LITERACY TESTS, THE FOURTEENTH AMENDMENT, AND DISTRICT OF COLUMBIA VOTING: THE ORIGINAL INTENT*

ALFRED AVINS**

On August 6, 1965 the President signed into the law the Voting Rights Act of 1965.[1] Section 4(e), purporting to secure fourteenth amendment rights, prohibits the states from requiring literacy tests in the English language as a voter qualification if the applicant is literate in another language learned in an American flag school. This provision was designed principally to extend the right to vote to Spanish-speaking natives of Puerto Rico who had moved to New York City although they were unable to comply with New York State's English language literacy test.[2]

Inasmuch as this statute is the first congressional attempt to interfere with English language literacy tests used by the states for voting qualifications, and since only six years before, the United States Supreme Court unanimously upheld the constitutionality of such tests,[3] it is obvious that a substantial question is presented as to the constitutionality of the congressional provision. In fact, in *Morgan v. Katzenbach*[4] a statutory three judge court, in a two to one decision, held section 4(e) of the Voting Rights Act of 1965 unconstitutional. This article attempts to show that the legislative history of the fourteenth amendment unequivocally supports the decision of the lower federal court that the fourteenth amendment did not bestow upon Congress the power to ban literacy tests prescribed by state law.

I. Relevance of Inquiry into Original Intent

This author starts from the premise that the amending power as set forth in article V of the United States Constitution, and the respective provisions in state constitutions for amendments, are exclusive, and that any changes made in a constitution must be made in accordance with such provisions, and not otherwise. As a corollary, this author's position is that a constitu-

* This article constitutes a portion of the legislative history appendices originally written for the United States Supreme Court in Katzenbach v. Morgan, No. 877, Oct. Term 1965. The author was the prevailing attorney for the appellee in the lower federal court case of Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965).

** Professor of Law, Memphis State University.

1. Pub. L. No. 89-110, 89th Cong., 1st Sess. (Aug. 6, 1965).
2. 111 Cong. Rec. 10675 (daily ed., May 20, 1965).
3. Lassiter v. Board of Elections, 360 U.S. 45 (1959).
4. Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965).

tion is exactly what its framers intended it to be, as in the case of other documents, and that the intent of the framers is the beginning, middle, and end of all inquiry as to meaning.[5] This author takes the position that the ideology of the framers, and not that of the present-day judges, is dispositive of all issues, and that such intent is obtained from the enactment itself and from the debates thereon. Since amendments to the United States Constitution are submitted by Congress on a "take-or-leave-it" basis to the state legislatures, the intent in Congress is controlling absent evidence of a different understanding by state legislatures, and such intent in later amendments may be gleaned primarily from the *Congressional Globe* and *Record.*

The purpose of a constitution as seen by this author was well-stated in Congress in 1871 as follows:

> Constitutions are chains with which men bind themselves in their sane moments in order that they may not die by a suicidal hand in the day of their frenzy. If they can be disregarded deliberately and avowedly on a plea of public safety in time of war or peace; if they can be altered or amended except by the will of all, expressed as directed therein, they are of no more value than the paper on which they are written. Nay, sir, they are worse than useless; for they drug the sentinels of liberty while the freedom of the country is being destroyed. They lead us to lean on a broken reed, and our fall will be heavy.[6]

Moreover, the necessity of resorting to the original understanding was well-known during this period also. One senator observed:

> I should like to know upon this question of constitutional law how it is that my colleague can be so "educated." Upon questions of policy and propriety men may be educated by passing events; we may change our minds and not be "milestones standing by a deserted highway," as he expressed it. We may change our opinions in regard to questions of policy and propriety according to the changing scenes that are passing before us; but so far as the law of the country is concerned, especially the highest law of the land, the Constitution itself, how are we so readily to change our opinions? Events do not change that. We are not allowed to be "educated" by passing events in regard to the proper meaning of the Constitution of the United States. We gather that from the letter and from the contemporaneous history and construction.[7]

---

5. See Avins, *Gray v. Sanders—A Constitutional Footnote,* 26 ALA. L. REV. 82 (1965).

6. CONG. GLOBE, 42d Cong., 1st Sess. 574 (1871) [hereinafter cited as 42 (1) GLOBE 574 (1871)].

7. 40 (2) GLOBE 857 (1868).

> I ask the question, that he may answer it, because after all he will admit, as a lawyer, as we all must, that in construing a constitution, and construing a statute and construing any provision, we look at contemporaneous history in the first place, and we look more particularly, when endeavoring to find out what the sense of an instrument is, at all its clauses, in order to get the meaning of all, for one explains the other. 39 (1) *id.* at 706 (1866) quoted in 41 (2) *id.* at 1560 (1870).
>
> I desire also to protest against the idea that our Constitution changes with the

John Locke's statement in his *Essay on Civil Government,* also well-known during this period, that " 'usurpation is the exercise of power which another hath a right to . . . .' "[8] also seems sound, and therefore, if a judge intentionally and knowingly construes a constitutional provision in a manner at variance with the original intent of its framers, thereby in effect amending it, he usurps power not belonging to him, and violates his oath to defend the particular constitution he is charged with supporting. Where the court so doing is the highest court which can be appealed to, the usurpation is aggravated because the error cannot be corrected.

Where a constitution is construed at variance with the original intent of the framers, but in accordance with prevailing political or ideological ideas, as reflected in the executive or legislative branches of the government, opposition to such usurpation is liable to be feeble, as people are often wont to accept the benefits of an illegal transaction if they strongly desire these benefits without caring too much about the means by which the benefits were obtained.[9] However, no matter to what extent the general public may be fooled into believing that the construction is legitimate, the lawyers of opposing ideology will not, of course, be in any way misled by a judiciary which amends a constitution under the guise of construing it. For the time being, they may be powerless to take any corrective measures, but it does not follow that involuntary acquiescence indicates agreement or even acceptance. History teaches that political winds have a habit of shifting, and the ideology of one generation may become the anathema of the next generation. When the political tide turns, the protection of a favorable ideological climate is stripped away, and the work of the judiciary becomes exposed to the merciless judgment of the court's ideological opponents. If the court has simply performed its proper function of construing the constitution, its decisions will stand the test of time and be respected even by such opponents once they obtain power, but if the court has succumbed to the temptation to inject its own ideological concepts into its decisions, historical research will discredit these decisions and the judges who made them. The result will be to sweep these decisions into the ash can of history, and probably, along with them, other related decisions, which might have otherwise been permitted to stand, for the judges who have decided cases

---

fluctuations of public opinion. The Constitution of the United States is an unchangeable law, except as it is amended in the manner therein provided. *Id.* at 1323.

8. 42 (1) GLOBE 574 (1871).

9. See Roche, *The Expatriation Cases*: *"Breathes There the Man, With Soul So Dead . . .* ?" 1963 SUPREME COURT REV. 325.

based on their own ideology will have been so thoroughly discredited that nothing will remain of their work.[10]

Having established the necessity of resorting to the original understanding of the framers of a constitutional provision, the next inquiry must be, whose intent is decisive? Obviously, the views of the opponents, except as they are set forth for the purpose of rebutting the actual intent of the majority and not for the purpose of declamation or making political capital by exaggeration, are irrelevant. Therefore, the speeches of the opponents must be accepted with the utmost of caution. As for the majority, intent in respect to a controversial proposal must be gleaned from the views, not of those who would like to do as much as possible, but from those who would like to do less and whose votes are necessary to accomplish something. It is a corollary from the nature of the legislative process that nothing can be accomplished unless sufficient votes can be collected to make up the requisite constitutional minimum. Thus, the intent of the marginal proponents must be decisive, because unless these borderline legislators can be won over, no proposal can pass, and they will not vote for anything which goes beyond their views, while those who would like to go further will, because they must, accept a more limited measure than that which they desire.

---

10. *The Dred Scott Case,* Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), is an excellent case in point. At the present time, it has been erroneously assumed that the error in this case which caused it to fall into disrepute after 1860 was that it construed the United States Constitution in accordance with the original intent of the framers. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 3 (1955). The exact contrary, however, is true. Behind the facade of original understanding, the Anti-Slavery Republicans recognized the fact that the decision was in fact contrary to the original intent of the framers, and was politically and ideologically inspired in order to support the pro-slavery position of the Democratic Party and the Buchanan administration, and for this reason excoriated Chief Justice Taney. 39 (1) GLOBE 1116, 1263 (1866); CONG. GLOBE, 40th Cong., 2d Sess., Appendix 302 (1868) [hereinafter cited as 40 (2) GLOBE APP. 302 (1868)]; 40 (3) GLOBE 991 (1869); 40 (3) GLOBE APP. 210-11 (1869); 41 (2) GLOBE 1440 (1870). See also 39 (1) *id.* at 303-04 (1866). The Radical Republicans had no such words of denunciation for the Supreme Court when they discussed pro-slavery decisions, such as Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), and Moore v. Illinois, 55 U.S. (14 How.) 13 (1852), and referred to them as if they enunciated valid law. See, *e.g.,* 39 (1) GLOBE 1094 (1866); 40 (2) *id.* at 2602 (1868); 42 (1) *id.* at 695 (1871). Indeed, Congressman John A. Bingham, the Radical Republican from Ohio who drafted the first section of the fourteenth amendment, paid the Taney Court a compliment in respect to the *Moore* case, by saying: "The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution." 42 (1) GLOBE APP. 84 (1871). In other words, Bingham said that the Constitution was at fault, and the Court could not be blamed, as they were just "doing their job." Thus, Radical Republican denunciation of Chief Justice Taney was not based on the rendering of pro-slavery decisions but on perverting the Constitution to do so.

