ARTICLE

THE IDEOLOGICAL ORIGINS OF THE THIRTEENTH AMENDMENT

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ABSTRACT

This Article discusses a moment of constitutional development in which popular constitutionalism, that is, constitutional interpretation outside of the courts, had a profound impact on the development of constitutional law. It describes a group of antislavery activists who argued that slavery was unconstitutional prior to its abolition by the Thirteenth Amendment. Though the Supreme Court rejected their arguments in the *Dred Scott* decision, the antislavery constitutionalists strongly influenced the Reconstruction Era Congress. James Ashley, a member of the Reconstruction Congress, spearheaded the successful effort to transform antislavery constitutionalism into law by enacting the Thirteenth Amendment. The Article examines the tenets of antislavery constitutionalism and details how Ashley articulated that philosophy in speeches that he gave on the campaign trail and during congressional debates over that Amendment. This history not only illustrates the salutary impact that popular constitutionalism has on constitutional development, but it also provides lessons for understanding the meaning of the Thirteenth Amendment. First, the

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Amendment not only ended slavery, but it was also a transformative amendment that established freedom. Second, the Amendment bestowed broad power on Congress to define that freedom, incorporating into the Constitution an institutional role for the popular constitutionalism that contributed to its formation.

TABLE OF CONTENTS

I. INTRODUCTION..395

II. JAMES ASHLEY AND THE THIRTEENTH AMENDMENT............401
  A. *James Ashley—A Short Biography*...............................402
  B. *James Ashley—Antislavery Constitutionalist*..............412

III. ASHLEY, ANTISLAVERY CONSTITUTIONALISM, AND THE MEANING OF FREEDOM..414
  A. *The Antislavery Constitutionalists*...............................417
  B. *Constitutional Interpretation*..420
    1. *Antislavery Constitutionalists*...............................421
    2. *James Ashley*..423
  C. *The Declaration of Independence, the Preamble, and Natural Rights*...425
    1. *The Antislavery Constitutionalists*.........................425
    2. *James Ashley*..429
  D. *The Rights of Citizenship*..430
    1. *The Antislavery Constitutionalists*.........................431
    2. *James Ashley*..433
  E. *The Guaranty Clause and a Republican Form of Government*...433
    1. *The Antislavery Constitutionalists*.........................434
    2. *James Ashley*..434
  F. *Economic Rights*...436
    1. *Free Soil Ideology*...437
    2. *James Ashley*..438
  G. *Congressional Power*..439
    1. *Antislavery Constitutionalists*...............................440
    2. *James Ashley*..442
  H. *Conclusion*...443

IV. ANTISLAVERY CONSTITUTIONALISM, POPULAR CONSTITUTIONALISM, AND CONSTITUTIONAL DEVELOPMENT..444

V. LESSONS FOR UNDERSTANDING THE THIRTEENTH

AMENDMENT 448
A. Establishing Freedom 449
1. Court Interpretations 449
2. Popular Constitutionalist Interpretation 452
B. The Broad Enforcement Power 454

VI. CONCLUSION 458

"Let us establish freedom as a permanent institution, and make it universal."[1]

"[T]he passage of this [A]mendment will . . . [be a] constitutional guarantee of the Government to protect the rights of all, and secure the liberty and equality of its people . . . ."[2]

I. INTRODUCTION

During the era before the Civil War, abolitionists were fiercely divided over the constitutionality of slavery.[3] While William Lloyd Garrison famously referred to the Constitution as a "covenant with death,"[4] other advocates interpreted the Constitution as an antislavery document.[5] This Article tells the story of those antislavery constitutionalists, who insisted that slavery was unconstitutional even before the Thirteenth Amendment because slavery violated fundamental human rights and constitutional provisions protecting those rights. The advocacy of the antislavery constitutionalists is an example of popular constitutionalism, constitutional interpretation, and advocacy that occurs outside of the courts.[6] While they started on

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1. CONG. GLOBE, 38TH CONG., 1ST SESS. 2985 (1864) (statement of Rep. William D. Kelley).

2. CONG. GLOBE, 38TH CONG., 2D SESS. 141 (1865) (statement of Rep. James Ashley).

3. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 42–46 (1986); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 249–52 (1977).

4. William Lloyd Garrison, *The Constitution a "Covenant with Death and an Agreement with Hell,"* 12 LIBERATOR 71 (1842), *reprinted in* 9 THE LIBRARY OF ORIGINAL SOURCES 97, 98 (Oliver J. Thatcher ed., 1907) (internal quotation marks omitted).

5. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 76 (1995) (describing Salmon P. Chase's antislavery interpretation of the Constitution and the interpretation's effect on the Liberty Party).

6. Both the people themselves and officials in the political branches can engage in popular constitutionalism. Other scholarly works have discussed popular constitutionalism. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313 (2008); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional*

the margins of the debate, antislavery constitutionalists had a profound influence on the Reconstruction Congress.[7] One of the men who was responsible for translating their beliefs into constitutional law was James Ashley, the member of the Reconstruction Congress who was chiefly responsible for the congressional approval of the Thirteenth Amendment.[8] The history of James Ashley and antislavery constitutionalism well illustrates the salutary role that popular constitutionalism has played in our constitutional development. This history also provides two lessons for understanding the meaning of the Thirteenth Amendment. First, the Amendment not only ended slavery, but it was also a transformative amendment which established freedom. Second, the Amendment bestowed broad power on Congress to define that freedom, incorporating into the Constitution an institutional role for the popular constitutionalism that contributed to its formation.

This Article seeks to fill a significant gap in the voluminous literature about the Reconstruction Era. Despite the influence of the antislavery constitutionalists on that Era, surprisingly little has been written about them.[9] Those scholars that have considered the impact of antislavery constitutionalism on the Reconstruction Congress have focused only on their influence on

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Change: The Case of the de facto ERA, 94 CALIF. L. REV. 1323, 1323 (2006) ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees.").

7. *See* Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 200 (1951) ("The striking thing then about the Thirteenth Amendment is that it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement.").

8. *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS 686–87 (2005); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 179 (2001).

9. For classic and authoritative works on antislavery constitutionalism, see CURTIS, *supra* note 3, at 42–49, discussing the impact of antislavery constitutionalism on the legal theories of the Republican Party; FONER, *supra* note 5, at 76–77, recounting Salmon P. Chase's interpretation of the Constitution and his interpretation's effect on the Liberty Party; LEWIS PERRY, RADICAL ABOLITIONISM 188–95 (1973), describing how the debate over constitutional interpretation affected various factions of abolitionists; JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951), *reprinted in* EQUAL UNDER LAW (2d prtg. 1969); WIECEK, *supra* note 3; and Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 170, 174–76 (2011), outlining antislavery constitutionalists view of Article IV of the Constitution. Robert Cover wrote disparagingly about antislavery constitutionalists. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154–58 (1975).

the Fourteenth Amendment.[10] Here, I consider the more basic question of the vision of freedom held by the antislavery constitutionalists. That vision was reflected not only in the Fourteenth Amendment, but also in the Thirteenth Amendment, which abolished slavery and established fundamental human rights for freed slaves and other people in the United States.[11] This Article also tells the story of James Ashley, an unsung hero in constitutional development. Ashley played a key role in the success of the abolitionist movement and in enshrining that success into the Constitution. He was a catalyst between antislavery constitutionalism and political achievement, an ideologue who converted his ideology into practice. Yet despite the pivotal role that James Ashley played in transforming constitutional law, he is literally unknown in constitutional scholarship.[12] This Article seeks to remedy this unfortunate oversight.

James Ashley and the antislavery constitutionalists who influenced him argued that the institution of slavery violated both natural law and express limitations in the Constitution.[13] Many of the antislavery constitutionalists claimed that Congress had not only the power but also the duty to end slavery.[14] The Court rejected the claims of the antislavery constitutionalists in *Dred Scott v. Sandford*.[15] Nonetheless, antislavery constitutionalists gained

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10. *See* CURTIS, *supra* note 3, at 42–56 (mentioning other sections of the Constitution only to frame the historical context of the Fourteenth Amendment); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 73 (1993) (describing John Bingham's theory of the Fourteenth Amendment as enforcing the Bill of Rights against the states); Barnett, *supra* note 9, at 173 (focusing on four components of the Fourteenth Amendment).

11. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 11 (2004) ("The Thirteenth Amendment is not merely a positive prescription against slavery; it is a normative statement about the intrinsic value of freedom.").

12. *But see* Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. CONST. L. 1269 (2009). Jacobus tenBroek mentions Ashley in his article on the Thirteenth Amendment. tenBroek, *supra* note 7, at 178. To the Author's knowledge, to the present date these are the only law review articles discussing James Ashley's constitutional contributions. This unfortunate oversight may be due in part to the zealous role that Ashley played in the attempt to impeach President Andrew Johnson and in part to his obsession with the tragic assassination of Lincoln. *See* ROBERT F. HOROWITZ, THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY 141–42 (1979). Ashley's involvement in the impeachment process, however, does not diminish the importance of the role that he played in Congress in prior years, during a time in which he was greatly respected by his colleagues. *See id.* at 50.

13. *See infra* notes 279–82 and accompanying text.

14. *See infra* note 181 and accompanying text (describing Congress's duty to ensure that all citizens, regardless of race, were fairly represented in State legislative assemblies and in the national Congress).

15. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

prominence as the political conflict over slavery escalated in the years leading up to the Civil War.[16] The platforms of the Republican Party in 1856 and 1860 contained elements of the antislavery constitutionalist ideology.[17] Along with Ashley, other prominent members of the Reconstruction Congress influenced by antislavery constitutionalism included Representative John Bingham, the chief author of Section One of the Fourteenth Amendment,[18] and Senator Lyman Trumbull, the sponsor and chief advocate of the 1866 Civil Rights Act.[19] These members of the Reconstruction Congress did not amend the Constitution in a vacuum. In debates over the Amendments and the implementing legislation, they invoked the antislavery constitutionalist beliefs that had inspired them and propelled them into office. This Article illustrates the role that antislavery constitutionalism played in the political debate by analyzing the speeches that James Ashley gave on the campaign trail and before Congress. Those speeches illustrate the broad view of freedom and fundamental rights held by Ashley and his allies, which they incorporated into constitutional law by enacting the Thirteenth Amendment.

This is also a story of popular constitutionalism. The fact that the Supreme Court rejected their theories in the *Dred Scott* decision did not deter the antislavery constitutionalists because they made their arguments not primarily to the courts, but as part of the political process.[20] The story of James Ashley and the antislavery constitutionalists is thus a story of popular constitutionalism. Popular constitutionalism is a process through which people develop a theory of constitutional meaning, often combined with political advocacy. All popular constitutionalists enrich our constitutional culture, but they do not succeed in altering constitutional meaning until their theories are accepted by either the courts or the political branches.[21] At times, the popular theory is adopted by members of the Court and influences the Court's

16. *See* CURTIS, *supra* note 3, at 42–43 (asserting that Joel Tiffany's antislavery constitutional views, expressed in 1849, were "remarkably similar" to those of Republicans in the Thirty-ninth Congress).

17. *Id.* at 46–47.

18. *See* Aynes, *supra* note 10, at 57–58, 74–75 (summarizing Bingham's national citizenship, Bill of Rights, and compact theories).

19. *See* CURTIS, *supra* note 3, at 49.

20. In fact, the antislavery constitutionalists are sometimes referred to as "political-action abolitionists." *See* WIECEK, *supra* note 3, at 184.

21. *See* Siegel, *supra* note 6, at 1324.

interpretation of the Constitution.[22] Other times, theories of popular constitutionalism are adopted by legislators and influence the law making process.[23] If neither of those avenues is available, it becomes necessary for popular constitutionalists to attempt to amend the Constitution to comport with their theories. When they succeed in doing so, as they did with the Thirteenth Amendment, their theories are important both to determine the original meaning of those constitutional provisions and to understand their meaning as they are applied.

James Ashley's popular constitutionalism and his role in amending the Constitution well illustrate this phenomenon. Ashley and his allies articulated a highly developed theory of constitutional interpretation pursuant to which slavery was unconstitutional and violated fundamental human rights. By holding that Congress lacked the power to abolish slavery, *Dred Scott* also cut off the avenue of political discourse to Ashley and the other antislavery constitutionalists. This left only one avenue open to Ashley and his colleagues—amend the Constitution.[24] The Union victory in the Civil War enabled this to take place. By leading the fight to amend the Constitution to comport with his constitutional vision, Ashley contributed to the original meaning of the Thirteenth Amendment. Ashley and his allies also helped to empower future popular constitutionalists to expand that meaning by using Section Two, the Amendment's enforcement clause.

In *Jones v. Alfred H. Mayer Co.*, the Court embraced the antislavery constitutionalist tenets in the Thirteenth Amendment and overruled its earlier stringent interpretations of that Amendment.[25] Moreover, notwithstanding the reluctance of courts to enforce the Thirteenth Amendment, popular constitutionalism kept its meaning alive and vital in our constitutional culture. In the tradition of the antislavery constitutionalists, popular movements from the labor to the civil rights movements have invoked the broad meaning of the Amendment to call for measures protecting workers' and civil rights, and members of Congress responded by enacting legislation to protect those rights.[26]

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22. *See id.* (observing that the Court began to interpret the Constitution to reflect the feminist movement after the Equal Rights Amendment was not ratified).

23. For a detailed description of Congress reacting to popular constitutionalism and enacting legislation to protect individual rights, see REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 117–18 (2006).

24. *See* TSESIS, *supra* note 11, at 32; VORENBERG, *supra* note 8, at 2.

25. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

26. For a detailed discussion of the advocacy of popular movements for Thirteenth Amendment-based legislation and congressional action in response to those movements,

Part II of this Article tells the story of James Ashley, one of the leaders of the fight to transform the Constitution to end slavery. Part III explores the speeches that Ashley gave on the campaign trail and before Congress leading up to the adoption of the Thirteenth Amendment. Ashley's speeches reveal that he was strongly influenced by the antislavery constitutionalists and their broad theories of fundamental rights and that he believed that those rights would be restored when slavery was abolished. Part IV explores what the story of antislavery constitutionalism and James Ashley reveals about the role of popular constitutionalism in constitutional development. The Thirteenth Amendment was born from popular constitutionalism, and it includes a mandate for future Congresses to enact legislation to remedy the denial of what those members of Congress identify as the fundamental rights protected by the Amendment.

