

THE FOURTEENTH AMENDMENT'S "OTHER" SECTIONS

By Aaron Astor¹

For a Constitutional Amendment that undergirds so much of modern American jurisprudence, there may be yet more value to be drawn from the Fourteenth Amendment in its "other" sections, as we consider the amendment's long reach over 150 years.

The Fourteenth Amendment is best known for its first section, which defines citizenship, extends Constitutional authority more directly over the states than ever before, protects the privileges and immunities of citizens, and establishes the principle of equal protection of the law. But the Fourteenth Amendment contains five sections, and only the first and the fifth (granting Congress the power to enforce the provisions of the amendment) address the better-known matters of civil rights, citizenship, and equal protection of the laws. It is the middle sections that have been more often ignored.

What do these "other" sections mean today, and what do they tell us about Congressional debates over Reconstruction in the 1860s? On the surface, the multi-section amendment is a grab bag of provisions only vaguely related to one another. However, the amendment's various sections cohere quite well as a mechanism to reconstruct the federal union by enhancing the jurisdictional reach of the federal government, solidifying (including financially) the states' adherence to the Union, and reconstructing the southern states (including the border states) on the basis of a racially egalitarian republicanism. This necessitated a restructuring of the body politic as well as of the financial and legal architecture of the federal union. As historian Eric Foner notes, "The Fourteenth Amendment can only be understood as a whole."² The "other" sections—those beyond Section 1—fleshed out how the Amendment's framers aimed to do this.

Section 4 is a case in point. President Andrew Johnson issued his lenient Reconstruction plan in 1865, and insisted upon two conditions before state civil governments could be restored: states must renounce secession and must abolish slavery. By October 1865, Johnson made clear that as the Confederate states renounced

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² Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Perennial Modern Classics, 2002), 259.

secession, they acceded to the cancellation of all Confederate bonds, a logical but necessary act to declare the Confederacy illegitimate for all time.³ Republicans incorporated this language into Section 4 of the Fourteenth Amendment: “Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States.” This clause provided for the inviolability of the federal public debt.⁴ The affirmation of the federal debt and invalidation of the Confederate debt served a political purpose more than a strictly financial one. A sizable portion of the Union population had purchased war bonds during the Civil War, and the promise to repay them served as a Constitutional validation of this collective act of financial patriotism.

Section 4 did more than this, however. It also prohibited compensation for “any claim for the loss or emancipation of any slave.”⁵ This clause affected more than the former Confederate states and their suddenly lost slave property. It also affected the border states of Missouri, Kentucky, Maryland and Delaware, where some owners had hoped to receive compensation for their slaves freed under the provisions of recently passed state laws or the Thirteenth Amendment. Kentuckians, in particular, opposed the Thirteenth Amendment, agitated for compensation for the loss of their property in persons and even sued the federal government for illegal seizure of slave property in late 1865.⁶ Thus, this clause helped zero out the financial basis of the slave system, regardless of its connection to rebellion. The future reconstructed United States would never again validate chattel slavery as a form of property.

In 2013, House Minority Leader Nancy Pelosi invoked Section 4 in unexpected circumstances. She argued that the recent Congressional debate over raising the national debt ceiling was unnecessary because “the 14th Amendment covers it.”⁷ Her comment struck many observers as odd and perhaps esoteric, as few Americans think of the Fourteenth Amendment when they consider the national debt. And yet, the Fourteenth Amendment explicitly states that the “validity of the public debt of the

³ Dan T. Carter, *When the War Was Over: The Failure of Self-Reconstruction in the South, 1865-1867* (Baton Rouge: Louisiana State University Press, 1985), 68-74.

⁴ “U.S. Constitution, Amendment XIV, Section 4,” Yale Law School Avalon Project, accessed July 4, 2018, http://avalon.law.yale.edu/18th_century/amend1.asp#14.

⁵ “U.S. Constitution, Amendment XIV, Section 4.”

⁶ Aaron Astor, *Rebels on the Border: Civil War, Emancipation, and the Reconstruction of Kentucky and Missouri* (Baton Rouge: Louisiana State University Press, 2012), 177.