Everything we know about the background of the fourteenth and fifteenth amendments reinforces this view. When the narrowly divided Senate of the First Session of the Thirty-Ninth Congress failed to override President Johnson's veto of the Freedmen's Bureau Bill,[11] it became obvious that the dominant Republicans would have to assemble a two-thirds majority to substitute the congressional plan of reconstruction for that of the President. This was done by persuading two of the marginal Republicans, Senators Edwin D. Morgan of New York and Waitman T. Willey of West Virginia to vote with the majority, and by expelling or excluding on somewhat flimsy grounds Senator John P. Stockton, a New Jersey Democrat.[12] Even so, the President's opponents were unsure of their majority.[13] Ultimately, on the critical vote to override President Johnson's veto of the Civil Rights Bill, the Republican majority prevailed by a vote of thirty-three to fifteen,[14] with one absentee, Senator James Dixon of Connecticut, an opponent of the majority.[15] Thus, the Republican leadership could ill afford defections. Although the vote on the fourteenth amendment was thirty-three to eleven, the difference is accountable to absences by opponents of the dominant party,[16] with the exception that Senator B. Gratz Brown of Missouri was absent, and Senator James Lane of Kansas switched to the majority. With such a razor-thin dominance of the Senate by the requisite two-thirds majority, the Republican leadership could hardly propose excessively advanced measures which might cause defections.

All the other evidence points the same way. Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee and a leading moderate in the dominant group, recognized the need for legislative compromise.[17] Even the ultra-Radical Senator Charles Sumner of Massachusetts was willing to make timely compromises on his proposals in order that some of them might be enacted.[18] Senator Henry Wilson of Massachusetts observed that "all the reformatory measures that have been carried during the last ten years have been carried in detail, a little today and a little tomorrow."[19] Moreover, "half-a-loaf-is-better-than-none" speeches were de-

11. 39 (1) GLOBE 943 (1866).
12. 40 (2) GLOBE 823 (1868); 40 (3) *id.* at 1630 (1869).
13. The somewhat unscrupulous Radical, later president *pro tem* of the Senate, Benjamin F. Wade of Ohio, went so far as to urge that the vote to override President Johnson's veto of the Civil Rights Bill be taken while several of the opposition were ill or away from the chamber. 39 (1) GLOBE 1786 (1866).
14. 39 (1) GLOBE 1809 (1866).
15. 40 (2) GLOBE APP. 236 (1868); 40 (3) GLOBE 859 (1869).
16. 39 (1) GLOBE 3042 (1866).
17. 40 (2) GLOBE 1315 (1868).
18. 42 (2) GLOBE 873 (1871).
19. 42 (2) GLOBE 874 (1871).

livered both during the debates on the fourteenth amendment[20] and during debates on the fifteenth amendment.[21] It is therefore obvious that the moderates had a decisive influence in limiting the scope of these constitutional amendments.

II. Divergence of Views on Literacy Tests and District of Columbia Suffrage

The question of literacy tests and voting qualifications arose in the Senate even before the close of the Civil War. In a colloquy between Senator Charles Sumner, the Massachusetts equalitarian Radical Republican, and Senator Edgar Cowan, a conservative Republican from Pennsylvania, on whether Negroes should be permitted to vote in the District of Columbia, Cowan pointed to the Massachusetts literacy test for voters as a limitation on suffrage there.[22] Likewise Senator Willey of West Virginia, one of the Republican moderates whose vote made the fourteenth amendment possible, in opposing Negro suffrage in the District of Columbia, pointed out that suffrage was not a natural right and that Connecticut had a literacy test for voters.[23]

When debate on Negro suffrage resumed on May 12, 1864, Senator Lot M. Morrill of Maine, another Radical Republican who voted for the fourteenth amendment, moved to amend the voting qualifications for the District of Columbia by adding the requirement of a literacy test.[24] Senator LaFayette S. Foster, a Connecticut Republican who voted for the fourteenth amendment, arose to state that he did not think that suffrage was a natural right, although color was not a reasonable test. However, he stated that he agreed with Morrill's proposal for a literacy test, saying:

> It is difficult to determine the precise amount of intelligence that a man should possess in order to be qualified as a voter. I think, however, all must agree that if he cannot read he is not qualified; he has not sufficient intelligence to be a voter. He must, of course, if he exercised the right, exercise it almost as the tool of somebody else; . . . . I would therefore make the ability to read a test for every man, and I would add to it the ability to write, but not a property qualification.[25]

Senator Timothy O. Howe also agreed with Morrill. He declared:

> I am willing to exclude those here in this District who cannot read and write from the right of suffrage, because really, if I am compelled to

20. 39 (1) Globe 2459, 2498, 2511, 2539, 3148 (1866).
21. 40 (3) Globe 1623-33, 1638-40 (1869).
22. 38 (1) Globe 2141 (1864).
23. *Ibid.*
24. 38 (1) Globe 2239 (1864). See also *id.* at 2241, 2543.
25. 38 (1) Globe 2240 (1864).

> tell the truth, I do not think a man can be qualified to exercise this very delicate power or prerogative or privilege—whichever you call it —of supervising the whole action of the Government who cannot read the first syllable as to what the Government does. I think he is as incompetent to exercise the right of suffrage as the man who has never read Blackstone or any other work on jurisprudence is to practice law.[26]

Nothing more was done on this subject in the Thirty-Eighth Congress. Hence, when the First Session of the Thirty-Ninth Congress met in December, 1865, not only did it have to deal with the status of the Southern states, including the basis for their representation in Congress, but in addition, this latter problem necessarily included a consideration of voting qualifications. Moreover, the Congress still had to deal with the District of Columbia suffrage question. Of course, debates on the District bill, by illuminating current ideas on literacy tests, necessarily reflect on prevailing ideas which influenced the fourteenth amendment. Hence, relevant material will be considered chronologically rather than segregated into a discussion of different measures because ideas in respect to these other bills and proposed bills naturally spilt over into the consideration of the fourteenth amendment.[27]

Early in the session, the House of Representatives considered the question of Negro suffrage in the District of Columbia.[28] As evidence that Negroes in the District were qualified to vote, Congressman James F. Wilson, a Republican from Iowa and Chairman of the House Judiciary Committee, pointed out that: "Four thousand of the colored population of the District can read and write. They subscribe for about four thousand five hundred copies of newspapers, a large proportion of these being dailies."[29] During the same debate, Congressman Glenni W. Scofield, a Pennsylvania Republican, in answering an argument that Negroes should not be permitted to vote because they were uneducated, said: "But it is not true of the largest portion of the colored people in this District. Nearly all of them can read, and the scholarship of many is of a very high order. The whole objection is easily obviated by an educational qualification."[30]

Of course, the Republicans were not unanimously in favor of educational

---

26. 38 (1) GLOBE 2243 (1864); *id.* at 2248.

27. The general background of the fourteenth amendment may be found in Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68 (Avins ed. 1963).

28. 39 (1) GLOBE 173 (1866).

29. 39 (1) GLOBE 175 (1866).

30. 39 (1) GLOBE 180 (1866).

qualifications for voting. Thus, such a test was opposed the next day by Congressman John F. Farnsworth of Illinois.[31]

On January 12, 1866, Congressman Thomas T. Davis, a Unionist-Republican from New York, advocated extending the Negroes restricted suffrage and praised the literacy test imposed by Massachusetts' constitution.[32] Three days later, Congressman John A. Kasson, after noting that each state had the right to determine the qualifications of its voters for itself, declared with approval that the leading Radical newspaper, the Republican Party organ of Iowa, his home state, had urged a literacy test for voting.[33] He declared, "[L]et *all* these who did go and fight, and who can read and write, and thus understand the system of our Government; who can read the ballot with which they are attempting to control our country; let all these men go and vote if you will, and aid in the government of our country."[34] He pointed with approval to Massachusetts' English-language literacy test, and declared, "I say, therefore, on whatever grounds you put it, whether you regard the safety of our institutions or the light of philanthropy, you should insist on qualifications substantially the same as those required in the State of Massachusetts."[35] In reply, Wilson endorsed Kasson's position, and noted "that the action of Massachusetts, in relation to that [English-language literacy] amendment, was not aimed at the Negro, but at the foreigner."[36]

The next day, Congressman George W. Julian, an Indiana Republican, urged Negro suffrage in the District of Columbia. He quoted John Stuart Mill for the proposition that universal suffrage was the best rule, but Congressman James A. Garfield, the Ohio Republican who later became President, interrupted him to point out that "Mr. Mill, in the volume from which the gentleman has just quoted, takes strong ground in favor of suffrage restricted by educational qualifications."[37] Julian went on to disagree with Davis' preference for a literacy test for voting, and stated that "the educational test [was] invented by the Know-Nothings some years ago, during their raid against the foreigners."[38]