Finally, Part V considers the extent to which the context of antislavery constitutionalism, as practiced by James Ashley and his Reconstruction colleagues, fosters a deeper understanding of the meaning of that Amendment. Section One of the Thirteenth Amendment did not merely abolish slavery, it also established freedom, a state which entitles individuals to fundamental human rights.[27] Section Two of the Thirteenth Amendment provides Congress with broad power to enforce those rights. Recently, scholars have debated whether the Section Two enforcement power is remedial and subject to strict limitations imposed by the Court.[28] The antislavery constitutionalists chafed at the limitations on congressional power imposed by the Court in the *Dred Scott* decision and saw Congress, and not the federal courts, as the primary enforcer of rights. Thus, the Court should maintain its deferential approach to the enforcement power, and members of Congress should play an active role by protecting

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see Rebecca E. Zietlow, *Free At Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 277, 281–82 (2010).

27. *See* CURTIS, *supra* note 3, at 49 (describing Trumbull's view that the Thirteenth Amendment granted blacks the "great fundamental rights" of citizenship and "authorized Congress to pass laws to secure freedom").

28. *Compare* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 133 (2010) (arguing that Section Two legislation is limited to "purely nonsubstantive remedial measures" based on judicial interpretation of Section One), *with* Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 48, 53 (2011) (maintaining that the legislative intent of Section Two was to "grant legislative authority to define rights essential to all free citizens" and to "extend[ ] the reach of federal governance far beyond the enumerated provisions of Section One").

workers and others who have been denied the freedom to which they are entitled under the Thirteenth Amendment.

II. JAMES ASHLEY AND THE THIRTEENTH AMENDMENT

James Ashley represented northwestern Ohio in the U.S. House of Representatives from 1859 to 1869.[29] He was a lifelong opponent of slavery, a journalist, and an avid reader.[30] Ashley was a close political ally of fellow Ohioan Salmon Chase, and along with Chase, he participated in the founding of the Republican Party.[31] Ashley passionately believed that slavery was not only immoral, but also unconstitutional.[32] In speeches given on the campaign trail and before Congress, Ashley articulated arguments against slavery that echoed those of the antislavery constitutionalists.[33] While in Congress, he acted to amend the Constitution in accordance with that ideology. Ashley thus played a central role in enshrining antislavery constitutionalism into constitutional law.

Throughout the Civil War and into the early Reconstruction Era, James Ashley was a leader in the Republican Party. He served as chair of the House Committee on the Territories at a time when slavery in the territories was the most pressing political issue of the day.[34] In 1862, Ashley introduced the first bill aimed to deal systematically with the concept of reconstruction,[35] and in 1863, the first version of the Thirteenth Amendment to Congress.[36] With President Abraham Lincoln at his side, Ashley shepherded the Amendment through the approval process of the House of Representatives.[37] Frederick Douglass later observed, "[i]n

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29. *See Ashley, James Mitchell, (1824–1896)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000314 (last visited Apr. 12, 2012).

30. *See* HOROWITZ, *supra* note 12, at 9–10. Despite Ashley's importance in U.S. constitutional development, this is his only known biography. Ashley began writing his memoirs late in life, but he died before they were completed. *See* James M. Ashley, Memoirs [hereinafter Ashley Memoirs] (unpublished drafts) (on file with the Carlson Library, University of Toledo, in the James M. Ashley Papers, 1860–1960, Box 1, Folders 2–10).

31. HOROWITZ, *supra* note 12, at 14–19.

32. *Id.*

33. *Id.* at 35–36, 41.

34. *Id.* at 76.

35. *Id.* at 73.

36. Les Benedict, *James M. Ashley, Toledo Politics, and the Thirteenth Amendment*, 38 U. TOL. L. REV. 815, 833 (2007); *see also* VORENBERG, *supra* note 8, at 106.

37. VORENBERG, *supra* note 8, at 179–80; *see also* GOODWIN, *supra* note 8, at 687 (describing Lincoln's efforts to sway a few necessary additional votes).

every phase" of the conflict over slavery, Ashley "bore a conspicuous and honorable part."[38]

Despite the crucial role that James Ashley played in our constitutional development, very little has been written about him, and until now, he has been virtually overlooked by legal scholars. To the extent that he has been recognized, Ashley is known primarily as the member of Congress who first called for the impeachment of President Andrew Johnson.[39] Ashley's active role in the impeachment effort caused his political downfall, and he lost his attempt at re-election in 1868.[40] Unfortunately, Ashley's image as a radical impeacher has eclipsed the role that Ashley played in the early Reconstruction effort. This Article represents an attempt to remedy this oversight.[41]

A. *James Ashley—A Short Biography*

James Mitchell Ashley was born in Alleghany, Pennsylvania, on November 14, 1824.[42] He was the son of an evangelical minister, and his early opposition to slavery stemmed from his religious beliefs.[43] When he was fourteen, Ashley left home and went to live with a Quaker abolitionist family.[44] He worked as a cabin boy on the Ohio River, where he had frequent contact with slaves and their owners.[45] Ashley later attributed his deep opposition to slavery to the fact that he had witnessed the cruelty of slavery firsthand so early in life.[46] Ashley was also an avid reader of political theory.[47] He studied law and was admitted to the bar, though he rarely practiced.[48] Ashley was involved in the Underground Railroad in southern Ohio and continued to aid

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38. Benedict, *supra* note 36, at 815 (quoting Frederick Douglass, *Introduction* to DUPLICATE COPY OF THE SOUVENIR FROM THE AFRO-AMERICAN LEAGUE OF TENNESSEE TO HON. JAMES M. ASHLEY OF OHIO 3 (Benjamin Arnett ed., Philadelphia, Publ'g House of the A.M.E Church 1894) [hereinafter SOUVENIR]) (internal quotation marks omitted).

39. The title of the only known biography of Ashley, *The Great Impeacher*, speaks to the significance of this role. *See* HOROWITZ, *supra* note 12, at 123.

40. *See id.* at 125–26; Benedict, *supra* note 36, at 836.

41. *See* Zietlow, *supra* note 12, at 1274 (noting Ashley's significant participation in amending the Constitution so that slavery was abolished).

42. HOROWITZ, *supra* note 12, at 1.

43. *Id.* at 2.

44. *Id.* at 6.

45. *Id.* at 7.

46. *See* Chas. S. Ashley, *Governor Ashley's Biography and Messages*, *in* 6 CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA 143, 145–46 (1907); Ashley Memoirs, *supra* note 30, Box 1, Folder 6 at 22.

47. *See* HOROWITZ, *supra* note 12, at 9.

48. *Id.* at 9.

fugitive slaves there until his activities became public.[49] In 1851, Ashley and his wife moved to Toledo, Ohio, a town more hospitable to their antislavery beliefs.[50] There, he set up a drug store and tried, and failed, to publish a newspaper.[51] In 1858, Ashley sold his newspaper and ran for Congress.[52]

Until the early 1850s, Ashley was a member of the Democratic Party.[53] He considered himself a "Jefferson and Jackson" Democrat with a belief "in the wisdom and intelligence of the common man."[54] In 1853, Ashley left the Democratic Party in protest over the party's support for slavery and joined other opponents of slavery to form a new political party.[55] The Kansas–Nebraska Act, which repealed the Missouri Compromise and allowed the residents of Kansas and Nebraska to vote on whether or not they wanted slavery, was the catalyst for this effort.[56] The Act "united the radicals, disrupted the moderates, and fragmented the entire American political party structure."[57] Ashley helped to organize the mass meetings in Ohio in January 1854, which led to the formation of the Ohio Republican Party.[58] Ashley was one of the leaders of the party, along with his friend and ally, Salmon Chase.[59] He represented Chase at the first convention of the Republican Party in 1856 and thus "deserves credit for being one of the founders of the national Republican party."[60]

In the speeches that he gave at the time, Ashley made it clear that his chief political motivation was opposition to slavery and support of rights for freed slaves. At a speech given at a rally in Montpelier in September 1856, Ashley proclaimed, "I am opposed to the enslavement in any country on God's green earth, of any man or race of men . . . and I do not admit that the Constitution of my country recognizes property in man."[61] He argued that blacks should have the right to vote and hold office,

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49. *Id.* at 10.
50. *Id.* at 10–11.
51. *Id.*
52. *Id.* at 40.
53. *Id.* at 14.
54. *Id.* at 13, 20.
55. *Id.* at 17.
56. *Id.*
57. *Id.*
58. *Id.* at 17–18.
59. *Id.*
60. *Id.* at 32.
61. James M. Ashley, Closing Portion of Stump Speech Delivered in the Grove near Montpelier, Williams County, Ohio (Sept. 1856), *in* SOUVENIR, *supra* note 38, at 601, 605.

and admitted that it might be necessary to amend the Constitution to end slavery.[62] Ashley had evolved from a Democrat to a radical Republican.[63] Two years later, Ashley was elected to the House of Representatives.[64] He remained a strong advocate for the abolition of slavery and the rights of freed slaves, including black suffrage, throughout his tenure in Congress.[65]

In November 1859, Ashley set off to Washington to begin his term in Congress.[66] On the way there, Ashley went to Charleston, Virginia, to attend John Brown's execution and then to Harper's Ferry to comfort Brown's widow.[67] Ashley published an eyewitness account of the execution, in which he warned, "Men may talk as they will, but I tell you there is a smoldering volcano burning beneath the crust, ready to burst forth at any moment; and an enemy to peace of almost every hearth-stone, is lurking in the heart of the apparently submissive lashed slave."[68] Once in Congress, Ashley was appointed to the House Committee on the Territories.[69] This enabled him to advocate for immediate abolition within the District of Columbia and the western territories on the grounds that they fell within congressional jurisdiction. He began a lasting friendship with Massachusetts Representative Charles Sumner, after whom he named his third son.[70]

In January 1861, even before the Civil War began, Ashley gave a speech to Congress in which he put forth his first theory of reconstruction.[71] He argued that if a civil war broke out, the federal government would have the authority to declare martial law and restore a republican form of government in the seceding states by abolishing slavery.[72] From the start of the Civil War, Ashley insisted that "the war should bring about complete

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62. *Id.* at 616.

63. HOROWITZ, *supra* note 12, at 48.

64. *Id.* at 40–41.

65. *See id.* at 73–74 (observing that, during reconstruction, Ashley sought to ensure that slaves were emancipated and that slaves had the right to own land, vote, and serve on juries).

66. *Id.* at 49.

67. *Id.*

68. *Id.*; Letter from John M. Ashley to His Family, TOLEDO BLADE, Dec. 1859, *reprinted in John Brown's Execution—An Eye Witness Account*, 21 NW. OHIO Q. 140–48 (Robert L. Stevens ed., 1949).

69. HOROWITZ, *supra* note 12, at 50.

70. *Id.* at 50–51.

71. *Id.* at 60–61.

72. *Id.* at 61.

emancipation."[73] He fiercely resisted claims that the war was intended solely to restore the Union.[74] Ashley traveled to the battlefield to visit General Benjamin Butler, who was confiscating slaves from the rebels and emancipating them.[75] Ashley heartily endorsed Butler's approach. In Congress, Ashley became the leading proponent of the territorial theory of Reconstruction.[76] Under this theory, states ceased to be states when they rebelled and, upon recapture by federal troops, reverted to territories under full federal control.[77] This would enable federal troops to expropriate "property," including slaves, from the rebel troops.[78]

In 1862, Ashley introduced the first Reconstruction bill in the House of Representatives.[79] The bill would have abolished all slave laws in conquered territories, prohibited the new territorial governments from establishing slavery, and installed congressional control over those territories.[80] All loyal inhabitants (including freed slaves) would have been entitled to seize land from the disloyal. Blacks would be allowed to vote and serve on juries, and the legislation would have established schools (presumably open to blacks) and limited the work day to 12 hours.[81] Radical for its time, the bill had little chance of passage.[82]

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73. *See id.* at 61–62, 64.

74. *See, e.g.*, James M. Ashley, Patriotic Address of Hon. J.M. Ashley (Mar. 18, 1863), *in* SOUVENIR, *supra* note 38, at 248, 254 ("I have demanded from the first, that our soldiers should fight for Liberty and Union, instead of Slavery and Compromise."); James M. Ashley, The Rebellion—Its Causes and Consequences (Nov. 26, 1861), *in* THE REBELLION—ITS CAUSES AND CONSEQUENCES 4 (Toledo, Pelton & Waggoner 1861), *available at* http://ebooks.library.cornell.edu/m/mayantislavery/browse.html (scroll down the author list to "Ashley, James Mitchell" and follow the "Rebellion: Its Causes and Consequences" hyperlink) ("[S]lavery is the germ from which this rebellion sprang."); *see also* HOROWITZ, *supra* note 12, at 64, 69 (remarking that Ashley refused to support the Union Party's idea that the war was to preserve the union because Ashley believed that "the aim of the war was to destroy slavery").

75. HOROWITZ, *supra* note 12, at 65.

76. *Id.* at 67.

77. *See* James Ashley, The Liberation and Restoration of the South (Mar. 30, 1864), *in* SOUVENIR, *supra* note 38, at 264, 271–72 (maintaining that when states "change their State Constitutions and governments, and renounce their obedience to the National Constitution, their State governments cease from that very hour"). Charles Sumner introduced a similar measure in the Senate, declaring that the rebellious states had "committed suicide." HOROWITZ, *supra* note 12, at 73–74.

78. *See* HOROWITZ, *supra* note 12, at 67.

79. *Id.* at 72–73.

80. *See* James M. Ashley, First Reconstruction Bill, §§ 2–3 (1862) (unintroduced House Resolution) (on file with the Carlson Library, University of Toledo, in the James M. Ashley Papers, 1860–1960, Box 2, Folder 10); HOROWITZ, *supra* note 12, at 73–74.

81. HOROWITZ, *supra* note 12, at 73–74.

82. *Id.* at 74.

