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## THE CONTINUING IMPORTANCE OF CONGRESSMAN JOHN A. BINGHAM AND THE FOURTEENTH AMENDMENT

*Richard L. Aynes\**

In the now-famous 1830s chronicle of a visit to America, Alexis de Tocqueville wrote that in America every political issue is ultimately a legal issue in the courts.<sup>1</sup> For Americans who lived through the anti-slavery and abolitionist era as well as the crisis of the war of 1861-1865, the military victory of the Union forces on the field of battle still left open large political issues. These issues were attempted to be resolved through the political process that produced a legal solution: a constitutional amendment that we currently identify as the Fourteenth Amendment. The meaning of the Amendment was ultimately determined by the courts.

That Amendment, first proposed in 1866 and declared ratified in 1868, plays a monumental role in the politics and law of modern America. Justice Brennan suggested that more cases were litigated under the Fourteenth Amendment than under any other provision of the United States Constitution.<sup>2</sup> James Bond has likened the Amendment to a "Second Constitution."<sup>3</sup> As one would expect of an important charter

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This article and the articles and papers that follow were the product of a national symposium titled "John Bingham and the Meaning of the Fourteenth Amendment," held at The University of Akron School of Law on October 17-18, 2002. This symposium brought together experts from the disciplines of history, political science, diplomacy, and law. It was made possible by funding from the Ohio Humanities Council as well as the John and Geraldine Stoller Fund. It was co-sponsored by The University of Akron Office of Multicultural Development, The University of Akron Ray C. Bliss Institute of Applied Politics, and The University of Akron School of Law Center for Constitutional Law.

1. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Henry Reeve trans., Oxford University Press 1959) (1835-1840).

2. William J. Brennan, Jr., *The Fourteenth Amendment*, 25 *Trial* 24 (1989).

3. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 *AKRON L. REV.* 435, 435 (1985).

that demarcates boundaries between the rights of individuals, citizens, states and the federal government, the Fourteenth Amendment continues to be a vital and contested part of our legal life with which society and the courts must struggle.

Ohio Congressman John A. Bingham was the author and champion of critical and important parts of Section one of the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.<sup>4</sup>

U.S. Supreme Court Justice Hugo Black called Bingham “The Madison” of the Fourteenth Amendment, drawing an analogy between Madison’s pervasive role in the formulation and drafting of the U.S. Constitution and Bingham’s role in the drafting of Section one of the Fourteenth Amendment.<sup>5</sup> Indeed, one cannot read the journal of the Joint Committee on Reconstruction without seeing conclusive evidence that Bingham was not only the drafter of this language, but also the relentless champion of engrafting these concepts into the Constitution. Without his advocacy within the Joint Committee, Section one probably would not exist today.<sup>6</sup>

Similarly, even though Thaddeus Stevens introduced the final version of this portion of the Fourteenth Amendment in the House and spoke in favor of the Amendment in a way that has relevance and importance,<sup>7</sup> it was John Bingham who was the chief advocate and the real floor manager of the Amendment.

Indeed, cases and legal literature quote Bingham’s speeches when treating issues relating to the Reconstruction statutes and the Fourteenth Amendment.<sup>8</sup> His contemporaries referred to him as a “brilliant statesman and scholar.”<sup>9</sup> For example, a turn of the century account of Ohio Congressmen described Bingham as a “gifted” statesman and

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4. U.S. CONST., amend. XIV, § 1.

5. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

6. BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 183 (1914).

7. CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (May 8, 1866).

8. A LEXIS search using the terms “Bingham” and the “Fourteenth Amendment” returned 347 cases and 657 law review articles.

9. Memorial Address on the Life and Character of Lorenzo Danford delivered in the House of Representatives and Senate, (56th Cong., 1st Sess., 1900) at 14, 20.

orator.<sup>10</sup> He was said to have been an “eminent lawyer” and his career in Congress was described as “most brilliant.”<sup>11</sup>

Fourteen years after Bingham’s death, Benjamin Kendrick, who published *The Journal of the Joint Committee of Fifteen on Reconstruction*,<sup>12</sup> ranked Bingham as third, behind Thaddeus Stevens and William P. Fessenden, in order of “relative importance” in their “contributions to the reconstruction measures of the 39<sup>th</sup> Congress.”<sup>13</sup> He also ranked Bingham as one of “the five or six leading Republican members” of the House after 1865.<sup>14</sup> Kendrick described Bingham as one of “great legal ability.”<sup>15</sup> Moreover, he found Bingham to be a man of “great intellect, powerful in argument and masterful in speech.”<sup>16</sup>

Bingham’s inseparable link with the Amendment makes him worthy of attention from both a legal and an historical view. Further, in the context of the continuing struggle to appropriately interpret and apply the Fourteenth Amendment to the political and legal contests of our own day, it is at least interesting to examine the life of the individual who played such a key role in the drafting of that provision. While to some, Bingham can only remain of historical interest, to others his life and his words may provide meaning or context for what has been termed original intent,<sup>17</sup> meaning<sup>18</sup> or understanding of the Fourteenth Amendment.<sup>19</sup>

Unlike his later life, where there are voluminous records concerning Bingham’s views and activities, his early life is somewhat obscure. Nevertheless, what we know about that life consistently supports the view that Bingham was opposed to slavery, had a sincere interest in the welfare of individuals held in slavery, and was an unlikely candidate to write an amendment calling for a narrow construction of the protection

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10. WM. A. TAYLOR, OHIO IN CONGRESS 207 (1900).

11. *Id.* at 208. *But see* Richard L. Aynes, *The Bill of Rights, The Fourteenth Amendment, and The Seven Deadly Sins of Legal Scholarship*, 8 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 407, 423-25 & n.128 (2000) (providing a survey of comments on Bingham’s abilities made by his contemporaries, including some less complimentary descriptions). *See also* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

12. *See* KENDRICK, *supra* note 6, at 183.

13. *Id.*

14. *Id.* at 184.

15. *Id.* at 185.

16. *Id.*

17. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 402 (2d ed. 1997).

18. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

19. *But see* Berger, *supra* note 17, at 266-67 (arguing that abolitionist views had little influence on the Fourteenth Amendment).

of rights of either African-Americans or others in our nation.

Bingham memorialized what I have called a tantalizing reference<sup>20</sup> on the floor of Congress, when he referred to slavery as “infernally atrocious” and said that he was glad that he “learned to lisp this at my mother’s knee.”<sup>21</sup> Whether Bingham meant this literally or figuratively is unimportant. This is so because it seems clear that Bingham was raised in an environment that was congenial to the development of anti-slavery and perhaps even abolitionist doctrines.

Born on January 21, 1815, John Armor Bingham was the son of Hugh Bingham and Ester Bailey. Bingham was born in what was then a frontier town of Mercer, Pennsylvania, some fourteen miles from the Ohio border. In this farming community, Hugh Bingham was a craftsman, carpenter and brick layer.<sup>22</sup> He was also intimately involved in politics serving at various times on the city council, the county board of commissioners, and having sought election as sheriff.<sup>23</sup> Hugh Bingham was prosperous enough to build a brick house across from the Mercer County Courthouse.

The brick house that Hugh Bingham built in Mercer in the early 1800s still stands today. It is a two-story house with living and dining rooms downstairs and the bedrooms upstairs. It sits on the courthouse square, on the side with only a small street separating the home from the courthouse. One can imagine that every morning, as a little boy, a young John Bingham came down those stairs and the first thing he saw out the window at the bottom of the stairs was the Mercer County Courthouse. It is not too far of a stretch of the imagination to think that when Hugh was late for lunch or dinner that his son was sent to call him home. Or that in John Bingham’s spare time in an age before television, radio and movies, when the courthouse was the “entertainment” of the age, that young John spent his spare time in the courthouse, imaging himself to be the lawyer that his parents undoubtedly wanted him to be.

