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# The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives

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**THE 39th CONGRESS (1865-1867) AND THE 14th  
AMENDMENT: SOME PRELIMINARY PERSPECTIVES**

*Richard L. Aynes\**

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This article is a preliminary effort to tell the story of the people who brought the nation the 14th Amendment, the 39th Congress. The 14th Amendment is the basis of more litigation than all the other provisions of the Constitution.<sup>1</sup> It is a very critical part of our distribution of

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A prior version of this paper was presented at the “Fourteenth Amendment 140th Anniversary Symposium” held at The University of Akron School of Law on October 23-24, 2008.

This article is dedicated to the memory and accomplishments of the Honorable John F. Seiberling (1918-2008), a member of Congress for 16 years (1971-1987) who served upon the House Judiciary Committee and made lasting contributions in many areas, including constitutional law and the protection of the environment. Bob Downing, “*An American Hero*” *Dies: Retired Congressman Who Represented Akron for 16 Years Praised for His Tireless Work Creating Cuyahoga Valley Park, Preserving Wilderness*, AKRON BEACON J., Aug. 3, 2008, at A1. He served in World War II and for both his military record and his civic services, was referred to as an “American Hero” by the Akron Beacon Journal upon the occasion of his death. *Id.*

government powers and the framework for protecting the rights of citizens. As Associate Dean Reilly indicated in her introduction to this conference, it has been considered by some to be a second founding<sup>2</sup> and has been called by others a second U.S. Constitution.<sup>3</sup>

It is also one of the areas in which the courts frequently look to the legislative history<sup>4</sup> and use that history to help inform and develop a decision. Historians and lawyers do not always agree with the way the Court uses history, but nevertheless this is an area in which the court makes that effort.<sup>5</sup>

The 39th Congress met from March 4, 1865 to March 3, 1867.<sup>6</sup> Normally we think about Congress through individuals – great individuals such as Henry Clay, Daniel Webster, or even John C. Calhoun.<sup>7</sup> We might also think of Congressmen who later became President like James Madison, James Monroe, or Lyndon B. Johnson. We might think of more controversial Congressmen like reconstruction's Thaddeus Stevens and Charles Sumner or turn of the century Congressmen like Joseph Cannon or Henry Cabot Lodge. We often do not often think about the Congress as a whole. Though this is still a work in progress, this article will attempt to give a collective overview of the 39th Congress while acknowledging its important leaders.

If we look at the Congress, most people would say there have been great Congresses that were critically important. One such Congress would undoubtedly be the First Congress. Because the First Congress assembled many of those individuals who drafted the Constitution and many who had been in the ratifying conventions, the U.S. Supreme Court often assumes that because they were so familiar with the

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1. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229 (1955) (“[The 14th Amendment] is probably the largest source of the Court's business.”).

2. Elizabeth A. Reilly, *Infinite Hope, Introduction to the Fourteenth Amendment: The 140th Anniversary of the Fourteenth Amendment*, 42 AKRON L. REV. 1003 (2009).

3. HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* xi (1973); James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

4. A LEXIS search conducted on February 7, 2009 indicated that the Congressional Globe had been cited 212 times in U.S. Supreme court cases, over 700 times in combined state and federal cases, and over 1700 times in law journals.

5. Eric Foner, *Remarks at Conference on the Second Founding*, 18 J. CONST. L. \_\_\_\_ (forthcoming 2009).

6. There were two sessions, and the Congress was in recess from July 29, 1866 - December 2, 1866. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1789, S. DOC. NO. 100-34, at 179 (1989). There was also a special session of the Senate from March 4, 1865 to March 11, 1865. *Id.*

7. See MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY AND CALHOUN* (1987).

Constitution, they must know what it meant, and they would not have passed a statute that was inconsistent.<sup>8</sup> That may not always be a safe assumption, but it is an interpretative method that the Court uses.<sup>9</sup>

Other Congresses people might look to as a great are the Depression-era New Deal Congresses that enacted so much legislation, implemented so much change, and then became war Congresses during World War II. We could probably develop other Congresses to add to the list.

I want to suggest that when someone creates the Hall of Fame of the Congresses we need to include the 39th Congress. The reason for this becomes more apparent when we look at context. We can begin by drawing some comparisons between the 38th<sup>10</sup> and the 39th Congresses. The 38th Congress was a “war” Congress and one that supported the efforts of the Lincoln Administration to bring the war to a successful conclusion. Because there were so many different political affiliations – Republicans, Unionists, Unconditional Unionists, War Democrats, Peace Democrats, etc. – a contemporary publication divided the 38th Congress into two groups: “Administration” supporters and the “Opposition” party.<sup>11</sup>

Using the categories of *Harper’s Weekly*, there was strong majority support for the Union in the 38th Congress.<sup>12</sup> In the Senate, the split was 32-18, with the Administration having a 14-member majority.<sup>13</sup> In the House, the split was 104-81, with the Administration having a majority of 23.<sup>14</sup> In the context of the history of the nation, both of these margins

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8. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“An act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.’” (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (omission in original))).

9. For example, Justice William Paterson was a member of the Constitutional Convention and also a member of the First Congress, which drafted the Judiciary Act. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6, at 51, 1616. Yet, as a member of the Court in *Marbury v. Madison* he voted to declare a portion of the act unconstitutional. 5 U.S. 137 (1803). Though more remote in time, the same principle is illustrated by Chief Justice Salmon P. Chase who, as Secretary of the Treasury, proposed and later implemented the use of paper money as legal tender and then as Chief Justice held that action unconstitutional. *Hepburn v. Griswold*, 75 U.S. 603 (1870) (overruled in part by *Legal Tender Cases*, 79 U.S. 457 (1870)).

10. There were two sessions of the 38th Congress, which were held December 7, 1863 to July 4, 1864 and December 5, 1864 to March 3, 1865. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6, at 175. The Senate met for a special session from March 4, 1863 to March 14, 1863. *Id.*

11. *Domestic Intelligence*, HARPER’S WEEKLY, Jan. 16, 1864, at 35.

12. *Id.*

13. *Id.*

14. *Id.*

are significant. At the same time, neither house had the two-thirds vote necessary to override a Presidential veto or to propose an amendment to the U.S. Constitution.<sup>15</sup>

The Union Party did well in the 1864 elections where Abraham Lincoln was re-elected President.<sup>16</sup> When the 39th Congress convened in 1865, the Republican majorities increased in both the House and the Senate. According to a contemporary source, there were 155 Republican members in the House of Representatives and only 46 Democrats.<sup>17</sup> There were 44 Republicans in the Senate and only 12 Democrats.<sup>18</sup> Thus, between the 38th and 39th Congresses, the Republican percentage in the Senate had increased from 64% to 79% and in the House from 56% to 77%. From a Constitutional point of view, the Republicans not only gained a veto-proof Congress – something that would become

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15. See U.S. CONST. art. V.

16. Lincoln was reelected President on November 8, 1864. E.B. LONG & BARBARA LONG, *THE CIVIL WAR DAY BY DAY: AN ALMANAC: 1861-1865*, at 594 (1971).

17. WILLIAM H. BARNES, *HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 577-624* (Negro Univ. Press 1969) (1868). Barnes provided biographical sketches of all members of the 39th Congress, indicating by typeface whether they were Republican or Democratic. See *id.* at 577. The calculations are my own based upon Barnes' sketches. The numbers should be treated as only approximations—though hopefully close ones. For example, I have counted all the Representatives and Senators, but omitted the territorial delegates. Because of deaths, resignations, results from contested elections, and similar changes, the summary of all the Congressmen is both over-inclusive (it includes more than actually were serving at any one time) and under-inclusive (at any one point in time, it may not include others who served later.) When someone served in the 39th Congress in both the House and the Senate I counted them only once, in the house of Congress in which they first were elected. In spite of the fact that one may therefore need to re-calculate the numbers for a given day or a given event, as an overall picture, these numbers should give a good idea of the distribution of power in the Congress.

There is, of course, also a question about parties. Most of the Congressmen are, as Barnes indicated, clearly affiliated with the Republican or Democratic Party. See *id.* However, reference to other sources indicates that some were elected with party names like "Unionist," "Unconditional Unionist," etc. See, e.g., *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774-PRESENT*, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Mar. 23, 2009). A search of the on-line Biographical Directory indicates that there were seventeen Unconditional Unionists and eight Unionists in the 39th Congress. *Id.* These alternative parties or labels may be important for a more focused examination of the 39th Congress. But for purposes of this article, I have accepted Barnes' division of all members into Republican and Democrats as fairly accurate in that virtually all members of Congress were allied with one of the two major parties no matter what their individual party label.

18. One approach that the overwhelming number of Republicans, compared to Democrats, should produce is caution in citing the members of the minority party for the meaning of the 14th Amendment. They knew the Amendment was going to pass the House and Senate without their approval and had motives to misstate its meaning for purposes of affecting the state ratifications, elections, or future litigation. A more thorough discussion of this using Senator Reverdy Johnson (D-Md.) as an example is found in Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 18 J. CONST. L. \_\_\_\_ (forthcoming 2009).

important when Andrew Johnson became President – but they also gained the super-majority necessary to propose constitutional amendments.