However, after the Civil War, Congress enacted Reconstruction measures similar to Ashley's proposal (though without the most radical proposals of authorizing the confiscation of land or limiting the work day).[83] In December 1863, Ashley again proposed a bill to establish military governments over rebellious states.[84] This time, he was acting as a member of a committee on rebellious states, which had been established at the behest of President Lincoln.[85] Ashley's bill would have allowed rebellious states to rejoin the Union as states if they formed a republican form of government by abolishing slavery.[86] Ashley's bill would also have given voting rights to freed slaves.[87]

In December 1861, Senator Lyman Trumbull introduced a bill that would authorize the confiscation of slaves.[88] Ashley supported it, arguing that it was properly based on Congress's war powers.[89] In a speech in Congress citing John Quincy Adams, Ashley said:

> More than a year ago, I proclaimed to the constituency which I have the honor to represent, my purpose to destroy the institution of slavery . . . I then declared, as I now declare, that 'justice, no less than our own self-preservation as a nation, required that we should confiscate and emancipate, and thus secure indemnity for the past and security for the future.'[90]

Ashley supported a similar bill in the House.[91]

While the war was going on, Ashley demanded that slavery be abolished in the District of Columbia.[92] Ashley's bill contained no provision for compensation, but he was forced to compromise on this issue because the Senate bill did allow for it.[93] On June 17, 1862, Congress abolished slavery in the territories.[94] As chair of the Committee on Territories, Ashley was "deeply gratified"

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83. *Id.* at 145–49; *see also* ERIC FONER, RECONSTRUCTION 480–81 (1988). Northern Democrats and radical Republicans allied to support a bill to establish an eight-hour workday for federal employees. *See id.*

84. HOROWITZ, *supra* note 12, at 92.

85. *See id.*

86. *Id.* at 93.

87. *Id.* at 94.

88. *Id.* at 78.

89. *Id.*

90. CONG. GLOBE, 37TH CONG., 2D SESS. app. at 225–27 (1862).

91. HOROWITZ, *supra* note 12, at 78.

92. *Id.* at 75.

93. *Id.* at 75–76.

94. *Id.* at 77.

that he had achieved this monumental goal.[95] Ashley was of course thrilled when President Lincoln issued his Emancipation Proclamation on January 1, 1863.[96] In a letter to the *Toledo Commercial*, Ashley proclaimed, "To–day the Rubicon was crossed, and the nation, thanks to the persistent demands of her earnest sons, is at last irrevocably committed to the policy of universal emancipation."[97] However, the Proclamation did not itself abolish slavery because it did not apply to loyal states.[98]

On December 14, 1863, Ashley was the first to propose a constitutional amendment that would abolish slavery.[99] His amendment would have prohibited "slavery or involuntary servitude, in all of the States and Territories now owned or which may be hereafter acquired by the United States."[100] Although Ashley's proposed amendment did not contain a congressional enforcement clause, he apparently believed that such a clause was not necessary.[101] He accompanied the proposed amendment with a Reconstruction statute that would have established voting rights for the freed slaves.[102] The combined amendment and enforcement statute was a compromise to garner the votes of both moderates and radicals.[103] In the Senate, Lyman Trumbull proposed another version of the amendment, with language modeled on the Northwest Ordinance.[104] Trumbull hoped that the northern Democrats would be swayed by his choice of language because the Ordinance had been written by Thomas Jefferson.[105] It was Trumbull's version that eventually prevailed.[106]

The Thirteenth Amendment passed the Senate by a 38–6 vote on April 8, 1864, but the battle in the House was much

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95. *Id.* at 77, 95.

96. *Id.* at 84.

97. James M. Ashley, *The Future of the Republican Party and the Cause of Freedom*, TOLEDO COM., Jan. 1, 1963, *reprinted in* SOUVENIR, *supra* note 38, at 240, 240–41.

98. *See* VORENBERG, *supra* note 8, at 1.

99. CONG. GLOBE, 38TH CONG., 1ST SESS. 19 (1863); HOROWITZ, *supra* note 12, at 91.

100. CONG. GLOBE, 38TH CONG., 1ST SESS. 19 (1863).

101. If so, Ashley's belief would have been consistent with those who argued that the Court's reasoning behind *Prigg v. Pennsylvania* empowered Congress to enforce any provision of the Constitution regardless of whether that provision contained an enforcement clause. *See infra* notes 369–72 and accompanying text (discussing how some abolitionists, such as Joel Tiffany, believed the *Prigg* ruling empowered Congress to end slavery).

102. VORENBERG, *supra* note 8, at 49.

103. *See id.* at 50; *see also* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 21–22 (1974). Later during Reconstruction, of course, the Constitution was amended to prohibit the denial of franchise based on race and therefore establish the right of freed slaves to vote. *See* U.S. CONST. amend. XV.

104. VORENBERG, *supra* note 8, at 55–56, 59.

105. *Id.* at 59.

106. *Id.* at 53, 63.

more difficult.[107] In the summer of 1864, the war effort was not going well, and it was unclear whether President Lincoln would be re-elected.[108] The House vote on June 15, 1864, was along partisan lines, and the amendment lost.[109] Ashley angrily denounced the vote. He warned, "The record is made up, and we must all go to the country on the issue thus presented. When the verdict of the people is rendered next November I trust this Congress will return determined to ingraft this verdict into the national Constitution."[110] Ashley spent the next year of his life ensuring that his prophecy came true.[111]

The Republican Party declared the Amendment a central issue in the presidential election.[112] However, most of those who ran in close races chose not to emphasize the issue of black freedom.[113] Despite the fact that he was running against a strong opponent, James Ashley was a notable exception. "On the campaign trail, Ashley repeatedly affirmed 'man's equality before the law' and even boasted—inaccurately—that he had written the antislavery amendment."[114] After he won a narrow victory, Ashley went back to the House to lead the battle as the sponsor of what he claimed as his amendment.[115] He was joined by the President, who declared his re-election to be a "popular mandate for the antislavery amendment."[116] The radical James Ashley had often been at odds with his more moderate President. However, in the winter of 1865 the two joined forces to end slavery in the United States.

In the fall of 1864, members of the House of Representatives were divided over whether to vote for the Amendment.[117] Ashley drew up a list of thirty-six Democrats and border state Unionists who had voted against the Amendment in the summer and worked to persuade them to change their minds.[118] Lincoln and Ashley engaged in hard-hitting, behind-the-scenes lobbying.[119]

107. *Id.* at 112, 127.
108. *See id.* at 142–43.
109. CONG. GLOBE, 38TH CONG., 1ST SESS. 2995 (1864); VORENBERG, *supra* note 8, at 138.
110. CONG. GLOBE, 38TH CONG., 1ST SESS. 3357 (1864).
111. *See* HOROWITZ, *supra* note 12, at 102–06.
112. *See* VORENBERG, *supra* note 8, at 139.
113. *Id.* at 171.
114. *Id.*
115. *Id.* at 171, 179.
116. *Id.* at 174.
117. HOROWITZ, *supra* note 12, at 102–03.
118. *Id.* at 102.
119. VORENBERG, *supra* note 8, at 198–201.

Indeed, according to historian Michael Vorenberg, "No piece of legislation during Lincoln's presidency received more of his attention than the Thirteenth Amendment."[120]

The final vote on the Thirteenth Amendment occurred on January 31, 1865.[121] Ashley led the proceedings, which he began by quoting President Lincoln, "If slavery is not wrong, then nothing is wrong."[122] Ashley then explained what he believed enacting the Thirteenth Amendment would mean. First, and most obviously, the Amendment would abolish slavery, "a system so at war with human nature, as revolting and brutal, and is withal so at variance with the precepts of Christianity and every idea of justice, so absolutely indefensible in itself."[123] The Amendment would create a constitutional right to free labor, "a pledge that the labor of the country shall hereafter be unfettered and free."[124] Finally, Ashley argued that the Amendment would embody a "constitutional guarantee of the Government to protect the rights of all, and secure the liberty and equality of its people."[125] Many of his colleagues agreed.[126]

When the vote in favor of the Amendment was announced, the House exploded into cheers.[127] The congressional reporter noted:

> The members on the Republican side of the House instantly sprung to their feet, and, regardless of parliamentary rules, applauded with cheers and clapping of hands. The example was followed by the male spectators in the galleries, which were crowded to excess, who waved their hats and cheered

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120. *Id.* at 180.

121. CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

122. CONG. GLOBE, 38TH CONG., 2D SESS. 138 (1865); HOROWITZ, *supra* note 12, at 103; *see also* VORENBERG, *supra* note 8, at 206.

123. CONG. GLOBE, 38TH CONG., 2D SESS. 141 (1865).

124. *Id.*

125. *Id.*

126. TENBROEK, *supra* note 9, at 164–65. For example, E.C. Ingersoll of Illinois argued that the Thirteenth Amendment would "secure to the oppressed slave his natural and God-given rights . . . a right to live, and live in a state of freedom . . . a right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor . . . A right to the endearments and enjoyment of family ties." CONG. GLOBE, 38TH CONG., 1ST SESS. 2989–90 (1864). Godlove Orth claimed that the Thirteenth Amendment embodied the natural law principles of the Declaration of Independence *See* CONG. GLOBE, 38TH CONG., 2D SESS. 142–43 (1865) (arguing that the slavery "extinguish[es]" the Declaration of Independence and that the United States must set an example for the international community in ways they have in the past with other outcasts of society, such as pirates and rebels). James Wilson cited the Preamble to the Constitution and argued that the Thirteenth Amendment protected the natural rights of all people, both slaves and non-slaves. CONG. GLOBE, 38TH CONG., 1ST SESS. 1199–1203 (1864).

127. CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

> loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their handkerchiefs . . . .[128]

As Michael Vorenberg points out, "Thirty years later, George Julian still remembered the transforming quality of the moment: 'It seemed to me I had been born into a new life, and that the world was overflowing with beauty and joy.'"[129] Ashley sent a telegram to the *Toledo Commercial*: "Glory to God in the highest! Our country is free!"[130] According to the *National Anti-Slavery Standard*, "The credit [for the Amendment] belongs principally to Mr. Ashley of Ohio. He has been at work the whole session, and it is his management that secured the passage of the Joint Resolution."[131]

Of course, the question of what freedom entailed remained to be decided. That same January, Ashley added a measure to his Reconstruction bill that would have guaranteed "equality of civil rights before the law . . . to all persons in said states."[132] This bill reflects Ashley's view that the freedom established by the Thirteenth Amendment entailed equal rights for those who were freed. Although Ashley's measure failed, Congress adopted similar language in the 1866 Civil Rights Act, the first statute enforcing the Thirteenth Amendment.[133]

Ashley spent his remaining two years in Congress fighting for suffrage for blacks. He proposed another amendment, which would have prohibited states from denying the right to vote "to any of its inhabitants, being citizens of the United States, above the age of twenty-one years because of race or color."[134] After Ashley was no longer in Congress, Congress adopted the Fifteenth Amendment, which largely achieved Ashley's goal.[135]

Unfortunately, Ashley's congressional career came to an end in 1869, in the midst of Reconstruction. Ashley had become enmeshed in the attempt to impeach President Andrew Johnson.

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128. *Id.*

129. VORENBERG, *supra* note 8, at 208 (quoting GEORGE W. JULIAN, POLITICAL RECOLLECTIONS: 1840 TO 1842, at 251 (1883)).

130. HOROWITZ, *supra* note 12, at 105.

131. *Id.* at 106 (internal quotation marks omitted).

132. *Id.* at 107 (internal quotation marks omitted).

133. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2006)); Zietlow, *supra* note 26, at 281.

134. CONG. GLOBE, 39TH CONG., 1ST SESS. 2879 (1866).

135. *See* HOROWITZ, *supra* note 12, at 157. One notable difference is that Ashley's proposed amendment arguably would have established the right to vote for women. *Id.* at 119–20. Ashley was a longtime proponent of women's suffrage, due in part to the influence of his wife, Emma. *Id.* at 11, 120.

He was distraught when Lincoln was assassinated and served as one of Lincoln's pallbearers when his cortege traveled through Cleveland.[136] Ashley was among the first to move that Johnson be impeached.[137] Some historians later argued that Ashley was motivated by a conspiracy theory that Johnson had participated in the plot to assassinate Lincoln.[138] While Ashley may have believed this, he never said so in public, and he also "firmly believed that Johnson's policy of trying to implement his own reconstruction program in 1865 was a blatant usurpation of the constitutional powers and prerogatives of Congress."[139] Ashley's loss was also due to local politics and the vocal opposition of the editor of the *Toledo Blade*.[140]

After he left Congress, James Ashley was appointed as the governor of the territory of Montana.[141] There, he angered residents by calling for an end to cheap coolie labor, comparing it to slavery, and condemning discrimination against the Chinese.[142] President Grant removed Ashley as governor because of political and personal differences.[143] In 1875, Ashley moved to Ann Arbor, where his son was attending law school.[144] He founded a railroad from Ann Arbor to Toledo, which eventually expanded into Wisconsin.[145] In 1887, Ashley introduced a profit sharing plan to his work force, and he also promised accident insurance for employees and death benefits to widows.[146] Two years before his death in 1896, the Afro-American league of Tennessee paid tribute to Ashley and published a bound volume of his speeches.[147] Unfortunately, most of Ashley's papers were destroyed in a fire, and he passed away before completing his memoirs.[148]

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136. *Id.* at 110–11.

137. *Id.* at 123; *see also* T.B. PETERSON & BROS., THE GREAT IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES 13 (Phila. 1868).

138. HOROWITZ, *supra* note 12, at 124.

139. *Id.* at 126.

140. *See* Benedict, *supra* note 36, at 834, 836.

141. HOROWITZ, *supra* note 12, at 158.

142. *Id.* at 161.

143. *Id.* at 162–63.

144. *Id.* at 166.

145. *Id.* at 166–67.

146. *Id.* at 167–68. Ashley was unable to fulfill these promises because his railroad went out of business during the economic slump of 1893. *Id.*

147. SOUVENIR, *supra* note 38.

148. *James M. Ashley Papers, 1860–1960*, WARD M. CANADAY CTR. FOR SPECIAL COLLECTIONS, UNIV. OF TOLEDO, http://www.utoledo.edu/library/canaday/HTML_findingaids/MSS-002.html (last updated Mar. 6, 2012).

