express grant of power, a constitutional objection might arise to any future civil rights legislation that it wanted to enact.

Under the Tenth Amendment and the structure of the Constitution, Congress is a legislature of limited powers.<sup>167</sup> Nothing in the Constitution expressly gives Congress the power to enforce either the Bill of Rights or the Privileges and Immunities Clause of Article IV. Accordingly, Senator Howard said section 5 was "indispensable" because "[w]ithout this clause, no power is granted to Congress by the amendment or any one of its sections" to protect civil rights.<sup>168</sup> Representative Bingham said that "it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution."<sup>169</sup> In addition, Congress had already added a similar clause to the Thirteenth Amendment granting power to enforce the prohibition on slavery.<sup>170</sup> That precedent made adding section 5 to the Fourteenth Amendment a logical step.

## III. PROPOSED JOINT RESOLUTIONS FOR AMENDING THE CONSTITUTION

In the first session of the 39th Congress, members of the House and Senate introduced numerous proposals for constitutional amendments.

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<sup>164</sup> *Infra* Section III.A.

<sup>165</sup> U.S. CONST. amend. XIV, § 5.

<sup>166</sup> Veto Messages, *supra* note 102, at 3606.

<sup>167</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited . . .").

<sup>168</sup> CONG. GLOBE, *supra* note 27, at 2768.

<sup>169</sup> *Id.* at 1034.

<sup>170</sup> See U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

Congress designated each proposal as a House or Senate joint resolution, and assigned it a number. For example, as described below, one proposal for amending the Constitution to prohibit payment of Confederate debts was House Joint Resolution No. 9<sup>171</sup> (abbreviated as “H. R. No. 9” in the *Congressional Globe*,<sup>172</sup> and as “H. Res. 9” in the House Journal<sup>173</sup>). Ordinarily, joint resolutions require the approval of a majority of the House and Senate and the signature of the President.<sup>174</sup> But by their express terms, H.R. Res. 9 and the other joint resolutions proposing constitutional amendments required the concurrence of two-thirds of both the House and Senate and approval by three-quarters of the state legislatures (but not the signature of the President).<sup>175</sup> These approval requirements satisfy the standards in Article V for amending the Constitution.<sup>176</sup>

Some of the proposals for constitutional amendments during the first session of the 39th Congress addressed Congress’s concerns about citizenship, civil rights, representation of former Confederate States in Congress, the eligibility of former Confederate leaders to hold office, payment of Union and Confederate debts, and the powers of Congress. As described below, the most important of these joint resolutions were H.R. Res. 9, H.R. Res. 51, H.R. Res. 63, and H.R. Res. 127. Of these measures, only H.R. Res. 127 achieved the support of two-thirds of the House and the Senate; it ultimately became the Fourteenth Amendment. The other joint resolutions, however, are important because they may provide clues about the meaning that Congress attached to H.R. Res. 127.

#### A. *H.R. Res. 9 (Confederate Debts)*

As described above, a major concern of Congress in 1866 was the extensive debts incurred by the Confederate State governments. Congress thought that it had no duty to repay these debts and did not want the newly reformed governments of the former Confederate states to pay them either. Congress ultimately addressed this issue by approving H.R. Res. 127, which included what is now section 4 of the Fourteenth Amendment.<sup>177</sup> But H.R. Res. 127 was not the first proposal that Congress considered for amending the Constitution to address Confederate debts. On the contrary,

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<sup>171</sup> See CONG. GLOBE, *supra* note 27, at 84 (proposing House Joint Resolution No. 9 as an amendment to the Constitution).

<sup>172</sup> See, e.g., *id.* at 88 (abbreviating House Joint Resolution No. 9 as “H. R. No. 9”).

<sup>173</sup> See, e.g., H. JOURNAL, *supra* note 67, at 92 (abbreviating House Joint Resolution No. 9 as “H. Res. 9”).

<sup>174</sup> *Joint Resolution*, U.S. SENATE, [https://www.senate.gov/reference/glossary\\_term/joint\\_resolution.htm](https://www.senate.gov/reference/glossary_term/joint_resolution.htm) [<https://perma.cc/BT3J-BTL3>] (last visited Mar. 28, 2017).

<sup>175</sup> H.R. Res. 9, for example, started by saying: “Be it resolved by the Senate and House of Representatives of the United States in Congress assembled, (two thirds of both Houses concurring,) That the following article be proposed . . . as an amendment to the Constitution of the United States, which, when ratified by three fourths of [state] Legislatures, shall be valid to all intents and purposes as part of said Constitution, namely . . . .” CONG. GLOBE, *supra* note 27, at 84.

<sup>176</sup> U.S. CONST. art. V.

<sup>177</sup> *Id.* amend. XIV, § 4.

on December 6, 1865, Representative Farnsworth introduced a joint resolution, H.R. Res. 9, a proposal on the subject which the House referred to its Committee on the Judiciary.<sup>178</sup> The Committee studied the matter, and reported back with a slight revision on December 19, 1865.<sup>179</sup> As revised, H.R. Res. 9 proposed an amendment to the Constitution that would read as follows:

No tax, duty, or impost shall be laid, nor shall any appropriation of money be made, by either the United States, or any one of the States thereof, for the purpose of paying, either in whole or in part, any debt, contract, or liability whatsoever, incurred, made, or suffered by any one or more of the States, or the people thereof, for the purpose of aiding rebellion against the Constitution and laws of the United States.<sup>180</sup>

Representative Wilson explained that this proposed Amendment had just one purpose, which was that “no part of the people, either in the North or the South, shall be called upon in the future to pay one dollar of the debt . . . contracted for the purpose of destroying the Government of the United States.”<sup>181</sup> The House debated the proposal the same day and then easily approved it, without changes, by well more than the required two-thirds margin (150 yeas, 11 nays, and 21 not voting).<sup>182</sup> The Senate learned of the House’s approval of the proposed joint resolution on December 20, 1865.<sup>183</sup> Despite the extraordinarily speedy passage of the measure in the House, the Senate never debated H.R. Res. 9, and it was removed from the Senate’s calendar on June 20, 1866.<sup>184</sup>

In addition to H.R. Res. 9, members of the House and Senate proposed but did not approve several other joint resolutions proposed as constitutional amendments addressing the payment of Confederate debts and paying for the emancipation of slaves: S. Res. 9,<sup>185</sup> S. Res. 10,<sup>186</sup> S. Res. 24,<sup>187</sup> S. Res. 62,<sup>188</sup> S. Res. 76,<sup>189</sup> and H.R. Res. 43.<sup>190</sup> Members of the House and Senate said little about these measures and they did not

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<sup>178</sup> See H. JOURNAL, *supra* note 67, at 36.

<sup>179</sup> See CONG. GLOBE, *supra* note 27, at 84. On December 13, 1865, Senator Stewart had introduced a similar proposal for a constitutional amendment into the Senate as S. Res. 5. *Id.* at 35. The Senate took no action on this proposal. *Id.* at 3276–77.

<sup>180</sup> *Id.* at 84.

<sup>181</sup> *Id.* at 86 (statement of Rep. James F. Wilson).

<sup>182</sup> *Id.* at 84–87.

<sup>183</sup> *Id.* at 88.

<sup>184</sup> *Id.* at 3276–77.

<sup>185</sup> S. Res. 9 was introduced on January 5, 1866. *Id.* at 129. The Senate postponed consideration of S. Res. 9 indefinitely on June 20, 1866. *Id.* at 3276.

<sup>186</sup> *Id.* at 129, 3276.

<sup>187</sup> *Id.* at 391, 701–02.

<sup>188</sup> *Id.* at 1906.

<sup>189</sup> *Id.* at 2233.

<sup>190</sup> *Id.* at 1605. H.R. Res. 43 was introduced on March 13, 1866, and referred to the Joint Committee. *Id.* at 1367. An attempt to bring it up for discussion on March 27, 1866 failed. *Id.* at 1695.

come to a vote. Although none of these proposed measures became part of the Constitution, contrasting them to H.R. Res. 127 may provide clues as to the meaning of section 4 of the Fourteenth Amendment.<sup>191</sup>

### B. *H.R. Res. 51 (Representation in Congress)*

Another issue that concerned Congress, as described above, was the representation of the former Confederate states in Congress. Congress ultimately addressed this issue in section 2 of the Fourteenth Amendment as set forth in H.R. Res. 127. But H.R. Res. 127 was not the first joint resolution proposing a constitutional amendment to tackle the subject.

On December 5, 1865, Representative Thaddeus Stevens introduced a joint resolution to the Constitution that would make a state's representation depend on the number of eligible voters in the state.<sup>192</sup> The House immediately referred this unnumbered proposal to the Committee on the Judiciary.<sup>193</sup> On January 8, 1866, the House met as a committee of the whole and informally discussed the problem of representation.<sup>194</sup> During this session, Representative Blaine of Maine proposed an amendment to Article I, section 2, clause 3, which excludes from a state's population "those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color."<sup>195</sup> He predicted that the amendment would "secure the right of suffrage to the colored population throughout the South in a very few years."<sup>196</sup> Otherwise, the states would lose representation; they could not even count African-Americans as three-fifths of a person for determining their populations. The House, later that day, referred this proposal to the Joint Committee.<sup>197</sup> The House again discussed the issue of the basis of representation on January 22–26, and 29–30.<sup>198</sup>

On January 9 and 12, the Joint Committee considered possible ways to address the issue of representation, and settled on proposing the following text:

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

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<sup>191</sup> See *infra* Section IV for a discussion about how courts and scholars have attempted to discern the meaning of the Fourteenth Amendment, in part by contrasting H.R. Res. 127 with earlier joint resolutions that failed to obtain sufficient support.

<sup>192</sup> CONG. GLOBE, *supra* note 27, at 10.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 138–42.

<sup>195</sup> *Id.* at 141–42.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 136.

<sup>198</sup> See *id.* at 353–59 (Jan. 22); *id.* at 376–89 (Jan. 23); *id.* at 403–12 (Jan. 24); *id.* at 422–35 (Jan. 25); *id.* at 447–60 (Jan. 26); *id.* at 483–94 (Jan. 29); *id.* at 508–09 (Jan. 30).

therein of such race or color shall be excluded from the basis of representation.<sup>199</sup>

Representative Thaddeus Stevens introduced this proposal into the House on January 31 as H.R. Res. 51,<sup>200</sup> and made the purpose of the proposed amendment abundantly clear:

If a state abuses the elective franchise and takes it from those who are the only loyal people there, the Constitution says to such a State, you shall lose power in the halls of the nation, and you shall remain where you are, a shriveled and dried-up nonentity . . . .<sup>201</sup>

The same day, after brief debates, the House voted to approve the amendment by a two-thirds margin (120 yeas, 46 nays, and 16 not voting).<sup>202</sup> H.R. Res. 51 then went to the Senate for approval. The Senate discussed the proposal on February 6–9, 14, 16, 21, 23 and March 5, 7–9, 1866.<sup>203</sup> When the Senate voted on March 9, 1866, a majority of the Senators approved it but not with the required two-thirds majority (the vote was 25 in favor and 22 against).<sup>204</sup> Accordingly, H.R. Res. 51 did not have enough support to become a constitutional amendment.<sup>205</sup> At least two other joint resolutions also addressed representation in Congress, but they were not discussed.<sup>206</sup>

### C. *H.R. Res. 63 (Civil Rights and the Powers of Congress)*

As described above,<sup>207</sup> Congress had two important concerns about civil rights in 1866. One was that the Bill of Rights by itself did not limit the actions of state governments and the other was the Congress lacked any express power to enforce the Bill of Rights against the states. Congress ultimately addressed these concerns in sections 1 and 5 of the Fourteenth Amendment.<sup>208</sup> But before Congress approved H.R. Res. 127, the House

<sup>199</sup> *Id.* at 535.

