

Bound By Oath | Season 1 | Episode 2: The Fight for the 14th

John: This is Bound by Oath, a new podcast series from the Institute for Justice's Center for Judicial Engagement. Thanks for tuning in. In the first episode, we talked about what the world was like before the 14th Amendment. In this episode, we're going to talk about the birth of the Amendment itself: the people behind it and opposed to it, and why its ratification was so controversial that it nearly plunged the country back into war.

Kurt Lash: The story of the Fourteenth Amendment is one of the most dramatic stories in American constitutional history. The amendment was born of political desperation. It almost caused a second Civil War and it was only passed after the impeachment of an American president.

Aderson Francois: What you have for the first time is an entire population of people who up until then had been considered to be property actually sitting down and rewriting the document that had enslaved them. To me that's radical thing. To me, it sort goes in a very very deep sense to what the Amendment was meant to do and what it stands for and why we should value it as much as we value the 1787 Constitution.

John: If you're not a lawyer, the text of the 14th Amendment is probably unfamiliar.

Here is Section One of the Amendment, which does most of the heavy lifting in terms of protecting individual rights.

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

John: Here's the fundamental change the 14th Amendment makes to the Constitution:

The original 1787 Constitution contained strict limitations on federal power but relatively few limitations on what state governments could do to their residents. The rights that we associate with the Founding Era, like the right to free speech and the right to be free from cruel and unusual punishment, those only applied to the federal government. If a state gov't punished you for speaking out against slavery for instance, the federal constitution had nothing to say about it. Even though it's in the Bill of Rights. Which was not an accident. The thought was that because state and local governments were closer to the people it was much less likely that they would become tyrannical. But after the Civil War, state and local governments show that, even in the aftermath of defeat, they can be very tyrannical indeed.

John: It's 1865. The Civil War is over. As many as 800,000 Americans have lost their lives. Bodies are still decaying in the fields. Soldiers families' are awaiting word of their whereabouts. Four million slaves, one-eighth of the population, are now free, many of them anxiously searching for loved ones they've been separated from. The economy is devastated. The federal government is mired in debt. The country is in chaos. Welcome to Reconstruction.

Gerard Magliocca: Well, it's a disaster. The problems that the country is facing at that point are greater than the problems that faced the Founding Fathers after the end of the Revolutionary War or probably any set of leaders at any other point in American history. I mean, first of all the South is in ruins or at least large segments are just in ruins. And they are under occupation by the Union Army.

John: That's Gerard Magliocca. He's a professor at the Indiana University McKinney School of Law.

Gerard Magliocca: There is a very large open question about what do you do with the ex-Confederate states? What about the fact that the Confederacy racked up all this debt? What's going to happen with that? What about the fact that the Union racked up all of this debt to fight the war? What about the fact that the leader of the Union was just assassinated a few months earlier? Try to imagine what would our post-revolutionary history would have looked like if George Washington had been gunned down in 1783 or

something like that. So these are enormous challenges and challenges that have no precedent.

John: When we finished Episode One, President Lincoln had signed the 13th Amendment and sent it to the states for ratification. Over the course of 1865 it had become clear that the votes are there; slavery will soon definitively be unconstitutional. But even as Southern states are ratifying the 13th Amendment, at the very same time time they are passing a series of laws called the Black Codes, which reinstate slavery in all but name.

Kurt Lash: Everyone was in a situation where they were scrambling for food and scrambling to put their lives back together. Southern white officials were particularly concerned with keeping the labor that they had had under slavery under their control so that they could rebuild themselves.

John: That's Kurt Lash, a professor of law at the University of Richmond.

Kurt Lash: So they enacted the Black Codes as an effort to try and control the slaves, the former slaves, the now freedman and keep them available to work the plantations in a form of quasi-slavery. It was an act of both racism and economic desperation.

John: The Black Codes are the beginning of what comes to be called the convict-leasing or peonage system. We can think of them as a series of laws that provide an excuse to arrest black people.

Daniel Harawa: One of the ways they try to recreate a slave like existence or slavery-like existence was to pass all of these really restrictive, draconian laws that if a black person was found to have violated would essentially allow them to be put back in bondage.

John: That's Daniel Harawa, a lawyer at the NAACP Legal Defense and Educational Fund. Not only do the Black Codes empower local law enforcement to arrest black people for trivial things, but the Codes give them a powerful incentive to do it. Once you're arrested, you get charged jail fees and court fees; even if you're not convicted, you wind up owing. And if you can't pay, the sheriff will find a local landowner to pay for you. The sheriff pockets the money, and you get leased out to work on a plantation in slave-like conditions, maybe even for your former owner.

Daniel Harawa: So vagrancy is kind of what it sounds like if somebody didn't own property or didn't have a job they were considered quote unquote vagrant. They could be arrested they could be prosecuted. They could be jailed and then be bonded out to

plantation owners to work for free, which essentially was just recreating slavery in a different name.

John: If you wanted to stay on the right side of vagrancy laws, you more or less had to be under the protection of a local white landowner. To get that protection, you had to sign a labor contract. And in some states, the law said you had 10 days after the new year to sign a contract or face criminal penalties.

Daniel Harawa: These were very one-sided labor contracts where former slave masters or slaveholders would enter into contracts with the people who were enslaved on their plantations and these contracts would be for little to no money -- would a lot of times just be for subsistence.

