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## THE FOURTEENTH AMENDMENT: THE GREAT EQUALIZER OF THE AMERICAN PEOPLE

*Abel A. Bartley\**

The Fourteenth Amendment to the United States Constitution, which was ratified on July 28, 1868, demonstrated the change in attitude, which hit many Americans after the chaotic Civil War. It was America's first attempt to legally challenge White supremacist ideas by creating a truly equal multiracial society. With its emphasis on equal protection and equal justice, the Fourteenth Amendment was intended to be the great equalizer of American people, legally changing African American men into White men so that they could enjoy all the rights, privileges, and immunities of United States citizenship. However, determining the meaning of equality uncovered the racism which characterized Americans. Even though the Fourteenth Amendment changed the law, it could not change White Americans who refused to accept African American equality. The dichotomy in American racial ideas was summed up by two Democratic slogans. First, "The Union as It Is, the Constitution as It Was" represented many American's desire to return to a prewar constitutional status quo with Whites in a favored position.<sup>1</sup> The other slogan captured in the 1866 *Cincinnati Enquirer*, "Slavery is dead, . . . the negro is not, there is the misfortune" underscored the real problem.<sup>2</sup> Abolishing slavery did not solve America's race problem. The Civil War changed American racial laws, but it did not change American racial attitudes.<sup>3</sup> It was not until the

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1. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 31 (Perennial Library 1988).

2. *Id.*

3. See CARTER G. WOODSON & CHARLES H. WESLEY, *THE NEGRO IN OUR HISTORY* 378-79

Warren Court's decision in *Brown v. Board of Education* that the courts finally instituted Fourteenth Amendment principles and attempted to legally create racial equality, as well as color blindness when dispensing justice and carrying out social policy.<sup>4</sup>

The Civil War profoundly changed the role and power of the United States government. During the war years of 1861-1865, the role of the federal government expanded as the Lincoln administration attempted to deal with the dual issues of maintaining the Union and eradicating slavery. Attitudes about the Constitution changed from the traditional limited interpretation to a broader interpretation. Lincoln's expansion of federal authority pushed ordinary citizens to accept the change in federal power.<sup>5</sup> The clearest example of the acceptance of this increased federal clout can be seen in the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which dramatically changed racial realities in the United States by making the federal government the defender of civil liberties.<sup>6</sup> The most far-reaching of these amendments was the Fourteenth. Even though both Ohio and New Jersey tried to rescind their ratifications, 27 of the 37 states ratified the Amendment.<sup>7</sup> The Fourteenth Amendment received solid support from Republican leaders in the House, where the measure passed 127 to 88.<sup>8</sup> There is no record of the Senate vote.<sup>9</sup>

On Sunday, April 9, 1865 General Robert E. Lee surrendered his Confederate forces at the Appomattox Courthouse in Richmond, Virginia, essentially ending the nation's bloodiest and most destructive war.<sup>10</sup> Between April 12, 1861 and April 9, 1865, more than one million Americans perished in a war to determine the nature and makeup of America's democracy. The war, which destroyed America's physical landscape, was equally devastating to the country's social and racial landscape. After four years of bloody conflict the defeated South was forced to accept the overthrow of the Confederacy, the end to chattel slavery, and the equal status of African Americans. Historian John Hope Franklin says, "[f]or Blacks, Lee's surrender was a victory. At last they had achieved what human beings everywhere have always wanted—

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(The Associated Press, Inc. 1962) (1922).

4. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

5. J. G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 537 (D.C. Heath & Co. 1961 2d ed.).

6. *See generally, id.* at 634-35.

7. *See generally, id.* at 635.

8. *Id.*

9. *Id.*

10. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 848-49 (1988).

freedom.”<sup>11</sup> Northern victory turned the White South on its head. As one African American soldier said as he saw his former owner within a group of Confederate prisoners he was guarding, “Hello, Massa; bottom rail on top dis time.”<sup>12</sup>

The Civil War forced American leaders to stand up and recognize their responsibility to the nearly four million African Americans who had been locked in a cruel system of chattel slavery and to define the position of the more than one million African Americans bewildered by their nondescript free—Black status. The Reconstruction period, which occurred in stages, signified America’s best effort to solve its race problem and forever define the rights and privileges of American citizenship. It is clear that had there been no Civil War, the nation would never have had the political resolve to redefine the meaning of citizenship and include African Americans in this democracy.

