

JOHN BINGHAM’S “IMPORTANT” AMENDMENT:THE VIEW FROM DECEMBER 1865

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INTRODUCTION

The New York *Evening Post* on December 6, 1865, reported on a congressional proposal for major constitutional reform. “Mr. Bingham,” readers learned, “has prepared the draft of an important amendment to the Constitution.”¹ That day, Representative John Bingham of Ohio offered the following joint resolution in the House of Representatives.

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¹ *By Telegraph*, EVENING POST (N.Y.), Dec. 6, 1865, at 3.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following articles be proposed to the Legislatures of the several states as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of said Legislatures, shall be valid to all intents and purposes as part of the said Constitution, viz:

ARTICLE —

The fifth paragraph of the ninth section of the first article of the Constitution, to wit: “No tax or duty shall be laid on articles exported from any State,” is hereby repealed and declared of no effect.

ARTICLE —

No part of any debt or debts contracted in aid of the late rebellion, or which may hereafter be contracted in aid of any rebellion against the United States, shall ever be assumed or paid by the United States, nor shall any State assume or pay any part thereof.

ARTICLE —

The Congress shall have power to make all laws necessary and proper to secure to all persons, without distinction, in every State of the Union, equal protection in their rights of life, liberty and property.²

Every contemporary constitutionally literate citizen of the United States knows the important Amendment was the last, the provision empowering Congress to protect certain fundamental rights that morphed into Section One of the Fourteenth Amendment. *The Evening Post*, a committed Republican newspaper,³ did not share this contemporary view. The “important amendment to the Constitution” that “Mr. Bingham has prepared,” the editors informed readers, was the first of his three proposals for

² CONG. GLOBE, 39th Cong., 1st Sess. 14. Many newspapers published the full text. See, e.g., CHARLESTON DAILY COURIER (S.C.), Dec. 12, 1865, at 1.

³ See *The Amended Constitution*, EVENING POST (N.Y.), Dec. 19, 1865, at 2.

constitutional reform. That proposal called for "repealing the fifth section of that instrument, which prohibits a tax on exports."⁴

The Evening Post's priorities on needed constitutional reform two weeks before the official ratification of the Thirteenth Amendment⁵ were broadly shared. Many newspapers republished the *Post's* commentary that Bingham's "important amendment to the constitution" was his call to repeal the constitutional ban on export taxes.⁶ No newspaper published in December 1865 asserted that Bingham's proposal to empower the national government to protect rights was the most important of his three proposed constitutional amendments. Republican Newspapers published in December 1865 commented more frequently and more favorably on Bingham's proposals to repeal the constitutional ban on export taxes and ban payment of the rebel debt than on his proposals to vest Congress with the power to protect personal and property rights.

Republican newspapers in December 1865 gave short shrift to Bingham's third proposed amendment authorizing Congress to protect certain fundamental rights. No Republican newspaper endorsed that proposal as a stand-alone proposition.⁷ Very few offered favorable comments. Democratic newspapers offered far more commentary than Republican newspapers on Bingham's empowerment amendment. That commentary was negative.

⁴ *By Telegraph*, *supra* note 1, at 3.

⁵ Secretary of State William Seward announced the official ratification of the Thirteenth Amendment on December 18, 1865. *See, e.g., The Consummation!*, N.Y. TIMES, Dec. 19, 1865, at 1; *The Constitutional Amendment*, DODGEVILLE CHRON. (Wis.), Dec. 28, 1865, at 2.

⁶ HARTFORD COURANT, Dec. 11, 1865, at 2; LEDGER-ENQUIRER (Ga.), Dec. 27, 1865, at 2; *News Paragraphs*, VT. REC. & FARMER, Dec. 15, 1865, at 7; *Political Items*, DET. FREE PRESS, Dec. 15, 1865, at 2; *Washington Intelligence*, MOBILE DAILY TIMES, Dec. 31, 1865, at 1; RICH. TIMES, Dec. 9, 1865, at 1; *Items*, BUFF. WEEKLY EXPRESS, Dec. 12, 1865, at 2; *All Sorts of Paragraphs*, BOS. POST, Dec. 11, 1865, at 1; *Interesting Items*, CONN. COURANT, Dec. 16, 1865, at 1; *General News*, MIRROR & FARMER, Dec. 16, 1865, at 2 [hereinafter MIRROR & FARMER *General News*]; *Miscellaneous Intelligence*, NEWARK DAILY ADVERTISER, Dec. 11, 1865, at 1; NEW BERNE DAILY TIMES, Dec. 15, 1865, at 1; *Washington News*, DAILY UNION & AM. (Nashville, TN), Dec. 21, 1865, at 2; *Bingham's Constitutional Resolutions*, CIN. DAILY GAZETTE, Dec. 11, 1865, at 3; *United States Congress*, RICHMOND DISPATCH (Rich., VA), Dec. 9, 1865, at 4; *News from Washington*, NEW YORK SEMI-WEEKLY TRIB., Dec. 8, 1865, at 1; *General News*, NEW YORK DAILY TRIB., Dec. 7, 1865, at 6 [hereinafter NEW YORK DAILY TRIB. *General News*].

⁷ Several newspapers endorsed all three of Bingham's proposals. *See infra* notes 83-84, and the relevant text.

Hardly anyone in the United States other than Bingham, the newspaper record of December 1865 suggests, was interested in a constitutional amendment that protected personal and property rights, but not political rights.

This paper states conclusions with varying degrees of confidence. The newspaper evidence suggests more Republican enthusiasm in December 1865 for the export amendment than the empowerment amendment. The relatively sparse commentary on all three of Bingham's proposed amendments nevertheless provides reason for doubting that a clear consensus existed among Republicans when the Thirty-Ninth Congress opened that Bingham's first proposed amendment was particularly important or at least far more important than Bingham's third proposed amendment. The newspaper evidence more decisively demonstrates that proponents of free labor and racial equality did not initially think the proposed amendment empowering Congress to protect certain rights was more important than the proposed amendments on exports and the rebel debt. The empowerment amendment in December 1865 was no more salient than the export and debt amendments on any reasonable measure of significance. No evidence suggests that proponents of free labor and racial equality thought urgent a new constitutional guarantee for black personal and property rights that did not include black political rights.

The following pages explore newspaper reporting and commentary published in the United States during December 1865, the month the United States ratified the Thirteenth Amendment, on proposals by Bingham and others to repeal the constitutional ban on export taxes, prevent payment of the rebel debt, and empower Congress to protect certain fundamental rights. The discussion relies on a survey of three online newspaper collections, *Newspapers.com*,⁸ *Newspaper Archives*,⁹ and *Genealogy Bank*,¹⁰ as

⁸ NEWSPAPERS, <https://www.newspapers.com> [<https://perma.cc/D56D-5WU3>] (last visited Apr. 25, 2025).

⁹ NEWSPAPER ARCHIVE, <https://newspaperarchive.com> [<https://perma.cc/M2UL-G9ST>] (last visited Apr. 25, 2025).

¹⁰ GENEALOGY, FAMILY HISTORY & ANCESTRY, <https://www.genealogybank.com> [<https://perma.cc/V25Z-TWE5>] (last visited Apr. 25, 2025).

well as the online edition of *The New York Times*,¹¹ which gives readers access to all past issues. These collections, combined, offer a good selection of newspapers from the full spectrum of constitutional thought immediately after the Civil War. The materials below present articles from newspapers whose editorial line was Radical Republican (including African American newspapers),¹² Republican,¹³ Johnson Unionist,¹⁴ and Democrat.¹⁵ The geographical scope encompasses the United States in December 1865. The survey includes newspapers published in every existing state, several territories, and Hawaii.

The simple word searches for "constitution," and "Bingham" are imperfect and incomplete, but sufficient for preliminary conclusions. The search engines for both newspaper databases are prone to error. Searches for "constitution" in December 1865 did not find all instances of "constitution" in the American press that month. The broader project that, when finished, is likely to require reading nearly 100,000 articles is ongoing. A significant possibility exists that some relevant articles in the collections were missed. Others may turn up when different words are used, or different newspaper databases are searched. Nevertheless, the preliminary survey provides reasons for thinking *The Evening Post* was not idiosyncratic when treating Bingham's proposed repeal of the constitutional ban on export tax as the most important of the amendments Bingham proposed on January 6, 1865. Nothing in the methodology suggests any bias in favor of finding articles emphasizing the export amendment rather than articles on the

¹¹ THE NEW YORK TIMES: TIME MACHINE, <https://timesmachine.nytimes.com/browser?searchResultPosition=0> [https://perma.cc/3DH3-8A5R] (last visited Apr. 25, 2025). Newspapers from the Civil War/Reconstruction Era contain numerous typographical errors and the print may be hard to read. In circumstances where correcting the typographical errors would not change the meaning, I do so silently. When the *Milwaukee Daily Sentinel* reports that Bingham urged an amendment protecting all "in the right of life liberty and prosperity," the text will read, "the right of life, liberty and prosperity." "Our Washington Letter," MILWAUKEE DAILY SENTINEL, Dec. 14, 1865, at 2; *News from Washington*, *supra* note 6, at 1; NEW YORK DAILY TRIB. *General News*, *supra* note 6, at 6.

¹² See generally, e.g., *Proposed Amendment of the United States Constitution*, LA TRIB. DE LA NEW ORLEANS, Dec. 31, 1865, at 4.

¹³ See generally, e.g., *The Amended Constitution*, *supra* note 3, at 2.

¹⁴ See generally, e.g., *Our Washington Correspondent*, N.Y. TIMES, Dec. 18, 1865, at 1.

¹⁵ See generally, e.g., *The Radical Programme*, WORLD (N.Y.), Dec. 15, 1865, at 8.

congressional power to protect rights amendment. Preliminary searches using other words (“amendment”) have found more articles on constitutional amendments other than Bingham’s empowerment proposal, but no more articles on the empowerment proposal.

Part I of this essay discusses how newspaper reported on Bingham’s three proposed amendments. Newspaper coverage gave readers no reason for thinking Bingham’s third proposal was particularly pressing. Wire services and editors always placed the export proposal first. Some reports noted only Bingham’s proposed export amendment. The very few headlines that were not generic more often focused the reader’s attention on the export and debt amendments than on the empowerment amendment.

Part II discusses newspaper commentary that explicitly mentions Bingham by name when discussing his proposed amendments. That commentary was relatively sparse. More often than not, the limited newspapers commentary on Bingham’s proposals lumped all three amendments, betraying no hint that one of the amendments was more important or vital than the other two. The even more limited commentary on each amendment was partisan with a twist. Republican newspapers tended to favor and Democratic newspapers tended to oppose the export amendment. Republican newspapers spoke favorably about the debt amendment which was largely ignored by Democratic newspapers. Democratic newspapers were critical of the empowerment amendment that was ignored by Republican newspapers. No newspaper in December 1865 appears to have published a favorable multi-paragraph article devoted solely or primarily to praising Bingham’s proposal to empower Congress to protect certain fundamental rights.

Part III moves beyond Bingham by looking at newspaper commentary on all constitutional proposals to repeal the constitutional ban on export taxes, repudiate the rebel debt, or provide greater protections for personal and property rights. Bingham, by any other name, the newspaper survey suggests, smelled the same. Newspapers did not shower the attention on other limited or more comprehensive bans on race discrimination that they withheld from the Bingham empowerment amendment. Proposed amendments on exports and the rebel debt, with or without Bingham’s name, received more newspaper attention and

more newspaper support than proposed amendments on personal and property rights, with or without Bingham's name. Newspapers from all partisan perspectives in December 1865 expressed little enthusiasm for constitutional reform that guaranteed certain personal and property rights but did not include political rights. Proposed constitutional amendments that banned all official race discriminations garnered more newspaper attention than proposals limited to personal and property rights, but no more on some measures and considerably less on others than constitutional reforms aimed at repealing the ban on export taxes and repudiating the rebel debt.