The formal leadership in the Senate was provided by the President Pro Tempore of the Senate. Lafayette S. Foster (R-Conn.) was elected President Pro Tempore at the March 7, 1865 Special Session of the Senate and continued to serve until March 2, 1867.<sup>19</sup> Benjamin F. Wade (R-Ohio) was elected to that position on March 2, 1867, serving on March 3rd and then into the 40th Congress.<sup>20</sup> In the House of Representatives, prior Speaker Schuyler Colfax (R-Ind.) was again elected Speaker of the House.<sup>21</sup>

Of course, there are other formal positions of leadership and informal ones. Within the House of Representatives, Thaddeus Stevens was one of the key leaders.<sup>22</sup> Next to Stevens, historian Benjamin Kendrick listed John A. Bingham (R-Ohio), Roscoe Conkling (R-N.Y.), and George S. Boutwell (R-Mass.).<sup>23</sup> Other members of the House had influence, depending upon the issue, and we would number among these James F. Wilson (R-Iowa), Chairman of the Judiciary Committee, and James M. Ashley (R-Ohio), who played a critical role in the adoption of the 13th Amendment.<sup>24</sup>

In the Senate, Kendrick identified William P. Fessenden (R-Maine), Chair of the Joint Committee on Reconstruction, James W. Grimes (R-Iowa), and George H. Williams (R-Oregon) as influential leaders.<sup>25</sup> To that important group we could add Charles Sumner (R-Mass.), Lyman Trumbull (R-Ill.) (Chair of the Senate Judiciary

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19. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6, at 179; CONG. GLOBE, 39th Cong., Special Session 1427 (1865); CONG. GLOBE, 39th Cong., 2d Session 2003 (1867).

20. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6; CONG. GLOBE, 39th Cong., 2d Session 2003 (1867).

21. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6.

22. See BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 155-69 (1914).

23. *Id.* at 183-87.

24. See David E. Kyvig, *Ohio and the Shaping of the U.S. Constitution*, in THE HISTORY OF OHIO LAW 346 (Michael Les Benedict & John F. Winkler eds., 2004); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 31 (1974). Michael Les Benedict includes Bingham (of the Joint Committee on Reconstruction), Stevens (of the Joint Committee on Reconstruction), Colfax, Wilson, Justin S. Morrill (of the Joint Committee on Reconstruction), and Elihu B. Washburne (of the Joint Committee on Reconstruction) as six of the eleven “Representatives with Pre-eminent Influence” in the House. *Id.* Joint Committee members George S. Boutwell (R-Mass.) and Roscoe Conkling (R-N.Y.) are categorized as two of the six “Other Influential Representatives.” *Id.* at 31-32.

25. BENEDICT, *supra* note 24, at 32-33.

Committee), and Henry Wilson (R-Mass.), later Vice President of the United States.<sup>26</sup>

In the 19th Century, Congress came back after the elections for a “lame duck” session before the new Congress took office. The Republican platform for 1864 had called for a constitutional amendment to abolish slavery.<sup>27</sup> But with the Republicans needing 124 votes in the House to propose the Amendment and having only 104 votes potentially available from their own party, it did not seem likely that the 38th Congress would abolish slavery. While President Lincoln could have simply waited until the 39th Congress convened to propose the 13th Amendment, hindsight allows us to know that, had he done so, he would not have lived to see the proposal approved by Congress. Instead Lincoln worked, especially, with Congressman James M. Ashley (R-Ohio) to push the Amendment through the 38th Congress.<sup>28</sup> It was ultimately passed by the House of Representatives on January 31, 1865,<sup>29</sup> though by the time of Lincoln’s death it had only been ratified by 21 states.<sup>30</sup> Ratification was not complete until December 6, 1865.<sup>31</sup>

Though only a portion of the statistical analysis has been completed, one surprising aspect was that, in an era where less than one percent of the population had a college education,<sup>32</sup> a striking number of

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26. Michael Les Benedict indicated that in the 38th-40th Congresses all of these individuals were either “Senators with pre-eminent influence” or “Other Influential Senators.” *Id.* The only other Senators listed beyond those set forth above are John Sherman (R-Ohio), Lafayette Foster (R-Conn.), Lot M. Morrill (R-Maine), Ira Harris (R-N.Y.), and Benjamin F. Wade (R-Ohio). *Id.*

27. *Campaign of 1864*, in NATIONAL PARTY PLATFORMS: 1840-1972, at 35 (Donald Bruce Johnson & Kirk H. Porter eds., 1973). The national Republican Platform of 1864 called for a Constitutional Amendment to “forever prohibit the existence of Slavery within the limits of the jurisdiction of the United States.” *Id.* Similarly, the Platform of the Union Convention in Ohio, May 25, 1864, “pledge[d] the cordial sup[port]” and “especially” approved “the pending amendment of the Constitution to make States of the Union all free and republican, and therefore forever one and undivided.” THE OHIO PLATFORMS OF THE REPUBLICAN AND DEMOCRATIC PARTIES FROM 1855 TO 1881 INCLUSIVE 23 (Cott & Hann 1881).

28. See Kyvig, *supra* note 24.

29. See LONG, *supra* note 16, at 630.

30. See *Constitutional Amendments 13, 14 (notes 1-940)*, U.S.C.S. 1-2 (Lawyers ed., LEXIS L. Pub. 1999) [hereinafter *Constitutional Amendments*] (indicating that Arkansas was the 21st state to ratify the Amendment and did so on the day Lincoln was assassinated).

31. *Id.* at 2.

32. According to U.S. Census data, only 9,371 degrees had been granted in 1870, the first year in which such information was recorded. National Center for Education Statistics, Digest of Education Statistics, available at [http://nces.ed.gov/programs/digest/d07/tables/dt07\\_258.asp](http://nces.ed.gov/programs/digest/d07/tables/dt07_258.asp) (last visited May 27, 2009). The total population at that time was 38,558,000. NATL CTR. FOR EDUC. STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 34 (Jan. 1993), <http://nces.ed.gov/pubs93/93442.pdf>.

members of the 39th Congress had attended college.<sup>33</sup> It appears that a clear majority of the members of the 39th Congress were lawyers or judges.<sup>34</sup>

One surprising matter is that we think in this era about two tracks to becoming a lawyer. There was the very small group of people who came from law school to the practice of law, and there was the vast majority who served apprenticeships before being admitted to the bar.<sup>35</sup>

Two matters are of particular interest in the 39th Congress. One is that many of the Congressmen took what could be called courses in law when they were in college. Some took courses about the history of the world which included studying the Magna Carta, Due Process Clause,

33. Merely as an illustration and without any claim of it as a representative sample, this is an account of the universities and law schools formally attended by members of Congress whose last names began with the letter "D":

- William A. Darling (R-N.Y.): none.
- Garrett Davis (D-Ky.): none.
- Thomas T. Davis (R-N.Y.): Hamilton College (1831).
- Henry Dawes (R-Mass.): Yale College (1839).
- John L. Dawson (D-Penn.): Washington College (n.d.).
- Joseph H. Defrees (R-Ind.): none.
- Columbus Delano (R-Ohio): none.
- Henry C. Deming (R-Conn.): Yale College (1836) and Harvard Law School (1838). He served as a Colonel in the 12th Connecticut Regiment during the war.
- Charles Denison (R-Pa.): Dickinson College (1839).
- Arthur A. Denny (R-Wash.): none.
- James Dixon (R-Conn.): Williams College (1834).
- Nathan F. Dixon (R-R.I.): Brown University (1833) and attended law schools at New Haven and Cambridge.
- William E. Dodge (R-N.Y.): none.
- Ignatius Donnelly (R-Minn.): none.
- James R. Doolittle (R-Wis.): Geneva College (1834).
- John F. Driggs (R-Mich.): none.
- Ebenezer Dumont (R-Ind.): Indiana University (n.d.). He was a Colonel in the 7th Regiment of Indiana Volunteers.

BARNES, *supra* note 17, at 586-89. Thus, within this biographical group, 9 of the 17 members had received a college education. *Id.*

34. My own quick count suggests that more than 160 were lawyers. The same appears to have been true of the 38th Congress; for example, all nineteen member of the Ohio delegation had studied law. MARGARET LEECH & HARRY J. BROWN, *THE GARFIELD ORBIT* 157 (1978). I appreciate Brian L. Grimsley (University of Akron J.D. candidate, 2010) for calling this source to my attention.

35. See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1982). Abraham Lincoln is a classic example of the 19th century lawyer who did not attend law school and studied under the apprenticeship or preceptor system. See *id.* at 25, 207. The last Justice of the Supreme Court to do so was Justice Robert H. Jackson. See Henry Abraham, *Mr. Justice Robert H. Jackson (1892-1954): An Attempt to Place Him into Some Historical Perspective*, Mar. 18, 2003, <http://www.roberthjackson.org/Man/theman2-6-15/> (stating that Jackson, Stanley Reed, and Jimmy Byrnes were the last three justices who did not attend law school).

and the meaning of the Constitution.<sup>36</sup> They were actually receiving a partial formal legal education as part of their college education. Second, though this is a small group, it is striking nevertheless that some members of the 39th Congress both attended law school and worked in an apprenticeship program.<sup>37</sup> I am not suggesting that is representative of what was happening for most lawyers, but it is at least interesting to see this development among members of the 39th Congress.