The task of reestablishing a social order radically changed by emancipation and the overthrow of the slave-owning oligarchy proved difficult. America’s leaders needed to determine the nature and composition of the recreated democracy, and to include those who had originally been left out. The most important issue facing America’s leaders was determining the place of African Americans. The Reconstruction leaders had at least three choices about what they could do with African Americans after the war.

The first and most obvious choice was to return the newly freed slaves to slavery. Many argued that Lincoln’s Emancipation Proclamation had been an illegal act perpetrated during a wartime crisis. Some legal scholars argued that the United States Constitution gave no legal sanction to the method by which Lincoln freed the slaves. Once the war ended, Republican leaders could have reconstructed the agricultural South and set up a slightly modified system of slavery while they debated the legality of emancipation.<sup>13</sup>

The second alternative was to create a permanent or temporary second-class status, reserved for African Americans. There were few White Americans whose thinking had evolved enough to accept African American equality. Therefore, they could have accepted some type of semi-permanent or temporary second-class status for African Americans. This subordinate status could have been used as a training period to prepare African Americans for citizenship, or to continue the debate

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11. JOHN H. FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 244 (8th ed. 2000).

12. MCPHERSON, *supra* note 10, at 862.

13. *See generally*, FONER, *supra* note 1, at 198-99.

over colonization. President Andrew Johnson expressed this view when he vetoed the 1866 Civil Rights Act. This second-class status would have mirrored the experience of most African Americans who lived in Northern states. Even though some Northern states offered citizenship to African Americans, only Massachusetts granted full civil rights.<sup>14</sup>

The last option was to create an interracial democracy based on freedom and equality. This option required a transformation in the thinking of ordinary Americans. The problem with creating an interracial democracy was: how do you create equality in a nation ruled by privileged White men? Creating equality required either a leveling up of African American rights, or a leveling down of White men's rights. Reconstruction leaders had to determine whether they wanted to reduce the status of White men, or increase the status of African Americans.<sup>15</sup>

Many people recognized the historic opportunity presented by Northern military victory to restructure our democracy and continue the work started by our founding fathers. Frederick Douglass wrote that

[T]he question before the nation was: "Whether the tremendous war so heroically fought and so victoriously ended shall pass into history a miserable failure, barren of permanent results, . . . a strife for empire, as Earl Russell characterized it, of no value to liberty or civilization, . . . or whether . . . we shall . . . have a solid nation, entirely delivered from all contradictions and social antagonisms, based upon loyalty, liberty, and equality."<sup>16</sup>

The question was whether we use Northern victory to correct the ambiguities in American democracy, or return to a prewar status quo leaving the Constitution as it was?

Douglass, who had experienced the demonical nature of slavery and White supremacy, understood that unless the federal government asserted its authority over the states there was no way to counter the prevailing power of the slavocracy. The events of 1864-1865 convinced him that the South's hostility towards African Americans had not subsided. He argued that without a guaranteed vote, African American freedom would be meaningless. According to Douglass, "unless the Federal government be armed with despotic power, to blot out state authority" the only other option was "to give to every loyal citizen the

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14. JOHN H. FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 252 (8th ed. 2000).

15. See RANDALL & DONALD, *supra* note 5, at 579; FONER, *supra* note 1, at 66-67.

16. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 255 (1991).

elective franchise,—a right and power which will be ever present, and will form a wall of fire for his protection.”<sup>17</sup> Douglass was calling for something the United States had never attempted before; an interracial democracy based upon racial equality and natural rights. Anything less would be an unfinished revolution.

Even during the war, Douglass understood that we could not just reestablish the old Union. We had to create something fundamentally different and new to reward those who bravely fought to protect the Union. As he noted,

Men talk about saving the Union, and restoring the Union as it was . . . what business . . . have we to fight for the old Union. We are fighting for something incomparably better . . . We are fighting for unity, . . . in which there shall be no North, no South, no East, no West, no black, no white, but a solidarity of the nation, making every slave free, and every free man a voter.<sup>18</sup>