John: Knowing that their workers would go to jail if they didn't agree to these labor contracts, planters imposed conditions like requiring 19 hours of work a day or requiring workers to accept all their pay at the end of the contract year. Here's how a Freedmen's Bureau agent in Mississippi described the attitude of former slave owners:

Freedmen's Bureau agent: "the people here feel very indignant that they are obliged to hire the negroes they used to own and will by every possible means endeavor evade the payment of wages due them."

John: By the way, the Freedmen's Bureau was a federal agency created by Congress in 1865 to assist with emancipation. It sent agents all over the South, who saw the effects of the Black Codes firsthand. The Codes specifically said freedmen could be whipped for failing to abide by the terms of a contract. But if a landowner broke the contract, freedmen and women rarely had recourse in local courts. According to another Freedmen's Bureau agent in Mississippi, in the fall of 1865 former slaves were wandering the roads starving and naked after being kicked off plantations without pay once crops had been harvested, some of them with bruises and other signs of violence.

Daniel Harawa: And if a person no longer wanted to be a part of that contract, they were often penalized under the law for doing so. So it was a forced contract in that they enter the contract because they had no other alternative but then they could never leave the contract for fear of being arrested, punished and then ultimately bonded out into a slavery like situation.

John: The Codes also imposed some rules on white people. It was illegal for instance to try and hire blacks away from their employers by offering better pay or working conditions.

Daniel Harawa: It's kind of reasserting this idea of ownership over somebody right where this is my person my property as it was in slavery and now my employee, if you

can even call somebody in that situation employee and they're mine and you can't take them from me. I have ownership over them.

John: Here's how a group of freedmen described the situation in Tusculumbia, Alabama in November 1865.

Freedman's voice: "We want a school here and can't get one ... if we have any money we can't buy anything except we get a white man to get it for us ... they say it is against the law to sell negroes powder and shot and even if you had the ammunition you has not got the land to hunt on ... if a white man strike you with a rock you are not allowed to look mad at him. We want justice ... we are treated here like dogs."

John: Another aspect of the Black Codes was the fierce insistence that blacks be prevented from doing anything that looked like entrepreneurship or obtaining any sort of economic independence. Mississippi, for example, prohibited the sale or lease of farm land to blacks. The Codes also imposed occupational licensing.

Aderson Francois: If you want to do any work other than husbandry and sort of farming work and you're a quote colored person you need a license.

John: That's Aderson Francois, a professor of law at Georgetown University.

Aderson Francois: In order to obtain the license you need to show that you're fit. In order to show that you're fit, you need to be of good moral character and you need to pay somewhere between 10 to 100 dollars, which at the time was a fortune.

John: If you're a black person in South Carolina in 1865 and you want to do any job other than farm worker or domestic servant, you need a license. And local authorities have unlimited discretion to refuse to grant one. Mississippi had a similar law. Sometimes licensing happened at the local level. In Marengo County, Alabama for instance, a black man was prosecuted for operating a barbershop without a license and was only spared being put on a chain gang when two white men, presumably customers, paid his fine and court fees. Black women could be arrested for doing laundry without a license.

John: The Black Codes were stifling. And yet in some places, African-Americans did succeed in working for themselves and beginning to play a role in civic and political life. And this is something that is simply unacceptable to many whites. So unacceptable that armed gangs known as "regulators" and "night riders" roam the countryside, murdering, raping, robbing, and chasing people out of their homes and off their land. Secret

organizations like the Ku Klux Klan emerge, and government officials either turn a blind eye or directly support the terrorist violence that engulfs the South.

Aderson Francois: They targeted mostly folks who are advocating political power for blacks. They didn't simply target blacks for what it's worth. They also targeted Northern whites who came to the South. They targeted schools. They targeted teachers. One of the sort of underappreciated aspect of Reconstruction was that the greatest push by the newly freed slaves wasn't really about economic reparations if you will. It was really a fierce desire for education. And you see them first importing from the north teachers. And these schools became a big target of the KKK. They became a big target of these night rides and I say this because one of the things that you'll notice also is that over time as you look to various sort of so-called racial riots that occurred in various cities inevitably what always occurred is that schools were targeted.

John: In Memphis in May 1866, whites go on a rampage led by police and other city officials; they massacre blacks for three days and nights.

Aderson Francois: I believe the numbers that they killed 50 people injured a lot more, raped women, burned down a bunch of houses and cabins. But they also burned down every single one of 12 schools for blacks that were in Memphis. So I make this point to say that sometimes when we speak about the KKK and we talk about the night rides we often talk about the fact that they targeted their violence toward blacks seeking political power. But another specific target of the KKK were also schools. It was to be blunt an

easy target. It was a visible target. And it was a target that was designed to instill the greatest terror in the population because there was not there was nothing that would make you feel more vulnerable than the fact that the organization would actually target a place where children would be educated.

John: As Congress tries to figure out what needs to happen to reintegrate the Southern states back into the union, they form the Joint Committee on Reconstruction. The committee summons people to Washington to testify about events in the South and much of the testimony, to borrow a phrase from the historian Nell Irvin Painter, is just “buckets of blood.” We’re going to read just one excerpt. It’s the testimony of Dexter Clapp, who organized and commanded the 38th United States Colored Troops during the war. We edited the transcript moderately; please go to shortcircuit.org for the full version. At the time of his testimony in February 1866, Dexter Clapp is an agent with the Freedmen’s Bureau in North Carolina. The committee member doing the questioning is Senator Jacob Howard of Michigan.

Jacob Howard: What position have you been recently occupying in the service?

