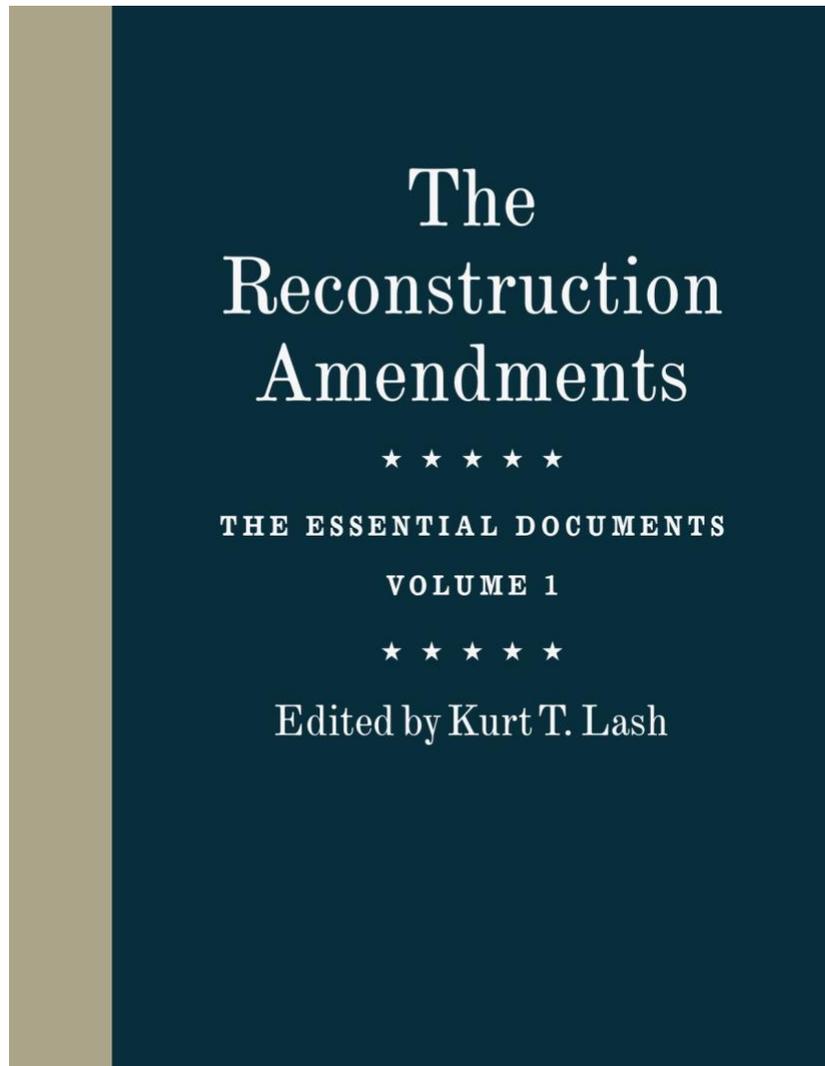


**Constitutional Reconstruction:  
The Origins of the Thirteenth, Fourteenth and Fifteenth Amendments**

A Fourteen Week Course Based on  
THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS, Vols. 1 & 2  
(Kurt T. Lash, ed., U. Chicago Press 2021).

*Syllabus & Teachers Manual*  
Kurt T. Lash



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## I. Course Description

### ***“Constitutional Reconstruction: The Thirteenth, Fourteenth and Fifteenth Amendments”***

A Fourteen Week Course Based on  
THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS, Vols. 1 & 2  
(Kurt T. Lash, ed., U. Chicago Press 2021).

#### ***Teachers Manual***

*Course Title:* “Constitutional Reconstruction: The Thirteenth, Fourteenth and Fifteenth Amendments”

*Course Textbook:* The primary text for this course is THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS, Vols. 1 & 2 (Kurt T. Lash, ed., U. Chicago Press 2021). This text contains all of the assigned original historical documents, along with substantive introductory material providing the relevant historical context.

*Course Description:* This course explores the historical origins, framing and passage of the Thirteenth, Fourteenth and Fifteenth Amendments. The Thirteenth Amendment abolished slavery along with its badges and incidents. The Fourteenth Amendment established birthright citizenship and nationalized the protection of fundamental rights. The Fifteenth Amendment protected the right to vote against racial discrimination. These “Reconstruction Amendments” represent the culmination of an extended national constitutional debate—one which began with the adoption of the original Constitution in 1787 and ended with the 1870 adoption of the Fifteenth Amendment and what Frederick Douglass described as “a new world.”

Over the course of fourteen weeks, students will study original historical documents containing the public debates over the nature of the original Constitution and its relationship to slavery, the role of federalism in antebellum debates over slavery and its abolition, Garrisonian and constitutional abolitionist theory, the evolving understanding of the rights of national citizenship, theories of nullification and secession, the meaning and protection of freedom, the extraordinary struggle to frame and ratify the Fourteenth Amendment, and the securing of black suffrage. These documents include voices from across the political, ideological and regional spectrum. They include northern abolitionists, southern slavery apologists, women’s rights advocates, self-emancipated black Americans, the members of the freedmen conventions, federal and state politicians, national and local newspaper essayists, critical northern Democrats, supportive southern Loyalists, and radical, moderate and conservative Republicans.

By the end of the course, students will understand the general nature of the antebellum constitutional debate, the primary arguments of those who advocated or opposed post-bellum constitutional reform, and the original historical sources that are available for further historical research.

## II. Sample Syllabus (brief)

### The Reconstruction Amendments Syllabus

#### Week 1: *Antebellum Constitutionalism*

Class 1: Madisonian Federalism and the “Principles of ’98.”

Class 2: Early Debates on the Nature of the Constitution: Federalism, Nationalism, and Nullification

#### Week 2: *Slavery and the Original Constitution*

Class 1: Slavery and the Founding

Class 2: Southern Slavery and Northern Abolitionism

#### Week 3: *Pro-Slavery Nationalism, Abolitionist Constitutionalism*

Class 1: Slavery as National Policy

Class 2: Garrisonian and Constitutional Abolitionism

#### Week 4: *Dred Scott and Abolitionist Resistance*

Class 1: Dred Scott, Frederick Douglass

Class 2: Federalism and the Northern Abolitionist Resistance

#### Week 5: *Secession, Civil War, and Emancipation*

Class 1: Southern Secession, James Buchanan, and The Corwin Amendment

Class 2: War Time Emancipation

#### Week 6: *Framing and Passing the Thirteenth Amendment*

Class 1: Congressional Debate: The Failed First Attempt

Class 2: Congressional Debate: The Second Attempt and Success

#### Week 7: *Ratifying the Thirteenth Amendment: Interpretations and Implications*

Class 1: Andrew Johnson, Provisional Governments and Ratification

Class 2: The Thirty-Ninth Congress and the Exclusion of the Southern States

#### Week 8: *The Agendas of the Thirty-Ninth Congress: Amendments and Statutes*

Class 1: The Early Months: Proposed Amendments, Vetoed Statutes

Class 2: The 1866 Civil Rights Act

Week 9: *A Five-Sectioned Fourteenth Amendment: Framing and Passage.*

Class 1: Framing and Passing the Final Version of the Amendment

Class 2: Ratification Phase 1: The Congressional Election of 1866

Week 10: *Securing the Ratification of the Fourteenth Amendment*

Class 1: Ratification Phase 2: The Second Session of the Thirty-Ninth Congress

Class 2: Ratification Phase 3: The Impeachment of President Andrew Johnson and Final Ratification

Week 11: *The Fifteenth Amendment: Framing and Passage*

Class 1: Framing the Fifteenth Amendment (I)

Class 2: Framing the Amendment (II), Passage

Week 12: *The Fifteenth Amendment: Ratification*

Class 1: Ratification (I)

Class 2: Ratification (II)

Week 13: *Early Interpretation (I)*

Class 1: The Petition of Victoria Woodhull; John Bingham and the Privileges or Immunities Clause (1871)

Class 2: The Slaughterhouse Cases (1873)

Week 14: *Early Interpretation (II)*

Class 1: *Bradwell v. The State* (1873); *Minor v. Happersett* (1875)

Class 2: *United States v. Reese* (1876); *United States v. Cruikshank* (1876)

### III. Note to Instructors and Sample Weekly Reading Assignments (extended)

#### THE RECONSTRUCTION AMENDMENTS

##### *Instructor's Notes and Extended Syllabus*

This teaching guide provides an example of how instructors can organize a fourteen-week course around the materials presented in the two-volume collection, *THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS* (Kurt T. Lash, ed., University of Chicago Press, 2021) This unique collection of original historical documents presents the public constitutional debates which culminated in the passage of the Thirteenth, Fourteenth and Fifteenth Amendments.

The overall goal of the course is to provide students with a basic understanding of the public debates attending the framing, passage and ratification of the Reconstruction Amendments. Because these debates both expressly and implicitly involve ideas and disputes that first emerged during the years prior to the Civil War, the course begins by studying antebellum constitutional debates involving slavery, the nature of the original Constitution, and the rights of citizens and non-citizens. A basic awareness of these antebellum ideas and debates prepares students to understand the nature and content of the historical debates surrounding the framing and passage of the Reconstruction Amendments.

The two-volume collection contains a wealth of original historical material, most of which has never before been collected and published in book form. No other work contains the constitutional framing and ratification debates, including the major state ratification debates. This collection includes, but goes much further than, the congressional debates; it includes a wealth of voices from outside of the halls of Congress—women's rights groups, black abolitionists, political essayists, and newspaper editorialists. The collection's goal is to present the public debate in its fullest available form. Accordingly, this collection will be especially helpful to the student, scholar, lawyer or judge seeking information about the original public understanding of the three Reconstruction amendments.

Given the wide range of topics and materials included in the two volumes, each instructor will curate the assigned materials in a manner that reflects their particular goals and emphasis. The syllabus below presents *one* way of doing so.

Students are not expected to enter the course with any specialized historical knowledge. In order to provide essential background historical information, the course textbook includes scholarly essay at the beginning of each major section of documents. These essays explain both the historical context and the particular importance of the included historical documents. ***Instructors are strongly encouraged to read these essays and include them in their reading assignments.***

The syllabus includes reading assignments of about 50-70 pages per week. Although some of the weekly assignments include somewhat lengthy document lists, these lists often involve documents of no more than a paragraph or a single page. Still, instructors will want to review the weekly assigned documents and determine for themselves whether the assignment is the appropriate length.

The textbook's primary collection, ends with the ratification of the Fifteenth Amendment, followed by a short appendix containing examples of early discussions and judicial opinions involving the Reconstruction Amendments. The model syllabus reserves the last few classes for these materials. Instructors teaching this course as a paper or research course might choose to reserve these final classes for student presentations.

Finally, a word of encouragement for instructors to give full value to the pre-civil war materials. The documents in this collection are meant to "talk" to one another. The disputes and debates of the antebellum period inform the debates over all three of the Reconstruction Amendments.

## The Reconstruction Amendments

### Sample Syllabus II (Reading assignments)

[Note: "I.1.B /18" refers to Volume I, Part 1, Section B, page 18]

#### **Week 1: Antebellum Constitutionalism**

*For both classes:*

I.1.B. Introduction: Federalism and the Structure of Antebellum Constitutional Liberty. /18

*Class 1:* Madisonian Federalism and the "Principles of '98."

- (1) Federalist 39. /23
- (2) Federalist 45. /28
- (3) Alien and Sedition Acts. /35
- (4) Virginia and Kentucky Resolutions. /37, 38
- (5) Madison's Report of 1800 (excerpts). /40

*Class 2:* Early Debates on the Nature of the Constitution: Federalism, Nationalism, and Nullification

- (6) St. George Tucker, A View of the Constitution. /60
- (7) McCulloch v. Maryland. /84
- (8) James Madison, Detached Memoranda. /92
- (9) Calhoun, South Carolina Exposition. /97
- (10) James Madison to Edward Everett. /102
- (11) Daniel Webster, Speech "The Constitution is not a Compact Between the Sovereign States." /106

#### **Week 2: Slavery and the Original Constitution**

*For both classes:*

I.1.C. Introduction: Slavery: Antebellum Law and Politics. /157

*Class 1:* Slavery and the Original Constitution

- (1) Virginia Slave Code (170). /160
- (2) Sommersett's Case (1772). /164
- (3) The Declaration of Independence (1776). /5
- (4) Pennsylvania, An Act for the Gradual Abolition of Slavery (1780). /165
- (5) Thomas Jefferson, Notes on the State of Virginia (1785). /167
- (6) The Northwest Ordinance (1787). /6
- (7) Debates in the Philadelphia Constitutional Convention (1787). /172
- (8) Provisions in the Original Constitution Relating to Slavery (1787). /186

*Class 2:* Southern Slavery, Northern Abolitionism, and The Fugitive Slave Act

- (9) State v. Mann (1829). /200
- (10) American Anti-Slavery Society, Declaration of Sentiments (1833). /208
- (11) Commonwealth v. Aves (1836). /211
- (12) Prigg v. Pennsylvania (1842). /217

**Week 3: *Slave-State Nationalism, Abolitionist Constitutionalism***

*For both classes:*

I.1.C. Introduction: Slavery: Antebellum Law and Politics. /157 [*previously assigned*]

*Class 1: Slavery as National Policy*

- (1) Letter of Postmaster General Amos Kendall Regarding the Delivery of Anti-slavery Literature, Richmond Whig (1835). /210
- (2) South Carolina Resolutions on Abolitionist Propaganda (1835). /211
- (3) US House of Representatives, The “Gag” Rules, May 26, 1836. /216
- (4) South Carolina Resolutions Relating to the Exclusion of Massachusetts Commissioner Samuel Hoar, 7 Dec. 1844. /229

*Class 2: Garrisonian and Constitutional Abolitionism*

- (5) Wendell Phillips, The Constitution: A Pro-slavery Compact (1844). /227
- (6) Joel Tiffany, A Treatise on Unconstitutionality of Slavery (1849). /237
- (7) William Garrison, “No Union with Slaveholders,” Liberator (1854). /259

**Week 4: *Dred Scott and Abolitionist Resistance***

*For both classes:*

I.1.C. Introduction: Slavery: Antebellum Law and Politics. /157 [*previously assigned*]

*Class 1: Dred Scott, Frederick Douglass*

- (1) Dred Scott v. Sandford (1856). /261
- (2) Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (1860). /303

*Class 2: Federalism and the Northern Abolitionist Resistance*

- (3) Susan B. Anthony, Make the Slave’s Case Our Own (1859). / 283
- (4) Massachusetts Personal Liberty Act (1855). /259
- (5) In re Booth (1854). /284
- (6) Ableman v. Booth, 62 U. S. 506 (1859). /291
- (7) Wisconsin’s declaration in defiance of Ableman v. Booth (1859). /296
- (8) Lemmon v. People (1860). /297

**Week 5: *Secession, Civil War, and Emancipation***

*For both classes:*

I.1.D. Introduction: Secession and Civil War. /310

*Class 1: Southern Secession, James Buchanan, and The Corwin Amendment*

- (1) Lincoln, Cooper Institute Address (1860). /313
- (2) Republican Party Platform (1860). /319
- (3) James Buchanan, Fourth Annual Message (1860). /322
- (4) South Carolina Declaration of Secession (1860). /327
- (5) The Corwin Amendment (1861). /343
- (6) Abraham Lincoln, First Inaugural Address (March 4, 1861). /343

*Class 2: War-Time Emancipation*

- (7) District of Columbia, Compensated Emancipation Act (1862). / 359
- (8) Lincoln to Horace Greeley (1862). /360
- (9) Attorney General Edward Bates, On Citizenship (1862). / 361
- (10) The Emancipation Proclamation (1863). /363

**Week 6: *Framing and Passing the Thirteenth Amendment***

*For both classes:*

I.2.A. Introduction: The Thirteenth Amendment: Drafting. /373

*Class 1: The First Set of Congressional Debates, Failure (December 1863- June 1864)*