Over 40% of the members of the 39th Congress were freshmen<sup>38</sup> and many others were second-term Congressmen. This put a premium

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36. John Bingham is among those Congressmen who took such a course. See ERVING E. BEAUREGARD, REVEREND JOHN WALKER, RENAISSANCE MAN 69-71 (1990). Walker was the founder of Franklin College (Ohio), and his class in "General History" was said to have included the struggle for liberty with discussion of the Magna Carta, the English Petition of Right, the English Declaration Rights, writings of John Locke, American history, the Declaration of Independence, the Fifth Amendment Due Process Clause, and other matters related to freedom and law. *Id.* at 71. John Bingham was a student of Walker's. *Id.* at 70. Other members of the 39th Congress who attended Franklin College at about the same time as Bingham and were likely to have studied the same legal principles were Senator Edgar Cowan (class of 1839) (R-Pa.), Senator Joseph S. Fowler (class of 1843) (R-Tenn.), and Representative William Lawrence (class of 1838) (R-Ohio). BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6, at 834, 1022, 1350. Even in earlier times, lawyers who engaged in classical studies would have studied Roman Law. *E.g.* Herbert A. Johnson, *Bushrod Washington*, 62 VAND. 447, 475 n.159 (2009) (discussing the education of Justice Washington and his contemporaries).

37. Again, this example is provided without any claim about its representativeness. Benjamin G. Harris (D-Md.) attended Yale College, Cambridge (Mass.) Law School, and apparently studied law with a lawyer prior to being admitted to the bar in 1840. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 6, at 1137. Representative Philip Johnson (D-Pa.) apparently studied law in an apprenticeship program and subsequently attended Union Law School in Easton Pennsylvania before being admitted to the bar in 1848. *Id.* at 1270. Senator Charles Sumner (R-Mass.) graduated from Harvard University (1830), from Harvard Law School (1833), and was admitted to the bar in 1834, raising the possibility that he served in some type of apprentice program in the intervening year. *Id.* at 1896. Charles Upson (R-Mich.) studied at Yale Law School in 1844, moved to Michigan where he taught school, and served as a deputy county clerk in a local court, and was admitted to the bar in 1847. *Id.* at 1966. This raises the possibility that he either served in an apprenticeship program in Michigan or his deputy clerkship served that purpose. Similarly, Elihu B. Washburne (R-Ill.) studied law at both Kents' Hill Seminary (1836) and Harvard Law School (1839), but was not admitted to the bar until 1840. *Id.* at 2012. On Elihu Washburn, a biographical work indicates that he worked in two different law offices before enrolling in Cambridge Law School. ISRAEL, ELIHU AND CADWALLADER WASHBURN: A CHAPTER IN AMERICAN BIOGRAPHY 164, 166 (Gaillard Hunt ed., New York, MacMillan 1969) (1925) (hereinafter ISRAEL).

38. Using Barnes' biographical sketches, my own calculations indicate that 23.3% (14 of the 60 Senators) of the Senate and 41.8% (84 of the 201 House members) of the House had never been in Congress before the 39th Congress. See BARNES, *supra* note 17. If there was a gap between the person's prior service and their membership in the 39th Congress, I nevertheless counted them as experienced, rather than freshmen, members. Additionally, in the 38th Congress, it was said that 60% of the entering Congressmen were new to Congress, meaning that many of the members of the 39th Congress were only in their second term. LEECH & BROWN, *supra* note 34, at 157.

on leadership, which provided opportunities for the more experienced Congressmen. Last of all, but a very important dynamic, is that the overwhelming membership of this Congress was Republican.<sup>39</sup> It not only allowed the Congress to ignore the veto threats of the President, but provided little incentive to negotiate with or care about the very small Democratic minority. This was all the more the case because several members of the Democratic Party had been “Peace Democrats” who did not support the war and incorrectly predicted its failure.<sup>40</sup> These Democrats would have little credibility or influence with the Republican majority.

### I. CHALLENGES FACING THE 39th CONGRESS

The greatest challenge facing the 39th Congress may be surprising to many – but it was how to bring the war to a close and, in the terminology of the day, “secure the peace” so that there would be no future war. Many people think the connection between the 14th Amendment and the Civil War is that winning the war allowed the Congress to pass the Amendment. But the connection is much stronger: the war actually prompted the Amendment as a means of preventing a future war.<sup>41</sup> Three of the challenges before the Congress will be considered below: (1) the losses of life and property in the war; (2) the uncertainty about whether the war was really over or was simply in reprise at the time the Congress met; and (3) the enormity of the task of economic and political reconstruction to try to put the country back together again. All of these problems and people with these problems were facing the 39th Congress.

#### A. *Loss of Life and Property*

There were an estimated 620,000 soldiers who died in the Civil War.<sup>42</sup> That does not count the civilian loss.<sup>43</sup> If one translates that into

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39. See BARNES, *supra* note 17.

40. See Richard L. Aynes, *Ohio and the Drafting and Ratification of the Fourteenth Amendment*, in 1 THE HISTORY OF OHIO LAW 374 (Michael Les Benedict & John R. Winkler eds., 2004) (“There was a small group of antiwar Democrats – ‘Copperheads,’ according to the Republicans – who believed that slavery had been the business of each of the states and not that of the national government.”).

41. See *id.* at 370 (“Many Republicans viewed it as embodying the terms upon which peace could be made after the Civil War; the amendment was thought to provide guarantees that would prevent another outbreak of rebellion.”).

42. See DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR xi (2008).

our population today, that would be about six million soldiers killed.<sup>44</sup> Think about how our country would react if there were some catastrophe that resulted in almost 6 million people being killed. We would be shaken to the core, and that is part of what the 39th Congress and their constituents were living through.

There were also civilian casualties. There were people wounded in an era when being wounded often meant amputation of an arm or leg - people who had diseases and physical problems that continued throughout their lives. There was an immense amount of property destroyed by the various armies, and there was an immense amount of wealth poured into nonproductive war matters. Bullets and cannon shells are not like machinery that produces a continuing return on the investment or that is going to help the nation economically.

After the war, it was estimated that the Confederate debt was over two billion dollars, and the rebel states and local governments had another one billion dollars in debt.<sup>45</sup> Further, the value of the emancipation of people formerly held in slavery was estimated between \$1.6<sup>46</sup> and \$2 billion.<sup>47</sup> These losses do not include the loss of property and livestock where battles were fought, the loss of food and property requisitioned for use by various armies, and the investment in the non-productive goods of war. Nor do they include the Union expenditures in the war or the Union debt. Senator Henry Wilson (R-Mass.), later Vice President of the United States, indicated that in charity alone the North had contributed \$75 million to the care of wounded and sick soldiers, and he referred to a “vast national debt.”<sup>48</sup>

### *B. Was the War Really Over?*

When the 39th Congress convened on March 4, 1865, the war was still ongoing. To be sure, within only slightly more than a month, the major Confederate Army had surrendered. But even then, the 39th Congress could not be sure the war was over. Robert E. Lee surrendered

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43. *See id.* at xii (citing Civil War historian James McPherson’s estimate that 50,000 civilians were killed during the war).

44. *Id.* at xi.

45. GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 291-92 (1868).

46. W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 605 (Touchstone 1995) (1935).

47. PASCHAL, *supra* note 45, at 291-92.

48. *Thirty-Ninth Congress*, WASH. NEWS, Feb. 8, 1866, at 1, col. 4; CONG. GLOBE, 39th Cong., 1st Sess. 701 (Feb. 7, 1866).

to Ulysses S. Grant in April 1865<sup>49</sup> and we know that this marked the end of the war for all practical purposes. But that is overly simplistic and comes only from the benefit of hindsight.<sup>50</sup>

Lincoln's assassination on April 14, 1865, the wounding and attempted assassination of Secretary of State Seward, and the planned-but-unexecuted attempt to assassinate Vice President Johnson was clearly designed by John Wilkes Booth to disrupt the war effort and give hope for continued Confederate resistance.<sup>51</sup> Whether his purported plan to kidnap Lincoln was supported by formal Confederate action or not is a matter of dispute. It is clear that many people in the government and country believed that the assassination efforts were supported by the Confederate Government of Jefferson Davis.<sup>52</sup> Indeed, this was the very theory that the Judge Advocate General proceeded under in the trial of the Lincoln co-conspirators.<sup>53</sup>

While earlier scholars repudiated this theory, more modern scholarship has raised questions and provided evidence that, if credited, could link the Confederate government and its secret service to John Wilkes Booth's kidnapping plan.<sup>54</sup> There will probably always be conflicting views on this.

In any event, it is clear that the feeling of the country at the time was that this unsettling conspiracy could portend new military action by the Confederates in the form of guerilla warfare and assassination, and that this was further evidence that the war had not ended.

After President Lincoln's assassination, Secretary of War Edwin Stanton estimated that there were over 90,000 Confederate soldiers still in the field.<sup>55</sup> One reflection of the perceived seriousness of the

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49. The surrender at Appomattox Court House occurred on April 9, 1865. LONG, *supra* note 16, at 670.

50. On April 10, Secretary of War Edwin Stanton reported to President Johnson his estimate that the various rebel armies still had a total of 91,222 soldiers in the field. MICHAEL W. KAUFFMAN, *AMERICAN BRUTUS: JOHN WILKES BOOTH AND THE LINCOLN CONSPIRACIES* 456 n.21 (2004).

51. See generally WILLIAM A. TIDWELL, JAMES O. HALL, & DAVID WINFRED GADDY, *COME RETRIBUTION: THE CONFEDERATE SECRET SERVICE AND THE ASSASSINATION OF LINCOLN* (1988).

52. See generally *id.*; WILLIAM A. TIDWELL, *CONFEDERATE COVERT ACTION IN THE AMERICAN CIVIL WAR: APRIL '65* (1995). For a carefully researched, but more conventional account, see KAUFFMAN, *supra* note 50.