It is at least understandable, though certainly not inevitable, that what would come from such a childhood and such an upbringing was a respect for the law, an opposition to slavery, support for freedom, and the view that constitutions and constitutional amendments could be used to destroy slavery and protect freedom.

John Bingham’s father, Hugh Bingham, was apparently a member

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20. See Richard L. Aynes, *The Anti Slavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881, 886 (1988).

21. CONG. GLOBE, 37th Cong., 2d Sess. 1203 (March 12, 1862).

22. Aynes, *supra* note 20, at 887.

23. *Id.*

of the anti-Mason party at a time when that party was ascendant in Pennsylvania government. Two of the leaders of that party were Governor Joseph R. Ritner and someone who later loomed large in Bingham's life, the speaker of the Pennsylvania Assembly, Thaddeus Stevens.<sup>24</sup> Ritner was known as a "promoter of common schools, and was distinguished for his opposition to slavery."<sup>25</sup> In 1836, when southern legislatures petitioned northern legislatures to restrain the abolitionist press, Ritner "sharply" refused to do so and denounced the request.<sup>26</sup> It was said that Ritner "alone of all the Governors of the Union in 1836 met the insulting demands and menaces of the South in a manner becoming a freeman and hater of Slavery."<sup>27</sup>

It was Ritner who appointed John Bingham's father, Hugh Bingham, to be clerk of the various courts in Mercer County.<sup>28</sup> Hugh Bingham apparently continued to follow the political beliefs of Ritner, because he was reappointed in 1839.<sup>29</sup> Further, Hugh Bingham had apprenticed his son, John, to the proprietor of an anti-Masonic newspaper, *The Luminary*, in 1831.<sup>30</sup> Fourteen years prior to the time the Fourteenth Amendment was written, Bingham's former employer indicated that the employer and Bingham had fought "Hell's masterpiece" (Masonry) together and that John Bingham was not one to "be a friend to slavery or oppression."<sup>31</sup>

Ultimately, both Hugh and John Bingham became members of the Whig party. Hugh Bingham was often a Whig candidate when the Mercer County Whig party opposed the Mexican War, the annexation of new territory, and the "abominable institution of slavery over additional territory."<sup>32</sup>

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24. *Id.* at 889 & n.65.

25. JOSEPH THOMAS, LIPPINCOTT'S PRONOUNCING BIOGRAPHICAL DICTIONARY 2065 (5th ed. 1930).

26. RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 113 (1949). See 6 PAPERS OF THE GOVERNORS, 1832-1845, PENNSYLVANIA ARCHIVES 282-334 (G. Reed ed. 1901) (containing Ritner's complete message).

27. Preface to Whittier's poem *Ritner*, THE COMPLETE POETICAL WORKS OF JOHN GREENLEAF WHITTIER 275 (1894).

28. The appointment was made on January 13, 1836. 10 PENNSYLVANIA ARCHIVES 8203 (1906).

29. HISTORY OF MERCER COUNTY, PENNSYLVANIA 309 (Brown, Runk & Co. ed. 1880).

30. Maynard Brichford, *The Life of John A. Bingham* 4 (1951) (unpublished M.S. thesis, University of Wisconsin); C. Russell Riggs, *The Ante-Bellum Career of John A. Bingham—A Case Study in the Coming of the Civil War* 7 (Dec. 1958) (unpublished Ph.D. dissertation, N.Y.U.).

31. Letter from John Bingham's former employer to the New Lisbon Aurora, *reprinted in* CADIZ DEMOCRATIC SENTINEL, Nov. 8, 1854, at 2, col. 1 (*quoted in* C. Riggs, *supra* note 30, at 7-8).

32. *The Mercer County Whig*, Aug. 11, 1846, at 3. See Aynes, *supra* note 20, at 891-92

After the death of his mother in 1827, when John was twelve years old, he went to live with his uncle, Thomas Bingham, formerly of Mercer County, who had settled in Cadiz, Ohio. The reasons for John's move are unknown. It may be that with the remarriage of his father the family simply grew too large to be contained in a single home. Or it may be that, like many children of his age, John had difficulty adjusting to a new stepmother. It is even possible that Hugh Bingham foresaw that there was more opportunity in the frontier town of Cadiz than there would be in Mercer.<sup>33</sup>

Thomas Bingham, a merchant, no doubt reinforced Bingham's connections with the law and interest in politics. Thomas Bingham was not only "president" of the borough of Cadiz<sup>34</sup> but also an associate judge of the Harrison County Court of Common Pleas.<sup>35</sup> This was part of Ohio's Jeffersonian system, under which two lay people would serve with a lawyer as a three-judge panel for each county. Thomas Bingham served in that capacity from 1825 to 1839. As the Whig party developed, Thomas Bingham became a pillar of that organization, as did John Bingham and another of Thomas' son-in-laws, Josiah Scott. Thomas Bingham was also a key supporter of the Associated Reform Presbyterian Church.<sup>36</sup>

During the time Bingham lived in Cadiz as a teenager, many of the leading members of the community openly held anti-slavery or abolitionist sentiments. This included people like Matthew Simpson who went on to become a close friend and advisor of both President Lincoln and President Grant.<sup>37</sup> Both of Simpson's uncles, Joseph Tingley and William Tingley were prominent in Cadiz politics and William Tingley joined William Lloyd Garrison's radical American Anti-Slavery Society in 1834.<sup>38</sup> William Tingley worked with Bingham's uncle, Thomas, and was apparently well known to John

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(summarizing and discussing these resolutions).

33. See IRVING E. BEAUREGARD, *BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY* 5 (1989). John Bingham's stepmother, Ellen Junkin Galloway, was the sister of Miami University President, Rev. George Junkin, who was known to be pro-slavery. There is an intriguing suggestion that the stepmother's sympathy to slavery, which Bingham hated, was the basis for a dispute between them, which caused him to leave home. However, this conclusion is based upon documents that are no longer accessible to scholars and must be viewed cautiously.

34. Aynes, *supra* note 20, at 894 n.105.

35. *Id.* at n.106.

36. *Id.* at 895 nn.112 & 113.

37. *Id.* at 896 nn.120 & 121.

38. ROBERT D. CLARK, *THE LIFE OF MATTHEW SIMSON* 53 (1956). Tingley was apparently one of the organizers of the Cadiz Anti-Slavery Society in 1840. See *e.g.*, Proceedings of the Harrison County Anti-Slavery Society, *THE ORGAN*, Jan. 30, 1840, at 4, col. 3.

Bingham. Yet, rather than being ostracized, Tingley was a leader in Cadiz affairs, having served as Associate Common Pleas Judge and a State Senator. The same is true of the elder Matthew Simpson who was Bishop Matthew Simpson's uncle.

There was controversy in Cadiz over the anti-slavery movement, and sentiment was not unanimous. Nevertheless, one study of the 1836 membership of Harrison County's five anti-slavery societies estimated that they constituted ten percent of the town's population and three percent of the county's population.<sup>39</sup> Another scholar, who was not sympathetic to the abolitionists or to Bingham, concluded that: "the number of active participants in the anti-slavery movement bore a relatively large proportion to the total population. . . . Cadiz was in a strongly anti-slavery, even abolition-minded, territory from at least the year 1820."<sup>40</sup> The Whig party and the Whig newspapers in the region opposed the war with Mexico and opposed the extension of slavery into the newly acquired territory.<sup>41</sup>

Perhaps most important to Bingham's development is that he was one of the small number of individuals in his era to attend college. After his apprenticeship with the *Luminary* in Mercer, Pennsylvania, he returned to Ohio and attended Franklin College, just six miles from Cadiz. The "leading spirit" of this college was Reverend John Walker.<sup>42</sup> Reverend Walker taught at the college and at various times was on the Board of Trustees and President of the Board of Trustees. It was claimed that Reverend Walker had been part of the underground railroad<sup>43</sup> and was an advocate of the "anti-slavery doctrine in its most ultra-secessionist form."<sup>44</sup> In 1875 one of his former students described Reverend Walker as "a man of deep convictions upon the subject of equal rights and common justice to all mankind."<sup>45</sup>

Reverend Walker was no stranger to the Bingham family. He had been the first pastor of the Associate Church of Springfield in Mercer County that was organized in 1810.<sup>46</sup> Walker served as the Pastor there

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39. Bernice R. Hasin, John A. Bingham and Due Process 16 n.20 (1976) (unpublished master's thesis, California State Univ., Long Beach).