<sup>200</sup> *Id.* at 534–535. Senator Fessenden introduced a similar measure into the Senate on January 22, 1866, as S. Res. 22. *See id.* at 337 (“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.”).

<sup>201</sup> *Id.* at 536.

<sup>202</sup> *Id.* at 535–38.

<sup>203</sup> *See id.* at 673–87 (discussing H.R. Res. 51 on February 6); *id.* at 702–08 (discussing H.R. Res. 51 on February 7); *id.* at 736–42 (discussing H.R. Res. 51 on February 8); *id.* at 763–70 (discussing H.R. Res. 51 on February 9); *id.* at 831–35 (discussing H.R. Res. 51 on February 14); *id.* at 876–86 (discussing H.R. Res. 51 on February 16); *id.* at 957–65 (discussing H.R. Res. 51 on February 21); *id.* at 981–91 (discussing H.R. Res. 51 on February 23); *id.* at 1180–84 (discussing H.R. Res. 51 on March 5); *id.* at 1224–33 (discussing H.R. Res. 51 on March 7); *id.* at 1254–58 (discussing H.R. Res. 51 on March 8); *id.* at 1275–89 (discussing H.R. Res. 51 on March 9).

<sup>204</sup> *Id.* at 1288–89.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2264–65 (addressing S. Res. 78 on April 30, 1866); *id.* at 2560 (addressing S. Res. 78 on May 14, 1866).

<sup>207</sup> *See supra* Section II.B (detailing representation in Congress).

<sup>208</sup> U.S. CONST. amend. XIV, §§ 1, 5.

considered another provision, H.R. Res. 63, which had similar objectives. H.R. Res. 63 arose in the Joint Committee. On January 12, the Joint Committee formed a subcommittee on the powers of Congress.<sup>209</sup> On January 27, 1866, Representative Bingham reported to the full committee that the subcommittee had approved a proposed amendment.<sup>210</sup> The subcommittee's proposal said:

Congress shall have power to make laws which shall be necessary and proper to secure to all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and equal political rights and privileges.<sup>211</sup>

Although the Journal of the Joint Committee does not report the debates of the full committee, it does show that the full committee made minor amendments to the proposal on both January 27 and February 3.<sup>212</sup> On February 10, the Committee then voted to send the proposed amendment to both Houses of Congress as a proposed constitutional amendment.<sup>213</sup>

On February 26, Representative Bingham introduced the proposed constitutional amendment to the House as a joint resolution, H.R. Res. 63.<sup>214</sup> The proposal, as it had been revised by the full committee, said:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2), and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amendment).<sup>215</sup>

After quoting the Privileges and Immunities Clause in Article V and the last clause of the Fifth Amendment, Representative Bingham said:

Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred

<sup>209</sup> KENDRICK, *supra* note 37, at 43, 46.

<sup>210</sup> *Id.* at 56.

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 56–58 (describing the amendments agreed to on January 27); *id.* at 60–61 (describing the amendments agreed to on February 3).

<sup>213</sup> *Id.* at 62–63.

<sup>214</sup> CONG. GLOBE, *supra* note 27, at 1033–34. Senator Fessenden had introduced a very similar measure, S.R. 30, on February 13, 1866. *Id.* at 806.

<sup>215</sup> *Id.* at 1034.



and blasted the land, would have been an impossibility.<sup>216</sup>

Representative Bingham explained that the proposed amendment would solve these problems. He said: "The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."<sup>217</sup>

The House of Representatives debated H.R. Res. 63 on February 26–28.<sup>218</sup> Despite Representative Bingham's arguments, opponents of the proposal strongly objected that it went too far. The Supreme Court summarized the opposition to H.R. Res. 63 in *City of Boerne v. Flores*:<sup>219</sup>

[Some argued that the] proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedure . . . may be overridden, may be repealed or abolished, and the law of Congress established instead." Senator William Stewart of Nevada likewise stated the Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government." Some radicals, like their brethren "unwilling that Congress shall have any such power . . . to establish uniform laws throughout the United States upon . . . the protection of life, liberty, and property," also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities.<sup>220</sup>

On February 28, 1866, when it appeared that the proposal would not gain approval, the House voted to postpone consideration until "the second

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1088.

<sup>218</sup> *See id.* at 1033–34 (discussing H.R. Res. 63 on February 26); *id.* at 1054–67 (discussing H.R. Res. 63 on February 27); *id.* at 1083–95 (discussing H.R. Res. 63 on February 28).

<sup>219</sup> 521 U.S. 507 (1997).

<sup>220</sup> *Id.* at 520–21 (citations omitted).

Tuesday in April” (i.e., April 10, 1866).<sup>221</sup> The House, however, never reopened the subject. On June 6, 1866, Representative Bingham moved that H.R. Res. 63 “be indefinitely postponed, for reason that the constitutional amendment already passed by the House [i.e., H.R. Res. 127] covers the whole subject matter.”<sup>222</sup> The House approved the motion.<sup>223</sup> The Senate never considered H.R. Res. 63.

#### D. *H.R. Res. 127 (The Fourteenth Amendment)*

After these unsuccessful initial attempts to approve the previously discussed joint resolutions proposing amendments to the Constitution, Congress finally succeeded with H.R. Res. 127, the provision that became the Fourteenth Amendment. H.R. Res. 127 was broader in scope than the prior proposals. It addressed all of the subjects of H.R. Res. 9, H.R. Res. 51, and H.R. Res. 63. It also included a provision on the eligibility of former Confederate officials to hold government office.

On April 21, 1866, Representative Stevens introduced into the Joint Committee “a plan of reconstruction, one not of his own framing, but [one] which he should support.”<sup>224</sup> This proposal contained five sections. The Committee debated the proposal and, as described below, made various revisions before approving it for submission to Congress on April 28, 1866.<sup>225</sup> Representative Stevens introduced the proposal into the House on April 30, 1866, as H.R. Res. 127,<sup>226</sup> but the House voted to postpone discussing the proposal until May 8.<sup>227</sup> On May 8, Representative Stevens gave a long speech in which he explained the meaning and purpose of each section.<sup>228</sup> The House debated H.R. Res. 127 on May 8, 9, and 10.<sup>229</sup> On May 10, the House voted to approve H.R. Res. 127, without amendment, by a two-thirds majority (128 yeas, 37 nays, and 19 not voting).<sup>230</sup>

H.R. Res. 127 was introduced into the Senate on May 10, but no discussion occurred on that day.<sup>231</sup> On May 23, Senator Howard initiated the Senate’s consideration of H.R. Res. 127 by analyzing each of its five sections.<sup>232</sup> The Senate discussed H.R. Res. 127 as a committee of the whole on May 23, 24, and 29, in regular sessions on May 30 and 31, and

<sup>221</sup> CONG. GLOBE, *supra* note 27, at 1094–95. Immediately before this decision, the House rejected a motion to “lay the whole subject on the table,” which would have only temporarily delayed consideration. *Id.*

<sup>222</sup> *Id.* at 2980.

<sup>223</sup> *Id.*

<sup>224</sup> KENDRICK, *supra* note 37, at 82–83.

<sup>225</sup> *See id.* at 83–116 (documenting revisions to the initial plan).

<sup>226</sup> CONG. GLOBE, *supra* note 27, at 2286.

<sup>227</sup> *Id.*

<sup>228</sup> *See id.* at 2459–60 (providing a transcript of the speech made by Representative Stevens).

<sup>229</sup> *See id.* at 2458–73 (discussing H.R. Res. 127 on May 8); *id.* at 2498–513 (discussing H.R. Res. 127 on May 9); *id.* at 2530–45 (discussing H.R. Res. 127 on May 10).

<sup>230</sup> *Id.* at 2545.

<sup>231</sup> *Id.* at 2530.

<sup>232</sup> *See id.* at 2764–68 (May 23, 1866) (detailing Senator Howard’s explanation of sections 1–5 of H.R. Res. 127).

as a committee of the whole from June 4 to June 8.<sup>233</sup> During this time, as discussed below, the Senate made various amendments to the proposal. On June 8, 1866, the Senate approved the amended version of H.R. Res. 127 by a two-thirds vote (33 yeas, 11 nays).<sup>234</sup>

Because the Senate had approved an amended version of H.R. Res. 127, the joint resolution had to go back to the House to see if the House would concur in the Senate's amendments. The Amended version of H.R. Res. 127 was introduced in the House on June 9.<sup>235</sup> The House debated the amended version on June 13.<sup>236</sup> Representative Stevens briefly described the Senate's amendments, some of which he approved and some of which he disfavored.<sup>237</sup> The House concurred in the Senate's version by a two-thirds vote (120 yeas, 32 nays, and 32 not voting).<sup>238</sup>

Congress sent the approved version of joint resolution H.R. Res. 127 to the Secretary of State, for delivery to President Johnson, on June 16.<sup>239</sup> President Andrew Johnson likely opposed the Fourteenth Amendment, but Article V assigns no role to the President in the Amendment process. Accordingly, President Andrew Johnson's only duty was to send the proposed Fourteenth Amendment to the states, which he did on June 22, 1866.<sup>240</sup> In doing so, he emphasized that this action should "be considered as purely ministerial, and in no sense whatever committing the Executive to an approval or a recommendation of the amendment to the State legislatures or to the people."<sup>241</sup>

The details of the state ratification of the Fourteenth Amendment are beyond the scope of this Article. Suffice it to say that there were serious irregularities.<sup>242</sup> But on July 28, 1868, Secretary of State William Seward proclaimed that three-fourths of the states had ratified the Fourteenth Amendment.<sup>243</sup>

The following discussion outlines the development of the text of each section of H.R. Res. 127 from the initial proposal of April 21 within the Joint Committee to the final version approved by the House and Senate.

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<sup>233</sup> See *id.* at 2764–71 (discussing H.R. Res. 127 on May 23); *id.* at 2798–2804 (discussing H.R. Res. 127 on May 24); *id.* at 2868–69 (discussing H.R. Res. 127 on May 29); *id.* at 2890–02 (discussing H.R. Res. 127 on May 30); *id.* at 2914–21 (discussing H.R. Res. 127 on May 31); *id.* at 2938–44 (discussing H.R. Res. 127 on June 4); *id.* at 2960–65 (discussing H.R. Res. 127 on June 5); *id.* at 2984–93 (discussing H.R. Res. 127 on June 6), *id.* at 3010–11 (discussing H.R. Res. 127 on June 7); *id.* at 3026–42 (discussing H.R. Res. 127 on June 8).

<sup>234</sup> *Id.* at 3041–42.

<sup>235</sup> *Id.* at 3055.

<sup>236</sup> *Id.* at 3144–49.

<sup>237</sup> *Id.* at 3148.

<sup>238</sup> *Id.* at 3149.

<sup>239</sup> Joint Resolution Proposing an Amendment to the Constitution of the United States, No. 48, 14 Stat. 358 (1866).

<sup>240</sup> 39TH CONG., 1ST SESS., S. JOURNAL 563 (1866).

<sup>241</sup> *Id.*

<sup>242</sup> See Colby, *supra* note 16, at 1666.

<sup>243</sup> Proclamation No. 13, 15 Stat. 708, 709–710 (1868).