Dexter Clapp: I was lieutenant colonel of the 38th United States Colored Troops. I am now on duty in the Bureau of Refugees, Freedmen, and Abandoned Land, in charge of twenty counties in the central part of North Carolina.

Jacob Howard: Have you mingled much with the people of North Carolina since you have been there?

Dexter Clapp: I have been constantly in contact with all classes of people.

Jacob Howard: What effect would it have to withdraw the United States troops and the Freedmen's Bureau from North Carolina ?

Dexter Clapp: I think that all Northern men would be in great danger of personal injury, and that the freedmen would be without any protection whatever, and subject to great oppressions. I think that killing freedmen would be the rule.

Jacob Howard: Go on and give the narrative.

Dexter Clapp: Some eight weeks ago several returned rebel soldiers went into the village of Washington and commenced shooting and beating Union men. Several assaults were made, and at least one Union man was publicly whipped in the streets, and some negroes were wounded. On their return they met on the public highway a negro. They first castrated him and afterwards murdered him in cold blood. These persons a short time afterwards gave themselves up to the civil authorities; but they soon escaped by overpowering the jailer. An order was issued to the police of that county to arrest them. This was not done. Meanwhile this party continued to commit outrages. I know that several negroes were shot by them. On the 25th of December the father of one of these parties rode up to a plantation, where two negro boys, ten and twelve years old, were playing in the yard. He took them one mile direct into a swamp, and there he shot them, killing one instantly and wounding the other.

Dexter Clapp: Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons. That seems to me the worst indication of the state of society there -- worse than the fact that these things take place.

Jacob Howard: How did [the] Governor demean himself towards such outrages; did he make any efforts as governor of the State to punish them?

Dexter Clapp: I know of no such efforts that he has made.

Jacob Howard: Have these scenes been brought to his attention?

Dexter Clapp: I have known of several instances in which outrages were committed, and in which he exerted his influence with the military authorities to have them passed over. I can specify some particular instance.

Jacob Howard: Do so.

Dexter Clapp: A sergeant of the local police of Johnson County, brutally wounded a freedman when in his custody, and while the man's arms were tied, by striking him on the head with his gun; the freedman having committed no offence whatever that was shown. This freedman lay in the hospital, which is under my charge, at the point of death, for several weeks. The same day [the sergeant] whipped another freedman, having searched his house and found no stolen property there. He whipped him so that from his neck to his hips his back was one mass of gashes. While [the] sergeant was under my charge, and while I was investigating the matter, very many prominent citizens interested themselves to have him entirely discharged.

Jacob Howard: Does a Unionist or a freedman stand much chance for justice in the state courts?

Dexter Clapp: I think not, emphatically.

Jacob Howard: Go on and relate any other facts that you may know of, illustrating the state of feeling in North Carolina.

Dexter Clapp: A freedman by the name of Cotton was assaulted by a white man. He defended himself: A fight ensued, which terminated in the freedman's running away to preserve his life. He was arrested by the military police and put into jail, which was the means of saving his life from the mob. He was tried by the provisional justice the same night and sentenced to be publicly whipped then to be tied up by the thumbs for two hours, his toes touching the ground only. While the justice was writing out the sentence in the courtroom, the negro was assaulted by the man with whom he had the difficulty; the white man striking him twice on the head, felling him to the ground insensible. The justice still insisted upon inflicting the penalty, which the deputy sheriff did, with the exception of letting the negro's feet rest partially on the ground. This penalty was inflicted in violation of the laws of the State of North Carolina, which only allow a man to be whipped on sentence after a trial by jury. In this case there was no jury.

Jacob Howard: Who appointed that blackguard justice?

Dexter Clapp: [The] Governor. I will state, also, that in the lower portions of Johnson county, and in Sampson and Duplin counties, being in the vicinity of the battle of Bentonville, many freedmen had obtained worn out horses and mules from the army and from the battlefield. These have all been taken away from them, either by midnight robbery or open violence. These are representative instances which illustrate the general state of feeling there.

John: In just that testimony, you have conduct, perpetrated by state and local government officials that would violate the Fourth Amendment's protections against unreasonable searches and seizures, the Fifth Amendment's guarantee of due process, the Seventh Amendment right to a jury trial, the Eighth Amendment's protections against cruel and unusual punishment. But in 1866, the Bill of Rights doesn't apply the states. If

you can't get justice in state courts, you are out of luck. Something had to be done.

When we get back from the break, Congress embarks on Reconstruction.

BREAK

John: News of the Black Codes and atrocities in the former Confederate states have reached Congress. But even though the Republican party, which is the party of emancipation, controls both houses of Congress, there is a major problem. Here's Kurt Lash, of the the University of Richmond law school.

Kurt Lash: The Civil War ends in 1865 and the 39th Congress meets on December 4th, 1865. When they meet they they are about to experience the ratification of the Thirteenth Amendment. It hasn't happened yet. They're waiting for a few more states to ratify. What are the states that are ratifying? The southern states. The same states that were in rebellion were the states that were now in the process of following the instructions of new President Andrew Johnson who set up provisional governments in the South, asked them to ratify the 13th Amendment abolishing slavery and promised them that if they did so they would be quickly restored to the missing or empty seats in Congress. So they did so and it quickly became apparent that there were going to be sufficient votes to ratify the 13th Amendment. So the southern states sent their representatives to Congress for that opening day on the December 4th 1865. They showed up waiting for their names to be called and they were left standing at the door. The Republicans refuse to call their names for the roll. And when they demanded, both

the Democrats and also the southern Representatives who had showed up to take their seats, when they demanded an explanation from the Clerk of the House as to why they were not being called for the roll, you have Thaddeus Stevens interrupting the clerk and saying “no need we know all” announcing that everyone knew why they weren't being admitted.

