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## JOHN BINGHAM AND THE BACKGROUND TO THE FOURTEENTH AMENDMENT

*Paul Finkelman*\*

Legal scholars have long debated the “original intent” of the Fourteenth Amendment, especially Section one, which has been the driving engine of the national expansion of civil rights and civil liberties for the past half century or more.<sup>1</sup> Lawyers comb the records of the Thirty-ninth Congress, certain they will find some Rosetta stone that will explain such terms as “privileges or immunities of citizens of the United States,” “due process of law” or “equal protection of the laws.”<sup>2</sup>

While exploring the records of Congress can be useful, the debates in Congress do not tell the whole story of the origin and meaning of the Fourteenth Amendment. These debates may not even tell the most important story. Two other stories may be a better guide to what the members of Congress, and especially John Bingham, the primary author of Section one of the Fourteenth Amendment, had in mind when they wrote the Amendment. An understanding of the Fourteenth Amendment begins not in Congress, but in the history leading up to the Civil War. The first crucial story in understanding the Fourteenth Amendment is the striking changes in the law of race relations that took place in the North - especially in Bingham’s home state of Ohio - in the dozen or so years before the Civil War began. The second story is about the South, and the legal repression and brutal racial violence that took place there immediately after the Civil War ended.

These two stories compliment each other. The first gives insight

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1. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. 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 to any person within its jurisdiction the equal protection of the laws.

2. *Id.*

into the legal and political history that shaped Bingham's thoughts about race and his aspirations for a racially just society. The second helps understand what Bingham was struggling against in drafting Section one of the Fourteenth Amendment, and thus illuminates what he hoped the Amendment would accomplish.

#### I. RACE AND LAW IN OHIO: A PRELUDE TO THE FOURTEENTH AMENDMENT

In his own state, Bingham had witnessed a dramatic change in the nature of race relations. In the first decades of the Nineteenth Century, Ohio was one of the most racially retrograde states in the North. However, by the 1840s this had begun to change and this change continued through the 1850s as Bingham's new political organization, the Republican Party, gained power.<sup>3</sup>

##### *A. Racism in Early Ohio: A Short Legal History*

In 1804 and 1807, Ohio adopted elaborate registration requirements for blacks entering the state.<sup>4</sup> These laws were rarely enforced and were utterly ineffective in limiting the growth of the state's free black community. Indeed, while these laws were on the books, Ohio's black population grew rapidly.<sup>5</sup> Nevertheless, these laws always posed a threat to blacks who might be forced out of the state if they could not prove their freedom or find sureties to promise to support them if they were unable to support themselves. Ohio law also prevented blacks from voting,<sup>6</sup> serving on juries<sup>7</sup> or testifying against whites.<sup>8</sup> Laws

3. See Paul Finkelman, *Race, Slavery and Law in Antebellum Ohio*, in A LEGAL HISTORY OF OHIO (Michael Les Benedict & John Winkler eds., forthcoming 2004) (providing a longer discussion of race and legal change in Ohio during this period).

4. An act, to regulate black and mulatto persons, ch. 21, Jan. 5, 1804, 1804 Ohio Laws 356; An act, to amend the act, entitled "An act regulating black and mulatto persons," ch. 8, Jan. 25, 1807, 1807 Ohio Laws 53.

5. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NEGRO POPULATION IN THE UNITED STATES 1790-1915 57 (1918). In 1800, Ohio had a black population of 337. *Id.* It had grown by more than 550% to 1,899 by 1810, despite the fact that anti-immigration laws were on the books for six of those years. *Id.* It more than doubled to 4,723 in the next decade, and doubled again in the next decade, reaching 9,568 by 1830. *Id.* By 1840 the black population was 17,342, and in 1850, a year after the registration laws went off the books, the census found 25,279 blacks in Ohio, giving it the third largest free black population in the North. *Id.*

6. See OHIO CONST. of 1802, art. IV, § 1 (limiting the franchise to white males).

7. An Act relating to Juries, Feb. 9, 1831, 1831 Ohio Laws 94.

8. See An Act to amend the act, entitled "An act regulating black and mulatto persons," ch. 8, Jan. 25, 1807, § 4, 1806 Ohio Laws 53, 54.

prohibited blacks from attending schools with whites,<sup>9</sup> while denying them meaningful access to public schools even on a segregated basis.

These and other laws led conservative legal scholar Raoul Berger to assert that the Fourteenth Amendment could not have been meant to require integration or substantive equality for blacks.<sup>10</sup> Berger insisted that the “key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia.”<sup>11</sup> Berger’s position reflected the work of liberal historians like Leon Litwack and Eugene Berwanger.<sup>12</sup> Writing in the early years of the Civil Rights movement, Litwack’s message was that northerners should realize their own racist past. He concluded that on the eve of the Civil War, “the Northern Negro remained largely disenfranchised, segregated and economically oppressed” and, just as importantly, “change did not seem imminent.”<sup>13</sup> Similarly, in his influential book *The Frontier Against Slavery*, Berwanger proposed that “[d]iscrimination against Negroes in the Middle West reached its height between 1846 and 1860, the same years in which the slavery extension controversy became most acute.”<sup>14</sup> Berwanger argued “that prejudice against Negroes was a factor in the development of antislavery feeling in the ante-bellum United States.”<sup>15</sup>

### *B. The Transformation of Ohio Race Laws*

The analysis of Berger, Litwack and Berwanger is in fact wrong. It ignores the fundamental sea change in race relations that took place throughout most of the North in the 1840s and 1850s.<sup>16</sup> Far from being “shot through with Negrophobia,”<sup>17</sup> in much of the North<sup>18</sup> there was a

9. An Act to provide for the support and better regulation of Common Schools, March 12, 1829, § 1, 1829 Ohio Laws 72, 73.

10. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

11. *Id.* at 10.

12. See LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961); EUGENE H. BERWANGER, *THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY* (1967).

13. LITWACK, *supra* note 12, at 279.

14. BERWANGER, *supra* note 12, at 4.

15. *Id.* at 1.