1. *Section 1 of the April 21 Proposal, Which Became Section 1 of the Fourteenth Amendment*

Section 1 of the April 21 proposal in the Committee said: “No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.”<sup>244</sup> The Committee revised this sentence substantially before submitting it to Congress. As introduced in Congress, the proposal said:

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.<sup>245</sup>

Two features of the revision in the Committee deserve mention. First, as the text shows, the Committee decided to drop all mention of race. Professor Earl Maltz has observed that this specific change has had sweeping consequences, allowing courts to apply the Equal Protection clause to address many forms of discrimination and not just racial discrimination.<sup>246</sup> Second, the revised version sounds very much like H.R. Res. 63, but does not say anything about the powers of Congress.

The House approved H.R. Res. 127 as it was introduced. But the Senate added an initial sentence declaring all persons born in the United States to be U.S. citizens.<sup>247</sup> Senator Howard and others discussed the purpose, meaning, and limitations of this amendment to the proposal on May 30.<sup>248</sup> The sentence had the effect of overruling the Supreme Court’s decision in *Dred Scott* that persons of African descent could never be citizens.<sup>249</sup> Senator Revard Johnson, who as an attorney had represented John Sanford against Dred Scott before the Supreme Court,<sup>250</sup> supported the amendment.<sup>251</sup> Without discussing his former role in the matter, he subtly mentioned that “serious questions have arisen, and some of them have given rise to embarrassments, as to who are citizens of the United States, and what are the rights which belong to them as such; and the object of this amendment is to settle that question.”<sup>252</sup> When the matter came before the House, Representative Stevens merely commented: “This is an excellent amendment, long needed to settle conflicting decisions between

<sup>244</sup> KENDRICK, *supra* note 37, at 83.

<sup>245</sup> CONG. GLOBE, *supra* note 27, at 2286.

<sup>246</sup> Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L.Q. 287, 297–98 (2015).

<sup>247</sup> See U.S. CONST. amend. XIV, § 1.

<sup>248</sup> CONG. GLOBE, *supra* note 27, at 2890–95.

<sup>249</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 457 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>250</sup> CONG. GLOBE, *supra* note 27, at 2893; see *Dred Scott*, 60 U.S. at 399 (identifying “Mr. Johnson” as counsel for the defendant in error).

<sup>251</sup> CONG. GLOBE, *supra* note 27, at 2893.

<sup>252</sup> *Id.*

the several States and the United States.”<sup>253</sup>

2. *Section 2 of the Committee’s April 21 Proposal, Which Was Deleted by the Committee and Not Included in the Fourteenth Amendment*

Section 2 of the April 21 proposal would have banned racial discrimination with respect to the right to vote. The proposal said:

From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.<sup>254</sup>

The Joint Committee, however, deleted the original section 2. Because the Journal does not record committee discussions, the reasons for deleting this provision are lost to history. Voting discrimination became a subject that ultimately would be addressed by the Fifteenth Amendment.<sup>255</sup>

3. *Section 3 of the April 21 Proposal, Which Became Section 2 of the Fourteenth Amendment*

Section 3 of the April 21 committee proposal addressed representation in Congress and was very similar to H.R. Res. 51. It said:

Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.<sup>256</sup>

The Committee undertook various changes to this proposal and renumbered it to be section 2. As introduced into Congress, the new section 2 read as follows:

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

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<sup>253</sup> *Id.* at 3148.

<sup>254</sup> KENDRICK, *supra* note 37, at 83–84.

<sup>255</sup> See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”). That said, it should be noted that Senator Henderson introduced a proposal, SR. No. 23, on January 23, 1866, that would have amended the Constitution to prohibit discrimination in voting: “No State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race.” CONG. GLOBE, *supra* note 27, at 362.

<sup>256</sup> See KENDRICK, *supra* note 37, at 84.

in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age.<sup>257</sup>

This language is very similar to the language in H.R. Res. 51, but it is more detailed. The House approved the language without change, but the Senate revised it. The following marked paragraph shows the difference between the initial version of H.R. Res. 127 and the final version approved by both Houses (with deleted text stricken and new text underlined):

Representatives shall be apportioned among the several ~~States which may be included within this Union~~ according to their respective numbers, counting the whole number of persons in each ~~State~~, excluding Indians not taxed. But ~~whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than 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 in such State therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age in such state.~~<sup>258</sup>

The changes to the first sentence appear to be purely stylistic, as are some of the changes in the second sentence. But the second sentence also differs substantively. Senator Williams, who proposed the amendment, thought it would be preferable for the section to specify “particularly the officers for which these people must be allowed to vote in order to be counted.”<sup>259</sup> The Senate discussed the whole issue of representation at length on June 8 before approving the amended version.<sup>260</sup> When the Senate’s revisions came back to the House for approval, Representative Stevens did not object to the changes but expressed disappointment that the joint resolution did not go further and ban discrimination in voting (as section 2 of the original April 21 proposal would have done).<sup>261</sup>

#### 4. *A New Section, Which Was Not Included in the April 21 Proposal and Which Became Section 3 of the Fourteenth Amendment*

President Johnson’s proclamations regarding the reconstruction of

<sup>257</sup> CONG. GLOBE, *supra* note 27, at 2286.

<sup>258</sup> U.S. CONST. amend. XIV, § 2.

<sup>259</sup> CONG. GLOBE, *supra* note 27, at 3029.

<sup>260</sup> *See id.* at 3026–40.

<sup>261</sup> *See id.* at 3148.

former Confederate states allowed most former Confederate supporters to vote so long as they took a loyalty oath. The constitutional amendments proposed in H.R. Res. 9, No. 51, and No. 63 did not address this issue of former Confederate officials. The initial April 21 proposal in the Joint Committee also contained no provision on the subject. But the issue arose again after the Joint Committee deleted the original section 2, and renumbered the original section 3 to be section 2. On April 28, Representative Williams proposed the following new provision, which became section 3 of the Committee's proposal when it was introduced into the House:

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.<sup>262</sup>

The House did not make any changes to this provision when it passed H.R. Res. 127. The Senate, however, approved a substantial revision of it to say:

That no person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability.<sup>263</sup>

This modification switched the focus from voting to limiting the ability to serve in state or federal office. The new language was proposed on May 30,<sup>264</sup> and discussed the same day.<sup>265</sup> Senator Johnson thought that it was better than the committee's original proposal of disenfranchisement. He said:

I am opposed to the amendment as proposed by the committee . . . . All history shows, as I think, that on the conclusion of a civil war, the more mild . . . the measures are which are adopted the better for the restoration of entire peace and harmony.<sup>266</sup>

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<sup>262</sup> See KENDRICK, *supra* note 37, at 116.

<sup>263</sup> CONG. GLOBE, *supra* note 27, at 2897.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 2897–2902.

<sup>266</sup> *Id.* at 2898.

He complained that the committee's original proposal would disenfranchise "nine tenths, perhaps, of the gentlemen of the South."<sup>267</sup>

When the revision came back to the House, Representative Stevens said: "This I cannot look upon as an improvement. It opens the elective franchise to such as the States choose to admit. In my judgment, it endangers the Government."<sup>268</sup> Despite his reservations, he still urged the House to approved H.R. Res. 127 as modified by the Senate. "[L]et us no longer delay; take what we can get now," he said, "and hope for better things in future legislation."<sup>269</sup>

5. *Section 4 of the April 21 Proposal, Which Became Section 4 of the Fourteenth Amendment*

Section 4 of the original April 21 proposal resembled H.R. Res. 9. It concerned payment of Confederate debts and payments for the emancipation of slaves. It said that "[d]ebts incurred in aid of insurrection or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any state nor by the United States."<sup>270</sup> The committee modified the language before sending this version to Congress as section 4 of H.R. Res. 127:

Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.<sup>271</sup>

The House passed this version without making any changes. The Senate discussed section 4 at length on June 4.<sup>272</sup> That same day, Senator Howard suggested revisions, which included changing the last clause to read "any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."<sup>273</sup> The debates contain little explanation for these minor revisions. When the matter returned to the House, Representative Stevens had no issues with the Senate's amendments to section 4.<sup>274</sup>

6. *Section 5 of the April 21 Proposal, Which Became Section 5 of the Fourteenth Amendment*

Section 5 of the April 21 proposal read: "Congress shall have power to enforce by appropriate legislation, the provisions of this article."<sup>275</sup> This section resembled H.R. Res. 63 in that it sought to give additional

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 3148.

<sup>269</sup> *Id.*

<sup>270</sup> See KENDRICK, *supra* note 37, at 84.

<sup>271</sup> CONG. GLOBE, *supra* note 27, at 2286.

<sup>272</sup> *Id.* at 2938.

<sup>273</sup> *Id.* at 2941.

<sup>274</sup> *Id.* at 3148.

<sup>275</sup> KENDRICK, *supra* note 37, at 84.



legislative power to Congress but was more limited. Rather than granting Congress a general power to protect life, liberty, and property, section 5 provides authority limited to enforcing the provisions of the amendment. As the Supreme Court explained in *City of Boerne v. Flores*,<sup>276</sup> “[u]nder the revised Amendment, Congress’ power was no longer plenary [i.e., as it would have been under H.R. Res. 63] but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective.”<sup>277</sup>

The April 21 proposal made it through the Joint Committee and both the Senate and the House with only stylistic changes (adding “The” before “Congress” and a comma after “enforce”).<sup>278</sup> In the House, Representative Bingham discussed the protections of the first section and then with apparent reference to the fifth section explained that the amendment would empower Congress “to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State.”<sup>279</sup> Senator Howard said that section 5 “enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.”<sup>280</sup>

#### IV. DEFINITIONS OF ORIGINAL MEANING AND THE LIMITED RELEVANCE OF LEGISLATIVE HISTORY

In discussions of the “original meaning” of the Fourteenth Amendment, the term “original meaning” may refer to at least three distinct kinds of meaning. The term “original intent of Congress” (or “original intent”) typically refers to the meaning that the members of the 39th Congress collectively intended the Amendment to have. The “original understanding of the ratifiers” (or “original understanding”), in contrast, is the meaning that the state legislatures actually understood the Fourteenth Amendment to have when they approved and ratified the Amendment. And the “original objective meaning” (or “original public meaning”) is the meaning that a reasonable person would have attached to the words of the Amendment when the Amendment became effective.

In some cases, the original intent, the original understanding, and original objective meaning are one and the same. For a simple hypothetical example, consider section 3 of the Fourteenth Amendment. The last sentence of this section says Congress may remove a former Confederate’s disability from holding office by a vote of two-thirds of “each House.” Evidence may show that the 39th Congress intended the quoted term to refer to the Senate and the House of Representatives, that the state legislatures understood the quoted term to have the same meaning, and that a reasonable person would also have understood the quoted term in

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<sup>276</sup> 521 U.S. 507 (1997).

<sup>277</sup> *Id.* at 522.

<sup>278</sup> U.S. CONST. amend. XIV, § 5.

<sup>279</sup> CONG. GLOBE, *supra* note 24, at 2542.

<sup>280</sup> *Id.* at 2768.

the same way.

But the original intent, the original understanding, and the original objective meaning may diverge on particular issues. As another hypothetical example, consider the term “privileges or immunities” in section 1 of the Fourteenth Amendment. Statements by members of the House and Senate may show that Congress intended the quoted term to refer to the specific privileges and immunities discussed in Justice Bushrod Washington’s circuit court opinion in *Corfield v. Coryell*.<sup>281</sup> But evidence of debates in the state legislatures may show that those legislatures actually understood the term to refer only to the privileges or immunities identified in the Bill of Rights. And objective evidence showing the customary usage of such words might show that a reasonable person of the era would have interpreted the term to refer to all privileges and immunities secured by federal laws.