John: Thaddeus Stevens the Radical Republican from Pennsylvania. More on him later.

Kurt Lash: There's a lot to that statement by Thaddeus Stevens. What they knew was that they couldn't possibly admit these Representatives until they solved an enormous problem. And it was a problem that was caused by the 13th Amendment itself. It had been a glorious achievement in the nation's history that we abolished slavery. But when those slaves were made free it was going to have a dramatic impact on the political power of Democrats in the South. Under the original Constitution, slaves counted as three-fifths of a person and gave something sometimes called the slavery bonus for slaveholding states in terms of their representation in the House of Representatives -- and also in the Electoral College helping them in terms of choosing the president of the United States. When they became free under the 13th Amendment they were now going to count as five-fifths of a person in terms of representation in the House of Representatives and in the Electoral College. That means that when the Democrats when the rebels return to Congress, they were going to return with more political power having lost the Civil War than they had had prior to the beginning of the Civil War, and they could dominate the Reconstruction agenda. The Republicans couldn't let that

happen. They had to ensure that representation by the former Rebels would be limited so that they couldn't take over the congressional agenda as they try to go about reconstruction. That's what they were facing on December 4th, and that's why they didn't let them take their seats.

John: That's one pressing problem, but there are others.

Kurt Lash: There needed to be some response to the former rebel leaders whether or not they could continue to vote or be political players in national politics after having betrayed the nation.

Gerard Magliocca: So President Andrew Johnson who succeeded Lincoln, after Lincoln was killed, granted a broad amnesty to people who for example had just served in the Confederate Army while reserving to some extent the question of what do you do with the leadership of the Confederacy.

John: That's Gerard Magliocca of Indiana University again.

Gerard Magliocca: There was a strong feeling that the leaders of the Confederacy ought not to be elected to positions of power in the newly reunited United States. And so there was great suspicion, especially because some of the same ex-Confederate leaders were actually elected in elections held after the end of the Civil War to positions

in the House and Senate and they showed up in December of 1865 saying, okay. Well we've been elected and now we're ready to come back. And people looked at that and said that's ridiculous. You have Alexander Stephens who was the Vice President of the Confederacy showing up to reclaim a seat that he had held in Congress before the war began. And that just seemed intolerable to people, understandably.

John: And to top it all off, there is the question of whether the federal government even has the authority to force state governments to protect the rights of the former slaves and union supporters in the South.

Kurt Lash: These were incredibly complex issues and in the early months of the 39th Congress there was chaos. Multiple amendments -- more than 30 amendments -- were introduced probably within the first 30 days of the 39th Congress, all of them pointing in different directions all of them representing different theories.

John: Before we dive into that, let's take a step back and talk about the various factions in Congress and the White House. You had a President, Andrew Johnson, a Democrat from Tennessee.

Kurt Lash: The Democrats insisted and Andrew Johnson took the lead in making this insistence that it had been wrong to exclude the southern states. Southern States who had voted to ratify the 13th Amendment whose votes counted in the ratification of the

Thirteenth Amendment and if those Southern States had governments that were qualified to vote on an amendment to the United States, under what possible grounds could Congress refuse to seat them in determining how we're to move forward -- now during peacetime -- with reconstructing the South.

Gerard Magliocca: The great irony of Andrew Johnson is that a white Southerner is president during Reconstruction, right? And of course that is an accident created by the fact that he was put on the ticket in 1864 to help attract the votes in border states that still had slavery in 1864 or just other conservative Democrats. So Johnson initially is supportive of for example the abolition of slavery and some very basic things that he wants the southern states to do to be readmitted to the union. But once you get past that point and he runs into the much stronger demands coming out of Congress for protections for African Americans and other measures, he becomes a very fierce opponent and uses his authority both in vetoing legislation -- partly on white supremacy grounds, but partly also on the on the ground that Congress simply lacked legitimacy to do these things because the southerners were not represented in the House and the Senate. And after all well could Congress pass a law -- let alone a constitutional amendment -- when a significant chunk of the country was not represented in Congress?

John: And then you had the Republicans. They have big majorities in both the House and the Senate. But they are sharply divided into different camps, the moderates and the radicals.

Kurt Lash: The Republicans were not uniform in their particular ideology or their approach to Reconstruction. They were divided between Radical Republicans who had a very expansive understanding of national power, who believe that there was nothing that prevented Congress both from abolishing slavery even without a 13th Amendment and certainly passing civil rights statutes without the need for additional amendments. They had a general idea that there was inherent power in Congress to take control of the situation without any sort of change of the Constitution.

John: This group of radical Republicans includes Charles Sumner of Massachusetts in the Senate and Thaddeus Stevens of Pennsylvania in the House. They believed that because the North had won the war the Union Army could and should occupy the former Confederate states indefinitely.

John: The Radical Republicans wanted a fundamental...

Gerard Magliocca: ... reorganization of Southern society as the price to be paid for readmission. And that was represented by people like Thaddeus Stevens and Charles Sumner, who took the view that the real problem in in the South was the denial of rights to the slaves and then the freed slaves once they were free but also the power of the plantation owning elites and that if you broke up that power by basically redistributing

wealth and taking other measures to sort of equalize land ownership in the South that that was really what was required to have true equality.

