For historians, the Fourteenth Amendment is one of the three “Civil War Amendments”—the Thirteenth, Fourteenth, and Fifteenth—that remade the nation after the Civil War. The Thirteenth ended slavery and involuntary servitude in the nation. The Fifteenth prohibited discrimination in voting on the basis of race or “previous condition of servitude.” Sandwiched in between them was the Fourteenth, which is the subject of this chapter.

Over time the Fourteenth has emerged as one of the most important parts of the Constitution. Since the mid-twentieth century, the Fourteenth Amendment has emerged as a central—if not the central—provision in our constitutional jurisprudence. In the last half century or so, Section 1 of the amendment has been the driving engine of the judicial expansion of civil rights and civil liberties. During this period, scholars and jurists have combed the records of the Thirty-Ninth Congress, seeking a sure answer to the question of what the Fourteenth Amendment meant.

The search for the “intent” of the Fourteenth Amendment was at the center of the litigation in Brown v. Board of Education. In scheduling reargument for the fall of 1953, the Supreme Court asked lawyers to provide briefs on two historical issues:

1. What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment
contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in the public schools.\textsuperscript{1}

2. If neither the Congress in submitting nor the states in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in the public schools, was it nevertheless the understanding of the framers of the amendment (a) that future Congresses might in the exercise of their power under Section 5 of the amendment, abolish segregation, or (b) that it would be within the judicial power, in light of future conditions, to construe the amendment as abolishing such segregation of its own force?\textsuperscript{2}

Paraphrasing the court’s questions of sixty years ago, we might ask, did the Congress in 1866 contemplate or understand that the amendment would make all forms of racial discrimination illegal?

These, of course, are “lawyer” questions rather than “historian” questions. For historians, the question of how to understand the meaning of the Fourteenth Amendment takes us beyond the debates on the floor of Congress, to ask questions about the political and social realities of the age and the context of the writing of the amendment. What events were fresh in the minds of the framers of the Fourteenth as they sought to secure the victory of the Union cause? These stories help guide us to what the supporters of the amendment in Congress had in mind when they wrote it.

An understanding of the Fourteenth Amendment begins not in the debates on the floor of Congress but in the history leading up to the amendment. One crucial aspect to our understanding of the Fourteenth Amendment is the striking changes in the law of race relations that took place across the North in the two decades before the Civil War began. Tied to this was the attempt of many Northerners, especially Republicans and those who would become Republicans, to change the law of race relations in this period. 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 complement each other. The first gives us an insight into the legal and political history that shaped Republican thought about


\textsuperscript{2}Ibid.
race and the aspirations of Republican leaders for a racially just society. Two key Republican congressional leaders in this story are Representative John A. Bingham, the primary author of Section 1 of the Fourteenth Amendment, and Representative Thaddeus Stevens of Pennsylvania, the most powerful member of the House of Representatives, who played a key role in the adoption of the Fourteenth Amendment and in the shaping of Republican policy toward race. How they felt about race—what their prewar and wartime positions were on race—helps us better understand the purpose of the Fourteenth Amendment. The second story, based on the evidence presented to the Joint Committee on Reconstruction, helps us understand what Congress struggled against in drafting Section 1 of the amendment, and thus illustrates what the Republican leadership of the Congress hoped the amendment would accomplish and what it would prevent. This history affects our understanding of how the Fourteenth Amendment was designed to protect both civil rights and civil liberties for all Americans.

**Race and Law in the Antebellum North: A Prelude to the Fourteenth Amendment**

The general view of antebellum Northern race relations has been shaped by an odd mixture of progressive and conservative scholarship. In the 1960s a number of scholars began to look carefully at the nature of race relations in the antebellum North and concluded that they were abysmal. Influenced by the civil rights movement in the South, scholars including Leon Litwack and Eugene Berwanger discovered that the antebellum North was not a paragon of equality. On the contrary, they discovered racism, segregation, and other forms of discrimination. Thus, Litwack asserted that on the eve of the Civil War “the northern Negro remained largely disenfranchised, segregated and economically oppressed,” and, just as important, “change did not seem imminent.” Similarly, in *The Frontier against Slavery*, Berwanger claimed that “discrimination 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.” Berwanger argued that “prejudice against Negroes was a factor in the development of antislavery feeling in the
ante-bellum United States.” Even abolitionists came under attack. Jane Pease and William Pease argued that some lifelong opponents of slavery were uncomfortable in the presence of blacks, and that many abolitionists could never decide “whether the Negro was equal or inferior to the white; whether equality for the Negro should be stressed or whether it should be damped; whether civil and social rights should be granted him at once or only in the indefinite and provisional future; whether, in fact, social and civil rights should be granted or whether only civil rights should be given him.”

Writing in the early years of the civil rights movement, these scholars wanted to teach Northerners about their own racist past. Recognizing this past was a key to changing the nature of mid-twentieth-century race relations.

In an ironic twist, conservative scholars seized on this scholarship to reach a different conclusion. If the antebellum North was inherently racist, these scholars argued, the Congress in the 1860s and 1870s could not possibly have meant to create an integrated society. Thus, Raoul Berger claimed that the framers of the Fourteenth Amendment could not have intended to require integration or substantive equality for blacks. He asserted that the “key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia.”

