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THE BIRTH AND REBIRTH OF CIVIL RIGHTS IN AMERICA

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GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013) Pp. 304. Hardcover $ 39.00.

GEORGE A. RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866 (2012). Pp. 224. Hardcover $ 41.95.

The titles of these two books promise an introduction to the creation of a body of law, *civil rights*, in the United States in the immediate aftermath of the Civil War. The first use of the term "civil rights" in a United States legislative enactment occurred in the 1866 Civil Rights Act.[1] It was also used in an early draft of Section One of the Fourteenth Amendment, within weeks of the adoption of the 1866 Civil Rights Act.[2] John Bingham, author of the constitutionally formative second sentence of Section One of the Fourteenth Amendment, originally opposed using "civil rights" in the language of the 1866 Act because, he said, he feared that it implied the right to vote (a right that, on January 25, 1866, he said he favored, but believed was not yet politically attainable).[3] At his criticism, the phrase was removed from the internal language of the bill but retained in its title.[4] The bill did get adopted, even over the veto of (Tennessean) President Andrew Johnson and without the vote of John Bingham. Bingham believed the Constitution needed first to be amended so that Congress would be explicitly authorized to protect these rights, and they would be secured against retrenchment by later Congresses.[5] Later, as Rutherglen explains, the 1866 Act, adopted under the authority of the Thirteenth Amendment by a Congress that understood itself to be forbidding the imposition of "badges and incidents of slavery," came, unfortunately, to be viewed as all that the Fourteenth Amendment prohibited, that is *governmental* action (and perhaps biased inaction) abridging privileges or immunities of citizens of the United States, or depriving persons of equal protection or due process of

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1. GEORGE A. RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866 4 (2012).

2. GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 119 (2013).

3. *Id.* at 113, 119.

4. *Id.*

5. *Id.* at 119-20.

law. And, relatedly, the enforcement power of Congress under *both* Amendments was also for a long time seen as thusly limited to correction of state action (and possibly also systematic governmental inaction) of this sort.[6] To some degree, the reader does get the story of this development from the combination of these two books. I will retell this story briefly below, and then I will offer a more complete overview of the two books.

Before 1866, there were some citizen rights, called in the Constitution "[p]rivileges and [i]mmunities of [c]itizens[hip],"[7] but these rights were understood to be determined by state citizenship. Each state granted to its own citizens whatever it considered to be their citizen rights, and whichever of those rights were the "fundamental" ones, said the Supreme Court in *Corfield v. Coryell*,[8] Article Four, Section Two of the United States Constitution forbade the state to deny to incoming American citizens from other states.[9]

This protection proved inadequate because states put their own citizens into hierarchical categories—most notoriously, white and colored—and then denied rights as fundamental as the freedom of locomotion to people of color, whether from within or without the state.[10] Many Northern states had laws, albeit unenforced ones, forbidding the entry of outside Negroes for purposes of residency. Southern states did enforce their Negro Seaman Acts, laws restraining Negro sailors employed on boats docked in town by the requirement that those men, citizens or not, be literally imprisoned in town until the boat was ready to depart. Justice John Marshall (on circuit in 1820) refused to apply such a law (although he did this by indirection) and Justice William Johnson (on circuit in 1823) flatly declared such laws unconstitutional; his decision did not help the seaman in question because the Supreme Court did not have power prior to the Civil War to issue a writ of habeas corpus to a state judge. In 1853, a Southern Federal District Court Judge sitting alone as a circuit court judge, with Justice Wayne unable to attend, declared one such Negro Seamen law constitutional. All of these cases involved foreign sailors, so the issue was never joined whether these laws violated the Privileges and Immunities Clause with respect to black citizens of northern states.[11]

John Bingham (1815-1900)—raised in a small town in rural east-central Ohio, brought up in a staunchly anti-slavery Church, educated at a tiny college whose president