40. See Riggs, *supra* note 30, at 12 n.31.

41. Aynes, *supra* note 20, at 904-05.

42. *Id.* at 906.

43. See CHARLES A. HANNA, HISTORICAL COLLECTIONS OF HARRISON COUNTY, IN THE STATE OF OHIO 137-38 (Genealogical Publishing Co., Inc. 1975) (1900) (describing trap doors in buildings through which fugitive slaves could hide).

44. *Id.*

45. Report of Proceedings on the Semi-Centennial Celebration of Franklin College, New Athens, Harrison County, Ohio 6 (1870).

46. COMBINATION ATLAS OF THE COUNTY OF MERCER AND THE STATE OF PENNSYLVANIA,

until 1815, and also had been a Pastor in another Associate Reform Congregational Church in the same county.<sup>47</sup> It appears Reverend Walker moved to Cadiz about the same time that Uncle Thomas Bingham moved there. Walker was also a Pastor of the Cadiz Associate Congregational Church from 1814 to 1820.<sup>48</sup>

Thus, both Bingham's father and uncle were well acquainted with Reverend Walker and were likely to have known his views on slavery. According to one of his former students, Reverend Walker pleaded with his students to "slay the dragon of slavery."<sup>49</sup> This message was presented at the University Chapel, at the Unity Meeting House, and at his home where he entertained groups of students.<sup>50</sup> Walker taught Bingham several classes, including a class on world history that included a discussion of slavery, the Magna Carta, John Locke, and interpretations of the Fifth Amendment Due Process Clause.<sup>51</sup>

Reverend Walker and his followers were not anti-slavery individuals with no regard for the slaves themselves. Indeed, early on, Walker specifically rejected any colonization schemes. It has been said that his sentiment and those of the region was for the "abolition of slavery, pure and simple."<sup>52</sup> Indeed, their philosophy was summed up as follows:

[T]he hard-headed, austere Seceders, the followers of Dr. John Walker . . . would tolerate no compromise, and they looked upon Benjamin Lundy's colonization schemes with almost the same disrespect that they would consider any half-way measure proposed by pro-slavery advocates.<sup>53</sup>

Some suggestion of how these principles were applied is seen in the fact that Titus Basfield, a former slave, attended the college during the same time that Bingham did.<sup>54</sup> Reverend Basfield, graduating in Bingham's class, appears to have been one of the first African-Americans to receive a degree from an Ohio institution of higher

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FROM ACTUAL SURVEYS & OFFICIAL RECORDS (G. M. Hopkins & Co., 1873).

47. *Id.* at 57.

48. Report of Proceedings, *supra* note 45, at 10.

49. Beauregard, *supra* note 32, at 16.

50. *Id.*

51. See ERVING E. BEAUREGARD, THE REVEREND JOHN WALKER RENAISSANCE MAN 70-72 (1990).

52. W. H. Hunter, *The Pathfinders of Jefferson County, Ohio*, Supplementary VI OHIO ARCHAEOLOGICAL & HIST. Q. 132, 186 (1899).

53. *Id.*

54. TITUS BASFIELD, AN INTERESTING HISTORY OF THE LIFE OF THE REVEREND TITUS BASFIELD, A COLORED MINISTER IN THE ASSOCIATE PRESBYTERIAN CHURCH 24-25 (1858).

learning.<sup>55</sup> Mr. Basfield lived with Reverend John Walker and apparently did chores for him in exchange for his education.<sup>56</sup> It is claimed that Bingham and Basfield became friends in college and that they corresponded with each other between 1848 and 1875.<sup>57</sup> It is not implausible to think that Bingham's interactions with Basfield and the example of Reverend Walker's relationship with Titus Basfield would have an effect on his future interracial experiences. As then Dean J. Clay Smith, Jr. of Howard University School of Law observed:

The fact that Bingham attended an integrated college may have influenced the strong abolitionist philosophy he later exhibited as a lawyer and as a United States Congressman responsible for drafting portions of the Fourteenth Amendment to the U.S. Constitution. Titus Basfield may have "liberated" Bingham.<sup>58</sup>

It was from men like Walker and his colleagues that Bingham received his education and he later referred to them as his "venerated instructors."<sup>59</sup> Indeed, it is claimed that Bingham had attributed his own success to Reverend John Walker: "All that I have accomplished stem from my beloved alma mater and especially from the unparalleled Reverend John Walker."<sup>60</sup>

After his education at Franklin College concluded, John Bingham returned to Mercer to study law under two lawyers that were undoubtedly acquaintances of his father. Both of these men, John J. Pierson and William Stuart, were Whigs who later became Republicans. They too, as Whig candidates, had opposed to the expansion of slavery.

Bingham was admitted to the Pennsylvania Bar on March 25, 1840.<sup>61</sup> He was subsequently admitted to the Ohio Bar that same year.

Before proceeding, it may be wise to consider the legal concepts that existed during Bingham's formative years. As Professor Akhil Amar has noted, by 1866 when the Fourteenth Amendment was proposed, "half the states had begun as federal territories; the modal and model

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55. Aynes, *supra* note 20, at 910 n. 228.

56. *Id.* at n.230.

57. Erving Beauregard, *John A. Bingham and the Fourteenth Amendment*, 50 *THE HISTORIAN* 67, 70-75 (1987-88) (citing various letters from private collections that are no longer accessible to historians).

58. Letter from Dean J. Clay Smith, Jr. to Richard Aynes (Nov. 10, 1987).

59. John Bingham, Address given to the Literary Societies of Franklin College (Sept. 23, 1851).

60. Beauregard, *supra* note 57, (citing Campbell to Williams, Mar. 21, 1900). Again, these documents are not now accessible to scholars.

61. Certificate of Admission by the Protonotary of the Court of Common Pleas. Bingham Papers, Roll 2, Box 1, Folder 6, Item 556.

state was no longer Madison's Virginia, but Bingham's Ohio."<sup>62</sup> The truth of this observation bears elaboration.

At the beginning of the nation's history, Virginia was one of the new country's most populous states and the mother of Presidents. Ohio was but a frontier wilderness. By the 1860s, however, Ohio had grown into an industrial and agricultural giant—the third most populous state in the Union. In addition to population and economic power, Ohio was a crossroads for many moving further west and was itself an amalgamation of pioneers from the older states. This produced an intellectual cauldron from which many of the national ideas about slavery and democracy arose.

Bingham was exposed to the ideals not only of the Pennsylvania State Constitution but also those of Ohio. Those principals were the precursors of the Fourteenth Amendment itself. The Ohio Constitution of 1802 contained a "Bill of Rights."<sup>63</sup> It protected every right guaranteed in the United States Bill of Rights.<sup>64</sup> According to the preamble, the purpose of the Bill of Rights was that "the general, great and essential principles of liberty and free government may be recognized and [be] forever unalterably established."

Section one provided, in part:

"That all men are born equally free and independent, and have certain natural, inherent and unalienable rights. . . ."<sup>65</sup>

In naming some of those rights the Ohio provision proceeded:

"[A]mongst which are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."<sup>66</sup>

Though this language parallels that of the Declaration of Independence and mimics a portion of the first sentence of the first Section of the Virginia Bill of Rights in its Constitution of June 12, 1776,<sup>67</sup> the most immediate ancestor of the Ohio provision was the Constitution of John Bingham's native Pennsylvania. In Section one of

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62. AMAR, *supra* note 11, at 252.