It is certainly true that in most of the antebellum North full racial equality was rare. But it is also true that in this period many Republican politicians (or politicians who became Republicans) worked hard to alter race relations in order to move toward a more equal society. Many party leaders had long been working for greater equality. For example, in the years leading up to the Civil War, Republican leaders in Iowa, Wisconsin, New York, and Connecticut attempted to create equal suffrage. Voting was not on the

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agenda in 1866, but the Republican congressional leaders who had long been working for racial equality (or something close to it) at the state level saw the Fourteenth Amendment as an opportunity to achieve this goal at the national level.

Thaddeus Stevens and Race in Pennsylvania

In 1866 Thaddeus Stevens (fig. 1) was the most powerful member of the House of Representatives, and perhaps the most powerful politician in the nation. He was also a key member of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment. In 1866, as a member of the Joint Committee, he was in a position to implement his ideology.

For more than four decades Stevens had been an uncompromising supporter of black rights and racial equality. As a delegate to the 1837 Pennsylvania Constitutional Convention, Stevens worked hard to maintain black suffrage in the face of Jacksonian Democrats, who were intent on taking the vote away from blacks. Stevens was unsuccessful in this effort. This failure, however, only increased his commitment to racial equality. From the 1820s on, Stevens regularly took fugitive slave cases for free. His most famous effort came in the dramatic prosecutions in the wake of the Christiana incident. In 1851 a slave owner, his relatives, and a U.S. deputy marshal had attempted to seize a fugitive slave living with a number of other fugitive slaves and free blacks in Christiana, Pennsylvania (fig. 2). The blacks refused to surrender peacefully and instead opened fire on the approaching whites. A short battle ensued, which left the slave owner dead and his relatives wounded. The slave who had killed his master calmly traveled by train to Rochester, New York, where he visited Frederick Douglass before taking a boat to Canada. Meanwhile, President Millard Fillmore and Secretary of State Daniel Webster insisted on treason trials, and the federal prosecutor secured indictments for treason for more than forty blacks and five white men who had refused to help the marshal arrest the fugitive slaves.7 Part of the defense strategy included defying racial conventions; thus, the black defendants entered the courtroom accompanied by white women, to the

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Fig. 1. Representative Thaddeus Stevens of Pennsylvania, from a photograph ca. 1860–68. (Brady-Handy photograph collection, Library of Congress Prints and Photographs Division)
horror of the proslavery prosecutors. Here, Stevens, as a key strategist in the case, demonstrated his belief in fundamental racial equality and his willingness to challenge the racial status quo.8

Stevens’s relationships with blacks were more than political. He saw them as his social equals, and he acted on this belief in his personal life. Stevens had a longtime black housekeeper who was probably his paramour. But whatever their private relations, in public Stevens treated her with respect and dignity. “He always addressed her as ‘Madam,’ gave her his seat in public conveyances, and included her in social intercourse with his friends.” Here, again, Stevens challenged prejudice. Indeed, throughout the last half century of his life, Stevens challenged racism. Even in death the congressman from Pennsylvania struck a blow for equality. Before he died, Stevens

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8Hans L. Trefousse, Thaddeus Stevens: Nineteenth-Century Egalitarian (New York, 1997), pp. 174, 14–15, 49–50. After the judge in the first trial instructed the jury that the case did not amount to treason, the defendant was found not guilty and the remaining cases were dropped by the prosecution. Paul Finkelman, “The Treason Trial of Castner Hanway,” in Michal R. Belknap, ed., American Political Trials, rev. ed. (Westport, Conn., 1994), pp. 77, 82, 84–86, 89.

Fig. 2. A wood engraving published in 1872 depicts African Americans firing on slave catchers near Christiana, Pennsylvania, in 1851. (Library of Congress Prints and Photographs Division)
made certain he would be buried in a cemetery that accepted the bodies of all people without regard to race.\(^9\)

Race relations in Pennsylvania during Stevens’s lifetime were complicated and often in flux. The high point of antebellum Northern racism was not the 1850s and the eve of the Civil War, as Litwack, Berwanger, and Berger claim. Rather, it was in the 1830s—the age of Andrew Jackson—when “Jacksonian democracy” came to mean an expansion of rights for white men and a contraction of rights for blacks. Until 1837 black men could vote in Pennsylvania, but in that year a new constitution deprived them of that right. As I have already noted, Stevens was unsuccessful in fighting this change. By the 1840s, however, the racial climate in Pennsylvania had begun to move in a more progressive direction. The South’s incessant demands for more slave territories and greater federal support for slavery led to greater Northern opposition to slavery. This opposition to slavery, and Southern demands for protecting and expanding slavery, also led to greater rights and legal protections for blacks.