6. RUTHERGLEN, *supra* note 1, at 14.
7. U.S. CONST. art. IV, § 2.
8. Corfield v. Coryell, 6 F. Cas. 546, 551 (1823).
9. *See* U.S. Const. art. IV, § 2.
10. RUTHERGLEN, *supra* note 1, at 23.
11. *See* Elkison v. Deliesseline, 8 F. Cas. 493 (1823) (Justice Johnson declaring unconstitutional on commerce clause grounds a South Carolina law that imprisoned free persons of color who worked on ships that landed in South Carolina for the duration of the ship's stay, and according to which, if the ship abandoned them there, they would be sold as slaves); The Wilson v. United States, 30 F. Cas. 239 (1820) (Justice Marshall declaring through rather tortured reasoning that the Virginia law meant to keep free Negro seamen imprisoned while docked, did not apply to the seamen "of color" in question). The third, *Roberts v. Yates*, 20 F. Cas. 937 (1853) is the only one cited in the Rutherglen volume under review here; this book erroneously states that the South Carolina Negro Seaman's Law "was eventually upheld against challenges that it violated the Privileges or Immunities Clause." RUTHERGLEN, *supra* note 1, at 23. The plaintiff, Roberts was a native of Nassau in the Bahamas, not a citizen of a U.S. state, and was employed on a British ship and he claimed that the South Carolina law violated commercial treaty law with Great Britain (and implicitly the foreign commerce power of Congress). He could not have brought a challenge that the law violated the "privileges and immunities of citizens of the United States."

was an outspoken abolitionist, resident in a part of Ohio where some of the earliest arguments that the Constitution is an antislavery document were being published by such men as Theodore Weld, and trained as an attorney—was troubled by the lack of protection for free blacks both before *and* after the Civil War.[12] Bingham was active in party politics from the early years of his career as an attorney: first, in an antislavery wing of the Whig Party and later the Free Soil and then the Republican Party.[13] His earliest years as a political activist do not publicly show antislavery sentiment; in 1844 he campaigned for pro-slavery Whig Henry Clay (not for the Liberty Party), and in 1848, he campaigned for Zachary Taylor (not for the Free Soil Party).[14] In a private letter from December of 1850 to then-Senator Salmon Chase, a fellow Ohioan, Bingham bemoaned of the 1850 Fugitive Slave Act that "[a]ll men who have souls are indignant," but publicly took the stance that all unrepealed laws must be obeyed.[15] In another private letter of the same month, he insisted that he wanted the Fugitive Slave Act amended.[16] But publicly, his stance was simply that the Union itself had done much to check slavery, for instance, ending the foreign slave trade and checking its expansion above the Missouri Compromise line of 1820, and that continuing to uphold national laws offered hope for further reform.[17]

By 1852, having lost a judgeship election in 1851, Bingham finally took a firm antislavery stand, authoring a resolution for his county Whig party that called for amending the Fugitive Slave Act, forbidding any new slave states, and ending slavery in the District of Columbia and in all federal territory.[18] From this point on his position was that of the Free Soil Party, but in Ohio that position was taken by a group called the Free Democrats.[19] Bingham stayed out of politics in 1853, but after the 1854 Kansas Nebraska Bill was introduced (letting slavery spread above the 1820 line via popular sovereignty), a furious Bingham was drawn back into the fray, running for the House of Representatives on what was called the Anti-Nebraska Party.[20] To him, it was now clear that compromise with the South was no longer possible.[21] A local paper reported him as having "gone completely over to the abolitionists."[22] At this point, Bingham's publicly stated views were not fully abolitionist but included the relatively radical position that Congress acted unconstitutionally in authorizing slavery in any territory beyond the original thirteen states.[23] Bingham won the election, and in those days, Congressmen did not take office until December of the year following the election, which would be December 1855.[24] The full statement of his antislavery position was not to come until 1859, but by January 1857, a couple of months before the *Dred Scott* decision, his fully stated view had come to be that the Bill

12. MAGLIOCCA, *supra* note 2, at 6, 11, 16, 19.
13. *Id.* at 20, 38-39.
14. *See id.* at 27, 31.
15. *Id.* at 32.
16. *Id.* at 33.
17. *Id.* at 32-33.
18. *Id.* at 38.
19. *Id.*
20. *Id.* at 39-40.
21. *Id.* at 40.
22. *Id.*
23. *Id.*
24. *Id.* at 40-41.