16. See HARLOD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENTS, 1835-1875* (1982); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1965).

17. BERGER, *supra* note 10, at 10.

18. Indiana and to a lesser extent Illinois, stand out as examples of places where much of the Berger-Litwack-Berwanger thesis would hold true. Yet, even in those states the Republican leadership was pushing for greater civil rights for blacks. California similarly stands out in this regard, although by 1862 with Republicans in control of the state, its laws on black civil rights

profound transformation of the law with regards to race in the last two decades of the antebellum period.<sup>19</sup> This change was especially apparent in Ohio, at precisely the time that Bingham, Salmon P. Chase, Jacob Brinkerhoff<sup>20</sup> and other future leaders of the Ohio Republican Party were entering politics or taking a leading role in the state's new Republican Party.<sup>21</sup>

In 1839, the Ohio legislature created an elaborate state system for regulating the return of fugitive slaves.<sup>22</sup> The law required that ownership of a fugitive slave "be proved" to the "satisfaction" of a state judge, while at the same time authorizing state officials to aid in the return of bona fide fugitive slaves.<sup>23</sup> This law was consistent with Ohio's long-standing policy of protecting free blacks from kidnapping, while still supporting its constitutional obligation to return fugitive slaves. However, unlike earlier laws that punished kidnapping, this act had the potential to frustrate attempts by masters to recover their runaway slaves and would have made fugitive slaves feel more secure in the Buckeye State.

The adoption of this law cuts against the idea of a Negrophobic Ohio, because the end result of the law was to increase the black population and make the state a haven for runaway slaves. If Ohio had been truly Negrophobic, then it would have done everything it could to discourage blacks from living in the state. Under such a policy, Ohio would have withheld specific legislative protection from free blacks and instead of creating barriers to the return of fugitives, it would have provided legislation to help slave catchers. A truly Negrophobic Ohio would have passed laws similar to those in the South, which required law enforcement officers to incarcerate black strangers and travelers and

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began to change.

19. See Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986) (citing examples of this in other states).

20. Jacob Brinkerhoff (1810-1880) became a county prosecutor in 1839 and served in Congress as an antislavery Democrat from 1843 to 1847. He was a Free Soil member of the legislature in the late 1840s and joined the Ohio Republican Party when it was formed in 1856. He was a State Supreme Court justice from 1856 until 1871.

21. Edward Wade (1802-1866) was a Free Soil and Republican Party member of Congress, 1853-61. Benjamin F. Wade (1800-1878) entered politics in 1835 and became a powerful state figure as a state senator, judge, and then United States Senator in the 1840s and 1850s. James Ashley (1824-1896) entered politics in 1858, and served as a Republican member of Congress. William Dennison, Jr. served as Governor of Ohio from 1860 to 1862 and as Postmaster General from 1864 until July 1866.

22. An Act Relating to Fugitives from labor or service from other States, Feb. 26, 1839, 1838 Ohio Laws 38.

23. *Id.*

advertise them as runaway slaves unless they could document their status as free people.

In 1842, the United States Supreme Court decision in *Prigg v. Pennsylvania*<sup>24</sup> barred any state from regulating the return of fugitive slaves. This decision effectively struck down the personal liberty laws of the free states,<sup>25</sup> such as Ohio's 1839 Act. In response to *Prigg*, the Ohio legislature repealed this fugitive slave regulating law and reinstated an earlier law. The earlier law provided imprisonment "at hard labor" for up to seven years for anyone convicted of removing a free black from the state as a fugitive slave or even attempting to seize a free black with the intent to remove that person from the state.<sup>26</sup> Again, a more Negrophobic state would have not have passed a law to punish the kidnapping of free blacks.

Starting in 1848, at a time when Bingham was beginning his political career,<sup>27</sup> Ohio began a rapid change in its regulation of blacks, while taking an increasingly strong political stand against southern slavery. A resolution of that year urged the national Congress to prohibit slavery in any territories acquired in the Mexican War.<sup>28</sup> More significantly for the background to the Fourteenth Amendment, in that year a new Ohio law<sup>29</sup> provided for two separate methods for the education of blacks. For the first time in the state's history, the laws of Ohio specifically allowed school districts to permit blacks to attend schools with whites. The law also authorized the creation of segregated schools for blacks funded by taxes collected from blacks. These schools would be organized on a segregated basis. While considered a mark of discrimination at the time (just as it is today), this law was nevertheless an important and positive step forward in the expansion of rights for

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24. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (elaborating further on this particular case).

25. See generally THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974) (supplying additional information on the personal liberty laws of the North).

26. An Act to repeal the act entitled "An act relating to fugitives from labor or service from other States," passed February 26, 1839, Jan. 19, 1843, 1842 Ohio Laws 13; An Act to prevent Kidnapping, Feb 15, 1831, 1831 Ohio Laws 442.

27. From 1846 to 1849, Bingham was the district attorney of Tuscarawas County, Ohio.

28. Resolution Declaring that so much of the Ordinance of 1787 as relates to slavery, should be extended to the territory acquired from Mexico, Feb. 25, 1848, 1847 Ohio Laws 314.

29. An Act to provide for the establishment of Common Schools for the education of children of black and mulatto persons, and to amend the act entitled, "An act for the support and better regulation of Common Schools, and to create permanently the office of Superintendent," passed March 7, 1838, and the acts amendatory thereto, Feb. 24, 1848, 1847 Ohio Laws 81.

blacks in Ohio. Without this law, blacks had no right to a public education on either an integrated or a segregated basis. This law marked an improvement over the earlier conditions that had denied blacks a public school education.<sup>30</sup> In addition, this law allowed blacks to attend schools with whites if local communities did not object. In 1849, the Ohio legislature acted to repeal the registration and surety bond requirements of the 1804 and 1807 laws, allow blacks to testify against whites, and give blacks even greater access to the public schools.<sup>31</sup> Laws passed in the 1850s, when Bingham was in Congress and a rising star in the Republican Party, provided blacks with new protections against kidnapping and demonstrated Ohio's hostility to the federal Fugitive Slave Law of 1850.