B. James Ashley—Antislavery Constitutionalist

The speeches that James Ashley gave on the campaign trail and before Congress reveal that Ashley was influenced by the antislavery constitutionalist and Free Soil movements. This is no surprise. Ashley was a lawyer and an avid reader from an early age, with a strong interest in political theory.[149] Ashley was one of the founding members of the Republican Party, and he was a close political ally of one of the most prominent antislavery constitutionalists, Salmon Chase.[150] Ashley was devoted to ending slavery and establishing fundamental rights. While reserving the right to amend the Constitution if necessary, Ashley consistently argued that slavery was not only immoral, but also unconstitutional.[151] In an 1856 stump speech, Ashley observed, "I do not believe slavery can legally exist in this country, a single hour, under an honest interpretation of our national Constitution. I differ with my friends Garrison and Phillips, on this point."[152] He referred to the Constitution as a "charter of national liberty."[153] Ashley's antislavery constitutionalism was central to his political philosophy, and he articulated it throughout his political career. He later observed:

> I held and in all my speeches affirmed, that the adoption of the national constitution by the citizens of nine states united us as one people and one nation: that in no line of the constitution did it recognize property in man, nor did it confer on Congress the power to enact a fugitive slave law of any kind, and that an honest interpretation of the constitution by the Supreme Court would destroy slavery everywhere beneath our flag.[154]

Until the end of his life, Ashley continued to insist that slavery was unconstitutional even before the Thirteenth Amendment.[155]

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149. HOROWITZ, *supra* note 12, at 4, 9.

150. *Id.* at 17–18.

151. *See, e.g.*, CONG. GLOBE, 38TH CONG., 2D SESS. 138 (1865) ("If the national Constitution had been rightfully interpreted . . . , slavery could not have existed in this country for a single hour . . . . Only because the fundamental principles of the Government have been persistently violated . . . is it necessary to-day to pass the amendment now under consideration."); Ashley, *supra* note 61, at 616 ("If this can be done in no other way, it will become our duty to amend our national Constitution . . . .").

152. Ashley, *supra* note 61, at 623.

153. Ashley, *supra* note 97, at 243.

154. Ashley Memoirs, *supra* note 30, at 43.

155. *See id.* at 43. The evidence suggests that he truly believed in the unconstitutionality of slavery. From a popular constitutionalist's perspective, however, the public statements that Ashley made are more important than his private beliefs. His speeches and other public statements are the best evidence of his engagement in a constitutional movement, and the best evidence of popular constitutionalism precisely

In the debate over the Thirteenth Amendment, some antislavery constitutionalists were concerned that the Amendment undermined their claim that slavery was already unconstitutional.[156] Others, including Charles Sumner, claimed that the Amendment merely reaffirmed the Constitution's antislavery character.[157] Ashley attempted to reconcile the two theories by arguing that although the Constitution was antislavery, the courts had perverted its meaning with their proslavery interpretations. Ashley insisted:

> If the national Constitution had been rightfully interpreted, and the government organized under it properly administered, slavery could not have legally existed in this country for a single hour, and practically but a few years after the adoption of the Constitution. Only because the fundamental principles of the government have been persistently violated in its administration, and the Constitution grossly perverted by the courts, is it necessary to-day to pass the amendment now under consideration.[158]

Insisting that the "great majority of the framers of the Constitution desired the speedy abolition of slavery," Ashley argued that the Amendment would restore the true antislavery meaning of the Constitution.[159]

How could Ashley have possibly believed that slavery was unconstitutional prior to the Thirteenth Amendment? After all, slavery had existed within the United States since well before the Founding Era, and it was widely known that the Founders had made certain compromises to preserve the institution of slavery.[160] Nonetheless, Ashley was far from the only politician who held these antislavery constitutionalist views. While the antislavery movement was divided over the issue of slavery during the years leading up to the Civil War,[161] Ashley sided with the group of activists who argued that the Constitution was actually an antislavery document, with structural provisions and

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because he made these statements to the public in order to garner support. Ashley's speeches are also valuable because they contributed to the widely understood meaning of the terms and concepts that Ashley and his colleagues used before they amended the Constitution, and therefore help to illuminate the meaning of that amendment.

156. VORENBERG, *supra* note 8, at 192.

157. *Id.*

158. James M. Ashley, Representative, Amend the Constitution—It Is the Way to Unity and Peace (Jan. 6, 1865), *in* SOUVENIR, *supra* note 38, at 333, 335–36 (emphasis omitted).

159. *Id.* at 343.

160. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 31–32 (1996).

161. WIECEK, *supra* note 3, at 202–03.

protections for individual rights, intended to bring about the downfall of slavery.[162] As the following section illustrates, antislavery constitutionalism became a significant movement and had a major impact on the antislavery debate.[163] In his speeches on the campaign trail and before Congress, James Ashley advocated the views of the antislavery constitutionalist movement. By enacting the Thirteenth Amendment, Ashley believed that he had transformed the Constitution to adopt the broad vision of freedom and individual rights held by the antislavery constitutionalists.

III. ASHLEY, ANTISLAVERY CONSTITUTIONALISM, AND THE MEANING OF FREEDOM

Since the framing of the Constitution, abolitionists had struggled with the question of whether the Constitution was a proslavery or antislavery document. Those who opposed slavery made a variety of arguments against it, including those based on moral and religious objections to the institution.[164] This first group, the Garrisonian abolitionists, believed that slavery was a moral evil, that any compromise with slavery was equally evil, and that the Constitution was fatally flawed because it condoned slavery.[165] As Garrison argued in an influential and widely

162. *See* HOROWITZ, *supra* note 12, at 34–35; WIECEK, *supra* note 3 at 112 (observing that, in 1819, an opponent of slavery argued that "[t]he Constitution was universally considered as leading to the gradual abolition of slavery even in the old states" (quoting Sen. William Plumer) (internal quotation marks omitted)). Notwithstanding their influence on the Reconstruction Congress, very little has been written about the antislavery constitutionalists. For a comprehensive history of antislavery constitutionalism, see generally WIECEK, *supra* note 3, and Alexander Tsesis, *Anti-Slavery Constitutionalism*, *in* 1 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 78, 78–81 (David S. Tanenhaus ed., 2008). For a discussion of the influence of antislavery constitutionalism on the Fourteenth Amendment, see generally CURTIS, *supra* note 9; Aynes, *supra* note 10, at 73–74, describing John Bingham's theory of Section One; and Barnett, *supra* note 9.

163. *See* CURTIS, *supra* note 3, at 43 (arguing that Joel Tiffany's views were "similar to those [adopted] by Republicans in the Thirty-ninth Congress"); WIECEK, *supra* note 3, at 275 (pointing out that antislavery constitutionalists were the first to introduce concepts "of substantive due process, equal protection of the laws, paramount national citizenship, and the privileges and immunities of citizenship").

164. *See, e.g.*, William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525–28 (1974) (describing the jurisprudence of antislavery as an "amalgam of three strands of American thought": religion, transcendentalism, and human rights); Garrison, *supra* note 4, at 97–98 (condemning the institution of slavery through biblical allusions).

165. *See* FONER, *supra* note 5, at 74 (stating that the Garrisonians accepted the southern viewpoint, which recognized an inherent protection of slavery in the Constitution); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 445 (2001) (noting that the Garrisonian abolitionists accepted

publicized speech, he and his allies believed that the Constitution was so tainted by slavery that it represented a "covenant with Death" and an "agreement with Hell."[166] This Article focuses on another strand of argument against slavery, the argument that slavery was unconstitutional, and that it violated fundamental human rights that were protected by the Constitution. The Garrisonians eschewed politics,[167] but antislavery constitutionalists became actively engaged in antebellum politics and influenced the political debate.[168] The antislavery constitutionalists were idealistic, but they were not naïve. Their arguments were legal, but they were also political. Above all, they hoped to convince the public at large and their political representatives that slavery could be, and must be abolished, and that the Constitution not only allowed this to occur, but required it to happen.[169] James Ashley was strongly influenced by the antislavery constitutionalists, and he often cited their views in speeches that he made on the campaign trail and before Congress. This section analyzes the antislavery constitutionalist philosophy and details its influence on Ashley as he fought to transform their constitutional theories into constitutional law.

Antislavery constitutionalists claimed that the Constitution should be interpreted consistently with the egalitarian principles of the Declaration of Independence and the Northwest Ordinance, and argued that ambiguities should be resolved consistently with those egalitarian principles.[170] Although their arguments varied, three broad theories of human rights are discernible from their writings. First, many antislavery constitutionalists argued that slavery was illegal because it violated the natural rights of man.[171] Others made a more

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that the Constitution protected slavery, and believed that "avoiding the corruption of a slaveholder's constitution was a moral necessity").

166. Garrison, *supra* note 4, at 98 (internal quotation marks omitted); VORENBERG, *supra* note 8, at 8.

167. Garrison claimed that any political activity, including voting, amounted to an act of allegiance to the proslavery, morally corrupted government. *See* William Lloyd Garrison, *The Protests*, 14 LIBERATOR 82 (1844), *reprinted as In Support of the American Anti-Slavery Society*, *in* 9 THE LIBRARY OF ORIGINAL SOURCES, *supra* note 4, at 99, 102–03.

168. *See* WIECEK, *supra* note 3, at 265 (noting that by 1864, Goodell's annotated constitution listed at least half of the constitutional provisions as "actually or potentially antislavery").

169. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 270–73, 276–77 (Burt Franklin 1965) (1860).

170. WIECEK, *supra* note 3, at 112; *see* SPOONER, *supra* note 169, at 90–93.

171. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 23–24 (Mnemosyne Publ'g Co. 1969) (1849).

textually based argument that slavery violated the Due Process Clause of the Fifth Amendment, and the Article IV Privileges and Immunities and Guarantee Clauses.[172] The third strand of theory focused on the economic impact of slavery and the harm that it caused to all workers by degrading the institution of free labor.[173] These Free Soilers did not usually frame their arguments in constitutional terms, but they did believe that people possessed fundamental economic rights that could not be deprived by the government.[174] Thus, they contributed significantly to the debate over the meaning of freedom that consumed the Reconstruction Congress.[175] James Ashley's views were influenced by all three theoretical strands.

In *Dred Scott v. Sandford*, the U.S. Supreme Court held that the right to own slaves was a fundamental right and that Congress therefore lacked the power to abolish slavery.[176] Antislavery activists were infuriated by the *Dred Scott* decision and accused the Court of representing the interests of the Slave Power.[177] Even before *Dred Scott*, however, antislavery constitutionalists saw Congress, and not the courts, as the institutional body most likely to end slavery.[178] Some antislavery constitutionalists also claimed that the Constitution authorized Congress to prevent the extension of slavery.[179] The latter argument was based on three provisions of the Constitution—the provisions authorizing Congress to regulate the territories and to admit new states, the Article IV Guaranty Clause, which guaranteed to states a republican form of government, and the provision authorizing Congress to ban the importation of slaves.[180] Some argued that Congress

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172. FONER, *supra* note 5, at 76; Tiffany, *supra* note 171, at 128–29.

173. FONER, *supra* note 5, at 11.

174. *See id.* at 43 (stating that the "economic superiority of free to slave labor" was a common theme throughout free-soil speeches).

175. *Id.* at 152–54.

176. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

177. *See* WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM 179–80 (Applewood Books 2007) (1979); ZIETLOW, *supra* note 23, at 29–36.

178. *See* Barnett, *supra* note 9, at 179 (describing Theodore Dwight Weld's argument that the power to exclusive legislation includes the power to establish as well as abolish slavery).

179. For example, the Radical Political Abolitionist Convention, held in Syracuse, New York, adopted a resolution arguing that the Constitution authorized and "required" the suppression of slavery. *See* Barnett, *supra* note 9, at 243 (quoting CENT. ABOLITION BD., PROCEEDINGS OF THE CONVENTION OF RADICAL POLITICAL ABOLITIONISTS 7 (N.Y.C. 1855)) (internal quotation marks omitted).

180. U. S. CONST. art. IV, § 3, cl. 1–2 (admission of states and territories); U.S. CONST. art. IV, § 4 (Guaranty Clause); U.S. CONST. art. I, § 9, cl. 1–2 (importation of

not only possessed the authority to abolish slavery, but also the duty to do so.[181] Eventually, their allies amended the Constitution to empower Congress to protect the rights of free people.

A. The Antislavery Constitutionalists

The antislavery constitutionalists included lawyers, journalists, and political activists. Perhaps the most prominent was Salmon P. Chase. A lawyer from Cincinnati, Ohio, Chase was a leader and founder of the Liberty, Free Soil and Republican Parties.[182] Chase served twice as a U.S. Senator, and twice as governor of the state of Ohio, and repeatedly contemplated running for president.[183] President Abraham Lincoln appointed Chase first as Secretary of the Treasury and Chief Justice of the U.S. Supreme Court.[184] Thus, Chase was clearly of the most influential antislavery constitutionalists.[185] Chase's close friend, James Gillespie Birney, was a journalist who articulated his antislavery views in his newspaper, the *Philanthropist*.[186] Because he was a former slave owner who had served on the state legislatures in Kentucky and Alabama, Birney's views carried special weight.[187] "In 1837 Birney was elected executive secretary of the American Anti-Slavery Society," shortly before it split between the followers of Garrison and the Liberty Party.[188]

The "chief architect" of the argument that slavery violated the Due Process Clause was Alvan Stewart.[189] Stewart was a prominent New York lawyer and leader of the New York state antislavery society.[190] In 1845, Stewart unsuccessfully argued

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slaves); *see* WIECEK, *supra* note 3 at 113–16 (discussing the argument that the Constitution authorized Congress to deny states entrance to the Union unless they abolished slavery).

181. Barnett, *supra* note 9, at 182.

182. Glyndon G. Van Deusen, *Chase, Salmon Portland*, *in* ENCYCLOPEDIA OF AMERICAN BIOGRAPHY 191, 191–92 (John A. Garraty ed., 1974).

183. *Id.*

184. *Id.* at 192.

185. *See* FONER, *supra* note 5, at 73; Barnett, *supra* note 9, at 45 (pointing out Chase's prominence in this era, and concluding that his "arguments were far from marginal").

186. Barnett, *supra* note 9, at 220.

187. *James Gillespie Birney*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/66664/James-Gillespie-Birney/ (last visited Apr. 12, 2012).

188. *Id.*

189. WIECEK, *supra* note 3, at 265; *see* CURTIS, *supra* note 9, at 42 (discussing Alvan Stewart's argument that the Due Process Clause empowered Congress to abolish slavery).