- (1) Doc. 2 /384-85
- (2) Doc. 8 /391-402 (Wilson);
- (3) Doc. 9 /402-406 (Trumbull);
- (4) Doc. 11 /408-415 (Garrett Davis);
- (5) Doc. 16 /434- 443 (Sumner/Trumbull exchange);
- (6) Doc. 21 /447-453 (Pruyn, Wood, Shannon, Coffroth)
- (7) Doc. 21 /455-457; 461-463 (Pendelton; failed house vote)

*Class 2: The Second Attempt, Success*

- (8) National Union Party (Republican) Convention (June 17, 1864) /446
- (9) Frederick Douglass, “The Final Test of Self-Government” (Nov.13, 1864) /465
- (10) Abraham Lincoln, Annual Message to Congress (December 6, 1864) /465
- (11) Doc. 29 /481-485 (Rollins, Stevens, Baldwin);
- (12) Doc. 31 /485-496 (Higby, Patterson, Coffroth, Herrick, Kalbfleisch, final vote)
- (13) “Exciting Scene in the House of Representatives, Jan. 31, 1865” Frank Leslie’s Illustrated Newspaper (February 8, 1865) /496

**Week 7: *Ratifying the Thirteenth Amendment: Interpretations and Implications***

*For both classes:*

I.2.B. Introduction: The Thirteenth Amendment: Ratification. /498

*Class 1: The Conundrums of Ratification, Black Suffrage as the Next Step?*

- (1) "A King's Cure"-Speech of Mr. Lincoln on the Constitutional Amendment, New York Herald (February 3, 1865). /505
- (2) "Dr. Lieber's Letter to Senator E. D. Morgan on the Amendment of the Constitution Extinguishing Slavery," N.Y. Tribune, Feb. 4, 1865. /511
- (3) Charles Sumner, Resolutions Regarding the Number of States Necessary for Ratification, New York Tribune, February 6, 1865. /513
- (4) "Is the Union Destroyed?" (On Sumner's Resolutions), New York Times February 6, 1865. /514
- (5) On Black Suffrage-- Speech of Frederick Douglass, Boston, Mass. (Feb. 10, 1865). /522
- (6) Louisiana, Ratification of Amendment, Call for Black Suffrage, Salem Register (MA), February 27, 1865. /527
- (7) Abraham Lincoln, Speech on the Status of Louisiana (Lincoln's Last Public Address) April 11, 1865. /534.
- (8) Assassination of President Lincoln, New York Times, April 15, 1865. /536

*Class 2: Andrew Johnson, the Provisional Governments and Section 2 of the Thirteenth Amendment*

- (9) "This Hour Belongs Exclusively to the Negro," Speeches at the Thirty-Second Anniversary of the American Anti-Slavery Society (May 10, 1865) Garrison, Phillips, F.W. Harper. /537
- (10) Andrew Johnson, Proclamation Creating a Provisional Government for the State of North Carolina (May 29, 1865). /542
- (11) President Andrew Johnson to Mississippi Provisional Governor Sharkey (Aug. 15, 1865). /543
- (12) "Equal Suffrage," Address from the Colored Citizens of Norfolk, Virginia (June 26, 1865). /543
- (13) Provisional S. C. Gov. Benjamin F. Perry to Sec'y of State William Seward (Nov. 1, 1865). /545
- (14) Sec'y of State William Seward to Prov. S. C. Gov. Benjamin F. Perry (November 6, 1865). /546
- (15) South Carolina, Ratification and Accompanying Resolution (November 13, 1865). /546
- (16) "South Carolina," New York Times, (Nov. 16, 1865). /547
- (17) Pres. Andrew Johnson to Provisional Miss. Gov. William L. Sharkey (November 17, 1865). /548
- (18) "The Amendment to the Federal Constitution," Daily Eastern Argus (November 17, 1865). /548
- (19) "The Meaning and Scope of the Great Amendment," N. Y. Tribune (November 17, 1865). /549
- (20) "Manhood, the Basis of Suffrage," Speech of Hon. Michael Hahn of Louisiana at the National Equal Suffrage Association of Washington, DC (November 17, 1865). /551
- (21) "What the Amendment Amounts to in South Carolina," New York Daily Tribune (November 18, 1865). /553

- (22) “Power Given to Congress by the Constitutional Amendment,” New York Times (November 20, 1865). /554
- (23) Alabama, Ratification and Statement of Understanding (December 2, 1865). /558
- (24) Georgia, “Message of the Provisional Georgia Gov. James Johnson on the Proposed Amendment” (December 11, 1865). /559
- (25) Georgia, “Ratification of the Constitutional Amendment” (and Statement of Understanding), New York Times (December 17, 1865). /560
- (26) Secretary of State William Seward, Proclamation of Ratification (December 18, 1865). /561

**Week 8: *The Agendas of the Thirty-Ninth Congress: Amendments and Statutes***

*For both classes:*

II.1.A. Introduction: The Fourteenth Amendment: Drafting. /5

*Class I: The Early Months: Proposed Amendments, Vetoed Statutes*

- (1) The Thirty-Ninth Congress, Membership. /14
- (2) House, Opening Day of Thirty-Ninth Congress, Exclusion of Former Rebel States, Appointing Joint Committee on Reconstruction (Dec. 4, 1865). /20
- (3) Senate, Appointing Joint Committee on Reconstruction (Dec. 12, 1865). /23
- (4) Membership, Joint Committee on Reconstruction. /24
- (5) Senate, Freedmen’s Bureau Bill; Black Codes (Dec. 13, 1865). /24
- (6) Ratification of the Thirteenth Amendment (Dec. 18, 1865). /28
- (7) Senate, Lyman Trumbull, Civil Rights Bill (Jan. 12, 1866). /35
- (8) House, Debate, Apportionment Amendment; Women’s Suffrage Petition (Jan. 23, 1866). /47
- (9) Joint Committee, John A. Bingham, Proposed Amendment (Jan. 27, 1866). /66
- (10) Senate, Debate, Civil Rights Bill, Proposed Addition of Citizenship Clause (Jan. 29, 1866). /67
- (11) House, Apportionment Amendment, Speech of Thaddeus Stevens, Vote and Passage (January 31, 1866). /80
- (12) Senate, Civil Rights Bill, Debate, Vote and Passage (February 2, 1866). /84
- (13) House, Freedmen’s Bureau Bill, Debate and Passage (February 2, 1866). /88
- (14) Joint Committee, John A. Bingham, Proposed Amendment (February 3, 1866). /90
- (15) Joint Committee, Adopts John A. Bingham’s Version of Proposed Amendment (February 10, 1866). /95
- (16) Senate, William Pitt Fessenden Reports Proposed Amendment (February 13, 1866). /95
- (17) Senate, Freedmen’s Bureau Bill, President Andrew Johnson’s Veto Message (February 19, 1866). /96
- (18) Senate, Freedmen’s Bureau Bill, Speech of Lyman Trumbull, Vote to Override Fails (February 20, 1866). /98

- (19) House, John A. Bingham Reports Proposed Amendment Empowering Congress to Secure the “Privileges and Immunities” of Citizens and the Due Process Rights of All Persons (February 26, 1866). /99
- (20) House, Debate, Proposed Amendment Empowering Congress to Secure the “Privileges and Immunities” of Citizens and the Due Process Rights of All Persons (Feb. 27, 1866). /103
- (21) House, Debate Continued, “Privileges and Immunities” Amendment, Speeches of John A. Bingham, Giles Hotchkiss, Vote to Postpone Consideration (Feb. 28, 1866). /108

*Class 2: The 1866 Civil Rights Act*

- (22) House, Debate, Civil Rights Bill, Speeches of James Wilson and M. Russell Thayer (March 1–2, 1866). /119
- (23) Senate, Debate, Apportionment Amendment, Fails Two-Thirds Vote (March 9, 1866). /133
- (24) House, Debate, Civil Rights Bill, Speech of John A. Bingham in Opposition (March 9, 1866). /135
- (25) House, Debate, Civil Rights Bill, Vote and Passage (March 13, 1866). /142
- (26) Senate, Motion to Retroactively Exclude John Stockton (March 22, 1866). /144
- (27) Senate, President Andrew Johnson’s Message Accompanying Veto of the Civil Rights Bill (March 27, 1866). /144
- (28) Senate, Exclusion of John Stockton (March 27, 1866). /146
- (29) Senate, Civil Rights Bill, Veto Override (April 6, 1866). /146

**Week 9: A Five-Sectioned Fourteenth Amendment: Framing and Passage.**

*For class 1:*

II.1.A. Introduction: The Fourteenth Amendment: Drafting. /5 [*previously assigned*]

*Class 1: Framing and Passing the Final Version of the Fourteenth Amendment*

- (1) “News of Proposed Amendments in the Joint Committee on Reconstruction,” Chicago Tribune (April 16, 1866). /151
- (2) Joint Committee, Thaddeus Stevens Introduces Five-Section Constitutional Amendment (April 21, 1866). /152
- (3) Joint Committee, Proposed Constitutional Amendment, Adoption of John Bingham’s Draft of Section One (April 28, 1866). /154
- (4) U.S. House, Proposed Fourteenth Amendment; Speech of Thaddeus Stevens Introducing the Amendment (May 8, 1866). /158-60
- (5) U.S. House, Proposed Fourteenth Amendment, Debate and Passage (May 10, 1866). /170
- (6) U.S. Senate, Proposed Fourteenth Amendment, Speech of Jacob Howard (May 23, 1866). /185
- (7) U.S. Senate, Proposed Fourteenth Amendment, Debate, Citizenship Clause Added (May 29, 1866). /194

- (8) U.S. Senate, Proposed Fourteenth Amendment, Debate (May 30, 1866). /195
- (9) Majority and Minority Reports of the Joint Committee (June 8, 1866). /212
- (10) U.S. House, Proposed Fourteenth Amendment; Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version (June 13, 1866). /218
- (11) U.S. Senate, Proposed Fourteenth Amendment; President Andrew Johnson's Message of Transmission (June 22, 1866). 223

*Class 2: Ratification Phase 1: The Congressional Election of 1866*

II.1.B. Introduction: The Fourteenth Amendment: Ratification. / 227

- (12) Connecticut, Debate and Ratification of the Fourteenth Amendment (June 25 and 27, 1866). /235
- (13) Campaign Speeches of Montgomery Blair and George H. Pendleton, (July 18, 1866). /241
- (14) U.S. House, Readmission of Tennessee, Speech of John A. Bingham (July 20-23, 1866). /247
- (15) The New Orleans Riot, Albany Evening Journal (August 1, 1866). /252
- (16) "The Rebel Massacre in New Orleans", The Evening Telegraph (Philadelphia, Pa.) (August 1, 1866). /254
- (17) Speech of Sen. Lyman Trumbull (R-Ill.), Chicago, Illinois (August 2, 1866). /255
- (18) Speech of Rep. Schuyler Colfax (R-Ind.), Indianapolis, Indiana (Aug. 7, 1866). /257
- (19) Speech of Sen. Thomas A. Hendricks (D-Ind.), Indianapolis, Indiana (Aug. 8, 1866). /260
- (20) Speech of Rep. John A. Bingham (R-Ohio), Bowerston, Ohio (August 24, 1866). /263
- (21) Frederick Douglass, Speech at Southern Loyalist Convention, Philadelphia, PA (September 6, 1866). /269
- (22) President Andrew Johnson, Remarks on the New Orleans Riot, St. Louis, MO (September 8, 1866). /270
- (23) Texas, House Report and Rejection of Proposed Fourteenth Amendment, (October 13, 1866). /282
- (24) Letter from Secretary of the Interior, O. H. Browning, to W. H. Benneson and H. V. Sullivan, Daily National Intelligencer (October 24, 1866). /289
- (25) "Secretary Browning's Letter", Evening Post (New York, N.Y.) (October 24, 1866). /292
- (26) Election Returns, Evening Post (New York, N.Y.) (November 7, 1866). /293
- (27). "Madison," Essays on the Fourteenth Amendment, Nos. I, II, and V, New York Times (November 10, 15, and 28, 1866). /297

**Week 10: *Securing the Ratification of the Fourteenth Amendment***

*For both classes:*

II.1.B. Introduction: The Fourteenth Amendment: Ratification. / 227 [*previously assigned*]

*Class 1: Ratification Phase 2: The Second Session of the Thirty-Ninth Congress*

- (1) Speech of Wendell Phillips on the Fourteenth Amendment, Cooper Institute (October 25, 1866). /277
- (2) Frederick Douglass, "Reconstruction," The Atlantic Monthly (November, 1866). /293
- (3) North Carolina, Gov. Jonathan Worth's Message to the Legislature, Joint Committee Report, Rejection of the Fourteenth Amendment November 20 and December 6, 1866. /309
- (4) Arkansas, Senate Committee Report, Rejection of the Fourteenth Amendment December 10, 1866. /312
- (5) House, Proposed Bill for the Restoration of the Southern States, Speech of Thaddeus Stevens (January 3, 1867). /327
- (6) U.S. House, Speech of John A. Bingham (R-Ohio) in Opposition to Bill for the Restoration of the Southern States (January 16, 1867). /342
- (7) House, Cruel and Unusual Punishments Bill, Debate (January 28, 1867). /355
- (8) House, Bill for the Restoration of the Southern States, Vote to Recommit to Committee on Reconstruction (January 28, 1867). /357
- (9) Proposed "Compromise" Amendment, New York Times (February 5, 1867). /363.
- (10) "The Amendment—The Situation," Crisis (Columbus, OH) (February 13, 1867). /382
- (11) Massachusetts, Legislative Committee on Federal Relations, Majority and Minority Reports on the Proposed Fourteenth Amendment (February 28, 1867). /383
- (12) The Reconstruction Acts and Tenure in Office Act (March, 1867). /388, 389, 391

*Class 2: Ratification Phase 3: The Impeachment of President Andrew Johnson and Final Ratification*

- (13) Suspension of Secretary of War Edwin Stanton, Official Correspondence, Cincinnati Daily Gazette (August 13, 1867). /402
- (14) Ohio Legislature Rescinds Prior Ratification, Plain Dealer (Cleveland, Ohio), (January 13, 1868). /404
- (15) General Ulysses Grant Restores Edwin Stanton to the Office of Secretary of War, New York Tribune (January 15, 1868). /404
- (16) President Andrew Johnson Removes Secretary of War Edwin Stanton, Precipitates Impeachment Proceedings, (February 22, 1868). /404
- (17) "Impeachment . . . The President Pronounced Not Guilty," New York Herald (May 17, 1868). /414
- (18) 1868 Republican National Convention and Party Platform (May 21, 1868). /415

- (19) U.S. Congress, An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress (June 25, 1868). /417
- (20) South Carolina, Ratification of the Fourteenth Amendment, (Reverses Earlier Rejection) (July 7-9, 1868). /419
- (21) Secretary of State William Seward, Provisional Proclamation of Ratification of the Fourteenth Amendment (July 20, 1868). /421
- (22) U.S. Congress, Senate and House Resolutions, Declaring the Ratification of the Fourteenth Amendment (July 21, 1868). /422
- (23) “Georgia Restored to Civil Authority,” New York Times (July 24, 1868). /424
- (24) Secretary of State William Seward, Final Proclamation of the Ratification of the Fourteenth Amendment (July 28, 1868). /425

**Week 11: *The Fifteenth Amendment: Framing and Passage***

*For both classes:*

- II.2.A. Introduction: The Fifteenth Amendment: Drafting. /435

*Class 1: Drafting the Fifteenth Amendment (I)*

- (1) US Senate, Exclusion of Georgia Senator Joshua Hill, Proposed Suffrage Amendment (Dec. 7, 1868) / 445
- (2) House George Boutwell (R-Mass.), Proposed Suffrage Bill and Suffrage Amendment (January 11, 1869). /445
- (3) Senate, John B. Henderson (R-Mo.), Proposed Suffrage and Office Holding Amendment (January 23, 1869). /446
- (4) House, George Boutwell (R-Mass.), Proposed Suffrage Bill and Suffrage Amendment (January 23, 1869). /447
- (5). House, Suffrage Amendment, Speech of Charles A. Eldridge (D-Wisc.), Debate (January 27, 1869). /463
- (6) Senate, Suffrage and Office Holding Amendment (January 28, 1869). /478
- (7) House, Suffrage Amendment; Speech of John A. Bingham (R-Ohio), Debate, (January 29, 1869). /485
- (8) House, Suffrage Amendment, Alternative Versions Rejected, Passage of Amendment (January 30, 1869). /489
- (9) US Senate, Suffrage and Office Holding Amendment, Debate (Feb. 4, 1869) / 493
- (10) US Senate, Suffrage and Office Holding Amendment, Speech of Charles Sumner (Feb. 5, 1869) / 498