of Rights—including the Fifth Amendment Due Process Clause—was supposed to govern Congress's action in admitting any new states beyond the first Thirteen.[25] Since this clause said that no person could be deprived of liberty without the kind of process involved in trials for crimes, and since the Constitution everywhere referred to slaves as persons, Congress had been obligated since 1789 to forbid slavery in carrying out its power to admit new states.[26] Bingham argued that the "primal object" of the Constitution "must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights," and "the equal protection of each" is a "principle[] of our Constitution."[27]

The entry of Oregon into the Union in 1859 provoked John Bingham to develop his full-blown anti-slavery theory of civil rights.[28] Oregon's constitution prohibited negroes or mulattos from entering or residing in Oregon, from making contracts, from owning land, and from "maintain[ing] any suit" (in courts), and provided for punishing persons employing blacks or helping them enter.[29] John Bingham insisted (to no avail) that Oregon should be kept out of the Union until it changed this constitution.[30] These prohibitions, he argued, violated the natural right of free persons to live in the land of their birth.[31] Moreover, they violated the Privileges and Immunities Clause of Article Four, Section Two since (in contrast to "political rights" like voting) the rights of coming into a state, acquiring and enjoying property there (which, per the Fifth Amendment, could not be taken away without just compensation), making contracts and filing lawsuits (with protection of the right to trial by jury, per the Sixth and Seventh Amendments, as well as Article Three) were "privileges of citizens of the United States" which no state could take away.[32] In addition, "no one should be deprived of life or liberty but as punishment for crime" (per the Fifth Amendment).[33] Bingham admitted that the phrase "of the United States" did not appear in Article Four, Section Two, but he considered it an implied ellipsis that made sense of the clause.[34] Therefore, "free African-Americans were 'entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights to life, liberty, and property, and their due protection in the enjoyment thereof by law.'"[35]

Here one sees the origin of the later Section One of the Fourteenth Amendment, and also the nature of Bingham's understanding of the linkage between the rights that ended up listed in the Civil Rights Act of 1866 and the rights of the first eight Amendments to the Constitution, which Bingham said more than once were what was meant in the Fourteenth Amendment phrase "privileges or immunities of citizens of the United States."[36] In Bingham's view, these fundamental rights or "privileges and immunities" of citizens were

25. *Id.* at 53.
26. U.S. CONST. amend. V.
27. MAGLIOCCA, *supra* note 2, at 56.
28. *Id.* at 62.
29. *Id.* at 63.
30. *See id.* at 62.
31. *Id.* at 63
32. *Id.*; U.S. CONST. amend. XIX.
33. MAGLIOCCA, *supra* note 2, at 223 n.212.
34. *Id.* at 63.
35. *Id.* at 223 n.213.
36. U.S. CONST. amend. XIV.

an amalgam of natural rights (such as the right to acquire and enjoy property) and conventional rights (such as the right to trial by jury).[37] After slavery was abolished in the Thirteenth Amendment, such that all African-Americans were now free, he made it his point to see to it that the Constitution be again amended.[38] The follow-up amendment would have to assure, first, African-Americans' citizenship (contrary to the *Dred Scott* decision) and, secondly, African-Americans' privileges and immunities of national citizenship (for Bingham, at least, a combination of natural rights and common law rights) and African-Americans' (along with other persons') natural rights to equal protection and due process of law.[39]

The Civil Rights Act of 1866 had, like the Fourteenth Amendment, begun with a sentence declaring all persons born in the United States except persons "subject to a foreign power" and except "Indians not taxed," to be citizens.[40] It then addressed the same concerns later described in Section One of the Fourteenth Amendment, but instead of the broad phrase "privileges and immunities of citizens of the United States," had listed specific citizen rights: the right to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property. It said that irrespective of race or previous servitude, all citizens' rights to these things shall be the same as that of white citizens, and that they shall be subject to like pains and punishments, any "law, statute, ordinance, regulation, or custom to the contrary notwithstanding."[41] In his veto of this Bill, President Andrew Johnson had declared that he did not believe that the freed slaves "possess[ed] the requisite qualifications to entitle them to *all the privileges and immunities of citizens of the United States*," even though the 1866 Bill nowhere used this phrase.[42] In explaining his own vote against the Civil Rights Bill of 1866, Bingham described it as "legislation to enforce in its letter and spirit the bill of rights as embodied in [the] Constitution," and said he would support such legislation as soon as the Constitution itself was amended to authorize it.[43] Thus, we observe from its very beginnings that the phrase "privileges or immunities of citizens[hip]" was understood in