190. CURTIS, *supra* note 9, at 42.

against the unconstitutionality of slavery in the New Jersey Supreme Court.[191] Horace Binney was an expert on land title and a leader of the Philadelphia Bar who served one year as a member of the United States House of Representatives.[192] Theodore Dwight Weld began his antislavery activism as a ministry student in Cincinnati, Ohio.[193] In 1834, after transferring to Oberlin College in Ohio, "Weld left his studies . . . to become an agent for the American Antislavery Society."[194] In his capacity as an AASS agent, Weld is credited with recruiting James Birney, Harriet Beecher Stowe, and Henry Ward Beecher to abolitionism.[195] Horace Mann was a lawyer who is best known for his advocacy on behalf of public education.[196] During the 1830s, he served for several years in the Massachusetts state legislature, where he participated in an active school reform movement and "led the movement that established a state hospital for the insane."[197] Mann served in the U.S. House of Representatives from 1848 to 1853, where he was an outspoken opponent of slavery and joined the Liberty Party.[198]

Two other influential antislavery constitutionalists were also prominent journalists, Lysander Spooner and Joel Tiffany. As a resident of Boston, Massachusetts, Spooner published a treatise entitled *The Unconstitutionality of Slavery* in 1845.[199] The treatise earned Spooner the wrath of Garrison's ally, Wendell Phillips, and they engaged in a highly public debate over the issue.[200] Joel Tiffany was a lawyer who grew up in the "abolitionist hotbed" of Lorain County, Ohio, and worked as a reporter for the New York Supreme Court.[201] In 1849, Tiffany published his own *Treatise on the Unconstitutionality of Slavery*, in which he made the radical argument that slaves

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191. WIECEK, *supra* note 3, at 90.

192. *Horace Binney*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/65701/Horace-Binney (last visited Apr. 12, 2012).

193. *Theodore Dwight Weld*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/639217/Theodore-Dwight-Weld (last visited Apr. 12, 2012).

194. *Id.*

195. *Id.*

196. *Horace Mann*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/362466/Horace-Mann (last visited Apr. 12, 2012).

197. *Id.*

198. *Mann, Horace*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, at 1497 (2005); *Horace Mann*, *supra* note 196.

199. WIECEK, *supra* note 3, at 257.

200. *See* Barnett, *supra* note 9, at 198–99, 203–04 (explaining that Spooner's views were "outside some of the principal fault lines of abolition[ists]," such as Philips and other Garrisonians).

201. CURTIS, *supra* note 9, at 42.

were "citizens" by virtue of having been born in the United States.[202]

Gerrit Smith was a reformer and philanthropist who provided financial support for John Brown.[203] Smith took the lead in founding the Liberty Party in 1840, and ran for president twice on the Liberty Party ticket after most of the party was absorbed by the Free Soil Party.[204] Smith was elected to the U.S. House of Representatives in 1852, but he only served one year of his term.[205] William Goodell was a member of the New York Antislavery Society who began as a supporter of colonizing freed slaves but became increasingly radical over time.[206] Goodell also participated in the Radical Political Abolitionist Party and spoke to the Liberty Party convention in 1845.[207] The editor of the *Radical Abolitionist*, Goodell also wrote a synopsis of the radical argument against slavery in 1844.[208] When the Republican Party was formed, Smith and Goodell refused to support it because they insisted "that they could not support a party which recognized the constitutionality of slavery anywhere in the Union."[209]

Frederick Douglass was the most influential black leader among the abolitionists.[210] As a former slave and effective orator, Douglass became one of the most visible antislavery constitutionalists.[211] Douglass originally joined Garrison in his condemnation of the Constitution.[212] Douglass caused a sensation when he changed his mind and adopted the position that slavery was unconstitutional.[213] As an antislavery constitutionalist, Douglass gave several prominent speeches that fired up the

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202. WIECEK, *supra* note 3, at 259, 269.

203. *Gerrit Smith*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/549737/Gerrit-Smith (last visited Apr. 12, 2012).

204. *Id.*; *see also* FONER, *supra* note 5, at 134 (noting that Smith was leader of the Liberty Party).

205. *Gerrit Smith*, *supra* note 203.

206. *See* WIECEK, *supra* note 3, at 161 (recounting William Goodell's move from a colonizationist viewpoint to the more radical New York City Anti-Slavery Society).

207. *Id.* at 250–51.

208. *Id.* at 251, 257.

209. FONER, *supra* note 5, at 302.

210. *Id.* at 275.

211. Barnett, *supra* note 9, at 244.

212. *See* Frederick Douglass, *Comments on Gerrit Smith's Address*, N. STAR, Mar. 30, 1849 (writing that a government which fails to protect the "rights and liberties of its subjects" is "extremely guilty").

213. *See* Frederick Douglass, *A Change of Opinion Announced*, N. STAR, May 15, 1851, *reprinted in* 21 LIBERATOR 81, 82 (May 23, 1851) (announcing that the American Anti-Slavery Society would recommend a paper even if it did not assume the Constitution to be a proslavery document).

debates over slavery, the Constitution, and political strategy, among abolitionists.[214]

These antislavery constitutionalists made their arguments in a variety of contexts. The majority wrote pamphlets, which were widely distributed, and newspaper commentaries.[215] Some made speeches, and a few served in the antebellum Congress.[216] Others made arguments in courts, primarily while defending people who were accused of aiding fugitive slaves.[217] While the U.S. Supreme Court soundly rejected their theories in *Dred Scott v. Sandford*,[218] this did not dissuade the antislavery constitutionalists. They directed their arguments primarily towards the public sphere, and the court of public opinion. Thus, antislavery constitutionalists truly engaged in popular constitutionalism. Antislavery constitutionalists started out as a fringe group with few adherents.[219] However, as time went by, their influence grew. Their theories were adopted by leading members of the Reconstruction Congress, including James Ashley.

B. Constitutional Interpretation

Antislavery constitutionalists had to confront the fact that slavery existed at the time of the framing of the Constitution, and that many of the Framers of the Constitution represented

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214. *See* TWO SPEECHES BY FREDERICK DOUGLASS (Rochester, C.P. Dewey 1857).

215. *See, e.g.*, WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY (Negro Univs. Press 1968) (1852); WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (Books for Libraries Press 1971) (1845); SPOONER, *supra* note 169; TIFFANY, *supra* note 171; THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (New York, John F. Trow 1838); James G. Birney, *Can Congress, Under the Constitution, Abolish Slavery in the States?*, ALBANY PATRIOT, May 12, 19, 20 & 22, 1847, *reprinted in* TENBROEK, *supra* note 9, app. c; Alvan Stewart, *A Constitutional Argument on the Subject of Slavery*, 2 THE FRIEND OF MAN (Utica, 1837), *reprinted in* TENBROEK, *supra* note 9, app. b.

216. *See, e.g.*, SALMON PORTLAND CHASE & CHARLES DEXTER CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845 (Negro Univs. Press 1969) (1867) (providing two speeches on antislavery; one given in Philadelphia, the other in Cincinnati); Horace Mann, Speech Delivered in the House of Representatives on the Fugitive Slave Law (Feb. 28, 1851), *in* HORACE MANN, SLAVERY: LETTERS AND SPEECHES 390 (Mnemosyne Publ'g Co. 1969) (1851) (addressing the 1851 U.S. Congress).

217. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 400 (1857) (addressing whether a slave becomes entitled to freedom where the owner takes him to reside in a state where slavery is not permitted), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; WIECEK, *supra* note 3, at 191–92 (describing a lawsuit challenging the constitutionality of slavery brought by Salmon Chase and Horace Binney).

218. *See* Tsesis, *supra* note 162, at 79.

219. *See* WIECEK, *supra* note 3, at 171 (stating that antislavery constitutionalism began, as did other antislavery movements, gradually, "loosely federated[,]" and predominately in the "Middle Atlantic and upper-South states").

states in which slavery was a thriving institution.[220] If the Constitution was interpreted according to the intent of the Framers, it was almost certainly a proslavery document, as Garrison and his allies maintained.[221] Some antislavery constitutionalists argued that the Framers intended slavery to die out eventually, and that it would have done so had it not been for the invention of the cotton gin.[222] They argued that the Framers "attempted to subordinate their pro-slavery concessions to the more exalted libertarian principles of the Revolution and the Constitution."[223] However, most antislavery constitutionalists did not engage in arguments over the intent of the Framers. James Ashley adopted the theories of constitutional interpretation advocated by the antislavery constitutionalists, arguing both that the Framers intended slavery to die out, and that the text of the document itself barred the institution of slavery.[224]

1. Antislavery Constitutionalists. Portraying the Framers of the Constitution as antislavery was a somewhat awkward endeavor, given that many of the Framers (including James Madison) owned slaves.[225] Instead, many antislavery constitutionalists argued that the intent of the Framers was simply irrelevant—what mattered was the actual text that the Framers had chosen. Lysander Spooner made the most in-depth argument in favor of this method of interpretation in his *Treatise on the Unconstitutionality of Slavery*.[226] Spooner maintained that the text of the Constitution should be interpreted according to its meaning at the time of the enactment, and the "original meaning

220. *See* FINKELMAN, *supra* note 160, at 1–3 (stating that particularly after the publication of Madison's convention notes, abolitionists became aware of the fact that the Framers considered, and intended the Constitution to allow slavery, as part of a compromise between the northern and southern states).

221. *See id.* at 1–2.

222. CONG. GLOBE, 38TH CONG., 2D SESS. 138–39 (1865) (statement of Rep. James Ashley); *see* An Argument for the Defendant, Jones v. Vanzandt, 46 U.S. (5 How.) 215 (1847), *in* RECLAMATION OF FUGITIVES FROM SERVICE 105–06 (Cincinnati, R.P. Donogh & Co. 1847) (arguing that it is unlikely that the states ratifying the Constitution supported the institution of slavery, considering each state guaranteed its citizens absolute and inalienable rights); WILLIAM C. DOUB, A HISTORY OF THE UNITED STATES 421–22 (1905) (describing how the invention of the cotton gin led to an increased demand for cotton, and therefore an increased demand for slave labor).

223. WIECEK, *supra* note 3, at 210.

224. CONG. GLOBE, 38TH CONG., 2D SESS. 138–39 (1865) (statement of Rep. James Ashley); *see* tenBroek, *supra* note 7, at 182 (stating that Ashley endorsed Spooner's textual view, while also addressing the Framers' original intent).

225. *See* FINKELMAN, *supra* note 160, at 2 (arguing that the original Constitution is fundamentally a proslavery document).

226. *See generally* SPOONER, *supra* note 169.

of the constitution itself" is binding regardless of the intent of the Framers.[227] Spooner explained, "It is not the intentions men actually had, but the intentions they constitutionally expressed, that make up the constitution."[228]

Spooner's argument met with bitter criticism from Garrison's ally, Wendell Phillips, who insisted that Spooner was turning a blind eye to the real, proslavery nature of the Constitution.[229] Phillips based his arguments primarily on Madison's notes from the constitutional convention, which described the compromises between representatives from slave and free states.[230] Spooner replied that these discussions were irrelevant to determining the meaning of the document. What mattered was that the Constitution itself contained not a single mention of the institution of slavery. Moreover, Spooner maintained, "[N]o intention, in violation of natural justice and natural right . . . can be ascribed to the constitution."[231] Thus, while Spooner did not argue that slavery itself violated natural rights, he asserted their existence and maintained that the Constitution must be interpreted against the backdrop of those rights.

Other antislavery constitutionalists adopted the same method of interpretation as Spooner. In his influential *Treatise on the Unconstitutionality of Slavery*, Joel Tiffany listed the appropriate sources of interpretation, including "the general common established meaning of the words used" and "the preamble, with a view of ascertaining the true reason and spirit of the law."[232] Tiffany denied the relevance of extraneous evidence such as legislative history, commenting "that none of these rules launch us out into the wide ocean of conflicting, '[collateral] history, or national circumstances,' in search of light."[233] Similarly, Gerrit Smith maintained that the meaning of the

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227. Barnett, *supra* note 9, at 200 (quoting SPOONER, *supra* note 169, at 218) (internal quotation marks omitted).

228. SPOONER, *supra* note 169, at 226.

229. *See* WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 3–4 (Arno Press, Inc. 1969) (1847) (criticizing Spooner's views of the Constitution as "beautiful theories" that were ineffective to "oust from its place the ugly reality of a pro-slavery administration" and stating that "the ostrich does not get rid of her enemy by hiding her head in the sand").

230. *See* THE CONSTITUTION: A PRO-SLAVERY COMPACT 5 (Wendell Phillips ed., 3d ed., N.Y., Am. Anti-Slavery Soc'y 1856).

231. SPOONER, *supra* note 169, at 58–59.

232. TIFFANY, *supra* note 171, at 48. William Wiecek called this document "the foundation of radical constitutionalism." WIECEK, *supra* note 3, at 259; *see* CURTIS, *supra* note 9, at 43 (noting the similarities between Tiffany's views and those expressed by the Thirty-ninth Congress).

233. TIFFANY, *supra* note 171, at 48.

Constitution is to be "gather[ed] from the words of the Constitution, and not from the words of its framers—for it is the text of the Constitution, and not the talk of the Convention, that the people adopted."[234] Smith appealed to the democratic legitimacy of the Constitution, pointing out that only the document itself had been approved by the people.[235]

Thus, even as the antislavery constitutionalists engaged in popular constitutionalism, they advocated a textualist method of constitutional interpretation. Their method allowed them to disregard the considerable evidence that the Constitution was intended to perpetuate the institution of slavery.[236] As for the several constitutional provisions that furthered the institution of slavery, including the Fugitive Slave Clause,[237] the Three-Fifths Clause,[238] and the limitations on congressional power to bar the importation of slaves,[239] they pointed out that none of these provisions used the word slave or slavery, and argued that they should be interpreted according to the ordinary meaning of the words. As Frederick Douglass pointed out, "[n]either in the preamble nor in the body of the Constitution is there a single mention of the term *slave* or *slave holder*."[240] Douglass insisted that "the plain and common sense reading" of the text lacked any guarantee for slavery.[241]

2. James Ashley. To support his constitutional arguments, Ashley often invoked the rules of interpretation championed by the antislavery constitutionalists. Like them, Ashley refused to

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234. CONG. GLOBE, 33D CONG., 1ST SESS. app. at 522 (1854) (statement of Rep. Gerrit Smith).