*Class 2: Drafting the Fifteenth Amendment (II), Passage*

- (11) Senate, Suffrage and Office Holding Amendment, Debate (February 8, 1869). /500
- (12) US Senate, Suffrage and Office Holding Amendment, Appointment of

- Electors, Passage of “Dual” Amendment (Feb. 9, 1869) / 525
- (13) Elizabeth Cady Stanton, “Women and Black Men,” *The Revolution* (February 11, 1869). /527
- (14) Wendell Phillips, “The Senate and the Proposed Amendment,” *National Anti-Slavery Standard* (February 20, 1869). /532
- (15) US House, Suffrage Amendment, Bingham’s broader amendment fails, Addition of Language Protecting the Right to Hold Office (Feb. 20, 1869) / 532
- (16) US Senate, Suffrage Amendment, Call for Conference with House (Feb. 23, 1869) / 535
- (17) House, Suffrage Amendment, Removal of Language Protecting Office Holding, Passes Without Debate (February 25, 1869). /536
- (18) Senate, Suffrage Amendment, Debate and Passage (February 26, 1869). /536

### **Week 12: *The Fifteenth Amendment: Ratification***

*For both classes:*

II.2.B. Introduction: The Fifteenth Amendment: Ratification. /541

#### *Class 1: Ratification of the Fifteenth Amendment (I)*

- (1) “Ratifying the Amendment,” *Daily Evening Bulletin* (San Francisco, California) (March 4, 1869). /547
- (2) President Ulysses S. Grant, First Inaugural Address, March 4, 1869. /548
- (3) South Carolina, Statement of House Minority, Ratification of the Fifteenth Amendment (March 11, 15 1869). /554
- (4) Georgia, Gov. Rufus B. Bullock’s Message to the Legislature, House Passage and Senate Rejection of the Fifteenth Amendment (March 10-18, 1869). /554
- (5) New Jersey, Gov. Theodore Randolph’s Message to the Legislature, Note on Rejection of Amendment (March 24, 1869). /558
- (6) Ohio, House Debate, Rejection of Fifteenth Amendment (March 25 - April 1, 1869). /559
- (7) U. S. Congress, The Requirement Bill: Requiring Virginia, Mississippi and Texas to Ratify Fifteenth Amendment as a Condition of Readmission, *New York Herald* (April 10, 1869). /559
- (8) *Texas v. White* (1869) / 561
- (9) “The Fifteenth Amendment,” *New York Times* (April 12, 1869). /569

#### *Class 2: Ratification of the Fifteenth Amendment (II)*

- (10) Annual Meeting of the American Equal Rights Association, Remarks of Stephen Foster, Elizabeth Cady Stanton and Frederick Douglass (New York, N.Y.) (May 12-13, 1869). /570
- (11) “Wendell Phillips Advocates It—Ratification by Rhode Island,” *New York Times* (May 30, 1869). /574
- (12) “All Wise Women Should Oppose the Fifteenth Amendment,” Elizabeth

- Cady Stanton, *The Revolution* (October 21, 1869). /577
- (13) U.S. Congress, *The “Georgia Bill,” Debate and Passage* (December 16, 20, 22, 1869). /581
- (14) New York, “*Ratification of the Fifteenth Amendment Rescinded,*” *New York Times* (January 6, 1870). /585
- (15) California, Gov. H. H. Haight’s *Message to the Legislature, Rejection of the Fifteenth Amendment* (January 5, 28, 1870). /588
- (16) Ohio, *Legislature Reverses Prior Vote and Ratifies the Fifteenth Amendment* January 3 and 14, 1870. /586
- (17) “*The Amendment Complete,*” *Boston Daily Journal* February 4, 1870. /593
- (18) President Ulysses S. Grant, *Message to Congress Announcing the Ratification of the Fifteenth Amendment* (March 30, 1870). /595
- (19) Frederick Douglass, *Letter to a Ratification Celebration* (April 5, 1870). /597

**Week 13: *Early Interpretation (I)***

*For both classes:*

- II. *Introduction to the Appendix.* /601

*Class 1: Repassing the Civil Rights Act, The Petition of Victoria Woodhull*

- (1) *The Enforcement Bill and Repassage of the 1866 Civil Rights Act* (May 31, 1870) / 605.
- (2) *US House, Judiciary Committee, Petition of Victoria Woodhull on the Subject of Female Suffrage* (Jan. 2, 1871) / 607
- (3) *US House, Judiciary Committee, “The Woodhull Report”* (Jan. 30 and Feb. 1, 1871) / 609.
- (4) *US House, Speech of John Bingham on the Meaning of the Privileges or Immunities Clause of Section One of the Fourteenth Amendment* (Mar. 31, 1871) / 620.

*Class 2: Slaughterhouse and the Privileges or Immunities Clause*

- (5) *The Slaughterhouse Cases* (1873) / 630.

**Week 14: *Early Interpretation and Debate (II)***

*Class 1: Women’s Rights*

- (1) *Bradwell v. The State* (1873) / 654
- (2) *Minor v. Happersett* (1875) / 656

*Class 2: The Fifteenth Amendment; The (non) Incorporation of the Bill of Rights*

- (3) *United States v. Reese* (1876) / 661
- (4) *United States v. Cruikshank* (1876) / 664

## IV. Weekly Instructor's Notes and Suggested Discussion Questions

### Week 1: *Antebellum Constitutionalism*

*For both classes:*

I.1.B. Introduction: Federalism and the Structure of Antebellum Constitutional Liberty. /18

*Class 1: Madisonian Federalism and the "Principles of '98."*

- (1) Federalist 39 /23
- (2) Federalist 45 /28
- (3) Alien and Sedition Acts (1798) /35
- (4) Virginia and Kentucky Resolutions (1798) /37, 38
- (5) Madison's Report of 1800 /40

*Class 2: Early Debates on the Nature of the Constitution: Federalism, Nationalism, and Nullification*

- (6) St. George Tucker, A View of the Constitution (1803) /60
- (7) McCulloch v. Maryland (1819) /84
- (8) James Madison, Detached Memoranda (1819) /92
- (9) Calhoun, South Carolina Exposition (1828) /97
- (10) James Madison to Edward Everett (1830) /102
- (11) Daniel Webster, Speech "The Constitution is not a Compact Between the Sovereign States" (1833) /106

### **Week 1 Materials**

The overall goal of the course is to introduce students to the original constitutional debates accompanying the adoption of the Reconstruction Amendments. Those debates contain repeated references to ideas and issues that emerged between the Founding and the Civil War. Accordingly, before engaging the debates of 1865-1870, one must first engage the antebellum historical materials and ideas that informed those debates.

Of particular importance is the need to engage antebellum debates regarding the nature of the federal Constitution, the division of power between the state and federal governments, the relationship between slavery and the original Constitution, and the national rights of persons and citizens. These issues and their attendant debates contain the seeds of what became post-bellum arguments regarding the need for, and nature of, constitutional reform.

The assigned documents for the first week dive into the first great antebellum constitutional debate—the nature of the new federal Constitution and the scope of congressional power. Opposition to the 1798 Alien and Sedition Acts prompted the publication of three of the most influential documents in antebellum constitutional debate: The Virginia and Kentucky Resolutions and Madison's Report of 1800. Following the 1800 electoral success

of Thomas Jefferson and the Democratic Republicans, these documents became known as declaring “the principles of ’98.” These principles included an understanding of the national Constitution as a “compact” between the states and called for a strict or limited construction of national power. Given intellectual heft by the first constitutional treatise, St. George Tucker’s “View of the Constitution,” compact theory dominated early constitutional theory until later challenged by the more nationalist constitutional theories of Supreme Court Chief Justice John Marshall in cases like *McCulloch v. Maryland* and in the legal texts of Marshall’s protégé, Joseph Story in his 1833 *Commentaries on the Constitution*.

By the midpoint between the Founding and the Civil War, three major constitutional theories dominated public debate: Madisonian Dual Federalism, Marshallian Nationalism and Calhounian States Rights Radicalism. Students should be able to distinguish these theories but also recognize where and how they theories overlapped. Understanding these early constitutional theories will enable students to better understand the nature of later constitutional debates over chattel slavery that are the focus of next section’s material.

### **Questions for Class 1:**

Compare the federalism of “Publius” (the *Federalist Papers*) with that of the Virginia and Kentucky resolutions and Madison’s Report of 1800. Are the 1798 documents a playing out of the federalist theories of Publius? Do they modify (or potentially modify) those theories?

Was opposition to the Alien and Sedition Acts based on theories of federalism or theories of individual rights? Would Jefferson and Madison give the same answer to this question?

Madison speaks of the right of states to “interpose” in cases involving federal overreach. What does he mean? Is he right? Are such disputes best resolved by the Supreme Court? How does Madison address this issue in his 1800 Report?

### **Questions for Class 2**

In his “View of the Constitution,” Virginia judge and early constitutional theorist St. George Tucker describes the Constitution as a “compact” that must be “strictly construed” whenever the rights of a state or an individual are at stake. What does he mean by “compact” and how is the idea of a “compact” related to his theory of strict construction?

Notice that St. George Tucker in his *View of the Constitution*, John Marshall in *McCulloch*, Calhoun in his *Exposition*, and Webster in his famous speech, all spend time discussing the creation of the Union (So did Madison in *Federalist 39*). Tucker believes the people in the several states created the Union, Marshall believes the people as a single nation created the Union, Calhoun believes the States created the Union and Webster believes the Union preceded the states. Compare Marshall and Madison’s *Federalist 39*—do they give the same answer? Why do these theorists believe the issue is so important (particularly when it comes to the right of states to “nullify” federal law or “secede” from the Union)?

All of these authors agreed that the Constitution established a federal system with powers divided between the states and the national government. The issue under dispute (among others) involves who gets the final word in cases of disagreement about the scope of state or federal power. Does the Constitution resolve this issue? Before you too quickly cite the Supremacy Clause and Article III, do those clauses demand that states acquiesce to *any* decision of the Supreme Court, no matter how injurious to individual freedom or state autonomy? Madison insisted that the States had a role to play in cases of federal overreach—was he wrong?

## **Week 2:** ***Slavery and the Original Constitution***

*For both classes:*

I.1.C. Introduction: Slavery: Antebellum Law and Politics. /157

*Class 1: Slavery and the Original Constitution*

- (1) Virginia Slave Code (170) /160
- (2) Sommersett's Case (1772) /164
- (3) The Declaration of Independence (1776) /5
- (4) Pennsylvania, An Act for the Gradual Abolition of Slavery (1780) /165
- (5) Thomas Jefferson, Notes on the State of Virginia (1785) /167
- (6) The Northwest Ordinance (1787) /6
- (7) Debates in the Philadelphia Constitutional Convention (1787) /172
- (8) Provisions in the Original Constitution Relating to Slavery (1787) /186

*Class 2: Southern Slavery, Northern Abolitionism, and The Fugitive Slave Act*

- (9) State v. Mann (1829) /200
- (10) American Anti-Slavery Society, Declaration of Sentiments (1833) /208
- (11) Commonwealth v. Aves (1836) /211
- (12) Prigg v. Pennsylvania (1842) /217

### **Week 2 Materials**

The materials for week 2 are meant to acquaint students with the key legal and constitution concepts and precedents relating to slavery at the time of the Founding.

Materials like the Virginia Slave Code and State v. Mann are meant to be jarring reminders of the brutal, all controlling and rights-extinguishing nature of chattel slavery. Sommersett's Case and the Pennsylvania abolition statute are reminders that the United States came into being already divided between states moving away from slavery and states maintaining slavery. One finds this division Northwest Ordinance which both banned slavery in the northern territory but also validated the "reclaiming" of any "person escaping" from "service or labor." This division is starkly represented in the mind and work of a single man: Thomas Jefferson. Jefferson pens both the equality provisions of the Declaration of Independence and the ban on slavery in the Northwest Ordinance, but also the painfully racist Notes on the State of Virginia. Together, these materials prompt thinking about the role of slavery north and south at the time of Founding, and the place of slavery in the original Constitution. These issues will become matters of increasingly strident public debate after 1800.

### **Questions for Class 1**

At the dawn of the Constitution, is the country moving towards or away from the institution of slavery? Does the Constitution accelerate either of these possible directions? For example, do the debates and ultimate constitutional provisions relating to slavery ensure

slavery's continuation, point towards slavery's eventual extinction, or maintain a wholly neutral stance on the institution of chattel slavery?

What are we to make of Thomas Jefferson and slavery? Jefferson writes the Declaration of Independence, the Notes on the State of Virginia, and the provisions in the Northwest Ordinance prohibiting slavery. Is there any way to reconcile the statements of equality, freedom, slavery and race in these documents? Why did Jefferson advocate abolitionism and "colonization" (removing free blacks from the United States)—because of his views about blacks or his views about whites?

Think about the English court's decision in *Sommersett*. Did the reasoning of that case influence the decisions of the founding generation? Of the framing of the Constitution? Consider in this regard, Madison's statement during the framing debates "Mr. Madison thought it wrong to admit in the Constitution the idea that there could be property in men." (p. 184). What did he mean? What, if anything, is the legal and constitutional significance of leaving the word slavery out of the Constitution?

### **Questions for Class 2**

Think again about the federalism materials from last week (Federalist 39 and 45; The Virginia Resolutions and Madison's Report of 1800). Consider the role of federalism in cases like *Mann*, *Aves* and *Prigg*. Is federalism protecting slavery or protecting northern abolitionism? Is it "tilted" in one direction or another? If it represents a balance, is this balance sustainable?

Consider Justice Story's opinion and constitutional theory in *Prigg*. Story was a protégé of John Marshall and he devoted his *Commentaries on the Constitution* to Marshall—and spent much of that work refuting St. George Tucker's "compact theory" of the Constitution. Does his opinion in *Prigg* reflect Marshallian nationalism? Story himself later characterized his opinion as pro-state rights. How is that possible?

### **Week 3:** ***Slave-State Nationalism, Abolitionist Constitutionalism***

[In preparation for materials assigned for weeks 2-4, read Vol. 1, Introduction to Part 1C: Slavery: Antebellum Law and Politics. /157]

#### Class 1: Slave State Reaction to Abolitionism

- (1) Letter of Postmaster General Amos Kendall Regarding the Delivery of Anti-slavery Literature, *Richmond Whig* (Aug. 11, 1835) / 210
- (2) South Carolina Resolutions on Abolitionist Propaganda (1835) /211
- (3) US House of Representatives, The “Gag” Rules (May 26, 1836) /216
- (4) South Carolina Resolutions Relating to the Exclusion of Massachusetts Commissioner Samuel Hoar, (Dec. 7, 1844) /229

#### Class 2: Abolitionist Theories of the Federal Constitution

- (5) Wendell Phillips, *The Constitution: A Pro-slavery Compact* (1844) / 227
- (6) Joel Tiffany, *A Treatise on Unconstitutionality of Slavery* (1849) /237
- (7) William Garrison, “No Union with Slaveholders,” *Liberator* (July 7, 1854) / 259

### **Week 3 Materials**

The materials for this week mark a new phase in an increasingly heated national debate over slavery. In response to the growing northern abolitionist movement, pro-slavery advocates call for the suppression of abolitionist literature, both locally and on a national level (the purging of the U.S. mail). Pro-slavery advocates in Congress successfully call for the enactment of rules preventing Congress from even *receiving* petitions calling for the abolition of slavery. In what became a national scandal, South Carolina mobs threatened the lives of Massachusetts Commissioner Samuel Hoar and his daughter who had visited the state seeking information about the treatment of free black sailors from Massachusetts. Together, these materials and events show how slavery was no longer a matter that could be contained in the southern states. Slavery affected blacks and whites, north and south, and its advocates demanded the adoption of *national* policies protecting the institution from abolitionist criticism and opposition.