37. MAGLIOCCA, *supra* note 2, at 64.

38. U.S. CONST. amend. XIII; MAGLIOCCA, *supra* note 2, at 64.

39. MAGLIOCCA, *supra* note 2, at 65.

40. RUTHERGLEN, *supra* note 1, at 51-52. Rutherglen errs, in my view, in interpreting the exclusion of Indians from coverage as a racist move. The 1866 exclusion of aliens by silent omission and the exclusion of aliens from having property rights in the 1870 Act may well have had some racist motivation, since that Act was adopted with discussion of the Chinese and their rights, deliberately retaining the exclusion of non-white, non-black persons (i.e., Asians) from permission to naturalize. But the exclusion of "Indians not taxed" was a recognition respectful of Indian sovereignty; it applied to those Indians living on tribal land under tribal government. Other Indians were supposed to get civil rights. *Elk v. Wilkins*, 112 U.S. 94 (1884) got it wrong. *Compare* Gary A. Greenfield & Don B. Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 663-64 n.9, 671 n.40, 673-74 nn.52-55 (1975); *Id.* at 663-64 n.9 (describing the Fourteenth Amendment understood by its supporters as entrenching the principles of the 1866 Civil Rights Act in regards to "every person of color," "domesticated" Indians who "live in civilized society," and "Indians not taxed"); *Id.* at 611, n.40 & 673-674 nn.52-55 (citing CONG. GLOBE, 39th Cong., 1st Sess., 489, 572-73, 599 ("every person of color"), 498 ("domesticated" Indians who "live in civilized society"), 572 ("Indians not taxed"), 573 (discussing coverage by 1866 Act of non-reservation Indians), *with* RUTHERGLEN, *supra* note 1, at 63 (citing the very Congressional testimony that acknowledges the quasi-sovereignty of tribal governments).

41. Civil Rights Act, 14 Stat. 27, 27 (1866).

42. MAGLIOCCA, *supra* note 2, at 120 (emphasis added).

43. *Id*.

some quarters to be fully covered by the list of property rights and use of the legal system "for security of person and property" that were in fact itemized in the Civil Rights Act, and in other quarters, to embrace both these listed rights and the first eight amendments to the Constitution, called by John Bingham "the bill of rights."[44] Additionally, in his 1859 critique of the Oregon Constitution, Bingham said that the right to travel among the states was one of the privileges of United States citizenship; for him the "privileges or immunities" phrase referred to all rights mentioned in the Constitution, and he understood Article Four, Section Two to imply a right to travel into any state without encountering legislative discrimination there.[45] This ambiguity in the phrase "privileges or immunities of citizens of the United States" led to the historic debate between proponents of "wholesale" versus "selective" incorporation of the first eight amendments to be applied against state governments by the Fourteenth Amendment (not via the Privileges or Immunities Clause, as Bingham expected, but after the *Slaughter-House Cases'* evisceration of that clause, via the Due Process Clause).[46]

Bingham had expressed concern that the Civil Rights Act did not protect aliens as it should; they too have a right to engage in commerce, make contracts, and be equally protected by the laws.[47] The Fourteenth Amendment, ratified by the states (including Southern ones, which were kept out of Congress until they ratified it) by 1868, did extend both equal protection of the laws and the protection of life, liberty and property subject to due process of law to all "person[s]," not simply to citizens.[48] When Congress adopted the Enforcement Act of 1870, it took Bingham's concerns into account.[49] It (in Section Sixteen) specifically re-listed all the rights from the 1866 Act except "the right to inherit, purchase, lease, sell, hold and convey real and personal property"[50] and extended them to not just citizens but "all persons." And just to be on the safe side in terms of constitutionality, it announced (in Section Eighteen) that the Civil Rights Act of April 9, 1866 "is hereby re-enacted."[51]

Magliocca's book makes clear (if readers still doubt it after reading work on the subject by Michael Kent Curtis and Akhil Amar) that Bingham believed the Privileges or Immunities Clause of the Fourteenth Amendment applied the Bill of Rights provisions and other rights provisions of the Constitution against state governments.[52] His book, though, does uncover an intriguing incident of ambiguity as to what other members of Congress believed the Fourteenth Amendment established. Bingham chaired the House Judiciary Committee in 1871 when it was faced with a petition from Victoria Woodhull asking that the House adopt legislation to "secure to citizens of the United States the right to vote without regard to sex," on the grounds that voting was a "privilege or immunity of citizens

44. 14 Stat. 27; MAGLIOCCA, *supra* note 2, at 120-22.