53. See *The Trial of the Conspirators to Assassinate President Lincoln: The Argument of Judge Advocate Bingham for the Government*, in VIII *AMERICAN STATE TRIALS* 495-645 (John D. Lawson ed., 1917) (setting forth John Bingham's speech as Judge Advocate at the Lincoln conspirators' trial).

54. TIDWELL, *supra* note 52, at x-xiii. In assessing these claims, the evidence indicates that they are "plausible" but is not strong enough to indicate that they are "probable."

55. KAUFFMAN, *supra* note 50.

continuing threat may be seen in the fact that some ordinary Confederate prisoners of war were not released from captivity until July 1865.<sup>56</sup>

Many Confederate Cabinet officers, military officers, and members of the Confederate Congress had fled the United States. They went to Mexico,<sup>57</sup> England,<sup>58</sup> and Brazil.<sup>59</sup> If one looked at English history and what happened when the king or pretended king fled, he often came back from France or Scotland with an army to try to reclaim the kingdom. No one knew whether these Confederate leaders had really gone for good or if they were just trying to raise new support in foreign countries to return to fight at a later time.

As late as April 23, 1865, Confederate Brigadier General Douglas Cooper was planning an attack on Missouri from his base in Indian Territory.<sup>60</sup> Troops were still in the field, with fighting in different areas taking place well into the end of 1865. Forces in Alabama, Mississippi, and East Louisiana under the command of Confederate General Richard Taylor did not surrender until May 4, 1865.<sup>61</sup> Skirmishing occurred in Perche Hills, Missouri and Summerville, Georgia on May 5th.<sup>62</sup>

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56. See, e.g., John E. Skelton, *A Hartwell Man*, CIVIL WAR TIMES, July 2006, at 8 (stating that John Hamilton Skelton of the 16th Georgia Infantry was captured by Union troops near New Market, Virginia in 1864 and held by federal authorities until July 1865 when he was released by order of President Johnson).

57. Mexico became a refuge for many Confederate leaders, including Missouri Guard State Commander General Sterling Price, General Cadmus M. Wilcox, Major General John Magruder (who helped establish a center for Confederate exiles in Cardoba, Mexico), Brigadier General William P. Hardeman, and Brigadier General Thomas C. Hindman. STEWART SIFAKIS, WHO WAS WHO IN THE CIVIL WAR 552 (1988). Henry Watkins Allen, elected Confederate Governor of Louisiana in 1864, moved to Mexico after the war, where he edited a newspaper until his death in 1866. MICHAEL E. BANASIK, SERVING WITH HONOR: THE DIARY OF CAPTAIN EATHAN ALLEN PINNELL EIGHTH MISSOURI INFANTRY (CONFEDERATE) 217 n.14 (1999). It was also reported that former Confederate Congressman Waldo P. Johnson fled to Mexico. *Id.* at 227.

58. Secretary of State & War Judah Benjamin fled to the West Indies and then traveled to England where he was "Queen's Counsel" until one year before his death. SIFAKIS, *supra* note 57, at 50.

59. For a brief account of the estimated "thousands" of former Confederates who moved to Brazil, see *A Brief History of the Confederate Colonies of Brazil: The Confederados*, <http://www.patsabin.com/lowcountry/confederados.htm> (last visited Feb. 8, 2009); DAVID I. DURHAM & PAUL M. PRUITT, JR., A JOURNEY IN BRAZIL: HENRY WASHINGTON HILLIARD AND THE BRAZILIAN ANTI-SLAVERY SOCIETY (2008) (setting forth an account of former Confederate Hilliard's role in Brazil as a trade representative of President Hayes and also containing some information about the former Confederates who resided in Brazil). Confederate Brigadier General Alexander T. Hawthorn was one of the individuals who moved to Brazil after the war and did not return to the U.S. until 1874. BANASIK, *supra* note 57, at 205 n.11.

60. JOHN D. SPENCER, THE AMERICAN CIVIL WAR IN THE INDIAN TERRITORY 11 (2006).

61. LONG, *supra* note 16, at 685.

62. *Id.* at 686.

Indeed, as late as May 5, 1865 there were intact Confederate units, knowing of the surrender of Lee and Johnson, which were prepared to continue fighting. Captain Eathan Allen Pinnell of the Eighth Missouri Infantry noted in his diary that:

. . . the fall of everything east of the Mississippi don't warrant ignominious surrender of this Dep't. We can, if the foe should throw their entire force against us, contest every inch of soil from here to the Rio Grande, and if we must fall let it be after every means of defense has been employed, and we have been driven to the confine of our territory, and then not submit but seek homes in some foreign land, and not surrender with arms in our hands . . . .<sup>63</sup>

These sentiments were not unlike those of Confederate President Jefferson Davis who, even after the surrender of the armies of Lee and Johnson, proposed joining Cavalry General and former slave-trader Nathan Bedford Forrest in Mississippi or General Kirby Smith in Texas and to “carry on the war forever.”<sup>64</sup>

Confederate President Jefferson Davis was captured on May 10, 1865.<sup>65</sup> On that same day, President Johnson issued a proclamation indicating that “armed resistance . . . in the . . . insurrectionary States may be regarded as *virtually* at an end . . . .”<sup>66</sup> Yet, on that same day, guerilla forces under William Clarke Quantrill fought against an irregular Union group in Kentucky, with the result that Quantrill was fatally wounded.<sup>67</sup> Confederate troops in Florida surrendered on May 10th.<sup>68</sup> The next day, May 11th, saw the surrender of Confederate troops in Arkansas.<sup>69</sup> However, Confederate commerce raiders were still at sea and the C.S.S. Stonewall (originally made in France for the Confederacy,

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63. BANASIK, *supra* note 57, at 220 (entry for May 5, 1865). This is similar to Pinnell's view after the fall of Vicksburg, but apparently before it was known as more than a rumor to him. On July 13, 1863 he wrote: “But if it ever should fall I would not despair . . . . We could if forced to retire from the Arkansas River, fall back to the Red River and sustain our position for years.” *Id.* at 85. Pinnell's unit ultimately appears to have surrendered on June 5, 1865. *See id.* at 228. On June 2 he had written in his diary: “Ours is the only Confederate camp in existence.” *Id.* at 227. Unbeknownst to him, Brig. Gen. Stand Watie's battalion did not surrender until June 23, 1865. *Id.* at 227, n.33.

64. VII JEFFERSON DAVIS: CONSTITUTIONALIST: HIS LETTERS, PAPERS AND SPEECHES 139 (Dunbar Rowland ed., 1923). *See also* Case of Davis, 7 F.Cas. 63 (C.C.D.VA. 1866-71) (No. 3621A). I am indebted to Judge C. Ellen Connally for calling this speech to my attention.

65. LONG, *supra* note 16, at 687.

66. *Id.* (emphasis added).

67. *Id.*

68. *Id.*

69. *Id.* 687-88.

though it was ultimately purchased through an intermediary) arrived in Havana, Cuba on May 11, 1865.<sup>70</sup>

What is considered the last major engagement of the war took place on May 12th, with the Confederate forces in Texas winning the battle.<sup>71</sup> Yet, clashes between Union soldiers and guerillas continued in Missouri on May 14th, 20th, 22nd and 23rd, 27th, and 29th.<sup>72</sup>

While west of the Mississippi commander Kirby Smith was discussing the possibility of surrender on May 13th, Brigadier General Jo Shelby threatened to use force to arrest Smith unless Smith continued the war.<sup>73</sup> Smith did not surrender the Trans-Mississippi Department until June 2nd.<sup>74</sup>

Even with Smith's surrender of the last major Confederate army, fighting on small scale continued. Brigadier General Stand Watie did not surrender the Confederate Indian battalion until June 23.<sup>75</sup> The Federal army spent most of May 1865 through December 1865 skirmishing against guerillas and former Confederates escaping into Mexico.<sup>76</sup>

The CSS Shenandoah captured two whaling vessels on June 22nd, six whalers on June 26th, and eleven more on June 28th.<sup>77</sup> The Shenandoah did not learn the war was over until August 2, and it surrendered to British authorities on November 6, 1865.<sup>78</sup> Martial law continued in Kentucky until October 12, 1865, when President Johnson ended it by proclamation.<sup>79</sup> President Johnson himself did not revoke the suspension of the writ of habeas corpus in the majority of states until December 1, 1865, almost six months after the 39th Congress began its session.<sup>80</sup>

It took President Johnson until April 2, 1866 to declare that the insurrection in all of the Confederate states except Texas was over and until August 20, 1866 – after three states had already ratified the 14th

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70. *Id.* The CSS Stonewall surrendered on May 19th. *Id.* at 689.

71. *Id.* at 688.

72. *Id.* at 688-91.

73. *Id.* at 688.

74. *Id.* at 692. The naval forces on the Red River surrendered on June 3, 1865. *Id.*

75. *Id.* at 693.

76. *Id.* at 691.

77. *Id.* at 693-94.

78. *Id.* at 695.

79. *Id.*

80. *Id.* at 696.

Amendment<sup>81</sup> – to determine that the insurrection in Texas was at an end.<sup>82</sup>

Some Confederate battle units simply disbanded rather than surrender.<sup>83</sup> Confederate Brigadier General Jo Shelby refused surrender and led a portion of his Cavalry unit to Mexico, where French-supported Austrian Arch Duke Ferdinand Maximillian had been declared Emperor and there were Union concerns about France's involvement in American affairs.<sup>84</sup>

The point is that, in spite of Johnson's proclamation, there were substantial uncertainties that military operations were actually over. As documented above, there was at least some minor fighting continuing until December of 1865.