Even while the Jacksonians were disfranchising blacks, the state enforced its laws to protect black freedom. Laws passed at an earlier time, when Pennsylvania had been in the forefront of protecting black liberty, remained in force. Pennsylvania’s 1826 Personal Liberty Law, for example, was designed to protect free blacks from kidnapping and also provide some measure of due process for alleged fugitive slaves. In 1837 a justice of the peace invoked it to prevent Edward Prigg and three other Marylanders from removing Margaret Morgan and her children from the state. Prigg and his cohorts then seized Morgan and her children without any legal authority and dragged them to Maryland. Pennsylvania authorities quickly indicted Prigg and the other Marylanders for kidnapping. Pennsylvania’s governor pushed hard to have the Marylanders extradited, but ultimately Maryland returned only Prigg to Pennsylvania, where he was convicted of kidnapping. In *Prigg v. Pennsylvania*, the U.S. Supreme Court overturned Prigg’s conviction and struck down the state’s 1826 Personal Liberty Law. In response to this case the state withdrew all support for enforcement of the Federal Fugitive Slave Law and the Fugitive Slave Clause of the Constitution, and prohibited its officials from aiding in the return of fugitive slaves. This act also altered the state’s law with regard to visiting slaves. Before 1847 a Southern master could

bring a slave into Pennsylvania for up to six months. But after 1847 any slave brought into Pennsylvania, even for a moment, became instantly free.\textsuperscript{10}

Pennsylvania’s position on the rights of free blacks and the rights of fugitive slaves and slaves in transit illustrates the complexity of race relations in that state during the time of Stevens’s rise to political power. Increasingly, the state protected black liberty and offered African Americans safe haven from bondage. While Pennsylvania took the vote away from blacks in the 1830s, the state never attempted to limit their immigration or their right to own property. Had the state been as racist as some scholars argue, we could imagine new laws making black migration difficult. The 1847 repeal of the “six months law,” which since 1780 had allowed visiting masters to bring slaves into the state for up to half a year, meant that any slaves brought into the state would remain there as free people. Once there, Pennsylvania blacks could own property, enter the professions, attend schools, testify against whites in court, and fully exercise their rights to freedom of speech, press, and assembly. In \textit{Formans v. Tamm} (1853), the Pennsylvania Supreme Court ruled that blacks had the same right to own land as whites, even if they did not have the right to vote. They could also agitate for full political rights, as well as protest private discrimination. And of course they could, and did, participate in all sorts of protests against slavery.\textsuperscript{11}

The opinion in \textit{Formans} illustrates one aspect of the attitudes of Pennsylvanians on the eve of emancipation. Written by Ellis Lewis, a Jacksonian Democrat who was an ally of President James Buchanan, and no friend of

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abolition, the opinion nevertheless supported some of the fundamental rights of “equal protection” of the law that would be enshrined in the Fourteenth Amendment. Justice Lewis argued that “the effect” of ending slavery in Pennsylvania was

to give to the colored man the right to acquire, possess and dispose of lands and goods, as fully as the white man enjoys these rights. Having no one to look to for support but himself, it would be a mockery to tell him he is a “free man,” if he be not allowed the necessary means of sustaining life. The right to the fruits of his industry and to invest them in lands or goods, or in such manner as he may deem most conducive to his comfort, is an incident to the grant of his freedom.¹²

Immediately after the Civil War, former Confederate states would in fact enact such laws that mocked the ending of slavery, to prevent blacks from having basic common-law rights and in many places denying them the right to rent or own land. Thus, the experience in Pennsylvania, even coming from antiabolitionist jurists, was that blacks, including former slaves, had to have equal protection of the law.

During the late antebellum period, Pennsylvania’s government turned a blind eye to the active involvement of blacks and whites in the underground railroad, which of course led to more blacks coming to Pennsylvania and remaining in the state. On the other hand, state officials continued to prosecute whites accused of kidnapping free blacks.¹³ Meanwhile, in increasing numbers the people of Pennsylvania voted for antislavery politicians such as Stevens, Simon Cameron, and William D. “Pig Iron” Kelly, who were ready to fight against human bondage and for human equality.

These experiences and this history shaped the background that Stevens brought to Congress and to the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment.

¹²Formans, p. 25.
John A. Bingham and Race Relations in Ohio

The experience of Congressman John A. Bingham of Ohio (fig. 3) mirrors that of Stevens.\textsuperscript{14} Like Stevens, Bingham served on the Joint Committee on Reconstruction. Bingham, the author of Section 1 of the Fourteenth Amendment, was equally a longtime opponent of racial discrimination. And like Stevens, he had fought against slavery and segregation. In his home state of Ohio, 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.

In 1804 and 1807 Ohio adopted elaborate registration requirements for blacks entering the state. 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. 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 also prevented blacks from voting, serving on juries, and testifying against whites. Ohio prohibited blacks from attending schools with whites while denying them meaningful access to public schools, even on a segregated basis. Such laws were what led Raoul Berger to argue that the antebellum North was “shot through with Negrophobia.”\textsuperscript{15}

However, in Ohio and other parts of the North there was a profound transformation of the law with regard to race in the last two antebellum

\textsuperscript{14}On Bingham, see generally, Gerard N. Magliocca, \textit{American Founding Son: John Bingham and the Invention of the Fourteenth Amendment} (New York, 2013).