These materials also illustrate the rise of competing theories of abolitionist constitutional theory and rhetoric. The abolitionist William Lloyd Garrison insisted that the Constitution was inescapably pro-slavery, and he called for northern free-state separation from the slave-holding southern states. According to Garrison, the Constitution was a “covenant with death and an agreement with hell,” and his public events often closed with his ceremoniously burning the Constitution. By the end of the 1840s, however, a different strain of abolitionist theory had emerged which insisted that the Constitution properly interpreted said nothing about slavery at all and instead, obligated the federal government to adopt pro-freedom policies whenever possible. This theory of “constitutional abolitionism” later became the foundational principle of the Republican Party.

### **Question for Class 1**

In last week materials, we saw the rise of northern abolitionism and a commitment to use the mail and the pulpit to spread the message of anti-slavery. This week we see pro-slavery's response: A purge of the national mail, a prohibition on abolitionist petitions in Congress and the exclusion of northern abolitionists from slave holding states. Consider these responses from the perspective of constitutional law—to what degree does this represent an antebellum view of federalism and limited national rights, and to what degree does this represent a breach of federalism and national rights?

### **Question for Class 2**

Over time, a split emerged in abolitionist theory regarding the American Constitution. Radical abolitionists like Phillips and Garrison viewed the Constitution as irredeemably pro-slavery. Others like Joel Tiffany believed that the Constitution was better understood as tilted against slavery, particularly in the territories. The issue is more than theoretical—next week we will read the Supreme Court's ruling on the issue in *Dred Scott*. For now, who do you think has the better theory? Does it depend on whether one seeks the original intent of the framers? The original meaning of the actual text? Also note Tiffany's description of the privileges and immunities of citizens of the United States. His work represents a growing sense in the north that the rights enumerated in the Constitution are *national* rights which neither state nor federal governments may validly abridge.

## **Week 4: *Dred Scott* and Abolitionist Resistance**

*For both classes:*

I.1.C. Introduction: Slavery: Antebellum Law and Politics. /157 [*previously assigned*]

*Class 1:* Dred Scott, Frederick Douglass

(1) Dred Scott v. Sandford (1856). /261

(2) Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (1860). /303

*Class 2:* Federalism and the Northern Abolitionist Resistance

(3) Susan B. Anthony, Make the Slave's Case Our Own (1859). / 283

(4) Massachusetts Personal Liberty Act (1855). /259

(5) In re Booth (1854). /284

(6) Ableman v. Booth, 62 U. S. 506 (1859). /291

(7) Wisconsin's declaration in defiance of Ableman v. Booth (1859). /296

(8) Lemmon v. People (1860). /297

### **Week 4 Materials**

In his opinion in *Dred Scott*, Chief Justice Taney infamously declared that America was founded by a people who believed that black Americans “had no rights which the white man was bound to respect,” and that Congress had no power to exclude slavery from federal territory. The opinion would further inflame an already dangerously divided country and, to northern abolitionists, represented everything they rejected about pro-slavery constitutionalism. These materials ask students to engage Taney's opinion, first on its own terms, and then in terms of the broader debate between pro-slavery and pro-freedom theories of the original Constitution.

What is Chief Justice Taney's constitutional interpretive theory? One that focuses on the text? On the original intention of the framers? Which framers? Drawing upon last week's materials, how would Garrison view the opinion? Joel Tiffany? In his Glasgow speech, Frederick Douglass is expressly responding to Garrisonians, but his arguments are equally pointed at Taney. What is Douglass's methodological approach? Of all these approaches, which is most persuasive?

In regard to the materials for the second class: Recall that last week we saw how pro-slavery advocates pushed for the adoption of national policy and pro-slavery nationalist constitutionalism. This week we see how northern abolitionists increasingly embrace theories of federalism in support of their opposition to slavery. Wisconsin pursues a radically federalist approach, calling on the principles of '98 and the right to decide for themselves whether congress had exceeded its constitutional authority in passing the Fugitive slave act. The case, Lemmon v. People is yet another example of a federalism-

based reading of constitutional text (in this case, Art. IV's "privileges and immunities clause") that furthers the cause of northern resistance to southern slavery. In sum, southern pro-slavery nationalism and northern pro-federalism abolitionism at the threshold of the Civil War likely occupy a position that is the reverse of what students might have expected prior to taking this class.

Finally, Susan B. Anthony's essay "Make the Slave's Case Our Own," represents part of the broad and growing coalition of northern advocacy groups supporting the cause of abolition. Women's rights groups joined forces with abolitionists like Frederick Douglass and, as we will see, petitioned Congress to pass an abolition amendment. This coalition ultimately came apart over the issue of suffrage.

### **Questions for Class 1:**

Chief Justice Roger Taney articulated a theory of the Constitution in *Dred Scott* that excluded blacks, free or enslaved, from the protections of the document. At the same time, Taney reads the text as protecting the "property" rights of slave owners (and, in doing so, declares a law of Congress unconstitutional for the first time since *Marbury v. Madison* in 1803). How does Taney structure his opinion and what interpretive methods does he use to arrive at these conclusions? Are some parts of his opinion more or less persuasive than others?

In his speech, "The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?," Frederick Douglass quotes Chief Justice John Marshall in *U.S. v. Fisher* (1805): "Where rights are infringed—where the fundamental principles of the law are overthrown—where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness." What role does this maxim play in his argument about slavery and the Constitution? How does his approach differ from Taney's in *Dred Scott*?

In the decades prior to the Civil War, abolitionists increasingly argued that the Constitution favored freedom over slavery. Frederick Douglass, for example, originally agreed with William Lloyd Garrison that the Constitution was inextricably bound to slavery. Douglass eventually changed his mind, however, and joined abolitionists like Joel Tiffany in arguing that the Constitution, properly interpreted, favored freedom. Meanwhile, Chief Justice Roger Taney articulated a theory of the Constitution in *Dred Scott* that wholly excluded blacks, free or enslaved, from the protections of the document. How do you understand these competing arguments and who do you think had the more persuasive understanding of the Constitution?

### **Questions for Class 2**

Is the Booth episode in Wisconsin an example of Jefferson and Madison's Virginia and Kentucky Resolutions playing out to their logical conclusion? Would Madison have viewed Wisconsin's resistance as an echo of his Report of 1800 and the "principles of '98?" Put another way, is this an example of Madisonian Federalism or Calhounian Nullification?

Expanding upon the above: Consider how the doctrine of constitutional federalism (limited national power and the reserved rights of the states) played an increasing role in the deepening national debate over slavery. Was federalism a doctrine more favorable to the abolitionists in the north, or to pro-slavery advocates in the south? How would the players themselves (northern abolitionists and southern advocates of slavery) answer that question?

## **Week 5:** ***Secession, Civil War, and Emancipation***

*For both classes:*

I.1.D. Introduction: Secession and Civil War. /310

*Class 1: Southern Secession, James Buchanan, and The Corwin Amendment*

- (1) Lincoln, Cooper Institute Address (1860). /313
- (2) Republican Party Platform (1860). /319
- (3) James Buchanan, Fourth Annual Message (1860). /322
- (4) South Carolina Declaration of Secession (1860). /327
- (5) The Corwin Amendment (1861). /343
- (6) Abraham Lincoln, First Inaugural Address (March 4, 1861). /343

*Class 2: War-Time Emancipation*

- (7) District of Columbia, Compensated Emancipation Act (1862). / 359
- (8) Lincoln to Horace Greeley (1862). /360
- (9) Attorney General Edward Bates, On Citizenship (1862). / 361
- (10) The Emancipation Proclamation (1863). /363

### **Week 5 Materials**

We have arrived at the Civil War. The election of Republican Abraham Lincoln convinced a growing number of southern slave-holding states to secede from the Union. What began as a political and constitutional crisis became a military engagement when South Carolina fired on Fort Sumter and Lincoln began organizing the Union army. For the purposes of this course, students engage the constitutional dimensions of the crisis. How did the South justify secession? What was the initial northern response to secession? Those students previously unaware of the Corwin amendment are likely to be surprised that one of the first northern responses was an offer to pass a “thirteenth amendment” *protecting* the rights of state to maintain the institution of chattel slavery, in the hopes that this would stem the tide of further secession (and that Lincoln had no objections to the proposal).

The crucible of war quickly produced a reversal in Union policy. Within a short space of time, Lincoln and the Union went from supporting a pro-slavery amendment, to ending slavery in the District of Columbia, to Lincoln’s Emancipation Proclamation. How can one account for such a dramatic change in the northern response to slavery? The change involved more than the institution of slavery: Attorney General Bates’ opinion on citizenship represents an official rejection of the Supreme Court’s opinion in Dred Scott: all persons born in the United States should be considered citizens of the United States. These changes, these ideas, are harbingers of what will soon become constitutional amendments.

### **Questions for Class 1**

Compare Lincoln, Buchanan, and the South Carolina Declaration of Secession. Was secession triggered by an intractable dispute over slavery? Federalism? The meaning and nature of the federal Constitution? Are these separate issues?

Was secession a constitutional response to northern abolitionism and the election of Abraham Lincoln? What is the legal significance of Buchanan characterizing secession as a revolutionary act, but not a constitutional act? How would Lincoln and Buchanan differ regarding who to blame for causing the national crisis?

Regarding the Corwin Amendment: This proposed “thirteenth amendment” was ratified by a number of states before war (permanently) interrupted the ratification process. In his First Inaugural, Lincoln claimed this amendment represented nothing more than what was already implied by the Constitution. Was he right?

### **Questions for Class 2**

Who, exactly, were freed by the Emancipation Proclamation? Did Lincoln have the Constitutional authority to issue such a Proclamation? Does the proclamation concede the theory that one can own property in man? Does it concede that secession had succeeded to the extent that the south was no longer part of the Union, and instead existed as a separate belligerent nation? Note: The issue of the status of the seceding states will play a key role in the debates over the passage and ratification of the Reconstruction Amendments.

How does Attorney General Bate’s analysis of citizenship differ from that of Justice Taney in *Dred Scott*? What are the implications for those freed from slavery by the Emancipation Proclamation?

## **Week 6: Framing and Passing the Thirteenth Amendment**

*For both classes:*

I.2.A. Introduction: The Thirteenth Amendment: Drafting. /373

*Class 1: The First Set of Congressional Debates, Failure (December 1863- June 1864)*

- (1) Doc. 2 /384-85
- (2) Doc. 8 /391-402 (Wilson);
- (3) Doc. 9 /402-406 (Trumbull);
- (4) Doc. 11 /408-415 (Garrett Davis);
- (5) Doc. 16 /434- 443 (Sumner/Trumbull exchange);
- (6) Doc. 21 /447-453 (Pruyn, Wood, Shannon, Coffroth)
- (7) Doc. 21 /455-457; 461-463 (Pendelton; failed house vote)

*Class 2: The Second Attempt, Success*

- (8) National Union Party (Republican) Convention (June 17, 1864) /446
- (9) Frederick Douglass, “The Final Test of Self-Government” (Nov.13, 1864) /465
- (10) Abraham Lincoln, Annual Message to Congress (December 6, 1864) /465
- (11) Doc. 29 /481-485 (Rollins, Stevens, Baldwin);
- (12) Doc. 31 /485-496 (Higby, Patterson, Coffroth, Herrick, Kalbfleisch, final vote)
- (13) “Exciting Scene in the House of Representatives, Jan. 31, 1865” Frank Leslie’s Illustrated Newspaper (February 8, 1865) /496

### **Week 6 Materials**

Two major questions loom over this week’s materials. First: Why did the first effort to pass the thirteenth amendment fail? Second: Why did the second attempts succeed?

In terms of the first question, students must consider the issues and arguments that divided the members of the Thirty-Eighth Congress. This involves more than a division of political parties. Not every Democrat opposed the Thirteenth Amendment, and not every Republican was comfortable with all of the various proposed drafts. Students should be attentive to these various drafts and how they generated discussions regarding the nature of the original federal Constitution, the role of constitutional federalism and limited national power, and the nature of freedom itself.

In light of the arguments that preceded the final wording of the amendment and the close vote that attended its passage, how should we understand the nature and scope of that final draft? How would the public following all of these debates in national newspapers have understand the nature and scope of the final draft?

## **Questions for Class 1**

Given the pre-existing Emancipation Proclamation, why did many Republicans believe it necessary to also pass an abolition amendment? Could Congress have ended slavery without an amendment? What were the various Republican views on this matter and which view prevailed?

In 1865, amending the Constitution was an almost unheard of event (none since the addition of the Twelfth Amendment in 1803). The precise contours and limits of Article V remained untested and undertheorized. Democrats insisted that the mechanisms of Article V were limited to small-scale “amendments.” Because an abolition amendment amounted to a fundamental change in the original agreement between the states, the amendment therefore fell outside the scope of legitimate Article V amendments. Is this a plausible reading of Article V? Are there no changes in the Constitution that would be beyond the scope of the Article V process? What was the Republican response to Democrat claims about the fundamental role of slavery in the original Constitution?

Why did the drafters choose the language they did for the Thirteenth Amendment? What was Sumner’s objection to this language, and what was his proposed alternative? Why did he fail?

What arguments prevailed in the House’s initial (failed) attempt to pass the amendment?

## **Questions for Class 2:**

What occurred between the first and second House vote that helped increase the chances of the amendment’s passage? In the movie “Lincoln,” Director Steven Spielberg suggests that Executive Branch bribery accounted for much of the changed vote. After reading the statements by those members who actually altered their votes, do you think their explanations were insincere?

Although northern Republicans insisted that the southern states had never successfully “seceded” from the Union, they also insisted that they could pass an amendment even in the absence of representatives from the southern states. Why? Congress then sent the proposed amendment to those same “absent states” for a vote on ratification. Is there an inconsistency here? Was the process constitutional?

## **Week 7:**

### ***Ratifying the Thirteenth Amendment: Interpretations and Implications***

*Note:* Although the list of documents this week (and in following weeks) are longer than usual, they are often quite short.

#### ***Week 7: Ratifying the Thirteenth Amendment: Interpretation and Implications***

*For both classes:*

I.2.B. Introduction: The Thirteenth Amendment: Ratification. /498

*Class 1: The Conundrums of Ratification, Black Suffrage as the Next Step?*

- (1) "A King's Cure," Speech of Mr. Lincoln on the Constitutional Amendment, New York Herald (February 3, 1865). /505
- (2) "Dr. Lieber's Letter to Senator E. D. Morgan on the Amendment of the Constitution Extinguishing Slavery," N.Y. Tribune (Feb. 4, 1865). /511
- (3) Charles Sumner, Resolutions Regarding the Number of States Necessary for Ratification, New York Tribune (February 6, 1865). /513
- (4) "Is the Union Destroyed?" (On Sumner's Resolutions), New York Times (February 6, 1865). /514
- (5) On Black Suffrage, Speech of Frederick Douglass, Boston, Mass. (Feb. 10, 1865). /522
- (6) Louisiana, Ratification of Amendment, Call for Black Suffrage, Salem Register (MA) (February 27, 1865). /527
- (7) Abraham Lincoln, Speech on the Status of Louisiana (Lincoln's Last Public Address) (April 11, 1865). /534.
- (8) Assassination of President Lincoln, New York Times, April 15, 1865. /536

*Class 2: Andrew Johnson, the Provisional Governments and Section 2 of the Thirteenth Amendment*

- (9) "This Hour Belongs Exclusively to the Negro," Speeches at the Thirty-Second Anniversary of the American Anti-Slavery Society (May 10, 1865) Garrison, Phillips, F.W. Harper. /537
- (10) Andrew Johnson, Proclamation Creating a Provisional Government for the State of North Carolina (May 29, 1865). /542
- (11) President Andrew Johnson to Mississippi Provisional Governor Sharkey (Aug. 15, 1865). /543
- (12) "Equal Suffrage," Address from the Colored Citizens of Norfolk, Virginia (June 26, 1865). /543
- (13) Provisional S. C. Gov. Benjamin F. Perry to Sec'y of State William Seward (Nov. 1, 1865). /545
- (14) Sec'y of State William Seward to Prov. S. C. Gov. Benjamin F. Perry (November 6, 1865). /546
- (15) South Carolina, Ratification and Accompanying Resolution (November 13, 1865). /546
- (16) "South Carolina," New York Times, (Nov. 16, 1865). /547

- (17) Pres. Andrew Johnson to Provisional Miss. Gov. William L. Sharkey (November 17, 1865). /548
- (18) “The Amendment to the Federal Constitution,” Daily Eastern Argus (November 17, 1865). /548
- (19) “The Meaning and Scope of the Great Amendment,” N. Y. Tribune (November 17, 1865). /549
- (20) “Manhood, the Basis of Suffrage,” Speech of Hon. Michael Hahn of Louisiana at the National Equal Suffrage Association of Washington, DC (November 17, 1865). /551
- (21) “What the Amendment Amounts to in South Carolina,” New York Daily Tribune (November 18, 1865). /553
- (22) “Power Given to Congress by the Constitutional Amendment,” New York Times (November 20, 1865). /554
- (23) Alabama, Ratification and Statement of Understanding (December 2, 1865). /558
- (24) Georgia, “Message of the Provisional Georgia Gov. James Johnson on the Proposed Amendment” (December 11, 1865). /559
- (25) Georgia, “Ratification of the Constitutional Amendment” (and Statement of Understanding), New York Times (December 17, 1865). /560
- (26) Secretary of State William Seward, Proclamation of Ratification (December 18, 1865). /561

## **Week 7 Materials**

### **Issues and Questions for Class 1**

The proposed Thirteenth Amendment generated a host of excruciatingly difficult issues and questions. Would the southern states ratify the amendment? Would enough northern states ratify to make southern votes unnecessary? If they were necessary and refused to ratify, would Union allow the defeated rebel states vote *against*, and possibly help defeat, an abolition amendment? Charles Sumner along with other radical republicans, insisted that the rebel states had committed “suicide” and thus their votes were irrelevant to determining Article V’s required ratio of ratifying states for ratification. Was he correct (consider the response of the New York Times to Sumner’s idea)?