These distinctions are important because when jurists and scholars cite the legislative history of the Fourteenth Amendment, they are generally attempting to discern the original intent of Congress rather than the original understanding of the state legislatures or original objective meaning. The *Congressional Globe*, the Journal and Report of the Joint Committee, and the House and Senate Journals typically yield clues about what members of Congress were thinking in December of 1865 and in the spring of 1866. The legislative history of the Fourteenth Amendment has less relevance in establishing the original understanding of the state legislatures and the original objective meaning. What appears in the *Congressional Globe* and similar documents is not a record of what state legislatures understood the Fourteenth Amendment to mean, and do not necessarily show how a reasonable person would have understood the Amendment’s text. The best evidence of those meanings would come from other sources not discussed in this Article. For example, records of the debates within the state legislatures might show how the legislatures understood the amendment. And dictionaries from the 1860s and similar sources might show how a reasonable person would have interpreted the Fourteenth Amendment.

Although the distinction among types of original meaning may sound academic, the subject is very important when discussing the Fourteenth Amendment. The legislative history contains evidence showing that Congress attached (or may have attached) meanings to H.R. Res. 127 that likely would not have been evident to state legislatures and reasonable members of the public. For example, as noted above, Justice Black concluded that Congress intended the Due Process Clause to incorporate the substantive protections of the Bill of Rights.<sup>282</sup> Statements by

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<sup>281</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823). This was a decision from the Circuit Court in the Eastern District of Pennsylvania that was decided by Justice Washington while he was riding circuit. *Id.* at 551–52.

<sup>282</sup> *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting), *overruled in part*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

Representative Bingham and others may support this view. But these statements at best help to prove the original intent. They do not show the original understanding of the state legislatures or original objective meaning of the words “due process.”<sup>283</sup>

Eminent writers have taken different views on which type of original meaning of the Constitution is most important.<sup>284</sup> Resolution of this interesting debate is beyond the scope of this Article. Regardless of whose view on the subject is best supported, writers who rely on the legislative history of the Fourteenth Amendment to make claims about the Amendment’s original meaning should recognize that their arguments are primarily about the original intent of Congress. The legislative documents show what members of Congress wanted the Amendment to mean.

The legislative history of the Fourteenth Amendment, however, is not irrelevant in determining the original objective meaning of its text. The numerous Congressional documents provide what has been called “publicly available context of constitutional communication.”<sup>285</sup> They show how people in 1866 talked about the subjects covered by the Fourteenth Amendment. Justice Thomas’s opinion in *McDonald v. City of Chicago* provides an example. Justice Thomas began his discussion of the original meaning of the Privileges or Immunities clause with this statement: “When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.”<sup>286</sup> Justice Thomas then had to explain how citing statements from the legislative history could help to show this objective meaning. His nuanced argument shows that, while such statements may not always provide strong evidence of the original public meaning, they might have relevance in some circumstances. Justice Thomas wrote:

Statements by legislators can assist in this process [i.e., the process of discerning the original public meaning] to the extent they demonstrate the manner in which the public used or understood a particular word or phrase. They can further

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<sup>283</sup> Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 362–65 (2009) (discussing how the intent of the Congress may not correspond to the original public meaning).

<sup>284</sup> Chief Justice John Marshall, for example, generally looked to the original intent of the Framers of constitutional provisions in his opinions. See Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 499 (2009). James Madison, on the other hand, said that the original understanding of the ratifiers was more important. *Id.* at 501–02. Justice Antonin Scalia asserted that courts should focus on the original objective meaning. *Id.* at 502. And more recently Professors John McGinnis and Michael Rappaport have been influential in arguing that courts should interpret the constitution according to the “original methods” by which courts interpreted at the time of the Framing. John McGinnis & Michael Rappaport, *Interpreting the Constitution Through Original Methods Originalism*, VOLOKH CONSPIRACY (Jan. 8, 2014, 9:00 AM), <http://volokh.com/2014/01/08/interpreting-constitution-original-methods-originalism/> [https://perma.cc/DMC2-FDHJ].

<sup>285</sup> Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1939 (2013).

<sup>286</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part and concurring in the judgment).

assist to the extent there is evidence that these statements were disseminated to the public. In other words, this evidence is useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.<sup>287</sup>

The key in making this kind of argument is showing strong reasons for believing that the public knew what transpired. For example, after Justice Thomas cited a floor speech by John Bingham, he explained:

That speech was printed in pamphlet form, see Speech of Hon. John A. Bingham, of Ohio, on the Civil Rights Bill, Mar. 9, 1866 (CONG. GLOBE); see 39th CONG. GLOBE 1837 (remarks of Rep. Lawrence) (noting that the speech was “extensively published”), and the New York Times covered the speech on its front page. Thirty–Ninth Congress, N.Y. Times, Mar. 10, 1866, p. 1.<sup>288</sup>

And when Justice Thomas cited a floor speech by Senator Howard, he noted: “News of Howard’s speech was carried in major newspapers across the country, including the New York Herald, see N.Y. Herald, May 24, 1866, p. 1, which was the best-selling paper in the Nation at that time.”<sup>289</sup> When this kind of evidence can supplement the legislative history, and show that it may have influenced state legislators or public debate, claims about the original objective meaning or original understanding of the Fourteenth Amendment are stronger.

An earlier example of using legislative history to determine the original objective meaning appears in *United States v. Wong Kim Ark*.<sup>290</sup> In that case, the Court considered whether a child born in the United States, of parents of Chinese descent, is a citizen under the first sentence of the Fourteenth Amendment.<sup>291</sup> The Court considered statements by members of Congress on the issue and concluded that they believed that such children would be citizens.<sup>292</sup> The Court then addressed the distinction between the original objective meaning and the original intent of Congress as follows:

Doubtless, the intention of the congress which framed, and of the states which adopted, this amendment of the constitution, must be sought in the words of the amendment, and the debates in congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of

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<sup>287</sup> *Id.* at 828–29.

<sup>288</sup> *Id.* at 831.

<sup>289</sup> *Id.* at 832.

<sup>290</sup> 169 U.S. 649, 653 (1898).

<sup>291</sup> *Id.* at 699.

<sup>292</sup> *Id.* at 674–75.

jurists and statesmen upon the legal meaning of the words themselves, and are, at the least, interesting as showing that the application of the amendment to the Chinese race was considered and not overlooked.<sup>293</sup>

In other words, the Court believed that Citizenship Clause should be interpreted according to its original objective meaning. It cited statements by members of Congress not to discern their subjective intentions, but instead to determine the legal meaning of the words as “jurists and statesmen” would have interpreted them at the time.

#### V. TYPICAL METHODS OF USING THE LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT TO MAKE CLAIMS ABOUT ITS ORIGINAL MEANING

Describing all of the different ways that jurists and scholars might use the legislative history of the Fourteenth Amendment to make claims about the Amendment’s original meaning would be impossible. The ingenuity of the legal mind in devising arguments from such documentary evidence is limitless. But a summary of the most common approaches may be helpful. The following discussion addresses five typical ways of basing claims about the Fourteenth Amendment’s original meaning on its legislative history. Each section below describes a method, gives examples of its use, analyzes strengths and weaknesses of the method, and suggests practices that writers can use to make their claims employing that method more persuasive.

##### A. *Express Explanations*

Jurists and scholars most commonly base claims about the original meaning of the Fourteenth Amendment on express explanations of H.R. Res. 127 that appear in the legislative history. The theory behind this approach, generally unstated, is that members of Congress heard, understood, and accepted these explanations about the meaning of H.R. Res. 127. And when they voted to approve H.R. Res. 127, they intended the language to have the same meaning.

An example of this method of making a claim about the original meaning of the Fourteenth Amendment appears in Justice Powell’s concurring opinion in *Fullilove v. Klutznick*.<sup>294</sup> That case concerned the scope of Congress’s power under section 5 to enact a law that set aside 10% of certain funding for minority-owned businesses.<sup>295</sup> Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>296</sup> Justice Powell concluded from numerous statements by Representative Stevens, Senator Howard,

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<sup>293</sup> *Id.* at 699.

<sup>294</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring).

<sup>295</sup> *Id.* at 453 (plurality opinion).

<sup>296</sup> U.S. CONST. amend. XIV, § 5.

and others that Congress could use this power “to select reasonable remedies” for “repairing the effects of discrimination.”<sup>297</sup> Justice Powell cited statements in which speakers explained how Congress had discretion in exercising its powers under section 5. Senator Howard and Senator Poland, for instance, both described section 5 as giving Congress the power to enforce the Fourteenth Amendment’s “principles,” and Representative Stevens described section 5 as granting a power “to correct the unjust legislation of the States.”<sup>298</sup>

Researchers can find express statements about the meaning of H.R. Res. 127 in the *Congressional Globe* in nearly every discussion of H.R. Res. 127 from May 10, when it was introduced into the House, until June 8, when the House approved the Senate’s amendments. Additional statements about H.R. Res. 127 appear in the appendix to Volume 36. Unfortunately, as noted above, the Journal of the Joint Committee contains no express statements by members of the Committee in committee meetings about the meaning of the various provisions of H.R. Res. 127. As explained above, the Journal records only official actions, such as proposals, amendments, and votes, and does not preserve internal committee debates.

The most commonly cited explanations of H.R. Res. 127 are found in four passages: (1) Representative Stevens’s section-by-section introduction of H.R. Res. 127 to the House on May 8, 1866;<sup>299</sup> (2) Senator John Howard’s section-by-section introduction of H.R. Res. 127 to the Senate on May 23, 1866;<sup>300</sup> (3) the Senate’s discussion of proposed amendments to H.R. Res. 127 on May 30, 1866;<sup>301</sup> and (4) Representative Stevens’s explanation to the House on June 13, 1866, of the Senate’s amendments to H.R. Res. 127.<sup>302</sup> Although researchers should not limit themselves to these passages, they provide an excellent starting point for discovering what Congress intended H.R. Res. 127 to mean.

Claims about Congress’s intent in enacting the Fourteenth Amendment that rely on a statement made during the debates over H.R. Res. 127 often are subject to a straightforward objection: Just because a Senator or Representative said something when debating the resolution that became the Fourteenth Amendment does not mean that everyone agreed with it. The statement may have been a unanimous view, a majority view, a minority view, or even the view only of the speaker.

Writers can respond to this potential basis for impeaching claims that rely on express explanations in three basic ways. First, writers can look for additional supporting evidence in the legislative history. The more statements made in support of a position, the more likely it was to hold a

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<sup>297</sup> *Fullilove*, 448 U.S. at 508–10 (Powell, J., concurring).

<sup>298</sup> *See id.* at 508–09 (quoting remarks from Sen. Howard, Sen. Poland, and Rep. Stevens in the CONGRESSIONAL GLOBE).

<sup>299</sup> CONG. GLOBE, *supra* note 27, at 2459–60.

<sup>300</sup> *Id.* at 2764–67.

<sup>301</sup> *Id.* at 2890–2902.

<sup>302</sup> *See id.* at 3148 (June 13, 1866).

majority view.

Second, writers can look to see if any member of Congress objected to the explanation upon which they are relying. A lack of objection may suggest general agreement. For example, in *Katzenbach v. Morgan*,<sup>303</sup> the Supreme Court considered the question whether Congress could restrict literacy tests for voting using its power under section 5 of the Fourteenth Amendment.<sup>304</sup> The New York state attorney general argued that Congress did not have this power because a court had not determined that the state literacy test violated the Equal Protection Clause.<sup>305</sup> But the Court rejected this interpretation of section 5. It relied on Senator Howard's statement that section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith."<sup>306</sup> Sensitive to the possible concern about whether other members of Congress agreed with Senator Howard on this point, the Court remarked, "This statement of § 5's purpose [by Senator Howard] was not questioned by anyone in the course of the debate."<sup>307</sup> Justice Thomas used similar reasoning in construing the Privileges or Immunities Clause. After quoting statements indicating that the phrase referred to what Justice Washington had said in *Corfield v. Coryell*,<sup>308</sup> he added "no Member of Congress refuted the notion that Washington's analysis in *Corfield* undergirded the meaning of the Privileges or Immunities Clause."<sup>309</sup> To be sure, a lack of express objection to a statement does not necessarily mean that everyone agreed. But it does add weight.