235. *Id.*

236. For a compelling argument that the Constitution was a proslavery document, see FINKELMAN, *supra* note 160, at 2–5, arguing that five specific provisions and numerous supplemental clauses in the Constitution challenge the notion that the Framers were against slavery.

237. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

238. U.S. CONST. art. I, § 2, cl. 3 (providing that representation in the House of Representatives "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons").

239. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

240. Frederick Douglass, The *Dred Scott* Decision (May 14, 1857), *in* TWO SPEECHES BY FREDERICK DOUGLASS, *supra* note 214, at 25, 40.

241. *Id.* at 41.

acknowledge that the Fugitive Slave Clause referred to slaves.[242] He pointed out that the clause uses the word "person" rather than slave, and observed that "[t]he slave code of every slave State, denies that slaves are 'persons,' and describes them as chattels personal, or as property."[243] Ashley maintained that the clause, which refers to persons who are bound to labor, "cannot possibly mean slaves, because no person, black or white, or of mixed blood, can legally sell himself into slavery or make a contract, binding on himself for life, with a provision that his posterity shall be slaves and chattels forever."[244] Here, Ashley adopted a textualist approach to constitutional interpretation.

Ashley also invoked the intent of the Framers to support his interpretation, and insisted that the intent of the Framers was consistent with his antislavery views. Ashley maintained that the Framers had deliberately excluded explicit mentions of slavery from the Constitution because they hoped, and expected, that slavery would die out.[245] He claimed that when the clause was under consideration at the constitutional convention, the use of the word "slave" was proposed and rejected, and insisted that Madison "repeatedly declared during the sitting of the convention, 'that it would be wrong to recognize in the Constitution, the idea that there could be property in man.'"[246] In his speech introducing the final vote on the Thirteenth Amendment, Ashley claimed:

> [N]othing can be clearer to the reader of history than that the men who made our Constitution never expected nor desired the nation to remain half slave and half free. . . . [W]hile demanding liberty for themselves, and proclaiming to the world the inalienable right of all men to life, liberty, and the pursuit of happiness, they were not guilty of the infamy of making a Constitution which, by any fair rules of construction, can be interpreted into a denial of liberty, happiness, and justice to an entire race.[247]

In an earlier stump speech, he asked rhetorically:

> Are we to believe, that a majority of the members of that memorable convention, who had just passed through the fire and blood of the Revolution—a revolution conceived and

242. Ashley, *supra* note 61, at 623. He also insisted that Congress lacked the power to enforce the clause since it had no enforcement provision. *Id.* at 624.

243. *Id.* at 625.

244. *Id.*

245. *See id.* at 625–26 (arguing that the Framers' exclusion of explicit mentions of slavery from the Constitution indicated their opposition to the institution of slavery for a sustainable future).

246. *Id.* (quoting James Madison).

247. CONG. GLOBE, 38TH CONG., 2D SESS. 138 (1865) (statement of Rep. James Ashley).

> achieved to establish the God-given rights of personal liberty—would have been so false to their principles and professions, as to induce them to voluntarily grant to Congress the power to force them and their posterity forever, to engage in an everlasting slave hunt, for the benefit of a few slave barons?"[248]

His answer? "[N]ot one jot or tittle of evidence" could be found to sustain this claim.[249] Here, Ashley expressed the view of antislavery constitutionalists—that the Framers expected slavery to end of its own accord.

C. The Declaration of Independence, the Preamble, and Natural Rights

Some antislavery constitutionalists argued that slavery could never be legal under the Constitution because slavery violated the natural rights of mankind, which were protected by the Constitution. For textual support, these men relied primarily on the Declaration of Independence, with its grand proclamation of natural rights.[250] They also cited the Preamble to the Constitution, which states that "We The People" ordained and established the Constitution in order to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[251] The belief in self-evident, universal rights was central to the philosophy of the antislavery constitutionalists.[252] The view that slavery violated fundamental human rights was also central to James Ashley's antislavery philosophy.

1. The Antislavery Constitutionalists. Antislavery constitutionalists argued that natural law had a legally binding force, and that superseded man made law.[253] For example, in 1847 journalist and lawyer James Gillespie Birney wrote a four-

248. Ashley, *supra* note 61, at 626–27.

249. *Id.* at 627.

250. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

251. U.S. CONST. pmbl.

252. *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1797–98 (2006) (noting that abolitionists argued that natural rights were intrinsic to individuals and precede society); *see also* Daniel Farber & John Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 241–45 (1984) (emphasizing the importance of natural rights in that ideology).

253. *See* WIECEK, *supra* note 3, at 259–60 (describing the radicals' argument that religious or secular natural law was superior to manmade law).

part treatise in which he invoked the Declaration of Independence to support his argument that slavery violates the "right to liberty that can never be alienated" by preventing the slave "from pursuing his happiness as [he] wished to do" and thus violating the rule that "governments were instituted among men to secure their rights, not to destroy them."[254] While a member of the House of Representatives, prominent abolitionist Gerrit Smith invoked the same theory in a speech opposing the Kansas–Nebraska Act.[255] Smith pointed out that the Declaration of Independence states that governments are instituted "to secure these rights," and explained, "[t]hese are not conventional rights, which, in its wisdom, Government may give, or take away, at pleasure. But these are natural, inherent, essential rights, which Government has nothing to do with, but to protect."[256] Smith concluded, "I understand the Declaration of Independence to say that men are born with an equal right to use what is respectively theirs."[257] Here, Smith treated the Declaration of Independence as a binding document which recognized the force of natural law and had the same status as the Constitution.[258]

Those antislavery constitutionalists who invoked the Preamble to the Constitution argued that slaves were part of the People mentioned in the Preamble and therefore subject to its protections. For example, Lysander Spooner explained that the Preamble referred to "*all* 'the people' then permanently inhabiting the United States" because it did not distinguish between types of people.[259] "It does not declare . . . 'we, the *white* people,' or 'we, the *free* people.'"[260] He concluded, the invocation of "we *the people*" in the Preamble "is equivalent to a declaration that those who actually participated in its adoption, acted in behalf of all others, as well as for themselves."[261] In a speech before the House of Representatives, Horace Mann made a

254. Birney, *supra* note 215, at 318.

255. CONG. GLOBE, 33D CONG., 1ST SESS. app. at 520 (1854) (statement of Rep. Gerrit Smith) (arguing that the Declaration of Independence swept away any law allowing slavery); *see* Barnett, *supra* note 9, at 252–55 (describing the contribution of abolitionist constitutionalism to the original meaning of Section One of the Fourteenth Amendment). For a biography of Smith, see *Smith, Gerrit*, CONCISE DICTIONARY OF AMERICAN BIOGRAPHY 970 (Joseph G.E. Hopkins et al. eds., 1964).

256. CONG. GLOBE, 33D CONG., 1ST SESS. app. at 525 (1854).

257. *Id.*

258. *See* WIECEK, *supra* note 3, at 264–65.

259. SPOONER, *supra* note 169, at 90.

260. *Id.*

261. *Id.* at 91.

similar argument, concluding that therefore "the constitution of the United States creates no slaves, and can create none. Nor has it power to establish the condition of slavery any where."[262] He explained further, "No reason can be assigned why a slave is not as much under the protection of a constitution made for the 'people,' as under the protection of a law made for the 'people.'"[263] Similarly, Frederick Douglass invoked the Preamble and the Declaration of Independence to support his view that "we the people" referred to "the men and women, the human inhabitants of the United States."[264] He concluded:

> The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic, give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime.[265]

Many antislavery constitutionalists argued that slavery violated the Due Process Clause of the Fifth Amendment.[266] This was a narrower argument. Since the Court had held that the Fifth Amendment was not enforceable against the states,[267] most antislavery constitutionalists conceded that the Due Process Clause only prohibited Congress, and not the states, from authorizing slavery. Most of those who invoked the Due Process Clause agreed that it only applied to the District of Columbia and the territories, which were under the jurisdiction of Congress.[268] However, some, including Birney, disregarded the Court's ruling and claimed that the Due Process Clause prohibited slavery everywhere.[269]

The premise of the Due Process argument was that slaves had a natural right to liberty and the fruit of their labor, which could not be taken away without a ruling from a court of law.[270]

262. Mann, *supra* note 216, at 415.

263. *Id.* at 424.

264. Douglass, *supra* note 240, at 40.

265. *Id.* at 35.

266. *See, e.g.*, GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY, *supra* note 215, at 59; TIFFANY, *supra* note 171, at 79; Charles Dexter Cleveland, Address of the Liberty Party of Pennsylvania to the People of the State (Feb. 22, 1844), *reprinted in* CHASE & CLEVELAND, *supra* note 216, at 11, 17.

267. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

268. *E.g.*, WIECEK, *supra* note 3, at 190; Cleveland, *supra* note 266, at 17–18.

269. WIECEK, *supra* note 3, at 191–93.

270. *See* CONG. GLOBE, 33D CONG., 1ST SESS. app. at 519 (1854) (statement of Rep. Gerrit Smith); GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY, *supra* note 215, at 60–61 (pointing out that the literal language of the Constitution prohibits the deprivation of liberty without due process before a court);

Gerrit Smith called the Due Process Clause "an organic and fundamental law, [which] is not subject to any other law, but is paramount to every other law."[271] James Birney asked rhetorically, "By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that 50,000 'persons,' the annual increase in the slave population, are annually deprived of their 'liberty?'"[272] Though Birney conceded that the Due Process Clause was not intended to address slavery, nevertheless he claimed that it embodied "principles, which are at an entire enmity with the spirit and practice of slavery."[273] Horace Mann agreed that the word "person" "embraces all, from the slave to the President of the United States."[274]

Perhaps the most prominent antislavery constitutionalist to make a natural rights argument against slavery was Salmon P. Chase.[275] In a speech restating an argument that he made before the U.S. Supreme Court on behalf of a client who was sued for damages based on aid he had given to a fugitive slave, Chase argued that "slaveholding is contrary to natural right and justice" and therefore "can subsist nowhere without the sanction and aid of positive legislation."[276] In his brief challenging the constitutionality of the Fugitive Slave Act, Chase argued that slaves were entitled to the protections of the Due Process Clause because they were persons.[277] Chase argued that the Fifth Amendment Due Process Clause prevented Congress from enacting any legislation in favor of slavery. Thus, he claimed, the Fugitive Slave Act of 1793 was unconstitutional.[278]

Stewart, *supra* note 215, at 286 (arguing that "each man, woman, and child, claimed as slaves, before they shall be deprived of liberty, shall always have an opportunity, as ample as the benignity of the common law, to vindicate their freedom").

271. CONG. GLOBE, 33D CONG., 1ST SESS. app. at 524 (1854) (statement of Rep. Gerrit Smith).

272. James G. Birney & Gamaliel Bailey, Editorial Response to Letter to the Editor, PHILANTHROPIST, Jan. 13, 1837.

273. *Id.*

274. Horace Mann, Speech Delivered in the House of Representatives (Feb. 23, 1849), *in* MANN, *supra* note 262, at 121, 172 (emphasis omitted) (internal quotation marks omitted).

275. Historian Eric Foner identified Chase as the ideological leader of the Free Soil Party. *See* FONER, *supra* note 5, at 73–102.

276. Salmon Portland Chase, Address of the Southern and Western Liberty Convention (June 11–12, 1845), *reprinted in* CHASE & CLEVELAND, *supra* note 216, at 75, 101.

277. *Id.* at 89.

278. *Id.* at 89, 100; *see also* WIECEK, *supra* note 3, at 192–93 (describing Chase's argument on behalf of Matilda Lawrence that the Fugitive Slave Act was unconstitutional).

2. James Ashley. On the stump and before Congress, Ashley repeatedly argued that slavery violated the natural rights that could not be deprived by any government, including that of the United States or any state. Ashley's belief in natural rights was rooted in his religious heritage.[279] Late in his life, Ashley recalled:

> Every child born of a slave mother in America, was by the law of nature and of nature's God, born free. All such children seized and held as slaves by American slave masters involved the moral crime of kidnapping and was simply the act of kidnapping helpless human beings, and depriving them, by force and fraud, of their natural right to liberty, and denying to them the protection which by the law of nature all the human race are entitled.[280]

This belief formed the focus of his advocacy against the institution of slavery.

In a stump speech which he gave near Montpelier, Ohio, in September 1856, Ashley called slavery "the blackest of crimes" and "the most revolting infamy that ever afflicted mankind or cursed the earth," and proclaimed, "I am opposed to the enslavement in any country on God's green earth, of any man or any race of men, however friendless or poor, whatever their race or color, and I do not admit that the Constitution of my country recognizes property in man."[281] The voters evidently responded positively to this message, and elected him to Congress the following term. In an 1859 speech thanking the voters for electing him, Ashley championed his belief in natural rights, proclaiming:

> Let all remember that liberty is the birthright of the human race, that no consistent believer in that greatest and best charter of human freedom can do otherwise than acknowledge the justice of that principle which recognizes the natural right of every human being, and claims that they are entitled to the protection of life and liberty, by every law of man's enactment.[282]

Once in Congress, Ashley worked to fulfill this promise.

Like the other antislavery constitutionalists, Ashley invoked the Declaration of Independence, explaining that "If this government was organized for any purpose, it was to secure the blessings of liberty to ourselves and to our posterity, and not to

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279. *See* HOROWITZ, *supra* note 12, at 1–2.

280. Ashley Memoirs, *supra* note 30, at 13.

281. Ashley, *supra* note 61, at 605.

282. James M. Ashley, Address Delivered at Charloe, Ohio (Jan. 31, 1859), *in* SOUVENIR, *supra* note 38, at 22, 24.

enslave any man, nor to become the defenders of slavery."[283] Ashley noted the obvious contradiction between the Declaration's promise of equality and the institution of slavery, and argued that this was evidence that the Framers of the Constitution hoped to abolish slavery:

> Sir, while demanding liberty for themselves, and proclaiming to the world the inalienable right of all men to life, liberty, and the pursuit of happiness, they were not guilty of the infamy of making a Constitution which, by any fair rules of construction, can be interpreted into a denial of liberty, happiness, and justice to an entire race.[284]

What were the natural rights that slavery deprived? Those rights included the right to own property and to enter into a contract including a marriage contract. Ashley's vision of natural rights went beyond the conventional trichotomy of life, liberty and property, and included the right to the equal protection of the government.[285] He insisted:

> I demand for every human soul within our gates, whether black or white, or of mixed blood, the equal protection of the law, and that everywhere beneath [our] flag, on the land or on the sea, that they be protected in their right to life and liberty, and the secure possession of the fruits of their own labor. In short, I demand that all of God's children shall have an even chance in the race of life.[286]

Here, Ashley made it clear that he believed the natural rights of man included the material preconditions of success in civil society and the guarantee that the government could protect the exercise of those rights.