Kurt Lash: But with a different approach were the moderates. Moderate Republicans and in particular, I think the the personality you need to focus in on is John Bingham, not only because he drafted section one or most of section one of the Fourteenth Amendment but also because he represented a particular approach a particular constitutional philosophy that became important in the debates that took place during the 39th Congress.

John: Bingham, a representative from Ohio and a dedicated abolitionist, does not think Congress has the authority to pass and enforce civil rights legislation that is binding on the states. He also has an unusual story.

Gerard Magliocca: His closest friend in college was a former slave, which was a very unusual experience for a man who went to college in the 1830s in America. And one of his classmates was an ex-slave, Titus Brasfield. And so they were friends then and then they basically corresponded for decades afterwards. Eventually Brasfield became a minister and then moved to Canada to preach at a church that basically was attended by slaves who had escaped on the Underground Railroad to Canada. And they corresponded until Brasfield's death which occurred sometime in the 1870s.

Kurt Lash: Moderate Republicans disagreed with the expansive visions of national power of the Radical Republicans and insisted that although they shared the goals of passing civil rights legislation and they share the goals of bringing freedom to the people in the South -- both white and black -- they nevertheless believed in federalism. They believed that the national government had limited, enumerated powers and that in order to grant them power to pass civil rights legislation -- needed civil rights legislation -- there would need to be the addition of amendments. So they insisted first of all on a 13th Amendment, one abolishing slavery and arguing that if we wanted to go forward with civil rights legislation, there would have to be more there would have to be new amendments to the Constitution.

John: And finally you have the conservative Republicans, who would sometimes move towards the moderates and sometimes toward the Democrats.

Kurt Lash: As the 39th Congress went about trying to determine the nature and the scope of Reconstruction in the House, in the early weeks they quickly divided between the approach of the Senate and the approach of the House. The Senate immediately went forward with a legislative agenda.

John: A legislative agenda meaning that there was no need for further constitutional amendments. Congress had all the authority it needed.

Gerard Magliocca: Stevens took the view that the 13th Amendment in giving Congress the power to enforce the abolition of slavery or the prohibition on slavery that that was like a general power to legislate in favor of liberty. And so Congress had broad powers to confer rights upon the freed slaves, but also just to legislate more generally in the name of the prohibition against slavery. And he was suspicious of the thought that you needed to achieve the broader consensus necessary to get constitutional amendments because first it was harder to do and second. Well, would it really make any difference if you had something further in the Constitution? Would that really accomplish anything or was that more just a formalism that was sort of a waste of the political capital that they had.

John: That's the Radical Republican view. Out of the Senate you get legislation to extend the Freedmen's Bureau, which President Johnson vetoes, but Congress overrides. You also get what would become the Civil Rights Act of 1866.

Kurt Lash: In the House, the first approach was a constitutional agenda. You also had Representatives like John Bingham who proposed early visions of what would become Section 1 of the Fourteenth Amendment, protecting a degree of due process, equal due process rights and protecting privileges and immunities of citizens in the several States. These two agendas were being debated at the same time.

John: And things got heated between Thaddeus Stevens, the de facto leader of the Radical Republicans, and John Bingham, the leader of the moderates. They both wanted civil rights, but their disagreements about strategy made them bitter political enemies.

Kurt Lash: And so John Bingham refused to support the Civil Rights Act. He and other moderate Republicans and certainly all of the Democrats believed that it would be unconstitutional to move forward with the Civil Rights Act until first getting something granting Congress additional power.

John: Nonetheless, the Civil Rights Act moves forward and becomes law in the spring of 1866, after Congress overrides President Johnson's veto. It repudiates the *Dred Scott* ruling that said blacks cannot be citizens. The Civil Rights Act declared that all people born in the United States -- with some exceptions like the children of diplomats -- are entitled to be citizens, without regard to race, color, or previous condition of slavery or involuntary servitude. But leaders in Congress are worried that the Supreme Court will strike down the Act; three justices who were in the majority in *Dred Scott* are still on the Court, and some of the remaining justices, even ones appointed by Lincoln, were not in favor of black citizenship. Congressional Republicans are also worried that if they lose their majorities then a subsequent Congress will repeal the Act. It's not an idle concern, around the same time the Act is passed, Connecticut holds elections, in the spring rather than the fall like most states, and Democrats campaigning on an

anti-Reconstruction platform very nearly win. Republicans believe their majority is precarious, so later in the session, the Fourteenth Amendment to the Constitution picks up steam. And the nation is watching.

Kurt Lash: The debates in Congress of the 39th Congress were published on a daily basis by major national newspapers, which contained the actual debates themselves, were then carried over into more Regional newspapers and you can find excerpts of debates in the House and the Senate in the smallest local newspapers on both in the west and up and down the Eastern Seaboard. There was remarkable penetration. The public is aware of John Bingham's opposition to the Civil Rights Act of 1866. They're aware of his dramatic statements that we need to finally make the Bill of Rights enforceable against the states. So then those debates themselves become part of the political debates during ratification where you'll see both Democrats and Republicans referring to the debates and how everyone knows that certain portions of the Fourteenth Amendment were in response to certain speeches regarding the Civil Rights Act of 1866. So it is this remarkable public event and not something which just takes place behind closed doors that we have to wait two decades to get the secret proceedings ultimately ultimately published. No. Everyone was aware of what was going on.