Third, when both supporters and opponents of a proposed legislative measure make statements about the meaning of a proposition, writers might argue that the statements of the supporters of the Amendment should have more weight than the comments of opponents. This proposition rests on the idea that, even if we cannot know for sure which arguments persuaded the legislature, it was more likely to be the arguments of the supporters because they represented the majority.

### B. *Comparison of Drafts*

Writers also make claims about what Congress originally intended the Fourteenth Amendment to mean based on comparisons of H.R. Res. 127 to H.R. Res. 9, No. 51, or No. 63 or based on comparisons of the final version of H.R. Res. 127 to prior versions of H.R. Res. 127. The theory behind this method is that a comparison of texts can yield context for making inferences about meanings that Congress intended.

An example of comparing H.R. Res. 127 to another proposal for

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<sup>303</sup> 384 U.S. 641 (1966).

<sup>304</sup> *Id.* at 643-47.

<sup>305</sup> *See id.* at 648.

<sup>306</sup> *Id.* at 648-49 n.8 (quoting CONG. GLOBE, *supra* note 27, at 2768).

<sup>307</sup> *Id.* at 648 n.8.

<sup>308</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

<sup>309</sup> *Saenz v. Roe*, 526 U.S. 489, 526 (1999) (Thomas, J., dissenting).

amending the Constitution appears in *City of Boerne v. Flores*. At issue was how to interpret section 5 of the Fourteenth Amendment. The Supreme Court compared H.R. Res. 63 to section 5 of H.R. Res. 127. As described above, H.R. Res. 63 would have given Congress plenary power “to make laws which shall be necessary and proper to secure to all persons in every state full protection in the enjoyment of life, liberty and property.”<sup>310</sup> Congress did not approve H.R. Res. 63, but did approve H.R. Res. 127, which gave Congress only the power “to enforce, by appropriate legislation, the provisions of this article.”<sup>311</sup> An inference from comparing the two drafts is that Congress did not intend the Fourteenth Amendment to have the broader plenary power that H.R. Res. 63 would have provided. As the Court put it: “Under the revised Amendment, Congress’ power was no longer plenary but remedial.”<sup>312</sup>

An example of comparing the final version of H.R. Res. 127 to an earlier draft of H.R. Res. 127 appears in *Davidson v. New Orleans*.<sup>313</sup> The issue in that case was whether the Due Process Clause of the Fourteenth Amendment requires a state government to pay just compensation when it takes private property. Contrary to modern decisions, the Court inferred that Congress had not intended a just compensation requirement.<sup>314</sup> The Court relied on evidence that the Joint Committee considered but rejected a proposal by Representative Bingham to amend section 1 to include a just compensation requirement.<sup>315</sup> The Court said, “[I]t must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject (just compensation), in immediate juxtaposition in the fifth amendment with the one we are now construing (due process), was left out, and this (due process) was taken.”<sup>316</sup> Years later, in dicta in *Adamson v. California*,<sup>317</sup> Justice Black drew a different conclusion from the evidence. He concluded that Representative Bingham’s proposed version of section 1 was rejected because expressly stating a just compensation clause was unnecessary. In his view, the deletion helped confirm “the Framers thought that in the language they had included this protection along with all the other protections of the Bill of Rights.”<sup>318</sup>

This example shows that a comparison of drafts does not always yield unambiguous clues about what Congress intended in approving H.R. Res. 127. Writers therefore should explain their inferences as clearly as possible—as the Court did in *Davidson* and Justice Black did in *Adamson*—and anticipate possible alternative inferences. Given the potential for ambiguity, writers also should look for additional bases for

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<sup>310</sup> KENDRICK, *supra* note 37, at 56.

<sup>311</sup> U.S. CONST. amend. XIV, § 5.

<sup>312</sup> *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997).

<sup>313</sup> 96 U.S. 97 (1877).

<sup>314</sup> *Id.* at 105.

<sup>315</sup> KENDRICK, *supra* note 37, at 85 (Apr. 21, 1866) (rejecting Rep. Bingham’s proposal to amend section 1 of the proposal that became H.R. Res. 127 by adding the phrase “nor take private property for public use without just compensation”).

<sup>316</sup> *Davidson*, 96 U.S. at 105.

<sup>317</sup> 332 U.S. 46 (1947), *overruled in part*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>318</sup> *Id.* at 80 n.9 (Black, J., dissenting).



supporting their claims about the original meaning of the Fourteenth Amendment.

### C. *Evidence of Purpose*

Writers also sometimes base claims about the original meaning of the Fourteenth Amendment on evidence of Congress's purpose in approving H.R. Res. 127. The legislative debates contain many statements about the goals of Congress in approving H.R. Res. 127. For instance, Senator Howard explained that the purpose of the first sentence of section 1 was to eliminate doubt caused by the *Dred Scott* decision on the issue of citizenship. He said: "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."<sup>319</sup> In this statement Senator Howard is not explaining the meaning of the first sentence of section 1, but instead the purpose that the first sentence serves.

Over the years many scholars have debated the weight that judges interpreting a legislative measure should give to the purpose of the legislature that enacted it. Professors Henry M. Hart Jr. and Albert M. Sacks prominently supported the "purposive" school of statutory interpretation. They advocated that courts should determine "what purpose ought to be attributed to the statute" and then "interpret the words of the statute immediately in question so as to carry out the purpose as best it can."<sup>320</sup> In contrast, the textualist school of statutory interpretation, typified by Justice Antonin Scalia, holds that the objective meaning of the language used in legislative measures controls; courts generally are not to depart from the objective meaning merely based on legislative purpose. Justice Scalia wrote:

To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed . . . to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.<sup>321</sup>

Regardless of which side of the debate has the better argument, it is indisputable that the Supreme Court sometimes has looked to the legislative history of the Fourteenth Amendment for evidence of its purpose and then used the purpose to decide issues. An excellent example is *Strauder v. West Virginia*.<sup>322</sup> In that case, the Supreme Court considered whether a state law that only permitted "white male persons" to serve on

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<sup>319</sup> CONG. GLOBE, *supra* note 27, at 2890, 2896 (May 30, 1866).

<sup>320</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>321</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (Amy Gutmann ed., 1997).

<sup>322</sup> 100 U.S. 303 (1879).

a jury violated the Fourteenth Amendment.<sup>323</sup> The Court expressly endorsed a purposive interpretation of the Fourteenth Amendment, saying that the Amendment “is to be construed liberally, to carry out the purposes of its framers.”<sup>324</sup> Quoting its recent decision in the *Slaughter-house Cases*,<sup>325</sup> the Court declared that “the one pervading purpose” of the Thirteenth, Fourteenth, and Fifteenth Amendment was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.”<sup>326</sup> Because the law limiting jury service to white males discriminated on the basis of race, the Court concluded that it was unconstitutional.<sup>327</sup>

The *Strauder* Court’s holding with respect to racial discrimination in eligibility to serve on juries remains valid today. But the Court did not limit its remarks to this specific issue. The Court also discussed in dicta the application of the Fourteenth Amendment to other forms of discrimination in jury eligibility. The Court said:

[State law] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color.<sup>328</sup>

This dicta, some of which the Supreme Court has since repudiated,<sup>329</sup> also is an example of purposive interpretation. The Court’s statements rest on the logic that the Equal Protection clause does not prohibit discrimination against women, for example, because the purpose was to prevent discrimination on the basis of race.

This final example pointedly shows that claims about the Fourteenth Amendment based on purpose may be more controversial than claims that rest on explanations of the meaning of H.R. Res. 127 or a comparison of the final text of H.R. Res. 127 to the text of prior proposals. Even if the legislative history supports conclusions about the purpose of a provision, opponents may charge that purposive interpretation is improper.<sup>330</sup> They

<sup>323</sup> *Id.* at 305.

<sup>324</sup> *Id.* at 307.

<sup>325</sup> *Slaughter-house Cases*, 83 U.S. (16 Wall.) 36 (1872).

<sup>326</sup> *Strauder*, 100 U.S. at 307 (quoting the *Slaughter-house Cases*). The Court in the *Slaughter-house Cases* apparently did not think it was necessary to cite specific passages in the legislative history to establish this purpose, saying that the events motivating them are “almost too recent to be called history, but which are familiar to us all.” *Slaughter-house Cases*, 83 U.S. at 71.

<sup>327</sup> *Strauder*, 100 U.S. at 308.

<sup>328</sup> *Id.* at 310.

<sup>329</sup> See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (holding that states cannot exclude women as a class from serving on juries).

<sup>330</sup> E.g., John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) (“[T]extualism emphasizes that judges . . . have a duty to enforce *clearly worded* statutes as written,

may assert, for example, that nothing in the text of section 1 limits the guarantee of equal protection to matters of race and not of sex, and judges cannot legitimately rewrite the text based on purpose.

Writers often disagree about the level of generality at which to identify Congress's purpose. For example, in *City of Richmond v. J.A. Croson Co.*,<sup>331</sup> the Supreme Court considered whether a municipal program that gave contracting preferences to minority-owned businesses violated the Fourteenth Amendment. Justice Marshall asserted in dissent that they did not. Making a claim about original meaning based on Congress's evident purpose, he wrote:

Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads.<sup>332</sup>

The majority saw a more general purpose, namely, preventing unequal treatment. The majority said, with emphasis: "The Equal Protection Clause of the Fourteenth Amendment provides that '[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.'"<sup>333</sup> The Court observed that favoring any one group of contractors would harm others. The Court thus concluded that all racial discrimination, whether aimed at helping or harming minorities, must be subjected to strict scrutiny.<sup>334</sup>

Writers should take this potential ground of impeachment into account by acknowledging all possible purposes and then expressly addressing why they are choosing one over the others. Judge Robert Bork took this approach in discussing the *Brown v. Board of Education*<sup>335</sup> decision from an originalist perspective. He acknowledged that "[t]he ratifiers [of the Fourteenth Amendment] probably assumed that segregation was consistent with equality but they were not addressing segregation."<sup>336</sup> In other words, their purpose was not to end segregation. But they also had another purpose. Judge Bork wrote, "The text itself demonstrates that the equality under law was the primary goal."<sup>337</sup> What should be done in this situation? Judge Bork said that when there is a conflict between the primary purpose and some other purpose, the primary purpose must

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even if there is reason to believe that the text may not perfectly capture the . . . purposes that inspired their enactment.").

<sup>331</sup> 488 U.S. 469 (1989).

<sup>332</sup> *Id.* at 559 (Marshall, J., dissenting).

<sup>333</sup> *Id.* at 493.

<sup>334</sup> *Id.*

<sup>335</sup> 347 U.S. 483 (1954).

<sup>336</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 82 (1990).