45. MAGLIOCCA, *supra* note 2, at 63.

46. *See Slaughter-House Cases*, 83 U.S. 36 (1873); MAGLIOCCA, *supra* note 2, at 63; RUTHERGLEN, *supra* note 1, at 141.

47. MAGLIOCCA, *supra* note 2, at 119.

48. U.S. CONST. amend. XIV, § 1.

49. *Cf.* MAGLIOCCA, *supra* note 2, at 120 (stating erroneously that the Civil Rights Act of 1866 was amended to accommodate this criticism. That did not happen until the 1870 Civil Rights Act).

50. Prohibitions on foreigners' owning land were common among the states, and initially were not racially biased. *See* Enforcement Act of 1870, 16 Stat. 140, 144 (1870).

51. *Id.*

52. MAGLIOCCA, *supra* note 2, at 62-63.

of the United States."[53] By this time the Fifteenth Amendment had been both proposed and ratified. Bingham had pushed hard for a stronger version of the Fifteenth Amendment, successfully urging that religious creed and property also be forbidden grounds for denying the vote. His amendments to this effect, however, had been dropped in conference committee, and the Amendment as we know it is what went to the states for ratification.[54] Now, faced with the question whether voting was a privilege or immunity of citizenship, the committee replied rather obscurely, as follows:

> Section One did not "refer to privileges and immunities of citizens of the United States other than those embraced in the original text of the Constitution" by the Privileges and Immunities Clause. Put another way, the Fourteenth Amendment "did not add to the privileges or immunities before mentioned, but was deemed necessary to their enforcement. It had been judicially determined that the first eight articles of amendment to the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the [Privileges and Immunities Clause]." Accordingly, the committee held that the Privileges or Immunities Clause "did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution."[55]

This last internal quote is both shocking and is a foreshadowing of what the Supreme Court majority would say two years later in the *Slaughter-House Cases*.[56] It comes during the same session of Congress when Bingham said (speaking for himself, as distinguished from reporting views of a committee): "The privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States."[57] He then read aloud the entirety of the eight amendments and said that they had not been treated as limiting the power of the States "until made so by the fourteenth amendment."[58] The Committee Report passage certainly seems in tension with this statement of Bingham's own views, and it would have been both helpful and interesting for Magliocca to let his readers know who else was on this Committee, and what their political commitments were. At a minimum, it suggests that the *Slaughter-House Cases* majority opinion similarly diminishing the import of the Privileges or Immunities Clause was reflective of some segment of opinion beyond that of the five justices who signed on to it.

The Magliocca volume is a biography; it is not limited to a discussion of Bingham's role in shaping the Fourteenth and Fifteenth Amendments. In the book, we learn of his role

53. *Id.* at 159.
54. *Id.* at 155-56.
55. *Id.* at 159. The extended quote is Magliocca paraphrasing the report.
56. *See Slaughter-House Cases*, 83 U.S. 36 (1873).
57. MAGLIOCCA, *supra* note 2, at 122 (citing CONG. GLOBE, 42d Cong., 1st Sess. App. at 84 (1871)).
58. *Id.*

as a prosecutor of the John Wilkes Booth conspiracy[59] and as the lead attorney in the Impeachment/Removal Trial of President Andrew Johnson for, essentially, attempting to undo the required military supervision of elections in the South to carry out the Reconstruction Acts (which he had vetoed).[60] We learn of Bingham's exit from Congress in 1872[61] due to redistricting and his subsequent career as an Ambassador to Japan.[62] And we learn what little is available in the records about his family life.[63] But the book is of interest because of his role as a "founding son," in Magliocca's apt phrase. The book is a good read and well-documented; however, readers would have been better able to assess its contribution had the author made clear how he understands its contents to differ from earlier work on Bingham by Erving Beauregard,[64] whose 1989 biography is cited in both bibliography and endnotes, and by Richard Aynes,[65] whose three lengthy articles on Bingham are similarly cited.