Part IV explains Republican priorities in December 1865. Constitutional reform at the time the Thirteenth Amendment was ratified was not motivated exclusively or even primarily by the need to provide constitutional foundations for federal civil rights laws. Newspaper reports in December 1865 indicate a broad consensus among Republicans that the Thirteenth Amendment (and perhaps the guarantee clause of Article IV) permitted Congress to guarantee equal protection for personal and property rights. Republican newspapers did not doubt existing federal power to outlaw black codes and related measures. Mainstream Republican newspapers support for constitutional amendments on exports and the debt reflected the continued influence on the Republican coalition of former Whigs who detested the slave power not only for practicing human bondage, but because southerners with extra political power consistently defeated Whig proposals for national laws promoting commercial prosperity. Abolitionist and black newspapers emphasized black voting rights, which they believed provided the only secure foundation for other black rights protected by the Thirteenth Amendment. Bingham's proposal to empower Congress to protect life, liberty, and property did not speak to controversies within the Republican Party over whether Congress was or should be empowered to protect political rights.¹⁶

¹⁶ See *Proposed Constitutional Amendments*, TROY DAILY TIMES (N.Y.), Dec. 19, 1865, at 2 (stating that Bingham's third proposed amendment "is intended to secure equal personal, not political, rights to all persons").

The conclusion briefly examines newspapers reporting and commentary on other amendments proposed in December 1865. The substantial attention newspapers gave to proposals to alter the constitutional basis of representation in Congress, as well as the considerable attention given to abolishing the electoral college and constitutionally prohibiting secession, demonstrate the salience of constitutional change at the time the Thirteenth Amendment was ratified. Americans, newspaper reporting and commentary suggest, were extremely interesting in continued constitutional reform when the Thirty-Ninth Congress opened. They just were not interested in the constitutional change proposed by Bingham's empowerment amendment.

This paper examines constitutional thinking in December 1865. The final Fourteenth Amendment included a variation on Bingham's empowerment proposal and a variation on his debt proposal, but did not include a provision repealing the constitutional ban on export taxes. Something happened between December 1865 and May 1865 that influenced the relative attraction of Bingham's three proposals. One possibility is Johnson's veto of the Civil Rights Act¹⁷ convinced Republicans that Congress needed to be empowered more explicitly to protect personal and property rights. Another is Bingham's sheer obstinacy.¹⁸ What can be said with more confidence is that the events responsible for increased interest in what became Section One of the Fourteenth Amendment happened after December 31, 1865.

I. REPORTING

American newspapers when reporting without any editorial commentary on Bingham's proposed constitutional amendments betrayed no awareness that the provision empowering Congress to protect personal and property rights was especially vital to constitutional reform in the wake of the Civil War. The export proposal was always mentioned first and the debt proposal second

¹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1865).

¹⁸ See Gerard N. Magliocca, *Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York University Press: New York, 2013), pp. 108-27. Future work will suggest the latter more important than the former.

when newspapers noted all three proposals. The empowerment proposal was always listed third. Almost all newspaper descriptions of Bingham's proposal amendments used headers and subheaders that did not refer to the substance of those measures. The few that did more often mentioned the export and debt proposals than the proposal to empower Congress to protect certain rights.

Newspaper reports that described Bingham's proposals without any further commentary almost always noted all three proposals. Apart from one newspaper that left out the proposed debt amendment,¹⁹ and another that left on the empowerment amendment,²⁰ no newspaper informed readers that Bingham had proposed only two constitutional amendments. Solo mentions were almost as rare. One newspaper published in English described Bingham's attempt to empower Congress without reporting on the other two amendments.²¹ Only one newspaper published a report noting that Bingham, by name, had proposed repealing the constitutional ban on export taxes without describing the other two amendments.²² Three newspapers without mentioning Bingham declared that on December 6, "(a) joint resolution was introduced . . . to amend the article of the constitution prohibiting a tax on exports."²³ Bingham was the only member of Congress who on that day proposed repealing the constitutional ban on export taxes. Two foreign language papers noted only one of Bingham's proposed amendments. The December 7, 1865, edition of *Le Messager Franco-Americain* informed readers that Bingham had prepared an amendment repealing the constitutional ban on export duties without, in that article, noting the two other amendments.²⁴ The December 14, 1865, edition of *Der Westbote*, a German newspaper published in Columbus, Ohio, stated "Bingham beantragte ein Amendment sur Constitution, bas

¹⁹ *News from Washington*, TROY DAILY TIMES (N.Y.), Dec. 8, 1865, at 3.

²⁰ "From Washington," *The Village Record* (West Chester, PA), December 9, 1865, p.

4.

²¹ *Congressional Proceedings*, WOOSTER REPUBLICAN (Ohio), Dec. 14, 1865, at 1.

²² *Proceedings of Congress*, BRADFORD REP. (Pa.), Dec. 14, 1865, at 2.

²³ *Id.* at 2; *XXXIXth Congress—First Session*, NEW ENGLAND FARMER (Bos., MA), Dec. 16, 1865, at 2; *Thirty-Ninth Congress*, VT. CHRISTIAN MESSENGER, Dec. 14, 1865, at 2.

²⁴ *Dépêches Telegraphiques*, LE MESSENGER FRANCO-AMERICAIN, Dec. 7, 1865, at 1.

allen personen gleich rechte und gleichen Schutz fichert,”²⁵ which roughly translated declares, “Bingham applied for an amendment to the Constitution which would grant equal rights and equal protection to all persons.”

Newspapers took four different approaches when describing Bingham’s proposals. Some newspapers published the text of all three proposed amendments. The *Charleston Daily Courier* (SC) was one of many papers that quoted all three resolutions without commentary in the order in which they were presented to the House of Representatives.²⁶ Other newspapers paraphrased the amendments without quoting the exact language. The December 14, 1865, edition of *The Independent Democrat* (Concord, NH) reported,

Mr. Bingham offered a joint resolution, submitting to the Legislatures of the States and amendment to the Constitution declaring first, that the article prohibiting a tax or duty on exports is repealed and of no effect; second, that no part of any debt contracted in aid of the Rebellion, or which may be hereafter contracted for any such purpose shall ever be assessed or paid by the United States; and, third, that Congress shall have power to make all laws necessary and property to secure all persons equal protection, right, and liberty of person and property.²⁷

Most newspapers preferred a heavily abridged version. *The Evening Post* (New York, NY) reported, “Mr. Bingham offered amendments to the Constitution annulling export duties, repudiating the rebel debts, and securing all persons equal protection and the rights of liberty.”²⁸ Many newspapers described the proposed amendments without noting their authorship. *Freedom’s Champion* (KS) informed readers that “Several amendments to the Constitution have also been presented, among them propositions annulling export duties, repudiating rebel debt,

²⁵ Congress, DER WESTBOTE, Dec. 14, 1865, at 1.

²⁶ *Joint Resolution to Amend the Constitution*, CHARLESTON DAILY COURIER (S.C.), Dec. 12, 1865, at 1.

²⁷ XXXIXth Congress—First Session, INDEP. DEMOCRAT (Concord, N.H.), Dec. 14, 1865, at 3.

²⁸ *By Telegraph*, *supra* note 1.

and securing to all persons equal protection and the rights of liberty.”²⁹

These reports were almost always taken from wire services. Newspapers that subscribed to the same wire services provided readers with the same version of Bingham’s three proposals. Newspapers that subscribed to more than one wire service often included slightly different presentations of Bingham’s proposals, sometimes on the same day and page. The first column on page 1 of the December 7, 1865 edition of the *Chicago Tribune* (IL) under the header “The News” reported that “Mr. Bingham offered a resolution proposing amendments to the Constitution annulling export duties, repudiating the rebel debt and securing equal rights to all persons.”³⁰ The next column under the header “From Washington” featured the full text of Bingham’s resolutions.³¹ The third column on page 1 under the header “Proceedings of Congress” informed readers that “Mr. BINGHAM offered amendments to the Constitution annulling export duties, repudiating the rebel debt, and securing all persons equal protection and the right of liberty.”³²

Bingham’s three proposals for constitutional reform are listed in the same order in the *Congressional Globe*³³ and in every newspaper in which all three are reported. The export tax proposal is always listed first; the debt proposal is always listed second, and the empowerment proposal is always listed third. While good reason exists to question the accuracy of the *Congressional Globe*,³⁴ that the *Globe*, every correspondent, and every wire service that reported on Bingham’s proposals put them in the same order strongly suggests that this was the order in which they were first presented. Although newspapers sometimes edited wire service reports, no editor thought to change the order of presentation,

²⁹ Congress, FREEDOM’S CHAMPION (Kan.), Dec. 14, 1865, at 2.

³⁰ *The News*, CHI. TRIB., Dec. 7, 1865, at 1.

³¹ *From Washington*, CHI. TRIB., Dec. 7, 1865, at 1.

³² *Proceedings of Congress*, CHI. TRIB., Dec. 7, 1865, at 1; accord *The Latest News*, DAILY PITT. GAZETTE, Dec. 7, 1865, at 1 (full text of resolutions and amendments in column three); accord XXXIX Congress—First Session, DAILY PITT. GAZETTE, Dec. 7, 1865, at 1 (summary of amendments in column five).

³³ CONG. GLOBE, 39th Cong., 1st Sess. 13 (1865).

³⁴ See generally Rachel A. Shelden, *Finding Meaning in the Congressional Globe: The Fourteenth Amendment and the Problem of Constitutional Archives*, 2 J. AM. CONST. HIST. 715 (2024).

placing first the amendment empowering Congress to protect personal and property rights as a reflection of that proposal's significance.

The headers that newspapers used when describing Bingham's proposed amendments rarely suggest that one of his three proposals was of particular significance. Some presentations do not have an identifiable header.³⁵ Bingham's proposals were most frequently included in summaries of recent news or congressional activities. They appear, without additional guidance, under such headers as "News by Telegraph,"³⁶ "Congress,"³⁷ "XXXIXth Congress-First Session,"³⁸ "Proceedings of Congress,"³⁹ "Summary of the Week,"⁴⁰ and "News of the Day."⁴¹ Such subheaders as "Proposed Constitutional Amendment,"⁴² "Amendment to the Constitution,"⁴³ "New Constitutional Amendment,"⁴⁴ and "Joint Resolution to Amend the Constitution"⁴⁵ do not call attention to particular proposals. Rare exceptions exist. *The Philadelphia Inquirer* published the full text of Bingham's three amendments under the header, "State Taxes and the Rebel Debt."⁴⁶ *The Evening Post* (NY) published a summary under the header "Tax on Exports,"⁴⁷ as did the *New York Daily Tribune*.⁴⁸ The headers in *The New York Times* are "The Tax on Exports" and "The Rebel Debt."⁴⁹ The subheader in the *Chicago Tribune* is "Bill Introduced by Mr. Bingham—Amendments to the Constitution—Repudiation of the Rebel War Debt—

³⁵ See, e.g., DER LECHA CAUNTY PATRIOT (Allentown, Pa.), Dec. 12, 1865, at 3.

³⁶ See, e.g., *News by Telegraph*, BOS. POST (Mass.), Dec. 7, 1865, at 2.

³⁷ *Congress*, CHARLES CITY INTELLIGENCER (Iowa), Dec. 14, 1865, at 2.

³⁸ *XXXIXth Congress—First Session*, EVENING STAR (D.C.), Dec. 6, 1865, at 2.

³⁹ *Proceedings of Congress*, YORKVILLE ENQUIRER (S.C.), Dec. 14, 1865, at 2.

⁴⁰ *Summary of the Week*, BENTON TRIB. (Oxford, Ohio), Dec. 19, 1865, at 2.

⁴¹ *News of the Day*, BALT. DAILY COM., Dec. 7, 1865, at 1.

⁴² *Proposed Constitutional Amendments*, REP. & TRIB. (Washington, PA), Dec. 27, 1865, at 1.

⁴³ See, e.g., *Amendment to the Constitution*, N.Y. HERALD, Dec. 7, 1865, at 1.

⁴⁴ See, e.g., *New Constitutional Amendment*, WORCESTER DAILY SPY (Mass.), Dec. 11, 1865, at 1.

⁴⁵ See, e.g., *Joint Resolution to Amend the Constitution*, BEAVER ARGUS (Penn.), Dec. 13, 1865, at 2.

⁴⁶ *State Taxes and the Rebel Debt*, PHILA. INQUIRER, Dec. 7, 1865, at 1.

⁴⁷ *Tax on Exports*, EVENING POST (N.Y.), Dec. 8, 1865, at 1.

⁴⁸ "Thirty-Ninth Congress," *New York Daily Tribune*, December 7, 1865, p. 1.

⁴⁹ *House of Representatives*, N.Y. TIMES, Dec. 7, 1865, at 1.