By the eve of the Civil War, blacks still did not have full equality under Ohio's laws. They could not vote, sit on juries, or serve in the state militia. But, they had far more legal rights than they had ever had before. Moreover, the thrust of the newly created Republican Party was towards greater racial equality. Far from being "shot through with Negrophobia,"<sup>32</sup> as Berger incorrectly argues, Ohio in this period was making steady and significant progress towards a more egalitarian polity that provided increasing rights for free blacks.

Ohio did not at this time eliminate discriminatory laws entirely because a substantial number of voters were Democrats opposed to racial equality. Many of these voters and the politicians they supported would later be hostile to emancipation, black citizenship, and the enfranchisement of blacks. After antislavery Democrats like Salmon P. Chase and Jacob Brinkerhoff joined the new Republican Party, the Democrats became extremely hostile to blacks. These Democratic voters, who were particularly powerful in southern Ohio, made impossible certain changes that would have required the state to amend its constitution. The Democrats were also able to block Republican hegemony in the 1850s and 1860s, and sometimes to control the state legislature. Ohio in the late antebellum period was a divided polity, with the Republicans usually, but not always, able to control state government.

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30. See Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. OF AM. HIST. 842 (1988) (discussing this issue of the post-Civil War South). Rabinowitz "discovered" that what preceded segregation in the South "was normally exclusion" and that "ironically, segregation often therefore marked an improvement in the status of blacks." *Id.* at 845.

31. An Act to authorize the establishment of separate schools for the education of colored children, and for other purposes, Feb. 10, 1849, 1848 Ohio Laws 17.

32. BERGER, *supra* note 10, at 10.

*C. Executive and Legislative Protections of Black Freedom in the 1850s*

Ohio's responses to two separate events in the 1850s illustrate the state's growing commitment to black liberty, even at the expense of interstate comity and national harmony. Neither involved Bingham directly, but both illustrate the context of his move to the national political stage and reflect the increasing civil rights concerns of his constituents. These events also exemplify how a significant number of antebellum political leaders in Ohio, many of whom would emerge as leaders of the Republican Party in the 1850s and 1860s, were quite sympathetic to racial fairness and racial justice.

The first event involved the children and grandchildren of a free black named Peyton Polly. In 1850, kidnappers seized seven of Polly's children and one of his grandchildren, taking them to Virginia and Kentucky where they were sold as slaves. In 1851, the legislature authorized the Governor to "inquire into the facts of [this] alleged seizure and abduction," and to "employ counsel, and adopt such other measures as shall conduce most speedily to restore" the Polly children "to their liberty."<sup>33</sup> The Governor did just this, sending attorneys to the two states to seek the return of these black citizens of Ohio. Kentucky Attorney General James Harlan, the father of future Supreme Court justice John Marshall Harlan, intervened to help four of the Polly children return to Ohio. However, in Virginia the authorities stonewalled.<sup>34</sup> As late as 1860, Ohio sought the return of the four Polly children from Virginia, but those four did not gain their freedom until the Civil War ended slavery. Over that decade, the State of Ohio spent substantial funds in legal fees to bring these free blacks back to their home.<sup>35</sup>

The response of the Ohio legislature and the executive branch to the Polly kidnappings illustrates that in the 1850s, Ohio was willing to spend its resources to protect the freedom of its black inhabitants. This commitment to liberty and racial fairness was at the heart of what would become the Ohio Republican Party in the middle of the decade. It was the party that sent Bingham to Congress.

The second illustrative event of the 1850s involved the liberty of a free black man, Willis Lago, who was accused of helping a slave escape

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33. Resolution Relative to the abduction of the children and grand child of Peyton Polly, March 20, 1851, 1850 Ohio Laws 811.

34. See *Ratcliff v. Polly*, 53 Va. (12 Gratt.) 528 (1855).

35. Joint Resolution relative to the kidnapping of the Polly family, March 10, 1860, 1859 Ohio Laws 149.



into Ohio. Kentucky tried to extradite Lago in order to prosecute him for the theft. Republican Ohio Governor Salmon P. Chase, who had been known as the “Attorney General for Fugitive Slaves” in the 1840s, refused to arrest Lago, asserting the power of his state to ignore the request of the governor of another state.<sup>36</sup> Chase argued that the crime of “slave stealing” did not exist in Ohio.<sup>37</sup> Kentucky officials waited until a new Ohio Governor took office, but William R. Dennison was no more cooperative than Chase. Ohio’s Attorney General told Dennison that Lago had not committed a crime recognized by Ohio “or by the common law.”<sup>38</sup>

Eventually, Kentucky sought relief in the United States Supreme Court. In *Kentucky v. Dennison* the Supreme Court determined that it did not have the power to force a state to return a fugitive from justice to another state.<sup>39</sup> The narrow result of this decision appeared to support antislavery, but this was not Chief Justice Taney’s goal. Rather, he sought to create a precedent that limited the power of the national government to force states to act in support of the federal Constitution. With seven states out of the Union, the pro-slavery, southern-nationalist Taney hoped to offer constitutional protection for the newly created Confederate States of America.

The actions of Chase and Dennison pitted Ohio against a sister state and almost forced Ohio into a confrontation with the United States Supreme Court. This controversy took place because of Ohio’s determination to protect the liberty of a free black living within the state. This was not the behavior of a state “shot through with Negrophobia.”<sup>40</sup> On the contrary, a state “shot through with Negrophobia” would have been happy to help remove a free black to the South. Ohio, however, was a state that emphatically supported the liberty of all its citizens, including blacks.

During this same period, the Ohio Supreme Court ruled that blacks that were brought into the state by their masters became immediately

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36. See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 70 (1861) (documenting the factual and political history of this particular issue).

37. *Id.* at 68.