Getting northern states to ratify was no easy task. Democrats remained a formidable political force in a number of northern states, making the outcome in a number of states less than a forgone conclusion. On the other hand, what if ratification was successful? Francis Lieber’s letter to Senator Morgan points out that abolishing slavery might have the ironic effect of derailing the entire Republican effort to establishing black civil rights. How might that happen?

Finally, as the country considered whether to abolish slavery, black Americans themselves looked beyond abolition and towards the key to securing the rights of equal citizenship: *the vote*. Radical Republicans and civil rights advocates like Frederick Douglass and Michael Hahn increasingly focused on black suffrage, to the point of alienating women’s rights

groups who resented the focus on black, rather than universal (including women's) suffrage. In his final public speech, Lincoln himself publicly advanced the cause of black suffrage—triggering the racist John Wilkes Booth to plan Lincoln's assassination. Frederick Douglass and other radicals believed that Congress could immediately grant suffrage for black males. Did Congress have such power? Would they upon the ratification of the Thirteenth Amendment?

In thinking about these issues, students should call upon their knowledge of antebellum constitutional debate. How would engaged Americans at this time have reconciled antebellum theories of federalism with the proposed abolition amendment? Would they have understood Section Two of the Thirteenth Amendment as a radical restructuring (and potential abandonment) of Madisonian federalism? What theories of federalism were still in play in 1865 and how might those theories have informed the public understanding of both sections of the Thirteenth Amendment?

### **Issues and questions for Class 2**

Democrats north and south feared the amendment would destroy the constitutional safeguard of federalism allow the federal government to regulate the full panoply of common law civil rights in the states. This would include everything from black suffrage to the regulation and protection of life, liberty and property. Were they right? Is this how the amendment would have been understood by engaged northern Republicans?

Pres. Johnson had his officials assure southern governments that the amendment would do nothing more than empower Congress to eradicate the formal institution of slavery. A number of southern states included a statement along with their notice of ratification declaring their reliance on Pres. Johnson's assurance. Should we consider these assurances part of the original public understanding of the Thirteenth Amendment?

Do not underestimate the radical nature of Seward's proclamation regarding the ratification of the Thirteenth Amendment. The proclamation expressly counts the votes of former rebel states. Johnson had promised these states that ratifying the amendment would help smooth the path to their return to Congress. Seward's proclamation seemed to imply that these states had rejoined the Union. In fact, several of these ratifying states sent Senators and Representatives to Congress where they expected to be readmitted to their seats. As we shall see next week, they were left standing at the door.

**Week 8:**  
***The Agendas of the Thirty-Ninth Congress: Amendments and Statutes***

*For both classes:*

II.1.A. Introduction: The Fourteenth Amendment: Drafting. /5

*Class I: The Early Months: Proposed Amendments, Vetoed Statutes*

- (1) The Thirty-Ninth Congress, Membership. /14
- (2) House, Opening Day of Thirty-Ninth Congress, Exclusion of Former Rebel States, Appointing Joint Committee on Reconstruction (Dec. 4, 1865). /20
- (3) Senate, Appointing Joint Committee on Reconstruction (Dec. 12, 1865). /23
- (4) Membership, Joint Committee on Reconstruction. /24
- (5) Senate, Freedmen's Bureau Bill; Black Codes (Dec. 13, 1865). /24
- (6) Ratification of the Thirteenth Amendment (Dec. 18, 1865). /28
- (7) Senate, Lyman Trumbull, Civil Rights Bill (Jan. 12, 1866). /35
- (8) House, Debate, Apportionment Amendment; Women's Suffrage Petition (Jan. 23, 1866). /47
- (9) Joint Committee, John A. Bingham, Proposed Amendment (Jan. 27, 1866). /66
- (10) Senate, Debate, Civil Rights Bill, Proposed Addition of Citizenship Clause (Jan. 29, 1866). /67
- (11) House, Apportionment Amendment, Speech of Thaddeus Stevens, Vote and Passage (January 31, 1866). /80
- (12) Senate, Civil Rights Bill, Debate, Vote and Passage (February 2, 1866). /84
- (13) House, Freedmen's Bureau Bill, Debate and Passage (February 2, 1866). /88
- (14) Joint Committee, John A. Bingham, Proposed Amendment (February 3, 1866). /90
- (15) Joint Committee, Adopts John A. Bingham's Version of Proposed Amendment (February 10, 1866). /95
- (16) Senate, William Pitt Fessenden Reports Proposed Amendment (February 13, 1866). /95
- (17) Senate, Freedmen's Bureau Bill, President Andrew Johnson's Veto Message (February 19, 1866). /96
- (18) Senate, Freedmen's Bureau Bill, Speech of Lyman Trumbull, Vote to Override Fails (February 20, 1866). /98
- (19) House, John A. Bingham Reports Proposed Amendment Empowering Congress to Secure the "Privileges and Immunities" of Citizens and the Due Process Rights of All Persons (February 26, 1866). /99
- (20) House, Debate, Proposed Amendment Empowering Congress to Secure the "Privileges and Immunities" of Citizens and the Due Process Rights of All Persons (Feb. 27, 1866). /103
- (21) House, Debate Continued, "Privileges and Immunities" Amendment, Speeches of John A. Bingham, Giles Hotchkiss, Vote to Postpone Consideration (Feb. 28, 1866). /108

*Class 2: The 1866 Civil Rights Act*

- (22) House, Debate, Civil Rights Bill, Speeches of James Wilson and M. Russell Thayer (March 1–2, 1866). /119
- (23) Senate, Debate, Apportionment Amendment, Fails Two-Thirds Vote (March 9, 1866). /133
- (24) House, Debate, Civil Rights Bill, Speech of John A. Bingham in Opposition (March 9, 1866). /135
- (25) House, Debate, Civil Rights Bill, Vote and Passage (March 13, 1866). /142
- (26) Senate, Motion to Retroactively Exclude John Stockton (March 22, 1866). /144
- (27) Senate, President Andrew Johnson’s Message Accompanying Veto of the Civil Rights Bill (March 27, 1866). /144
- (28) Senate, Exclusion of John Stockton (March 27, 1866). /146
- (29) Senate, Civil Rights Bill, Veto Override (April 6, 1866). /146

**Week 8 Materials**

We now enter the drama of the framing and passage of the Fourteenth Amendment. Over the next three weeks, students will witness an extraordinary, and extraordinarily public, national debate over the meaning of freedom, the proper role of federal power, the restructuring of constitutional federalism, the rights of national citizenship, and the legitimacy of pursuing constitutional change while the southern states remained excluded from the national Congress. As you move through these materials, notice that many of them involve newspaper reports—this is meant to alert students to the fact that these congressional debates, unlike those at the original Philadelphia Constitutional Convention, were very public, with speech and debate transcripts published in newspapers on a daily basis.

The materials begin with the opening day of the Thirty-Ninth Congress and the refusal to admit representatives from the former rebel states (over the objections of Democrats). Congress then appoints the Joint Committee on Reconstruction (the “Committee of Fifteen”) who get to work investigating conditions in the southern states and determining what needs to be done prior to the readmission of the southern states. This committee immediately begins drafting and proposing a number of stand-alone amendments on subjects involving civil rights, political apportionment in the House, and disfranchisement of rebel leaders. None of these amendments initially pass. In the meantime, the Senate Judiciary Committee produces drafts of the Freedmen’s Bureau Bill and the 1866 Civil Rights Act (both vetoed by Pres. Johnson, but only the latter passed over that veto). The events of these early months of the 39<sup>th</sup> Congress thus reveal a growing rift with President Johnson (who criticized the exclusion of the southern states) and a divide among Republicans themselves regarding the need for, and content of, constitutional amendments

Students engaging these materials should come away with a sense of how the various factions of Republican members of Congress differed with one another regarding the scope of the Thirteenth Amendment, the proper scope of national power, the value of constitutional federalism, the fundamental rights of all persons and the central rights of

citizens of the United States. Students should pay particular attention to the proposals of John Bingham and Bingham's objections to the Civil Rights Act. These early speeches provide insight into the thinking behind the final version of Section One of the Fourteenth Amendment—most of which Bingham's framed himself.

### **Questions for Class 1**

Why did the Congressional Republicans exclude Senators and Representatives from the former rebel states? What was their authority for this move? When would they be readmitted?

What was the role of the Joint Committee (which ultimately submitted the Fourteenth Amendment). Did this committee have the same agenda as the Senate Judiciary Committee (which submitted the Freedmen's Bureau Bill and the Civil Rights Act)? How were they related and how did they differ?

What was Joint Committee member Ohio Rep. John Bingham trying to accomplish with his proposed amendment, and why did he think the language of Article IV and the Fifth Amendment accomplished these purposes? (in thinking about this, consider Bingham's theory of Art. IV he first announced in his speech opposing the admission of Oregon. (Vol. I.1.B /152) Bingham's insisted this proposed language would take from no state any right that belonged to it under the original Constitution—what did he mean? What were the objections to this draft that led both Conkling and Bingham to vote to withdraw the amendment and postpone debate until April?

### **Questions for Class 2**

What kind of rights were protected by the Civil Rights Act? Why the focus on these rights? The supporters of the Civil Rights Act originally presented the CRA as an enforcement of the Thirteenth Amendment. Did their colleagues agree? Was this a reasonable interpretation of the ratifier's understanding of Section Two of the 13<sup>th</sup> Amendment? In answering this question, recall the material we studied last week regarding the public debate over the ratification of the Thirteenth Amendment. Were there any other plausible sources of constitutional authority for the CRA?

What was John Bingham's understanding of the Civil Rights Act? Why did he refuse to support the Bill? It will be important to remember Bingham's objections when we consider Bingham final draft of Section One of the Fourteenth Amendment.

## **Week 9:**

### ***A Five-Sectioned Fourteenth Amendment: Framing and Passage.***

*For class 1:* As assigned last week, make sure students have read Vol. 2, Introduction to Part 1A, The Fourteenth Amendment: Drafting. /5

*Class 1:* Framing and Passing the Final Version of the Amendment

- (1) S. S. Nicholas, “The Civil Rights Bill” (April 12, 1866). /150
- (2) “News of Proposed Amendments in the Joint Committee on Reconstruction,” Chicago Tribune, (April 16, 1866). /151
- (3) Joint Committee, Thaddeus Stevens Introduces Five-Section Constitutional Amendment, (April 21, 1866). /152
- (4) Joint Committee, Proposed Constitutional Amendment (April 25, 1866). /154
- (5) Joint Committee, Proposed Constitutional Amendment, Adoption of John Bingham’s Draft of Section One (April 28, 1866). /154
- (6) U.S. House, Thaddeus Stevens Introduces Proposed Five-Section Fourteenth Amendment (April 30, 1866). /155
- (7) U.S. House, Proposed Fourteenth Amendment; Speech of Thaddeus Stevens Introducing the Amendment, Debate (May 8, 1866). /158
- (8) U.S. House, Proposed Fourteenth Amendment, Debate and Passage (May 10, 1866). /170
- (9) U.S. Senate, Proposed Fourteenth Amendment, Speech of Jacob Howard (May 23, 1866). /185
- (10) U.S. Senate, Proposed Fourteenth Amendment, Debate, Citizenship Clause Added (May 29, 1866). /194
- (11) U.S. Senate, Proposed Fourteenth Amendment, Debate (May 30, 1866). /195
- (12) Majority and Minority Reports of the Joint Committee (June 8, 1866). /212
- (13) U.S. House, Proposed Fourteenth Amendment; Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version (June 13, 1866). /218
- (14) U.S. Senate, Proposed Fourteenth Amendment; President Andrew Johnson’s Message of Transmission (June 22, 1866). 223

*Class 2:* Ratification (I)—The Election of 1866

*For Class 2 of week 9, and the materials for week 10:* Read Vol. 2, Introduction to Part 1B, The Fourteenth Amendment: Ratification. / 227

- (15) Connecticut, Debate and Ratification of the Fourteenth Amendment (June 25 and 27, 1866). /235
- (16) A Call for a Convention of Southern Loyalists (July 4, 1866). /240
- (17) Circular Accompanying the Call for a Convention of Southern Loyalists (July 10, 1866). /241
- (18) Campaign Speeches of Montgomery Blair and George H. Pendleton, (July 18, 1866). /241

- (19) Tennessee, Gov. William Brownlow's Proclamation and Address, Ratification (July 4–19, 1866). /243
- (20) U.S. House, Readmission of Tennessee, Speech of John A. Bingham (July 20-23, 1866). /247
- (21) The New Orleans Riot, Albany Evening Journal (Albany, N.Y.) (August 1, 1866). /252
- (22) "The Rebel Massacre in New Orleans", The Evening Telegraph (Philadelphia, Pa.) (August 1, 1866). /254
- (23) Speech of Sen. Lyman Trumbull (R-Ill.), Chicago, Illinois (Aug. 2, 1866). /255
- (24) Speech of Rep. Schuyler Colfax (R-Ind.), Indianapolis, Indiana (Aug. 7, 1866). /257
- (25) Speech of Sen. Thomas A. Hendricks (D-Ind.), Indianapolis, Indiana (Aug. 8, 1866). /260
- (26) Speech of Rep. John A. Bingham (R-Ohio), Bowerston, Ohio (Aug. 24, 1866). /263
- (27) "The Appeal," Southern Loyalists Convention, Philadelphia, PA (Sept. 6, 1866). /268
- (28) Frederick Douglass, Speech at Southern Loyalist Convention, Philadelphia, PA (Sept. 6, 1866). /269
- (29) President Andrew Johnson, Remarks on the New Orleans Riot, St. Louis, MO (Sept. 8, 1866). /270
- (30) Texas, House Report and Rejection of Proposed Fourteenth Amendment, (Oct. 13, 1866). /282
- (30) Letter from Secretary of the Interior, O. H. Browning, to W. H. Benneson and H. V. Sullivan, Daily National Intelligencer (Oct. 24, 1866). /289
- (31) "Secretary Browning's Letter", Evening Post (New York, N.Y.) (Oct. 24, 1866). /292
- (32) Election Returns, Evening Post (New York, N.Y.) (Nov. 7, 1866). /293
- (33) Frederick Douglass, "Reconstruction," The Atlantic Monthly (Nov. 1866). /293
- (34). "Madison," Essays on the Fourteenth Amendment, Nos. I, II, and V, New York Times (Nov. 10, 15, and 28, 1866). /297

## **Week 9 Materials**

One of the purposes behind this collection is to highlight the public nature of the debates over the Reconstruction Amendments. Unlike the secret constitutional drafting convention in Philadelphia, the drafting debates over the three Reconstruction Amendments were published on a daily basis. As this week's materials show, the public was able to follow the work of the Joint Committee, even to the point of knowing the draft amendments they would be discussing at their next meeting!