<sup>337</sup> *Id.*

prevail. He explained: “By 1954, when *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality. . . . Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored.”<sup>338</sup>

#### D. *Silence*

Writers sometimes rely on silence in the legislative history of the Fourteenth Amendment when making claims about what Congress originally intended the Amendment to mean. The theory appears to be that the House and Senate thoroughly discussed H.R. Res. 127 before voting to approve it, and it is therefore unlikely that Congress intended the Fourteenth Amendment to have a meaning that the representatives and senators never mentioned. One example of this type of reasoning appears in *Regents of the University of California v. Bakke*.<sup>339</sup> In that case, a white applicant claimed a state university’s consideration of race in its medical school admissions process violated the Equal Protection clause. Justice Brennan wrote an opinion, joined by three others, in which he concluded that the admissions policy was constitutional even though it was not race neutral. Justice Brennan relied in part on silence in the legislative history in rejecting the applicant’s claim. He wrote:

“Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. . . . We therefore conclude that [the university’s] goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.”<sup>340</sup>

Although arguments from silence have some strength, they invite three counterarguments. First, these arguments rest on the questionable premise that the legislative history contains complete evidence of what Congress intended the Fourteenth Amendment to mean. But we know that the legislative history is incomplete. The Journal of the Joint Committee, for example, does not contain any record of the Committee’s debates. Maybe a member of the Committee said something relevant to the issue in *Bakke* but the remark has been lost to history. In addition, as described above, the House and Senate debated H.R. Res. 127 in haste, discussing its many provisions on only a handful of days. Their conversations were not as extensive as they might have been.

Second, arguments from silence may rest on the questionable premise that Congress intended the Fourteenth Amendment to achieve specific results rather than to establish generally applicable principles. In *The Path*

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<sup>338</sup> *Id.*

<sup>339</sup> 438 U.S. 265 (1978).

<sup>340</sup> *Id.* at 368–69 (Brennan, J., concurring in the judgment in part and dissenting in part).

of the Law, Justice Oliver Wendell Holmes offered this instructive tale:

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he ha[d] looked through the statutes and could find nothing about churns, and gave judgment for the defendant.<sup>341</sup>

The lesson of this tale is that the hypothetical justice failed to see that a general principle (i.e., a defendant may be liable for damaging the property of another) may apply to new circumstances (i.e., broken churns) even if no one previously thought to discuss those specific circumstances. Similarly, a critic of the plurality's reasoning in *Bakke* might argue that discrimination against a white medical school applicant may violate the general principle of Equal Protection even if no one specifically discussed this kind of discrimination during debates over H.R. Res. 127.

Third, arguments about silence in the legislative history often can be flipped around, showing that they are not very strong. For example, suppose that the issue is whether the Equal Protection Clause prohibits separate but equal high school locker rooms for boys and girls. Suppose further that the legislative history is silent on the issue. One writer might argue that separate but equal locker rooms are constitutional because no representative or senator said that the Fourteenth Amendment would prohibit them. But another writer might respond that having separate but equal locker rooms is unconstitutional because no representative or senator said the Fourteenth Amendment would allow them. Any writer making an argument from silence should anticipate this kind of response.

#### E. *Contemporaneous Congressional Actions*

Jurists and scholars also sometimes base claims about what the 39th Congress intended the Fourteenth Amendment to mean on evidence of how the same Congress handled related matters.<sup>342</sup> This method rests on the assumption that Congress would have wanted to act consistently during the spring of 1866.<sup>343</sup> One example appears in Justice Breyer's dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>344</sup> In that case, Justice Breyer concluded that state laws assigning children to attend public schools according to the children's race for the purpose of promoting school integration did not violate the Equal Protection Clause even if the busing was not directed solely at remedying

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<sup>341</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

<sup>342</sup> For an impressive survey of actions taken by the Reconstruction Congress, see David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383 (2008).

<sup>343</sup> This is akin to the First Congress canon, which is based on the premise that the actions of the Framers and the "contemporaries of the Constitution" "provide unique insights" into its meaning. Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745, 1747 (2006).

<sup>344</sup> 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).

past discrimination in school assignments.<sup>345</sup> Justice Breyer supported his conclusion by asserting:

There is reason to believe that those who drafted [the] Amendment . . . would have understood the legal and practical difference between the use of race-conscious criteria . . . to keep the races apart, and the use of race-conscious criteria . . . to bring the races together.<sup>346</sup>

He cited as evidence to support this claim various federal efforts to ameliorate the conditions of former slaves during reconstruction.<sup>347</sup> In other words, Congress would not have intended the Fourteenth Amendment to prohibit measures aimed at integrating African-Americans because Congress itself undertook such measures.

This method of discerning the original meaning of the Fourteenth Amendment has the strength of relying on objective demonstrations of Congress's intent. Actions often speak louder than words. Because Congress enacted the Freedman's Bureau Act, we can conclude with certainty that a majority of the House and Senate supported the Act's provisions. In contrast, even if Senator Howard or Representative Stevens gave a speech in which they clearly defined the meaning of terms in the Fourteenth Amendment, no one can say for sure whether the rest of the Senate or anyone in the House agreed with them. Congress votes to support acts, but does not vote to support floor statements.

But this method has three potential weaknesses that proponents must recognize and address. First, congressional actions taken before the Fourteenth Amendment became effective do not necessarily indicate what Congress intended the Fourteenth Amendment to permit. Congress may have wanted the Fourteenth Amendment to impose new limitations on the States. For example, prior to the enactment of the Fourteenth Amendment, the Civil Rights Act of 1866 protected only certain enumerated rights.<sup>348</sup> Section 1 of the Fourteenth Amendment appears to have gone further in its broadly stated Due Process, Equal Protection, and Privileges or Immunities Clauses.<sup>349</sup>

Second, section 1 of the Fourteenth Amendment by its terms limits only the states and does not limit Congress. Congress may have thought that it had power to take actions that the Fourteenth Amendment would

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<sup>345</sup> *Id.* at 803–04, 820.

<sup>346</sup> *Id.* at 829.

<sup>347</sup> *See id.* at 829–30 (citing, among other things, RICHARD SEARS, *A UTOPIAN EXPERIMENT IN KENTUCKY: INTEGRATION AND SOCIAL EQUALITY AT BEREAS, 1866–1904* (1996), and ROGER FISCHER, *THE SEGREGATION STRUGGLE IN LOUISIANA 1862–77*, at 51 (1974)).

<sup>348</sup> This included the “right . . . to make and enforce contracts, to sue” and be sued, “to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property.” Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1952)).

<sup>349</sup> *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 721 (1989) (“Many of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as ‘constitutionalizing’ and expanding the protections of the 1866 Act . . .”).

preclude the states from taking.<sup>350</sup> For example, Congress may have believed that the Equal Protection clause would limit state governments in ways that the Bill of Rights—which does not contain an express guarantee of Equal Protection—would not. Congress, for example, might be able to pass laws helping African Americans that states could not.<sup>351</sup>

Third, this method of making claims about the original meaning usually relies on argument by analogy. Any claim by analogy necessarily rests on an assumption that things which resemble each other in some ways must resemble each other in another way.<sup>352</sup> Analogies are often helpful in law; a First Amendment precedent that applies to flag burning might also apply to defacing a state seal based on an analogy of flags to seals. But every analogy must fail at some point because two things are never completely the same.<sup>353</sup> In *Parents Involved in Community Schools*,<sup>354</sup> for instance, Justice Breyer analogized the race conscious measures that the 39th Congress approved to the race conscious school assignments at issue.<sup>355</sup> Justice Breyer concluded that if Congress thought that the former were lawful, then by analogy Congress would not have intended the Fourteenth to prohibit the latter.<sup>356</sup> But the measures are not identical. Despite the similarities of the two practices, Congress may have seen differences that it considered important. A stronger opinion would have explained why the differences should not matter.

## VI. GENERAL PROBLEMS TO AVOID

When writers rely on the legislative history of the Fourteenth Amendment in making claims about its original meaning, they should take into account all potential grounds upon which others might impeach their reasoning. The preceding discussion of five different methods of using the legislative history identified possible weaknesses of each method. What follows is a discussion of three more general problems to avoid.

### A. *Overlooking Conflicting Evidence*

One general problem is overlooking conflicting evidence. Justice Antonin Scalia famously condemned efforts to use legislative history to

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<sup>350</sup> Justice Harlan's dissent in *Afroyim v. Rusk*, 387 U.S. 253 (1967), a case that dealt with involuntary expatriation of citizens, raised this point. The Court held that Congress, like the states, could not deprive citizenship from an unwilling citizen. *Id.* at 267. Justice Harlan wrote: "Nothing in the debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens." *Id.* at 284 (Harlan, J., dissenting).

<sup>351</sup> See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563–65 (1990) (granting deference to Congress that would not be granted to states in determining the validity of race conscious measures), *overruled in part*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995).

<sup>352</sup> See W. WARD FEARNside & WILLIAM B. HOLThER, FALLACY: THE COUNTERFEIT OF ARGUMENT 23 (1959) (explaining that reasoning by analogy will break down at some point because the two things are not identical and therefore do not share all possible properties).

<sup>353</sup> See *id.*

<sup>354</sup> 551 U.S. 701 (2007).

<sup>355</sup> *Id.* at 829–30 (Breyer, J., dissenting).

<sup>356</sup> *Id.*

discern the meaning of statutes in part because he believed that these efforts are often selective.<sup>357</sup> In one opinion, he recounted that “Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>358</sup> In other words, researchers look for comments that support their position and ignore contradictory statements. The same criticism may apply to claims about the original meaning of the Fourteenth Amendment that rely on a few apt statements in Volume 36 of the *Congressional Globe*.<sup>359</sup>

Professor Charles Fairman advanced this type of criticism in his influential article addressing the question of whether the Fourteenth Amendment incorporates the Bill of Rights.<sup>360</sup> Professor Fairman recognized that Senator Howard had said that “[t]he great object of the first section of this amendment” is to make the guarantees of the first eight amendments of the Constitution applicable to the states.<sup>361</sup> But Professor Fairman questioned whether this choice comment was enough to prove the original meaning. He remarked:

Here at last is a clear statement that the new privileges and immunities clause is intended to incorporate the federal Bill of Rights. For the first time, “the first eight amendments” are specified. On this point Howard’s statement seems full and unequivocal. It must be given very serious consideration, coming from the Senator who had the measure in charge. The question then becomes: did the Senate agree, did the House agree, did the State Legislatures that ratified the Amendment agree, that this was what the clause meant?<sup>362</sup>

Professor Fairman recognized that Representative Bingham appeared to share Senator Howard’s view, but saw little evidence that others did.<sup>363</sup> As Professor Fairman put it, “[t]hat is all. The rest of the evidence bore in the opposite direction, or was indifferent.”<sup>364</sup> Whether Professor Fairman is correct in his conclusion is a topic of some debate.<sup>365</sup> The important point, though, is that the kind of criticism he raises—that a few comments are not enough to prove original meaning—is something all people who write about the Fourteenth Amendment must take into account.<sup>366</sup>

<sup>357</sup> See SCALIA, *supra* note 321, at 35–36.

<sup>358</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

<sup>359</sup> See *supra* Section II.A.

<sup>360</sup> Fairman, *supra* note 8, at 58.

<sup>361</sup> CONG. GLOBE, *supra* note 27, at 2766 (May 23, 1866).

<sup>362</sup> Fairman, *supra* note 8, at 58.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 65.

<sup>365</sup> See Pamela Brandwein, *Dueling Histories: Charles Fairman and William Crosskey Reconstruct “Original Understanding,”* 30 LAW & SOC’Y REV. 289, 300 (1996) (describing the debate over whether Professor Fairman’s criticism of Justice Black was correct).