38. Letter from C.P. Wolcott, Ohio Attorney General, to William R. Dennison, Ohio Governor (April 14, 1860) (on file with the Ohio Historical Society) (reprinted in *Dennison*, 65 U.S. at 67-70). Richard Aynes argues persuasively that this case is a significant marker in the development of Republican thought, and especially John Bingham’s thought, which led to the Fourteenth Amendment. Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 77-78 (1993).

39. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

40. BERGER, *supra* note 10, at 10.

free.<sup>41</sup> Such a ruling could only increase the state's black population. Clearly the state's Republican leadership was intent on protecting black freedom and liberty, and expanding blacks rights.<sup>42</sup>

#### *D. Bingham's Ohio Background*

In was in the context of these statutes, court decision, and executive actions that John Bingham became a key member of the Ohio Republican Party and a rising star in national politics. His pedigree was deeply connected to anti-slavery and black civil rights. He brought these ideas to Congress and to his role in drafting the Fourteenth Amendment. Thus, when we consider what the Amendment meant, we must begin with Bingham's background. We must further consider the racial trajectory of his state and more significantly his party within that state. The evidence suggests that for Bingham and his party, black civil rights mattered. Certainly others in Ohio had a different view. After all, the state was the home of the notorious Negrophobic Confederate sympathizer, the outspokenly racist Democrat, Clement L. Vallandigham. But, while Vallandigham was a force in state politics, he was never a successful force beyond his own southern Ohio district. Even there he lost in three elections (1852, 1854, and 1862).

The key to understanding Bingham's Ohio background is that while parts of his state were clearly Negrophobic, his northern Ohio district and much of the state contained Free Soilers and Republicans who gradually gained enormous power during the 1850s. These Republicans won elections while expanding the rights and liberties of blacks in Ohio. By the mid-1860s they were at their zenith of political power, and they brought with them a long history of civil rights advocacy as well as a track record of successfully moving Ohio forward in the march to civil rights.

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41. *Anderson v. Poindexter*, 6 Ohio St. 622 (1856).

42. Aynes, *supra* note 38, at 66-78. Dean Aynes argues that this history supports the idea that the Privileges or Immunities Clause of the Fourteenth Amendment was designed to incorporate the Bill of Rights against the states. *Id.* Aynes' argument dovetails with the one presented here and they are mutually supportive. If blacks were to have political and legal rights in the South, then they needed the protection of the Bill of Rights, especially the First Amendment. Similarly, incorporation of the Fourth, Fifth, Sixth and Eighth Amendments was necessary to overcome the racist law enforcement allowed by the Black Codes passed in the South immediately following the Civil War.

## II. THE SOUTHERN CONTEXT OF RECONSTRUCTION AND THE SHAPING OF THE FOURTEENTH AMENDMENT

Bingham and other Republicans in the Thirty-ninth Congress were not influenced solely by their own long struggle against racism in the North and slavery in the South. They were also influenced by the racist brutality of southern whites and the retrograde actions of southern politicians in the wake of the Civil War. A brief description of race relations in the South in 1865-66 reminds us why the Fourteenth Amendment was passed and helps us understand what Bingham and his colleagues hoped it would accomplish.

### A. *The Aftermath of Slavery*

In April 1865, the United States successfully suppressed what leaders at the time referred to as the “late wicked rebellion.”<sup>43</sup> Suppression of the rebellion involved more than 2,000,000 soldiers and sailors, ten per cent of whom were blacks. The vast majority of these black soldiers - the “sable arm” of the United States Army<sup>44</sup> - had been slaves when the rebellion began. Most northerners understood that these black soldiers had earned their freedom and a claim to political and legal equality.

Republican politicians like Bingham assumed that the end of slavery would lead to a new political reality in the South that would include the votes of the freedmen, as the former slaves were called.<sup>45</sup> In much of the South blacks constituted a third to a half of the population. These Republican leaders venerated and celebrated the idea of a “republican form of government,” in which the people of a society elected a legislature and in which all citizens had equal rights under the law.<sup>46</sup> Thus, northern politicians expected that emancipation, which was completed with the ratification of the Thirteenth Amendment in December 1865, would lead to more than simply an end to slavery; they

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43. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866).

44. See DUDLEY TAYLOR CORNISH, *THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861-1865* (1966).

45. HYMAN & WIECEK, *supra* note 16, at 388-97 (arguing that many framers of the Thirteenth Amendment assumed it would give political rights to blacks under the republican Form of Government Clause of Article IV of the U.S. Constitution).

46. Clearly, most mid-century Americans saw no contradiction between the idea of republican form of government and the denial of suffrage to women. At the time most men, and many women, would have defended this situation on the grounds that women were virtually represented in Congress through their husbands, fathers, and brothers. Thus, most Americans at this time could accept the idea that male suffrage provided republican, that is representative, government.

assumed it would lead to an entire revolution in the way blacks were treated and in the rights they held.

Southern whites, however, had other ideas. General Carl Schurz, after visiting the South in 1865, concluded that many, perhaps most, southern whites conceded that blacks were no longer the slaves of individual masters, but intended to make them “the slave of society.”<sup>47</sup>

The following fall, southern voters - most of whom had supported the rebellion - elected new state legislatures. Many of these incoming state lawmakers had served in the Confederate government or in the rebellious state governments. Others had been soldiers, often officers, in the Confederate Army. The vast majority had either been slave owners or members of slave owning families. Although defeated in battle and permanently deprived of their slaves by a combination of congressional acts,<sup>48</sup> the Emancipation Proclamation and the brilliant military success of the United States Army, these former Confederates were unwilling to accept that the Civil War had fundamentally altered the racial status quo in the South. They knew that blacks could no longer be held as chattel slaves, to be bought and sold at the whim of a master; but they were unprepared to accept that the freed people were entitled to liberty, equality, or even fundamental legal rights.

Immediately after the War ended these as yet unreconstructed southern legislatures passed new and extremely discriminatory statutes which gave northern political leaders a glimpse of how the South intended to treat former slaves. The Fourteenth Amendment was in large part a reaction to these laws, generally known as “Black Codes.”