Magliocca's book makes plain that John Bingham understood the rights he fought to protect in the Fourteenth Amendment as basically natural rights which had already been incorporated into American positive law but (prior to the Amendment) incompletely; George Rutherglen takes a different view.[66] His book, *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866*, is specifically about the Civil Rights Act of 1866.[67] He describes the 1866 Act as a "bridge" between the privileges and immunities of state citizenship protected in Article IV and those of national citizenship protected by the Fourteenth Amendment.[68] He says that the 1866 Act "took the previously recognized privileges and immunities of citizenship [and] *gave them content from the common law*" and then said these were rights that must be recognized irrespective of race.[69] As the book's title indicates, Rutherglen considers the fact that the 1866 Act constitutionalized the freedom from discrimination with respect to *common law rights* to be of signal importance, although the book failed to convince me of this.[70] Interestingly, Rutherglen agrees with Bingham that the 1866 Act was unconstitutional until rendered constitutional by the Fourteenth Amendment.[71]

One comes to understand the source of Rutherglen's differing from Bingham on the nature of civil rights as follows: William Blackstone, readers learn, described property rights as "civil rights conferred upon individuals" under the social contract "in exchange

59. *Id.* at 89.
60. *Id.* at 142.
61. *Id.* at 154.
62. *Id.* at 167.
63. *Id.* at 6.
64. *Id.* at 277.
65. *Id.*
66. *Id.* at 56.
67. *See generally* RUTHERGLEN, *supra* note 1.
68. *Id.*
69. *Id.* at 11.
70. Rutherglen himself acknowledges that "the basic rights protected by the act" were contemporaneously "characterize[d]" by "various" terms: "natural rights, common law rights, privileges or immunities, and civil rights." *Id.* at 74. Despite this acknowledgment, he lapses back into certainty and inevitability language when he says that framers of the 1866 Act "had nowhere to turn other than to the resources of the common law." *Id.* at 174.
71. RUTHERGLEN, *supra* note 1, at 73.

for that degree of natural freedom" that people give up to enter society.[72] By contrast, John Bingham apparently sided with John Locke (*Second Treatise*) in believing that property rights were natural rights that people retained as inalienable.[73] Rutherglen traces the phrase "civil rights" back to sixth century Justinian, but the real insight from his historical exegesis does not come until his exploration of the connections among slave codes, postbellum Black Codes, and the 1866 Act.[74] The civil rights encoded by the latter turn out to be the "mirror image" of slave status.[75] What the slave codes took away, the Civil Rights Act gave back.

Rutherglen's book is meant simply as a history of one law, perhaps the most important law ever adopted in the U.S., but that deliberately narrow focus provides a certain distortion in the history presented in the book. The book limits its gaze resolutely to civil rights as they were understood by drafters of that 1866 law and as those rights evolved over time. Originally, the right to vote and the right to serve on juries were both widely understood (despite Bingham's remark to the contrary noted above) as political rights, rather than civil rights.[76] By 1870, American blacks possessed both because the Fifteenth Amendment had been ratified.[77] Instead of relating the downs and ups that followed for these rights, Rutherglen says that with a single deviation for *Buchanan v. Warley*,[78] the period from *Yick Wo v. Hopkins*[79] to *Shelley v. Kraemer*[80] was flatly a "period of civil rights neglect."[81] This book ignores the history of the Southern dispossession of both jury and voting rights from blacks,[82] the Fuller Court's complicity therein,[83] the near miss by