When Lee contemplated surrender, one of his staff urged him to disband the army so that they could continue to fight a guerilla war.<sup>85</sup> Though Lee rejected this suggestion, there was no way for Union commanders to determine if some of Lee's soldiers might follow such a

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81. See *Constitutional Amendments*, *supra* note 30, at 13-14.

82. LONG, *supra* note 16, at 696-97.

83. This was true of Colonel John Singleton Mosby's partisan Cavalry Regiment which simply disbanded on August 20, 1865. SIFAKIS, *supra* note 57, at 460. It is said that "most" of the 2nd Virginia Cavalry "refused to surrender" at Appomattox and went west to Lynchburg where they apparently disbanded. Christopher D. Rucker, *The Pastor-Poet*, CIVIL WAR TIMES, Apr. 2005, at 12. It is claimed that Robert J. Lee, a distant relative of Robert E. Lee, and a Captain under Nathan Bedford Forrest, did not surrender in 1865 but simply returned to his father's farm in Texas where he "held off the United States Army for four bloody years." Thomas Ayres, THAT'S NOT IN MY AMERICAN HISTORY BOOK: A COMPILATION OF LITTLE-KNOWN EVENTS AND FORGOTTEN HEROES 125 (2000).

As if all of this uncertainty were not enough, new research suggests that the robberies by Jesse James and his band of outlaws, who served as Confederate guerillas during the war, were much more political than one might think. T.J. STILES, JESSE JAMES: LAST REBEL OF THE CIVIL WAR 6 (2002). They largely targeted Union supporters and ex-Union soldiers and their actions can be reasonably seen as a continuation of the guerilla portion of the war. *Id.* ("[Jesse James] was, in fact, a major force in the attempt to create a Confederate identity for Missouri, a cultural and political offensive waged by the defeated rebels to undo the triumph of the Radical Republicans in the Civil War . . . . Had Jesse James existed a century later, he would have been called a terrorist."). *Id.*

84. SIFAKIS, *supra* note 57, at 439, 585. Shelby offered his services to Maximillian, but they were declined. *Id.* at 439; *see also id.* at 585. Though French Emperor Napoleon III "wanted to recognize the Confederacy early in the war," his ardor on that question had cooled by the end of the war. *Id.* at 467. Nevertheless, Maximillian was still on the throne and the potential for some type of support for the defeated Confederates from Maximillian or Napoleon III was still a possibility from the Union point of view. *Id.* at 467, 439. One of the first actions that General Grant took after the surrender of Lee and Johnson was to send General Philip Sheridan to Texas to put a military presence of the United States on the border with Mexico. *Id.* at 439, 588. Maximilian was overthrown and executed after the French were withdrawn and while the ratification of the 14th Amendment was pending. *Id.* at 439.

85. RICHARD E. BERINGER ET AL., WHY THE SOUTH LOST THE CIVIL WAR 346 (1991).

policy. This was also especially true of those units that disbanded but refused to surrender. Was this an abandonment of the war, or simply a shift in tactics? Would these soldiers reappear to fight the Union again? At what has been called the end of the war, thoughtful Union leaders had to consider the possibility that these were temporary exiles who would return to renew the conflict.

Immediately after the war, violence in Memphis and New Orleans against white and black Unionists was orchestrated by local government employees trying to resist or overthrow the results of the war.<sup>86</sup> In Memphis, the “riots” lasted 3 days and were led largely by white police and firemen attacking African-American areas of town, including areas where the families of African-American U.S. soldiers lived.<sup>87</sup> As summarized by one of the nation’s leading historians of reconstruction history, “at least forty-eight persons (all but two of them black) lay dead, five black women had been raped, and hundreds of black dwellings, churches, and schools were pillaged or destroyed by fire.”<sup>88</sup>

Twelve weeks later, it “appear[ed] certain that some members of the [New Orleans] city police, made up largely of Confederate veterans, conspired to disperse [a] gathering [of Radical Republicans] by force.”<sup>89</sup> Twenty-five delegates and about 200 African-American veterans were attacked in what General Philip H. Sheridan termed “an absolute massacre.”<sup>90</sup> The son of former Vice President Hannibal Hamlin, a Union war veteran, termed it a “wholesale slaughter” that was worse than anything he had seen on the battlefield.<sup>91</sup> Thirty-four black and three white Republicans were killed and it was estimated that over 100 people were injured.<sup>92</sup>

The enactment of the Black Codes<sup>93</sup> indicated that the white governments of Andrew Johnson could not be trusted to protect the legal rights of African Americans or their freedom, notwithstanding the 13th Amendment. The actions of white police and former Confederate veterans in Memphis and New Orleans demonstrated that, not only could

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86. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 261-63 (1988).

87. *Id.* at 262.

88. *Id.*

89. *Id.* at 263.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 199. The Black Codes were “a series of state laws . . . [i]ntended to define the freedmen’s new rights and responsibilities . . . .” *Id.*

the white Johnson governments not be trusted to enforce the law, but that they would actually take the lead in violating it.

Further, the Ku Klux Klan was the terrorist wing of the Southern White Democratic Party, and its membership largely consisted of former Confederate soldiers resisting the results of the war and Reconstruction.<sup>94</sup> They tried to resist – and were ultimately successful in resisting – constitutional requirements and the results of the war by assassination, violence, and voter fraud.<sup>95</sup>

Thus, in many ways, former Confederate soldiers continued their resistance to the national government and union supporters all the way into the 1870s and perhaps the 1880s. These events show that the situation was more ambiguous and nuanced than the simplistic use of the formal surrender of Confederate Armies or the Proclamation of President Johnson that resistance had “virtually”<sup>96</sup> ceased might suggest.

This had gone on throughout the time the 39th Congress was deliberating over the 14th Amendment. President Johnson did not proclaim a total end of hostilities in the United States coming from the war until August 20 of 1866, approximately three months after the 14th Amendment was proposed by Congress.<sup>97</sup> Thus, the debate, proposal, recommendation, and beginning of the ratification of the Amendment all took place during a time of great military uncertainty.

### *C. Andrew Johnson and the Loss of Life*

The third challenge that the 39th Congress had involves the reasons for the attempt to remove President Johnson from office. Johnson was not Abraham Lincoln. In fact, Johnson was “a firm believer in the superiority of the white race, a prejudice he would never be able to overcome.”<sup>98</sup> Johnson was not simply disagreeing with the Congress on certain policy issues; he was also removing commanders who enforced congressional law and replacing them with commanders who would not enforce it. Johnson even removed war hero Philip Sheridan from his position as a military governor because he was enforcing the law and

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94. *See id.* at 342.

95. *See id.* (stating that the Ku Klux Klan launched “a ‘reign of terror’ against Republican leaders black and white” that included violence, murder, and intimidation).

96. *See* LONG, *supra* note 16, at 687.

97. LONG, *supra* note 16, at 696-97.

98. HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 36 (1989). According to Trefousse, Johnson considered himself successful because “[h]e had preserved the South as a ‘white man’s country.’” *Id.* at 334.

supporting the Congress.<sup>99</sup> Johnson was encouraging the white southern former slaveholders to resist Reconstruction, and people were dying. This was not simply a philosophical disagreement, this was a disagreement that was resulting in thousands of people losing their lives because the President of the United States was trying to undermine the Congress, undermine the results of the war, and refusing to enforce the law as required by the Constitution.

## II. ACTIONS BY THE 39TH CONGRESS

What did the Congress do when faced with all these problems? They did what any legislative body does – they legislated. The legacy of the 39th Congress is in the 807 pages of Volume 14 of the U.S. Statutes. If one reviews that volume, what one finds is that over the course of its term, the 39th Congress passed 714 pieces of legislation.<sup>100</sup> This was more legislation than any Congress had ever passed up to that time. They faced problems and they tried to come up with solutions to those problems. At least three of these merit mention.

First, the 39th Congress passed the Civil Rights Act in 1866, the first Civil Rights Act in our history.<sup>101</sup> It is the first time there was a statutory definition of citizenship and it also defines some of the rights of citizens.<sup>102</sup> President Johnson vetoed the statute, but it was passed over his veto.<sup>103</sup>

Next, the Congress extended the Bureau of Freedmen and Refugees for another two years.<sup>104</sup> People often view the Bureau as designed to only help people formerly held in slavery. While that was its predominant role, it also helped people of all races who were suffering because of the war. It provided substantial legal protections for those who were under the jurisdiction of the white racist governments Johnson

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99. ISRAEL, *supra* note 37 at 237. Both houses of Congress adopted a resolution condemning Johnson's dismissal of Sheridan and censuring Johnson. TREFOUSSE, *supra* note 98, at 310. The harshness of the times may be seen in a speech by Congressman Elihu B. Washburne (R-Ill.): "His whole official career as President has been marked by a wicked disregard of all the obligations of public duty and by a degree of perfidy and treachery and turpitude unheard of in the history of the rulers of a free people; his personal and official character has made him the opprobrium of both hemispheres, and brought ineffable disgrace on the American name." ISRAEL, *supra* note 37 at 237.

100. 14 Stat. 1-809 (1865-1867). These include public and private bills, resolutions, and treaties.

101. 14 Stat. 27 (1866).