Constitutional Rights”⁵⁰ *The Daily Dispatch* (Wilmington, NC) presented all three Bingham proposals under the subhead, “Payment of the Confederate Debt to be Prohibited.”⁵¹ This makes the score four headers for the export proposal, four headers for the debt proposal, and one for the proposal to empower Congress to protect certain rights. A slim reed for claiming newspapers thought the export and debt proposals more important than the rights/power proposal. This scorecard provides a sturdier foundation for claims that newspaper headlines and subheaders do not support claims that Americans in December 1865, Republicans in particular, thought particularly important Bingham’s effort to empower Congress to protect personal and property rights.

II. COMMENTARY

The limited commentary that specifically refers by name or obvious reference to one or all of Bingham’s three proposed amendments provides somewhat stronger evidence that newspapers, Republican newspapers in particular, thought the export amendment and debt amendments more important than the proposal to empower Congress to protect personal and property rights. Republican newspapers were more likely to leave Bingham’s empowerment amendment off when they listed the proposals for constitutional reform before Congress in December 1865. Republican newspapers were more likely to describe Bingham’s export and debt proposals than his empowerment amendment. They were more likely to declare Bingham’s export amendment “important” than his debt and empowerment proposals. More Republican newspapers endorsed Bingham’s export and debt proposals than his empowerment amendment. No Republican newspaper published an article endorsing Bingham’s empowerment amendment that did not also endorse the export and debt amendments. Bingham’s empowerment amendment was most often mentioned by Democratic newspapers criticizing Republican

⁵⁰ *From Washington, supra* note 31, at 1 (republishing an article from the *New York World*).

⁵¹ “By Telegraph,” *The Daily Dispatch* (Wilmington, NC), December 7, 1865, p. 2.

proposals for what they claimed was support for “negro equality”⁵² and related perceived sins. As is the case with newspaper reporting, a fair case can be made that the newspaper commentary on Bingham’s proposed amendments is not frequent enough to make a strong claim that Republicans in general valued the export and debt amendments more than the empowerment amendment. The strong claim that can be made is the newspaper commentary in December 1865 provides no support for any claim that Republicans at that time thought Bingham’s empowerment amendment the most important of his three proposals.

Republican newspapers in December 1865 interpreted Bingham’s third proposal as empowering Congress to protect personal and property rights, not such political rights as the right to vote. *The New York Times* reported that Bingham’s last proposed amendment “is intended to secure equal personal, not political rights to all persons, without distinction of race or color, and without which no man can look for security in any rebel State during this generation.”⁵³ *The Troy Daily Times* agreed that Bingham’s third proposal “is intended to secure equal personal, not political, rights to all persons.”⁵⁴ No Republican newspaper interpreted the third amendment Bingham proposed on December 6, 1865, as protecting the right to vote or some other political right.⁵⁵ When newspapers in December 1865 commented on proposed constitutional amendments mandating universal or impartial suffrage they either did so without commenting on a particular amendment proposal or by discussing a proposal made by someone other than Bingham.⁵⁶

⁵² See *Sambo in the Front*, ERIE OBSERVER (Penn.), Dec. 14, 1865, at 2; *The Negro in Congress*, EVENING COURIER & REPUBLIC (Buff., N.Y.), Dec. 12, 1865, at 2.

⁵³ *Washington News*, N.Y. TIMES, Dec. 12, 1865, at 1.

⁵⁴ *Proposed Constitutional Amendments*, *supra* note 12, at 2 (stating that Bingham’s third proposed amendment “is intended to secure equal personal, not political, rights to all persons”); *Proposed Constitutional Amendment*, BUFF. WEEKLY EXPRESS, Dec. 26, 1865, at 2.

⁵⁵ This article takes no position on whether Bingham’s later proposals to empower Congress or Section One of the Fourteenth Amendment was understood at the time or should be understood as protecting political rights.

⁵⁶ See *infra* note 144, and the relevant text.

A. Agenda

Bingham's first two proposed constitutional amendments were more often included than his empowerment proposal when newspapers published lists of proposed constitutional amendments on the congressional agenda. Democratic newspapers included all three of Bingham's amendments when cataloguing the proposals for constitutional reform before Congress. *The World's* (New York, NY) often republished article, "The Radical Programme," which featured most of the constitutional amendments proposed in early December 1865 and various civil rights statutes that Democrats found particularly objectionable, offered the reader the full text of each Bingham proposal.⁵⁷ Proponents of free labor and racial equality were less likely to highlight Bingham's third proposal when discussing the constitutional agenda of the Thirty-Ninth Congress. Several Republican newspapers left out the empowerment amendment when listing amendments before Congress. A correspondent for *The Portland Daily Press* (ME) omitted Bingham's empowerment amendment in an article noting that Congress was considering four proposed amendments changing the apportionment; three prohibiting payment of the rebel debt, including Bingham's second proposed amendment; two other amendments on the national debt, one of which was attributed to Bingham; two proposals to repeal the export tax, including Bingham's first proposal; a proposal for direct election of the President; another to allow soldiers to vote; a proposal by Representative Thaddeus Stevens of Pennsylvania that all laws be

⁵⁷ *The Radical Programme*, *supra* note 15, at 8. For republications, see *The Radical Programme*, TRI-WEEKLY COURIER (Rome, Ga.), Dec. 30, 1865, at 2; *The Radical Programme—Amendments to the Constitution of the United States Already Proposed*, DET. FREE PRESS, Dec. 17, 1865, at 4; *The Radical Programme*, BEAVER DAM ARGUS (Wis.), Dec. 30, 1865, at 2; *The Radical Programme*, REPUBLICAN BANNER (Nashville, Tenn.), Dec. 19, 1865, at 1; *The Radical Programme*, WEEKLY MICH. ARGUS, Dec. 22, 1865, at 2; *The Radical Programme*, MEM. DAILY APPEAL, Dec. 23, 1865, at 1. See also *The Republicans vs. the Constitution*, STAR OF THE NORTH (Penn.), Dec. 20, 1865, at 2 (including Sumner's apportionment amendment, Schenck's apportionment amendment, Stevens no discrimination, apportionment, export, and rebel debt amendments, Brownall's apportionment amendment, Bingham's export, rebel debt, and rights amendments, and Farnsworth's debt amendment); *Constitutional Tinkers*, NEW BERNE DAILY TIMES, Dec. 27, 1865, at 4 (including all three of Bingham's proposals when complaining about Republican efforts to amend the Constitution); *Proposals to Change Our Form of Government*, DAILY QUINCY HERALD (Ill.), Dec. 20, 1865, at 2.

uniform; a related proposal by Representative Columbus Delano of Ohio mandating a state duty to permit persons to pursue happiness without race discrimination; and Senator William Stewart of Nevada's proposal to make national supremacy the explicit constitutional law of the land.⁵⁸ *The Atchison Daily Champion* (KS) reported that Republicans, Bingham by name, were committed to constitutional amendments on the rebel debt, apportionment, exports, direct election of the president, and a ban on race discrimination that, unlike Bingham's proposed third amendment, included political rights. "The adoption of this and its acceptance by the States," the paper reported, "would of course be to make unconstitutional all suffrage or other legislation not disqualifications on their statutes, to repeal or make them bear on all alike."⁵⁹ Nowhere did the Kansas newspaper suggest that Republicans were considering Bingham's proposed ban on race discrimination that was limited to personal and property rights.⁶⁰ The *Newark Daily Advertiser* (NJ) began a list of proposed constitutional amendments by noting "Mr. Bingham proposes to remove the restriction in reference to levying export duties."⁶¹ The following list included apportionment reform, abandoning the electoral college, an anti-secession amendment, union and rebel debt amendments, an amendment requiring all laws to be uniform, and another specifically mandating black suffrage. Bingham was not referred to as the author of any other amendment, nor did the article note his proposed empowerment amendment without mentioning Bingham by name.⁶²

⁵⁸ *Letter from the Federal Capital*, PORTLAND DAILY PRESS, Dec. 21, 1865, at 1.

⁵⁹ *Washington Correspondence*, ATCHISON DAILY CHAMPION (Kan.), Dec. 29, 1865, at 2.

⁶⁰ *Id.*

⁶¹ *From the National Capital*, NEWARK DAILY ADVERTISER (N.J.), Dec. 15, 1865, at 2.

⁶² *From the National Capital*, NEWARK DAILY ADVERTISER (N.J.), Dec. 15, 1865, at 2; see also *Character of the Bills before Congress*, MASS. WEEKLY SPY, Dec. 22, 1865, at 1 (crediting Bingham with an amendment on the union debt but not crediting Bingham for any other amendment on a list of amendments before Congress); *Character of the Bills before Congress*, WORCESTER DAILY SPY (Mass.), Dec. 15, 1865, at 1.

B. Discussions

Bingham's empowerment amendment did not stand out when newspapers analyzed the three proposals the Representative from Ohio made on December 6. Many newspaper discussions were cribbed from a *New York Times* article detailing what the editors believed were the purposes of Bingham's three amendments.⁶³ As was the case with reporting, *The Times* commentary considered the amendments in order, with the export amendment first and the empowerment amendment last. Nothing in the presentation indicated that the empowerment amendment was more pressing than the export (or debt) amendment. The point of the export amendment, *The Times* declared, was "to enable Congress, by an export duty, to compel the European Powers to pay tribute upon our productions which they must buy, such as cotton, tobacco, &c., and thereby relieve to that extent our own people from the burdens of taxation."⁶⁴ The point of the rebel debt amendment was to secure the union debt. *The Times* asserted, "This amendment is intended to make repudiation of our war debt impossible by making it unconstitutional to pay anything for rebellion, either by the United States or State appropriation."⁶⁵ "This being done," the article continued, "no party, North or South, can ever open the question for the ratification of such an amendment. It is an implied declaration that both the States and the nation hold all their resources exclusively to pay the debt of the Union contracted in its defence."⁶⁶ *The Times* thought the point of the empowerment amendment was to secure civil rights. As noted above, *The Times* emphasized that the Bingham's third proposal "is intended to secure equal personal, not political rights, to all persons without distinction, in every State which is a part of the republic, and without which no man can look

⁶³ "Washington News," *The New York Times*, December 12, 1865, p. 1, at 1. Several newspapers republished the article. See, e.g. CHARLESTON DAILY NEWS, Dec. 16, 1865, at 1; *The Daily Standard* (N.C.) left out some of the commentary on the second and third proposal. *Daily Standard* (N.C.), Dec. 15, 1865, at 1 (republishing some of the article). *The New Orleans Tribune* and *Le Messager Franco-Americain* translated the article into French, with an introduction declaring that Bingham's proposals would "excite l'attention générale," *Affairs du Congress*, NEW ORLEANS TRIB., Dec. 24, 1865, at 1; *On écrit de Washington*, LE MESSENGER FRANCO-AMERICAN, Dec. 12, 1865, at 1.

⁶⁴ "Washington News," *The New York Times*, December 12, 1865, p. 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

for such security in any rebel State during this generation.”⁶⁷ The analysis concluded that Bingham’s empowerment amendment was “a healing measure, and a measure of security for the future against the calamities and crimes of the past.”⁶⁸

Several Republican newspapers republished only *The Times*’s analysis of Bingham’s proposed export amendment. The *Boston Semi-Weekly Advertiser* (MA) on December 13, 1865, reported,

The joint resolution introduced by Hon. John. A. Bingham in the House, on Wednesday last, which provides for three amendments to the Constitution, does not, on its face, indicate fully the purpose of Mr. Bingham in proposing the amendments nor the necessity which suggests them. The object of the first amendment, which provides for the repeal of the fifth paragraph of the ninth section of the first article of the Constitution, to-wit: “No tax or duty shall be laid on articles exported from any State,” is to enable Congress, by an export duty, to compel the European powers to pay tribute upon our productions which they must buy, such as cotton, tobacco, &c, and thereby relieve, to that extent, our own people from the burdens of taxation.⁶⁹

The editorial omitted the discussion in *The Times* of the other two amendments. The *Chicago Tribune* (IL), *New York Daily Tribune*, *Daily Missouri Democrat*, and *Connecticut Courant* engaged in similar editing, presenting the paragraph discussing the export amendment, but not the paragraphs discussing the debt and

⁶⁷ *Id.*

⁶⁸ *Id.* Given the *Times* commentary on all three amendments, a later *Times* claim that “if the propositions of Mr. Stevens, Mr. Bingham and others had been adopted as the doctrine of the Union party in this State last Fall, the Opposition would have elected their ticket by 50,000 majority,” probably refer to the decision not to seat representations from the former confederate states, not proposed constitutional amendments. *Mr. Raymond’s Speech*, N.Y. TIMES, Dec. 28, 1865, at 4; *Mr. Raymond’s Speech*, DAILY CONST. UNION, Dec. 29, 1865, at 1 (publishing the same speech).