72. *Id.* at 41.
73. *Id.* at 42.
74. *Id.* at 53.
75. *Id.* at 45-47, 54, 160.
76. *Id.* at 41.
77. *Id.* at 80.
78. Buchanan v. Warley, 245 U.S. 60 (1917).
79. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
80. Shelley v. Kraemer, 334 U.S. 1 (1948).
81. RUTHERGLEN, *supra* note 1, at 121.
82. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1888-1910 (1974) (documenting the wave of voting rights deprivation measures that swept the South; jury lists generally came from voter lists).
83. To cite just five examples of the Fuller Court's deliberate turning of a blind eye when compelling evidence of unconstitutional disenfranchisement of blacks was presented to it: (1) The first instance was *Mills v. Green*, 159 U.S. 651 (1895). After district court Judge Goff had enjoined the holding of elections for the South Carolina constitutional convention on the grounds that the voting rules and their blatant manipulation violated the Fifteenth Amendment, Chief Justice Fuller, sitting on circuit, lifted the injunction saying that the district court judge erred in assuming jurisdiction "to protect the purely political rights of individuals." Green v Mills, 69 F. 852, 858 (1895). Then in *Mills v. Green*, 159 U.S. 651 (1895), the Supreme Court ruled the case moot, since the election had been held. (2) *Williams v. Mississippi*, 170 U.S. 213 (1898) refused to declare void the Mississippi system for excluding black voters and consequently black jurors on the grounds that the fact pattern of discrimination was not as extreme as the one in *Yick Wo v. Hopkins*. (3) *Giles v. Harris*, 189 U.S. 475, 488 (1903) refused to overturn the voting system of Alabama on the grounds that even if the allegations were true, and "the great mass of the white population intend[ed] to keep the blacks from voting," nonetheless, "relief from a great political wrong" can come only from "the legislative and political department of the government of the United States." (4) *Giles v. Teasley*, 193 U.S. 146 (1904) refused to grant either a damages award or writ of mandamus to deal with the massive deprivation of black voting rights in Alabama. (5) *Jones v. Montague*, 194 U.S. 147 (1904) refused to intervene against massive administrative manipulation denying voting rights to blacks in Virginia on the grounds that the 1902 election had already taken place, so the issue was moot.

Eleven appeals went to the Fuller Court between 1891 and 1906 to reverse murder convictions of blacks, several of which documented massively biased jury selection systems. The Fuller Court did not overturn a single

the Republicans in 1889-1890 to adopt new federal enforcement machinery to protect black voters in the South,[84] the 1894 removal of voting rights protections from the federal code by a Democratic Congress without a filibuster by the Republicans, and then the gradual restoration of voting and jury rights by post-Fuller Supreme Courts,[85] including the gradual beginning of the end to Jim Crow and the insistence on due process for (Southern black) criminals by the Supreme Court of the thirties and forties.[86]

Rutherglen summarizes the failure of Reconstruction with this statement: "Indifference rather than hostility defeated the efforts to achieve the ambitious goals of Reconstruction."[87] This statement is misleadingly incomplete. No doubt the indifference of the Northern public and the costliness of maintaining a military presence for decades in the South, or even of an imaginably huge administrative presence, prevented the kind of enduring enforcement that Reconstruction would have required, were it not to have been postponed for a hundred years. But such a military or administrative effort would not have been needed at all if not for the implacable, violent, and enduring white Southern hostility to allowing blacks their Fourteenth and Fifteenth Amendment rights—rights under the two amendments that were forced upon the South as the price of readmission into Congress. Nor is "indifference" adequate to characterize the callous blindness exhibited by the Fuller Court (1888-1910) to the deprivation of jury and voting rights of blacks, nor to characterize the Democratic Congress's attitude in eliminating from the federal code all voting rights enforcement laws in 1894.

The reason for Rutherglen's focus becomes clear in chapters seven, eight, and nine, where the book really has a story to tell. It is a terrifically interesting story (although it could perhaps have been more compellingly told within the confines of one substantial law review article). These chapters comprise the final third of the book. The story is basically about what happened to the Civil Rights Act of 1866 in *Jones v. Alfred Mayer Co.* (1968),[88] in the follow-up to this Supreme Court decisions in *Sullivan v. Little Hunting*

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conviction, at most returning the case to the state judicial system for a second look. Leslie F. Goldstein, *How Equal Protection Did and Did Not Come to the United States, and the Executive Branch Role Therein*, 73 MD. L. REV. 190, 223-26 (2013).