The following day, Congressman William A. Darling, a New York Republican, stated that "I am not in favor of giving the colored man here the right of suffrage without imposing an educational qualification. The prop-

31. 39 (1) GLOBE 205 (1866).
32. 39 (1) GLOBE 215 (1866).
33. 39 (1) GLOBE 237 (1866). He said: "I will say that my argument militates against ignorance in the qualification of electors wherever found." *Id.* at 238.
34. 39 (1) GLOBE 239 (1866).
35. *Ibid.*
36. *Ibid.*
37. 39 (1) GLOBE 257 (1866).
38. *Ibid.*

erty qualification I consider odious, and disregard it entirely."[39] Congressman Robert S. Hale, another New York Republican, followed with a similar proposal.[40] He urged that education presumptively fitted a man to vote, even if it were not a perfect test of fitness. Julian's point that the "educational qualification in Massachusetts is a bequest from the late lamented Know-Nothing party" did not deter Hale's advocacy of it. Hale stated that while he disliked that party, he was not going to be deterred from accepting its proposals because of the source.[41] Congressman Burt Van Horn, another New York Republican, also endorsed Hale's position.[42]

When the final vote in the House of Representatives was taken on January 18, 1866, on Hale's proposal to limit suffrage of both Negroes and whites in the District of Columbia to those who could read, paid taxes, or saw military service, fifty-three votes, all Republican, were cast in favor of this measure, although Wilson protested that "I do not see how any man can justify himself in voting [for] . . . these instructions, when it would deprive even loyal white men in the District of the right to vote, to say nothing of its effects on the blacks."[43] It is interesting to note that all but one of this group of fifty-three House members, consituting almost half of the party's strength, voted for the fourteenth amendment on one of the two occasions during which it was before the House, and that exception was an absentee announced as favoring the measure. Thus, so strong was the Radical feeling in favor of a literacy test that half of the Republican delegation was prepared to disenfranchise both loyal whites and Negroes in the District of Columbia to impose it.

III. The Civil Rights Bill and the Fourteenth Amendment

On January 23, 1866, the House of Representatives took up a proposed constitutional amendment relating to the basis of representation in that body which, in revised form, ultimately became the second section of the fourteenth amendment. Congressman Thaddeus Stevens, the Pennsylvania Radical Republican leader, proposed that representation be based on population, except that where suffrage was restricted based on race or color, all persons of such race or color should be excluded from the basis of representation.[44] Congressman William D. Kelley, a Philadelphia Republican,

39. 39 (1) Globe 278 (1866).
40. 39 (1) Globe 279 (1866).
41. 39 (1) Globe 280 (1866). See the discussion of prejudice against foreigners by Radical Republicans in 39 (1) Globe App. 62 (1866).
42. 39 (1) Globe 283 (1866).
43. 39 (1) Globe 311 (1866).
44. 39 (1) Globe 376 (1866).

proposed to add a proviso giving Congress power to regulate voting qualifications.[45] These proposals drew discussion by a number of congressmen relative to literacy tests.

For example, Congressman John F. Farnsworth, an Illinois Republican, expressed the fear that "a State may enact that a man shall not exercise the elective franchise except [*sic*] he can read and write, making that law apply equally to the whites and blacks, and then may also enact that a black man shall not learn to read and write, exclude him from their schools, and make it a penal offense to instruct or to teach him, and thus prevent his qualifying to exercise the elective franchise according to the State law."[46] Congressman Jehu Baker, another Illinois Republican, likewise objected to the proposal of Stevens because states could impose non-racial tests such as property qualifications and still not lose representation in Congress.[47] Congressman Thomas A. Jenckes, a Rhode Island Republican, agreed with Baker, and pointed out that "there are many States where the payment of a tax is required as a condition of voting."[48]

The next day, Congressman Robert C. Schenck, an Ohio Republican, objected to Stevens' proposal because it would discourage Southern states from allowing literate Negroes or those with property to vote, and thus from making a start in Negro suffrage. Schenck stated that he disapproved of a property qualification, but, adverting to Massachusetts, indicated that he thought a literacy test might have merit. Congressman John A. Bingham, a fellow Republican from Ohio who drafted the first section of the fourteenth amendment, replied that if a Southern state required everybody to take an English-language literacy test, Stevens' proviso would not be violated, but "if, on the other hand, South Carolina shall by law expressly declare that

45. 39 (1) GLOBE 377 (1866).

46. 39 (1) GLOBE 383 (1866). Congressman John M. Broomall, a Radical Republican from Pennsylvania, alluded to the Massachusetts literacy test, and predicted that "the people of the South [may] choose to impose an educational qualification upon the elective franchise among the negroes. . . ." *Id.* at 433. Likewise, Congressman Hamilton Ward, a New York Republican lawyer, declared: "They will readily publish some ground of exclusion from suffrage other than of 'race or color.' They may require them to read and write, and yet keep alive the black code against disseminating knowledge among them. Indeed, they may require them to have a collegiate education, or something else equally absurd." *Id.* at 434.

47. 39 (1) GLOBE 385 (1866). Congressman William Higby, a California Republican lawyer, also objected: "The amendment as reported would, at least impliedly, give to the states the power to discriminate as to those who shall be allowed the elective franchise." *Id.* at 426. Higby also added: "I say it, without fear or favor, that that amendment will allow any State government in its organization to exclude one half of its population from the right of suffrage. . . ." *Id.* at 427.

48. 39 (1) GLOBE 386 (1866). For other references to poll taxes in existence at the time, see 42 (1) *id.* at 453 (1871); 43 CONG. REC. 4173 (1873).

no colored citizen of the State shall vote unless he can read the English language, leaving the ignorant white man to vote, then this provision declares that South Carolina shall not be entitled to representation upon her black population."[49] Schenck did not agree and wanted to give Southern states credit for even limited Negro suffrage. In addition, he objected to interfering with state qualifications of any kind and therefore proposed that representation be based solely on voting population, leaving to the states the power to limit such voting population as they saw fit, subject to the reduced representation thereby incurred.[50] This scheme, rather than Stevens' proposal, was ultimately adopted.

The question of literacy and voting next came to the attention of the House of Representatives in a somewhat different context. On February 1, 1866, Congressman Ignatius Donnelly, a Minnesota Republican, offered an amendment to the Freedmen's Bureau Bill giving the commissioner the power to provide a common-school education for all freemen and white refugees who applied for it. Donnelly launched into a long peroration on the necessity for education, the evils of illiteracy, and the extent to which the Southern rebellion and secession was made possible by the widespread illiteracy in the South. Donnelly's speech was accompanied by extensive statistics on illiteracy, to which he attributed many of the votes for Breckinridge, the southern candidate for President in 1860.[51] Donnelly was hostile to letting illiterates vote. He declared:

> Education means the intelligent exercise of liberty, and surely without this liberty is a calamity, since it means simply the unlimited right to err. Who can doubt that if a man is to govern himself he should have the means to know what is best for himself, what is injurious to himself, what agencies work against him and what for him? And the avenue to all this is simply education. Suffrage without education is an edged tool in the hands of a child—dangerous to others and destructive to himself.[52]

The question of literacy and suffrage also came up in the Senate on February 8th in the debate on the Freedmen's Bureau Bill.[53] Senator John B.

49. 39 (1) GLOBE APP. 298 (1866).

50. 39 (1) GLOBE APP. 299 (1866).

51. 39 (1) GLOBE 585-90 (1866).

52. 39 (1) GLOBE 586 (1866). Congressman James G. Blaine, the well-known Maine Republican, was also in favor of literacy tests for voting. He remarked:

> Basing representation on voters—unless Congress should be empowered to define their qualifications—would tend to cheapen suffrage everywhere. There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters, and all conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. *Id.* at 141.

53. 39 (1) GLOBE 742 (1866).

Henderson, a Missouri Republican who later voted for the fourteenth amendment, urged that Negroes be permitted to vote. But he was willing to accept a literacy or property qualification, saying:

> I do not say give the Negro the suffrage immediately. I say just declare simply that no State shall discriminate against him, and then, if you wish to require as a qualification of a white man that he shall read and write, let it be required of a black man. . . . Make it equal; let the State laws be equal and let your own laws be equal. . . .[54]

Senator Lyman Trumbull, an Illinois Republican who was the virtual party leader in the Senate during this period, sarcastically rejected Negro suffrage "which he regards as the cure-all for all troubles and difficulties."[55]

On February 14, 1866, Henderson returned to the subject of Negro suffrage, urging such an amendment on Congress. He objected to the proposed amendment being considered which reduced representation when voting qualifications were based on race or color because, "It admits the exclusive right of the States over the whole subject. It does not stop there either; but the implication is clear, that the negro may and ought to be, in some cases, excluded from the ballot on account of the color of his skin."[56] Moreover, he urged that this proposal, which with a modification ultimately became the second section of the fourteenth amendment, could be easily evaded, and to demonstrate this quoted from the *Richmond Examiner* that the states could easily nullify the amendment by imposing an educational or property qualification on new voters.[57] But Henderson added:

> I desire that no State law hereafter shall be permitted to set up the senseless test of color in fixing the qualifications of voters. But I am not now ready to take away from the States the long-enjoyed right of prescribing the qualifications of electors in their own limits. Congress is not now prepared to take and exercise properly this power. Local reasons may exist, and do often exist, for excluding certain persons from the ballot. The people of each State can better judge of these reasons than Congress or the people in other States.[58]

Henderson, who ultimately voted for the fourteenth amendment, added: "It is, in my judgment, yet proper to leave the qualifications of electors with the States, but not to the extent of allowing them to introduce disease and death into the body-politic, by denying in their own organizations the ele-

54. 39 (1) GLOBE 746 (1866).