The abolition of slavery had to be followed by the abolition of color distinctions. As Henry Highland Garnet wrote, “Emancipation is one fact . . . old attitudes survive the proclamation of liberty . . . Does America want to hold the Black suspended between slavery and freedom, in a sphere where he possesses neither the right to live according to his wishes, nor the power to act by himself?”<sup>19</sup> That was the essence of what reconstruction leaders wanted. They were not interested in simply reestablishing the old order; they wanted to create something radically different where African Americans would be equal to White men.<sup>20</sup>

W.E.B. Dubois noted that the four million people freed from slavery were free persons, but they were not political persons.<sup>21</sup> Even after the 1865 ratification of the Thirteenth Amendment, African Americans still had no recognized political status. Freedom had accentuated only natural rights, not political rights. Life, liberty, and the pursuit of happiness meant little without the vote. Despite emancipation, the United States Constitution continued to see African

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17. *Id.*

18. PHILIP S. FONER ED., *THE LIFE AND WRITINGS OF FREDRICK DOUGLASS VOL. 3 THE CIVIL WAR* NEW YORK, INTERNATIONAL PUBLISHERS, 42 (1952).

19. JAMES M. MCPHERSON, *THE NEGRO'S CIVIL WAR: HOW AMERICAN NEGROES FELT AND ACTED DURING THE WAR FOR THE UNION* 295 (1965).

20. *Id.*

21. W.E. DUBOIS, *BLACKS RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* 289 (1935).

Americans as only three-fifths of a person. The political power of these three-fifths of persons was still in the hands of the former slaveholders. If that situation remained, Northern victory would have actually increased the South's power at the expense of the North. Granting citizenship rights to African Americans would make them five-fifths of a person and reduce the power of the slaveholding oligarchy which dominated the South. It would take the three-fifths power, formerly controlled by slave owners, and give it to the freedmen. Under the old system, the South received representation for slaves who were themselves given no representation. Granting African Americans citizenship made them five-fifths of a person, and reduced the power of the White South while giving power to African Americans.<sup>22</sup>

President Andrew Johnson saw the tenor of the radical Republican controlled Congress and advocated a return to a slightly modified status quo. He was frightened by their talk about racial equality and the radical notions of granting political and civil rights to African Americans. Johnson, a Southerner, saw no need to change the old Union, or to make drastic changes to the state-federal relationship.<sup>23</sup> As a White supremacist, he wanted to reassert White dominance by rejecting the 1866 Civil Rights Act, hampering attempts to ratify the Fourteenth Amendment, and closing down the Freedmen's Bureau. Collectively, these three policies were the most pronounced examples of the Republican desire to create a fundamentally new republic based upon racial equality.<sup>24</sup>

The battle, which erupted between Johnson and the Republican Congress, was a fight for the control of the direction of reconstruction and the meaning of citizenship. Despite his antagonism with the Southern aristocracy, Johnson had no desire to see them replaced with African Americans. The Republican Congress wanted to make sure that Northern victory would result in permanent measurable changes in the South. As a result they could countenance no challenge from the White House. The Radical Republicans silenced their opponent by pushing forward an impeachment proposal. Congress' victory represented a victory of idealism over the old order. Johnson epitomized the old era, one based upon racial castes with Whites at the top and African Americans locked in "semi-personhood." The Radical Republicans embodied a new era, one based upon racial equality and African

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22. *Id.* at 289-90.

23. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 46 (1975).

24. *See generally, id.*

American citizenship where Republican ideas of free land and free people dominated.<sup>25</sup>

By 1866, the Radical Republicans had wrestled the reins of government from President Johnson.<sup>26</sup> They used their control to follow Douglass' advice and create an interracial democracy dedicated to racial equality and a broad definition of citizenship.<sup>27</sup> Despite their moral and human failures, these men represented the best of their generation. Their efforts can be criticized, but they cannot be ignored. They attempted to tread the ground that the founding fathers feared. They wanted to amend the Constitution, to create a definition of citizenship large enough to incorporate all African Americans, and to guarantee equal treatment for all citizens.<sup>28</sup> Concerning the Fourteenth Amendment, Richard Kluger wrote, "without doubt its language asserted that the black man was not only no longer a slave but could not be shunted into some indeterminate limbo between slavery and full citizenship."<sup>29</sup>