63. OH. CONST. of 1802, art. VIII.

64. Compare OH. CONST. of 1802, art. VIII, §§ 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 19, 20, 22, and 28 with the first ten amendments to the UNITED STATES CONSTITUTION.

65. OH. CONST. of 1802, art. VIII.

66. *Id.*

67. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 311 (Richard L. Perry & John C. Cooper, eds., 1978). Bingham paraphrased this provision in an 1857 speech before Congress, indicating that it was in the Constitutions of Ohio, Indiana, Illinois, Michigan, Iowa, and Wisconsin. CONG. GLOBE, 34th Cong., 3d Sess. 135, 138 (Jan. 13, 1857).

the Declaration of Rights contained in the Pennsylvania Constitution of August 16, 1776, one finds the exact same words that were later imported into the Ohio Constitution.<sup>68</sup>

Thus, whether we think about a young John Bingham growing up in the common schools of Mercer, Pennsylvania or the young lawyer studying for the bar of Pennsylvania and Ohio, the most important documents of these states both told him that “all men” are equal, free and independent. Indeed, the Ohio provision went further and indicated that “every free republican government” was founded upon the authority of these free and equal people and was “organized for the great purpose of protecting their rights and liberties.”<sup>69</sup>

In a family where the father worked in the courthouse as the clerk of courts, where there was a Whig article of faith in supporting the laws and the rule of law, where the father was friends and a political ally of the leading lawyers of the region, and where there are such striking provisions in the organic acts of the state, it is not surprising that Bingham grew up to be an advocate of freedom and an enemy of slavery.

Bingham does not appear to have been involved in the representation of any runaway slaves or any cases involving the Fugitive Slave Act. However, as early as 1846 he and his partner Josiah Scott (also his brother-in-law) were active in representing Nancy Smith, an African-American alleged debtor, against the attempts of a white creditor, Joseph Jordan, to collect on a promissory note.<sup>70</sup>

In one of those “delicious ironies”<sup>71</sup> that often occurred in this era, Bingham and Scott<sup>72</sup> interposed a proof objection by utilizing the Ohio statute that prohibited African-Americans from giving testimony in any case in which a white person was a party.<sup>73</sup> In this case, the alleged creditor, Joseph Jordan, was relying upon the signature of an African-

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68. Perry, *supra* note 67, at 329 (containing text of the Pennsylvania Constitution). Compare with *supra* text at note 66.

69. OH. CONST. of 1802, art. VIII, § 1 (emphasis added).

70. See *Jordan v. Smith*, 14 Ohio 199 (1846).

71. See, e.g., Avian Sofier, *Protecting Civil Rights—A Critique of Raoul Berger’s History*, 54 N.Y.U.L. REV. 651, 669 (1979).

72. Both the reported case and the court’s docket indicate only that “Scott and Bingham” appeared on behalf of Smith. We really do not know who represented her at trial or argued on her behalf in the Ohio Supreme Court. In the practice of that day, it was not uncommon for one lawyer to conduct all the trials and the other lawyer to do the office or transactions work. By all accounts it was Bingham who did the trial work. It is likely that it was Bingham who was active in the representation of Nancy Smith.

73. 1806 Ohio Laws Ch. VIII § 4. (enacted as An Act to amend the act entitled: An act regulating black and mulatto persons).

American witness to the note. The court rejected arguments that this statute could be waived by the white party. It agreed that the creditor had a good claim and should prevail, but indicated that it intended to enforce the statute uniformly and expressed the opinion “that the statute has always had the effect of preventing ‘justice.’”<sup>74</sup> Thus, the Supreme Court of Ohio seemed to be opposing the statute and hoping that by full enforcement it would induce the statute’s repeal.

In spite of the anti-slavery sentiment in the Harrison County area, Bingham was not likely to gain political popularity by representing an African-American debtor against a white creditor. Nor was he likely to be paid by someone who could not pay on the disputed debt. There was no instance of a case in which Bingham represented a client whose interests were adverse to the rights of African-Americans.

Nor surprisingly, many of Bingham’s legal and political associates had anti-slavery views and eventually wound up in the Republican party too. In 1838 the citizens of the Western Reserve elected Joshua R. Giddings as their representative to Congress. Giddings was, at the very least, a militant anti-slavery Congressman who was censured for violating the gag rule, only to resign and be re-elected by his constituents. He helped draft the “Appeal of the Independent Democrats,” protesting Senator Douglas’ bill to organize the Nebraska Territory and leading to the formation of the Republican party.<sup>75</sup> As the delegate to the Republican party in 1856 and 1860, he fought hard to keep sentiments of the Declaration of Independence in the platform itself.<sup>76</sup> John Quincy Adams held Giddings in high regard<sup>77</sup> and it is said that Adams bequeathed to Giddings “the mantel of anti-slavery leadership in the house.”<sup>78</sup>

John Bingham admired Giddings even before Bingham was elected to Congress.<sup>79</sup> Once Bingham came to Congress, he lived in the same boarding house as Giddings.<sup>80</sup> Indeed, southerners such as Mississippi Congressman John Barksdale, commonly believed that Bingham and

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74. *Jordan*, 14 Ohio at 204.

75. Aynes, *supra* note 20, at 927.

76. *Id.*

77. *Id.*

78. *Id.* at 928.

79. Letter from John A. Bingham to Joshua R. Giddings (Dec. 7, 1856) (Ohio Historical Society, Columbus, Ohio).

80. Carolyn Barbara Huff, *Politics of Idealism: The Political Abolitionists of Ohio and Congress, 1840-1866*, at 12 (1969) (unpublished doctoral dissertation, Univ. of N.C.) (on file with the University of Akron Law Library). *See also* GEORGE W. JULIAN, *THE LIFE OF JOSHUA R. GIDDINGS* 398 (1892) (Bingham and Giddings frequently occupied the same quarters).

Giddings were of the same mind. Papers sympathetic to the South, such as the Steubenville *American Union*, frequently categorized them together.<sup>81</sup> Upon Giddings' retirement from Congress, Bingham was the one who organized his retirement recognition.<sup>82</sup>

Congressman George Julian, Giddings son-in-law, indicated: "that Bingham loved [Giddings] as devotedly as any son could love his own father."<sup>83</sup> Giddings apparently had similar feelings toward Bingham. In 1863 Giddings wrote his son-in-law, George Julian: "[G]o straight to Bingham for advice and exhortation. He is a jewel of a man, true as steel."<sup>84</sup>

Running as a Whig, Bingham was elected prosecutor of Tuscarawas County in 1846.<sup>85</sup> Bingham attended the 1848 Whig National Convention. Bingham went to that convention to support Ohioan Justice John McLean, who would eventually be a key dissenter in *Dred Scott*.<sup>86</sup> Bingham was willing to support the convention nomination of Zachary Taylor, but he did not want to go to the electorate based only upon a popular candidate. Rather, he startled the convention by proposing an anti-slavery platform: "No more slave states, no more slave territories, the maintenance of freedom where freedom is and the protection of American industry."<sup>87</sup>

Though unsuccessful when ruled out of order, the words represented the views of idealism over practicality and brought the first national attention to Bingham.

Further, in 1855 the State of Ohio revised its Constitution in a convention in which Bingham's law partner and brother-in-law, Josiah Scott, was one of the delegates.<sup>88</sup> One of the provisions of the new Constitution stated that governments existed for the "equal protection

81. See CONG. GLOBE, 35th Cong., 1st Sess. 1216 (March 20, 1858) (containing remarks of Giddings and Bingham on the floor regarding their opposition to the admission of new slave states); Hon. John A. Bingham's *Nomination – Abolitionist*, AMERICAN UNION [Steubenville], Aug. 25, 1858, at 2, col. 4.