55. *Ibid.*

56. 39 (1) GLOBE APP. 119 (1866).

57. *Ibid.*

58. 39 (1) GLOBE APP. 120 (1866).

mentary principles of republicanism."[59] A little later, Henderson got into a colloquy with Sumner of Massachusetts, as follows:

> Mr. SUMNER. Do I understand my friend to say that a State might adopt a rule, for instance, founded on the color of the hair, so that all men with light hair should be excluded from the right of suffrage? I insist that a State is not, under the Constitution of the United States, authorized to make any exclusion on account of color.
>
> Mr. HENDERSON. It ought not to be, you mean.
>
> Mr. SUMNER. No; it cannot be. Color cannot be a qualification. There may be a qualification founded on age or residence or knowledge or crime.[60]

Shortly thereafter, Henderson again returned to the question of literacy tests. He declared:

> My proposition is put in the least offensive form. It respects the traditionary right of the States to prescribe the qualifications of voters. It does not require that the ignorant and unlettered negro shall vote. Its words are simply that "no State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of race or color." The States may yet prescribe an educational or property test, but any such test shall apply to white and black alike. If the black man may be excluded because he is uneducated, the uneducated white man must be excluded too. If a property test be adopted for the negro, as in New York, the same test must apply to the white man. It reaches all the states, and not a few only, in its operation.[61]

Later that same day, Senator Daniel Clark, a New Hampshire Republican, also urged Negro suffrage on the Senate, subject to such limitations as would "apply to all classes, and be clearly for the public good." He declared: "I would put both [Negroes and whites] on the same basis, whether with or without restriction or qualification. If the negro should learn to read and write before he votes, let the white man do the same."[62] However, Senator Richard Yates, an ultra-Radical Republican from Illinois, disagreed with his fellow Republicans and opposed any literacy or other test or qualification

---

59. *Ibid.*

60. 39 (1) GLOBE APP. 121 (1866). Sumner also declared: "Education also, may, under certain circumstances, be a requirement of prudence, especially valuable in a Republic, where so much depends on the intelligence of the people. These temporary restrictions do not in any way interfere with the right of suffrage, for they leave it *absolutely accessible to all.*" 39 (1) Globe 685 (1866).

61. 39 (1) GLOBE APP. 122 (1866). Henderson also urged in support of his position that President Andrew Johnson favored letting Negroes vote if they were literate or owned at least $250 worth of real estate. *Id.* at 123.

62. 39 (1) GLOBE 833 (1866).

which would restrict universal manhood suffrage.[62] But this plea was rejected by Senator John Sherman of Ohio, a Republican who also later voted for the fourteenth amendment. Sherman proclaimed: "Let us be moderate," and urged his fellow Republicans "to waive extreme opinions." Mindful of the fall elections of 1866 in which the Republicans would have to run, for the first time, without the benefit of Lincoln's popularity, Sherman cautioned:

> Will you, by your demand of universal suffrage, destroy the power of the Union party to protect them [Freedmen] in their dearly purchased liberty? Will you, by new issues upon which you know you have not the voice of the people, jeopard these rights which you can by the aid of the Union party secure to these freedmen? . . . Why, then, present these issues? Why decide upon them? Why not complete the work so gloriously done by our soldiers by securing union and liberty to all men without distinction of color, leaving to the States, as before, the question of suffrage.[64]

During this period, Congress was also considering the Civil Rights Bill, the principles of which were ultimately embodied in the first section of the fourteenth amendment. Congressman James F. Wilson of Iowa, the Republican Chairman of the House Judiciary Committee, who was in charge of the bill, opened the debate on March 1, 1866, by saying that the bill did not touch voting qualifications because suffrage was a political right and not a civil right.[65] Congressman Andrew Jackson Rogers of New Jersey, a Democratic opponent of the bill, argued in reply that if Congress could ensure that Negroes had civil rights it could also give them political rights, and this bill could be fairly so construed, notwithstanding Wilson's disclaimer.[66] But Rogers was rebutted by Congressman Burton C. Cook, an Illinois Republican supporter of the bill.[67] Moreover, Congressman M. Russell Thayer, a Pennsylvania Republican, spoke in support of the bill the next day and specifically rebutted Rogers' charge. He said:

> I do not think he can believe that this bill extends or alters, or can be construed to extend or alter, the laws regulating suffrage in any of the States. Sir, no lawyer who is acquainted with the use of terms and the rules which regulate the construction of laws will, I think, seriously contend that the language of this bill can by any possibility, or by any forced construction, produce any such result.[68]

---

63. 39 (1) GLOBE APP. 104 (1866). See also *id.* at 1227, 1229.
64. 39 (1) GLOBE APP. 132 (1866).
65. 39 (1) GLOBE 1117 (1866).
66. 39 (1) GLOBE 1121-22 (1866).
67. 39 (1) GLOBE 1123 (1866).
68. 39 (1) GLOBE 1151 (1866).

Thayer added:

> No man upon this floor can successfully defend himself before the country for voting against this bill upon the ground that it impairs the rights of States in determining the qualifications of electors. It has no such effect, and I tell those gentlemen that when they vote against this bill they will have an answer to their constituents for voting, not to protect the rights of States in the regulation of suffrage, but for voting against the protection of the fundamental rights of citizenship and nothing else.[69]

Congressman Ralph Hill, an Indiana Republican, suggested that the bill be amended in line with Thayer's speech to exclude suffrage.[70]

Debate continued on this point. Congressman Anthony Thornton, an Illinois Democrat and opponent of the bill, urged against it that the term "civil rights" might be construed liberally to include suffrage.[71] But a Republican supporter of the bill, Representative William Windom of Minnesota, replied that the bill "does not . . . confer the privilege of voting, for that is a political right, and not included in the bill."[72] Indeed, to remove all doubt, Wilson at the close of the debate moved to amend the bill so that it would expressly exclude suffrage, and the House agreed to this amendment.[73] Moreover, he again reiterated that the right of suffrage was not included[74] in reply to Bingham's argument that the term "civil rights" might include such a right, and that the bill was therefore in excess of Congress' constitutional power.[75] Finally, to obviate these objections, the House Judiciary Committee struck out the term "civil rights" entirely so that there could be no possible basis for construing the bill to include voting rights.[76] In this amendment, the Senate concurred,[77] and in urging the Senate to override President Johnson's veto of the bill, Trumbull noted that the bill did not include the right to vote, saying: "I have never thought suffrage any more necessary to the liberty of a freedman than of a non-voting white, whether child or female."[78]

During the debate on overriding the veto of the Civil Rights Bill in the Senate, Senator James H. Lane, a Kansas Republican, quoted with approval the President's proposal to let Negroes vote who were literate or

69. *Ibid.*
70. 39 (1) GLOBE 1154 (1866).
71. 39 (1) GLOBE 1157 (1866).
72. 39 (1) GLOBE 1159 (1866).
73. 39 (1) GLOBE 1162 (1866).
74. 39 (1) GLOBE 1294 (1866).
75. 39 (1) GLOBE 1291 (1866).
76. 39 (1) GLOBE 1367 (1866).
77. 39 (1) GLOBE 1413 (1866).
78. 39 (1) GLOBE 1761 (1866).

possessed $250 worth of real estate.[79] When Senator B. Gratz Brown, a Missouri Republican, stated that he was in favor of universal suffrage, Lane added: "I am not one of the men who are for universal suffrage. I am for a qualification."[80]

With the Civil Rights Bill passed over the President's veto and a two-thirds regular Republican majority assured in the closely divided Senate, Congress turned its attention to the various proposals for a constitutional amendment which was intended to embody the congressional plan of reconstruction for the South and which ultimately became the fourteenth amendment. Once again, representation in the House of Representatives occupied the attention of the members, and as part of this, qualifications for voting were discussed. Thus, Congressman George F. Miller, a Pennsylvania Republican, alluded to the fact that "there can be no doubt that under the Constitution each state has a right to regulate the qualifications of its own electors, and Congress has no right to assume the authority."[81]

Congressman Thaddeus Stevens, the Radical Republican leader of the House of Representatives, opened the debate on the proposed fourteenth amendment by saying:

> This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. . . . Believing, then, that this is the best proposition that can be made effectual, I accept it.[82]

Stevens went on to say that he considered the second section "the most important in the article." He declared that this section, in effect, gave the Southern states a choice of either enfranchising their freedmen or suffering a loss of representation in the House.[83] He went on to say that he preferred

---

79. 39 (1) GLOBE 1802-03 (1866). The following colloquy also showed Lane's views:

> Mr. LANE, of Kansas. . . . Kansas, when she grants suffrage to the colored men, will grant it on the basis of qualification. We have, say, eight thousand black men; and we pass a law authorizing those who can read and write to vote. . . .
>
> . . . .
>
> Mr. WILSON. . . . Is the Senator in favor of suffrage in Kansas on qualifications?
>
> Mr. LANE, of Kansas. Yes, sir, and our people are. I am instructed by my constituents to vote for a constitutional amendment predicating representation on suffrage, and I am instructed to vote for extending suffrage in the District of Columbia on an educational basis. There is where I stand, and where my constituents stand. *Id.* at 1257.