The key historical event in these materials involves political activist Robert Dale Owens' suggestion to Joint Committee member Thaddeus Stevens that the Committee bundle

together redrafted versions of previously unsuccessful amendments into a single five-sectioned amendment. This combined approach would force supporters of one section to support the other sections as well. The Committee quickly embraced the idea and rapidly drafted and submitted a five-sectioned amendment, much of which survived to final passage. Students will likely focus on the adoption of Bingham's proposed draft of Section One. How does it differ from the previous version debated and postponed in February?

Jacob Howard's speech introducing the proposed amendment to the Senate (prior to the addition of the citizenship clause) was so widely published and well known that, during the ratification debates, commentators often referred to the Fourteenth Amendment as the "Howard Amendment." Accordingly, it is worth spending time discussing this speech and its implications for the possible public understanding of the amendment.

The second half of the week turns to the dramatic effort to secure the ratification of the Fourteenth Amendment. Pres. Johnson signals his opposition right out of the gate with his transmission message and he goes on to hit the campaign trail for Democratic congressmen running in the 1866 election (his infamous "swing around the circle"). Johnson's goal was to have enough Democrats elected that a combination of northern and (still excluded) southern congressmen that he might plausibly claim they constituted a "true congressional majority," and rely on them as a separate "Congress." This would precipitate a constitutional crisis and a possible second civil war.

Events overtook politics. The deadly summer rioting in New Orleans became a national scandal for the Johnson administration and moved the northern public in the direction of the Republican policy favoring an amendment requiring state officials to protect basic civil rights. Student should be aware that the riots involved an attack on freedmen meeting to discuss the rights of black suffrage. Even before the ratification of the Thirteenth Amendment, black civil rights activists insisted that black Americans receive the right to vote. This was a major subject in the public speeches of Frederick Douglass and it was the subject he pressed on a reluctant audience at the Southern Loyalist Convention.

### **Questions for Class 1**

How did the Joint Committee's final draft of Section One of the Fourteenth Amendment differ from the draft Bingham originally submitted in February? Does the language of the new draft suggest that Bingham had changed his purpose, or did he believe this new language would better advance his original goal? If the latter, how?

Consider Jacob Howard's speech introducing the new draft amendment to the Senate, a speech traditionally of great interest to (and intense debate among) scholars. Would Howard's audience have understood him as saying the Privileges or Immunities Clause makes the Bill of Rights enforceable against the states? Why or why not? Would they understand Howard as saying the Privileges or Immunities Clause makes otherwise unenumerated economic or common law rights enforceable against the states? What does Howard say about political rights and the effect of the amendment on the right to vote? How can the rights of citizenship *not* include an equal right to vote?

## Questions for Class 2

In the first phase of ratification, the public had to decide whether they supported the republican efforts to propose and ratify the Fourteenth Amendment even in the absence of the southern states in Congress. Assuming the elections of 1866 were a kind of referendum on the Fourteenth Amendment, what exactly did the people think they were ratifying? What, for example, would people have thought of Section One? Was it understood as no more than a restatement of the Civil Rights Act? Would they have thought it applied the Bill of Rights against the states? Would they have focused on these subjects at all rather than other parts of the proposed amendment?

Why did Frederick Douglass describe the proposed Fourteenth Amendment as an “unfortunate blunder?” What role did the issue of black suffrage play in the summer and fall federal election campaign and ratification speeches and debates?

Historians believe that the New Orleans riots, and the Johnson Administration’s response to those riots, played a major role in turning the political tide in favor of the Republicans in the 1866 elections, and their call for the ratification of the Fourteenth Amendment. How might the riots have had such an effect?

**Week 10:**  
***Securing the Ratification of the Fourteenth Amendment***

[For Class 2 of week 9, and the materials for week 10, Read Vol. 2, Introduction to Part 1B, The Fourteenth Amendment: Ratification. / 227]

*Class 1: Ratification Phase 2: The Second Session of the Thirty-Ninth Congress*

- (1) Speech of Wendell Phillips on the Fourteenth Amendment, Cooper Institute (October 25, 1866). /277
- (2) Frederick Douglass, “Reconstruction,” The Atlantic Monthly (November, 1866). /293
- (3) North Carolina, Gov. Jonathan Worth’s Message to the Legislature, Joint Committee Report, Rejection of the Fourteenth Amendment November 20 and December 6, 1866. /309
- (4) Arkansas, Senate Committee Report, Rejection of the Fourteenth Amendment December 10, 1866. /312
- (5) House, Proposed Bill for the Restoration of the Southern States, Speech of Thaddeus Stevens (January 3, 1867). /327
- (6) U.S. House, Speech of John A. Bingham (R-Ohio) in Opposition to Bill for the Restoration of the Southern States (January 16, 1867). /342
- (7) House, Cruel and Unusual Punishments Bill, Debate (January 28, 1867). /355
- (8) House, Bill for the Restoration of the Southern States, Vote to Recommit to Committee on Reconstruction (January 28, 1867). /357
- (9) Proposed “Compromise” Amendment, New York Times (February 5, 1867). /363.
- (10) “The Amendment—The Situation,” Crisis (Columbus, OH) (February 13, 1867). /382
- (11) Massachusetts, Legislative Committee on Federal Relations, Majority and Minority Reports on the Proposed Fourteenth Amendment (February 28, 1867). /383
- (12) The Reconstruction Acts and Tenure in Office Act (March, 1867). /388, 389, 391

*Class 2: The Removal of Secretary Stanton, Impeachment, Final Ratification*

- (12) Suspension of Secretary of War Edwin Stanton, Official Correspondence, Cincinnati Daily Gazette, August 13, 1867. /402
- (13) Ohio Legislature Rescinds Prior Ratification, Plain Dealer (Cleveland, Ohio), January 13, 1868. /404
- (14) General Ulysses Grant Restores Edwin Stanton to the Office of Secretary of War, New York Tribune (New York, N.Y.) January 15, 1868. /404
- (15) President Andrew Johnson Removes Secretary of War Edwin Stanton, Precipitates Impeachment Proceedings, CHICAGO REPUBLICAN, February 22, 1868. /404
- (16) “Impeachment . . . The President Pronounced Not Guilty,” New York Herald May 17, 1868. /414

- (17) 1868 Republican National Convention and Party Platform, Chicago, May 21, 1868. /415
- (18) U.S. Congress, An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, June 25, 1868. /417
- (19) South Carolina, Ratification of the Fourteenth Amendment, (Reverses Earlier Rejection) July 7-9, 1868. /419
- (20) Secretary of State William Seward, Provisional Proclamation of Ratification of the Fourteenth Amendment, July 20, 1868. /421
- (21) U.S. Congress, Senate and House Resolutions, Declaring the Ratification of the Fourteenth Amendment, July 21, 1868. /422
- (22) “Georgia Restored to Civil Authority,” New York Times (New York, N.Y.), July 24, 1868. /424
- (23) Secretary of State William Seward, Final Proclamation of the Ratification of the Fourteenth Amendment, July 28, 1868. /425

## Week 10 Materials

Although Congressional Republicans won veto-proof majorities in the election of 1866 and what appeared to be a popular (Republican) mandate to secure the ratification of the Fourteenth Amendment, ratification was not at all a sure thing. The provisional southern legislatures had uniformly rejected the proposed amendment (Tennessee would eventually be a lone exception), and northern radical Republicans remained frustrated at the Amendment’s failure to expressly protect the freedmen’s right to vote—indeed, Section 2 of the 14<sup>th</sup> could be read as *permitting* discriminatory denial of the right to vote, so long as states accepted reduced numbers in the House of Representatives. Douglass and other black civil rights activists continued to insist that Black Americans would not truly be free citizens until they had access to the ballot box.

Meanwhile, state legislatures continued to grapple with the meaning of the proposed amendment. Democrats insisted the amendment *did* in fact grant the freedmen suffrage. Republicans uniformly denied such a reading, but struggled with the language of Section One. What *were* the privileges or immunities of citizens of the United States? Was it limited to only the equal rights declared in the 1866 Civil Rights Act? Or did it demand that states protect a set of substantive national rights, like freedom of speech and assembly? Both the Arkansas legislature and a committee majority in Massachusetts insisted that the Privileges or Immunities Clause referred to the rights listed in the Bill of Rights and criticized the Clause *for that reason*. It was because these groups believed that provisions in the Bill of Rights *already* bound the states, the proposed Privileges or Immunities Clause was pointless. John Bingham, meanwhile, continued to declare that the ratified amendment would, *for the first time*, make the first eight amendments enforceable against the states. Would the ratifying public understand this to be the case? As last week’s materials illustrate, a number of Republicans simply tied Section One of the proposed Amendment to the 1866 Civil Rights Act and said nothing more.

The newly strengthened Republican majority, and the seemingly stalled ratification effort,

prompted Thaddeus Stevens to propose side-stepping the amendment altogether and simply impose the Republicans' will on the recalcitrant southern governments. His proposed bill would guarantee black suffrage and place the national government in a position of perpetual oversight of the former rebel states. His House colleague John Bingham was outraged by Steven's proposal; Bingham insisted that Congress had no power to alter the fundamental structure of the federalist Constitution and that Congress must allow *the people* to decide whether constitutional change was required. To the vocal frustration of Thaddeus Stevens, Bingham prevailed and Steven's proposal was sent to a languishing death in committee.

What replaced Stevens' proposal, however, was almost as dramatic in its effect on southern governments. Under the 1867 Reconstruction Acts, the military would oversee a new round of voting on a state constitutional convention for the creation of new state governments and, ultimately, new votes on the proposed Fourteenth Amendment. Black citizens in the southern states were to be registered and allowed to vote for a convention and for the members of the new state assemblies. The Reconstruction Acts further declared that no former rebel state would be readmitted until their state had ratified the Fourteenth Amendment and the Amendment itself had been ratified.

Overseeing this military-led endeavor would be Secretary of War Edwin Stanton, a radical Republican held over from the prior Lincoln administration. At the same time Congress passed the Reconstruction Acts, they also passed the Tenure in Office which prohibited President Johnson from firing cabinet members like Stanton without congressional consent. When President Johnson temporarily replaced Stanton with Ulysses S. Grant, and then eventually tried to fire Stanton altogether, Congress immediately moved for impeachment.

The impeachment and removal of Andrew Johnson failed, by a single vote, and southern states went on to vote for new constitutions and new governments. One of the most significant moments in American constitutional history occurred on July 9<sup>th</sup>, 1868, when the majority-black legislature of South Carolina reversed the decision of the prior provisional government and voted to ratify the Fourteenth Amendment. Other southern states, including Georgia, followed suit and on July 28, 1868, Secretary of State William Seward formally declared the ratification of the Fourteenth Amendment.

### **Questions for Class 1**

A number of influential radical Republicans were deeply critical of the proposed Fourteenth Amendment's failure to secure black suffrage. Frederick Douglass, for example, called the amendment an "unfortunate blunder" and Wendell Phillips denounced it as "swindle." Perhaps stung by criticism that he had "blundered" in failing to add the right to vote in Fourteenth Amendment, Thaddeus Stevens seems to abandon the effort to pass the Fourteenth Amendment (which in early 1867 was faltering with no clear chance at success) and establish the right to vote by way of legislation. John Bingham vigorously opposed this effort and called on Congress to stand by federalist principles of limited national power and await the people's decision whether to ratify the Fourteenth

Amendment. Putting yourself back into this moment in time, who had the better argument? Why do you suppose Bingham prevailed? How far did the Reconstruction Acts go towards accomplishing Stevens' ultimate goal?

In his speech on the Cruel and Unusual Punishments Bill, Bingham again describes the pending Fourteenth Amendment as securing the personal rights in the first ten amendments against the states. Interestingly, the Massachusetts majority report opposes the proposed amendment in part because the Bill of Rights *already* binds the states and so accomplishes nothing of value (as did the Arkansas legislature). Yet, as can be discovered by a simple word search for "civil rights act" in the materials relating to the ratification debates, it is clear that a number of Republicans associated the rights of Section One with nothing more than the equal protection rights of the Civil Rights Act. What do you suppose was the common understanding of the phrase "privileges or immunities of citizens of the United States?"

### Questions for Class 2

At the same time Congress passed the Reconstruction Acts, it also passed the Tenure in Office Act. When President Johnson attempted to fire Secretary of War Edwin Stanton without congressional approval, the House immediately moved to impeach Johnson. He escaped conviction and removal in the Senate by a single vote. Afterwards, Johnson refrained from further obstructing the enforcement of the Reconstruction Acts and the Fourteenth Amendment was soon thereafter ratified. Was the impeachment effort justified? In 1926, for example, the Supreme Court ruled that Presidents may remove officers without congressional approval. Another issue driving the impeachment involved Johnson's comments criticizing the actions of the Republican Congress—is this an impeachable offense?

Notice that Secretary of State Seward first only *provisionally* declares the Fourteenth Amendment ratified, leaving it to Congress to determine whether the rescinded affirmative votes of Ohio and New Jersey should count. Congress then declares that those votes *do* count, thus rejecting the power of states to rescind a prior vote to ratify an amendment. Other states, however, were allowed to reverse prior votes *against* the amendment (see, for example, the second vote of South Carolina). Seward defers to Congress's decision and announces the amendment properly ratified. But was it? Had Congress played too fast and loose with the rules for counting votes? Worse, had southern states been coerced into ratifying by making an affirmative vote a condition for readmission to the Union? If an affirmative vote signaled the existence of a properly functioning state government, what legal justification did Congress have for refusing to admit a state which had ratified the 14<sup>th</sup> amendment until *enough* states had ratified the Fourteenth Amendment?

**Week 11:**  
***The Fifteenth Amendment: Framing and Passage***

*For both classes:*

II.2.A. Introduction: The Fifteenth Amendment: Drafting. /435

*Class 1: Drafting the Fifteenth Amendment (I)*

- (1) US Senate, Exclusion of Georgia Senator Joshua Hill, Proposed Suffrage Amendment (Dec. 7, 1868) / 445
- (2) House George Boutwell (R-Mass.), Proposed Suffrage Bill and Suffrage Amendment (January 11, 1869). /445
- (3) Senate, John B. Henderson (R-Mo.), Proposed Suffrage and Office Holding Amendment (January 23, 1869). /446
- (4) House, George Boutwell (R-Mass.), Proposed Suffrage Bill and Suffrage Amendment (January 23, 1869). /447
- (5). House, Suffrage Amendment, Speech of Charles A. Eldridge (D-Wisc.), Debate (January 27, 1869). /463
- (6) Senate, Suffrage and Office Holding Amendment (January 28, 1869). /478
- (7) House, Suffrage Amendment; Speech of John A. Bingham (R-Ohio), Debate, (January 29, 1869). /485
- (8) House, Suffrage Amendment, Alternative Versions Rejected, Passage of Amendment (January 30, 1869). /489
- (9) US Senate, Suffrage and Office Holding Amendment, Debate (Feb. 4, 1869) / 493
- (10) US Senate, Suffrage and Office Holding Amendment, Speech of Charles Sumner (Feb. 5, 1869) / 498

*Class 2: Drafting the Fifteenth Amendment (II), Passage*

- (11) Senate, Suffrage and Office Holding Amendment, Debate (February 8, 1869). /500
- (12) US Senate, Suffrage and Office Holding Amendment, Appointment of Electors, Passage of “Dual” Amendment (Feb. 9, 1869) / 525
- (13) Elizabeth Cady Stanton, “Women and Black Men,” The Revolution (February 11, 1869). /527
- (14) Wendell Phillips, “The Senate and the Proposed Amendment,” National Anti-Slavery Standard (February 20, 1869). /532
- (15) US House, Suffrage Amendment, Bingham’s broader amendment fails, Addition of Language Protecting the Right to Hold Office (Feb. 20, 1869) / 532
- (16) US Senate, Suffrage Amendment, Call for Conference with House (Feb. 23, 1869) / 535
- (17) House, Suffrage Amendment, Removal of Language Protecting Office Holding, Passes Without Debate (February 25, 1869). /536
- (18) Senate, Suffrage Amendment, Debate and Passage (February 26, 1869). /536

## Week 11 Materials

The Introductory essay for the drafting of the Fifteenth Amendment provides the full historical account of the chaotic process by which the Fifteenth Amendment was framed and passed. In summary:

The question of black suffrage was a matter of significant public debate long before the debates on the Fifteenth Amendment. While the country debated whether to constitutionally abolish slavery, Louisiana freedmen were already organizing to secure the right to vote. Frederick Douglass insisted that the freedmen would not be truly free until they were guaranteed access to the ballot box and he refused to support the Fourteenth Amendment precisely because of its failure to secure black political rights. Although Section Two of the Fourteenth Amendment penalized states that excluded blacks from the electorate, nothing in the amendment expressly prohibited the states from preferring the penalty over black suffrage—indeed, Section Two appeared to constitutionally permit such a choice.