84. The Hoar-Lodge Act would have become law but for the deployment by Senate Democrats of first a filibuster and then a mass Democratic walkout to prevent a quorum. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 182-85 (2011).

85. The White Court (1911-1920) in eleven years produced two anti-segregation decisions (Rutherglen mentions only *Buchanan v. Warley*, 245 U.S. 60 (1917); the other was *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151 (1914)); upheld two convictions under the federal anti-peonage law, declaring void both a debt servitude law, *Bailey v. U.S. II*, 219 U.S. 219 (1911) and a criminal surety statute, *United States v. Reynolds*, 235 U.S. 133 (1914); and issued three pro-voting-rights decisions (striking down grandfather clauses): *Guinn and Beal v. United States*, 238 U.S. 347 (1915); *United States v. Mosley*, 238 U.S. 383 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

The Taft Court (1921-1930) struck down the white primary law of Texas in *Nixon v. Herndon*, 273 U.S. 536 (1927) and ruled that lynch-mob-dominated trials violate the due process clause in *Moore v. Dempsey*, 261 U.S. 86 (1923).

86. Jim Crow begins to end with *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) and *Mitchell v. United States*, 313 U.S. 80 (1941). The Hughes Court (1930-1941) threw out convictions for biased jury selection in five different cases and produced eight cases protecting Southern blacks who had been denied due process in sham trials. *See* Leslie F. Goldstein, *Asian and Black Intersectionality in Racial Discrimination Policy, 1866-1954*, 30-32, 37 (2014 APSA Annual Meeting), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455765.

87. RUTHERGLEN, *supra* note 1, at 100.

88. *Id.* at 137.

Park, Inc. (1969),[89] *Tillman v. Wheaton-Haven Recreation Ass'n* (1973),[90] *Johnson v. Railway Express Agency* (1975),[91] and *Runyon v. McCrary* (1976),[92] and in the Congressional ratification and expansion of these decisions in the 1991 Civil Rights Act. As a teacher of the constitutional law of civil rights, I was previously aware of the bare bones of this story.[93] However, I did not really grasp its profound impact on the *practice* of employment discrimination law. What I had already understood is that *Jones v. Alfred Mayer* transformed Section 1982 (whose words simply restated the equal right to buy and sell property from the 1866 Civil Rights Act) into a civil rights law that could be violated by private individuals (i.e. without state action), and into one that did not have to be tied to interstate commerce, thereby causing the Section to reach more broadly than the 1964 Civil Rights Act, and even than the 1968 Open Housing Act. What Rutherglen's book also taught me is that the Court's move in *Tillman v. Wheaton-Haven Recreation Association*, extending *Jones*'s logic to Section 1981 on contracts, meant that racially discriminatory employment contracts all over America would now be correctable not only by federal injunction (per Title VII), but also by damages remedies, and not only for big businesses, but also small employers.[94] Once damages opened up, then lawyers throughout the land had incentives to bring discrimination lawsuits (for they would get one-third of the award). And, since these rulings applied only to racial discrimination, because the Thirteenth Amendment power (foundation of the 1866 Act) applied to removing badges and incidents of slavery, Congress had incentive, on basic fairness grounds, to extend the potential for damages awards to other groups that it had used its commerce power to protect against employment discrimination, such as women, the elderly and the disabled.[95] This Congress did in 1991.[96] *Jones v. Alfred Mayer* had a profound ripple effect on employment law in America. This is an intriguing story, and one well worth reading.

This employment law development dramatically expanded the range of congressionally protected and protectable civil rights. At least as to male persons, this development might well be one that John Bingham would have welcomed. He would have gone further than the Supreme Court, however, and would have wanted it to declare long ago that all the protections of the Bill of Rights apply as restrictions on government at the state level as well as the federal.

89. *Id.* at 145.
90. *Id.*
91. *Id.* at 146.
92. *Id.* at 148.
93. And had even written a (widely neglected) article on an early phase of this development. *See* Leslie F. Goldstein, *Death and Transfiguration of the State Action Doctrine:* Moose Lodge v. Irvis *to* Runyon v. McCrary, 4 HASTINGS CONST L. Q. 1 (1977).
94. RUTHERGLEN, *supra* note 1, at 145.
95. *Id.* at 151.
96. *Id.*