Between 1865 and 1870, the nation solidified its commitment to racial equality by codifying its pronouncements in the Fourteenth Amendment. As Richard Aynes wrote, "[i]n the political arena, the architects of the national antislavery strategy considered Article IV, section 2 as recognition of national citizenship."<sup>30</sup> Clearly, the original intention of the Fourteenth Amendment was to define citizenship rights and to ensure that all American citizens be equally afforded its benefits and privileges. Even though there were others denied citizenship rights, it is obvious that the Fourteenth Amendment was intended to protect African Americans and give them American citizenship. Richard Kluger wrote that it was designed to "give the freed black people of America the same rights as everyone else."<sup>31</sup>

Traditionally, the rights and privileges of American citizenship had been reserved exclusively for White men. Women, Africans, and Native Americans were never considered for full citizenship in the original republic. During the Constitutional Convention, the founding fathers made no provisions for African American citizenship. Each state set its own rules to govern citizenship. However, their definition of citizenship was limited and reserved to a few select White men. State citizenship

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25. *Id.*

26. *Id.*

27. *Id.* at 47.

28. *Id.*

29. *Id.*

30. Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment* 112, in DAVID E. KYVIG, *UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT* (2000).

31. KLUGER, *supra* note 23, at 47.

did not confer all citizenship rights. Despite their polemics on egalitarianism, the founding fathers' definition of equality never extended far enough to include African Americans or women. The fifty-five White men who met in Philadelphia, in May 1787, to write the Constitution, never considered African American citizenship. The only times African Americans were mentioned were in reference to their propertied status.

The Reconstruction leaders were embarking on a new path. Bringing African Americans up to legal equality with Whites required a legal change in the status of African Americans. The Fourteenth Amendment was an attempt to do just that, so that they could enjoy all of the rights and privileges of American citizenship.<sup>32</sup> The failure of the law to accept African American and White equality was the failure of the federal court. In the North, African Americans were citizens. In the South, they were African Americans given rights intended to humiliate the proud White man who had climbed so high on the Black man's back."<sup>33</sup>

To understand why the Fourteenth Amendment did not solve the race problem requires a basic understanding of Reconstruction. After the Civil War, White Southerners immediately attempted to restore their antebellum social order, passing a series of laws collectively referred to as "Black codes."<sup>34</sup> Although these "Black codes" were based on established Northern laws, they were in poor taste and were an insult to Northern notions of victory.<sup>35</sup>

These so-called "Black codes" were designed to restore slavery under a different guise and represented the South's reluctance to accept the free status of African Americans. They also demonstrated an arrogance which insulted Northerners who had suffered devastating losses during the war. The "Black codes" proved that changed circumstances had not changed Southern attitudes about race and social custom. They demonstrated the South's refusal to accept defeat. Southerners, like most Northerners, did not believe that African Americans were equal to Whites. Southerners, however, went even further and refused to accept them as human beings.<sup>36</sup>

The "Black codes" dealt with the very issues which helped shape

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32. *Id.* at 46-47.

33. *Id.* at 59.

34. JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 50-51 (David J. Boorstin ed., The University of Chicago Press 1961).

35. *Id.*

36. *Id.* at 51.

American ideas on race and prejudice. The Thirteenth Amendment was designed to forever end the notion of people being property. For the first time, the federal government set social policy and defined the nature of America's republic. However, the "Black codes" were a clear withdrawal from those newly established principles. "Black codes" returned the belief in subhumans and restored the idea of human chattel. The Thirteenth Amendment prohibited slavery or involuntary servitude, but it made no mention of racial equality. Collectively, the "Black codes" were intended to reduce the status of African Americans to a level just above slavery and to demolish thoughts of racial equality.

Furthermore, African Americans who attempted to exercise their freedom, were met with violent opposition even though they were not challenging White rights. Simply asserting African American independence insulted White ideas of supremacy and racial order and resulted in violent reactions. White Southerners showed the same brutality towards African Americans as had existed before the war. Between April 30 and May 2, 1866, White Southerners in Memphis massacred 46 African Americans, burning four churches, 12 school buildings and 90 homes. The value of African American property destroyed was \$110,000. An investigative committee report described the riot as "the commission of crimes and perpetration of horrors, which can scarcely find parallel in the history of civilized or barbarous nations."<sup>37</sup>

The spark for this racial conflagration was a conflict between discharged African American soldiers of the Third heavy battalion and Irish police officers. This confrontation was used as an excuse for the wholesale murder of African Americans. On July 30, a riot broke out in New Orleans in which 34 African Americans were slain.<sup>38</sup> The precipitating issue was African Americans voting in the local elections.<sup>39</sup> In both cases local officials actively participated in the rioting and were responsible for much of the violence. Historian John Hope Franklin wrote, "[t]o most Northerners the riot was another step back towards slavery . . . ."<sup>40</sup>

The South had already relegated African Americans to a semi-slave status and now they were stripping them of their only means of protection. African Americans were banned from political participation,

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37. ALRUTHEUS A. TAYLOR, *THE NEGRO IN TENNESSEE: RECONSTRUCTION 1865-1880* 86 (1941).