80. 39 (1) GLOBE 1804 (1866).

81. 39 (1) GLOBE 2089 (1866).

82. 39 (1) GLOBE 2459 (1866).

83. *Ibid.*

his previous proposal because it would induce Southern states to give all Negroes the ballot, while this one carried less of an inducement. He said: "This section allows the States to discriminate among the same class, and receive proportionate credit in representation. This I dislike. But it is a short step forward. The large stride which we in vain proposed is dead. . . ."[84] Thus, Schenck's original proposal, to give Southern states credit for letting only literate or property-holding Negroes vote, was ultimately accepted over Stevens' views. Moreover, he considered the disenfranchisement section relating to rebels "too lenient." But he concluded: "Still I will move no amendment, nor vote for any, lest the whole fabric should tumble to pieces."[85]

After a speech against the fourteenth amendment by Congressman William E. Finck, an Ohio Democrat, who alluded to the fact that the first section embraced the principles of the recently enacted Civil Rights Bill,[86] Congressman James A. Garfield, an Ohio Republican and later President of the United States, spoke in favor of the proposed amendment. He said, however:

> First let me say I regret more than I shall be able to tell this House that we have not found the situation of affairs in this country such, and the public virtue such that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage.
>
> Sir, I believe that the right to vote, if it be not indeed one of the natural rights of all men, is so necessary to the protection of their natural rights as to be indispensible, and therefore equal to natural rights. . . . And I profoundly regret that we have not been enabled to write it and engrave it upon our institutions, and imbed it in the imperishable bulwarks of the Constitution as a part of the fundamental law of the land.
>
> But I am willing, as I said once before in this presence, when I cannot get all I wish to take what I can get. And therefore I am willing to accept the propositions that the committee have laid before us. . . .[87]

Congressman William D. Kelley, a Pennsylvania Republican, expressed the same sentiment. He declared: "I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the

84. 39 (1) GLOBE 2460 (1866).

85. *Ibid.* Stevens also told the House:

> Therefore if you should take away the right which now is and always has been exercised by the States, by fixing the qualifications of their electors, instead of getting nineteen States, which is necessary to ratify this amendment, you might possibly get five. I venture to say you could not get five in this Union. And that is an answer, in the opinion of the committee, to all that has been said on this subject.

Id. at 536.

86. 39 (1) GLOBE 2461 (1866). See *id.* at 2462, 2465.

87. 39 (1) GLOBE 2462 (1866).

committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country."[88] An opponent of the fourteenth amendment, Congressman Charles A. Eldridge, a Wisconsin Democrat, twitted the majority on this point. He asked: "Why is it that the gentleman from Pennsylvania [Mr. Stevens] gives up universal suffrage? . . . . It is a compromise of what they call principle for the purpose of saving their party in the next fall election."[89] Congressman George S. Boutwell of Massachusetts, a Radical Republican member of the Joint Committee on Reconstruction which had drafted the fourteenth amendment, likewise expressed his keen disappointment with the measure. He noted that the "proposition in the matter of suffrage falls short of what I desire. . . ."[90]

Not all Republicans, however, were so disappointed. Miller seemed to be satisfied. He said:

> Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age.[91]

Miller also stated in respect to the disenfranchisement of confederates, "I feel rejoiced that my worthy colleague [Mr. Stevens] has consented to forego some of his views in order to meet those of his Republican friends. . . ."[92]

Congressman Thomas D. Eliot, a Massachusetts Radical Republican, spoke next. He too reiterated that the second section of the fourteenth amendment was "not all that I wish and would demand."[93]

Indeed, the following day Congressman Samuel J. Randall, a Democratic opponent of the amendment from Pennsylvania, twitted the majority on this very point. He stated that the civil rights protected by the first section should be left "to the States themselves, just in the same manner as the elective franchise is permitted." He said that if this amendment were passed soon the Congress would seek one over suffrage. He continued:

---

88. 39 (1) GLOBE 2469 (1866). He added: "So far as I am individually concerned, I object to the amendment as a whole, because it does not go far enough and propose to at once enfranchise every loyal man in the country." *Ibid.*

89. 39 (1) GLOBE 2506 (1866).

90. 39 (1) GLOBE 2508 (1866). See *id.* at 2509 (Congressman Rufus P. Spalding).

91. 39 (1) GLOBE 2510 (1866).

92. *Ibid.*

93. 39 (1) GLOBE 2511 (1866).

> It is only because you fear the people that you do not now do it. . . . [H]ow soon will the privilege of determining who must vote within the States be assumed by the Federal power? Gentlemen here admit that they desire this, but that the weak kneed of their party are not equal to the issue. Your purpose is the same, and but for that timidity you would now engraft negro suffrage upon our Constitution and force it on the entire people of this Union.[94]

Congressman Nathaniel P. Banks, a Massachusetts Radical Republican, likewise pointed out that "public opinion of the country is such at this precise moment as to make it impossible" to "extend the elective franchise to the colored population" and therefore it was "most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion."[95] However, another Republican, Congressman John W. Longyear, of Michigan, complained that "the amendments and bills reported by the committee on reconstruction fall far short of the expectations of the people, and I may say are short of what I may have desired." But he added: "But so far as the report goes it is in the right direction, and I will not reject it for the sole reason that it does not go far enough."[96] Similarly, a fellow Michigan Republican, Congressman Fernando C. Beaman, stated that "I am convinced that my expectations [of colored suffrage], hitherto fondly cherished, are doomed to some disappointment," but "I will accept of the best arrangement available."[97] Congressman John F. Farnsworth, an Illinois Republican, likewise stated:

> I intend to vote for this amendment, in the form reported. . . . It is not all I could wish; it is not all I hope may yet be adopted and ratified; for I am not without hope that Congress and the people of the several States may yet rise above a mean prejudice and . . . [give] to every citizen, white or black, . . . the ballot. But I do not think it is becoming in a legislator to oppose some good because the measure is not all he wants.[98]

Farnsworth added: "This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best."[99]

The second to last speech in favor of the fourteenth amendment was delivered by Bingham, a Radical Republican member of the Joint Committee

---

94. 39 (1) GLOBE 2530 (1866).
95. 39 (1) GLOBE 2532 (1866).
96. 39 (1) GLOBE 2536 (1866).
97. 39 (1) GLOBE 2537 (1866).
98. 39 (1) GLOBE 2539 (1866).
99. 39 (1) GLOBE 2540 (1866).

on Reconstruction, who had drafted the first section. He noted that "the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Moreover, in speaking of the first section specifically, he declared:

> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. . . . The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.
>
> The second section excludes the conclusion that by the first section suffrage is subjected to congressional law. . . .[100]

Stevens then closed the debate by protesting the leniency of the amendment,[101] and the House then passed it.[102]

In opening the debate in the Senate, Senator Jacob M. Howard, a Michigan Republican and a member of the Joint Committee on Reconstruction, explained the purposes of the committee to that body in the absence of its chairman, Senator William P. Fessenden of Maine, who was ill.[103] Howard declared:

> But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.[104]

Further on, he said:

> It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I

---

100. 39 (1) GLOBE 2542 (1866). Bingham said in the following session:

> It is a guarantied [*sic*] right of every State in this Union to regulate for itself the elective franchise within its limits . . . .
>
> . . . .
>
> [T]his principle has been affirmed . . . [in] that constitutional amendment which this Congress proposed [the fourteenth amendment] . . . . The last clause of this bill [forbidding Nebraska to discriminate in the elective franchise by reason of race or color] is in utter conflict with one of the provisions of the proposed constitutional amendment [namely, Sec. 2] . . . . 39 (2) *id.* at 450 (1867).

101. 39 (1) GLOBE 2544 (1866).

102. 39 (1) GLOBE 2545 (1866).

103. 39 (1) GLOBE 2764-65 (1866).

104. 39 (1) GLOBE 2766 (1866).

could have my own way, if my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least . . . .

The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three-fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.[105]

Later on in his speech, Howard explained that representation was to be based on numbers, and that if the states excluded Negroes from voting, they would lose representation in the House of Representatives. He noted that the amendment did not apply to the South exclusively, and the following colloquy then occurred with Senator Daniel Clark, a New Hampshire Republican:

Mr. CLARK. I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.

Mr. HOWARD. Certainly it does, no matter what may be the occasion of the restriction. . . . If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [Mr. Sumner] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion. The principle applies to every one of the States in precisely the same manner. And sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided.[106]

A bit later on in the debate, Senator Benjamin F. Wade of Ohio, a Radical Republican and later president pro tem of the Senate, declared:

There are some reasons, and many believe there are good reasons, for restricting universal suffrage, and upon such principles as not to justify

105. *Ibid.*

106. 39 (1) GLOBE 2767 (1866).