#### *B. The Black Codes: 1865-1866*

The authors of the Black Codes tried to replicate, as much as possible, a system of involuntary servitude. Many of the statutes were designed to control black labor in order to ensure that masters had a sufficient, reliable, and pliable work force to maintain and operate their plantations. Just as the Thirteenth Amendment was going into effect,<sup>49</sup> Louisiana made it a crime for anyone to “persuade or entice away, feed, harbor or secret any person who leaves his or her employer, with whom she or he has contracted, or is assigned to live, or any apprentice who is bound as an apprentice.”<sup>50</sup> Offenders could be punished by up to a year

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47. RECONSTRUCTION, 1865-1877 38 (Richard N. Current, ed. 1965).

48. See Confiscation Act of 1862, 12 Stat. 589, 627 (July 17, 1862).

49. U.S. CONST, amend XIII (ratified on December 6, 1865).

50. An Act To provide for the punishment of persons for tampering with, persuading or

in jail and a five-hundred-dollar fine.<sup>51</sup> This law resembled antebellum fugitive slave laws, and was completely contrary to any understanding of free labor. The law dovetailed with another act passed a day later, which authorized Louisiana sheriffs, justices of the peace and other “officers of this State” to apprentice all females under age eighteen and males under twenty-one who were orphans or whose parents were deemed unable to support them. The law also specifically upheld the voluntary indenture of adults for up to five years.<sup>52</sup>

Under these laws, teenage blacks could be taken from their parents (on a theory that the parents were too poor to support their children) and apprenticed to a planter, thus depriving the children of any chance of attending school. If an apprenticed child ran away from the plantation to return to his or her parents, the parents could then be fined or jailed, and if unable to pay the fine might find themselves forced to labor for someone who would pay the fine.

An 1866 act took Louisiana one step closer to re-imposing bondage by exempting planters from licenses or taxes “as retail merchants, for any articles of clothing or other merchandise which he may buy or sell exclusively to the freedmen . . . on his plantation.”<sup>53</sup> This law helped set the stage for debt peonage, as planters could now pay black workers in scrip, redeemable for goods sold by the planters, or simply sell clothing and other goods directly to black workers. This law provided the means for planters to make blacks dependant for the clothes they wore, the manufactured products they used, and the processed foods, like flour and sugar, that they ate.

Mississippi had a more direct way of keeping former slaves tied to the land as menial laborers. Its Civil Rights Act of 1865 began by giving blacks the right to acquire personal property and to “sue and be sued, implead and be impleaded in all the courts of the state.”<sup>54</sup> However, the same section of the law prohibited blacks from renting land except in towns and cities.<sup>55</sup> This prevented blacks from renting

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enticing away, harboring, feeding or secreting laborers, servants, or apprentices, Dec. 20, 1865, 1865 Acts of Louisiana, Extra Session 24.

51. *Id.*

52. An Act Relative to apprentices and indentured servants, Dec. 21, 1865, 1865 Acts of Louisiana, Extra Session 28.

53. An Act To authorize planters and farmers to furnish their freedmen and other employees with articles of merchandise, without incurring the penalties of retail merchants, March 21, 1866, 1866 Acts of Louisiana, 1st Sess., 2d Legislature 236.

54. An Act to confer Civil Rights on Freedmen, and for other purposes, Nov. 25, 1865, 1865 Miss. Laws 82.

55. *Id.*

land in the countryside, where virtually all Mississippi blacks lived. Another section of the law required that all blacks prove they “have a lawful home or employment.”<sup>56</sup> The state’s vagrancy law, passed the previous day, allowed government authorities to auction off the labor of any vagrant, which included any black who did not have a labor contract.<sup>57</sup>

Georgia declared that all persons “wandering or strolling about in idleness, who are able to work, and who have no property to support them” were to be considered vagrants. As such, they could be arrested and sentenced to work on the public roads for up to a year, or be bound-out for up to a year to someone who would promise to give them food, clothing and medical care. The person getting such free labor would give the state “some valuable consideration as the Court may prescribe.”<sup>58</sup>

The Alabama code of 1865-66 acknowledged the new status of blacks, declaring that “all freedmen, free negroes, and mulattoes” had “the right to sue and be sued, plead and be impleaded.”<sup>59</sup> These were rights that slaves had not had. The law also allowed blacks to testify in court, but “only in cases in which freedmen, free negroes and mulattoes are parties, either as plaintiff or defendant.”<sup>60</sup> In addition, blacks were allowed to testify in prosecutions “for injuries in the persons and property” of blacks.<sup>61</sup> Mississippi enacted similar legislation, which more directly and unambiguously provided that blacks could testify against white criminal defendants, “in all criminal prosecutions where the crime charged is alleged to have been committed by a white person upon or against the person or property of a freedman, free negro, or mulatto.”<sup>62</sup> Georgia adopted almost identical legislation.<sup>63</sup>

These laws certainly expanded the rights and legal protections of blacks. For the first time in the history of these states, blacks could testify against whites. However, such laws did not give blacks the same legal rights as whites. Under these laws, blacks could not testify in a suit

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56. *Id.* at 83.

57. An Act to Amend the Vagrant Laws of the State, Nov. 24, 1865, 1865 Miss. Laws 90.

58. An Act to alter and amend the 4435th Section of the Penal Code of Georgia, March 12, 1866, 1866 Acts of Georgia, Annual Session 234.

59. *Id.*

60. *Id.*

61. An act to protect freedmen in their rights of person and property in this State, Dec. 9, 1865, 1866 Alabama Acts 90.

62. An Act to confer Civil Rights on Freedmen, and for other purposes, Nov. 25, 1865, 1866 Miss. Laws 82, 83.

63. An Act to make free persons of color competent witnesses in the Courts of this State, in certain cases therein mentioned, Dec. 15, 1865, 1866 Acts of Georgia, Annual Session 239.

between two whites or at the prosecution of a white for harming another white. Thus, the law in effect declared that blacks were not “equal” to whites and that their testimony was not as “good” as that of whites. A white suing another white could not use the testimony of a black to support his case. More importantly, these restrictions undermined fundamental justice and created dangerous possibilities for free blacks and their white allies. For example, under these laws southern vigilantes could kill a white Republican or a white teacher of blacks in front of black witnesses, and those witnesses could not testify at the trial. Thus, while such laws gave some protection to blacks, they did not give them legal equality and they did not even fully protect their civil rights.