D. *The Rights of Citizenship*

The issue of whether or not free blacks were citizens, and if so, what rights inhered therein, dominated constitutional debates over slavery in the years prior to the Civil War and into the Reconstruction Era.[287] In Congress, Representatives from free

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283. *Id.* at 29.

284. CONG. GLOBE, 38TH CONG., 2D SESS. 138 (1865) (statement of Rep. James Ashley).

285. *See* Ashley, *supra* note 61, at 620–22.

286. *Id.* at 622. As evidence of this commitment, in 1863, Ashley introduced a resolution to authorize the enlistment of freed slaves in the rebellious districts that would have required black soldiers to be paid at the same rate as their white counterparts. CONG. GLOBE, 38TH CONG., 1ST SESS. 20 (1863).

287. *See* ZIETLOW, *supra* note 23, at 26–29.

states argued that they had the power to make free blacks citizens, and that slave states lacked the power to treat those people as noncitizens.[288] There is overlap between the natural rights and citizenship-based rights arguments, and many of the antislavery constitutionalists relied on both lines of reasoning. Some believed that the rights of citizenship included all fundamental human rights.

1. The Antislavery Constitutionalists. In the 1833 case of *Corfield v. Coryell*, Justice Bushrod Washington held that the rights of "citizens of all free governments" protected by the Article IV Privileges and Immunities Clause included:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state . . . to claim the benefit of the writ of habeas corpus [and] to institute and maintain actions of any kind in the courts of the state . . . .[289]

Some antislavery constitutionalists cited *Corfield* to illustrate the human rights that all citizens, including free blacks, enjoyed, and that were recognized in the Declaration of Independence.[290] For example, Joel Tiffany relied on *Corfield*'s reasoning to support his broad view of citizenship rights that, he argued, were violated by the institution of slavery.[291]

The issue of citizenship came up most often when free blacks traveled to slave states and faced the danger of abduction. Free states such as Massachusetts recognized free blacks as state citizens, with the right to travel throughout the nation.[292] The citizenship-based right to travel became a cause célèbre of abolitionists after several free blacks from Massachusetts were arrested in Charleston, South Carolina.[293] Samuel Hoar, the scion of a prominent Boston family, made a well-publicized trip to

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288. *See id.*

289. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

290. *See* Tsesis, *supra* note 252, at 1805 (tracing the idea of unalienable liberty to the Declaration of Independence).

291. TIFFANY, *supra* note 171, at 99.

292. *See* LEON F. LITWACK, OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 57 (1961) (noting that the Massachusetts legislature authorized the issuance of passports to any citizen, "whatever his color may be"). *See generally* Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000).

293. William J. Rich, *Why "Privileges or Immunities"? An Explanation of the Framers' Intent*, 42 AKRON L. REV. 1111, 1113 (2009).

Charleston only to be turned away by local officials.[294] Antislavery constitutionalists in and out of Congress decried what Charles Cleveland and Salmon Chase called "the imprisonment of free citizens of Massachusetts."[295] Joel Tiffany went a step further, claiming that free blacks, and even slaves, were national citizens and thus protected from slavery by the Privileges and Immunities Clause of Article IV.[296] He explained that those rights were enforceable since "the whole Nation, individually and collectively, stand pledged to protect and defend him in the enjoymen[t] of those rights."[297]

Others invoked the ideology of civic republicanism, claiming that people were entitled to protection from the government to which they owed allegiance. In 1836, Theodore Dwight Weld advanced this argument, pointing out that slaves were expected to obey laws and maintaining that this allegiance to the laws entitled slaves to protection from the government. He concluded, "*Protection is the* CONSTITUTIONAL RIGHT *of every human being under the exclusive legislation of Congress who has not forfeited it by crime*."[298] Weld's contemporary, James G. Birney, agreed that the slaves' duty to obey the law entitled them to protection and maintaining that "[w]ithout this protection—this security—we have no right to try him for the violation of the laws of a country which deprives him of both."[299] These radical abolitionists, such as Joel Tiffany, argued that to be a citizen of the United States is to be like a Roman citizen, entitled to the protection of the government.[300]

National citizenship was central to the ideology of two prominent antislavery constitutionalists, Lysander Spooner and Joel Tiffany. Lysander Spooner argued that if states were to abolish slavery, then slaves would immediately become U.S. citizens.[301] He continued, "[I]f they would become citizens then, they are equally citizens now—else it would follow that the State governments had an arbitrary power of making citizens of the United States."[302] Spooner championed "the concept of full and equal national citizenship, which entitled each citizen to the

294. AKHIL AMAR, THE BILL OF RIGHTS 236 (1998).

295. CHASE & CLEVELAND, *supra* note 266, at 47 & n.*.

296. TIFFANY, *supra* note 171, at 97.

297. *Id.*

298. WELD, *supra* note 215, at 45.

299. Birney, *supra* note 215, at 317–18.

300. *See* CURTIS, *supra* note 9, at 44 (likening the protections and defenses afforded American citizens to those of the Romans).

301. Barnett, *supra* note 9, at 207 (citing SPOONER, *supra* note 170, at 93–94).

302. SPOONER, *supra* note 170, at 93.

protection of the law and informed the applicability of the Privileges and Immunities Clause of Article IV."[303] Joel Tiffany also maintained that "[a]ll persons, born within the jurisdiction of the United States, since the adoption of the Federal Constitution, became citizens by birth. . . . [P]ersons now . . . entitled to the benefits of the standing guarant[ees] of the [Constitution] for personal security, personal liberty, and private property."[304] Like Spooner, Tiffany linked his broad view of citizenship rights to "We The People" in the Preamble.[305]

2. James Ashley. Unlike many of the antislavery constitutionalists, Ashley did not rely on citizenship as a source of rights for free blacks. Ashley believed in the fundamental natural rights of all persons, but did not link those rights to a person's citizenship status.

E. The Guaranty Clause and a Republican Form of Government

Some antislavery constitutionalists argued that slavery was forbidden by the Guaranty Clause of Article IV, which obligates the United States to guarantee to each state a republican form of government.[306] They argued that a state with slavery did not have a republican form of government because slave states had a large number of people who could not participate in the polity, and whose fundamental human rights were violated.[307] They maintained that the Guaranty Clause required states to operate consistently with the principles of the Declaration of Independence.[308] The importance of this argument is reflected in the name of the political party formed by antislavery constitutionalists and their allies in 1856—the Republican Party.[309] It provided a constitutional basis for the Republicans' belief that "[t]he most cherished values of the free labor outlook—economic development, social mobility, and political democracy—all appeared to be violated in the South."[310]

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303. Barnett, *supra* note 9, at 209.

304. TIFFANY, *supra* note 171, at 88–89.

305. *Id.* at 89.

306. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

307. *See, e.g.*, TIFFANY, *supra* note 171, at 113–14 (contending that state governments are to be republican to all citizens, and that those which violate that guarantee risk being overthrown).

308. WIECEK, *supra* note 3, at 269–70.

309. *See* FONER, *supra* note 5, at 2 (noting that the Republican Party formed between 1854 and 1856).

310. *Id.* at 40.

1. The Antislavery Constitutionalists. Antislavery constitutionalists argued that the Guaranty Clause recognized an individual right to a republican form of government, and the promise of protection by the federal government from abuses by the state.[311] As Joel Tiffany observed, "[A]ll the citizens of the United States stand pledged to each citizen, that the State government under which he lives shall be to *him* Republican."[312] According to Tiffany, the United States would fail to fulfill this obligation "if there be a single citizen who is, or has been [robbed] of full and ample protection in the enjoyment of his natural and inherent rights, by the authority, or permission of the State in which he lives."[313] Thus, well before the adoption of the Equal Protection Clause of the Fourteenth Amendment, Tiffany linked equal protection to the structure of the government and championed it as a fundamental right.

The centrality of the Guaranty Clause to the antislavery constitutionalist philosophy begs the question of whether the freed slaves should have a right to vote. Was extending the right to vote necessary for a state to have a republican form of government? Few antislavery constitutionalists were willing to go so far, but championing the right to vote of freed slaves became a rallying cry for radicals in the Reconstruction Congress.[314] Those radicals followed their republican ideology to what they believed were its logical consequences. Divisions over the issue of voting rights split the moderates from the radicals throughout the Reconstruction Era.[315]

2. James Ashley. While Ashley rarely invoked the Guaranty Clause, he often argued that slavery was inconsistent with the republican democracy that was established by the Constitution. Ashley's boyhood hero was the populist president Andrew Jackson, and Ashley strongly believed in Jackson's populist version of democracy.[316] Ashley discussed his theory of sovereignty in a speech to the House of Representatives on January 17, 1861, explaining, "[b]oth these governments, the State and Federal, derive all the power they possess directly from

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311. TIFFANY, *supra* note 171, at 114.

312. *Id.*

313. *Id.*

314. *See* FONER, *supra* note 83, at 272 ("Three points appeared 'fully settled' among Republican leaders . . . existing Southern governments should be superseded, 'rebels' should hold no place in the new regimes, and 'the negroes should vote.'").

315. BENEDICT, *supra* note 103, at 22–23.

316. HOROWITZ, *supra* note 12, at 7; *see* Ashley, *supra* note 282, at 29 (confirming his belief in Jackson's "maxim" to provide good to the greatest number of people).

the people."[317] In his speeches, Ashley repeatedly decried what he called Congress "granting privileges to the few which are denied to the many."[318] To Ashley, a society based on slavery was the antithesis of democracy because the elite prospered by exploiting the labor of slaves and poor whites.[319]

Ashley insisted that slavery was only allowed to exist because the government was dominated by the privileged and wealthy slaveholders. In his Montpelier speech, he explained, "The time has gone by, when the Government of the nation, or that of any State, can, without protest, be dominated over by the minority, and be administered by organized force and fraud, in the interest of a privileged class."[320] The Republican Party was organized "[t]o meet and resist the aggressions of this privileged class."[321] Because a society based on slavery could never have a republican form of government, slavery corrupted the government and made it unconstitutional.

During the Reconstruction Era, radicals such as Ashley were united in their advocacy of voting rights for freed slaves.[322] However, Ashley embraced this cause earlier than most, at the beginning of his political career.[323] In an 1856 speech in Montpelier, Ohio, he insisted:

> If this can be done in no other way, it will become our duty to amend our national Constitution and all our State constitutions, so as to secure . . . to all States, representatives in Congress, and in State legislatures—in proportion to the votes cast in each, to the end that all the people, white and colored, shall be fairly represented in State legislative assemblies and in the national Congress.[324]

317. CONG. GLOBE, 36TH CONG., 2D SESS. app. at 63 (1861).

318. James M. Ashley, Address Delivered in German Township, Fulton County, Ohio (Nov. 1, 1859), *in* SOUVENIR, *supra* note 38, at 31, 34; *see also* James M. Ashley, Address Delivered at Napoleon (Aug. 19, 1868), *in* SOUVENIR, *supra* note 38, at 505, 507.

319. *See* Ashley, *supra* note 61, at 616 ("For nearly half a century, less than three hundred thousand slave barons have ruled this nation morally and politically, including a majority of the Northern States, with a rod of iron.").

320. Ashley, *supra* note 61, at 616.

321. Ashley, *supra* note 282, at 29.

322. *See* BENEDICT, *supra* note 38, at 832; HANS L. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE 4–5 (1969) (characterizing radicals as seeking full civil rights for freedmen during Reconstruction).

323. *See* HOROWITZ, *supra* note 12, at 36 (characterizing Ashley's advocacy of voting rights for blacks in 1856 as "radical a statement as an orator dared to make" and as "a risky issue for an ambitious young politician to espouse").

324. Ashley, *supra* note 61, at 616.

In Ashley's view, the right to vote was one of the natural rights denied to slaves, linked to the Guaranty Clause.[325] Later, Ashley also insisted that impartial suffrage was the only safe basis for Reconstruction.[326] Ashley called the right to vote "a natural right, a divine right if you will, a right of which the Government cannot justly deprive any citizen except as a punishment for crime."[327] Ashley repeatedly affirmed the importance of the right to vote. He called the ballot "American [citizens'] cleanest and purest weapon" and maintained that he would not rest until "the enfranchisement of the black man" was achieved.[328]

Ashley's emphasis on the right to vote was consistent with his strong faith in democracy. Ashley repeatedly advocated for the expansion of suffrage rights to blacks and women, and supported the direct election of senators and the President.[329] Ashley maintained that the only way to end this tyranny would be to expand suffrage rights. He insisted, "[T]he ballot is the only sure weapon of protection and defense for the poor man, whether white or black. It is the sword and buckler and shield before which all oppressions, aristocracies, and special privileges bow."[330]

F. Economic Rights

Some of the antislavery constitutionalists also championed economic rights. They argued that slavery caused the degradation of all labor and was also responsible for the plight of poor white workers.[331] Salmon Chase explained that "[t]he problem with slavery . . . was that it violated the free-labor ideal of workers exchanging their labor for appropriate wages."[332] The degrading impact of slavery on all labor formed the central ideology of the Free Soil Party, whose members were among the founders of the Republican Party in 1856.[333] Members of that party emphasized the impact of slavery on white workers in part

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325. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2881 (1866).

326. *Id.* at 2882.

327. *Id.* at 2881.