John: And what's going on is that in an effort to appeal to different factions, the moderate Republicans stitch together five different proposed constitutional amendments into one big Amendment.

Kurt Lash: The Fourteenth Amendment is an incredibly complex Amendment. It's made of five separate sections. There had never been anything like this added to the Constitution before. You have an opening section which talks about American citizenship and privileges and immunities and due process rights.

John: Section One repudiates *Dred Scott*, and it provides for a uniform set of rights applicable to all citizens while securing citizenship for African-Americans.

Kurt Lash: You have a second section that talks about how seats in the House of Representatives are going to be apportioned and how they'll be reduced if there isn't equal suffrage given to qualified males. You have a section disfranchising former rebel officials who had betrayed their oaths. You have a provision saying that slave owners shall not receive any compensation for their for their freed slaves. And then finally it's all summed up by granting Congress power to enforce the provisions of the Fourteenth Amendment. All of these sections began as different standalone amendments that went through different forms and by March of 1866 it didn't look like any of them had sufficient support by two-thirds of the members of Congress to actually become a standalone Amendment.

John: By joining the five amendments into one, Bingham and the moderate Republicans get the votes they need to pass it through Congress and send it to the states in June 1866. But the fight for the 14th is just getting started.

Kurt Lash: When Congress sent the 14th Amendment out to the states to be ratified it triggered an enormous political battle that would extend over the next two years.

John: By the way when Congress passes a Constitutional amendment, there's no need to first get the President to sign it before it goes to the states. So President Johnson doesn't have an opportunity to veto the 14th. What he does do is personally tour the country in the summer and fall before the elections of 1866, denouncing it and urging voters to reject it.

Kurt Lash: Now, this is an event that often is forgotten in discussions about the history of the Fourteenth Amendment, but it played a critical role. It has to be among the most important national elections that our country has ever ever experienced. What occurred is that Democrats went on the campaign trail. And with Andrew Johnson who wasn't facing re-election, but who was campaigning on behalf of the Democrats swung the circuit, calling on the American people to reject the efforts of the Republicans and instead elect Democrats in the coming elections of 1866. And the plan was if enough Democrats were elected and they took enough seats from Republicans, they would create a second Congress and alternative Congress, one made up of Northern

Democrats and the excluded Southern Democrats. The stage was set for a second Civil War. And Republican and Democrat officials began to plan for a second Civil War and began to mobilize who would be their loyal militias should such a thing come about. In the meantime Andrew Johnson as he rode the circuit campaigning on behalf of Democrats had someone seated next to him on the stage the entire time: The silent figure of Ulysses S. Grant in full uniform, leader of the army of the Potomac communicating that if push came to shove, the Union Army was going to stand with the president. We were facing potential constitutional disaster.

John: While he was out on the campaign trail, Andrew Johnson insisted that both the Civil Rights Act and the 14th Amendment were illegal and unconstitutional because the southern states were not represented in Congress. And he also argued that they were not necessary, because the southern states could be relied upon to live up to the 13th Amendment and to protect the rights of the freedmen.

Kurt Lash: This debate received a jolt by a terrible tragedy that occurred in the mid summer of 1866 when a group of freedmen in Louisiana had gathered in an assembly to debate amending the Louisiana state constitution to grant blacks the right to suffrage. Local officials found out about the assembly and at the direction of the mayor of New Orleans sent a mob to attack the otherwise peaceful assembly. And they shot down the members even as they tried to escape and as they tried to surrender. The massacre and the riots of New Orleans became a national scandal and affected the elections of 1866 in a dramatic way. Prior to these riots, which were reported in newspapers

primarily in August of 1866, Democrats were trying to make the argument that there was no need for a 14th amendment -- that in fact once the war was over we could trust Southern States who had ratified the 13th Amendment to provide decent protection of persons and property for all the blacks in the south. After the riots of New Orleans, however, Republicans were able to point that particular tragedy and maintain that this was precisely the reason why we needed an Amendment declaring that no state shall make or enforce any law abridging the Privileges or immunities of citizens of the United States or denying any person life liberty or property without due process of law or the equal protection of the laws. And when President Johnson tried to claim that the Republicans were wrongly inflaming an issue and preventing peace from coming to the country, the country was able to look at New Orleans and realize that it was Andrew Johnson who was refusing to allow peace to come to the South and they re-elected Republicans in a landslide.

John: Still, even though the Republicans have retained their electoral majority in Congress, the fate of the 14th Amendment rests with the states, three-fourths of which must ratify it. Which won't happen if the Southern states decline to ratify. And who are the delegates from those states? The landowning, white elite. They ratified the 13th Amendment in order to rejoin the Union. But when it comes time to ratify the 14th Amendment, they reject it. Republicans have to decide how to proceed.

Kurt Lash: One approach was offered by Radical Republicans like Thaddeus Stevens. Thaddeus Stevens suggested we don't need the 14th Amendment after all. We now

have all the political power we need after the elections of 1866. We can simply move forward with a legislative agenda and abandon the need to pursue a 14th Amendment to the Constitution.

John: But John Bingham pushed back in the early months of 1867. He urged Republicans to keep the faith, and he proposed a new plan that would require the southern states to hold new constitutional conventions to form new state governments and after that hold a second vote on whether to ratify the 14th Amendment. And this time, the military would oversee the vote to ensure that black voters -- who had been excluded from the previous vote -- would be able to participate.