102. *See id.*

103. TREFOUSSE, *supra* note 98, at 245-47.

104. 14 Stat. 173 (1866).

had established. Johnson vetoed this bill<sup>105</sup> and the Congress passed it over his veto.<sup>106</sup> In taking these actions, Johnson was breaking with the Republican Party. In part because of Johnson's silence and in part because his allies in Congress had voted for the Freedmen's Bureau Bill, Johnson's veto of the bill was an "utter surprise" to Congress.<sup>107</sup> Similarly, the Civil Rights Bill of 1866 was considered such a moderate proposal and had such widespread support that Johnson's veto of that bill was thought by many Republicans to be "a declaration of war against the party and the freedmen."<sup>108</sup>

Third, the Congress proposed the 14th Amendment, which will be discussed below. Though President Johnson was unable to veto the proposed Amendment, he opposed it and even supported a counter-14th Amendment designed to preserve the status quo.<sup>109</sup>

In these actions, as well as their other legislation, the 39th Congress made its mark upon the face of U.S. Constitutional Law.

### III. THE OVERRIDING GOAL OF THE 39th CONGRESS: ENDING THE WAR AND SECURING THE PEACE FOR THE FUTURE

If one looks at other wars in history one will find that this Congress was no different than those of other eras. World War I was the "war to end all wars."<sup>110</sup> The fighting of the war, the removal of the Kaiser in Germany, the creation of a democracy in Germany, the dismantling of the Austro-Hungarian Empire, and the creation of the League of Nations were all part of a design to stop future wars from occurring. In the aftermath of World War II, the Allies decided that they had to occupy Japan and Germany. Further, they determined that, in order to preserve peace in the future, they had to make sure that the militarists of Japan and the Nazis of Germany were no longer in positions of authority and power. If one looks at the second Iraq war, once the conventional battle

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105. See CONG. GLOBE, 39th Cong., 1st sess. 3838 (1866) ("The legislation which it proposes would not be consistent with the welfare of the country . . .").

106. CONG. GLOBE, 39th Cong., 1st sess. 3842 (1866).

107. FONER, *supra* note 86, at 247.

108. *Id.* at 249.

109. This proposal is discussed in Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627, 660 n.228 (1994). That work includes citations for sources of the original text and discussion of the counter-amendment.

110. See EDWARD M. COFFMAN, *THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I* 364 (1998).

was over and the civilian government was established, none of Saddam Hussein's party was allowed to hold any office in the government.<sup>111</sup>

That is exactly what the 39th Congress was doing. Time and time again, in countless speeches and newspaper articles, we read that the Unionists wanted to "secure the peace." The ultimate goal of the 39th Congress was to keep a civil war from happening again.

For example, in the Ohio Republican Convention of June 21, 1865, the Republicans stated that they desired a quick "reconstruction" of the "insurgent States[,] but they also insisted "that such reconstruction shall be at such time and upon such terms as will give unquestioned assurance of the peace and security, not only of the loyal people of the rebel States, but also for the peace and prosperity of the Federal Union."<sup>112</sup>

Immediately after the recommendation of the 14th Amendment by Congress, the Ohio Union Republican Convention of June 20, 1866 endorsed it, demanding that "peace shall be established upon such stable foundations that rebellion and secession will never again endanger our national existence."<sup>113</sup> Congressman Bingham himself, speaking on the campaign trail in the all-important congressional elections of 1866, touted the Amendment as the way in which to "[s]ecure a permanent peace by establishing freedom and justice throughout the whole land."<sup>114</sup> Senator John Sherman (R-Ohio), the brother of General William T. Sherman, advocated for the Amendment by indicating that the government had the "right to take a bond of [the rebels] for the future safety of this country."<sup>115</sup>

These goals were confirmed after ratification by Major General Wager Swayne, winner of the Medal of Honor and son of Justice Noah Swayne, in a speech before the New York Commandery of the Military Order of the Loyal Legion:

The fruits of our war are gathered and preserved . . . in three short paragraphs which are amendatory of the Federal Constitution. They

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111. Richard A. Oppel, Jr., *Iraqi Court Bars at Least 90 Candidates for Parliament*, N.Y. TIMES, Dec. 25, 2005, at YT12. I am not trying to draw analogies between the leaderships in those various countries identified and the southern white racist leadership. But I am trying to point out that no matter what the leadership of a given group, if they cause a war, a normal response by the winner of the war is to remove that leadership group from power as one of the means of avoiding future wars.

112. OHIO PLATFORMS, *supra* note 27, at 24.

113. *Id.* at 27.

114. *The State and the Nation*, CADIZ REPUBLICAN (Ohio), Aug. 15, 1866. The speech was given on August 8, 1866.

115. THE CINCINNATI COMMERCIAL, Sept. 29, 1866, at 1.

were adopted soon after the war, and with the express intention to make its results secure.<sup>116</sup>

During the Civil War, the Congress created a Joint Committee on the Conduct of the War made up of members of both the Senate and the House.<sup>117</sup> The 39th Congress took the same approach as it addressed the issues involved in securing the peace. They formed the Joint Committee of Fifteen on Reconstruction, made up of leading members of the House and Senate, to consider how to address these monumental issues.<sup>118</sup> It was well balanced between the different factions of the Republican Party and at least some of the more reasonable leaders of the Democratic Party. The Joint Committee was chaired by Senator William P. Fessenden (R-Maine), who has been described by a leading expert on Reconstruction as a “conservative,”<sup>119</sup> but the Joint Committee was clearly controlled by moderates.<sup>120</sup>

As a prelude to their proposals, they held hearings and produced a lengthy report. Approximately 150,000 copies of this document were published, and it was not only summarized in newspapers, but distributed across the country.<sup>121</sup> There were over 80 amendments proposed in Congress at various times to deal with Reconstruction, all of which were referred to the Joint Committee, and public discussions outside of Congress.<sup>122</sup> As the Joint Committee worked to craft this

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116. WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861: AN ADDRESS DELIVERED BEFORE THE NEW YORK COMMANDERY OF THE MILITARY ORDER OF THE LOYAL LEGION 4* (1892). In summarizing the effect of section 1 of the 14th Amendment, Swayne wrote that it was to assure “to the citizens the full enjoyment of all his rights and privileges . . . .” *Id.* at 5. Swayne focused upon Section 1 of the Amendment and this allowed him refer to the key provisions of the 13th, 14th, and 15th Amendments as three paragraphs. *See id.* at 4-5.

117. The committee was approved by the Senate on December 9, 1861, and approved by the House the following day. LONG, *supra* note 16, at 147-48.

118. *See THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, supra* note 22, at 37.

119. BENEDICT, *supra* note 24, at 32.

120. *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, supra* note 22. The members of the Joint Committee were Senator William P. Fessenden (R-Me.), Chair; Senator Jacob M. Howard (R-Mich.); Senator James W. Grimes (R-Iowa); Senator George H. Williams (R-Or.); Congressman Justin S. Morrill (R-Vt.); Senator Ira Harris (R-N.Y.); Senator Reverdy Johnson (D-Md.); Congressman Thaddeus Steven (R-Pa.); Congressman John A. Bingham (R-Ohio); Congressman Roscoe Conkling (R-N.Y.); Congressman George S. Boutwell (R-Mass.); Congressman Elihu B. Washburn (R-Ill.); Congressman Henry T. Blow (R-Mo.); Congressman Henry Grider (D-Ky.); and Congressman Andrew J. Rogers (D-N.J.). *Id.*

121. *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, supra* note 22, at 264-65.

122. Aynes, *supra* note 40, at 377 (estimate by Democratic candidate for Governor in Ohio, George W. Morgan). MEYER, *supra* note 3, at 53 (indicating, without citation of a source, that more than seventy amendments were introduced into the 39th Congress).

constitutional amendment, it is clear they built on all the background, thoughts, and ideas that had been discussed before.<sup>123</sup>

It is important to emphasize that, as they developed the terms of the 14th Amendment, these Congressmen were not writing on a clean slate. They were writing based on 30 years of anti-slavery debates, litigation, struggles for free speech and freedom of the pulpit, countless platforms of a variety of political parties, and the collective, shared experiences of their generation.

*Harper's Weekly*, for example, wrote in 1861 that while they were fighting a war they were already planning what was going to happen afterward.<sup>124</sup> This was that "'the North,' after conquering this rebellion, means to have guarantees for its rights."<sup>125</sup> One of the items they set forth was the constitutional right "of going freely every where in the country, and of freely expressing every where his opinion."<sup>126</sup> In other words, no longer could the Slave Power oligarchy keep someone out of South Carolina because he/she was a Republican judge who came down to file a suit arguing that the state law requiring the jailing of Massachusetts citizens who were sailors while they were in port was unconstitutional.<sup>127</sup> States could no longer punish people for expressing opinions that the state did not like.<sup>128</sup>

The 14th Amendment reads more like the Constitution than an amendment because there are multiple provisions.<sup>129</sup> In Section 1, citizenship is defined, the privileges or immunities of U.S. citizens<sup>130</sup> are guaranteed, and every person is guaranteed equal protection and due process of law.<sup>131</sup> Section 2 treats the question of how members of

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123. My work on telling the story of the work of the Joint Committee on Reconstruction is found in Aynes, *supra* note 40, at 370-401.

124. *The Union – In the Future*, HARPER'S WEEKLY, June 15, 1861, at 370.

125. *Id.*

126. *Id.*

127. The discussion of the officially sponsored mob action to expel Massachusetts Judge Samuel Hoar and his daughter from South Carolina because he wanted to contest South Carolina law against African-American citizens of Massachusetts was a frequently discussed event in Congress. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (Representative John M. Broomall (R-Pa.)).