\textsuperscript{15}In 1800 Ohio had a black population of 337; it had grown by more than 550 percent to 1,899 by 1810, despite the fact that anti-immigration laws were on the books for six of those years. It more than doubled to 4,723 in the next decade, and doubled again in the next decade, reaching 9,368 by 1830; 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 the state, giving it the third-largest free black population in the North. See United States Census, \textit{Negro Population, 1790–1915} (Washington, D.C., 1915), p. 57. Ohio Constitution of 1802, Art. IV, Sec. 1 (limiting the franchise to white males); Act of Feb. 9, 1831, 29 Ohio Laws 94 (1831) (relating to juries); Act of Jan. 25, 1807, 5 Ohio Laws 53 (1807) (amending the act of Jan. 5, 1804, entitled “An Act Regulating Black and Mulatto Persons”); Act of Feb. 10, 1829, 27 Ohio Laws 72 (1829) (providing “for the support and better regulation of common schools”). Berger, \textit{Government by Judiciary}, p. 10.
Fig. 3. Representative John A. Bingham of Ohio, from a photograph ca. 1860–75. (Brady-Handy photograph collection, Library of Congress Prints and Photographs Division)
decades. This change was especially apparent in Ohio, at precisely the time that Bingham, Salmon P. Chase, Jacob Brinkerhoff, James Ashley, and other future leaders of the Ohio Republican Party were entering politics or taking a leading role in the state’s new Republican Party.\footnote{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 to 1871. Others in this cohort included Edward Wade (1802–1866), a Free Soil and Republican member of Congress from 1853 to 1861; Benjamin F. Wade (1800–1878), who entered politics in 1835 and became a powerful figure as a state senator, judge, and then U.S. senator in the 1840s and 1850s; James Ashley (1824–1896), who entered politics in 1858, serving as a Republican member of Congress; and William Dennison Jr. (1815–1882), who served as governor of Ohio from 1860 to 1862 and as postmaster general from 1864 to July 1866.}

In 1839 the state legislature created an elaborate system for regulating the return of fugitive slaves. 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.\footnote{Act of Feb. 26, 1839, ch. 37, 1838 Ohio Laws 38 (relating to fugitives from labor or service from other states). For a general history of these laws, and others in Ohio, see Stephen Middleton, The Black Laws: Race and the Legal Process in Early Ohio (Athens, 2005).} This law was consistent with Ohio’s long-standing policy of protecting free blacks from kidnapping while supporting its constitutional obligation to return fugitive slaves. However, unlike earlier laws that only punished kidnapping after it had occurred, this act had the potential to frustrate attempts by masters to recover fugitive slaves as well as stopping kidnapping. Thus, the law would have made fugitives feel more secure in the Buckeye State because it gave blacks greater protections.

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” 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 advertise them as runaway slaves unless they could document their status as free people.
As noted above, in *Prigg v. Pennsylvania* the U.S. Supreme Court barred any state from regulating the return of fugitive slaves. This decision struck down the personal liberty laws of the free states, like Ohio’s 1839 Act. In response to *Prigg*, the Ohio legislature repealed the 1839 Act in 1843 and reinstated an earlier law, which 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.\(^{18}\) Again, a negrophobic state would not have passed a new law to punish the kidnapping of free blacks.

Starting in 1848—at a time when Bingham was beginning his political career as the district attorney of Tuscarawas County—Ohio began to rapidly change its racial laws while taking an increasingly strong stand against Southern slavery. A resolution of that year urged the national Congress to prohibit slavery in any territories acquired in the Mexican War. More significantly for the background to the Fourteenth Amendment, in that year a new law provided two separate methods for the education of blacks. The law for the first time 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 blacks in Ohio. Without this legal provision, blacks had no right to a public education, on either an integrated or a segregated basis. This law marked an improvement over these earlier conditions that denied blacks access to a public education. In addition, it allowed blacks to attend schools with whites, if local communities did not object. An 1849 law repealed the registration and surety bond requirements of the earlier laws, allowed blacks to testify against whites, and gave them even greater access to the public schools.\(^ {19}\)

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adopted by Ohio in the 1850s, when Bingham was representing his state in Congress, provided blacks with new protections against kidnapping and demonstrated Ohio’s hostility to the Fugitive Slave Law of 1850.

By the eve of the Civil War, blacks did not have full equality in Ohio. They still could not vote, serve on juries, or serve in the state militia (although this was a result of existing federal law). But, they had far more legal rights than they ever had before. Moreover, the thrust of the newly created Republican Party was toward greater racial equality. Far from being “shot through with Negrophobia,” Ohio in this period was making steady and significant progress toward a more egalitarian polity that provided increasing rights for free blacks. Ohio did not entirely eliminate discriminatory laws at this time, because a substantial number of voters were Democrats who opposed racial equality and were later hostile to emancipation. After antislavery Democrats such as Chase and Brinkerhoff joined the new Republican Party, the Democrats became extremely hostile to blacks. These Democratic voters and their representatives in the state legislature, who were particularly powerful in southern Ohio, were able to block some changes, especially those requiring a constitutional amendment. They were also able to block Republican hegemony in the 1850s and 1860s, and sometimes the Democrats controlled 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.

It was in the context of these statutes and court decisions, as well as executive actions against slavery, 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 antislavery and black civil rights. He brought these ideas to Congress and to his role in drafting the Fourteenth Amendment.

When we consider what the amendment meant, we must begin with the backgrounds and experiences of key Republican leaders like Stevens and Bingham. We must further consider the racial trajectory of the North—and

more significantly the Republican Party in the North. The evidence suggests that for Stevens, Bingham, and other Republicans, black civil rights mattered.\textsuperscript{20}

The key to understanding Bingham’s Ohio background is that parts of his state were clearly negrophobic, but that in his northern Ohio district, and in much of the state, Free Soilers and Republicans gained enormous power in the late 1840s and 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.