Gerard Magliocca: Others have pointed out that the basic problem is that at this time the federal government has only one institution that is large enough and sophisticated enough to organize this ratification process: the army. The Union Army, right? There's no there's no federal agency of whatever that's going to be able to do this. Now the trouble is if you do anything through the army, that casts a big shadow over the legitimacy of what you're doing. Because first of all you might say that military authorities might not be the best people to do that sort of thing, but also because they're ultimately doing it where with the barrel of a gun. There was really no way to avoid that problem though. We can all say well gee why didn't they just come up with a bunch of agencies and they course they did a little bit of that. There was a Freedmen's Bureau and a few other things but on a very small scale because the resources simply weren't there. So that was that was a basic problem. The other problem is in the aftermath of a

civil war you need significant buy-in from the losers in order to make whatever comes out of it legitimate. Now there were efforts made to do that. I mean a general amnesty was given and one can talk about various ways in which of course the South might have been treated more leniently but of course that's that wasn't the way most of the white Southerners saw it.

John: Bingham's plan prevails. Southern state legislatures are disbanded; and the South is divided into five military districts under martial law; they're told they can rejoin the Union when they pass new state Constitutions that provide for equal rights. But now there's another problem.

Kurt Lash: Military oversight was conducted by the Secretary of War. Edwin Stanton was Secretary of War and he could be counted on as a radical republican to ensure that these new conventions these new votes were held. Andrew Johnson also knew that Stanton would make sure that it was accomplished, and so he removed Edwin Stanton as Secretary of War. And he replaced him with a man who had sat on the stage next to him throughout all of his campaign speeches of 1866, Ulysses S Grant. At that point Ulysses S Grant became temporary Secretary. And under the Tenure In Office Act, when Congress returned to session a few months down the road, they would decide whether or not to support the removal of Edwin Stanton. For those critical months not a single vote in favor of the 14th amendment was held. Everyone was holding their breath to see what Congress would do and whether or not the president would be forced to bring Stanton back to his office. When Congress returned everyone understood that

they were going to disapprove of the removal of Edwin Stanton. So President Johnson told you Ulysses Grant when Congress moves don't do anything -- come and communicate to me and we'll decide what to do at that point. And clearly his idea was that he was going to litigate the constitutionality of the Tenure In Office Act and see if he could draw out the political debate and ultimately kill the Fourteenth Amendment through inaction. When Congress ultimately voted to disapprove of the removal of Stanton, Ulysses S. Grant disobeyed the president of the United States. He didn't go to Johnson. He went to Edwin Stanton and he handed in the keys to the office and he wrote a polite letter to Andrew Johnson saying, "I resign." Andrew Johnson was furious. He immediately announced the firing of Stanton and that he was going to be replaced and that he would not stand for this insubordination. But when he fired Stanton that was an official violation of the Tenure in Office Act. The House immediately voted to impeach Andrew Johnson.

John: Congress is tired of President Johnson holding up Reconstruction, and they are looking for any excuse to impeach. The Tenure in Office Act violation is the excuse they need.

Kurt Lash: And two members carried the articles of impeachment to the Senate. One was Thaddeus Stevens, who was so old and so close to dying that he could not proceed on his own without assistance. And so holding on to his arm and helping him into the Senate was John Bingham. The two former adversaries therefore traveled to the Senate and led the impeachment proceedings against Andrew Johnson that then carried forth

over the next few months. Johnson escaped impeachment by a single vote, but he was politically crippled. Edwin Stanton remained Secretary of War. He successfully oversaw the new conventions and the creation of new governments in the South. And one by one the former Rebel States, now with the votes of blacks, ratified the Fourteenth Amendment.

John: In 1868. 150 years ago. For the first time, the Constitution guarantees all Americans a uniform set of rights. And Congress has the authority to protect those rights if they are violated by state governments. But there's one more piece to the story of the ratification of the 14th Amendment, a piece that Professor Francois says is under studied and under told. Coming up after the break we're going to talk about what today would be called grassroots organizing to get the Amendment over the finish line in the Southern states. We're going to talk about the role that African-Americans played in rewriting the Constitution.

BREAK 2

John: If we just talk about what Congress did during the fight for the 14th Amendment, we miss a big part of the picture.

Aderson Francois: The fourteenth amendment was the first time in our constitutional structure where African-Americans black people as individuals and as a group actively

participated and shaped that Constitution. In other words without black participation the Fourteenth Amendment doesn't get ratified in some significant ways.

John: As we discussed earlier, the first time the southern states vote on the 14th Amendment they reject it.

Aderson Francois: The southern states, after having ratified the 13th Amendment, drew a line. They said basically this much as no further. And, except for Tennessee, which has its own strange history as to how it passed it, the others simply don't want to. So now you're sort of stuck. So let's look at it -- maybe the best way to think about it is to look at the example of one particular state. Let's take South Carolina. After the war, South Carolina calls a convention. The convention is essentially a white convention -- the cream of the cream of South Carolina high society, the top, the propertied class -- folks who essentially were controlling the Confederacy.

John: They vote 98 to 8 to adopt the 13th Amendment

Aderson: But then whenever issues come up regarding black suffrage they say absolutely not. But here's what's also happening on the ground at the same time. In November of 1865 very soon after that convention, which is a white convention from which blacks are excluded, blacks basically formed their own convention. They call it the

Colored People's Convention out of Zion Church in South Carolina, and that convention is the beginning of their pushing for black participation.

John: The convention publishes an address to the people of the state.