<sup>366</sup> Justice Thomas took this point into account in his dissent in *Saenz v. Roe*, 526 U.S. 489 (1999), a case that held that the Privileges or Immunities Clause of the Fourteenth Amendment prohibited the states from imposing durational residency requirement for public benefits. *Id.* at 503–



The only way to avoid or defeat this kind of criticism is to conduct thorough research and confront contrary evidence. Historical research often yields ambiguities. In some cases, the researcher must determine and explain which conclusions are best supported. Justice Kennedy illustrated this approach in *Alden v. Maine*.<sup>367</sup> Although that case did not involve the Fourteenth Amendment, it concerned an issue of original meaning.<sup>368</sup> The question in the case was whether the Constitution stripped the states of their sovereign immunity.<sup>369</sup> Justice Kennedy recognized that some statements made during the ratification of the Constitution supported this view, but he found the other side better supported.<sup>370</sup> After considering the competing sources, he summarized:

In short, the scanty and equivocal evidence offered . . . establishes no more than . . . that some members of the founding generation disagreed with Hamilton, Madison, Marshall, Iredell, and the only state conventions formally to address the matter. The events leading to the adoption of the Eleventh Amendment, however, make clear that the individuals who believed the Constitution stripped the States of their immunity from suit were at most a small minority.<sup>371</sup>

Here, Justice Kennedy acknowledged contrary evidence but based his conclusion on what appeared to be the majority view.<sup>372</sup> When evidence points in more than one direction, judges and scholars usually should take this approach and should not overstate the certainty of their conclusions.<sup>373</sup>

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04. In arguing that the Privileges or Immunities Clause was meant to protect fundamental rights, not public benefits, Justice Thomas cautiously relied on the drafters' statements only after providing other supporting evidence, writing:

That Members of the 39th Congress appear to have endorsed the wisdom of Justice Washington's opinion does not, standing alone, provide dispositive insight into their understanding of the Fourteenth Amendment's Privileges or Immunities Clause. Nevertheless, their repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law.

*Id.* at 527 (Thomas, J., dissenting).

<sup>367</sup> *Alden v. Maine*, 527 U.S. 706, 722–23 (1999).

<sup>368</sup> See e.g., *id.* at 714 ("The Amendment confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'").

<sup>369</sup> *Id.* at 759–60.

<sup>370</sup> *Id.* at 726.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> In *Afroyim v. Rusk*, 387 U.S. 253 (1967), the Court held that the Citizenship Clause prohibited Congress from enacting a statute that involuntarily expatriated U.S. citizenship from those who voted in a foreign election. *Id.* at 267. The Court relied on Senator Howard's statement to show that the purpose of the Amendment was "to put this question of citizenship . . . beyond the legislative power,"

## B. *Taking Statements out of Context*

Another general problem to avoid is taking statements from the legislative history out of context. The 39th Congress was busy during its first session. As described above, Congress seriously considered four proposals for constitutional amendments: H.R. Res. 9, H.R. Res. 51, H.R. Res. 63, and H.R. Res. 127. Congress also passed the bill that became the Civil Rights Act of 1866.<sup>374</sup> Members of Congress made numerous statements during debates about these provisions, and many of these statements relate to subjects that the Fourteenth Amendment ultimately addressed. But in the end, only H.R. Res. 127 received the requisite approval and became the Fourteenth Amendment. Statements made during debates over other matters, accordingly, provide only limited evidence of what Congress intended the Fourteenth Amendment to mean.

Consider, for example, the Supreme Court's decision in *Plyler v. Doe*.<sup>375</sup> That case concerned a Texas law that sought to exclude from public schools certain children who were present in the state in violation of immigration laws.<sup>376</sup> Advocates for the children argued that law violated the Equal Protection Clause, but Texas responded that the Equal Protection Clause does not apply to noncitizens who are not lawfully present.<sup>377</sup> The Equal Protection Clause says that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>378</sup> Ruling against Texas, the Court concluded: "Congress, by using the phrase 'person within its jurisdiction,' sought expressly to ensure that the equal protection of the laws was provided to the alien population."<sup>379</sup> To support this claim about the original meaning, the Court quoted Representative Bingham, who asked rhetorically: "Is it not essential to the unity of the Government and the unity of the people that all persons, *whether citizens or strangers, within this land*, shall have equal protection in every State in this Union in the rights of life and liberty and property?"<sup>380</sup>

A potential ground for impeaching the Court's reasoning on this point is that Representative Bingham was not speaking about H.R. Res. 127, the resolution that became the Fourteenth Amendment. Instead, Representative Bingham was speaking about H.R. Res. 63, a differently

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and Congress had no power to cause an involuntary forfeiture of citizenship. *Id.* at 263. Justice Harlan's dissent provided another statement from Senator Howard that a person can cease to be a citizen by "'the commission of some crime'" to show that the Citizenship Clause left intact Congress's power to cause an involuntary forfeiture of citizenship. *Id.* at 286 (Harlan, J., dissenting) (quoting CONG. GLOBE, *supra* note 27, at 2895). The Court recognized the "conflicting inferences" from the legislative history and relied also on the text and purpose of the Clause and other precedents. *Id.* at 267 (majority opinion).

<sup>374</sup> See *supra* text accompanying notes 102-109 (discussing passage of the Civil Rights Act of 1866).

<sup>375</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>376</sup> *Id.* at 205-206.

<sup>377</sup> *Id.* at 210.

<sup>378</sup> U.S. CONST. amend. XIV, § 1.

<sup>379</sup> *Plyler*, 457 U.S. at 214.

<sup>380</sup> *Id.* (quoting CONG. GLOBE, *supra* note 27, at 1090).

worded resolution that the House approved but the Senate did not.<sup>381</sup> Unlike H.R. Res. 127, H.R. Res. 63 did not guarantee “equal protection of the laws” but instead guaranteed “equal protection in the rights of life, liberty and property.”<sup>382</sup> It is true that the two phrases dealt with similar subject matters and may have had similar meanings. But the Court’s reasoning in *Plyler* is incomplete because it does not address this issue or explain why it is looking at comments concerning H.R. Res. 63 instead of comments concerning H.R. Res. 127. Without more explanation, the relevance of Representative Bingham’s statement is difficult to gauge and does little to support the Court’s conclusion.

Writers who rely on statements made during congressional debates to make claims about the original meaning of the Fourteenth Amendment should take two steps to strengthen their arguments. First, they should identify the speaker whom they are quoting, the date on which the speaker spoke, and the particular measure that the speaker was discussing. Second, if the speaker was addressing a measure other than H.R. Res. 127 (or an early draft of H.R. Res. 127), they also should explain in detail why the speaker’s statement may show what Congress intended when it approved the final version of H.R. Res. 127. In *Plyler v. Doe*, the Supreme Court omitted this second step.

### C. Using Methodology Selectively

A third general problem to avoid is a selective or inconsistent use of methods for making claims about the original meaning of the Fourteenth Amendment. Section V of this Article identified five methods for using the legislative history to make claims about the original meaning: relying on express statements about meaning, comparing drafts, looking at purpose, drawing inferences from silence, and looking at other contemporaneous actions.<sup>383</sup> Writers may be tempted to choose whichever methods best support the claim that they wish to make without addressing the other methods. Or they may rely on a method that they would not use in other contexts.

For example, as explained above, writers sometimes based claims about the original meaning on evidence of purpose or contemporary actions of Congress.<sup>384</sup> Justice Breyer took this approach in his dissent in *Parents Involved in Community Schools*.<sup>385</sup> He concluded that the purpose of the Fourteenth Amendment was to bring the races together, and that assigning children to schools by race in order to promote diversity therefore did not violate the Equal Protection Clause.<sup>386</sup> One question to ask is whether other methods of relying on the legislative history would produce the same result. A second question is whether Justice Breyer

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<sup>381</sup> The Court knew that Representative Bingham was addressing H.R. Res. 63, and erroneously said that this resolution “was to become the Fourteenth Amendment.” *Id.*

<sup>382</sup> See *supra* text accompanying note 209 (discussing quoting H.R. Res. 63).

<sup>383</sup> See *supra* Section V.

<sup>384</sup> See *supra* Section V.C, E.

<sup>385</sup> *Parents Involved v. Seattle Sch. Dist.*, No. 1, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).

<sup>386</sup> *Id.* at 803–04.

would use the same kind of purposive methodology in other Equal Protection cases, such as those involving challenges to laws discriminating against homosexuality. Although this example involves Justice Breyer, the same questions could apply to anyone.

### CONCLUSION

The legislative history of the Fourteenth Amendment consists of statements by Representatives and Senators, drafts of proposed amendments, committee reports, and other materials. This Article has outlined what might be considered a four-step process for using this legislative history to make or assess claims about its original meaning. The first step is to locate the pertinent sources—such as Volume 36 of the *Congressional Globe* and the Journal of the Joint Committee—and to find relevant evidence. Although the sources are now available online, this first step is still difficult because those sources are not all electronically searchable and because the process by which Congress ultimately approved the text of what is now the Fourteenth Amendment is complicated. This guide may provide some assistance in finding pertinent information.

The second step is to become familiar with some of the background necessary for understanding the legislative history. Many of the concerns of Congress in 1865 and 1866 are not our concerns today, and it is difficult to discern what the Senators and Representatives were seeking to accomplish without first understanding the context in which they acted. This guide has attempted to describe some of the concerns that motivated Congress to address the topics in each section of the Fourteenth Amendment.

The third step is to make a claim about the original meaning using the legislative history. As explained in some depth, writers have at least five methods of using the legislative history to make claims. They may rely on express statements, a comparison of drafts, evidence of purpose, inferences from silence, or other contemporaneous official actions. But other methods are also possible. A common theme, though, is that writers can strengthen their claims by thoroughly explaining their assumptions, inferences, and logic.

The fourth step is to consider whether there might be reasonable grounds for impeaching a claim about the original meaning. Each of the five methods discussed above has important strengths and weaknesses. This guide also has discussed three general problems to avoid: ignoring contrary evidence, taking comments out of context, and selectively using particular methods for making claims about the original meaning. Acknowledging and addressing possible weaknesses in claims about the original meaning is better than ignoring them.

As noted at the start of this guide, the question of what the Fourteenth Amendment originally meant is distinct from the question of whether courts should follow the original meaning. This guide has addressed only claims concerning the former question; the latter question is much debated

and addressed elsewhere. Put simply, it is possible to be interested in knowing the original meaning of the Fourteenth Amendment with or without believing that original meaning still controls today.

## APPENDIX A: PROPOSED CONSTITUTIONAL AMENDMENTS

This appendix contains the text of proposed constitutional amendments that Congress considered between December 1865 and June 1866.

*H.R. Res. 9*

The House approved the following proposed constitutional amendment by a two-thirds vote on December 19, 1865. The proposal did not come to a vote in the Senate. It addressed payment of Confederate debts, a subject ultimately covered by section 4 of the Fourteenth Amendment.

No tax, duty, or impost shall be laid, nor shall any appropriation of money be made, by either the United States, or any one of the States thereof, for the purpose of paying, either in whole or in part, any debt, contract, or liability whatsoever, incurred, made, or suffered by any one or more of the States, or the people thereof, for the purpose of aiding rebellion against the Constitution and laws of the United States.<sup>387</sup>

*H.R. Res. 51*

The House approved this proposed amendment by a two-thirds vote on January 31, 1866. The Senate voted on March 9 and the provision received the support of a majority of the senators but less than the required two-thirds. It addresses the subject of representation of the former Confederate states in a Congress, a subject ultimately covered by section 2 of the Fourteenth Amendment.

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 of such race or color shall be excluded from the basis of representation.<sup>388</sup>

*H.R. Res. 63*

The House debated this proposed constitutional amendment extensively in February 1866 but did not vote on it. The Senate did not consider it. It addressed civil rights and the powers of Congress, subjects ultimately covered by sections one and five of the Fourteenth Amendment.