\section*{The Southern Context of Reconstruction and the Shaping of the Fourteenth Amendment}

Stevens, Bingham, and other Republicans in the Thirty-Ninth Congress were influenced not only by their own long struggle against racism in the North and slavery in the South. The retrograde actions of Southern politicians and the racist brutality of Southern whites in the wake of the Civil War also affected their constitutional views. A brief description of race relations in the South in 1865–66 reminds us of why the Fourteenth Amendment was passed and helps us understand what Stevens, Bingham, and their Republican colleagues hoped it would accomplish.

\section*{The Aftermath of Slavery}

In April 1865 the United States successfully suppressed what leaders at the time referred to as “the late wicked Rebellion.” The suppression of the rebellion involved more than two million soldiers and sailors, 10 percent of whom were African Americans. The majority of these black men in uniform—the “sable arm” of the U.S. Army and Navy—had been slaves

\textsuperscript{20}See \textit{Commonwealth v. Dennison}, 65 U.S. (24 How.) 66, 68–69 (1861) (holding that the federal Constitution does not impose an obligation on one state to “surrender its citizens or residents to any other state on the charge that they have committed an offence not known to the laws of the former”). Republicans in New York and Connecticut, for example, attempted to create equal suffrage in their state.
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 Stevens and Bingham assumed 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. 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” (as the Constitution required), in which the people of a society elected a legislature and in which all citizens had equal rights under the law. 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 assumed it would lead to an entire revolution in the way blacks were treated and in the rights they had.\textsuperscript{21}

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 slaves of society.”\textsuperscript{22}

The following fall, Southern voters—all of whom were white and most of whom had supported the rebellion—elected new state legislatures. Many of these state lawmakers had served in the Confederate government or in the rebellious state governments. Others had been soldiers—often officers—in the traitorous Confederate army. The majority had been either slave owners or members of slave-owning families. Although defeated in battle and deprived of their slaves by a combination of congressional acts, the Emancipation Proclamation, the brilliant military success of the U.S. Army, and the Thirteenth Amendment, these former Confederates were unwilling to accept that the war had fundamentally altered the racial status quo in the South. They knew that African Americans could no longer be held as chattel.

\textsuperscript{21}Ex parte Milligan, 71 U.S. (4 Wall.) 2, 16 (1866). See David Dudley Cornish, The Sable Arm: Negro Troops in the Union Army, 1861–1865 (New York, 1966), pp. 29, 184. Clearly, most midcentury Americans saw no contradiction between the idea of the republican form of government and the denial of suffrage to women. At the time most men—and many women—would have defended this result, agreeing that women were effectively represented by their adult male relatives. Thus the failure to enfranchise women did not violate the republican form of government clause of the constitution. Obviously proponents of women’s suffrage, such as Elizabeth Cady Stanton, would have rejected this analysis.

slaves, to be bought and sold at the whim of a master; but they were unprepared to accept that the freedmen were entitled to liberty, equality, or even fundamental legal rights. Many Northerners were shocked by the statutes that unreconstructed Southern legislatures passed immediately after the war. The statutes indicated how the South planned to treat the former slaves. The Fourteenth Amendment was in large part a reaction to these laws, generally known as black codes.

The Joint Committee on Reconstruction

In December 1865 Congress created the Joint Committee on Reconstruction to investigate conditions in the South. The Joint Committee consisted of six senators and nine representatives. Thaddeus Stevens and John Bingham were key House members on the committee. Also on the committee were George S. Boutwell of Massachusetts and Justin Morrill of Vermont. Both had been lifelong opponents of slavery, and both came from states that gave free blacks full legal rights, including suffrage. The work 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 members signed the final report. Three Southerners and a New Jersey Democrat refused to sign the report.

This massive report was nearly 800 pages long. The committee members interviewed scores of people—former slaves, former Confederate leaders and slave owners, U.S. Army officers, journalists, Northern ministers, 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.” The committee concluded that it would be impossible to “abandon” the former slaves “without securing them their rights as free men and citizens.” Indeed, the “whole civilized world would have cried out against such base ingratitude” if the U.S. government failed to secure and protect the rights of the freedpeople. 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.” Noting the “leniency” of the policies of Congress and the president after the war, the committee discovered that “[i]n return for our leniency we receive only an insulting denial of our authority.” 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 official
duty,” and “similar prosecutions” were “threatened elsewhere as soon as the
United States troops [we]re removed.”

The committee understood that the task before the Congress and the na-
tion involved three things: preventing former Confederates from reinstat-
ing 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 had to be created, and protecting the
rights and safety of white Unionists who were threatened by the violence of
as yet unreconstructed Southern 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.

Two categories of evidence were particularly important in setting out the
need for civil rights legislation and a constitutional amendment to protect
liberty in the states. The Joint Committee learned a good deal about condi-
tions in the South by examining the statutes and constitutions adopted by
the former Confederate states immediately after the war. In addition, the
Joint Committee interviewed hundreds of people familiar with conditions
in the postwar South. The information from these interviews, along with
some published materials, such as excerpts from Southern state constitu-
tions, filled the nearly 800 pages of the Joint Committee’s report. Both the
legal documentation and the evidence from interviews led to the inescap-
able conclusion that the majority of Southern whites were not prepared to
accept blacks as equal citizens and that many Southern whites were willing
to use intimidation, violence, and murder to prevent racial equality in
the postwar South.