128. MICHAEL KENT CURTIS, FREE SPEECH, 'THE PEOPLE'S DARLING PRIVILEGE': STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 271-88 (2000) (on the free speech battle over Hinton Helper's *Impending Crisis*). *Id.* at 289-99 (on the free speech battle over Rev. Daniel Worth).

129. U.S. CONST. amend. XIV.

130. For a discussion of historical and legal support for the conclusion that privileges and immunities are the "rights" of citizens and what those rights mean, see Aynes, *supra* note 18.

131. U.S. CONST. amend. XIV, § 1.

Congress will be apportioned.<sup>132</sup> Section 3 disqualifies people from holding office who previously held a U.S. office and violated their oath by engaging in insurrection or rebellion.<sup>133</sup> Section 4 protects the public debt, barred payment of the debt of those involved in insurrection, and prohibited any claims for compensation for the emancipation of people previously held in slavery.<sup>134</sup> Section 5 gives Congress the power to enforce the provisions of the Amendment through “appropriate legislation.”<sup>135</sup>

The adoption of the 14th Amendment was analogous to the adoption of the Constitution: all of these clauses were presented as a package, on a take it or leave it basis. One had to take it all or leave it all, but one could not pick and choose. This is analogous to one adding a rider to an appropriations bill where another objects to the rider, but the objector still votes for the passage of the entire bill in order to accomplish the larger purpose.

There may be some minor inconsistencies between the public understanding of the Amendment and what happened after the Amendment passed. But many of these inconsistencies may result from the broad-based view in which some of the states wanted to make changes, but thought that adopting the Amendment was the lesser of the two evils.<sup>136</sup>

The Amendment was reported out of the House of Representatives, and because of the overwhelming Republican majority and that fact that the Amendment was a moderate proposal that appealed to so many people, the vote was not even close. The Amendment passed the House 128-37.<sup>137</sup> It was next considered by the Senate. After some preliminary debate, the Senate went into a private caucus.<sup>138</sup> The results of the caucus led to two actions – they added the Citizenship Clause and they also changed the Disqualification Clause. With that, after some debate

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132. U.S. CONST. amend. XIV, § 2. For a discussion of the importance of this provision after the Thirteenth Amendment abolished the 3/5 clause, see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What they Tell Us about its Interpretation*, 39 AKRON L. REV. 289, 313-15 (2006).

133. U.S. CONST. amend. XIV, § 3.

134. U.S. CONST. amend. XIV, § 4. Aynes, *supra* note 132, at 316-17 (discussing the importance of Section 4).

135. U.S. CONST. amend. XIV, § 5.

136. Aynes, *supra* note 132, at 309, 320.

137. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

138. See BENEDICT, *supra* note 24, at 185-86 (discussing the caucus and stating that Senators Fessenden, Grimes, and Howard were charged with altering the Amendment based upon the caucus discussion, and summarizing the changes that were eventually made).

and additional changes, the Senate approved the Amendment overwhelmingly by a vote of 33-11.<sup>139</sup> The Senate was more conservative than the House, and the fact that no Republican Senator voted against the Amendment was seen as evidence that the changes had eliminated all “vestiges of radicalism” from the proposal.<sup>140</sup> When the amended Amendment went back to the House, the vote was again overwhelming: 120-32.<sup>141</sup> The support for the Amendment in the Congress is beyond question. It is not like a 5-4 decision by the Supreme Court,<sup>142</sup> the election of a President by the Electoral College while losing the popular vote,<sup>143</sup> or even a very close election in the popular vote where a President wins in the Electoral College as well.<sup>144</sup> The legislative branch had expressed its view with great clarity.

The fact that the Amendment rejected what were considered to be “radical” proposals and became a moderate provision which would appeal to the mass of voters was seen in the actions of the *New York Times*. The *Times* was considered a “conservative” paper and had backed President Johnson in his dispute with the Congress.<sup>145</sup> But the Amendment convinced the *Times* to support the Congress against the President because the Amendment was a “good faith . . . measure of protection on the one hand and of reconciliation on the other.”<sup>146</sup>

The question became, what would the states do in response?

### III. INTERPLAY BETWEEN THE CONGRESS, PRESIDENT JOHNSON, AND THE RATIFYING STATES

The Amendment then went to the states for consideration of the people through their state legislatures. The first state to ratify was

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139. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

140. BENEDICT, *supra* note 24, at 186. Unionists Lovell Rousseau (Ky.) (who was counted as a Democrat by BARNES, *supra* note 17, at 613) and Thomas E. Noell (R-Mo.) both abstained rather than vote against the measure. BENEDICT, *supra* note 24, at 186.

141. CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

142. *E.g.*, Slaughter-House Cases, 83 U.S. 36 (1873).

143. Examples of such elections include the presidential elections of 1876 and 2000.

144. An example of such an election is the presidential election of 1960.

145. Aynes, *supra* note 40, at 386.

146. *Id.* (omission in original) (citing *The Reconstruction Problem — Mr. Bingham’s Speech*, N.Y. TIMES, Jan. 18, 1867, at 4).

Connecticut,<sup>147</sup> followed by New Hampshire.<sup>148</sup> The third state to ratify the Amendment was Tennessee.<sup>149</sup>

Tennessee is an interesting state because most people think of the southern states as monolithic Confederate states. But in reality each of those states had individuals who were loyal to the Union and estimates on the number of white Union soldiers from the eleven so-called Confederate states are between over 80,000 to almost 300,000, with slightly more than 100,000 probably being the most reliable estimate.<sup>150</sup>

Tennessee was one of the states with the strongest Unionist sentiment.<sup>151</sup> Eastern Tennessee was similar to what became West Virginia in topography, scarcity of people held in slavery, and its political views in resenting the slave-holding aristocracy that dominated the state.<sup>152</sup> Further, Tennessee had the tradition of Unionist President Andrew Jackson who, when faced with the nullification crisis in South Carolina and advised that it was unclear whether the militias of the other states would support him or not, declared: "I will die with the Union."<sup>153</sup>

While the loyalists were split between former Whigs and Democrats, many of them were "Andrew Jackson Democrats."<sup>154</sup> Eastern Tennessee roundly defeated the secessionist movement in its own counties. When the war came, it is estimated that 42,000 white soldiers from Tennessee volunteered and served in the Union Army.<sup>155</sup> Much of President Lincoln's anxiety early in the war was how to provide military support for these Mountain Loyalists, something he was not able to accomplish until 1863 when General Ambrose E. Burnside occupied Knoxville.<sup>156</sup>

Tennessee was also the home of President Andrew Johnson. Johnson had been the only Southern Senator not to leave the U.S. Senate

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147. *Constitutional Amendments*, *supra* note 30, at 13. Connecticut ratified the Amendment on June 25, 1866. *Id.*

148. *Id.* New Hampshire ratified the Amendment on July 6, 1866.

149. *Id.* Tennessee ratified the Amendment on July 19, 1866.

150. RICHARD NELSON CURRENT, *LINCOLN'S LOYALISTS: UNION SOLDIERS FROM THE CONFEDERACY* 218 (1992); *see also id.* at 213-18 ("Appendix: The Question of Numbers") (discussing estimates ranging from approximately 86,000-296,000 and how he arrived at the number 100,000).

151. *See generally id.*; BENEDICT, *supra* note 24, at 186.

152. SIFAKIS, *supra* note 57, at 82. *See also* CURRENT, *supra* note 150, at 33 (detailing Lincoln's plan to "bring about a revolt on the part of the Unionists in East Tennessee").

153. GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA: 1828-1848* 75 (1959).

154. Andrew Johnson himself has been characterized as a Jacksonian Democrat. SIFAKIS, *supra* note 57, at 342. TREFOUSEE, *supra* note 98, at 82.

155. CURRENT, *supra* note 150, at 215.

156. SIFAKIS, *supra* note 57, at 93-94.

after secession and eventually was the Military Governor of Tennessee.<sup>157</sup> Johnson sought to exercise influence in the state and attempted to use that influence to defeat the Amendment.

Johnson's connection with Tennessee and the fact that its majority had fought against the Union no doubt hurt it in the Congress. Nevertheless, at least the moderate Republicans wanted to recognize the Unionists in Tennessee and be able to readmit their representatives to the Congress.<sup>158</sup> This was not because the Republicans thought they "needed" the support of Tennessee to adopt the Amendment. They believed they needed only the votes of the loyal states that had active governments in the Union.<sup>159</sup> But Tennessee's ratification was seen as a symbolic signing of the "peace treaty" of the war, and its readmission would be an incentive for other rebellious states to come back to the fold in a like manner.<sup>160</sup>

We think of Thaddeus Stevens (R-Pa.) as being the leader of House. But Stevens was unwilling to guarantee admission to the rebellious states if they ratified the 14th Amendment.<sup>161</sup> Bingham, the "moderate," supported admission for Tennessee if it ratified the Amendment.<sup>162</sup> The moderates won over Stevens.<sup>163</sup>

The Governor of Tennessee was a Union man, William G. Brownlow.<sup>164</sup> The 14th Amendment was clearly a moderate proposal that commanded the support of the overwhelming majority of the nation, as would eventually be demonstrated by the 1866 elections.<sup>165</sup>

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157. *Id.* at 342.

158. Because Tennessee was controlled by loyal men, the Senate caucus had approved admitting Tennessee's Congressmen back into the Congress as soon as the state ratified the 14th Amendment. BENEDICT, *supra* note 24, at 186.

159. See *The Fourteenth Amendment*, MARYSVILLE TRIBUNE, Jan. 22, 1868 (reprinting an editorial from *The Delaware Gazette*) (arguing that because 22 of the 24 non-rebellious state legislatures had ratified the amendment, it was already in effect).