⁶⁹ *The Constitutional Amendment . . . The Export Duty Amendment*, BOS. SEMI-WEEKLY ADVERTISER, Dec. 13, 1865, at 1. For identical or nearly identical commentaries, see *From Washington*, *supra* note 31, at 1; *From Washington*, ST. LOUIS GLOBE-DEMOCRAT, Dec. 11, 1865, at 1; *From Washington*, DAILY MO. DEMOCRAT, Dec. 11, 1865, at 1; *Mr. Bingham’s Resolution*, TIMES PICAYUNE, Dec. 20, 1865, at 9; *Proposed Amendments to the Constitution*, PITT. GAZETTE, Dec. 11, 1865, at 1; *Bingham’s Constitutional Resolutions*, *supra* note 6, at 3.

empowerment amendments.⁷⁰ The *Buffalo Weekly Express* (NY) broke from this practice when editing *The Times* commentary. The December 26, 1865 edition of that newspaper included in entirety *The Times*' discussion of Bingham's empowerment proposal, while merely noting the existence of the export and debt proposals.⁷¹

Some presentations of the Bingham proposals offered brief comments, mostly, although not exclusively, focused on the export amendment. A correspondent to the *Toledo Blade* (OH) stated "that amendments to the constitution are proposed by John A. Bingham, repealing the clause prohibiting a tax on exports, (to enable us to get cotton) and for enacting new provisions against the payment of the rebel debt, and giving Congress power to make secure, in every State, equal protection in the great rights of life, liberty and prosperity."⁷² The *Worcester Daily Spy* (MA) when presenting Bingham's three amendments informed readers that the first proposal "is intended for the benefit of the cotton planters." The other two amendments were summarized without comment.⁷³ The *New-Orleans Times* (LA) did not comment on the debt or empowerment amendment when declaring the purpose of the Bingham export amendment was to enable Congress to pass a duty on cotton.⁷⁴ The *Milwaukee Daily Sentinel* (WI) did not distinguish the three proposals at all. When summarizing all three amendments, the paper informed readers that they were introduced "with a view to secure their passage *now*, their ratification this winter, and thus secure these points before the Southern States are admitted."⁷⁵

⁷⁰ *From Washington*, *supra* note 31, at 1; *General News*, *supra* note 6, at 6; *From Washington*, DAILY MO. DEMOCRAT, Dec. 11, 1865, at 1; *Interesting Items*, *supra* note 6, at 1; *From Washington*, WEEKLY MO. DEMOCRAT, Dec. 12, 1865, at 4; *Lettre de la Capitale*, COURRIER DES ETATS-UNIS (New York, N.Y.), Dec. 13, 1865, at 1 (article in French discussing the purpose of the export amendment—appears to refer to Bingham's export amendment, but Bingham is not mentioned).

⁷¹ *Proposed Constitutional Amendment*, *supra* note 54, at 2.

⁷² *Letter from Washington*, TOL. BLADE, Dec. 12, 1865, at 2.

⁷³ *Letter from Washington*, WORCESTER DAILY SPY (Mass.), Dec. 11, 1865, at 1.

⁷⁴ *Our Washington Correspondence*, NEW ORLEANS TIMES (La.), Dec. 18, 1865, at 4.

⁷⁵ *Our Washington Letter*, *supra* note 11, at 5.

C. Predictions

Journalists in December 1865 informed readers about the expected course of export and debt constitutional reform but left the fate of Bingham's empowerment amendment to their readers' imaginations. Some Republican newspapers predicted that Congress would pass Bingham's first two proposals. The third was not mentioned. A correspondent for the *Springfield Weekly Republican* (MA) anticipated that Congress would certainly pass apportionment and debt amendments, possibly pass an export amendment, but thought that Republicans were more interested in passing statutes protecting black rights.⁷⁶ A correspondent from the *Burlington Free Press* (VT) thought Republicans would propose "the entire abolition of privilege and inequality," congressional enforcement, rebel debt, national debt, apportionment, export and education amendments.⁷⁷ "Entire" appears to include voting rights, which were not included in Bingham's third proposed constitutional amendment. An article in the *Daily Free Press* (Burlington, VT), in an article noting Bingham as a leading constitutional reform, predicted passage of rebel debt, apportionment, and export amendments, but was unsure about an amendment prohibiting "the passage of laws by any State discriminating against citizens of the United States on account of color, race or former condition," an amendment Bingham did not propose.⁷⁸

Newspapers debated anticipated support for Bingham's export amendment. *The Press* (Philadelphia, PA) thought southerners would recognize that an export tax was a "necessary preparation . . . for that system of manufacturing, without which . . . they are now so immeasurably suffering."⁷⁹ The *Daily Dispatch* (Richmond, VA) disagreed. An editorialist thought "the Cotton States will oppose the measure" because "they wish to supply the world with cotton, and thereby recover some portion

⁷⁶ *Reconstruction—The Sweep of Events*, SPRINGFIELD WEEKLY REPUBLICAN, Dec. 30, 1865, at 4; *The Radical Programme*, MEM. DAILY APPEAL, December 23, 1865, at 1.

⁷⁷ *From Washington*, BURLINGTON FREE PRESS, Dec. 29, 1865, at 2.

⁷⁸ "The Position at Washington," *The Daily Free Press* (Burlington, VT), December 29, 1865, p. 2.

⁷⁹ *Export Duty on Cotton*, PRESS (Phila., Pa.), Dec. 12, 1865, at 1; see *Export Duty on Cotton*, DAILY DISPATCH (Rich., VA), Dec. 14, 1865, at 1.

. . . of the immense wealth they formerly enjoyed.”⁸⁰ No similar dialogue took place respecting predictions on the fate of or support for Bingham’s debt or empowerment amendments.

D. Importance

Newspapers that commented on the significance of Bingham’s proposals either focused on the export amendment or lumped all proposals together. Eighteen newspapers published pieces declaring the export amendment “important” that did not comment on Bingham’s proposed debt and empowerment amendments. The only newspaper articles that claimed Bingham’s debt or empowerment amendments “important” did so without distinguishing between any of the Representative from Ohio’s three proposals. The *Cleveland Daily Leader* (OH) was typical in this regard. The December 13, 1865, edition proudly indicated that a local boy had made good when asserting, “Our own eloquent and accomplished statesman, Hon. John A. Bingham has introduced important amendments to the Constitution. They are of vital interest to the welfare of the nation, and will no doubt be adopted.”⁸¹ Then followed the text of Bingham’s resolutions with no additional commentary other than “We are confident that Mr. Bingham will press them to a successful issue.”⁸² The *Washington Chronicle* (DC) introduced the text of all three Bingham amendments as an “important joint resolution” that “contains propositions of great general interest, which will doubtless receive, as they well deserve, the careful consideration of Congress.”⁸³ A correspondent for the *Metropolitan Record and New York*

⁸⁰ *Export Duty on Cotton*, *supra* note 79, at 1.

⁸¹ *From Washington*, CLEV. DAILY LEADER, Dec. 13, 1865, at 2.

⁸² *Id.*

⁸³ *Joint Resolution to Amend the Constitution*, WASH. CHRON. (D.C.), Dec. 8, 1865, at 2. For the same or similar article, see *Joint Resolution to Amend the Constitution*, *supra* note 45, at 2; see also *Joint Resolution to Amend the Constitution*, FRANKLIN REPOSITORY (Pa.), Dec. 20, 1865, at 1; *Joint Resolution to Amend the Constitution*, LOUISVILLE WEEKLY COURIER, Dec. 13, 1865, at 2 (“important joint resolution . . . contain[ing] propositions of great general interest”); *Joint Resolution to Amend the Constitution*, TRI-WEEKLY KY. YEOMAN, Dec. 14, 1865, at 3; *Joint Resolution to Amend the Constitution*, POTTER J. (Coudersport, Pa.), Dec. 26, 1865, at 2; *Joint Resolution to Amend the Constitution*, DAILY KY. YEOMAN, Dec. 14, 1865, at 3 (full text—“great general interest”); see *Affairs du Congress*, *supra* note 63, at 1.

Vindicator declared that the “most important resolutions introduced in the House” on December 6, 1865, included a “series by Bingham, of Ohio, providing for a repeal of the clause in the Constitution, which prohibits export duties, pledging Congress against the assumption of any part of the Confederate debt, and declaring the right of Congress to make laws for the protection of all persons within the United States.”⁸⁴

The empowerment proposal received more attention when *The New York Times* commented on the “most important” constitutional amendments proposed in Congress during the first weeks of December 1865. That newspaper pointed to apportionment reform, bans on race discrimination in the suffrage, the rebel debt, the repeal of the ban on export taxes and an amendment to “secure to all persons, in every State of the Union, equal rights to life, liberty, and property.” *The Times* credited Bingham with the last three proposals. All amendments, the *Times* observed, “are very important in their character, and embody all the questions pertaining to reconstruction in a very practical manner.”⁸⁵ The empowerment amendment was the only proposal *The Times* singled out for additional commentary. That amendment, *The Times* reported, repeating commentary from a previous article,⁸⁶ “is intended to secure equal personal, not political, rights to all persons, without distinction of race or color, and without which no man can look for security in any rebel State during this generation.”⁸⁷

⁸⁴ *Washington Correspondence*, METRO. REC. & N.Y. VINDICATOR, Dec. 16, 1865, at 11.

⁸⁵ *Our Washington Correspondence*, *supra* note 74, at 1; see *Proposed Constitutional Amendments*, *supra* note 12, at 2 (concluding that all the proposed amendments discussed were “very important in their character, and embody all the questions pertaining to reconstruction in a very practical manner”).

⁸⁶ See *supra* note 6, and the relevant text.

⁸⁷ *Our Washington Correspondence*, *supra* note 74, at 1; see *Proposed Constitutional Amendments*, *supra* note 12, at 2 (concluding that all the proposed amendments discussed were “very important in their character, and embody all the questions pertaining to reconstruction in a very practical manner”).

E. Evaluations

Very few papers endorsed, opposed, or evaluated any of the three amendments Bingham proposed on December 6, 1865. The *Cleveland Daily Leader*, as noted above, urged ratification of Bingham's amendment package.⁸⁸ A Republican newspaper in Pennsylvania supported Bingham's debt and export proposals. Several Republican newspapers endorsed his export amendment. Another handful endorsed Bingham's proposed rebel debt amendment. One newspaper endorsed an amendment credited to Bingham that would have secured the Union debt. No Republican newspaper singled out Bingham's empowerment amendment for endorsement or even favorable commentary. Democratic newspapers commented more frequently and critically on Bingham's proposals in general and on his empowerment amendment in particular. The precursor to Section One of the Fourteenth Amendment in December 1865 was a whipping boy for white supremacists rather than an inspiration for racial egalitarians.

The *Lewisburg Chronicle* (PA) endorsed the first two amendments that Bingham proposed. The export and debt proposals, the paper declared, "we look upon as possessing peculiar merit, and should be glad to see them adopted as soon as possible."⁸⁹ The editorial was "unable to conceive why any American should object to [the export] amendment" that would "at once bring a large revenue to the government and mete out to the countries named a measure of poetic justice for the sympathy they gave the rebellion."⁹⁰ The *Lewisburg Chronicle* was as supportive of Bingham's second proposal. The debt amendment would "allay all danger of the rebel debt being foisted upon our shoulders, and by forbidding its assumption by Southern States would increase their ability to pay their share of the national debt."⁹¹ The editorial comment made no mention of Bingham's empowerment amendment.

⁸⁸ *From Washington, supra* note 77, at 2.

⁸⁹ *Important Amendments*, LEWISBURG CHRON., Dec. 22, 1865, at 1.