The Black Codes and State Constitutions, 1865–66

The Southern black codes and constitutions passed in 1865 and 1866 were
designed to replicate, as closely as possible, the prewar suppression and

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23Report of the Joint Committee on Reconstruction, 39th Cong., 1st sess., 1866, Resolution and
Report of the Committee, pp. xiii, xvi–xviii (hereafter cited as Report of the Joint Committee, with
a reference to the particular part or section and page numbers).
exploitation of blacks. The Alabama Black Code of 1865–66 began by acknowledging the new status of blacks, declaring that “[a]ll freedmen, free negroes, and mulattoes” had “the right to sue and be sued, plead and be impleaded.” Slaves had never had these rights. 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.” In addition, blacks were allowed to testify in prosecutions “for injuries in the persons and property” of blacks.24 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.”25

These laws certainly expanded the rights of Southern blacks and gave them some legal protections they had not had before the war. 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 between two whites or at the prosecution of a white for harming other whites. 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. These restrictions undermined fundamental justice and created dangerous possibilities for free blacks and their white allies. For example, a white suing another white could not use the testimony of a black to support his case. More importantly, under these laws Southern white terrorists could kill a white in front of black witnesses, and those witnesses could not testify at the trial. This would undermine the safety of those white teachers, army officers, Freedmen’s Bureau officers, and Unionists who supported black rights and the national government. Thus, while these new laws gave some protection to blacks, the laws did not give them legal equality and they did not even fully protect their civil rights.

The laws allowing blacks to sign contracts and to sue and be sued under them appear, at first glance, to support black freedom, but in fact they undermined black rights. Before the war, slaves had no rights to sign contracts, and some slave states limited the rights of free blacks to enter into contracts.

24Ibid., p. xvii.
25Act of Nov. 25, 1865, ch. 4, 1865 Mississippi Laws 82 ("An Act for Conferring Civil Rights on Freedmen, and for Other Purposes").
Certainly laws allowing blacks to enter into contracts appear to be a concession to black freedom since they gave the freedmen rights they had never had as slaves. Such basic economic rights were vital to freedom, and they were rights that slaves had never had. Thus, on the surface, the laws granting former slaves the right to enter into contracts were an important sign of freedom. But in fact, these laws dramatically threatened blacks’ civil rights.

Former slaves in the Deep South were almost universally illiterate, had virtually no experience with either the law or a free economy, and were only a few months out of slavery. They were vulnerable to signing contracts—which would involve their “mark” or an “x”—that committed them to long-term labor agreements, and to being sued for breach of these contracts if they could not fulfill them. Some of the laws provided that blacks who did not fulfill a contract for any reason could be sued and forced to work for free to pay damages, or be denied any pay for work done if they left their job—no matter what the reason—before the end of the contract. The terms of the contracts were almost always completely favorable to the white employer and exploitative of the black worker. These laws encouraged planters to exploit and abuse black workers, especially near the end of a contract term, in hopes that these workers would leave and would not have to be paid or might be forced to work for free to pay damages under the contract. Laws similar to those in Mississippi were found in other states. Thus, Major General Christopher C. Andrews told the Joint Committee on Reconstruction that conditions in Texas were such that “[u]nless the freedmen are protected by the government they will be much worse off than when they were slaves” because the whites were prepared “to coerce” blacks into working for unfair wages under unfair contracts.26

Other provisions of the black laws 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.”27 Mississippi’s Civil Rights Act of 1865 provided that if any laborer quit a job before the end of the contract period he would

27Act of Nov. 24, 1865, ch. 6, 1865 Alabama Laws 90 (“An Act for Amending the Vagrant Laws of the State”).
lose all wages earned up to that time. Thus, if a black laborer signed a con-
tact to work for a planter for a year but left after eleven months, he would
get no wages. This provision allowed employers to mistreat and overwork
laborers, including whipping them as had been done under slavery, know-
ning they dare not quit. Indeed, a shrewd employer could purposefully make
life miserable for workers near the end of a contract term, in hopes that they
would quit and forfeit all wages. Mississippi law further declared that any
blacks “with no lawful employment or business” would be considered va-
grants and could be fined up to fifty dollars. Blacks who could not pay the
fine would be forcibly hired out to whoever would pay the fine, thus creat-
ing another form of unfree 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 hard labor.28
These laws also prohibited blacks from renting land or houses in towns or
cities, thus in effect forcing blacks into the countryside, where they were
doomed to agricultural labor.

Laws such as these set the stage for a new system of forced labor. South-
ern states passed these laws just before, or immediately after, the ratifi-
cation of the Thirteenth Amendment. They were attempts to reduce blacks
to a status somewhere between that of slaves (which they no longer were)
and full free people (which the white South would not allow). The labor con-
tract 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.