82. Letter from John A. Bingham to Joshua R. Giddings (Mar. 4, 1859) (Ohio Historical Society, Columbus, Ohio).

83. Julian, *supra* note 80, at 398-99.

84. Letter from Joshua R. Giddings to George W. Julian (Jan. 18, 1863) (quoted in C. Huff, *supra* note 80, at 123).

85. Beauregard, *supra* note 33, at xiii.

86. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

87. Richard L. Aynes, *John A. Bingham*, in 2 AMERICAN NATIONAL BIOGRAPHY 792 (1999). The importance of this effort was such that when a statute was dedicated to Bingham in 1901, these words were written on the base and there for all to see who enter the Harrison County, Ohio Courthouse. *Id.*

88. 1 OHIO CONSTITUTIONAL CONVENTION DEBATES 5 (1851).

and benefit” of the people in whom all political power is inherent.<sup>89</sup> In trying to give content to these words, the convention spelled out the following: “[N]o special *privileges* or *immunities* shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.”<sup>90</sup>

Thus, the Ohio Constitution contains many of the key words used in the Fourteenth Amendment - “equal protection,” “privileges” and “immunities.” Bingham did not have to be an innovator. The words and concepts were already known to him and to generations of lawyers. Also, there are some who claim not to understand what the words privileges and immunities mean, including a prominent scholar and former Judge who says it is like an “inkblot”—something we can’t understand.<sup>91</sup>

But here is an example of using words that are as plain in their meaning today as they were in the 1850s. Professor Michael Kent Curtis has documented the pedigree and meaning of these words in *No State Shall Abridge*<sup>92</sup> and further examinations appear in the work of Akhil Amar<sup>93</sup> and Bryan Wildenthal.<sup>94</sup>

Bingham was elected to Congress in 1854 and was almost immediately placed on the Committee on Elections.<sup>95</sup> In noting his speech opposing a fraudulent election in Kansas, a Cleveland newspaper headlined the March 7, 1856 speech as: “Great Speech of Hon. John A. Bingham on the Kansas Election Case.”<sup>96</sup> That same newspaper, in assessing the effect of Bingham’s speech, wrote:

A letter from a Washington correspondent assures us that it created more sensation than any other speech which has yet been delivered before the House of Representatives. No ordinary speaker can command the attention of that disorderly body, and the fact that Mr. Bingham was listened to with the most breathless stillness, except

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89. OH. CONST. of 1851, art. I, § 2 (emphasis added).

90. *Id.* (emphasis added).

91. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*, 166 (1990).

92. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE 14TH AMENDMENT AND THE BILL OF RIGHTS 64-68* (1986) (stating many Democrats of the day acquiesced to Bingham’s view that the Privileges or Immunities Clause “incorporated” Bill of Rights guarantees as against the states).

93. AMAR, *supra* note 11, at 166-69 (expressing the view that the plain meaning of the words privileges or immunities includes the doctrine of refined incorporation).

94. Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L. J. 1051, 1088 (2000).

95. Beauregard, *supra* note 33, at xiii.

96. THE MORNING LEADER, Mar. 17, 1856.

when the silence is broken by thunders of applause, is the best evidence of his great power as an orator. As a debater, he falls, perhaps, below Mr. Giddings; but he has no other competitor in the House.<sup>97</sup>

Subsequently, Bingham was chosen to be Chair of the Judiciary Committee, once the Republicans gained control of the House.<sup>98</sup> According to the *New York Times*:

John A. Bingham suddenly electrified the House by the first thoroughgoing pronouncement we have had of abolition principles. . . . Mr. Bingham speaks forcibly and with the heat of suppressed passion; he trots out anti-slavery quotations from Thomas Jefferson, and seems to have all of the weapon extracts of Republican argument worn smooth to his hand by long use.<sup>99</sup>

Bingham was an early and consistent opponent of slavery. In 1857 he opposed not only the admission of Kansas as a slave state, but also the imposition of slavery upon the territory.

In another speech, he vindicated the antislavery views of Salmon Chase—that freedom was national and slavery only local—while also claiming for slaves the right to act in self-defense.

“It is too late to make it felony to utter the self-evident truth that life and liberty belong of right to every man by virtue of the same creative energy which breathed into him the breath of life, and he became a living soul.”<sup>100</sup>

Bingham did not limit rights to white people. To the contrary, he based his legal and constitutional arguments upon the view that blacks had equal rights with whites. In doing so, he clearly indicated his belief in the inborn rights of blacks as well as whites:

[B]y the Constitution . . . MEN are not PROPERTY and cannot be made property, and have the right to defend their personal liberty even to the inflection of death!<sup>101</sup>

In his 1857 congressional speech responding to President Pierce’s

97. *Great Speech of Hon. John A. Bingham on Kansas Election Case*, THE MORNING LEADER, Mar. 17, 1856 (emphasis omitted).

98. TAYLOR, *supra* note 10, at 207.

99. N.Y. TIMES, Jan. 16, 1860, at 1.

100. CONG. GLOBE, 34th Cong., 1st Sess. 124 (March 6, 1856) (emphasis omitted).

101. CONG. GLOBE, 34th Cong., 3d Sess. App 35, 139 (Jan. 13, 1857). In support of the proposition, Bingham cited Justice John McLean’s dissenting opinion in *Groves v. Slaughter* that said: “the character of property is given them by the local law,” and that the Constitution acts upon slaves as persons, not property.” *Groves v. Slaughter*, 40 U.S. 449, 507 (1841).

message to Congress, Bingham expressed the view that the institution of slavery violated “the inherent rights of the black race.”<sup>102</sup> Moreover, he complained that the “violence” of the system was “deaf . . . to the cry of the oppressed, whether that cry bursts from the crushed heart of an African or an American.”<sup>103</sup> Indeed, Bingham found slavery intolerable because it “cast a fetter upon the human soul” and “interpose[d] the dark shadow of oppression between man and his Maker!”<sup>104</sup>

As early as 1857 Bingham was seeking to use the Republican Form of Government Clause to fight slavery:

You may call the State which enslaves and sells its own children, and menaces the hand which feeds and clothes and shelters it, republican; but truth, and history, and God’s eternal justice, will call it despotism, equally criminal and equally odious, whether sanctioned by one or many, by a single tyrant or by the million . . . .<sup>105</sup>

In referring to the use of the word “person” in the Fifth Amendment, Bingham noted that “[i]t makes no distinction either on account of complexion or birth—it serves these rights to all persons within its exclusive jurisdiction.”<sup>106</sup> In reversing the argument of slave holders for the protection of property Bingham continued:

This is equality. It protects not only life and liberty, but also property, the property of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life. . . .<sup>107</sup>

Similarly, when Oregon applied for admission as a “free” state in 1859, Bingham opposed its admission on the grounds that it excluded African-Americans from its borders and denied them the ability to use the courts of the new state to vindicate their rights.<sup>108</sup> While this speech is often cited because it explains Bingham’s views upon citizenship and

102. CONG. GLOBE, 34th Cong., 3d Sess. 135 (Jan. 13, 1857). In the same speech, Bingham also indicated that slavery “is contrary to the spirit of our constitution,” “a violation of justice” and “subversive of the ends of all free government.” *Id.*

103. CONG. GLOBE, 34th Cong., 3d Sess. App. 136 (Jan. 13, 1857).

104. *Id.*

105. CONG. GLOBE, 34th Cong., 3d Sess. 140 (Jan. 13, 1857) (emphasis omitted).

106. *Id.*

107. *Id.* (emphasis omitted). This was a recurrent abolitionist theme. *See also* *Butchers’ Union Slaughter House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter House Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring) (citing Adam Smith for the proposition that one’s own labor is the foundation of all property); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 254 (1984).