38. FRANKLIN, *supra* note 34, at 63.

39. *Id.*

40. *Id.* at 64.

which meant they could not voice their opposition to the developing situation. A pattern of servitude and subjugation, established by the former slaveowners, restricted their social conduct. They were subject to a form of peonage, not unlike slavery, by severe vagrancy and labor laws. Lastly, they were subjected to a harsh criminal code designed to maintain strict racial control and second-class status. In essence, all of the gains of the Civil War were reversed by Southern policy. This reversal had taken place with the support and sanction of President Andrew Johnson. The Civil War had ended less than nine months earlier, and Southern leaders were already demonstrating their inability to accept their changed status.<sup>41</sup>

The passage of the Thirteenth Amendment demonstrated the dramatic change four years of war produced. On February 27, 1861, a Constitutional amendment was introduced that would have permanently protected slavery where it existed. The Amendment, introduced by Ohio's Republican Congressman Thomas Corwin, stated "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere within any State, with the domestic institutions thereof, including that of persons held in labor or service by the laws of said State."<sup>42</sup> This amendment had the support of President Abraham Lincoln and was ratified by three states: Ohio, Maryland, and Illinois. If ratified, this 13th Amendment would have guaranteed slavery and ensured that African Americans remained a permanent slave class in America. Less than five years later, Americans ratified a radically different amendment, which forever ended slavery and abolished the notion of people as property.<sup>43</sup>

Under America's system of slavery, African Americans were defined as chattel or property, with no rights that Whites had to respect. As property, they could be bought and sold, a status that was similar to animals. By defining African Americans as animals, America had essentially divorced those of African descent from the human family, classifying them as social pariahs. This status was sanctioned by law and reaffirmed by the words of Supreme Court Chief Justice Roger Taney, who wrote the majority opinion in the controversial *Dred Scott* decision.

The *Dred Scott* case was possibly one of the most important Supreme Court decisions regarding race before 1860. *Dred Scott* was

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41. DAVID KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995 164 (1995).

42. KYVIG, *supra* note 41, at 151.

43. KYVIG, *supra* note 41, at 151.

born into slavery in Virginia around 1800. Between 1818 and 1830, Scott's owner moved him from Virginia to Alabama and finally to St. Louis. Between 1833 and 1836, Scott served as a slave to an Army doctor named John Emerson at Fort Armstrong in Illinois. During that period he lived on the Army base. Under Illinois' State Constitution Scott could have sued for his freedom, because slavery was illegal in Illinois.<sup>44</sup>

After the Army evacuated Fort Armstrong in 1836, Scott's owner moved him to Fort Snelling in Minnesota. According to the Missouri Compromise, slaves could never be brought into that area. Just two weeks before leaving Minnesota, Congress passed the Wisconsin Enabling Act, which reaffirmed that slavery could not exist in Wisconsin, Minnesota, or Iowa. Scott lived in Minnesota from 1836 through 1838, during which time he met and married Harriet Robinson, a slave owned by an Indian agent stationed near Fort Snelling.<sup>45</sup>

In 1837, Dr. Emerson moved to Louisiana where he met and married Eliza Irene Sanford. They were married in 1838, and moved Dred and Harriet Scott to Louisiana. In 1840, the Scotts had a child name Eliza, who was born on a boat on the Mississippi River between Illinois and Wisconsin. From 1840-1846, the Scotts lived in St. Louis. In 1846, Scott attempted to purchase his and his family's freedom. Irene Emerson refused to sell. Scott sued claiming that he was free because he had lived in free territory.<sup>46</sup>