The new state constitutions were equally oppressive. The Joint Commit-
tee reprinted some state constitutions and excerpts from others in its re-
port.29 The Florida Constitution, for example, limited suffrage to whites
and prohibited any person employed by the United States—white or black—
from voting in the state unless he was a resident of Florida before entering
federal service. The same constitution prohibited blacks from serving as
jurors and limited their testimony to cases involving blacks.30 The Arkan-
sas Constitution similarly limited voting to whites, banned federal officers

28 Act of Nov. 25, 1865, ch. 4, 1865 Mississippi Laws 82, 90 (“An Act for Conferring
Civil Rights on Freedmen, and for Other Purposes”).
from voting, and discriminated against blacks in other ways. The Georgia Constitution was similar, limiting the vote to whites. The state used a statute to limit black testimony. This too was included in the committee report. These laws and constitutional provisions 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. The reaction to these laws led to the Civil Rights Act of 1866 and to the Fourteenth Amendment.

Southern White Attacks on Blacks and the Report of the Joint Committee on Reconstruction

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 and their white allies after the war.

While Congress debated 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.” This box and note illustrated all too well the murderous and lethal violence that Southern whites were prepared to use to suppress black freedom.

The evidence presented in the massive committee report documented the dangers to blacks and white Unionists—and the nation itself—posed by the refusal of most former Confederates to accept black freedom. Congressman Bingham chaired the subcommittee that investigated the situation in Tennessee. Everyone agreed that Tennessee had more Union supporters than any other former Confederate state, and in the end the committee endorsed its immediate readmission to the Union. Nevertheless, a sampling of the testimony gathered from Tennessee supports the understanding that

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the committee that 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 toward blacks and Unionists, and that liberty was even more imperiled elsewhere in the former Confederacy.

Major General Edward Hatch testified that throughout Tennessee whites were unwilling to accept black liberty. General Hatch noted that “the negro is perfectly willing to work, but he wants a guarantee that he will be secured in his rights under his contract” and that “his life and property” would be “secured.” Blacks understood they were “not safe from the poor whites.” 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 price to be paid for his labor.” And if blacks resisted this reestablishment of bondage, “[t]hey are liable to be shot.”

Major General Clinton Fisk, for whom one of the nation’s first black colleges—Fisk University in Nashville, Tennessee—would be named, testified about the murderous nature of former “slaveholders and returned rebel soldiers.” 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.” Fisk pointed out this was “not the rule” 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 was far less optimistic than Major General Fisk. Perhaps because he was a field 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 the subject. I have not been in a 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.”’ Barnard thought this might be an exaggeration but told the committee, “I know there are plenty of bad men there

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36 Ibid., pp. 112, 120–21.
who would maltreat the negro.”37 He did not need to emphasize that this threat to black life came not from a “bad” man but from a Unionist.

Thus, in Tennessee, where loyal Union men were more common than elsewhere in the South, the dangers to blacks were great. In other states the dangers were extraordinarily greater. Major General John W. Turner reported that in Virginia “all 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, etc.” 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.” They would only “concede” such rights to blacks “if it is ever done, because they are forced to do it.” He noted that poor whites were “disposed to ban the negro, to kick him and cuff him, and threaten him.” George B. Smith, a Virginia farmer, admitted that whites in the state “maltreat [blacks] every day” and that blacks had “[n]ot a particle” of a chance “to obtain justice in the civil courts of Virginia.” He declared that a black or “a Union man” had as much chance of obtaining justice in Virginia as “a rabbit would in a den of lions.” Others in Virginia explained over and over again how the whites were trying to reduce blacks to servitude with laws and violence. The white sheriff of Fairfax County noted 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 of their old condition, as near as possible.”38

Perhaps the most powerful testimony on Virginia came from U.S. District Judge John C. Underwood, who had lived in the state since the 1840s. He described the cold-blooded murder of a white Unionist by a returning Confederate officer. The state did not prosecute anyone for the crime. He also noted that the murderer of an army officer had “not yet been punished” but was “still at large.” He believed that white Unionists in Virginia were even more vulnerable than blacks because the army would intercede to protect the freedmen, while “a Union man could” not “expect to obtain justice in the courts of the State.” But if the army abandoned the state and left the fate of the freedmen to the native whites of Virginia, the situation would

37 Ibid., p. 121.
38 Ibid., Part II: Virginia, North Carolina, South Carolina, pp. 4, 5, 17, 35.
be radically altered. Judge Underwood quoted a “most intelligent” man from Alexandria who declared that “sooner than see the colored people raised to a legal and political equality, the Southern people would prefer their total annihilation.”

Testimony about North Carolina revealed the lethal danger to blacks in the South. A black was shot down in cold blood near Camden. A U.S. Army captain reported “numerous cases” of the “maltreatment of blacks,” including flogging and shooting, and that “instances of cruelty were numerous.” He predicted that without U.S. troops, schoolhouses for blacks would be burned and teachers harassed. A minister in Goldsborough reported the cold-blooded shooting of a black man in order to take his horse. When another former slave led soldiers to the culprit, this black was also murdered.

Lieutenant Colonel Dexter H. Clapp told the committee about a gang of North Carolina whites who “first castrated” and then “murdered” a black man, but when the culprits escaped from jail the local police refused to even attempt to capture them. This gang then shot “several negroes.” One of these men, a wealthy planter, later killed a twelve-year-old black boy and wounded another. A local police sergeant “brutally wounded a freedman . . . in his custody.” While the man’s arms were tied behind his back, the policeman struck him on the back of his head with a gun. It was later shown that this man had “committed no offence whatever.” This policeman later “whipped another freedman” so that “from his neck to his hips his back was one mass of gashes.” The policeman left the bleeding man outside all night. A black man who defended himself when assaulted by a white was given twenty-two lashes with a whip over a two-hour period, then “tied up by his thumbs for two hours, his toes touching the ground only,” then “given nine more lashes and then tied up by his thumbs for another two hours.” A planter in the same area whipped two black women until their backs were “a mass of gashes.” Clapp asserted that away from military posts “scenes like these” were “frequent occurrences” in “portions” of North Carolina.