108. *See* CONG. GLOBE, 35th Cong., 2d Sess. 982 (Feb. 11, 1859).

his interpretation of the Article IV Privileges and Immunities Clauses,<sup>109</sup> it also sets forth his views on equality. In Bingham's view:

The equality of all to have the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the produce of their toil, is the rock upon which that Constitution rests—its sure foundation and defense.<sup>110</sup>

In an exchange with Tennessee Representative Horace Maynard in 1858, Bingham termed the argument that a man could be property “an atrocity, a wild and guilty fantasy.”<sup>111</sup> Bingham further indicated that the right to life and liberty—he omitted property—was “inherent and imperishable.”<sup>112</sup>

Bingham was prepared to act upon those principles. On March 26, 1858, when asked by Congressman Barksdale if he would vote to admit Kansas as a slave state if “all” the (assumptively “white”) people of that territory requested it, Bingham's response was unequivocal: “Certainly not.”<sup>113</sup>

When the House of Representatives was organized, many Republicans, including Bingham and speaker candidate John Sherman, had endorsed Hinton Helper's antislavery book, *Impending Crises*.<sup>114</sup> Virginia Representative William Smith, a future Confederate General, presented a resolution that no one could be speaker who had endorsed Helper's book.<sup>115</sup> Bingham was immediately on his feet arguing in opposition to the resolution.<sup>116</sup> Rather than trying to be conciliatory, Bingham confronted Smith and asked him if he intended to repudiate the Last Will and Testament of George Washington, the Virginia Resolution of 1774, the public declarations against slavery of former Virginia Governor McDowell, Thomas Jefferson, and the Declaration of Independence that ends with “it is the right of the people to alter or

109. See generally Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993) (for Bingham's interpretation).

110. See CONG. GLOBE, 35th Cong., 2d Sess. 985 (Feb. 11, 1859).

111. CONG. GLOBE, 35th Cong. 1st Sess. 1208 (March 20, 1858). This was a persistent theme of antislavery legal thought. See, e.g., Argument of S.P. Chase's in *Jones v. Van Zandt*, 13 Cas. 1040 (C.C.D. Ohio 1843), and Justice McLean's adoption of his view. 13 Fed. Cas. at 1042. It can be traced back to the English abolitionist Henry Brougham. See ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 47 (1899).

112. CONG. GLOBE, 35th Cong., 1st Sess. 1208 (March 20, 1858).

113. CONG. GLOBE, 35th Cong., 1st Sess. 1216 (March 20, 1858).

114. HINTON R. HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* (1857) (arguing that slavery held the South back economically).

115. CONG. GLOBE, 36th Cong., 1st Sess. 436 (Jan. 13, 1860).

116. *Id.*

abolish” the government. Bingham stated:

“I asked the gentleman to remember that the bold word ‘abolish’ is there. Abolition, if you please, is incorporated in that memorial declaration, for his father and mine went through . . . the revolution.”<sup>117</sup>

Further, Bingham stated, defiantly it would seem:

“I adopt the words as mine: when any form of government becomes destructive of the rights of life or liberty, it is the duty of people to *abolish* it.”<sup>118</sup>

Thus, Bingham goaded Smith into repudiating many famous Virginians and much of Virginia’s history to the “derisive laughter” of the Republicans in the house.<sup>119</sup>

When the Civil War was about to explode, Bingham opposed all efforts to compromise. Rather, he looked to the crisis of 1832 and reintroduced the “Force Bill” that Andrew Jackson had used to back down South Carolina’s threats.<sup>120</sup>

Bingham articulated a sophisticated theory of reconstruction in 1862, relying on the oaths to support the United States Constitution and the requirement that states have a republican form of government.

I wish to say that not one of the eleven rebel States is to-day a State in the Union. The territory is in the Union, the citizens of the original State are in the Union, and still owe allegiance to the Constitution of the United States. They cannot get the territory out of the Union. They cannot run away with it . . . the people are there, but there is no constitutional State—no State in the Union.<sup>121</sup>

This was so, Bingham reasoned, because Article VI of the United States Constitution<sup>122</sup> required all executive, legislative and judicial

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117. *Id.*

118. *Id.*

119. *Id.*

120. CONG. GLOBE, 36th Cong., 2d Sess. 219 (Dec. 31, 1860).

121. CONG. GLOBE, 37th Cong., 2d Sess. 1204 (March 12, 1862).

122. U.S. CONST., art. VI, § 4, cl. 2 provides:

This Constitution, and the Law of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Paragraph three provides:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . .

U.S. CONST. art. VI, § 4 cl. 3.

members of the state government to take an oath or affirmation to support the Constitution. Because the people purporting to govern the state were not its legal officers, there was no state.<sup>123</sup>

“There can be no State in the Union without these several departments. That would be a curious republican State without a legislative and an executive and a judicial department.”<sup>124</sup>

This situation led Bingham to conclude that the Congress could legislate for the government of the former states:

Because throughout the limits of the Republic of the United States Government has exclusive legislative power save where there is a constitutional State government. Otherwise the Constitution and Government could not be maintained, and the great end of the Constitution carried out.<sup>125</sup>

Throughout the war Bingham supported the war efforts. In advance of Lincoln, Bingham sought ways to abolish slavery as early as 1862. He supported freedom for people held in slavery by the Confiscation Acts, and abolition bills for the District of Columbia and Maryland. Arguing in 1862 that the Fifth Amendment Due Process Clause prohibited slavery in Washington, D.C., Bingham showed the breadth of his views:

No matter upon what spot of the earth’s surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law;. . .<sup>126</sup>

One of the southerners’ great fears during the war was that there would be a slave insurrection. Even northerners abhorred such a possibility. Several northern generals indicated they would use federal troops to suppress such insurrections.<sup>127</sup> Lincoln, in his Emancipation Proclamation, asked people held in slavery not to engage rebellion but rather to use violence only in self defense.<sup>128</sup>

Bingham, on the other hand, recognized a natural right of people

123. See CONG. GLOBE, 37th Cong., 2d Sess. 1204 (March 12, 1862).

124. *Id.* (emphasis omitted).

125. *Id.*

126. CONG. GLOBE, 37th Cong., 2d Sess. 1638 (April 11, 1862).

127. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1444-46 (1998), citing THE WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Washington, Gov’t Print Off. 1899).

128. See ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865 424 (Don E. Fehrenbacher ed. 1989).

held in slavery to use force to obtain their liberty. He denounced southern laws that would make it a crime to “whisper” to a slave that “there is a God that . . . sometimes condescends to clothe with superhuman power that good right arm of an outraged man when he strikes for the liberty of himself, his wife, and children.”<sup>129</sup>

Bingham was not shy about expressing his views. In 1862, in the course of debate upon the floor of Congress, a northern congressman used the words of a British abolitionist and referred to slavery as an “infernal atrocity.”<sup>130</sup> The reference was immediately met by a rebuke from Kentucky’s William Henry Wadsworth, a loyalist from a slave holding state.<sup>131</sup> Wadsworth, known for his eloquence, viewed this as an insult to slaveholders in Kentucky, of which he was one, who stood by the Union.<sup>132</sup>

Ohio’s Bingham was immediately upon his feet. When he could secure the floor he repudiated Wadsworth’s views:

“I repeat the word which so moved the gentleman from his propriety, that chattel slavery is an ‘infernal atrocity.’ I thank God that I learn to lisp it at my mother’s knee.”<sup>133</sup>

In that brief exchange, we read both Bingham’s history—that he learned anti-slavery doctrine at an early age—and his future—that he was willing to follow good principles even when they lead to conflict with supposed allies. Indeed, in the 1862 debate over the abolition of slavery in the District of Columbia, the venerable John J. Crittenden of Kentucky opposed abolition, arguing that it was an “unpropitious” time.<sup>134</sup> Bingham replied that “no time is unpropitious for an act of simple justice.”<sup>135</sup>

In 1866 Bingham defended the war efforts of African Americans during the debate on the question of black male suffrage in the District of Columbia. During that debate, Democratic Representative John Chanler of New York argued that blacks had always been subservient and had not won freedom like whites and indians.<sup>136</sup> Bingham defended

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129. CONG. GLOBE, 37th Cong., 2d Sess. 1203 (March 12, 1862).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. ISAAC NEWTON ARNOLD, THE HISTORY OF ABRAHAM LINCOLN AND THE OVERTHROW OF SLAVERY 257 (1866) (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1640 (April 11, 1862)).