These laws also undermined the position of the freed people by giving them the right to enter into contracts and to be sued. Certainly such rights were vital to freedom. But, blacks in the deep South were mostly illiterate, had virtually no experience with either the law or a free economy, and were only a few months out of slavery. Thus, they were vulnerable to signing contracts that committed them to long-term labor agreements, and being sued for breach of these contracts.

Other provisions of the Black Codes more blatantly undermined black freedom. Alabama’s law “Concerning Vagrants and Vagrancy” allowed for the incarceration in the public workhouse of any “laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.”<sup>64</sup> Mississippi’s Civil Rights Act of 1865 provided that if any laborer quit a job before the end of the contract period he would lose all wages earned up to that time.<sup>65</sup> Thus, if a black laborer signed a contract to work for planter for a year and left after eleven months, then he would get no wages. This allowed employers to mistreat and overwork laborers, knowing they dare not quit. Indeed, a shrewd employer could purposefully make life miserable for workers at the end of a contract term, in hopes they would quit and forfeit all wages. Mississippi law further declared that any blacks “with no lawful employment or business” would be considered vagrants, and could be fined up to fifty dollars.<sup>66</sup> Any black who could not pay the fine would be forcibly hired out to whoever would pay the fine, thus creating another form of forced labor. The same act created a one-dollar poll tax for all free blacks. Anyone not paying the tax could also be declared a vagrant, and thus assigned to some white planter to work at

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64. Act Concerning vagrants and vagrancy, Dec. 15, 1865, 1866 Alabama Acts 66, 119-120.

65. An Act to confer Civil Rights on Freedmen, and for other purposes, Nov. 25, 1865, 1866 Miss. Laws 82, 83.

66. An Act to Amend the Vagrant Laws of the State, Nov. 24, 1865, 1866 Miss. Laws 90.

hard labor.<sup>67</sup> These laws also prohibited blacks from renting land or houses except in towns or cities. This in effect forced blacks, most of whom lived in the countryside, to remain agricultural laborers, rather than becoming independent farmers.

Laws such as these set the stage for a new system of forced labor. Southern states passed these laws just before, or immediately after, the ratification of the Thirteenth Amendment.<sup>68</sup> They were attempts to reduce blacks to a status somewhere between that of slaves (which they no longer were) and full free people (which most white southerners opposed). The labor contract laws, tied to the vagrancy laws, were designed to create a kind of serfdom, tying the former slaves to the land, just as they were once tied to their masters.

These laws astounded northerners. Having been defeated in battle, and forced to give up slavery, the South seemed as defiant as ever, unwilling to accept the outcome of the war and the necessity of treating blacks as citizens. Southerners still believed slavery was the best status for blacks. Georgia leader Howell Cobb believed, even after the War ended, that “[t]he institution of slavery . . . provided the best system of labor that could be devised for the negro race.”<sup>69</sup> He predicted that emancipation would “tax the abilities of the best and wisest statesmen to provide a substitute for it.”<sup>70</sup> The Black Codes, which southern states began to pass later that year, were in fact an attempt to “substitute” a new form of repression for slavery. The reaction to these laws led to the federal Civil Rights Act of 1866 and later to the Fourteenth Amendment.

### *C. Racist Violence and the Fourteenth Amendment*

The southern Black Codes were not the only cause of northern astonishment at southern behavior. Even more important, perhaps, was the violence directed at blacks after the War. While Congress was debating what became the Civil Rights Act of 1866, Senator Charles Sumner of Massachusetts received a box containing the finger of a black man. The accompanying note read: “You old son of a bitch, I send you a piece of one of your friends, and if that bill of yours passes I will have a piece of you.”<sup>71</sup> While not typical, this box and note illustrated all too

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67. *Id.* at 92-93.

68. December 6, 1865.

69. RECONSTRUCTION, *supra* note 47, at 38 (reprinting letter from Howell Cobb to General J.H. Wilson (June 14, 1865)).

70. *Id.*

71. JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 341 (1964).



well the murderous and lethal violence that southern whites were prepared to use to suppress black freedom.

In December 1865, Congress authorized the fifteen-member Joint Committee on Reconstruction to investigate conditions in the South. The Joint Committee consisted of six senators and nine congressmen. Congressman John Bingham of Ohio was a key member of this committee. He was among the most prominent House members on the committee, along with Thaddeus Stevens of Pennsylvania and Justin Morrill of Vermont. The investigation of this committee led to the Civil Rights Act of 1866, reported out of the Committee on April 30, 1866, and to the proposed Fourteenth Amendment, which Congress passed on June 13, 1866. Eleven committee members signed the final report. Three southerners and a New Jersey Democrat did not sign the report.

The Report was massive, covering about 800 pages. The Committee members interviewed scores of people - former slaves, former confederate leaders and slave owners, United States Army officers, and others in the South. In its report, the Committee reminded the nation that the former slaves had "remained true and loyal" throughout the Civil War and "in large numbers, fought on the side of the Union."<sup>72</sup> The Committee concluded that it would be impossible to "abandon" the former slaves "without securing them their rights as free men and citizens."<sup>73</sup> Indeed, the "whole civilized world would have cried out against such base ingratitude"<sup>74</sup> if the United States government failed to secure and protect the rights of the freed people.

The Committee also found that southern leaders still "defend[ed] the legal right of secession, and [upheld] the doctrine that the first allegiance of the people is due to the States."<sup>75</sup> Noting the "leniency" of the policies of Congress and the President after the Civil War, the Committee discovered that "in return for our leniency we receive only an insulting denial of our authority."<sup>76</sup> Rather than accept the outcome of the War, southern whites were using local courts to prosecute loyalists and "Union officers for acts done in the line of duty" and that "similar prosecutions" were "threatened elsewhere as soon as the United States troops are removed."<sup>77</sup>

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72. H.R. JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xii (1st Sess. 1866) (*hereinafter* "COMMITTEE REPORT").