⁹⁰ *Id.*

⁹¹ *Id.*

The New York Times and several other papers wholeheartedly agreed with the *Lewisburg Chronicle* on the merits of the export proposal. *The Times* on December 29, 1865, declared that a constitutional repeal of the ban on export taxes would enable Congress to have the means to “lighten the burden” of “the enormous national debt” incurred during the Civil War.⁹² The *American and Commercial Advertiser* (Baltimore, MD) and *The Press* (Philadelphia, PA), asserted that Bingham’s export amendment “should receive the support of every true friend of the government.” The papers noted that leading Republicans thought “it is the imperative duty of the country to make provision for such an export tax.”⁹³ The *Washington Standard* (PA) reached a similar conclusion on December 16, 1865.⁹⁴ Supportive newspapers perceived bisectional support for empowering Congress to tax exports. The *Washington Chronicle* (DC), when advocating for Bingham’s export tax repeal, insisted that the Provisional Governor of South Carolina, James Orr, had endorsed the repeal of the ban on export taxes.⁹⁵ *The New York Times* thought former confederate states would see how the benefits of export duties outweighed the costs. “[T]he Southern States will willingly adopt,” an editorial maintained, “when satisfied that they must gain more by early relief from their share of the national debt than by the supposed protection which the provision in question gives them.”⁹⁶

The New York Herald was supportive but ambivalent. The editors on December 8, 1865, devoted multiple paragraphs to demonstrating that repeal was unnecessary. Congress had the power to impose a national tax on exports if Congress did not tax exports only from a specific state. The editorial declared,

⁹² *Why Not an Export Tax as a Temporary Financial Expedient*, N.Y. TIMES, Dec. 29, 1865, at 4; see *Debt and Finance of the United States*, WASH. STANDARD, Dec. 16, 1865, at 2 (noting an export tax would lighten the national debt).

⁹³ *Export Duty on Cotton*, AM. & COM. ADVERTISER (Balt., Md.), Dec. 13, 1865, at 1; *Export Duty on Cotton*, PRESS (Phila., PA), Dec. 12, 1865, at 1.

⁹⁴ See *Debt and Finance of the United States*, *supra* note 92, at 2 (noting an export tax would lighten the national debt).

⁹⁵ *The New South Carolina Governor*, WASH. CHRON. (D.C.), Dec. 13, 1865, at 2; see *Export Duty on Cotton*, *supra* note 93, at 1 (claiming the “idea that any opposition to this amendment of the Constitution should come from the South is absurd”).

⁹⁶ *Why Not an Export Tax as a Temporary Financial Expedient*, *supra* note 92, at 4.

The words of the article—"No tax or duty shall be laid on articles exported from any State"—may be interpreted as applicable to a single State only, and not to the States collectively represented in Congress, and in this view it is by no means clear that Congress has not the power to impose a tax on exports without the amendment.

In a nod to what resembles living constitutionalism or living originalism,⁹⁷ the essay continued,

there are those who contend that so long as the letter of the constitution is not violated its spirit should be interpreted as we understand it, and as may accord with existing circumstances and national interests, it being for us to regard the constitution, not as a fetter, but as the protecting bulwark and palladium of our liberties.⁹⁸

The paper concluded that if a federal constitutional amendment was warranted, that amendment repealing the constitutional ban on export taxes ought to be free from previous interpretive problems. The suggested language was "No tax or duty shall be laid on singular articles exported from every other State, and Congress only shall have the power to lay a tax on articles exported."⁹⁹

Republicans were not unified on export taxes. At least one Republican newspaper raised questions about Bingham's proposed repeal. *The Brooklyn Daily Times* (NY) hit this more discordant Republican note. An editorial in that newspaper opined: "It would be better for us to send a million of dollars to the cotton growers of India as charity, than to lay a tax of one cent a pound upon the cotton grown by Southern planters."¹⁰⁰

⁹⁷ See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

⁹⁸ *Financial and Commercial*, N.Y. HERALD, Dec. 8, 1865, at 3. The day before Bingham introduced his three amendment proposals, *The New York Herald* published an article more confidently proclaiming that Congress was empowered to enact a uniform export tax and suggesting ways to work around the constitutional ban on export taxes. "Financial and Commercial," *The New York Herald*, December 5, 1865, p. 2.

⁹⁹ *Financial and Commercial*, N.Y. HERALD, Dec. 8, 1865.

¹⁰⁰ *A Crusade Against Foreigners and Foreign Goods*, BROOK. DAILY TIMES, Dec. 16, 1865, at 2.

Three Republican newspapers praised Bingham's debt amendment. *The Times Record* (ME) and *Daily Sentinel and Times* (ME) noted that Bingham had proposed various amendments "one of which strikes as good." That was the amendment prohibited paying confederate obligations. Both papers contended,

This amendment is intended to make repudiation of our war debt impossible by making it unconstitutional to pay anything for rebellion, either by United States or State appropriation. It is an implied declaration that both the States and nation hold all their resources exclusively to pay the debt of the Union contracted in its defense.¹⁰¹

The *Baltimore Daily Commercial* (MD), another Republican newspaper,¹⁰² when endorsing Bingham's proposed amendment on the confederate debt declared, "the doors should be effectually shut on all attempts to pay the rebel war debts."¹⁰³

Republican newspapers appear to have more frequently (once) endorsed an amendment erroneously credited to Bingham than (never) Bingham's empowerment amendment. A *Massachusetts Weekly Spy* editorial maintained that Bingham was responsible for the "paternity of [a] measure" declaring, "No money shall be drawn from the treasury, but in consequence of appropriations made by law, except that the interest on the debts of the United States shall be paid as the same become due out of any money in the treasury, and to the exclusion of appropriations for any other purpose."¹⁰⁴ That this paternity does not appear in the *Congressional Globe* did not diminish the *Massachusetts Weekly Spy's* enthusiasm. The proposed constitutional amendment, the paper stated, "would add to the security of our debt, and consequently enhance the national credit."¹⁰⁵ Bingham's actual third proposed amendment did not fare as well as his possibly fictional fourth proposed amendment. No

¹⁰¹ *Rebel Debts*, TIMES RECORD (Brunswick, Me.), Dec. 23, 1865, at 2; *Rebel Debts*, DAILY SENTINEL & TIMES, Dec. 23, 1865, at 2.

¹⁰² See *The Dealings of Congress with the South*, BALT. DAILY COM., Dec. 29, 1865, at 2 (endorsing the Republican decision not to seat Representatives from the former Confederate states).

¹⁰³ *Id.*

¹⁰⁴ *Character of the Bills before Congress*, MASS. WEEKLY SPY, Dec. 22, 1865, at 1.

¹⁰⁵ *Id.*; *Character of the Bills before Congress*, WORCESTER DAILY SPY (Ma.), Dec. 15, 1865, at 1.

Republican newspaper singled out Bingham proposal to empower Congress to protect personal and property rights for endorsement or even favorable commentary.

Democratic newspapers devoted more ink to Bingham, none of which was complementary. Some newspapers went for the trifecta, criticizing all three proposed amendments. Others focused their ire specifically on the export amendment. A few Democratic newspapers heaped scorn on Bingham's empowerment amendment. None singled out the debt amendment for specific criticism.

Several Democratic newspapers published commentary condemning each of Bingham's proposals. In an editorial that clearly referred to Bingham's three amendments, but did not name Bingham, *The Daily Empire* (Dayton, OH) asserted,

The object of the [export amendment] is to give New England manufacturers a monopoly of Southern cotton by closing the foreign market of the South. The [debt amendment] is intended as a bunkum appeal to the cupidity of the North. The [empowerment amendment] virtually abolishes all State rights, and substitutes Congress for the Constitution, as the sole regulator of the whole people.¹⁰⁶

Jacksonian newspapers warned readers that Republican zeal for numerous amendments demonstrated that Bingham and his fellow partisans had little respect for the original Constitution. The Cleveland *Plain Dealer* moaned,

¹⁰⁶ *Abrogating the Constitution*, DAILY EMPIRE (Dayton, Ohio), Dec. 14, 1865, at 2.

John A. Bingham and Columbus Delano have both discovered that the Constitution of the United States, framed by Jefferson, Franklin, and the patriots of the earlier and purer days of the Republic, is a miserable botch, and both propose to tinker it by amendments. The country has indeed cause to regret that such miserable demagogues and arrant humbugs as Delano and Bingham ae chose to shape the Legislation of a disturbed and excited country.¹⁰⁷

The Wheeling Daily Register declared, "SUMNER, STEVENS and BINGHAM may be wiser than WASHINGTON, JEFFERSON and MADISON, but there are a few old fogies who do not think so."¹⁰⁸

Several Democratic newspapers lumped Bingham's three proposed amendments together when warning readers that Bingham had no respect for white supremacy. *The Cadiz Sentinel* (OH) declared that "Bingham" and others "had an innumerable number of bills for the benefit of the 'colored race' to offer."¹⁰⁹ The Richmond (VA) *Daily Dispatch* commented, "Mr. Bingham touched upon the negro, and other things combined, by a proposition for amending the Constitution so as to allow export duties, prohibit the payment of the 'rebel debt,' and secure everybody liberty and life."¹¹⁰ Some commentaries incorporated racist invectives into their racist attacks on Bingham. In a paragraph headed "The Negro in Congress" that began with the sentence, "SAMBO has come from under the wood-pile and is now in Congress!" the Cleveland *Plain Dealer* asserted, "Mr. Bingham offered a series of amendments to the Constitution looking directly towards 'negro equality.'"¹¹¹ *The*

¹⁰⁷ *The News*, CLEV. PLAIN DEALER (Ohio), Dec. 13, 1865, at 2 (the same squib appears in the Dec. 14 edition of the *Plain Dealer*); WEEKLY PLAIN DEALER (Ohio), Dec. 20, 1865, at 1; EVENING POST (Ohio), Dec. 13, 1865, at 2; DAILY EMPIRE (Ohio), Dec. 16, 1865, at 2.

¹⁰⁸ WHEELING DAILY REGISTER (Wheeling, W. Va.), Dec. 19, 1865, at 2.

¹⁰⁹ CADIZ SENTINEL (Ohio), Dec. 13, 1865, at 3.

¹¹⁰ *United States Congress*, *supra* note 6, at 4.

¹¹¹ *The Negro in Congress*, PLAIN DEALER (Clev., Ohio), Dec. 13, 1865, at 2; *The Negro in Congress*, PLAIN DEALER (Clev., Ohio), Dec. 9, 1865, at 2; *see* DAILY AGE (Phila., Pa.), Dec. 8, 1865, at 2 ("Mr. Bingham offered a series of amendments to the Constitution looking directly towards 'negro equality"); *see also* *The Negro in Congress*, BUFF. COURIER, Dec. 12, 1865, at 2; *Sambo in the Front*, *supra* note 52, at 2; *The Irrepressible Negro*, MD. UNION, Dec. 14, 1865, at 2; *The Negro in Congress*, LOUISVILLE WEEKLY

Jeffersonian (OH) played the race card when attacking Bingham's export proposal and other constitutional reforms. The editors complained about apportionment amendments proposed by Senator Charles Sumner of Massachusetts, Representative Robert Schenck of Ohio, and Representative John Broomall of Pennsylvania, which were aimed "to log in the negroes;" Steven's uniformity proposal "to make negroes voters;" Bingham's and Stevens' export proposals, "to fatten eastern manufacturers;" and Stevens and Farnsworth's amendments on the rebel debt.¹¹² Despite the clear aim of the piece to identify Republicans with African-Americans, the editors made no mention of Bingham's empowerment provision.¹¹³

The Harrisburg (PA) *Weekly Patriot and Union* emphasized the export amendment when objecting to each of Bingham's proposals. The commentary on the export amendment declared:

Bingham proposed to amend so as to enable the Rumpers to tax the exports of our farmers. Bingham, being tied to the Pennsylvania iron kings, and the wool and cotton manufacturers, don't care a copper about the Western agriculturalists, who ship grain abroad. But, Bingham has an ax to grind. He wants a protective tariff on iron for his masters; a bill to tax foreign imports; so that the iron, wool and cotton manufacturers may be enabled to raise the price of their goods to the American consumers. Bingham will doubtless sell out this proposition to Western members if they will go for his tariff bill. He only wants to scare somebody. He don't [sic] care about increasing the resources of the Government by taxing exports, but he does care about filling the pockets of the manufacturers at the expense of our own people.¹¹⁴

The Patriot and Union feared that "Such an amendment once made, it will be in the power of the commercial, mining and manufacturing States of New England and the Atlantic and Pacific seaboard to impose export duties upon the agricultural products of

COURIER, Dec. 13, 1865, at 3; INTELLIGENCER J. (Pa.), Dec. 8, 1865, at 2; DAILY AGE (Phila., PA), Dec. 9, 1865, at 2.

¹¹² *Loyalty in Congress*, JEFFERSONIAN (West Chester, Pa.), Dec. 30, 1865, at 2.