135. *Id.* Dr. Martin L. King’s response to claims that the march on Washington was ill-timed: “It may be ill-timed. Frankly, I have never engaged in any direct movement which did not seem ill-timed.” RALPH G. MARTIN, A HERO FOR OUR TIME AN INTIMATE STORY OF THE KENNEDY YEARS 515 (1983).

136. CONG. GLOBE, 39th Cong., 1st Sess. 222 (Jan. 12, 1866).

African Americans in the United States by indicating that Union General McClellan had made it clear that any rebellion by those held in slavery would be put down by the Union army as well as the rebel army.<sup>137</sup>

In a continuing exchange with Chanler, Bingham indicated that he would “bear witness” that African-American people were “the only race now existing upon this planet that ever hewed their way out of the prison-house of chattel slavery to the sun light of personal liberty by their own unaided arm.”<sup>138</sup> Bingham characterized the revolution in Haiti as “without a parallel in the history of any race now living on this earth.”<sup>139</sup>

In speaking of the role of African-American people in the Civil War, Bingham argued: “[T]hese people have borne themselves as bravely, as well, and, I may add, as wisely during the great contest just closed, as any people to whom he can point, situated in like circumstances, at any period of the world’s history.”<sup>140</sup>

He noted that even though African-Americans had been held in slavery for two centuries, they “rose as one man” to “stand by this republic” as soon as emancipation was the goal. In defending the war record of African-American soldiers, Bingham stated that they were:

[D]oing firmly, unshrinking by, and definitely their full share in securing the final victory of our arms. I have said this much in defense of men who had the manhood, in the hour of the nation’s trial, to strike for the flag and the unity of the republic in the tempest of the great conflict, and to stand, where brave men only could stand, on the field of poised battle, where the earthquake and the fire led the charge. Sir, I am not mistaken. . . .

Both in the Congress and on the campaign trail in Ohio, the Democratic Party used racist tactics and argued that if some action were taken, then it would bring more African-Americans into Ohio and other northern states. They used these arguments to oppose the repeal of Ohio’s “black laws,” the election of Lincoln, emancipation, the adoption of the Thirteenth Amendment and other actions. Bingham was not

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137. See W.H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 67 (Negro University Press 1969) (1868). The threat of violence due to some inherent barbarism was a standard Democratic claim. See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 97 (1988) (quoting from speeches of Senator and later Vice President Thomas A. Hendricks and Congressman and later Speaker of the House Michael Kerr).

138. *Id.*

139. *Id.*

140. *Id.*

moved. When it was alleged that he would try to take steps to stem African-American immigration into Ohio, Bingham took the same position he had held on Kansas and Oregon:

I desire to say to the gentlemen that I have no idea myself that under any possible pressure I will ever consent that any man born upon the soil of this Republic by any vote or work of mine, should be excluded from the limits of any state, my own included. . . .<sup>141</sup>

Bingham supported the Freedman's Bureau. While he opposed the Civil Rights Act of 1866 on constitutional grounds,<sup>142</sup> he saw the Fourteenth Amendment as a cure for those defects.<sup>143</sup> He supported the Fourteenth<sup>144</sup> and Fifteenth Amendments, though he wanted broader protection under the Fifteenth Amendment.<sup>145</sup>

Bingham's views upon race were remarkably progressive. Indeed, the fact that he held such views and yet was able to be the leader of the "moderates" in Congress should give pause to some of the claims of what I have called "racism trumps equality."<sup>146</sup>

Congressman William Higby was a lawyer and Republican from California. In the debate upon the effect of Section two of the Fourteenth Amendment, on legislative apportionment, Higby noted that African-Americans outnumbered Whites in both South Carolina and Mississippi. Higby argued that the Amendment would allow the majority of African-American voters to control these states, and thus would violate the intent of the U.S. Constitution.<sup>147</sup> Bingham retorted "derisively" and "sarcastically" about Higby's "new discovery" that a minority of voters (whites) could deprive a majority of citizens (African-Americans) the right to vote. His own attitude was clear: "For myself, I will never consent to it."<sup>148</sup>

While Bingham initially resisted the impeachment movement, once President Johnson appeared to have violated the Tenure of Office Act by

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141. CONG. GLOBE, 37th Cong., 2d Sess. 244 (June 3, 1862).

142. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (March 9, 1866).

143. *Id.*

144. Bingham's views on the Fourteenth Amendment are the source of much work. In my mind, the best works are by Michael Kent Curtis and Akhil Amar. *See supra* notes 11 and 92. For my own work, *see Aynes, supra* notes 11, 20, 87 and 109. For contrary views, *see Berger, supra* note 17; and JAMES BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997).

145. *See Curtis, supra* note 92.

146. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and The Slaughter-House Cases*, 70 CHI. KENT. L. REV. 627, 644-46 (1994).

147. Cong. Globe, 39th Cong., 1st Sess. 431 (Jan. 25, 1866).

148. *Id.*

trying to remove Bingham's ally Edwin Stanton, Bingham became Chairman of the Managers of the House of Representatives and gave the closing argument in the impeachment trial before the U.S. Senate.<sup>149</sup>

Bingham went on to become the U.S. Minister to Japan in 1872 and served until recalled by Democratic President Grover Cleveland in 1884. Though one author has termed this period a lost part of Bingham's life, it was a part in which he championed the rights of the Japanese against imperialism. It was a part of his life in which he won the friendship of the Chinese Ambassador and argued that his government should apply the principles of the Fourteenth Amendment to the Japanese. It was an extension of his life work.

Bingham returned to Ohio where he lived for the remainder of his life. To some extent, this return must have made Bingham feel like Rip Van Winkle. By that time, the sentiment in the country had become more conservative and many of the civil rights actions Bingham had advocated had been abandoned. Nevertheless, Bingham held his own views.

In 1885, at the age of seventy, Bingham spoke in Cadiz to the largest crowd there since the Civil War.<sup>150</sup> In making what was characterized as "An Eloquent Plea for Justice and Equal Rights"<sup>151</sup> there was said to be "a reawakening of the old Republican enthusiasm of twenty years ago."<sup>152</sup> At that time, the reporter predicted that Mr. Bingham's name would always be historically associated "with the struggle for full civil liberty."<sup>153</sup>

Bingham praised the Republican Party platform for supporting the Reconstruction Amendments to the Constitution and touted Section one of the Fourteenth Amendment as a necessary limitation "upon the power of the States."<sup>154</sup> In mocking the Democratic Party's claim to be the friend of labor, Bingham obviously counted African-Americans as full members of that constituency and condemned the Democratic Party for its resistance to emancipation.<sup>155</sup> He referred to the *Dred Scott* decision, that African-Americans "had no rights which a white man was bound to respect," as a "horrible blasphemy" which was overturned by the

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149. See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES* 221-52 (1999) (recounting the impeachment of Andrew Johnson).

150. *Father in Israel*, THE CINCINNATI GAZETTE, Oct. 3, 1885, at 3.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Father in Israel*, *supra* note 150, at 3.

Citizenship Clause of the Fourteenth Amendment.<sup>156</sup> He supported the candidacy of Benjamin Harrison and his distant cousin, William McKinley.