160. See Aynes, *supra* note 40, at 387. The restoration of Tennessee would act as "[a]n inducement to other Southern states to ratify the amendment." *Id.*

161. See BENEDICT, *supra* note 24, at 211.

162. See *id.*

163. See *id.* at 186 ("[T]he Republicans agreed to modify the Reconstruction bill reported by the Reconstruction committee to provide for restoration of each southern state upon its ratification of the constitutional amendment rather than upon the amendment's incorporation into the Constitution.").

164. SIFAKIS, *supra* note 57, at 82.

165. I realize that some may object here, because the white southern elite and their allies were not allowed to vote in this election. But neither were the white unionists living in the south allowed to vote and, more importantly, neither were the new citizens under the 1866 Civil Rights Act allowed to vote. In order to contest the results of this election one has to disqualify the African-American vote and ally one's self with the white racist elite.

Nevertheless, and contrary to the advice of many of his advisors, Johnson opposed the 14th Amendment.<sup>166</sup> He tried to advance a watered-down counter-amendment<sup>167</sup> and intervened in urging the white government of Alabama to defeat the proposed ratification.<sup>168</sup> This, in turn, spurred other white supremacist governments in the former Confederate states to repudiate the amendment.<sup>169</sup>

Nevertheless, the Tennessee Unionist government, working hand-in-glove with moderate Republicans in the Congress like John Bingham, quickly ratified the Amendment. Governor Brownlow sent a telegram to the Clerk of the Senate which read, in part: “We have ratified the Constitutional Amendment in the House . . . . Give my respects to the dead dog of the White House.”<sup>170</sup> Tennessee’s representatives were quickly readmitted to the Congress.

Other southern states controlled by the old aristocracy with Johnson’s encouragement did not ratify. They decided they were just going to wait and see what happened in the 1866 congressional elections. The congressional elections of 1866 become a referendum on the 14th Amendment.<sup>171</sup> It was the major issue of the campaign and resulted in a complete rout for the Democrats. On July 21, 1868, Congress declared the Amendment adopted.<sup>172</sup>

#### IV. SECURING THE FUTURE PEACE

Professor Charles Fairman, a student and long-time ally of Justice Frankfurter who taught at Stanford and Harvard, set the agenda for 14th Amendment scholarship from 1949 until the mid-1980s.<sup>173</sup> At one point, Fairman wondered how any of this could possibly have any effect on defending against a future war. The answer is aptly summarized by an 1860 article in *Harper’s Weekly*:

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166. TREFOUSSE, *supra* note 98, at 271, 274.

167. *See* Aynes, *supra* note 109.

168. TREFOUSSE, *supra* note 98, at 275.

169. *Id.*

170. *Id.* at 253 (omission in original).

171. WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 60 (1988).

172. Aynes, *supra* note 40, at 396. Secretary of State William Seward declared that it was adopted on July 28, 1868. *Id.*

173. Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995) (discussing Fairman’s scholarship and his relationship with Felix Frankfurter).

It was the knowledge that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South, slavery would be destroyed by the common-sense of the Southern people, which made [John] Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years.<sup>174</sup>

These were Republicans, Unionists, and antislavery advocates who started out as a minority, maybe even a despised minority. But by using free speech – including freedom of the press and freedom in the pulpit – they were able not only to establish the party, but to win the national election. They believed passionately in free discussion. They believed that had they been able to go into the south without being threatened and campaign in the south, had they been able to have free speech in the south and talk about slavery, they believed there would have never been a Civil War. They therefore believed that freedom of speech and other rights were going to protect the country from a future war, and that this was part of the security for the future.

There have been some disputes in interpreting the 14th Amendment, and other articles in this issue discuss those problems.<sup>175</sup> But Justice Swayne made an important point in his *Slaughterhouse Cases* dissent: “By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.”<sup>176</sup> That is what the 14th Amendment is supposed to do.

There is also an argument that I have termed “racism trumps equality.” It goes like this. These were terrible times and even the abolitionists were in some way racist and responsive to their racist constituents: everything was so racist in those days that one cannot interpret the words as they are written. Rather, it is argued, one has to interpret them in light of this racism and therefore one has to interpret them very narrowly.<sup>177</sup>

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174. *The Truth Confessed*, HARPER'S WEEKLY, Jan. 16, 1864, at 34 (emphasis added).

175. Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1053 (2009); David S. Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights*, 42 AKRON L. REV. 1131 (2009); “Horror of a Woman”: Myra Bradwell, the Fourteenth Amendment and the Gendered Origins of Sociological Jurisprudence, 42 AKRON L. REV. 1207 (2009); William J. Rich, “Why Privileges and Immunities”? An Explanation of the Framers' Intent, 42 AKRON L. REV. 1113 (2009).

176. 83 U.S. 36, 129 (1872) (Swayne, J., dissenting).

177. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 10 (1977).

There are strong counter-examples from 14th Amendment author John Bingham (a moderate and one of the leaders of the House) about the Equal Protection Clause.<sup>178</sup> He is even called a man of “conservative tendency” by the editor of *The Journal of the Joint Committee of Fifteen on Reconstruction*.<sup>179</sup> What is recounted, then, are not radical ideas out of the mainstream, but rather from the people in the middle.

In 1862, during the debate over the abolition of slavery in the District of Columbia, Bingham said the following:

No matter upon what spot of the earth’s surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; . . . no matter whether strong or weak, this new Magna Charta<sup>180</sup> to mankind declares the rights of all to life and liberty and property are equal before the law . . .<sup>181</sup>

This is a very expansive definition of a person or mankind.

In 1866 Bingham defended the efforts that African-Americans made in the Civil War, and there was a rather obscure Democratic Congressman by the name of James W. Chanler (D-N.Y.) who used the standard Democratic argument. Chanler claimed that the African race had never accomplished anything, had no prior history, and were not capable of voting, so they should not be involved in the government.<sup>182</sup> This was, in Chanler’s view, a white man’s government.<sup>183</sup>

This is what Bingham the moderate said, even though one will see he was not the diplomat that Lincoln was on occasion. Bingham had very strong feelings about this. In this exchange he said:

I will bear witness now, by the authority of history, that this very race of which he speaks is the only race now existing upon this planet that ever hewed their way out of the prison-house of chattel slavery to the sunlight of personal liberty by their own unaided arm.<sup>184</sup>

Then Bingham talked about them in the war and he said:

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178. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 37 (1988). Bingham drafted the first section of the Fourteenth Amendment. *Id.*

179. *THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION*, *supra* note 22, at 185.

180. Bingham was not talking about the 14th Amendment here, but rather about the 5th Amendment.

181. *CONG. GLOBE*, 37th Cong., 2d Sess. 1638 (1862).

182. BARNES, *supra* note 17, at 67; *CONG. GLOBE*, 39th Cong., 1st Sess. 216-22 (1866).

183. BARNES, *supra* note 17, at 67.

184. *Id.* at 68.

[T]hese people have borne themselves as bravely, as well, and, if I may add, as wisely during the great contest just closed, as any people to whom [Chanler] can point, situated in like circumstances, at any period of the world's history.<sup>185</sup>

Bingham noted that even though slavery existed for two centuries:

. . . the moment that the word 'Emancipation' was emblazoned upon your banners, those men who, with their ancestors, had been enslaved through five generations, rose as one man to stand by this republic . . .<sup>186</sup>

In talking about the war effort itself, and I am trying to convey the zeal that Bingham had, he said that they were

. . . doing firmly, unshrinkingly, and defiantly their full share in securing the final victory of our arms. I have said this much in defense of men who had the manhood, in the hour of the nation's trial, to strike for the flag and the unity of the republic in the tempest of the great conflict, and to stand, where brave men only could stand, on the field of poised battle, where the earthquake and the fire led the charge. Sir, I am not mistaken . . .<sup>187</sup>

At another point, Congressman S.S. Cox (D-Ohio) accused Bingham of being willing to have all actions taken which would affect the southern states, but that Bingham would take steps to try to stem the immigration of African-Americans into Ohio. Bingham's reply was consistent with what he had previously argued with respect to Kansas and Oregon:

I desire to say to the gentleman that I have no idea myself that under any possible pressure I will ever consent that any man born upon the soil of this Republic, by any vote or any word of mine would ever be excluded from any state, my own included.<sup>188</sup>

There are thousands of examples of why this "racism trumps equality" theme just does not work.

## VI. CONCLUSION

The members of the 39th Congress were not perfect people. They talked about overcoming their own acknowledged prejudices. These

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185. *Id.* at 69.

186. *Id.* at 70.

187. *Id.*

188. CONG. GLOBE, 37th Cong., 2nd Sess. 241 (1862).

Congressmen and state ratifiers did not write into the 14th Amendment their own worst practices and bad conduct. Instead, they wrote into the 14th Amendment their highest ideals and their best aspirations. They said they were trying to “perfect” the Constitution.<sup>189</sup> They probably failed at that, but we honor them 140 years later for striving for those ideals, for making progress – as imperfect as it may have been. Their efforts should inspire us to endeavor to make the Constitution, in *interpretation* and *application* as well as word, if not perfect, at least more perfect than we inherited it.

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189. CONG. GLOBE, 39th Cong., 1st sess. 156 (1866). *See also Eloquent Speech of Hon. John A. Bingham*, CADIZ REPUBLICAN (Ohio), Aug. 15, 1866, 2, at col. 3 (object of the amendment to “restore this Republic and perfect your Constitution”).