¹¹³ *Id.*

¹¹⁴ *More Raids Upon the Constitution*, WEEKLY PATRIOT & UNION, Dec. 14, 1865, at 5.

the interior and Western States.” Export taxes, the paper insisted, “rob American consumers to enrich American manufacturers.”¹¹⁵

The Democratic editors of the Harrisburg paper gave Bingham’s debt and empowerment proposals less extensive, but no less critical attention. *The Patriot and Union* complained that Bingham seems “to think that a national debt is actually a blessing, and that, unless the Constitution shall be amended, the people will demand an additional installment of it.”¹¹⁶ The Bingham empowerment amendment, *The Patriot and Union* feared, would centralize power in Congress and threaten white supremacy. The editorial declared, “Under this last proposition Congress would have unlimited power in everything that concerns whites or blacks, but the immediate aim is to secure the privilege of the suffrage for negroes.”¹¹⁷

The Democratic newspapers that focused solely on Bingham’s empowerment amendment condemned that proposal for promoting racial equality, centralization, and black suffrage. Jacksonians raised the banner of white supremacy when assaulting proposals by Bingham and others to bar race discrimination. The *Carlisle American Volunteer* (PA) mentioned Bingham’s empowerment amendment when flaying Republican proposals for racial justice. Accusing Republicans of “radical madness,” the paper pointed out that “On the same day Mr. Dixon offers resolutions ‘in favor of perfect equality before the law,’ . . . Bingham, in the House, offers an amendment to the Constitution of the United States providing ‘that Congress shall have the power to make all laws necessary and proper to secure all persons equal protection of person and property.’”¹¹⁸ A brief summary in *The Mobile Daily Times* declared “By Mr. Bingham—Equal rights to all men, (except Southerners, but including negroes).”¹¹⁹ Bingham’s proposal to empower Congress to protect personal and property rights, Democrats complained, subverted American federalism. *The Cincinnati Enquirer* (OH) pointed to Bingham’s empowerment amendment,

¹¹⁵ *The Export Duty Amendment*, WEEKLY PATRIOT & UNION (Pa.), Dec. 28, 1865, at 4 (the editorial included the usual litany of Democratic complaints against Republicans in Congress).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *What Congress is Doing*, CARLISLE AM. VOLUNTEER (Pa.), Dec. 14, 1865, at 2.

¹¹⁹ *Abridged Congressional Proceedings*, MOBILE DAILY TIMES, Dec. 13, 1865, at 4.

Schenck's apportionment amendment, and Sumner's bill granting equal rights as examples of the "amendments, bills, and resolutions . . . that . . . if passed, will as completely alter the appearance, and conceal the substructure of our country."¹²⁰ *The World* (New York, NY) and *The Cincinnati Enquirer* (OH) stated that Bingham's third proposed amendment would "confer upon Congress all the powers now exercised by the State Legislatures, and . . . reduce the States to the condition of counties."¹²¹ Some Democratic newspapers criticized Bingham for mandating black suffrage. *The Weekly Patriot and Union* insisted that empowering Congress to protect property and personal rights would lead to protection for black political rights.¹²² The *Newnan Herald* (GA) in an editorial attacking numerous proposed constitutional reforms claimed that "Stevens and Bingham are the movers of resolutions to prohibit all distinctions of color under State or national laws."¹²³

III. BEYOND BINGHAM (AND THE BINGHAM 3)

The dearth of commentary on Bingham's third proposed amendment is not an artificial construct resulting from an obsessive focus on newspaper articles that mention Bingham by name. Comparative public interest in proposals to empower Congress to protect property and personal rights does not increase when the survey is expanded to include newspaper commentary on all proposed constitutional amendments in December 1865 that anticipated Section One of the Fourteenth Amendment, prohibited payment of the rebel debt, or sought to repeal the constitutional ban on export taxes. Few newspapers commented on or endorsed constitutional reforms whose scope was limited to banning race discrimination in personal or property law or empowering Congress to pass such bans. The newspaper commentary on proposed export and debt amendments was far more extensive. Newspapers paid more attention to proposed constitutional amendments that would

¹²⁰ *The Proceedings of Congress*, CIN. ENQUIRER, Dec. 13, 1865, at 1.

¹²¹ *The Radical Revolution*, WORLD (N.Y.), Dec. 15, 1865, at 4; *The Radical Revolution*, CIN. ENQUIRER, Dec. 20, 1865, at 1 (republishing an article from the *New York World*); see *Proposals to Change our Form of Government*, QUINCY DAILY HERALD (Ill.) Dec. 20, 1865, at 2.

¹²² *More Raids Upon the Constitution*, *supra* note 114, at 5.

¹²³ *Freaks of Fanatics*, NEWNAN HERALD (Ga.), Dec. 30, 1865, at 2.

ban all race discriminations, most notably race discriminations in voting laws, than to anti-discrimination proposals that did not encompass political rights. Nevertheless, newspapers devoted at least as much attention to and offered far more support for proposed amendments on exports and the rebel debt than to proposed amendments aimed at any form of racial equality. Republicans who paid more attention to Bingham's export and debt amendments than to his empowerment amendment also paid more attention to export and debt amendments more generally than to all amendments aimed at racial equality.

No shortage of possible Bingham analogues existed in December 1865. Members of Congress, political conventions, and several newspapers proposed bans on race discrimination. Thaddeus Stevens and Columbus Delano offered amendments on December 11, 1865, in the House of Representatives. Stevens proposed a constitutional amendment declaring, "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."¹²⁴ Delano proposed a constitutional amendment "making it the duty of each State to provide for the rightful pursuit of happiness of all its inhabitants without distinction of color or race."¹²⁵ Several newspapers proposed constitutional amendments that might plausibly be said to anticipate Section One of the Fourteenth Amendment. *The National Anti-Slavery Standard* and *New Orleans Tribune/La Tribune de la N. Orleans* championed a constitutional amendment stating, "No State shall make any distinction in civil rights and privileges among the naturalized citizens of the United States residing within its limits, or among persons born on its soil of parents permanently resident there, on account of race, color, or descent"¹²⁶ Numerous papers reported that a black political convention in Boston wanted "the Constitution of the United States so altered as to fix general qualification for voters in all the States; to have settled what is citizenship in the American sense, and to look to all matters concerning the colored man and his status in the land."¹²⁷ The *Rockford Register* advocated an

¹²⁴ CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865).

¹²⁵ *Latest News*, BUFF. COURIER (N.Y.), Dec. 12, 1865, at 3.

¹²⁶ See *Proposed Amendment of the United States Constitution*, *supra* note 12, at 4.

¹²⁷ See "News Summary," THE TROY DAILY TIMES (NY), December 2, 1865, at 2.

amendment guaranteeing "equal and exact justice to all citizens."¹²⁸ Several newspapers championed equal rights amendments.¹²⁹ Robert Dale Owen in a letter published or excerpted by many newspapers asserted, "As to the civil rights of negroes, if Congress admit a single ex-insurgent State without seeing to it that these are constitutionally secure"¹³⁰

Determining whether any or all these proposals are Bingham analogues is far more difficult than determining whether other proposals for repealing the constitutional ban on export duties or repudiating the rebel debt are Bingham analogues. Bingham's proposed repeal of the constitutional ban on export tax is materially identical to the repeal Stevens proposed.¹³¹ Some material differences exist between the Bingham, Stevens, and Farnsworth proposals on the rebel debt, but none seemed worthy of newspaper commentary.¹³² Substantial differences exist between Bingham's empowerment amendment and each of the proposed amendments discussed in the last paragraph. The first is implementation. Bingham would empower Congress to protect personal and property rights. The Stevens, Delano, *The National Anti-Slavery Standard/New Orleans Tribune* and Owen proposals declare rights without setting out an implementation mechanism. The second and more important is political rights. The Bingham proposal was advertised as not including political rights, although Democrats disagreed. Almost all the alternatives were intended to give male persons of color access to the ballot.

Except for the Delano proposal, the other anti-discrimination proposed amendments were understood as including voting rights. Stevens would ban all race discriminations.¹³³ The Boston Black Convention,¹³⁴ *Rockford Register* and newspapers championing

¹²⁸ *The President's Message*, ROCKFORD REGISTER (Ill.), Dec. 9, 1865, at 4.

¹²⁹ See "Why Not," THE CHICAGO REPUBLICAN, December 25, 1865, at 4; "The Right Way," *Burlington Daily Hawk-Eye* (IA), December 29, 1865, at 2; "Amending the Constitution," THE BOSTON RECORDER (MA), December 1, 1865, at 2.

¹³⁰ *From Boston—A Colored Convention*, DAILY AGE (Phila., Pa.), Dec. 2, 1865, at 3.

¹³¹ For the texts, see "The Radical Programme," *Tri-Weekly Courier* (Rome, GA), December 30, 1865, at 2.

¹³² See *supra* note 126.

¹³³ Newspapers took Stevens at his word. See *The Thirty-Ninth Congress*, BOS. REC. (Mass.), Dec. 15, 1865, at 3.

¹³⁴ The wire service summaries of the Black Convention in Boston speak of constitutional amendment. The actual resolutions speak only of congressional action,

equal rights amendments asserted that their proposals encompassed the political rights that the Bingham proposal was advertised as omitting.¹³⁵ Radical Republicans and abolitionists often explicitly stated that voting rights were included in demands for constitutional reforms guaranteeing “equal rights.”¹³⁶ *The National Anti-Slavery Standard/New Orleans Tribune* proposal almost certainly covered voting rights, given that both newspapers regularly championed black suffrage.¹³⁷ Owen was probably not proposing a constitutional amendment when he insisted Congress make the civil rights of former enslaved persons “constitutionally secure.” The context suggests that Owen was calling for congressional legislation or state constitutional amendments to prohibit a practice the next paragraph of his letter declared to be “in violation of a republican form of government.”¹³⁸ The Delano proposal is the closest analogue to the Bingham proposal, but the meaning of “pursuit of happiness” is unclear. Delano never gave a speech or published an essay outlining the scope of his preferred amendment.¹³⁹ No newspaper commentary elaborated.

without specifying what enfranchisement should occur by legislation or constitutional amendment. *See Affairs at Home*, BOS. HERALD (Mass.), Dec. 2, 1865, at 3.

¹³⁵ *See The Thirty-Ninth Congress*, BOS. REC. (Mass.), Dec. 15, 1865, at 3. The *Rockford Register* stated that voting laws were encompassed by that paper’s proposed amendment. *The President’s Message*, *supra* note 128, at 4.

¹³⁶ *See, e.g., The Radicals Against the Constitution—The President Inveighed Against, &c.*, DAILY AGE (Phila., Pa.), Dec. 2, 1865, at 1 (memorial demanding equal rights being clear that this meant all rights) (republished from *The New York Herald*).

¹³⁷ *See, e.g., Congress—The Message*, NAT’L ANTI-SLAVERY STANDARD, Dec. 9, 1865, at 2; *see also The Enfranchisement of the Colored Race*, NAT’L ANTI-SLAVERY STANDARD, Dec. 9, 1865, at 1; *The New Congress*, LIBERATOR (Bos., Mass.), Dec. 8, 1865, at 2 (noting that suffrage is the most important question before Congress).

¹³⁸ Brief summaries of the Owen letter described the letter as calling only for electoral reform. *See* DAILY SENTINEL & TIMES (Bath, Me.), Dec. 2, 1865, at 2; BOS. CULTIVATOR (Mass.), Dec. 2, 1865, at 6; *A New Amendment Proposed*, N.Y. DAILY REFORMER, Dec. 2, 1865, at 2. Representative Thomas Jenckes of Rhode Island introduced a constitutional amendment that included every proposal Owen explicitly declared was a constitutional amendment, but he did not include protections for personal and property rights. *See* CONG. GLOBE, 39th Cong., 1st Sess. 18 (1866) (noting Jenckes introduced an unspecified amendment).

¹³⁹ The *Waterbury American* claimed that both Delano and Stevens proposed amendments guaranteeing equal civil rights, which suggests the Delano amendment was interpreted as being comprehensive. *Thirty-Ninth Congress—First Session*, WATERBURY AM. (Conn.), Dec. 15, 1865, at 1. This is a very slim reed for understanding what Delano proposed.