⁷ Quoted in Scott Bomboy, “Reviewing the 14th Amendment debt ceiling argument,” Constitution Daily: National Constitution Center, September 30, 2013, <https://constitutioncenter.org/blog/reviewing-the-14th-amendment-debt-ceiling-argument>.

United States...shall not be questioned.”⁸ Refusal to raise the debt ceiling meant the United States Treasury would not be able to make interest payments on bonds issued by the U.S. government, effectively rendering the federal government insolvent and its public debt no longer “valid.” The Fourteenth Amendment was not ultimately invoked during this debate. But the episodic commentary on the amendment’s connection to the public debt raised many questions in the minds of the general public.

The second section of the Fourteenth Amendment also resonates to this day. It offered the first Constitutional attempt to guarantee the right of African American men to vote; the Congressional Reconstruction Acts passed in March 1867 advanced black suffrage before the Fourteenth Amendment was ratified. Section 2’s immediate effect was to nullify the infamous three-fifths clause granting slave states representation in Congress far beyond what their free population would normally authorize. Ironically, emancipation now meant that southern states could take advantage of their African American populations as full persons for purposes of legislative apportionment without granting them the right to vote. In many ways, Section 2 applied the logic of the three-fifths compromise in reverse by limiting representation in Congress for states that refused to accord full voting rights to all men, regardless of race. This indirect approach was firmed up with the later Fifteenth Amendment explicitly denying states the rights to use race, color, or previous condition of servitude as a basis of disfranchisement.⁹

However, the most immediate political effect of this clause was the establishment of MALE suffrage as a Constitutional right, denying the suffrage claims of women. Indeed, Section 2 was the first time the word “male” was entered into the Constitution; state discrimination on the basis of sex would not threaten a state’s representation under the section’s provisions. This clause drove a wedge between African American activists and some women’s rights advocates even before passage of the Fifteenth Amendment. A vigorous debate unfolded between activists like Elizabeth Cady Stanton, who commented after the Fourteenth Amendment deliberations that “it is impossible for the best of men to understand women’s feelings or the humiliation of their position” in seeking the right to vote, and gradualists like Lucy Stone, who viewed the Fourteenth and Fifteenth Amendments as partial victories on the road to women’s suffrage.¹⁰ The heated debate and ensuing rift would take a generation to heal and

⁸ “U.S. Constitution, Amendment XIV, Section 4.”

⁹ “U.S. Constitution, Amendment XIV, Section 2,” Yale Law School Avalon Project, accessed July 3, 2018, http://avalon.law.yale.edu/18th_century/amend1.asp#14.

¹⁰ Elizabeth Cady Stanton, *Eighty Years and More (1815-1897): Reminiscences of Elizabeth Cady Stanton* (New York: European Publishing Company, 1898), 254, <http://archive.org/details/cu31924032654315>.

would underscore the often zero-sum nature of rights in American history—rights gained for some often come at the expense of rights for others.

But the second section of the Fourteenth Amendment may also have a modern application. The current debate over voter suppression, whether through restrictive voter ID laws, gerrymandering, lifelong punishment for felons who completed their sentences, or other restrictions that often suppress the votes of minorities and the poor may be resolved by Section 2, especially as the 1965 Voting Rights Act has been weakened. If a state is shown to have illegally and intentionally suppressed the votes of tens of thousands of legal citizens, Congress could turn to Section 2 to limit that state's representation in Congress. Imagine, for example, Wisconsin or North Carolina losing one or two Congressional seats as punishment for such aggressive forms of voter suppression. Such a claim might strike observers today as unusual or desperate, but it is no more outrageous than turning to Section 4 to "cover" the semi-annual debt ceiling debates. In fact, deploying Section 2 to this effect would be exactly in keeping with the original intent of the Fourteenth Amendment's framers who understood that a "republican form of government" required an expansive electorate.

By considering the Fourteenth Amendment as a whole, we gain deeper insight into what shape America's reconstructed Union would take. Section 1 outlines the ideological foundation of post-Civil War America, based on egalitarian republicanism. But Sections 2 and 4 clearly have long-term significance as well, by reassembling the financial and political architecture of the United States now reconstructed under the promise of equal protection of the laws.