73. *Id.*

74. *Id.*

75. *Id.* at xvii.

76. *Id.* at xviii.

77. COMMITTEE REPORT, *supra* note 72, at xviii.

The Committee understood that the task before the Congress and the nation involved three things: preventing former Confederates from reinstating the same type of regime that existed before the War; protecting the liberty of former slaves and guaranteeing them the power to protect their own rights within the new political regime that needed to be created; and protecting the rights and safety of white Unionists who were threatened by the violence of whites who had not accepted the political or social outcome of the War. After investigating the situation in the South, the Committee concluded that nothing short of a Constitutional amendment - what became the Fourteenth Amendment - would protect the rights of the former slaves.

The evidence presented in the massive Committee Report illustrated that the refusal of former Confederates to accept black freedom posed dangers to blacks, white Unionists, and the nation itself. Congressman Bingham chaired the subcommittee that investigated the situation in Tennessee. Everyone agreed that Tennessee had more Union supporters than any other state,<sup>78</sup> and in the end the Committee recommended its immediate readmission to the Union.<sup>79</sup> Nevertheless, a sampling of the testimony gathered from Tennessee supports the understanding that the Committee which wrote the Fourteenth Amendment was fully aware of the need for a powerful weapon to force change and protect freedom in the South. Testimony from other states reveals that the rest of the South was even more prone to violence towards blacks and Unionists, and that liberty was even more imperiled elsewhere in the former Confederacy.

Major General Edward Hatch testified that whites in much of Tennessee were unwilling to accept black liberty. General Hatch told the committee that “the negro is perfectly willing to work, but he wants a guarantee that he would be secured in his rights under his contract” and that his life and property would be secured.<sup>80</sup> Blacks understood they were “not safe from the poor whites”<sup>81</sup> without laws to secure their rights. He noted that whites wanted “some kind of legislation” to “establish a kind of peonage; not absolute slavery, but that they can enact such laws as will enable them to manage the negro as they please - to fix the prices to be paid for his labor.”<sup>82</sup> And, if blacks resisted this

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78. *Id.* at xvii, xix, xx (referring to a Joint Resolution concerning the State of Tennessee).

79. *Id.* at Part I, i (Reconstruction-Tennessee).

80. *Id.* at Part I, 107 (testimony of General Edward Hatch).

81. *Id.*

82. COMMITTEE REPORT, *supra* note 72, at Part I, 107-108.

reestablishment of bondage, then “[t]hey are liable to be shot.”<sup>83</sup>

Major General Clinton Fisk, for whom one of the first black colleges in the South would eventually be named, testified about the murderous nature of former “slaveholders and returned rebel soldiers.”<sup>84</sup> Such men “persecute bitterly” the former slaves, “and pursue them with vengeance, and treat them with brutality, and burn down their dwellings and school-houses.”<sup>85</sup> Fisk pointed out this was “not the rule”<sup>86</sup> everywhere in Tennessee, but nevertheless such conduct existed. And, as everyone admitted, Tennessee was the most progressive state on these issues in the former Confederacy.

Lieutenant Colonel R. W. Barnard, however, was less optimistic than General Fisk. Perhaps as a lower ranking officer, Barnard was more likely to see the day-to-day dangers blacks faced. Asked if it was safe to remove troops from Tennessee, he replied:

I hardly know how to express myself on that subject. I have not been in favor of removing the military. I can tell you what an old citizen, a Union man, said to me. Said he, “I tell you what, if you take away the military from Tennessee, the buzzards can’t eat up the niggers as fast as we’ll kill ‘em.”<sup>87</sup>

Barnard thought this might be an exaggeration, but told the Committee, “I know there are plenty of bad men there who would maltreat the negro.”<sup>88</sup>

Thus, in Tennessee, where loyal Union men were more numerous than anywhere else in the former Confederate states, the dangers to blacks were great. In other states, the dangers were extraordinarily greater. Major General John W. Turner reported that in Virginia “[a]ll of the [white] people” were “extremely reluctant to grant to the negro his civil rights - those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to testify in courts, &c.”<sup>89</sup> Turner noted that whites were “reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing.”<sup>90</sup> They would only “concede” such rights to blacks

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83. *Id.* at Part I, 108.

84. *Id.* at Part I, 112 (testimony of Major General Clinton Fisk).

85. *Id.*

86. *Id.*

87. *Id.* at 121 (testimony of Colonel R. W. Barnard).

88. *Id.*

89. *Id.* at Part II, 4 (Reconstruction – Virginia - North Carolina - South Carolina).

90. *Id.*

“if it is ever done, . . . because they are forced to do it.”<sup>91</sup> He observed that poor whites were especially “disposed to ban the negro, to kick him and cuff him, and threaten him.”<sup>92</sup> George B. Smith, a Virginia farmer, admitted that whites in the state, “maltreat them [blacks] every day” and that blacks had “not a particle” of a chance “to obtain justice in the civil courts of Virginia.”<sup>93</sup> A black or “a Union man” had as much chance of obtaining justice as “a rabbit would in the den of lion.”<sup>94</sup> Others in Virginia noted, over and over again, how the whites were trying to reduce blacks to servitude with laws and violence. The white sheriff of Fairfax County, Virginia, reported that the state was passing laws to disfranchise black voters and “passing vagrant laws on purpose to oppress the colored people and to keep them in vassalage, and doing everything they can to bring back things to their old condition, as nearly as possible.”<sup>95</sup>

Investigation of North Carolina revealed the lethal danger to blacks in the South, including testimony of a black shot down in cold blood.<sup>96</sup> A Union Army captain reported “numerous cases” of the “maltreatment of the blacks,” including flogging and shooting, and that “instances of cruelty were numerous.”<sup>97</sup> He predicted that without United States troops, schoolhouses for blacks would be burned and teachers harassed.<sup>98</sup> A minister in Goldsborough, North Carolina reported the cold blooded shooting of black in order to take his horse. When another black man led soldiers to the culprit, this black man was also murdered.<sup>99</sup> Lieutenant Colonel Dexter H. Clapp told the committee about a gang of North Carolina whites who castrated and then murdered a black, but that when the culprits escaped from jail the local police refused to try to capture them.<sup>100</sup> This gang then shot “several negroes.”<sup>101</sup> One of this gang, a wealthy planter, later killed a twelve-year-old negro boy and wounded another. A local police sergeant “brutally wounded a freedman when in his custody.”<sup>102</sup> While the man’s arms were tied behind his back, the policeman struck him on the back of

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91. *Id.*

92. *Id.* at 5.