With the passage of the Reconstruction Acts, Congress moved further in the direction of securing black suffrage by requiring the registration of southern black voters and permitting them to vote on the creation of a new state constitution and a new state government. Congress also imposed “fundamental conditions” on the readmission of former rebel states like Arkansas, North and South Carolina, Louisiana, Georgia, Alabama and Florida, prohibiting these states from denying blacks the right to vote any time in the future. It remained unclear, however, whether such conditions were enforceable, much less constitutional. Even in those southern states required by federal law to permit black suffrage, the exercise of black political power faced stiff resistance. In Georgia, for example, although blacks had been permitted to vote for the members of the state legislature, the Georgia State Assembly voted to remove elected black representatives, claiming that blacks had the right to vote but not the right to hold office. The removal outraged Republican members of Congress who had voted to readmit the state of Georgia, and prompted the Senate’s refusal to seat Georgia Senator Joshua Hill at the opening of the third session of the Fortieth Congress. By that time, Republican congressional leaders had decided the time had come to take the final step towards constitutionally securing the equal political rights of the freedmen: passage of a fifteenth amendment abolishing racial discrimination in voting.

Congress drafted and debated the Fifteenth Amendment during the third session of the Fortieth Congress, between December 7, 1868 and March 3, 1869. A widely-shared sense of urgency to see it completed before the end of the session resulted in both houses of Congress working on various suffrage amendments at the same time. The multiplicity of versions and votes, with drafts bouncing back and forth between the two houses, inevitably produced periods of substantive and procedural chaos. Accordingly, the debates can be difficult to follow, at least in terms of the actual sequence of events and the evolution of various drafts. Still, there is an identifiable flow to the general debate: the House moved first and adopted a suffrage amendment on January 30, 1869, the Senate adopted its own version on February 9 and, in the last weeks of February, a flurry of procedural votes and

exchanged drafts concluded with both houses passing a final joint-conference draft on February 25 and 26, 1869.

The issues up for debate also followed a general sequence. Each chamber began by debating whether Congress already had the power to secure black suffrage by way of a bill or whether it was necessary to first pass a constitutional amendment. Although Radical Republicans argued no amendment was necessary, both houses ultimately decided to proceed by way of amendment. The next set of issues involved questions of scope: Should the amendment protect both the right to vote and the right to hold office? And should the right to vote be limited to prohibiting racial discrimination (“impartial” suffrage), or should it more universally protect against discrimination based on prior condition of servitude, education, nativity, property, or creed? Finally, once each house decided for itself the issue of scope, it became a race against the clock as the two houses tried to reach a mutual agreement on the draft amendment before the end of the session.

Embedded within the debates on suffrage are extended and sophisticated discussions of congressional power and constitutional meaning. Just as the Fourteenth Amendment drafting debates contained extended discussion of the meaning and scope of the Thirteenth Amendment, so the Fifteenth Amendment drafting debates contain substantial commentary on the meaning and scope of the Fourteenth Amendment, especially the Citizenship and Privileges or Immunities Clause of Section One, and the suffrage provision of Section Two. Also, as was true during the Fourteenth Amendment debates, the suffrage amendment debates include significant discussion of the scope of congressional power under the original Constitution, particularly the Republican Guarantee Clause and the Comity Clause of Article IV, as well as repeated references to and debates about the theories of Madison and Hamilton in the Federalist Papers and the original ratification debates.

Democrats, of course, flatly denied that the Constitution granted Congress any power to interfere with the states’ regulation of suffrage. Most Republicans also denied, or at least seriously doubted, that Congress had the power to proceed by statute. According to Michigan Senator Jacob Howard:

I feel constrained to say here now that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained. No such thing was contemplated on the part of the committee which reported the amendment; and if I recollect rightly, nothing to that effect was said in debate in the Senate when it was on its passage. One word further. The construction which is now sought to be put upon the first section of this fourteenth article, it seems to me, is plainly and flatly contradicted by what follows in the second section of the same article.

Even the Radical Massachusetts Senator Henry Wilson conceded that “some of the ablest statesmen and most eminent jurists in and out of Congress question the constitutional authority to enact such a law,” and that “perhaps a large majority of the Republicans of the country entertain serious doubts of the right to secure equal suffrage by congressional legislation.” It was best, Wilson advised, to proceed by way of an amendment, submitting

it to the states and “putting forth our full strength to secure its adoption.” Both houses quickly concluded that there was little if any support for a suffrage bill and the assemblies focused their efforts on drafting an acceptable amendment.

Disagreement was grounded on whether banning racial discrimination in voting would be enough and whether states would find alternative ways of disfranchising the freedmen. On January 27, 1869, Ohio Representative and primary author of Section One of the Fourteenth Amendment John Bingham proposed replacing Boutwell’s Section One with a far broader amendment that prohibited states from abridging the “equal exercise of the elective franchise” among males, whether the distinction was based on education, property, religious creed, prior condition of servitude or something else. According to Bingham, “States may set up a religious test, and pronounce at once that all who are not of the Protestant faith shall be disqualified either to vote or to hold office and add thereto a property qualification and an educational qualification.” The majority of the House, however, voted down broader proposals by Bingham and others.

In fact, for a period of time it appeared as if *no* proposal would succeed. Worried onlookers who supported a black suffrage amendment feared that members holding out for a broader amendment might end up defeating any chance for an amendment this session, or ever. Accordingly, even the most radical civil rights advocates began calling for compromise; better a narrow amendment than no amendment at all. On February 20, 1869, writing in the *National Anti-Slavery Standard*, Wendell Phillips pleaded “[f]or the first time in our lives we beseech [radical congressional Republicans] to be a little more politicians—and a little less reformers—as those functions are usually understood

Finally, on February 25, 1869, the Conference Committee submitted what amounted to the narrowest proposal considered by either house the entire session. Limited to racial discrimination in voting, the draft amendment declared:

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 same day, the House without debate voted 144-44 to pass the amendment. The next day, February 26, 1869, the Senate followed suit, passing the amendment on a vote of 39-13. Regretfully supporting the stripped-down amendment, Senator Wilson lamented:

Do not tell me, sir, that the right to vote carries with it the right to hold office. It does no such thing. . . . I believe, however, that if the black men have the right to vote they and their friends in the struggle of the future will achieve the rest. Therefore, I am willing now to give them the right to vote if I cannot get for them the right to be voted for. I will take that if I cannot get any more.

## Questions for Class 1

Boutwell and few others insisted that Congress did not need an amendment and could simply pass legislation protecting the rights of suffrage. What possible sources of constitutional power did Congress have at this time (prior to the Fifteenth Amendment)? Did you find any of these arguments plausible? Would an informed member of the public (or the federal courts) have found such arguments plausible? Notice that both conservatives *and* some radical Republicans opposed proceeding by way of amendment—why?

What were the major differences between the various versions? Why might it not be enough to simply pass an amendment demanding the right to vote not be abridged on account of race? Why might it be a problem had Congress attempted to pass a broader amendment? What role is federalism playing in these debates? Obstructing amendments of sufficient breadth, or driving the amendment process by maintaining a limited understanding of previously granted power?

## Questions for Class 2

What do we learn in these debates about the common understanding of the Fourteenth Amendment? In particular, how do members understand the meaning of the Privileges or Immunities Clause? Members seem to disagree about whether this Clause establishes the right to vote—what are the arguments? Do you get a sense as to whether one view is more commonly held than another? On the same topic: What about our earlier discussion regarding whether the Privileges or Immunities Clause “incorporates” the bill of rights? Recall Sen. Howard’s description of Section One when he introduced the 14<sup>th</sup> amendment to the Senate in 1866 (see Vol. 2 p. 185). Compare this description with the one he presents in these debates (521-22). Are they the same?

How do you explain the ultimate decision to frame the 15<sup>th</sup> Amendment in the narrowest possible way (does not protect office holding, or prevent discrimination on the basis of sex, education, nationality, or any other classification). What were the various arguments against broader drafts? Was Congress correct to ultimately pass a narrow amendment, or should they have proposed something broader? How does the historical context inform your answer?

Consider the assigned essays by the influential abolitionist Wendell Phillips and the equally influential women’s rights advocate Elizabeth Cady Stanton. What were their views about what was occurring in the drafting debates? Were you surprised by either of their positions? What did Stanton mean when she warned that “fearful outrages” and “horrors” would be the result of passing an amendment that gave black males the right to vote but not women?

**Week 12:**  
***The Fifteenth Amendment: Ratification***

*For both classes:*

II.2.B. Introduction: The Fifteenth Amendment: Ratification. /541

*Class 1: Ratification of the Fifteenth Amendment (I)*

- (1) “Ratifying the Amendment,” Daily Evening Bulletin (San Francisco, California) (March 4, 1869). /547
- (2) President Ulysses S. Grant, First Inaugural Address, March 4, 1869. /548
- (3) South Carolina, Statement of House Minority, Ratification of the Fifteenth Amendment (March 11, 15 1869). /554
- (4) Georgia, Gov. Rufus B. Bullock’s Message to the Legislature, House Passage and Senate Rejection of the Fifteenth Amendment (March 10-18, 1869). /554
- (5) New Jersey, Gov. Theodore Randolph’s Message to the Legislature, Note on Rejection of Amendment (March 24, 1869). /558
- (6) Ohio, House Debate, Rejection of Fifteenth Amendment (March 25 - April 1, 1869). /559
- (7) U. S. Congress, The Requirement Bill: Requiring Virginia, Mississippi and Texas to Ratify Fifteenth Amendment as a Condition of Readmission, New York Herald (April 10, 1869). /559
- (8) Texas v. White (1869) / 561
- (9) “The Fifteenth Amendment,” New York Times (April 12, 1869). /569

*Class 2: Ratification of the Fifteenth Amendment (II)*

- (10) Annual Meeting of the American Equal Rights Association, Remarks of Stephen Foster, Elizabeth Cady Stanton and Frederick Douglass (New York, N.Y.) (May 12-13, 1869). /570
- (11) “Wendell Phillips Advocates It—Ratification by Rhode Island,” New York Times (May 30, 1869). /574
- (12) “All Wise Women Should Oppose the Fifteenth Amendment,” Elizabeth Cady Stanton, The Revolution (October 21, 1869). /577
- (13) U.S. Congress, The “Georgia Bill,” Debate and Passage (December 16, 20, 22, 1869). /581
- (14) New York, “Ratification of the Fifteenth Amendment Rescinded,” New York Times (January 6, 1870). /585
- (15) California, Gov. H. H. Haight’s Message to the Legislature, Rejection of the Fifteenth Amendment (January 5, 28, 1870). /588
- (16) Ohio, Legislature Reverses Prior Vote and Ratifies the Fifteenth Amendment January 3 and 14, 1870. /586
- (17) “The Amendment Complete,” Boston Daily Journal February 4, 1870. /593
- (18) President Ulysses S. Grant, Message to Congress Announcing the

Ratification of the Fifteenth Amendment (March 30, 1870). /595  
(19) Frederick Douglass, Letter to a Ratification Celebration (April 5, 1870).  
/597

## Week 12 Materials

Section Two of the Fourteenth Amendment was meant to incentivize the enfranchisement of the freedmen, but it left the ultimate decision to each state. If they refused to enfranchise otherwise eligible males, then their representation in the House and electoral college would be proportionately reduced.

The 1867 Reconstruction Acts went further. The former states of the confederacy were required to hold elections in which freedmen could vote for a new state government and a new Constitution—and then hold new votes on the Fourteenth Amendment. According to the Reconstruction Acts, these states would not be readmitted until (1) they ratified the amendment and (2) the amendment itself received enough ratification votes to be added to the constitution. States like South Carolina and Georgia voted to ratify the 14<sup>th</sup> amendment, and the Fourteenth Amendment itself was declared ratified on July 28, 1868. Accordingly, the military relinquished their control of those states and their representatives returned to Congress, including Georgia Senator Joshua Hill, appointed by the Georgia Legislature.

The majority white Georgia legislature, however, had created a political firestorm by refusing to seat newly-elected black state representatives. Although the Reconstruction Acts required the state to allow blacks to vote, those acts said nothing about the right to hold office. The provisional governor, Rufus Bullock, a radical Republican, was outraged. When the state legislature met to consider ratifying the fifteenth amendment, Bullock mocked them with a message declaring that the proposed Amendment would *guarantee* black citizens the right to hold office in the state legislature. Bullock's message was an effort to poison the vote against the Amendment and trigger action by the national Congress to reimpose military control of Georgia and oust the recalcitrant white legislators.

Ultimately, Georgia's ratification vote failed by a single vote—a vote cast *by a republican* legislator. As Gov. Bullock likely expected and hoped, the rejection prompted Congress to pass the Georgia bill, which restored military oversight of the state and imposed a new condition for readmission—ratification of the 14<sup>th</sup> Amendment. It was a stunning and unprecedented move, and one opposed by John Bingham as an unconstitutional maneuver. Opponents (and newspapers) criticized the act as calling into question the legitimacy of ratification.

Meanwhile, ratification faced on-going head winds. In the north, the leaders of the women's rights movement, Elizabeth Cady Stanton and Susan B. Anthony became increasingly vocal opponents of the Fifteenth Amendment. Their newspaper, *The Revolution*, was financially supported by the notoriously racist pro-slavery Democrat George Francis Train, it occasionally published Train's racist essays. Stanton and

Anthony's relationship with Democrats like Train, and their demand that educated white women receive the vote *before* uneducated black males created obvious tension with universal suffrage advocates like Frederick Douglass. Douglass supported suffrage for both men and women, but he advocated ratification of the Fifteenth Amendment as a critically important step in the right direction. The exchange between these civil rights leaders at the Annual Meeting of the American Equal Rights (May 12–13, 1869) is both awkward and telling. In response to Anthony's demands that women be given the ballot first, Douglass responds, "I do not see how any one can pretend that there is the same urgency in giving the ballot to woman as to the negro. With us, the question is a matter of life and death." Anthony, however, was immovable: "[I]f you will not give the whole loaf of suffrage to the entire people, give it to the most intelligent first. If intelligence, justice, and morality are to have precedence in the government, let the question of women brought up first and that of the negro last."

Movements that had once worked together in support of abolition were now splitting apart. Soon afterwards, the women's suffrage movement would itself split into two groups, The National Women's Suffrage Association headed by Anthony and Stanton and the American Women's Suffrage Association headed by Lucy Stone who continued to work alongside Douglass in support of the Fifteenth Amendment.