In 1898, thirty years after the ratification of his great Amendment, and when his health began to fail, friends secured a pension from the Congress based upon his military service. The legislation that provided for his pension includes the following:

We had a Grant, a Sherman, a Sheridan, a Thomas, a Hancock, and other great generals at the front, but all their ability would have been of no avail without the aid of equally great and brave men at the capital. . . . One of the ablest, most patriotic, and *fearless* of these was Maj. John A. Bingham.<sup>157</sup>

There is no question that the Fourteenth Amendment was designed to change the nature of the national and state governments. The way in which that change was to work is perhaps best captured by Ohio's U.S. Supreme Court Justice, Noah H. Swayne. Though originally a Jacksonian Democrat,<sup>158</sup> Swayne was somewhat of a rival of Salmon P. Chase for the leadership of the Free Soil movement in Ohio,<sup>159</sup> and an early leader in Ohio's Republican Party.<sup>160</sup> As such, he was also an ally of both Salmon P. Chase, the architect of the national antislavery legal strategy,<sup>161</sup> and of Section one author John Bingham.<sup>162</sup>

At the time of Chase's appointment as Chief Justice in 1864, Swayne was considered the "best lawyer" on the Court, its most "ardent defender of civil rights,"<sup>163</sup> and the most "nationalistic-minded member

156. *Id.*

157. H.R. Rep. No. 890, at 1 (1898) (55th Cong., 2d Sess., March 30, 1898).

158. J. Fletcher Brennan, 1 THE (OHIO) BIOGRAPHICAL CYCLOPEDIA AND PORTRAIT GALLERY 101 (1880).

159. JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 378 (1995).

160. Swayne was a delegate to the 1856 Ohio Republican Convention along with Section one framer John Bingham. 1 HISTORY OF THE REPUBLICAN PARTY IN OHIO 72, 73 (Joseph P. Smith ed., 1898) (listing convention delegates by district). Swayne was also a delegate to the 1856 national Republic Convention. *Id.* at 53. He supported John Fremont for President. Jonathan Lurie, *Noah Haynes Swayne*, in THE OXFORD COMPANION TO THE SUPREME COURT 850 (Kermit L. Hall ed., 1992). He also supported the re-election of radical Benjamin Wade to the U.S. Senate 1856. Francis P. Weisenberger, *Lincoln and His Ohio Friends*, 68 OHIO HIST. Q. 223, 245 (1959).

161. HAROLD M. HYMAN, THE RECONSTRUCTION OF JUSTICE SALMON P. CHASE 168 (1997) (discussing Chase's role as the preeminent national abolitionist legal strategist). See 1 THE SALMON P. CHASE PAPERS, 225, 247, 272, 275, 287, 292, and 293 (John Niven, ed. 1993) (discussing Swayne's close work with and connection to Chase in the 1850s).

162. They had, of course, served together at various Ohio Republican conventions. See Beauregard, *supra* note 57 (citing letters between these contemporaries).

163. Niven, *supra* note 159, at 378. See also letter from United States Supreme Court Justice David Davis to Massachusetts Judge Julius Rockwell, his brother-in-law, (Dec. 12, 1864), *in*

of the Court.”<sup>164</sup> Further, President Lincoln personally knew Swayne.<sup>165</sup>

His son, Major Wager Swayne, had won the Congressional Medal of Honor during the War and he had stayed in the South as the director of the Freedmen’s Bureau in Alabama.<sup>166</sup>

Not surprisingly, his opinion in the *Slaughter-House Cases*,<sup>167</sup> the Court’s first expression on the meaning of the new Amendment, reads strikingly like the speeches of the proponents of the Fourteenth Amendment in Congress. In both setting up the context in which the Amendment was passed and in what appears to be a direct response to the fainthearted interpretation of Justice Samuel F. Miller, Justice Swayne wrote:

The prejudice and apprehension as to the central government which prevailed when the Constitution was adopted was dispelled by the light of recent experience. The public mind became satisfied that there was less danger of tyranny by the head than of anarchy and tyranny in the members.<sup>168</sup>

In case there were those who did not understand his meaning, Justice Swayne proceeded:

By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That *want* was intended to be supplied by the [Fourteenth] Amendment.<sup>169</sup>

With respect to the increased power of the central government, Swayne wrote—and one can imagine spoke—with some vigor when he read his opinion in the courtroom:

“It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted.”<sup>170</sup>

In an influential publication in 1950-51, Jacobus tenBroek

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Charles Fairman, *Reconstruction and Reunion, 1864-88, Part I*, in 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 11-12 (Paul A. Freund, gen. ed. 1971). In that letter, Justice Davis expressed his belief that Swayne was “by all odds the best lawyer” among the five Justices appointed by President Lincoln. *Id.*

164. CONCISE DICTIONARY OF AMERICAN BIOGRAPHY 1036 (American Council of Learned Societies ed., 1964).

165. Fairman, *supra* note 163, at 11.

166. STEWART SIFAKIS, WHO WAS WHO IN THE CIVIL WAR 636 (1988).

167. *Slaughter-House Cases*, 83 U.S. 36 (1872) (Swayne, J., dissenting).

168. *Id.* at 128.

169. *Id.* at 129 (emphasis added).

170. *Id.*

published *The Anti-Slavery Origins of the Fourteenth Amendment*.<sup>171</sup> Professor tenBroek found Bingham to be the “synthesizer” of abolitionist thought.<sup>172</sup>

The work of Bingham was the meeting ground, in a sense that the work of no other individual was, of the three concepts and clauses that came to constitute the first section of the Amendment. He accepted the amalgamation of natural rights, due process and equal protection which had become the prime constitutional adornment of the party platforms.<sup>173</sup>

The question of Bingham’s intent, his goal, and his view of the Fourteenth Amendment has been intertwined with its meaning, understanding and judicial construction. What was he trying to do? What did he want to accomplish? John Bingham probably did learn to “lisp” antislavery and equality principles from his mother’s knee. He had the courage of his convictions and he was “true as steel.”<sup>174</sup>

This was a highly religious era. The dominant religion was Protestantism and the ever handy reference for all authority and all disputes was the King James Bible. In *Acts* 23:25, the story is told of the Apostle Paul who was taken into custody by the Romans. They bound him and were going to question him while they “scourged” or whipped him. But before they could do so, they discovered that he was a Roman citizen. Even though he had not yet been beaten or whipped, the Roman soldiers had already gone too far, “and the chief captain also was afraid, after he knew that [Paul] was a Roman and because he had bound him.”

Time and time again this story was repeated in the Congress and before the public that no doubt heard it many times in their Churches. It was said that American citizenship, like Roman citizenship, should protect its citizens against abuse—it should protect American rights to American citizens.

Yet, American citizens, who might have their rights vindicated if wronged by a foreign nation, would have no remedy if they were deprived of their rights, or even their life, by Georgia or South Carolina. This was the great complaint the Fourteenth Amendment was designed to address, the “want” it was designed to supply.

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171. Revised and reissued in 1965 under the title *Equal Under Law*. JACOBUS TENBROEK, *EQUAL UNDER LAW* (Collier Books 1965) (originally published as *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*, 1951).

172. *Id.* at 145.

173. *Id.* See also Howard Jay Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment, I Genesis, 1833-1835*, 1950 WIS. L. REV. 479 (1950).

174. Huff, *supra* note 80, at 123.

Ohio had already ratified the Amendment on January 4, 1867. But eight months later, John Bingham was still campaigning for the Amendment. In a speech delivered in Cleveland on September 26, 1867, Bingham explained the purpose of the Fourteenth Amendment.

“We propose to put it into the power of every man, woman, child, black or white, rich or poor, when his rights are invaded, to raise his hand toward the flag, and say, I AM AN AMERICAN CITIZEN.”<sup>175</sup>

The crowd knew that this would be a change. The audience knew that to invoke American citizenship as a protection would trench directly upon so-called state’s rights. However, its response to Bingham’s appeal to American citizenship was recorded as “GREAT APPLAUSE.”<sup>176</sup>

Societies, like individuals, have aspirations to which they may never quite fully meet. Indeed, they may even stumble and fall while striving for those ideals. Bingham was not a perfect man and while he had his ideals, he also had his faults. But when writing the Fourteenth Amendment he did not incorporate into it our worst failings. Rather, he wrote into that Amendment our highest aspirations.

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175. *Speech of Hon. John A. Bingham at Cleveland, in THE SUMMIT COUNTY BEACON*, Sept. 26, 1867.

176. *Id.*