After numerous delays, the case finally went to court. Both lower courts sided with Scott. They followed the precedent established in 1772, which said that periods in free territory granted freedom to slaves. The law relied on by the lower courts said that because slavery was an artificial condition, the law required positive law was required to reverse the natural order of men. In 1852, the Missouri Supreme Court, in a clearly bigoted decision, declared Scott a slave. John A. Sanford, Irene's brother, represented her interest in regard to the case. In 1854, Scott's lawyers appealed the Missouri decision to federal court.<sup>47</sup>

The case went before the United States Supreme Court, where Chief Justice Roger Taney reigned. Taney was clearly influenced by the developing political conflict between the North and South. He wanted to use this case to settle several issues that divided the nation. His decision was based upon established constitutional realities. According

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44. See generally, VINCENT C. HOPKINGS, *DRED SCOTT'S CASE 1-4*, 35-37 (1967).

45. *Id.* at 1-7, 37, 49, 56.

46. *Id.* at 1-7, 10-13.

47. *Id.* at 23-27.

to Taney,

The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than rights . . . They are not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term citizen.<sup>48</sup>

According to Taney, Africans were never supposed to be citizens of the United States. They were brought to this country to serve as a laboring class who were not included in the group with the natural rights to life, liberty, and the pursuit of happiness. A cursory investigation of 1850's thought reveals that this was not a radical position, but in fact, the opinion of many Americans. States conferred citizenship, but that conferral was always subject to federal review. An African American, whether free or slave, was still considered part of that degraded group who were ineligible for full citizenship rights. States which awarded citizenship rights to African Americans were imposing an artificial status of equality which did not fit the established order. As Taney wrote, "Blacks were so inferior that they had no rights which White man was bound to respect."<sup>49</sup> He went on to say African Americans could never be citizens of the United States, even if they were born in the country and considered to be citizens of the states in which they lived.<sup>50</sup>

African Americans were considered property, not people. Therefore, no African American could ever attain equality with Whites, because no African American could ever be seen as equal to a White man. This notion was solidified with Justice Taney's opinion and became a flashpoint for Northern and Southern leaders. Clearly, there were those who disagreed with this perception of African Americans and who fought hard and long to change the nation's opinion. Nevertheless, the law had defined African Americans as noncitizens and codified their inequality.<sup>51</sup>

The most significant issue for those who reshaped the nation after the Civil War was: how do you take property and turn it into humans? The second issue was: how free should African Americans be? The third issue was: who were American citizens and what does American

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48. PAUL FINKELMAN, *DRED SCOTT V. SANFORD: A BRIEF HISTORY WITH DOCUMENTS* 30 (1997).

49. *Id.* at 36.

50. *Id.* at 35-36.

51. HOPKINS, *supra* note 44, at 104-07.

citizenship mean?

The first step to answering those questions was to reverse the disastrous *Dred Scott* opinion. In March 1866, the United States Congress began defining what freedom meant to African Americans. Congress' answer to questions about citizenship was the 1866 Civil Rights Act. The 1866 Civil Rights Act provided the first federal statutory definition of citizenship. It also gave the federal government the authority to intervene into state affairs when necessary to protect federal citizenship rights. The 1866 Civil Rights Act made citizens of everyone born in the United States who was not subject to a foreign power. This citizenship and freedom was to be protected by the federal government.<sup>52</sup> "The power that gave freedom must see that this freedom is maintained."<sup>53</sup>

The 1866 Civil Rights Act excluded nontaxed Native Americans, but gave citizens, regardless of color, the authority to sue in court, give evidence in trials, "inherit, hold, and convey property," and "be entitled 'to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.'"<sup>54</sup> Those who deprived citizens of their rights were subject to fines and imprisonment.<sup>55</sup> They would also be tried in federal courts.<sup>56</sup> Since there was no federal police force, the measure also allowed for the use of federal troops, the Army and Navy, to enforce this measure.<sup>57</sup> Those who were aggrieved could appeal all the way to the United States Supreme Court.<sup>58</sup> The bill passed with unanimous Republican support in the House of Representatives, and only three Republican senators voted against it.<sup>59</sup>

Clearly, the majority of those in leadership wanted to give African Americans full equal citizenship rights. This law established African American and White equality under the law. The intention of those who supported this law was to end the argument about where African Americans fit into the newly formed nation. There was strong opposition to establishing one definition of citizen and providing for federal protection of citizenship rights during this period. The law also

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52. DUBOIS, *supra* note 21, at 270-72.