Despite these headwinds, ratification slowly moved forward. The Requirement Bills had their effect and Texas, Virginia, and Mississippi voted to ratify the Amendment. Meanwhile, New Jersey, Delaware, Oregon, California, Maryland, Kentucky Tennessee voted to reject the Amendment. Finally, on February 2, 1870, a reconstituted Georgia legislature held a new vote and ratified both the Fourteenth Amendment (for the second time) and the Fifteenth Amendment. This met the three-quarters requirement of 28 votes out of 37 states. President Grant insisted on making the ratification announcement himself and, in doing so, declared the final internment of *Dred Scott* :

"In view, however, of the vast importance of the fifteenth amendment to the Constitution, this day declared a part of that sacred instrument, I deem a departure from the usual custom justifiable. A measure which makes at once four million people voters who were heretofore declared by the highest tribunal in the land not citizens of the United States, nor eligible to become so (with the assertion that "at the time of the Declaration of Independence the opinion was fixed and universal in the civilized portion of the white race, regarded as an axiom in morals as well as in politics, that black men had no rights which the white man was bound to respect,") is indeed a measure of grander importance than any other one act of the kind from the foundation of our free Government to the present day . . . I repeat that the adoption of the fifteenth amendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."

Frederick Douglass, who had fought so long and so hard for black suffrage could hardly believe the day had finally arrived:

The revolution wrought in our condition by the fifteenth amendment to the Constitution of the United States, is almost startling, even to me. I view it with something like amazement. It is truly vast and wonderful, and when we think through what labors, tears, treasures and precious blood it has come, we may well contemplate it with a solemn joy. Henceforth we live in a new world, breathe a new atmosphere, have a new earth beneath and a new sky above us.

### Questions for Class 1

As the nation debates whether to ratify the Fifteenth Amendment, a number of states remain excluded from Congress and under federal military control. Is this on-going military control constitutional? Congress itself was not sure the Supreme Court would uphold the current Reconstruction Acts—this is why they repealed the statute granting the Supreme Court jurisdiction to issue an opinion in a suit challenging the constitutionality of the Reconstruction Acts--the case we know as *ex parte McCardle* (you may have studied this case in Constitutional Law). The Supreme Court handed down its opinion in *McCardle the same day* that it handed down *Texas v. White*. Does that latter case provide any clues as to whether a majority of the Court (Chief Justice Chase especially) believed the on-going military control of the southern states was constitutional?

Continuing to think about congressional power: What do you think about the Requirement Bill? What was its purpose? Was the law constitutional? Where does Congress get the authority to condition readmission of the southern states on their willingness to ratify the Fifteenth Amendment? Can this be reconciled with the reasoning of *Texas v. White*? With the doctrine of constitutional federalism? The New York Times declares the act will have the effect of rendering the Fifteenth Amendment an invalid political act, rather than a constitutional act of the people. Is the New York Times correct?

### Questions for Class 2

Some scholars argue that Reconstruction fundamentally transformed the original federalist (“states rights”) Constitution into a document of plenary national power. Reconstruction, they insist, erased federalist (state protective) limits on the scope of national power. Consider in this regard Congress’s decision to eject Georgia from Congress and reinstate military rule of the state *after they had already voted to readmit Georgia*. Does this suggest that these scholars are right?

Women’s rights groups had been pressing for the rights of suffrage since before the Civil War. While the 14<sup>th</sup> Amendment was being drafted and debated, they petitioned Congress to recognize universal (male and female, as well as black and white) suffrage. Instead, they got Section 2 of the Fourteenth Amendment which penalized the denial of the vote to *males*. When again they were excluded from the scope of the Fifteenth Amendment, Elizabeth Cady Stanton and Susan B. Anthony decided to openly oppose its ratification. Where they justified in doing so? Were they justified in the *manner* in which they opposed the amendment? What was your reaction to reading the interaction between Stanton and

Douglass at the 1869 AERA annual meeting?

At the time of its ratification, Frederick Douglass declared that the accomplishment was “truly vast and wonderful,” and that henceforth, “we live in a new world, breathe a new atmosphere, have a new earth beneath and a new sky above us.” Given what we know about (1) Congress choosing the most-narrow version of the proposed amendment and (2) the later rise of both government-mandated segregation and the manifold ways that southern laws and culture prevented black citizens from exercising the right to vote (poll taxes, literacy tests, private violence, etc), wasn’t Douglass unduly optimistic? Is it possible to view the accomplishment of the Fifteenth Amendment *without* taking into consideration what was coming down the road? On the other hand, is it reasonable to view the Fifteenth Amendment in isolation and only in reference to what happened afterwards, as opposed to thinking about the amendment as the third act in a remarkable three-amendment reconstruction of the Constitution?

## **Week 13:** ***Early Interpretation (I)***

*For both Classes:* Read the Introduction to the Appendix, Vol. 2, /601.

### *Class 1*

1. The Enforcement Bill and Repassage of the 1866 Civil Rights Act (May 31, 1870) / 605.
2. US House, Judiciary Committee, Petition of Victoria Woodhull on the Subject of Female Suffrage (Jan. 2, 1871) / 607
3. US House, Judiciary Committee, “The Woodhull Report” (Jan. 30 and Feb. 1, 1871) / 609.
4. US House, Speech of John Bingham on the Meaning of the Privileges or Immunities Clause of Section One of the Fourteenth Amendment (Mar. 31, 1871) / 620.

### *Class 2*

5. The Slaughterhouse Cases (1873) / 630.

## **Week 13 Materials**

Week 12, with its discussion of the ratification of the Fifteenth Amendment, marked the end of the primary set of materials for this class. At this point, some instructors may wish to end the substantive portion of the class and reserve the remaining classes for presentation of student papers.

For those continuing in their discussion of the historical materials, the Appendix in Volume 2 contains a number of key post-discussions and early Supreme Court cases interpreting the Reconstruction Amendments. As the introduction to Appendix explains, “[o]nce one opens the door to post-Fifteenth Amendment discussions and debates, of course, there is no end of possibly, indeed likely, informative historical documents. . . . [T]he limited nature of this collection required narrowing down the possibilities to a few key Supreme Court cases, a particularly important piece of reconstruction legislation, the debate over women’s suffrage, and a final word by one of the most important players in this constitutional drama, John Bingham.” The introduction contains more information about these final documents and their particular significance.

A few key points are worth emphasizing. First, students should notice that, although the original 1866 Civil Rights Act (CRA) protected only “citizens,” when Congress repassed the CRA in 1870, they extended the bulk of its protections to “all persons”—an extension that suggests Congress, like John Bingham, associated the CRA with the “all persons” clauses of Section One of the Fourteenth Amendment (Due Process and Equal Protection). Students will recall that Bingham originally refused to support the CRA on the grounds because (1) the due process protection of life, liberty and property under the Fifth Amendment should extend equally to all persons and (2) Congress currently lacked the

power to enforce the Due Process Clause of the Fifth Amendment. Once ratified, the Fourteenth Amendment bound the states to protect the rights of due process and granted Congress power to enforce those rights. Not surprisingly, John Bingham supported the *repassage* of the extended CRA.

### Questions for Class 1

Scholars disagree about the relationship between the 1866 Civil Rights Act and the Fourteenth Amendment. Some claim that Section One was passed in order to constitutionalize the CRA. Do you agree? Consider once again how the CRA and the Fourteenth Amendment were drafted by different congressional committees with different agendas. It does appear that the last-minute addition of the opening Citizenship Clause represented an effort to “constitutionalize” the CRA’s citizenship clause. But what about the rest of Section One? If both framers and ratifiers anticipated that Section One would authorize legislation *like* the CRA, which provisions in Section One (in combination with Section Five) accomplished this goal? Does the repassage of the Civil Rights Act suggest what the majority of Congress believed in 1870?

The Petition of Victoria Woodhull and the subsequent House Report present not only an early debate about the scope of the Privileges or Immunities Clause, these documents also present something of an historical mystery—one scholars have grappled with for decades. John Bingham chaired the House Judiciary Committee that considered the Woodhull Petition and Bingham submitted the subsequent Report of the Committee Majority. That Report declares that the Privileges or Immunities Clause protected nothing more than the same rights protected under the Comity Clause of Article IV as described by Justice Bushrod Washington in *Corfield v. Coryell*. The Privileges or Immunities Clause added no additional rights, and thus left the rights of suffrage to state control. Students will notice that this description suggests the Privileges or Immunities Clause did not “incorporate” the Bill of Rights against the states. This reading is narrower than that sought by John Bingham in the Thirty-Ninth Congress, and it quite different from the meaning presented by Jacob Howard in 1866. Only a few weeks later, Bingham expressly *rejects* such a narrow reading of the Privileges or Immunities Clause. In his speech before the House in March 1871, Bingham insists the Privileges or Immunities Clause contains different rights than those discussed in *Corfield*, and include the rights listed in the first eight amendments to the Constitution. Which “Bingham document” expresses Bingham’s actual view? The view of the ratifying public?

### Questions for Class 2

In 1873, the Supreme Court handed down a split decision in *The Slaughterhouse Cases*, with the majority rejecting a claim by Louisiana butchers that the Privileges or Immunities Clause granted them an absolute right to pursue an otherwise lawful trade (one they had been denied by a state granted monopoly to the Crescent City Slaughter-House Company). Justice Miller distinguished the rights of national citizenship covered by the Privileges or Immunities Clause from the rights of state citizenship covered by the Comity Clause of Article IV. The rights of national citizenship were those secured by the federal Constitution

and federal law. The right to pursue a trade was not secured by the federal Constitution and thus was left to the control of the individual states. Miller's opinion drew vigorous dissents from Justices Field and Bradley, both of whom insisted that, even if not enumerated in the Constitution, the right to labor was a fundamental right of American citizens protected against state abridgment. According to Justice Field, Miller's opinion reduced the Privileges or Immunities Clause to a "vain and idle enactment."

Miller insisted that his reading did not rob the Privileges or Immunities Clause of *all* meaning, but simply limited its scope to those rights which "owe[d] their existence to the Federal government, its National character, its Constitution, or its laws." Here Miller supplied a short, inexhaustive list of national privileges or immunities, including "[t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State." To accept the plaintiffs' interpretation of the Privileges or Immunities Clause, Miller insisted, would "transfer the security and protection" of local civil rights "from the States to the Federal government" and empower Congress to impose federal regulatory control of everything from "the right to acquire and possess property of every kind" to the right "to pursue and obtain happiness and safety." This would "fetter and degrade the State governments" and would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." Miller refused to accept such consequences "in the absence of language which expresses such a purpose too clearly to admit of doubt."

For decades, constitutional scholars have criticized Miller's opinion as wrongly rejecting the incorporation of the Bill of Rights and effectively rendering the Privileges or Immunities Clause a dead letter. But does it? Has Miller closed the door on the incorporation of the first eight amendments, or has he simply rejected the idea that the Clause protects rights nowhere enumerated in the Constitution? Miller is also often criticized for insisting the considerations of federalism should inform the Court's interpretation of the Reconstruction Amendments. From the perspective of these critics, the Reconstruction Amendments represent a *rejection* of federalism or, at the very least, these amendments should not be limited by antebellum theories of federalism. Having studied the actual constitutional debates, students are in a position to engage these criticisms: Does the Fourteenth Amendment represent a rejection of federalism? Did federalism play a role in its framing and ratification?

Finally, compare Bingham's description of the Privileges or Immunities Clause in his speech of 1871 with that of Justice Miller. To what degree do they differ? Both distinguish the "privileges or immunities of citizens of the United States" (14<sup>th</sup> amendment) from the "privileges and immunities of citizens in the several states." (Art. IV). Would Bingham have rejected Miller's continued embrace of constitutional federalism?

## **Week 14:** ***Early Interpretation (II)***

### *Class 1:*

1. Bradwell v. Illinois (1873) / 654
2. Minor v. Happersett (1875) / 656

### *Class 2:*

3. United States v. Reese (1876) / 661
4. United States v. Cruikshank (1876) / 664

## **Week 13 Materials**

As we studied last week, Justice Joseph Bradley in his *Slaughterhouse* dissent argued that the plaintiffs had a claim under the Due Process Clause:

“Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right. Liberty and property are not protected where these rights are arbitrarily assailed.”

Justice Bradley narrowed the potential scope of these words the very next day when the Supreme Court handed down its opinion in *Bradwell v. Illinois*. The Illinois Supreme Court had refused to admit Myra Bradwell to the practice of law, regardless of her credentials, on the ground that she was a woman. Bradwell appealed to the U.S. Supreme Court, arguing that the denial was an abridgement of her Fourteenth Amendment privileges and immunities. Writing once again for the majority, Justice Miller simply cited to the previous day’s decision in *Slaughterhouse* and denied Bradwell’s claim: The right to pursue a trade, whether lawyer or slaughterhouse operator, was not a protected privilege or immunity of citizens of the United States. Justice Joseph Bradley, who had just dissented in *Slaughterhouse*, this time concurred with the majority. According to Bradley, “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” Under common law, Bradley explained, “a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state,” and this legal incapacity justified the Illinois Supreme Court’s decision to “render[] a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.”

Efforts by women’s rights activists to expand the protections of the Fourteenth Amendment to the political realm would fair no better. In the 1875 case *Minor v. Happersett*, for example, the Supreme Court rejected the same claim that Victoria Woodhull had unsuccessfully made before the House judiciary committee—that women as citizens of the United States have a Fourteenth Amendment protected right to vote. Writing for a unanimous Court, Chief Justice Morrison Waite conceded that women were citizens, but noted that since the time of the Founding this status had never been understood as necessarily including the rights of suffrage. Examining the constitutions of the states that ratified the original Constitution, Waite concluded “we find that in no state were all citizens permitted to vote. Each state determined for itself who should have that power.” If the Founders, or the framers of the Fourteenth Amendment, had intended to alter this arrangement, it “would have been expressly declared.”

The framers of the Fifteenth Amendment had, of course, expressly declared that black citizens could not be denied the right to vote on account of race. Although the framers of that amendment had rejected efforts to prohibit other means of denying suffrage besides racial discrimination in Section One, it was an open question whether Congress could legislatively expand this protection pursuant to its powers under Section Two. In the 1876 case, *United States v. Reese*, the Supreme Court said *no*. According to Chief Justice Morrison Waite, “[t]he Fifteenth Amendment does not confer the right of suffrage upon any one.” The Amendment did nothing more than prevent the state or federal government “from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.” Congress had no power to enforce the amendment beyond legislation that protected against racially discriminatory interference with the right to vote. According to Waite, “[i]t is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment.” Because Section Three of the 1870 Enforcement Act prohibited any interference with the right to vote, not just those involving racial discrimination, this section exceeded Congress’s powers to pass “appropriate legislation.” The Court’s decision appeared to leave states free to deny blacks the right to vote on any ground (e.g., education, payment of a fee or tax, property, etc.), so long as the regulation appeared racially neutral.

The same day the Court limited its interpretation of the Fifteenth Amendment in *Reese*, it also handed down its opinion in *United States v. Cruikshank*, a case further narrowing the Supreme Court’s interpretation of the Fourteenth Amendment’s Privileges or Immunities Clause. In *Cruikshank*, a mob of white Democrats attacked a group of black Republicans who had barricaded themselves in the Colfax Louisiana Courthouse in an effort to prevent the mob from denying them the right to hold office. The resulting “Colfax Massacre” left scores dead, including “fifty blacks who lay down their arms under a white flag of surrender.”<sup>1</sup> In response, the federal government indicted some members of the mob under Section Six of the 1870 Enforcement Act which criminalized acts where “two or more persons [] band or conspire together. . . with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the

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<sup>1</sup> Eric Foner, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION*, at 437 (updated edition, 2014).

Constitution or laws of the United States.” The indictment specifically alleged an intent “to hinder and prevent the citizens named in the free exercise and enjoyment of their ‘lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose’” and the right of “bearing arms for a lawful purpose.”

According to Chief Justice Waite, to the extent the indictment refers to rights listed in the Bill of Rights, these original amendments were “not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone.” The indictments therefore were defective since they did not involve situations where the federal government had allegedly abridged the First Amendment right to assemble or the Second Amendment right to bear arms. Nor did the Fourteenth Amendment’s Due Process or Equal Protection Clauses authorize the federal indictments since these provisions applied only in cases where the state itself had denied due process or equal protection of the laws. According to Waite:

“The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.”

Finally, since it had not been specifically alleged that the individuals had attacked the black Republicans *because they were* black, Congress’s power to enforce the Fifteenth Amendment did not come into play.