> the inflicting of a punishment or penalty upon a State which adopts restricted suffrage. It is already done in some of the New England States—in Massachusetts, for instance. I believe the constitution of that State restricts the right of suffrage to persons who can read the Constitution of the United States and write their names. I am not prepared to say that that is not a wise restriction. At all events, a State has the right to try that experiment; but if she tries it, under the report of the committee she must lose, in the proportion that she has such persons among her inhabitants, her representation in Congress. I do not think that ought to be so. I think we should leave the subject open to the States to act as they see fit about it.[107]

He proposed that since we "are giving them [States] a right to fix this matter for themselves," namely a property or educational qualification, they ought not to lose representation on account of it.[108]

Debate continued. Some Senators urged Negro suffrage on the Senate.[109] There were other disagreements, too, and as a result the Republican majority went into a caucus. The result which emerged contained an abandonment of Negro suffrage.[110] The penalty of loss of representation, while calculated to induce the states to extend suffrage, did not compel it.[111]

The Radicals in neither house were happy with this solution. Thus, Wilson, Chairman of the House Judiciary Committee, lamented:

> If we will but do our duty as well as we know it, banishing those things from our deliberations which are but personal to ourselves or our party, we will leave to posterity little ground to complain of us. We know that impartial suffrage in the insurgent States would leave but little for posterity to quarrel over; but the fall elections lie between us and posterity, and some fear the result of the former more than they consider the welfare of the latter. . . . We will stop short of what most of us know we ought to do. . . .
>
> Mr. Speaker, I will vote for the best thing we can get as evidenced by the last thing upon which we may be called to vote; but I hope this may not be the amendment of the gentleman from Ohio [Mr. Bingham].[112]

But Senator Luke P. Poland, a Vermont Republican and a former chief justice of the state supreme court, explained:

> All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all

107. 39 (1) GLOBE 2769 (1866).
108. 39 (1) GLOBE 2770 (1866).
109. 39 (1) GLOBE 2800, 2869 (1866). See *id.* at 2881, 2882.
110. 39 (1) GLOBE 2938 (1866).
111. 39 (1) GLOBE 2939 (1866).
112. 39 (1) GLOBE 2948 (1866).

share its burdens, and they are all interested in its legislation and government.

Notwithstanding this no State or community professing to be republican allows all its people to vote. Every one fixes for itself some rule which, in its judgment, will furnish a body of voters or electors who will most wisely and safely represent the wishes and interests of the whole people. The right or franchise of voting has, probably, been more widely extended in these American States than in any other professed republican Government, but in the most liberal of these it has always been confined to a small minority of the whole people. In none of our States have females, or males under twenty-one years of age, ever been allowed to vote. In many of the States the right of voting has been restrained within much narrower limits. Persons coming to this country and establishing their permanent residence here are required to remain five years and then to go through an established process of naturalization before they are allowed the privilege of voting. Yet we all know that many females are far better qualified to vote intelligently and wisely than many men who are allowed to vote; and the same is true of many males under twenty-one, and of foreigners who have not resided here for the period of five years. The truth is that the whole system of suffrage of any republican State is wholly artificial, founded upon its own ideas of the number and class of persons who will best represent the wishes and interests of the whole people. The right of suffrage is not given to a particular class because they have any greater interest in the Government, or because they have any more natural right to it than others, nor to exercise it for themselves, and in their own behalf, but is given to them as fair and proper exponents of the will and interests of the whole community, and to be exercised for the benefit and in the interest of the whole.[113]

Poland pointed out that "if these States refuse to extend the right of suffrage to the colored men their representation will be confined to the white population," so that upon such refusal they would lose political strength in Congress. However, he too deplored the fact that the amendment did not do complete justice to the Negroes. He would have been "much better satisfied if the right of suffrage had been given at once to the more intelligent of them and such as had served in our Army."[114] He concluded: "Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further."[115]

---

113. 39 (1) GLOBE 2962 (1866).

114. 39 (1) GLOBE 2963 (1866).

115. 39 (1) GLOBE 2963-64 (1866).

Senator Timothy O. Howe, a Wisconsin Radical Republican, likewise expressed his dissatisfaction.[116] He noted: "I would much prefer, myself, to unite with the people of the United States in saying that hereafter no man shall be excluded from the right to vote, than to unite with them in saying that hereafter some men may be excluded from the right of representation."[117]

During the Senate debate, Senator Edgar Cowan, a conservative Republican who supported President Johnson, criticized the majority on the ground that Northern states did not let Negroes vote. When Senator Henry Wilson of Massachusetts pointed to bi-racial suffrage there, Cowan retorted by criticizing the state's literacy test.[118] Senator Reverdy Johnson, a Maryland Democrat, also referred to residence and property qualifications in other states.[119] He pointed out that the second section "says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise . . . ."[120]

Senator Fessenden, Chairman of the Joint Committee on Reconstruction, noted that "when he became satisfied that he could not get what he wanted he voted for the next best thing he could get. . . ."[121] Henderson did not like the amendment because "we admit the necessity, or at least the propriety, of excluding arbitrarily a freeman from the elective franchise; and it will be contended that we render a present doubtful power of the States to do so certain."[122] But Henderson found the second section a considerable improvement over Stevens' original proposal because: "The States under the former proposition might have excluded the negroes under an educational test and yet retained their power in Congress. Under this they cannot."[123] Henderson strongly favored Negro suffrage,[124] as did Yates, who spoke after

116. 39 (1) GLOBE APP. 217 (1866).

117. 39 (1) GLOBE APP. 219 (1866).

118. 39 (1) GLOBE 2989 (1866).

119. 39 (1) GLOBE 2991 (1866).

120. 39 (1) GLOBE 3027 (1866).

121. 39 (1) GLOBE 2992 (1866). Fessenden also said, "this question with regard to the right [to vote] is one after all, in my judgment, to be wisely considered by every State. You cannot settle it upon any minute principle, because the conditions of the States vary. In one State, one rule may be beneficial, in another another." *Id.* at 704. But it might be noted that Fessenden favored literacy tests for voting. He remarked:

> What is the constitution of Massachusetts to-day? It contains an educational qualification. A man must read or he cannot vote. Is not that an exclusion of a class? . . . . Is there not a class exclusion—I think it is a wise one—in Massachusetts? In every State there are more or less men who cannot read, and those men who cannot read are always to be found. One may learn, and he then comes within the class of voters; another may not, and he may stay in the excluded class for his life. *Id.* at 1279.

122. 39 (1) GLOBE 3033 (1866).

123. *Ibid.*

124. 39 (1) GLOBE 3035 (1866).

him.[125] The latter noted that "although we do not obtain suffrage now, it is not far off," because of the South's desire for increased representation.[126] Yates added:

> While gentlemen upon the other side of the Chamber are opposed to these measures as too radical, I am opposed to them, so far as I might present points of opposition, because they are not radical enough. At all events, therefore, we have the medium between extremes; we have moderation. If we do not meet the views of the Radicals on the one hand, nor the views of the pro-slavery Democracy upon the other, we at all events have the medium, the moderation which has been agreed upon by the collective wisdom of the American Senate.[127]

The last word on suffrage, before the vote was taken, was said by Senator Howard. He reiterated his former position, as follows:

> We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States.[128]

The Senate then passed a slightly modified version of the fourteenth amendment by a vote of thirty-three to eleven.[129]

Stevens made the last speech in favor of the amendment. It was perfectly in keeping with the general disappointment expressed by other Radicals. He declared:

> I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.
>
> Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels; among men as intelligent, as determined, and as independent as myself, who, not agreeing with me, do not choose to yield their opinions to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.
>
> . . . .
>
> You perceive that while I see much good in the proposition I do

125. 39 (1) GLOBE 3037 (1866).

126. 39 (1) GLOBE 3038 (1866).

127. *Ibid.*

128. 39 (1) GLOBE 3039 (1866).

129. 39 (1) GLOBE 3042 (1866).

> not pretend to be satisfied with it. And yet I am anxious for its speedy adoption, for I dread delay. . . . Hence, I say, let us no longer delay; take what we can get now. . . .[130]

And with this, the House passed the fourteenth amendment and sent it to the country.[131]

The passage of the fourteenth amendment did not end Radical preoccupation with Negro suffrage and the inadequacies of what had so far been accomplished by it.[132] Thus, Congressman William Windom, a Radical Republican from Minnesota, noted: "I am free to say that the plan of reconstruction proposed falls short of what I desire, but I accept it because of the great good it contains, and because it is the best that can now be obtained."[133] Congressman Godlove S. Orth, an Indiana Republican, declared:

> Mr. Speaker, I do not conceal the fact that, personally, I desired the adoption of more stringent terms and the assumption of a more elevated position than this Congress has assumed. . . . These guarantees are the result of a concession among friends having the same general object in view, and in that spirit they receive my assent.[134]

IV. District of Columbia Suffrage in the Senate

Meanwhile, the Senate turned its attention to suffrage in the District of Columbia. Senator Lot M. Morrill, a Radical Republican from Maine, informed the Senate that he intended to require "that persons to be entitled to the elective franchise in this District shall be able to read and write . . . ."[135] This resulted in some general discussion of literacy tests. Senator B. Gratz Brown, of Missouri, said that he believed in universal suffrage. He noted: "I do not wish the suffrage restricted by any educational qualifications; nor do I wish it restricted by any property qualifications."[136]

Thereafter, Morrill moved to amend the District of Columbia suffrage bill to require an applicant for voting to be able to "read the Constitution

---

130. 39 (1) Globe 3148 (1866).