The Congress shall have power to make all laws which shall

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<sup>387</sup> CONG. GLOBE, *supra* note 27, at 84.

<sup>388</sup> *Id.* at 535.

be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2), and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amendment).<sup>389</sup>

*The Joint Committee's April 21 Draft of What Became H.R. Res. 127*

Representative Stevens introduced the following five-part proposed amendment to the Joint Committee on April 21, 1866. The Joint Committee made a number of revisions before introducing it into the House as H.R. Res. 127.

Sec. 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

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

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

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

Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.<sup>390</sup>

*H.R. Res. 127 as Introduced into Congress*

Representative Stevens introduced H.R. Res. 127 into the House on behalf of the Joint Committee on April 30, 1866. The House passed it without amendment on May 10.

Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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<sup>389</sup> *Id.* at 1034.

<sup>390</sup> See KENDRICK, *supra* note 37, at 83–84.

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

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

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

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>391</sup>

*H.R. Res. 127 as Approved by the Senate and House and Then Ratified by the States (thus Becoming the Fourteenth Amendment):*

After the House approved H.R. Res. 127, the Senate modified it and approved it by a two-thirds vote on June 8, 1866. The House then approved the H.R. Res. 127 as amended on June 10, 1866. The President transmitted the approved version to the states on June 2, 1866. The Secretary of State certified that three-quarters of the states had ratified the proposal on July 28, 1868. It thus became the Fourteenth Amendment to the Constitution.

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

Section 2. Representatives shall be apportioned among the

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<sup>391</sup> CONG. GLOBE, *supra* note 27, at 2286.



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

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

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>392</sup>

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<sup>392</sup> U.S. CONST. amend. XIV.

## APPENDIX B: TIMELINE

- Apr. 8, 1864:** The Senate approves S. Res. 16 (which became the Thirteenth Amendment) by a vote of 38 to 6.
- June 15, 1864:** The House of Representatives initially defeats the Thirteenth Amendment.
- Jan. 31, 1865:** The House of Representatives passes the Thirteenth Amendment (S.J. Res. 16) by a vote of 119 to 56.
- Feb. 1, 1865:** President Abraham Lincoln signs a Joint Resolution submitting the proposed Thirteenth Amendment to the states.
- Apr. 9, 1865:** Lee surrenders to Grant.
- Apr. 15, 1865:** Lincoln is assassinated.
- Dec. 4, 1865:** 39th Congress convenes
- Dec. 18, 1865:** Secretary of State William Seward issues a statement verifying the ratification of the Thirteenth Amendment.
- Jan. 9, 1866:** Joint Committee convenes.
- Jan. 12, 1866:** Joint Committee approves the draft of a constitutional amendment proposed by Representative Conklin on representation, and sends it to Congress where it is introduced as H.R. Res. 51.
- Feb. 4, 1866:** Joint Committee approves the draft of a constitutional amendment proposed by Representative Bingham granting Congress the power to enforce privileges and immunities, and sends it to Congress.
- Feb. 28, 1866:** Facing opposition, House postpones consideration of Bingham amendment.
- Mar. 27, 1866:** Senate fails to pass Conklin amendment by two-thirds vote.
- Mar. 27, 1866:** President Johnson vetoes Civil Rights Act of 1866.
- Apr. 9, 1866:** Congress overrides Johnson's veto of Civil Rights Act of 1866.
- Apr. 21, 1866:** Joint Committee begins to discuss Representative Owen's proposal for an amendment.
- Apr. 28, 1866:** Joint Committee approves draft of Fourteenth Amendment, based on the Owen Proposal, with amendments proposed by Representative Bingham, and sends it to Congress.
- May 30, 1866:** Senate adds the first sentence to §1 on citizenship.
- June 18, 1866:** House and Senate jointly approve Fourteenth Amendment.
- June 25, 1866:** Connecticut ratifies.
- July 6, 1866:** New Hampshire ratifies.
- July 7, 1866:** Tennessee ratifies.
- Feb 7, 1867:** Delaware rejects.
- Mar. 2, 1867:** Congress passes reconstruction acts requiring the states to ratify in order to be readmitted to the union.
- July 8, 1868:** Louisiana and South Carolina ratify.
- July 28, 1868:** Secretary of State announces three-fourths of the states have ratified.

## APPENDIX C: TABLE OF SPEAKERS

This table lists the representatives and senators who made comments on the proposed constitutional amendments described in Section III. Following each name is the starting page of each comment in Volume 36 of the *Congressional Globe*.

*H.R. Res. 9*

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|--|--|
| Rep. Bingham, John (Ohio): 86              | Rep. Rousseau, Lovell H. (Ky.): 85           |
| Rep. Farnsworth, John F. (Ill.): 85        | Rep. Shellabarger, Samuel (Ohio): 85, 86     |
| Rep. Hale, Robert S. (N.Y.): 86            | Rep. Sloan, Ithamar C. (Wis.): 86            |
| Rep. Higby, William (Cal.): 86             | Rep. Smith, Green Clay (Ky.): 87             |
| Rep. Ingersoll, Ebon C. (Ill.): 86, 87     | Rep. Stevens, Thaddeus (Pa.): 85             |
| Rep. Johnson, Philip (Pa.): 86, 87         | Rep. Wilson, James F. (Iowa): 84, 85, 86, 87 |
| Rep. Niblack, William E. (Ind.): 86        | Rep. Wright, Edwin R. V. (N.J.): 87          |
| Rep. Randall, Samuel J. (Pa.): 87          |  |
| Rep. Rogers, Andrew (N.J.): 84, 85, 86, 87 |  |

*H.R. Res. 51*

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| Rep. Benjamin, John F. (Mo.): 535, 536   | Sen. Howe, Timothy O. (Wis.): 886, 983, 984   |
| Rep. Raymond, Henry J. (N.Y.): 536-538   | Sen. Johnson, Revardy (Md.): 763, 764, 765, 766, 767, 768, 769, 770, 984  |
| Rep. Schenck, Robert C. (Ohio): 535  | Sen. Lane, Henry S. (Ind.): 736, 737, 738, 739, 740, 741, 742   |
| Rep. Stevens, Thaddeus (Penn.) 536, 537  | Sen. McDougall, James A. (Cal.): 1282, 1283, 1287   |
| Rep. Thomas, J.L. (Maryland): App. 58  | Sen. Morrill, Lot M. (Me): App. 151   |
| Sen. Anthony, Henry B. (R.I.): 964, 1285   | Sen. Pomeroy, Samuel C. (Kan.): 1180, 1181, 1182, 1183, 1184  |
| Sen. Buckalew, Charles R. (Pa.): 957, 958, 959, 960, 961, 962, 963, 964, 965   | Sen. Saulsbury, Willard (Del.): App.  |
| Sen. Chandler, Zachariah (Mich.): 885  | Sen. Sherman, John (Ohio): 981, 982, 1284, 1287   |
| Sen. Clark, Daniel (N.H.): 831, 832, 833, 834, 835, 1284, 1287   | Sen. Stewart, William M. (Nev.): 1257, 1280   |
| Sen. Conness, John (Cal.): 1284  | Sen. Sumner, Charles (Mass.): 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1281, 1282, 1287, 1288 |
| Sen. Cowan, Edgard (Pa.): 1285, 1286   | Sen. Trumbull, Lyman (Ill.): 984, 1284, 1285  |
| Sen. Creswell, John A. (Md.): 1285   | Sen. Wilson, Henry S. (Mass.): 965, 1254, 1255, 1256, 1257, 1258, 1282  |
| Sen. Davis, Garrett (Ky.): 1288  | Sen. Yates, Richard (Ill.): 1255, 1256  |
| Sen. Doolittle, James R. (Wis.): 983, 984, 1232, 1287  |   |
| Sen. Fessenden, William Pitt (Me.): 702, 703, 704, 705, 706, 707, 708, 876, 965, 982, 984, 985, 986, 987, 988, 989, 990, 991, 1275, 1276, 1277, 1278, 1279, 1280, 1281 |   |
| Sen. Henderson, John B. (Mo): 1283, App. 115   |   |
| Sen. Hendricks, Thomas A. (Ind.): 876, 877, 878, 879, 880, 881, 882, 883, 884, 885   |   |

*H.R. Res. 63*

Rep. Bingham, John A. (Ohio): 1034, 1088, 1089, 1090, 1091, 1092, 1093, 1094  
 Rep. Davis, Thomas (N.Y.): 1083, 1084, 1085, 1086, 1087  
 Rep. Hale, Robert S. (N.Y.): 1034, 1063, 1064, 1065, 1066  
 Rep. Higby, William (Cal.): 1054, 1055, 1056  
 Rep. Hotchkiss, Giles W. (N.Y.): 1095  
 Rep. Kelley, William D. (Pa.): 1057, 1058, 1059, 1060, 1061, 1062, 1063  
 Rep. Price, Hiram (Iowa): 1066, 1067  
 Rep. Randall, Samuel J. (Pa.): 1057  
 Rep. Woodbridge, Frederick E. (Vt.): 1088

*H.R. Res. 127*

Comments in the House: 2286, 2332, 2433, 2458, 2498, 2530, 3055, 3144, 3177, 3241, 3276, 3356, 3357  
 Sen. Conness, John (Cal.): 2891, 2892  
 Sen. Cowan, Edgard (Pa.): 2890, 2891, 2899, 2900, 2987, 2988, 2989, 2990, 2991  
 Sen. Davis, Garrett (Ky.): 2918, 2919, 3041  
 Sen. Doolittle, James R. (Wis.): 2892, 2893, 2895, 2896, 2897, 2900, 2901, 2914, 2915, 2916, 2917, 2918, 2942, 2943, 2944, 2984, 2985, 2986, 3040  
 Sen. Edmunds, George F. (Va.): 2944  
 Sen. Fessenden, William Pitt (Me.): 3010  
 Sen. Guthrie, James (Ky.): 2899  
 Sen. Henderson, John B. (Mo): 2992, 3010, 3011, 3031, 3032, 3033, 3034, 3035, 3036  
 Sen. Hendricks, Thomas A. (Ind.): 2894, 2895, 2897, 2898, 2899, 2938, 2939, 2940, 2941, 2986, 2991, 2992, 2993, 3039, 3040  
 Sen. Howard, Jacob M. (Mich.): 2890, 2895, 2900, 2942, 3011, 3038, 3039  
 Sen. Howe, Timothy O. (Wis.): App. 217  
 Sen. Johnson, Revardy (Md.): 2893, 2894, 2898, 2899, 2916, 2991, 3026, 3027, 3028, 3029, 3030, 3041  
 Sen. McDougall, James A. (Cal.): 3030, 3031, 3038, 3041  
 Sen. Poland, Luke P. (Vt.): 2961, 2962, 2963, 2964  
 Sen. Saulsbury, Willard (Del.): 2919, 2920, 2921  
 Sen. Sherman, John (Ohio): 2899, 2942, 2986, 2987, 2992  
 Sen. Stewart, William M. (Nev.): 2964, 2965  
 Sen. Trumbell, Lyman (Ill.): 2893, 2894, 2901, 2902  
 Sen. Van Winkle, Peter G. (W.V.): 2897, 2898, 2900, 2941, 2942  
 Sen. Willey, Waitman T. (W.V.): 2918, 2919  
 Sen. Williams, George H. (Or.): 2897, 2944, 2991  
 Sen. Wilson, Henry S. (Mass.): 2986, 2987  
 Sen. Yates, Richard (Ill.): 3036, 3037, 3