In South Carolina, Brigadier General Rufus Saxton, who had been awarded the Congressional Medal of Honor for his wartime valor, reported numerous atrocities. In Edgefield local whites treated free people as if they

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39Ibid., p. 7.
40Ibid., pp. 198, 202, 203, 206.
41Ibid., pp. 209–11.
were slaves. One “freedman [and] 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. Another man was whipped with a stick, while two children were also whipped. Saxton reported shootings, whippings (including of naked women), various forms of torture, floggings, and beatings of all kinds. 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, etc.”

The committee heard similar stories from Major General George Armstrong Custer, who was stationed in Texas. He reported that whites in that state blamed the black man for “their present condition,” and thus they did not “hesitate” to use “every opportunity to inflict injuries upon him in order, seemingly, to punish him for this.” Custer noted that in Texas more than 500 former Confederates had been charged with murdering blacks or white Unionists, but no one had been convicted. Blacks, however, were routinely convicted and jailed for minor offenses. Custer reported that “it is of a weekly, if not of daily, occurrence that freedmen are murdered. Their bodies are found in different parts of the country,” but no whites were ever charged in these cases, even when they were known. Custer reported that “[c]ases have occurred of white men meeting freedmen they never saw before, and murdering them merely from this feeling of hostility to them as a class.”

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

Perhaps even more horrible than the fear of violence was the threat of reenslavement. Brigadier General Charles H. Howard, who was serving as an inspector for the Freedmen’s Bureau, reported instances in Georgia of blacks being held on plantations against their will and of others being

42Ibid., pp. 223, 222–29, 234.
43Ibid., Part IV: Florida, Louisiana, Texas, pp. 75–76.
kidnapped and taken to Cuba, where slavery was still legal.\textsuperscript{44} At South Newport, Georgia, a woman escaped from the plantation of her former master “after much maltreatment.” She reported that her former master had “insisted that she and her children were not free, [and] that he cared nothing for ‘Lincoln’s proclamation.’” When she insisted on leaving “she was confined on bread and water” until she escaped. However, she was forced to leave her children behind.\textsuperscript{45}

Howard also reported that at New Altamaha, Georgia, army officers had investigated “a case where certain parties were charged with kidnapping colored children and shipping them to Cuba.” Two children “mysteriously disappeared” but were then found in Florida after their former owner was placed “under bonds to produce the children.” The former owner could not (or would not) explain how the children got to Florida or how he knew where they were.\textsuperscript{46} The implication was clear: the former master had kidnapped the children, sent them (or took them) to Florida, and was preparing to send them to Cuba, where they could be sold as slaves.

\section*{Understanding the Fourteenth Amendment}

It was in the context of this history that the Joint Committee on Reconstruction and Congressman Bingham wrote Section 1 of the Fourteenth Amendment. What did Bingham, Stevens, and their colleagues desire to accomplish with this provision? We can never fully know, of course, but the context of the amendment suggests that their goals were sweeping and broad. Bingham 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.\textsuperscript{47} They had to be able to protect their families in the courtroom and the voting booth, as well as in the marketplace. They had to be protected

\textsuperscript{44}Ibid., Part III: Georgia, Alabama, Mississippi, Arkansas, p. 33. Howard was the brother of the war hero Major General Oliver Otis Howard, who at this time was the head of Freedmen’s Bureau.

\textsuperscript{45}Ibid., p. 42.

\textsuperscript{46}Ibid., p. 43.

\textsuperscript{47}For lawyers, although not necessarily for most historians, this analysis undermined the logic of the early twentieth-century-court’s decision in \textit{Lochner v. New York}, 198 U.S. 45 (1905) and was clearly wrong. The idea of “freedom of contract” did not include the right
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, which the First
Amendment guaranteed them at the federal level, and they need to be pro-
tected so they could organize politically. They needed equal schooling to
participate in the political process.

It would have been impossible to detail all these needs to explicitly pro-
tect them in a constitutional amendment, and thus Bingham did not try.
Instead, he used large phrases encompassing grand ideas. He took John
Marshall’s admonitions in *McCulloch v. Maryland*\(^48\) to heart. He did not try
to turn the Constitution into a legal code. Rather, he produced language
that would “endure for the ages” 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, Bingham and the Joint Committee reflected the
simple lesson of Major General John W. 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.”\(^49\)
Bingham’s goal was to make sure that African Americans, and all other mi-
norities, had full access to their “half of the sidewalk” in the social world, in
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,
by trying to bring those concepts and rights to “all” Americans, their goal
was nothing short of a revolution in liberty and justice.

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\(^{48}\)17 U.S. (4 Wheat.) 316 (1819).

\(^{49}\)Report of the Joint Committee, Part II: Virginia, North Carolina, South Carolina, p. 4.