The limited newspaper attention to and support for constitutional amendments prohibiting all race discriminations may moot questions about what proposals should be regarded as Bingham empowerment equivalents. No other newspaper in December 1865 endorsed or even mentioned the amendment championed by the *National Anti-Slavery Standard/New Orleans Tribune*. Newspapers noted black political conventions and sometimes reprinted their resolutions, but did not comment on the substance of black demands. No newspaper commented favorably on the Boston convention. One newspaper described the resolutions of a black convention in South Carolina as reasonable,¹⁴⁰ but that convention did not call for constitutional amendments.¹⁴¹ Newspapers commentary on the Owen letter focused entirely on his proposals to amend election law.¹⁴² Some excerpts did not even include Owen's proposal on civil rights.¹⁴³ Sumner and Delano received a bit more commentary,¹⁴⁴ but the best that can be said is that newspapers made readers aware that anti-discrimination amendments had been proposed and that, particularly comprehensive anti-discrimination amendments were important.

Newspapers paid no more attention to and offered far less support for constitutional reforms aimed at racial equality than constitutional reforms aimed at exports and the rebel debt, even when all possible Bingham analogues are included in the analysis. More newspapers commented on constitutional reforms aimed at racial equality than commented on Bingham's empowerment amendment, but newspaper commentary on export and debt

¹⁴⁰ *Daily Evening Standard* (New Bedford, MA), December 1, 1865, at 2.

¹⁴¹ See "South Carolina, Convention of Colored People," *Daily Morning Chronicle* (Washington, DC), December 1, 1865, at 1; "Memorial of the South Carolina Freedmen," *Springfield Republican* (MA), December 1, 1865, at 2.

¹⁴² See, i.e., *The Boston Cultivator* (MA), December 2, 1865, at 6. (prefers apportionment endorses because more likely to be ratified and will achieve equal suffrage—thinks literacy good, but better in the states, and worries about congressional qualifications); "Education and Suffrage," *Massachusetts Weekly Spy*, December 1, 1865, at 2 (endorses abolition of electoral College, black suffrage covered by guarantee clause, rejects education as limiting black suffrage).

¹⁴³ See "Robert Dale Owen's Plan," *The Burlington Times* (VT), December 2, 1865, at 2.

¹⁴⁴ See, i.e., "Suffrage," *The Boston Recorder*, December 29, 1865, p. 2 (blacks already have right to vote, but endorses Stevens amendment as confirming); *The Brooklyn Daily Eagle* (NY), December 15, 1865, p. 2 (two sentence criticism of Delano).

amendments was also greater than newspaper commentary on Bingham's proposed export and debt amendments. If anything, examining newspaper commentary on export, debt, and anti-discrimination amendments in December 1865 increases the salience of the debt amendment. Anti-discrimination amendments, particularly anti-discrimination amendments that did not encompass voting rights, do not appear to be Republican priorities when the Thirteenth Amendment was ratified.

Table One summarizes a very rough survey of newspaper commentary on proposed anti-discrimination, debt, and export amendments. Debt amendments received the most positive newspaper attention in December 1865. More newspapers endorsed debt amendments than endorsed export and anti-discrimination amendments combined. Export amendments garnered the most discussion and evaluation, although much of that commentary was from Democratic newspapers and critical. Antidiscrimination amendments were somewhat more likely to be included in newspaper summaries of the congressional agenda than export or debt amendments and as likely as export amendments to be considered important. Constitutional reforms aimed at racial equality were nevertheless subject to far less analysis and evaluation. Fewer newspapers endorsed anti-discrimination measures than export and debt amendments. None offered commentary on anti-discrimination amendments that did not include an evaluation. At best, racial equality appears to be one of many matters on the Republican agenda for constitutional reform, no more vital or pressing than repealing the ban on export taxes and repudiating the rebel debt.

Attention to and support for constitutional reforms aimed at racial equality nearly vanishes when we consider only Bingham's empowerment amendment, Delano's pursuit of happiness amendment, and other proposals limited to personal and property rights. Newspapers paid attention to anti-discrimination amendments limited to property and personal rights only when noting the congressional agenda and criticizing those proposals. Journalists rarely if ever thought such measures worthy of prediction, discussion, or endorsement. Americans in December 1865, this survey of newspapers suggests, had little discernible

interest in an anti-discrimination amendment that did not include voting rights.

Table One: Newspaper Commentary on Export, Debt and No Discrimination Amendments, December 1865.¹⁴⁵

	Agenda	Predictions	Important	Discussion	Superfluous	For	Against
Export	20	6	13	12	2	16	23
Rebel Debt	22	6	21	8	1	27	8
All No Discrimination	28	2	11	0	2	9	11
Person and property no discrimination	16	0	2	0	0	0	11

IV. THE REASON WHY

The surprising finding that newspapers in December 1865 paid more attention to Bingham's proposals to repeal the constitutional ban on export taxes and constitutionally prohibit paying the rebel debt than to his proposal to empower Congress to protect fundamental property and personal rights is rooted in three less surprising features of constitutional law and politics during Reconstruction. From one widely shared perspective, Bingham's empowerment amendment was unnecessary. Proponents of free labor and racial equality in December 1865 thought the Thirteenth Amendment empowered Congress to protect fundamental property and personal rights. From a second widely shared perspective, Bingham's export and debt amendments were vital. White Republicans had longstanding concerns with how the Slavepower threatened northern economic concerns. From a third widely shared perspective, Bingham's empowerment amendment was irrelevant. Abolitionist newspapers, black abolitionist newspapers in particular, in December 1865 emphasized black suffrage as the

¹⁴⁵ The data for the Table One and Table Two are taken from a newspaper survey that is presently ongoing. The information as of May 1, 2025, is on file with the *Mississippi Law Journal*. I am happy to share the ongoing dataset with all interested parties.

only means for black equality, rarely discussing constitutional amendments that did not directly concern persons of color or access to the ballot.

Republican newspapers in December 1865 were confident that the Constitution of December 18, 1865, the day the Thirteenth Amendment was officially ratified, empowered Congress to protect fundamental personal and property rights. Newspapers committed to free labor and racial equality published essays celebrating existing congressional power to promote free labor and racial equality.¹⁴⁶ Proponents of free labor and racial equality frequently condemned the black codes.¹⁴⁷ No newspaper called for a constitutional amendment that prohibited black codes or that empowered Congress to prohibit the black codes. Newspapers that favored racial equality called on Congress to pass legislation barring the black codes.¹⁴⁸ Several newspapers declared that an

¹⁴⁶ See, i.e., *Boston Semi-Weekly Advertiser*, December 30, 1865, at 1 (broad understanding of Section 2); "Conditions of Reconstruction," *The Bristol Phenix*, December 30, 1865, at 2; "The Great Task," *North American and United States Gazette*, December 30, 1865, at 2 (broad understanding of congressional powers); "Another Canard Exploded," *Providence Evening Press*, December 29, 1865, at 2 (broad congressional power).

¹⁴⁷ See, i.e., *Boston Semi-Weekly Advertiser*, December 30, 1865, at 1 (broad understanding of Section 2); "Conditions of Reconstruction," *The Bristol Phenix*, December 30, 1865, at 2; "The Great Task," *North American and United States Gazette*, December 30, 1865, at 2 (broad understanding of congressional powers); "Another Canard Exploded," *Providence Evening Press*, December 29, 1865, at 2 (broad congressional power).

¹⁴⁸ See, i.e., "A Two-Edged Sword," *The Congregationalist* (Boston, MA), December 29, 1865, at 2; "The Second Clause," *Albany Journal* (NY), December 13, 1865, at 2 (Congress can prohibit black codes under Section 2); "Condition of the Freedmen-Temper of the South," *The Troy Daily Times* (NY), December 29, 1865, at 2 (broad power to combat black codes); "How the Anti-Slavery Amendment is Defeated," *The Chicago Republican*, December 29, 1865, at 8 (selling black criminals into slavery demonstrates the need for federal legislation enforcing the 13th amendment); *Boston Daily Advertiser*, December 28, 1865, at 2 (broad power to forbid black codes). The *Illinois State Journal* without naming names stated that some Republicans thought a constitutional amendment necessary to pass civil rights legislation. Whether those Republicans included anyone other than Bingham or Republicans who voted with Democrats on civil rights issues is unclear. "Washington Correspondence," *Illinois State Journal*, December 28, 1865, p. 1.

amendment prohibiting or empowering Congress to protect personal and property rights was superfluous.¹⁴⁹

Bingham's export and debt amendments were attractive to Republican newspapers long concerned with ending slavepower control of the federal government and shifting the balance of national power northwards. The antebellum Republicans party was a coalition of abolitionists, committed to emancipating and enfranchising enslaved persons of color, and white racists who detested how southern domination of the national government undermined what they believed were vital interests of white citizens. Leonard L. Richards observes, "Some men and women clamored for free soil because they opposed slavery, or because they opposed its expansion. But others joined the free-soil ranks largely because they hated and feared blacks. . . . Still others supported free soil because they despised southern planters."¹⁵⁰ Republicans grew increasingly committed to racial equality during the Civil War.¹⁵¹ Republican majorities in the Union states frequently repealed laws mandating various race discriminations.¹⁵² Nevertheless, the concern Republican newspapers exhibited with exports and rebel debt highlight how old Republican commitments to Whig commercial policies remained vibrant immediately after the Civil War, even as they were combined with stronger commitments to free labor and racial equality.

Black and Abolitionist newspapers endorsed the mainstream Republican belief that additional constitutional protections for black property and personal rights were unnecessary. African Americans and white abolitionists insisted that the Thirteenth Amendment and/or the guarantee clause provided the foundations for protecting personal and property rights. A black political

¹⁴⁹ See "The Thirty-Ninth Congress," *The Boston Recorder* (MA), December 15, 1865, at 3; *Hartford Daily Courant*, December 13, 1865, at 2; "Washington Notes," *Springfield Republican*, December 9, 1865, at 4 ("rights of liberty and life").

¹⁵⁰ LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860*, at 3 (2000).

¹⁵¹ See generally KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (W.W. Norton & Company: New York, 2022).

¹⁵² See generally PHILIP A. KLINKNER AND ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (University of Chicago Press: Chicago, IL, 2002).

convention in Boston called “upon the Congress of the United States, either by general law or through the agency of the Freedmen’s Bureau, to throw around the loyal blacks such protection as will secure them from the hatred of their former owners.”¹⁵³ Robert Dale Owen in a widely republished letter wrote, “a state has no constitutional right to incorporate in any such laws or in any laws whatever defining the civil rights of free persons, a provision restricting their effect to any particular race of men.”¹⁵⁴

The constitutional reform that excited black and abolitionist newspapers concerned the right to vote. Black suffrage was the constitutional reform necessary to abolish black codes, not a constitutional amendment limited to personal and property rights. Indeed, black suffrage was the solution to all Republican concerns. The *National Anti-Slavery Standard* (New York, NY) on December 2 declared,

¹⁵³ *Affairs at Home*, *supra* note 134, at 3.

¹⁵⁴ *The Constitutional Guaranty of a Republican Form of Government*, PORTLAND DAILY PRESS, Dec. 5, 1865, at 1.

[Congress] will have time to examine, for instance, the Slave Code of South Carolina, where a disloyal minority of whites is legislating under the President's authority to re-enslave a loyal majority of nominally emancipated blacks. Let that sort of work go on long enough, and the country will be driven to ask whether for such legislative nullification of the Constitution there is any practical remedy but suffrage to that loyal majority in peril of enslavement; and will be driven, however reluctantly, to answer there is none. It will have to ask what sure pledge the South can give to repudiate beyond all possibility of re-assumption its Rebel State Debts, and it will have to answer—Only the black vote can ensure that. It will have to ask how the South is to be kept from sending representatives to Congress who, backed by Democratic allies at the North, will demand the recognition of the Confederate Debt as the price of not repudiating the debt of the Union; and again it will have to answer that to prevent it the suffrage of the blacks must enter into every Southern congressional election.¹⁵⁵

More often than not, black and abolition newspapers, as well as black conventions, called for black suffrage and racial equality without specifying the means for achieving those goals.¹⁵⁶ No black or abolitionist newspaper in December 1865 expressed any interest in a constitutional amendment or a package of constitutional amendments that did not include black political rights.

CONCLUSION

Proponents of free labor and racial equality during December 1865 did not think John Bingham's empowerment amendment the most important constitutional reform the Representative from Ohio proposed on December 6, 1865. Neither newspaper reporting nor

¹⁵⁵ *Congress*, NAT'L ANTI-SLAVERY STANDARD (New York, N.Y.), Dec. 2, 1865, at 2. See "Negro Voting—The Condition of the Nation's Salvation," *New York Semi-Weekly Tribune*, December 26, 1865, p. 6.