53. *Id.* at 272.

54. RANDALL & DONALD, *supra* note 5, at 579.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

gave state citizenship to state residents.<sup>60</sup>

The 1866 Civil Rights Act highlighted the developing split between the President and Congress over who should define citizenship, and which level of government should protect those rights. President Andrew Johnson, a former Tennessee Senator, had all of the characteristic prejudices of White Southerners. He did not accept African American equality or citizenship, and he was uncomfortable giving citizenship rights to the newly freed slaves, because he did not believe that they were ready for it. Johnson was especially uncomfortable with increasing governmental authority to protect African American rights at the expense of state's rights.<sup>61</sup>

President Johnson responded to this increased activism by using racial and nationalistic rhetoric to denounce Congress while vetoing the measure. To him, African Americans did not possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States. Johnson couched his veto in the two arguments people continue to use to deny African Americans equal rights. First, he talked about state's rights. Next, he showed his hand and admitted that he did not accept African American equality.<sup>62</sup>

After the initial opposition from the President to the 1866 Civil Rights Act, several of the Republican Congressmen decided to write a more permanent defense of African American rights into law. Their answer was the Fourteenth Amendment. The Fourteenth Amendment incorporated all of the legal and moral guarantees of the 1866 Civil Rights Act and made them part of the United States Constitution.<sup>63</sup>

It is obvious to anyone familiar with the debates about the Fourteenth Amendment that there was no uniformity of thought on African American citizenship. Many people challenged the change in African American status. Much of the debate on the Fourteenth Amendment revolved around the expansion of federal authority. The key issue surrounding the Fourteenth Amendment was: does the United States want to radically change the relationship between the state and federal government? Richard Kluger says: "Without doubt it was changing the previous division of powers between the state and federal governments. Without doubt it promoted the United States as an interloper between every state and its inhabitants."<sup>64</sup>

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60. *See generally, id.* at 579-82.

61. *Id.*

62. *See generally, id.* at 578-79.

63. FONER, *supra* note 1, at 251-53.

64. KLUGER, *supra* note 23, at 47.

What were the imperatives which pushed Reconstruction leaders to include African Americans in their national definition of citizenship? One of the first imperatives was African Americans' participation in the Civil War and their contribution to saving the Union. Even though Southern leaders shared a racial bond with most Northerners, their ideological differences were immense. African Americans sacrificed life and limb in defense of the Union. More than 38,000 of the 186,000 African Americans who served during the Civil War perished. White Southerners used everything at their disposal in a failed attempt to destroy the Union. Reconstruction leaders believed that it was only fair to allow those who helped preserve the nation enjoy the privileges of citizenship in the nation their sacrifices helped preserve. They also believed that they should strip those who had tried to destroy the union of their rights.<sup>65</sup>

Congress was under the control of the Republicans, who wanted to ensure that they guarded against any further constitutional disruptions. Therefore, they made it a condition of readmittance that states ratify the Fourteenth Amendment before they could be restored. The Fourteenth Amendment was a marvel of social reconstruction. It disqualified rebel leaders, established African American voting, created new constitutions based on racial equality, led to the election of multicultural state legislatures, and dramatically changed the relationship between the state and federal government. It also established the notion of equality under the law. There was no longer a Black and White. There was just an American.<sup>66</sup>

In essence, what the Fourteenth Amendment did was turn African Americans into White men, so that they could enjoy the rights, privileges, and immunities associated with citizenship. If the law looked at African Americans and saw Black people, African Americans could never hope to get justice from the legal system. In order to have the laws embrace African Americans, the courts had to view them as White men. America's standard for justice and equality is based upon the notion that all White men were created equal. To extend this equality to African Americans, they have to be seen in the eyes of the law as White men. As historian David Kyvig writes, "[t]he Fourteenth Amendment offers perhaps the best demonstration of the fundamental changes in American constitutionalism wrought by the Civil War; the Fourteenth

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65. JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE* 45-48 (1974).

66. *See generally*, DUBOIS, *supra* note 21, at 306-22.