93. COMMITTEE REPORT, *supra* note 72, at Part II, 17 (testimony of George B. Smith).

94. *Id.*

95. *Id.* at 35.

96. *Id.* at 198 (capsulized testimony).

97. *Id.* at 202.

98. COMMITTEE REPORT, *supra* note 72, at Part II, 203.

99. *Id.* at 206.

100. *Id.* at 208.

101. *Id.* at 209.

102. *Id.*

his head with a gun. It was later shown that this man had “committed no offence whatever.”<sup>103</sup> This policeman later “whipped another freedman . . . so that from his neck to his hips his back was one mass of gashes,” and then left him outside all night.<sup>104</sup> A black who defended himself when assaulted by a white was given thirty lashes with a whip over a two hour period, then “tied up by the thumbs for two hours, his toes touching the ground only” then given nine more lashes and tied by the thumbs for another two hours.<sup>105</sup> Planters in the same area whipped two black women until their backs were “a mass of gashes.”<sup>106</sup>

In South Carolina, General Rufus Saxton reported numerous atrocities, including treatment of free people as if they were still slaves. In one family, a black father “with three children, two male and one female, were stripped naked, tied up, and whipped severely,” while a woman was given a hundred lashes while tied to a tree.<sup>107</sup> Another man was whipped with a stick, while two children were also whipped.<sup>108</sup> Saxton reported shootings, whippings, various forms of torture, whipping of naked women, floggings, and beatings of all kinds.<sup>109</sup> In addition to attacks on blacks by individual planters, ruffians, and gangs, Saxton reported a more ominous trend:

Organized bands of ‘regulators’ - armed men - who make it their business to traverse these counties, and maltreat negroes without any avowedly definite purpose in view. They treat the negroes, in many instances, in the most horrible and atrocious manner, even to maiming them cutting their ears off, &c.<sup>110</sup>

Testimony about the rest of the South mirrored the violence and denial of rights sketched out here. Blacks disappeared, were beaten, maimed and killed. Legislatures passed laws to prevent them from owning land, moving to towns, voting, testifying in all court cases, or in any other way asserting and protecting their rights as free people. The Committee heard numbing reports of violence and hatred.

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103. COMMITTEE REPORT, *supra* note 72, at Part II, 209.

104. *Id.*

105. *Id.* at 210.

106. *Id.* at 211.

107. *Id.* at 223.

108. COMMITTEE REPORT, *supra* note 72, at Part II, 223.

109. *Id.* at 222-229.

110. *Id.* at 234.

### III. UNDERSTANDING THE FOURTEENTH AMENDMENT

When John Bingham arrived in Congress he brought with him the idealistic goals of northern Ohio Republicans and their abolitionist, Liberty Party, and Free Soil predecessors, who had been fighting for racial equality for the previous three decades. His support for racial equality was further strengthened by the Civil War, as more than 200,000 black soldiers and sailors - many only recently liberated from bondage - made a significant difference in the outcome. Most importantly, he drafted the Fourteenth Amendment in the context of the Black Codes of 1865-66 and the violence directed at blacks and white Unionists in the immediate post-war South.

It was in the context of this history that John Bingham wrote Section one of the Fourteenth Amendment. What did he desire to accomplish with this provision? We can never fully know, of course, but the context of the Amendment suggests that his goals were sweeping and broad. He and others in the majority on the Joint Committee understood that they had to protect the life, liberty, safety, freedom, political viability and property of the former slaves. They had to protect their rights to have meaningful contracts.<sup>111</sup> They had to protect their rights to the courtroom and the voting booth, as well as in the market place. They had to be protected from whipping and other forms of cruel and unusual punishment. They desperately needed the protections of the Bill of Rights - fair trials by fair juries, with legal counsel to represent these largely illiterate former slaves. They needed to be able to express themselves in public and to organize politically. They needed equal schooling.

It would have been impossible to detail all these needs and to explicitly protect them in a constitutional amendment. Bingham did not try. He used large phrases, encompassing grand ideas. He took to heart John Marshall's admonitions in *McCulloch v. Maryland*, who argued that a Constitution had to be read broadly.<sup>112</sup> Bingham did not try to turn the Constitution into a legal code. Rather, he produced language that would "endure for the ages,"<sup>113</sup> and could grow and develop over time. His goal was to reverse the racism and violence of slavery and its immediate aftermath. At a more basic level, though, Bingham and the

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111. In this sense, it seems that the Court's *Lochner* decision was clearly wrong. See *Lochner v. New York*, 198 U.S. 45 (1905). The idea of "freedom of contract" did not include the right to be exploited by powerful employers. That had been the situation in the South before the Fourteenth Amendment. The Fourteenth Amendment was designed to prevent just such a situation.

112. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

113. *Id.* at 415.

Joint Committee reflected the simple lesson of Major General Turner's testimony. Turner noted that whites in Virginia were "reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing."<sup>114</sup> Bingham's goal was to make sure that African Americans, and all other minorities, had full access to their "half of the sidewalk" in the social world, the political world, in the schools, and in the workplace. It was a radical change to the Constitution and to American notions of federalism. Indeed, their goal was nothing short of a Revolution in liberty and justice, by trying to bring those concepts and rights to "all" Americans.

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114. COMMITTEE REPORT, *supra* note 72, at Part II, 4.