¹⁵⁶ The summaries of a black convention in South Carolina quotes the following resolution that called on Congress to secure equal protection: "voting rights [defended at greater length], black jurors, the right to bear arms, and eliminate black codes, without indicating whether Congress should do this by legislation of constitutional amendment." See *Memorial of the South Carolina Freedmen*, GREEN MOUNTAIN FREEMAN (Montpelier, Vt.), Dec. 5, 1865, at 2.

newspaper commentary paid more attention to the third amendment Bingham proposed on December 6 than to the first two amendment proposals he made that day. Newspapers in December 1865 did not pay more attention to proposed constitutional amendments protecting the personal and property rights of formerly enslaved persons than to proposed amendments repealing the constitutional ban on export taxes or repudiating the confederate debt. More newspapers discussed, declared as important, and endorsed constitutional amendments that would repeal the ban on export taxes and repudiate the confederate debt than amendments that would ban all or some race discriminations. Bingham's specific empowerment proposal was ignored by almost all Republican newspapers, garnering attention only from a critical Democratic press.

Expanding the survey beyond the subjects of Bingham's concern further illustrates the relative low salience of the empowerment amendment in Republican constitutional thinking immediately after the Civil War. Newspapers were flooded with commentary on apportionment reform. Journalists published at least as many commentaries on electoral reform and proposals to ban secession explicitly as on constitutional amendments concerned with exports, the rebel debt, and racial equality. Newspapers in December 1865, this attention demonstrates, were interested in constitutional reform, just not in Bingham's proposals for constitutional reform.¹⁵⁷

The attention newspapers paid to proposed constitutional amendments changing the basis of representation in Congress and the Electoral College from population to voters dwarfed newspaper interest in any of Bingham's proposals. More than seventy-five articles published in December 1865 endorsed or reported on an endorsement of a constitutional amendment reforming the apportionment.¹⁵⁸ Nearly fifty newspapers, almost all of which were

¹⁵⁷ As noted in note 145, the survey is ongoing, but that the data relied on in this section is on file with the *Mississippi Law Journal*.

¹⁵⁸ Consider the number of newspapers that endorsed an apportionment amendment on December 30, 1865. See "Resolutions of Hon. Mr. Broomall on Reconstruction," *Village Record* (West Chester, PA), December 30, 1865, p. 1 (endorses Stevens on apportionment amendment); "Governor Low's Message," *The Humboldt Times* (CA), December 30, 1865, p. 2 (Governor endorses apportionment amendment); "Gen. Howard's Report," *The Burlington Times* (VT), December 30, 1865, p. 1 (brief

Democratic, opposed that proposal. Nearly one-hundred newspaper articles commented on proposals for apportionment reform, declaring various apportionment amendments "important," predicting their passage, and forecasting their probable impact. Readers learned from telegraphic reports and commentaries that five members of Congress proposed constitutional amendments reforming the apportionment.¹⁵⁹ The Union State Central Committee of Pennsylvania issued widely covered resolutions calling for constitutional amendments on apportionment, exports, the rebel debt, the union debt, and secession, but none concerning the personal or property rights of formerly enslaved persons.¹⁶⁰ Many newspapers republished or excerpted Representative Thaddeus Stevens' December 18 speech on Reconstruction¹⁶¹ that championed at length a constitutional amendment on the apportionment, at somewhat lesser length an amendment repealing the constitutional ban on export taxes, and more briefly, constitutional amendments repudiating the federal debt and barring discrimination in all federal and state laws.¹⁶² Some newspapers included only the passages in Stevens' speech that championed apportionment reform or the passages that

endorsement—will help protect blacks); "Personal and Political" *Springfield Republican*, December 30, 1865, p. 2 (brief endorsement); *The Press* (Philadelphia, PA), December 30, 1865, p. 4 (strong one paragraph endorsement); *Frank Leslie's Illustrated Newspaper* (NY, NY), December 30, 1865, p. 2 (endorses strongly Sumner apportionment); "The Basis of Representation," *The Commercial* (Cincinnati, OH), December 30, 1865, p. 4 (long editorial in favor); *The Daily Journal* (Ogdensburg, NY), December 30, 1865, p. 3 (squib—Johnson endorses, paper seems to endorse); *The Miners' Journal and Pottsville General Advertiser*, December 30, 1865, p. 1 (squib that seems to endorse and notes will lead to black suffrage).

¹⁵⁹ See, i.e., "The Radical Programme," *Memphis Daily Appeal*, December 23, 1865, at 1 (Sumner apportionment, Schenck apportionment, Stevens apportionment); "Thirty-Ninth Congress," *Daily Union and American* (Nashville, TN), December 9, 1865, at 2 (Sumner apportionment, Orth apportionment). See also, CONG. GLOBE, 39th Cong., 1st Sess. at 2 (Sumner), 9 (Schenck), 10 (Broomall), 74 (Stevens). The Orth proposal was not recorded in the *Congressional Globe*.

¹⁶⁰ CONG. GLOBE, 39th Cong., 1st Sess. at 31 (1865). For newspaper coverage, see, i.e., "Amendments to the Constitution," *The Burlington Free Press* (VT), December 15, 1865, at 3; "Congressional Summary," *Delaware State Journal and Statesman*, December 15, 1865, at 2.

¹⁶¹ CONG. GLOBE, 39th Cong., 1st Sess. at 72-75 (1865).

¹⁶² See "XXXIXth Congress," *New York Semi-Weekly Tribune*, December 19, 1865, at 5; "House of Representatives," *The New York Times*, December 19, 1865, at 1.

championed apportionment and export reform.¹⁶³ Newspapers in December 1865, this attention demonstrates, were interested in constitutional reform, just not in Bingham's proposals for constitutional reform.

Newspaper reporting and commentary on proposed constitutional amendments in December 1865 paid about as much attention to proposals for constitutionally prohibiting secession and proposals mandating a direct vote for the presidency as to proposals to ban race discrimination. The Union State Central Committee of Pennsylvania,¹⁶⁴ Senator William Stewart of Nevada,¹⁶⁵ and Senator Aaron Cragin of New Hampshire¹⁶⁶ proposed different anti-secession amendments. Table Two notes that these anti-secession amendments were more often discussed and almost as often endorsed as all anti-discrimination amendments.¹⁶⁷ Robert Dale Owen in a letter published in several newspapers¹⁶⁸ championed and Representative Thomas Jenckes of Rhode Island proposed an amendment providing for the direct election of the

¹⁶³ See, i.e., *The Daily Herald* (Newburyport, MA), December 20, 1865, at 2; "Congressional," *The Cecil Whig* (MD), December 23, 2024, at 2.

¹⁶⁴ CONG. GLOBE, 39th Cong., 1st Sess. at 31 (1865) (noting the memorial). For the text of the memorial, see "Amendment to the Constitution," *The Burlington Free Press* (VT), December 15, 1865, at 3.

¹⁶⁵ S.J.Res. 5, 39th Cong., 1st Sess., December 13, 1865 ("The union of the States under this Constitution is indissoluble; and no State can absolve its citizens from the obligation of paramount allegiance to the United States").

¹⁶⁶ S.J. Res. 8, 39th CONG. GLOBE 1st Sess., December 21, 1865.

Paramount sovereignty shall reside in the United States; and every citizen thereof, or of any State or Territory therein, shall be bound and primarily owe faith, loyalty, and allegiance to the United States, anything in the constitution, laws, or ordinances of any State to the contrary notwithstanding, and every State heretofore in the Union, or which may hereafter be admitted as a member thereof, shall forever remain and constitution a part of the United States, and shall not, under any circumstances whatsoever, have any right to secede or withdraw therefore.

Id.

¹⁶⁷ For a sampling of the commentary, see "A Word to Our U.S. Senators," *Gold Hill Daily News*, December 28, 1865, p. 2 (endorsing Stewart); *Delaware Gazette* (OH), December 29, 1865, p. 2 (endorsing Cragin).

¹⁶⁸ See *The Constitutional Guaranty of a Republican Form of Government*, WORCESTER PALLADIUM (Mass.), Dec. 6, 1865, at 1; *A Republican Form of Government*, CHI. REPUBLICAN (Ill.), Dec. 5, 1865, at 6.

president.¹⁶⁹ Both the Owen and Jenckes proposals empowered Congress to determine voter qualifications for national elections, prohibited Congress from making race a qualification for voting, and required Congress to adopt mandatory literacy tests for voters.¹⁷⁰ Newspaper commentary focused primarily on the direct election proposal, rarely considering these other constitutional reforms.¹⁷¹ More Republican newspapers endorsed abolishing the Electoral College than broad or narrow anti-discrimination measures.¹⁷²

Table Two: Newspaper Articles on all Major Proposed Constitutional Amendments

	Agenda	Predictions	Important	Discussion	Superfluous	For	Against
Export	20	6	13	12	2	16	23
Rebel Debt	22	6	21	8	1	27	8
All No Discrimination	28	2	11	0	2	9	11
Person and property no discrimination	16	0	2	0	0	0	11
Apportionment	24	18	20	32	0	76	48
Anti-Secession	5	0	3	5	3	8	2
Direct Vote for president	10	0	7	0	0	13	4

¹⁶⁹ See CONG. GLOBE, 39th Cong., 1st Sess. at 18 (1865) (noting that Representative Jenckes had proposed an unspecified amendment). For the text of that proposal, see "Direct Vote for President," *Providence Daily Journal* (RI), December 15, 1865, at 2.

¹⁷⁰ See "Direct Vote for President," *Providence Daily Journal* (RI), December 15, 1865, at 2.

¹⁷¹ But see *Another 'Amendment,'* WHEELING DAILY REG. (W. Va.), Dec. 5, 1865, at 2 (opposing all of Owen's constitutional reforms).

¹⁷² For a sampling of newspaper commentary, see "Another Constitutional Amendment," *The Indianapolis Daily Journal*, December 25, 1865, p. 2; "Elections for President," *New Albany Daily Commercial*, December 18, 1865, p. 2.

That hardly any Republican in December 1865 paid attention to John Bingham's empowerment amendment hardly establishes that Republican remained unconcerned with new constitutional¹⁷³ protections for the personal and property rights of formerly enslaved persons when the Fourteenth Amendment was framed five months later or by the time the Fourteenth Amendment was ratified in 1868. Perhaps Republicans came to value some variation on Bingham's third proposal after President Andrew Johnson vetoed the Second Freedman's Bureau Bill¹⁷⁴ and the Civil Rights Act of 1866.¹⁷⁵ Perhaps proponents of free labor and racial equality in May 1866 or May 1867 concluded that only a new constitutional amendment protecting rights and promoting racial equality could prevent former confederate states from practically reenslaving formerly enslaved African-Americans.¹⁷⁶ My preliminary research suggests these hypotheses are mistaken, that the emphasis of constitutional reform when the Fourteenth Amendment was framed and ratified was not and was never on empowering Congress to protect personal and property rights.¹⁷⁷ Still, that research, which does not cover newspaper reporting and commentary in May 1866 or the ratification debates in states other than Tennessee,¹⁷⁸ cannot rule out the possibility that at some time during the framing and ratification process, Republicans came to believe vital a constitutional provision similar to that Bingham championed at the opening of the Thirty-Ninth Congress. What the research presented in this paper settles is that that time was not December 1865.

¹⁷³ The numerous newspaper articles supporting broad interpretations of congressional power under the Thirteenth Amendment demonstrate that Republicans in December 1865 were very concerned with statutory protections for the personal and property rights of formerly enslaved persons. *See supra* notes 146-148, and the relevant text.

¹⁷⁴ CONG. GLOBE, 39th Cong., 1st Sess. 916-17 (1865).

¹⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1865).

¹⁷⁶ *See* Pamela Brandwein, *Reconstruction and the Pursuit of 'Loyal' Governance*, LAWFARE (Jan. 14, 2025, 8:00 AM), <https://www.lawfaremedia.org/article/reconstruction-and-the-pursuit-of-loyal-governance> [<https://perma.cc/3B78-4QH2>].

¹⁷⁷ *See* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 159 (2023).

¹⁷⁸ *See* Mark A. Graber, "Tennessee and the Fourteenth Amendment," ____ *Loyola Law Review* ____ (2025) (forthcoming).