131. 39 (1) Globe 3149 (1866).

132. *Cf.* 39 (1) Globe 3169, 3209, 3210, 3525, 3528, 4301 (1866); 39 (1) Globe App. 227 (1866).

133. 39 (1) Globe 3172 (1866).

134. 39 (1) Globe 3203 (1866). See also Congressman Miller's statement:

> A diversity of opinion prevails as to the propriety of extending to the colored race the elective franchise. . . .
>
> I do not wish to be understood to be in favor of giving the colored man the right of suffrage against the will of the majority of the people of any State and on this subject I think I speak the sentiments of the majority of this House. 39 (1) Globe App. 305 (1866).

135. 39 (1) Globe 3432 (1866).

136. 39 (1) Globe 3432-33 (1866).

of the United States in the English language and write his name." This provoked the following colloquy with Senator Samuel C. Pomeroy, a Radical Republican from Kansas:

> Mr. POMEROY. I do not think I would object to this amendment but for the insertion of the word "English." There are a great many very well-educated men who cannot read in the English language, or write their names in English.
>
> Mr. MORRILL. If they are citizens they ought to be able to read the English language.
>
> Mr. POMEROY. They are Germans. They are in my State a great many Germans who are educated, loyal, patriotic, and radical, but they cannot read the English language. They can write their names, but they cannot write their names in the English language. They write them in German . . . . I say such a man, if he cannot write a word in English, is an American; he is a patriot; he is loyal; and he should be entitled to vote.[137]

Senator Henry Wilson, a Massachusetts Radical Republican, arose to oppose this amendment. He stated that an illiterate person might still be an intelligent voter. Wilson added that he had voted against the Massachusetts English-language literacy test requirement when it was passed, and that he still opposed literacy tests. Morrill replied:

> But outside of Massachusetts there is a reason that occurs to me why we should require those who exercise the elective franchise to read the English language. It is the language of this country. There is none other recognized in the publication of the laws. . . .
>
> I am speaking now of the laws of Congress. The Constitution of the United States is not furnished by Congress to anybody except in the English language. The five years' quarantine, within which a foreigner is to have an opportunity to learn our institutions, are [*sic*] sufficient, if he is intelligent, to learn the English language, and to enable him to read the Constitution, and therefore it is no hardship. I believe for the sake of unity, unity in our civilization, unity in our language, unity in our sentiments and opinions, that we ought to inculcate as a standard and a formula that the laws should always be printed in the English language; and so far as any qualification is concerned, certainly our civilization is worth but little in its influence and its effect upon aliens and foreigners, if at least we do not require them to speak our language.[138]

However, immediately thereafter Morrill backed down and agreed to accept a literacy test in any language. But objections were raised to this too, and ultimately Morrill's amendment was defeated by a vote of nineteen to

---

137. 39 (1) GLOBE 3433 (1866).

138. *Ibid.*

fifteen, with fifteen absentees.[139] It is interesting to note that all of those who favored Morrill's amendment had voted for the fourteenth amendment, while only twelve out of the nineteen opponents had voted for that amendment. Thus, it is clear that the Senate Republicans were just as divided on literacy tests for voting as were the House Republicans.

Shortly thereafter, Senator Waitman T. Willey, a West Virginia Republican and a "marginal proponent" of the fourteenth amendment, whose switch from being a supporter of President Johnson gave the Radicals control of the Senate, made a speech advocating only a gradual enfranchisement of Negroes in the District of Columbia limited by an intelligence test.[140] Ultimately, the Senate put the District of Columbia suffrage bill over until after the 1866 elections. Indeed, Senator James R. Doolittle, a Wisconsin conservative Republican and a supporter of the President, pointedly noted, "With an overwhelming majority—a majority of more than two-thirds against the President—every Senator in this body, except Mr. Sumner of Massachusetts and Mr. Brown of Missouri, on Saturday, by a deliberate vote, surrendered negro suffrage as a condition of reconstruction . . . ."[141] He noted that others had charged "that it is abandoned only for the present, and for a purpose; to tide over the fall elections," although he would not himself make this charge.[142]

In the fall elections of 1866, the Radical Republicans triumphed against the President, and they returned emboldened. The Senate returned to complete work on the District of Columbia suffrage bill. Senator Morrill continued to urge, "In a country where the means of education are accessible to all, or should be, and a knowledge of the Government important, it cannot be a grievance that the State should impose the rule of intelligent suffrage."[143] Likewise, Senator Willey, in support of his amendment limiting Negro suffrage to veterans, taxpayers, and literate voters,[144] declared, as to the latter:

> In many sections of the country this provision might operate harshly, where there are no provisions made, and no facilities afforded for education; but looking to the principles of our Government and the necessity of popular intelligence, it would seem to me that it would be not a very harsh provision of law if where free schools do exist, and where there are easy facilities for acquiring education, there were a provision

139. 39 (1) GLOBE 3434 (1866).
140. 39 (1) GLOBE 3438 (1866).
141. 39 (1) GLOBE 4300 (1866).
142. 39 (1) GLOBE 4301 (1866).
143. 39 (2) GLOBE 40 (1866).
144. 39 (2) GLOBE 38 (1866).

of law making it criminal for any person over the age of twenty-one years not to be able to read and to write.

It seems to me, sir, that there ought to be some obligation, either in our fundamental laws in the States, or somewhere, by some means requiring the people to educate themselves; and if this can be accomplished by disqualifying those who are not educated for the exercise of the right of suffrage, thus stimulating them to acquire a reasonable degree of education, that of itself, it seems to me, would be a public blessing.[145]

Senator Wilson responded to this by opposing literacy tests and supporting universal suffrage.[146] Senator Pomeroy added his voice to the opposition, saying of literacy tests for the District Negro population:

I agree with what the Senator from Massachusetts has said in regard to the requirements of reading and writing as a qualification for voting. That might be entertained in a State where all the people were allowed to go to school and learn to read and write; but it seems to me monstrous to apply it to a class of persons in this community who were legislated away from school, to whom every avenue of learning was shut up by law.[147]

Senator John Sherman, an Ohio Republican, likewise opposed literacy tests because many people never had the opportunity for an education.[148] But the opponents of literacy tests were willing to accept the requirements of a year's residence as a check on fraud.[149]

Shortly thereafter, Senator James Dixon, a conservative Republican from Connecticut, a state which had a literacy test, proposed an amendment which imposed a literacy test only on new voters in the District, almost all of whom were Negroes. Dixon said in support of this:

I doubt the propriety of permitting any man to vote, whatever his race or color, who has not at least that proof of intelligence which the ability to read and write furnishes. It is true, as the Senator from Massachusetts remarked yesterday, that there are instances in which remarkable intelligence is found in men who can neither read nor write, yet these are exceptional. As a general rule, while ability to

145. 39 (2) GLOBE 41 (1866). See *id.* at 43: "[I]t does seem to me that the true interests of a free Government, and the wise establishment of a free Government, require the great and fundamental qualification of intelligence, when we propose to extend the fundamental right of suffrage to any of our citizens."

146. "I am against this qualification of reading and writing. I never did believe in it. I do not believe in it now. I voted against it in my own State, and I intend to vote against it here." 39 (2) GLOBE 42 (1866). "I am against putting on the restriction of reading and writing in this District." *Id.* at 43.

147. 39 (2) GLOBE 43 (1866).

148. 39 (2) GLOBE 45 (1866).

149. 39 (2) GLOBE 46 (1866).