Convention address: Fellow citizens: We have assembled as delegates representing the colored people of the State of South Carolina ... Although we feel keenly our wrongs ... we would address you not as enemies but as friends and fellow country men

John: Incidentally, one of the speakers at the Zion Church that year, mere weeks after the end of the war, is someone you may recognize from Episode One: Salmon P. Chase, the Chief Justice of the U.S. Supreme Court, who accepted John Rock's admission to the Supreme Court bar.

Salmon Chase: The armies of the rebellion are disbanded, peace returns, and peace brings with it its duties. A great race, numbering four millions, is suddenly brought into freedom. ... The colored man has borne his full, proper share in the great struggle. ... [I know] of no reason why the hand that laid down the bayonet might not take up the ballot.

John: Two years later, in 1867, black men finally do get the vote. Soon after, South Carolina sends six black men to U.S House of Representatives. Four of them were at the convention at Zion Church in 1865.

Aderson Francois: That's where it starts and it does a couple of things. The first thing it does is that it begins to establish what for them will be a priority in the next three years. What they're trying to do is establish two priorities. The first one is do with education. They want public education

Convention address: The measures which have been adopted for the development of white men's children have been denied to us and ours.

Aderson Francois: And the second thing that they want to do is basically the right to vote.

Convention address: We are also by the present laws, not only denied the right of citizenship, the inestimable right of voting for those who rule over us in the land of our birth, but by the so-called Black Code we are deprived ... the right to engage in any legitimate business free from any restraints, save those which govern all other citizens of this State.

John: When John Bingham and other players in Congress decide to hold a second ratification vote for the 14th Amendment and open the vote to blacks, the political organization on the ground already exists.

Aderson Francois: So what happens indeed is that by the time you get this new constitutional convention that's going to meet in Charleston to vote to ratify the 14th, for the first time it is a multiracial convention and the vast majority of the participants are actually blacks. What's also extraordinary in some instances where people vote for their delegates. You have participation voter participation among the black population to be as high as 90 percent.

John: And that's in part, says Professor Francois, because the Freedmen's Bureau helps prepare blacks to vote, explaining how to register and what you need to know. But there's also an organization -- or rather a loose group of organizations -- called the Southern Union Leagues, which we would now call a grassroots way of organizing ...

Aderson Francois: ... and indeed educating African-Americans to vote to register and vote in two ways. The first was to vote to select delegates to the constitutional conventions for the various states that would in fact consider the 14th Amendment and in addition obviously to vote for the candidates of their choice. And these leagues served the function of essentially a sort of civic education group, where you would take folks that promise that I'd previously been in slavery and engage in a process of

educating them about the Constitution, about political organization, about registering, about voting.

John: And they did so at great personal risk.

Aderson Francois: But in addition to that those meetings had to take place in secret -- in part because of the threats of violence. And they develop a whole series of rituals around their meeting that sometimes made it seem as if they were sort of mysterious Masonic-like organizations.

John: At their meetings, Southern Union league members recited a ritual incantation.

Ritual incantation: "Worthy sons of freedom! We bid you welcome. This circle of freedom and equal rights now encircling you must never be broken by treachery."

John: To conclude meetings, members said four words: liberty, Lincoln, loyal, and league, each one accompanied by a secret sign you made with your arms.

Aderson Francois: But part of the reason why is that they wanted to make certain that their members are kept safe, that they were not infiltrated, and they would not divulge the places and locations where they met.

John: White Democrats know about the leagues, and they are incensed.

Aderson Francois: Many white Democrats in the South complain bitterly about these leagues because they insisted that, rather than being sort of grassroots organizations they simply serve as a means by which white northern Republican carpetbaggers supposedly would bribe and pay off blacks and simply tell them how to vote.

John: And, for the Leagues to do their work, women were essential.

Aderson Francois: In many instances the need to organize politically had to be done under cover. The church was a useful way of doing it because the church provided you a ready made excuse to explain this sort of large group of people getting together. Secondly because you need to do it in secret you needed people to be able to organize it. And in some ways women were in a better position to do so than men. In great part because even during slavery but certainly post-slavery women had a lot more freedom to move in society between the black and the white world than black men. And women also a lot more control over the homes. So a lot of the times what would happen is that

this organization meetings would take place not only in churches but also in homes. And the sort of communications for those meetings and organizations etc would essentially be taken care of by women. So I think sometimes the role that they played in ratification of the Fourteenth Amendment, the role that women played in the Union Leagues, the role that women played in educating voters is sometimes underappreciated.

Conclusion:

John: So the story of the 14th Amendment is more than just a story of politicians, but also of African-Americans who fought to change the Constitution. Because of them 150 years ago, the country tries, in an important way, to live up to the ideals of the Declaration of Independence by enshrining birthright citizenship, by creating a uniform set of rights that all Americans are entitled to and by remedying the flaw in the design of the original Constitution that permitted states to violate individual rights. After the Amendment is ratified, the Black Codes are repealed. African-Americans for the first time are elected to Congress. Over 2,000 serve in federal, state, and local offices. In Mississippi, an African-American is elected to the U.S. Senate seat once held by Jefferson Davis. In South Carolina, a black man is elected to the state's Supreme Court. There is a legitimate reason to be hopeful for the future. But the 14th Amendment has one more gauntlet to run: the U.S. Supreme Court. And as we'll see in the next episode, the Amendment does not emerge unscathed. Next time on Bound By Oath, the Slaughterhouse Cases and the evisceration of the Privileges or Immunities Clause of the 14th Amendment.

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