Amendment would provide the legal basis for a federally directed end to racial segregation.”<sup>67</sup>

Ironically, what the Fourteenth Amendment did was destroy the Negro and leave only the White man in America. Equality, freedom, and social justice were extended to other groups only as they were viewed as White men. Therefore, justice in the United States became associated with a person’s or a group’s ability to be identified with White men in the courts’ eyes. The problem with this was that laws could not change attitudes. The essential notion of the *Dred Scott* case held sway only to the degree that White men accepted the notion of African American equality. White men dominated the American judicial system. The judges, juries, and prosecutors were generally White men. The Fourteenth Amendment put the onus of accepting African American equality on them and forced them to view African Americans as equals or face legal and judicial sanctions.

The majority of the Supreme Court Justices who decided the *Plessy* decision recognized the significance of the Fourteenth Amendment, but could not bring themselves to accept African American equality.<sup>68</sup> As a result, they shrouded their White supremacist feelings in arguments about differences. The Court when it dispensed justice continued to see African Americans and not White men. As Justice Henry Brown wrote, “[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law,”<sup>69</sup> and “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”<sup>70</sup> In his dissent from the majority, Justice John Marshall Harlan saw through the subterfuge and wrote,

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case . . . [I]t seems that we have yet, . . . a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.<sup>71</sup>

Harlan went on to explain how the *Plessy* decision violated the notion of leveling up when he wrote,

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state

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67. KYVIG, *supra* note 41, at 175.

68. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

69. *Id.* at 544.

70. *Id.* at 552.

71. *Id.* at 559-60.

enactments, which, in fact, proceed on the ground that the colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by whites citizens?<sup>72</sup> [I]n the view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows, nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.<sup>73</sup>

Harlan realized that the drafters of the Fourteenth Amendment deliberately rejected the flawed interpretations used by Justice Brown and the majority of the court in the *Plessy* decision. As John Bingham, one of the authors of the Fourteenth Amendment wrote, “the spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men.”<sup>74</sup> If Bingham and the other Republicans had wanted to create a second-class status for African Americans, they would not have written in the constitutional guarantees incorporated in the Act. The *Plessy* Court was clearly not colorblind. The Justices saw African Americans as inferior beings and in their ruling they incorporated their prejudices. Justice Brown and the majority did not recognize African American equality. Instead, they reverted to a pre-war interpretation, based on the *Dred Scott* decision, which held that African Americans were somehow divorced from the rest of society and could never be viewed as equal to Whites in America.<sup>75</sup>

If their view was correct, then there was no such thing as equal protection or equal justice in the United States. If that was the Court’s opinion, then the Fourteenth Amendment was a dead letter with no more authority than the Papal Bull against the Comet. This duality of thought produced the unfortunate period of Jim Crow segregation with all of its corresponding effects. In fact, the whole notion of segregation was because the United States courts did not recognize African American equality. Legal separation is by definition discriminatory. The mere act of separating people recognizes the difference and proves that the courts were not colorblind. Even if the accommodations had been legally equal, segregation would have been discriminatory and a violation of the spirit of the Fourteenth Amendment and the idea of leveling up.

On May 5, 1954, the United States Supreme Court finally recognized its mistake and carried out the true intent of the Fourteenth

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72. *Id.* at 560.

73. *Id.* at 559.

74. KYVIG, *supra* note 41, at 165-66.

75. KYVIG, *supra* note 41, at 165-66.

Amendment. Chief Justice Earl Warren understood that the Amendment's original intent was to create equality. He knew that the real meaning of a color-blind society is that law and society do not recognize that people are not White. No matter what color or gender stands before the bar of justice, the courts must see White men when dispensing justice. Before 1954, people were not singled out for disparate treatment because they were White, but instead because they were not. What a color blind society means, as it relates to the United States, is that people see others as Whites, not that they do 'not see color. Judge Warren understood that there was no legal or moral imperative in separating African Americans from others except the maintenance of White supremacy.<sup>76</sup>

The irony of this position is that fixing it requires the Court to recognize color and create race and gender specific solutions that correct the particular problems created by the Court's original flawed positions. Those who study Reconstruction should understand what the Republican leaders were trying to do. They wanted to solve America's most intractable problem: race. Unfortunately, intellectuals have allowed those who oppose creating a truly egalitarian society to capture the intellectual high ground. Until people like Charles Sumner, Thaddeus Stevens, and John Bingham are as respected as Robert E. Lee, Nathan Bedford Forrest, and Andrew Johnson, we will never appreciate the significance of the Fourteenth Amendment.

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76. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).