> read and write does not prove high intelligence, the want of this ability proves gross ignorance and utter incapacity to vote intelligently.[150]

All of the minority did not agree with this sentiment. Senator Thomas A. Hendricks, an Indiana Democrat, and later Vice-President of the United States, said that while he did not favor literacy tests generally, he would vote to impose it on Negroes.[151] Senator Willard Saulsbury, a Delaware Democrat, opposed Negro suffrage with or without a literacy test, which he belittled.[152] Likewise, Senator Edgar Cowan, a conservative Republican from Pennsylvania, opposed Dixon's amendment because it only required the voter to be able to read and write his own name and was therefore inadequate.[153] But Senator Lafayette S. Foster, a Connecticut Republican who voted for the fourteenth amendment, said:

> I differ very widely from the honorable Senator from Pennsylvania in my estimate of reading and writing. . . .
>
> Now, I agree that to be able simply to read and to write does not prove that a man has either the intellectual or moral qualifications necessary for a voter in the United States. But, sir, when I agree to that I must be permitted to lay it down as a proposition that the man who cannot read and who cannot write is in all human probability unqualified to perform the duties of an elector. The avenue to all the knowledge necessary to qualify one for that duty seems, under those circumstances, to be absolutely closed to him. It is possible, I agree, that a man who can neither read nor write may have sufficient intelligence to cast a vote; but such a case is exceptional; the great mass of mankind who can neither read nor write surely have not that intelligence which voters in this country ought to have and must have if our institutions are to be upheld and perpetuated.[154]

Foster proceeded to point out that Massachusetts was not the first state to institute a literacy test for voters. He noted that in 1855 Connecticut amended its constitution to bar from voting anyone unable to read the constitution and laws of the state, and that Massachusetts copied the idea two years later. Foster then declared:

> I do not believe that that was going backward in human progress; on the contrary I believe it was going forward, and I believe the idea of admitting men to the elective franchise who can neither read nor write is going backward and downward. . . . Why sneer at reading and writing when almost all the knowledge which the world has thus far accumulated can be acquired now only by reading; I mean substan-

150. 39 (2) GLOBE 84 (1866).
151. *Ibid.*
152. 39 (2) GLOBE 85 (1866).
153. 39 (2) GLOBE 98 (1866).
154. *Ibid.*

> tially all, of course not literally and absolutely. The knowledge of the past comes to us substantially through history, and history comes to us through the volumes which are stored in our libraries, and we acquire from them the wisdom of past ages. Now, where a man, no matter from what cause, cannot thus become acquainted, through books, by reading, with the wisdom of past ages, nor with the events and occurrences of the day, I say he is not and cannot be an intelligent, and is not therefore a safe voter.[155]

Foster pointed out that his fellow senators who opposed literacy tests for voting would not think of voting for an illiterate legislator or judge, yet the electorate, he noted, ultimately had to pass upon the work of these government officials. Moreover, he declared that an ignorant man could not use the ballot for his protection, and was more likely to "use it to his own detriment and to the detriment of the country than he is to use it for the benefit of either."[156] Foster emphasized that "on general principles without intelligence there can be no safety in allowing people to vote; there can be no safety in ignorant suffrage."[157] He applied this to Negroes as well as whites. He pointed out:

> [T]he wily demagogue, the evil-designing man . . . . will dupe the ignorant. Ignorant men are always tools and instruments in the hands of the ambitious, the unprincipled, the unscrupulous. They are a potent element of strength in the hands of such men, and can be used for the most mischievous and dangerous purposes.[158]

Cowan replied to this that reading and writing one's name was no barrier at all. When Willey said that Dixon's proposed amendment would require an ability to read generally, Cowan stated that this would give a politically minded election or registration officer the power to give one man an easy reading test and another man a difficult test, depending on how he voted.[159]

Debate continued, with Senator Frederick T. Frelinghuysen, a New Jersey Republican, rising to state that he saw arguments on both sides of the question. Frelinghuysen, who had been appointed to fill a vacancy occurring by the death of a Democrat, and who had not been sitting in the first session, declared that universal suffrage would encourage whites to educate Negroes. Next, Wilson arose to clarify his position. He first said:

> [W]hile I am opposed, in the present condition of the country at any rate, to making reading and writing a test, I believe that reading and

155. 39 (2) GLOBE 99 (1866).
156. 39 (2) GLOBE 100 (1866).
157. *Ibid.*
158. *Ibid.*
159. 39 (2) GLOBE 101 (1866).

> writing do aid in qualifying men to discharge the duties that belong to citizens of the United States at the ballot-box. In opposing this amendment I cannot consent to be put in that class of men who do not believe that reading and writing are qualifications for the duties of a citizen of the United States.[160]

However, his fear was that if a literacy test was imposed on Negroes, the whites would try to prevent them from becoming educated, but he believed that if suffrage were universal, not only would Negro voters demand education, but whites would also want them educated to raise the intelligence level of the voters.[161]

Hendricks arose again to say that while he intended to vote for Dixon's amendment, he did not generally favor literacy tests. He stated that many intelligent men were illiterate, but had acquired a sufficient knowledge of government and law by attending popular meetings where political questions of the day were discussed, sitting on juries in court, and otherwise attending court to listen to arguments of law. He noted that Negroes had no such opportunity, and should therefore be literate to vote.[162] Hendricks was answered by Senator Henry S. Lane, the Indiana Republican, who stated that it was unfair to require a literacy test of Negroes but not of whites because Negroes, having been slaves whom many state laws made it a penal offense to educate, and who at any rate had no opportunity to educate themselves, could not have acquired an education. He declared that the ballot was necessary for the Negro's self-protection.[163]

The last speech was made by Senator Charles Sumner of Massachusetts, the equalitarian ultra-Radical Republican. Sumner declared:

> [I]n voting against an educational test I do not mean to say that under certain circumstances such test may not be proper. But I am against it on the present occasion. . . .
>
> . . . .
>
> If the question could be confined in its influence to the District, I should have little objection to an educational test. I should be glad to witness the experiment and be governed by the result. But the question cannot be limited to the District. Practically it takes the whole country into its sphere. We must, therefore, act for the whole country. . . .
>
> Now, to my mind nothing is clearer than the absolute necessity of the suffrage for all colored persons in the disorganized States. It will not be enough if you give it to those who read and write; you will not in this way acquire the voting force which you need there for the protection of Unionists, whether white or black. . . . [N]ow you need their

160. 39 (2) GLOBE 103 (1866).
161. *Ibid.*
162. 39 (2) GLOBE 105 (1866).
163. 39 (2) GLOBE 106 (1866).

> votes; and you must act now with little reference to theory. . . . Therefore . . . when I am asked to establish an educational standard, I cannot on the present bill simply because the controlling necessity under which we act will not allow it.[164]

The vote was then taken on Dixon's amendment, and it lost by thirty-four to eleven. It is interesting to note the extent to which this vote cut across party lines. In the negative were twenty-five senators who had voted for the fourteenth amendment and five who had voted against it. For Dixon's amendment were three senators who had voted for the fourteenth amendment and three who had voted against it. The votes for it by the senators who supported the fourteenth amendment are all the more interesting because Dixon's proposal only applied to new voters and was clearly aimed at Negroes, so these senators must have been strongly in favor of a literacy test under any circumstances. Thereafter, the bill was passed.[165]

In President Johnson's veto message, he referred to the Massachusetts literacy test.[166] So did Senator John Sherman, an Ohio Republican, in speaking in opposition to the President. Senator Sherman's objection to such a test was that it was too uncertain in application.[167] Cowan replied to him and, as part of the argument against Negro suffrage, noted that "wherever this issue was attempted to be started, excepting, perhaps, in the New England States, it was repudiated in the last canvass (for the fall 1868 elections) by the winning party everywhere, and the opposed amendments to the Constitution were triumphantly pointed to to show that the question of suffrage was still to be left to the States."[168] Nothing else relevant to literacy tests was said, and the Senate then overrode the veto of the President,[169] as did the House the next day, without debate.[170]

Conclusion

The debates on the District of Columbia suffrage bill show quite clearly that English-language literacy tests were known in the Thirty-Ninth Congress, and that the examples of Massachusetts and Connecticut in imposing such tests were familiar to the members of both houses thereof. Moreover, the votes taken on suffrage in the District of Columbia likewise demonstrate that the opinions as to the desirability of such tests cut across party lines,

164. 39 (2) Globe 107 (1866).
165. 39 (2) Globe 109 (1866). See also *id.* at 138.
166. 39 (2) Globe 304 (1867). See also *id.* at 313.
167. 39 (2) Globe 307 (1867). Sherman also noted that Negroes "are now making rapid progress in education." *Id.* at 308.
168. 39 (2) Globe 310 (1867).
169. 39 (2) Globe 313 (1867).
170. 39 (2) Globe 344 (1867).

and that many of the Radical Republicans favored literacy tests for voters. Under these circumstances, it is obvious that any attempt to proscribe literacy tests in the fourteenth amendment would have so splintered the dominant Republican Party as to have prevented passage of that amendment.

Moreover, the debates on the Civil Rights Bill, the principles of which were embodied in the first section of the fourteenth amendment, show that this bill was not intended to affect the rights of the states to prescribe voting qualifications, which would, of course, include literacy tests. In addition, the debates on the fourteenth amendment likewise show that the first section thereof left to the states their power to fix the qualifications for voting. Indeed, the most striking thing about these debates is the dissatisfaction expressed by Radical Republicans at being unable to require Negro suffrage. Since the dominant party was unable or unwilling to require Negro suffrage in the fourteenth amendment, although wholeheartedly in favor of it, because of a fear of adverse reaction at the polls and a belief that the requisite majority in Congress and in the state legislatures would not favor it, it is obvious that the party leadership would not hazard its minimal Senate working majority and doubtful control over state legislatures with a proposition to forbid literacy tests, which was likely to split even the hard-core Radicals, and defeat any amendment to the Constitution. In other words, if the Radicals were unwilling to hazard the fourteenth amendment for something they really craved, it is clear that they would not jeopardize it on side issues on which they were, at best, rather lukewarm. It follows that it was not the original intent of the framers of the fourteenth amendment to forbid English-language or other literacy tests in the first section, although the states using it would be penalized in the second section along with those not permitting Negroes or others to vote for any other reason.