328. James M. Ashley, Speech at Gilead, Wood County, Ohio (1865), *in* SOUVENIR, *supra* note 38, at 634, 636.

329. HOROWITZ, *supra* note 12, at 119–20; Ashley, *supra* note 61, at 627.

330. CONG. GLOBE, 39TH CONG., 1ST SESS. 2882 (1866).

331. FONER, *supra* note 5, at 50. For a detailed explanation of the impact of free soil ideology on the Framers of the Thirteenth Amendment, see Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

332. VORENBERG, *supra* note 8, at 14.

333. *See* FONER, *supra* note 5, at 11, 58–61 ("[T]he concept of 'free labor' lay at the heart of the Republican ideology . . . .").

because they believed this argument would be more persuasive than moral arguments, but also because they strongly believed in the right to free labor.[334]

1. Free Soil Ideology. Free Soilers advocated the virtues of free labor. A central premise of their belief was that "[a] man who remained all his life dependent on wages for his livelihood appeared almost as unfree as the southern slave."[335] They emphasized the importance of mobility to workers, mobility that slaves obviously lacked.[336] Moderate and conservative Free Soilers believed that establishing economic rights would allow freed slaves the self-sufficiency to succeed.[337] They also maintained that freed slaves were entitled to essential human rights, such as the right to travel.[338] Not only was the right to travel linked to national citizenship, but mobility was necessary for workers to find gainful employment. The freedom to move and find a new employer was the antithesis of slavery and involuntary servitude, and central to the Free Soil ideology.[339]

At times, the Free Soil rhetoric had a "racist tinge," implying that not just slavery, but blacks themselves were degrading labor.[340] However, many Free Soilers joined the Republican Party with a history of support for black rights.[341] Some had endorsed black suffrage, and others opposed black exclusion, most notably during the debate over the admission of Oregon.[342] A number had defended fugitive slaves in court and some of them, including James Ashley, are reported to have participated in the Underground Railroad.[343] In Congress, Free Soilers extolled the value of economic rights,

334. *Id.* at 61–62.

335. *Id.* at 17.

336. *Id.* at 38. Many Republicans also opposed limits on working hours and believed that workers should decide themselves how long they want to work. *See id.* at 27.

337. *See id.* at 16.

338. *See* CURTIS, *supra* note 9, at 28–29 (describing abolitionists' theory that the Constitution prohibited the denial of fundamental rights to American citizens, including slaves); TSESIS, *supra* note 11, at 131 ("The Court has located the right to travel in so many constitutional provisions because, like family autonomy, it is a fundamental interest.").

339. *See* FONER, *supra* note 5, at 38 (emphasizing the free labor ideology as guaranteeing "mobility to the laborer").

340. *Id.* at 61.

341. *Id.* at 281.

342. *Id.* at 288–89; *see also* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 725–29 (2003) (describing the debate over a provision of Oregon State Constitution that would "exclude free people of color . . . from owning property, entering into contracts, and filing suit in Oregon state court").

343. FONER, *supra* note 5, at 282–83; HOROWITZ, *supra* note 12, at 10.

including the freedom to enter into contracts and own property. Some claimed all citizens were entitled to these economic rights. This ideology was later reflected in the 1866 Civil Rights Act, which protected economic rights such as the right to contract, own property, and have access to courts to protect that property, and linked those rights to citizenship.[344]

2. James Ashley. In his critique of slavery, Ashley made it clear that the institution was not just an extreme form of race discrimination, but also economic exploitation. Ashley argued that slavery was a class issue, an institution of the southern aristocracy that facilitated the subordination of white workers who could not afford to own slaves and therefore competed with slaves in the labor market. He claimed that class antagonism in the south was "the real point of danger to the ruling class of the South."[345] In his Montpelier stump speech, Ashley explained:

> I often wonder how your northern-born men can show such hostility to the black man. Singularly enough, I find here in the North, as in the South, that the hatred of the negro is not that he is black or of mixed blood, but because he is a slave. It is the hatred born of the spirit of caste, and not the hatred of color. Wherever the negro is free and is educated and owns property, you will find him respected and treated with consideration.[346]

Here, Ashley articulated a sophisticated recognition of the combination of racial and economic subordination suffered by slaves.

Ashley maintained his free labor philosophy. In his statement calling for discussion on the Thirteenth Amendment, Ashley argued that the system of free labor was guaranteed by the Constitution, and that the "passage [of this amendment] will . . . be a pledge that the labor of the country shall hereafter be unfettered and free, and I need not say that under the inspiration of free labor the productions of the country will be tripled and quadrupled."[347] Thus, ending slavery would help all workers by bringing up the bottom and acknowledging the value of free labor.

Ashley's economic critique went beyond criticizing slavery. He explained:

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344. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2006)).

345. FONER, *supra* note 5, at 120 (quoting CONG. GLOBE, 36TH CONG., 1ST SESS. app. at 374 (1860)) (internal quotation marks omitted).

346. Ashley, *supra* note 61, at 606–07.

347. CONG. GLOBE, 38TH CONG., 2D SESS. 141 (1865) (statement of Rep. James Ashley).

> I therefore repeat, that I am unutterably opposed to the ownership of labor by capital, either as chattel-slaves, or as apprentices for a term of years, as Chinamen are now being apprenticed in Cuba and in this country, ostensibly for seven years, but in reality for life.
>
> I do not agree that capital shall own labor, North or South, nor in any country on God's green earth. [Applause.] I do not care whether that capital is in the hands of one man or in the hands of many men combined.[348]

Years later, Ashley argued that ending slavery had not only helped the enslaved blacks, but also white workers. He claimed, "The abolition of slavery has made possible the ultimate redemption of the poor whites in the south, including the "sold passengers" (white slaves) and their posterity."[349]

G. Congressional Power

Prior to the Civil War, proslavery and antislavery forces bitterly disagreed over whether Congress had the power to regulate, and thus limit, slavery in the territories. Indeed, the principal constitutional crisis of the early nineteenth century, which resulted in the Missouri Compromise, expressly involved the extent of congressional power to regulate slavery.[350] At issue was the question of whether Congress could prohibit slavery in the territories, and whether that power extended to prohibiting slavery in a state that had been in a non-slave territory.[351]

In Congress, that dispute was resolved in a compromise which allowed slavery in southern territories and forbade it in northern territories.[352] However, the question of whether Congress had the power to abolish slavery, and if so, the extent of that power, remained a potent political issue.[353] Some antislavery constitutionalists argued that Congress had the power to abolish

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348. Ashley, *supra* note 61, at 621–22 (alteration in original).

349. Ashley Memoirs, *supra* note 30, at 18.

350. WIECEK, *supra* note 3, at 106–07 (describing federalist concerns as the root of the Missouri crisis); *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 232–33 (2001) (describing the territorial crisis leading up to the Missouri Compromise).

351. CURRIE, *supra* note 350, at 233–35.

352. *Id.* at 232–33. The U.S. Supreme Court held the compromise unconstitutional in the *Dred Scott* case. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

353. *See* CURRIE, *supra* note 350, at 233, 234 n.124 (discussing disagreements about the scope of Congress's power to abolish slavery in the states).

slavery. They articulated a broad theory of congressional power that was eventually adopted by the Reconstruction Congress.[354]

1. Antislavery Constitutionalists. Many antislavery constitutionalists believed that Congress's power to abolish slavery was limited to the District of Columbia and the federal territories. They accepted the "federal consensus" that slavery within the states was to be regulated by the states.[355] Others went further and argued that Congress had the power to abolish slavery in the original states. In 1837, Alvan Stewart argued that Congress had the power to abolish slavery because it violated the Due Process Clause.[356] Stewart claimed that this power extended to abolishing slavery "in every state and territory in the Union."[357] Stewart was the first to argue that Congress had the power to abolish slavery in the states.[358] Lysander Spooner and William Goodell agreed that the Due Process Clause empowered Congress to abolish slavery in the states.[359] In 1847, James Birney published a four-part article in the *Albany Patriot* in which he argued that Congress had the power to abolish slavery because slavery violated the fundamental human rights that were recognized in the Declaration of Independence.[360] Birney explained that abolishing slavery was the protection that Congress owed slaves in exchange for their allegiance and willingness to obey the law.[361] The fact that neither the original Constitution nor the Bill of Rights contained provisions authorizing Congress to enforce them did not deter these advocates.

While these arguments in favor of congressional power may seem extreme to contemporary ears, the United States Supreme Court adopted a similar approach a few years later, in the case of

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354. *See* William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973, 975 (2007) (arguing that the Reconstructionist drafters of the Thirteenth Amendment "envisioned congressional power to enforce the Amendment as both vigorous and broad").

355. *See* WIECEK, *supra* note 3, at 125 (describing the Jacksonian Democracy's endorsement of this position).

356. Stewart, *supra* note 215, at 282.

357. *Id.*

358. Barnett, *supra* note 9, at 184 (citing Helen J. Knowles, *The Constitution and Slavery: A Special Relationship*, 28 SLAVERY & ABOLITION 309, 315 (2007)); *see also* WIECEK, *supra* note 3, at 255 (stating that Stewart's position "shocked" the antislavery constitutionalist movement).

359. Barnett, *supra* note 9, at 197, 199–200.

360. Birney, *supra* note 215, at 310–11.

361. TENBROEK, *supra* note 9, at 317–18.

Prigg v. Pennsylvania.[362] Ironically, *Prigg* involved, not a federal law championing liberty, but instead the 1793 Fugitive Slave Act.[363] The case arose when Pennsylvania officials challenged the 1793 Act, which required state officials to cooperate in returning fugitive slaves.[364] The Court upheld the federal law and found that it preempted the Pennsylvania Personal Liberty Act.[365] The Court found that the 1793 Act was a proper use of Congress's power to enforce the Fugitive Slave Clause of Article IV even though Article IV did not contain a congressional enforcement provision.[366] Justice Story stated, "The clause manifestly contemplates the existence of a positive, unqualified right on the part of an owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."[367] Hence, *Prigg* is one of the most deferential rulings to congressional power in the history of the Court.[368]

Abolitionists understandably hated the *Prigg* ruling, and antislavery constitutionalists bitterly criticized it.[369] However, some relied on *Prigg* to argue that Congress's broad power also extended to ending slavery. For example, Joel Tiffany seized on Story's statement in *Prigg* that the existence of a right implied congressional authority to enforce it, and concluded that Congress had the power to enforce the Privileges and Immunities Clause against the institution of slavery.[370] Tiffany explained, "[T]aking the rules adopted by the Supreme Court of the United States, for construing that instrument to be correct, (and who can show that they are not correct?) the Federal Government [has] ample power to enforce those [guarantees] in every State in the Union."[371] Tiffany's theory influenced the Reconstruction

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362. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 614–16 (1842).

363. *Id.* at 559.

364. *Id.* at 556–57.

365. *Id.* at 625–26.

366. *Id.* at 614–17.

367. *Id.* at 612.

368. *See* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 658 (1993) (noting that the Court's "main concern in *Prigg* was to strengthen the federal power at the expense of the states"). It is also one of the most important rulings. *See* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 69 (1983) (arguing that *Prigg*'s "historical importance far outweighed the Dred Scott decision of 1857, because it invalidated all [the] efforts of the Northern states to protect the civil rights and the liberties of an important class of persons under their jurisdiction" (quoting DWIGHT LOWELL DUMOND, ANTISLAVERY ORIGINS OF THE CIVIL WAR IN THE UNITED STATES 64 (1969)) (internal quotation marks omitted)).

369. *See* An Argument for Defendant, *supra* note 222, at 102–03; TIFFANY, *supra* note 171, at 71–75 ("[E]ven if the Supreme Court [has] made such a decision, it by no means follows that such is the law. Decisions of Courts are not, necessarily law.").

370. TIFFANY, *supra* note 171 at 138–41.

371. *Id.* at 139.

Congress, as they amended the Constitution to give themselves the same broad power to end slavery and enact legislation enforcing the end of that institution.[372]

2. James Ashley. Throughout his career, Ashley was a supporter of strong congressional power. Ashley believed that courts had distorted the Constitution by upholding slavery.[373] Ashley also distrusted the Presidency because of the concentration of power in that branch.[374] Ashley insisted that the power to institute Reconstruction "is vested by the Constitution in Congress, and not in the President."[375] Ashley maintained that Congress should be the dominant branch of the federal government because it was elected democratically and was therefore most representative of the people.[376]

Ashley expressly rejected the precedential value of the rulings of the U.S. Supreme Court. He accused the Court of misinterpreting the Constitution in favor of slavery and against natural rights. He said:

> The confounding of the word 'person' as used in the Constitution, with the word 'slave,' which is not once used in the Constitution, has from the first given the slave barons much trouble. And but for the fact that national and State judges, claiming to own 'persons' as property, were carefully and craftily selected by the slave barons for all officials, and especially for all judicial positions—State and national—no such perverted and dishonest construction of our national Constitution would have been possible.[377]

372. *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 199 (2005) (describing how the Reconstruction Congress expanded its power and carried out its stated objective of enacting the Constitution's guarantees of freedom); *see also* ZIETLOW, *supra* note 23, at 45–46 (noting that Senator Trumbull used the same argument based on the Privileges and Immunities Clause of Article IV articulated by Tiffany).

373. *See, e.g.*, CONG. GLOBE, 38TH CONG., 2D SESS. 138 (1865) (statement of Rep. James Ashley) ("If the national Constitution had been rightfully interpreted, and the Government organized under it properly administered, slavery could not have legally existed in this country for a single hour, and practically but a few years after the adoption of the Constitution. Only because the fundamental principles of the Government have been persistently violated in its administration, and the Constitution grossly perverted by the courts, is it necessary to-day to pass the amendment now under consideration.").

374. HOROWITZ, *supra* note 12, at 20.

375. James M. Ashley, The Liberation and Restoration of the South (Mar. 30, 1864), *in* SOUVENIR, *supra* note 38, at 264, 283; *see also* Ashley, *supra* note 328, at 634 ("[U]nder the Constitution, Congress alone has the power to determine what shall be the future relations of all who have been in rebellion against the Government . . . .").

376. HOROWITZ, *supra* note 12, at 20.

377. Ashley, *supra* note 61, at 614.

He continued, "The God-defying judgments of our Supreme Court must be reversed, and the declaration of the grand men, who founded this Government, that 'the national Constitution did not recognize property in man,' must be made universal law."[378]

To counter the proslavery courts, Ashley asserted his own authority to interpret the Constitution. He said: "You know General Jackson said that he interpreted the Constitution for himself, as his oath required he should do . . . . I should follow in the footsteps of General Jackson, and interpret the Constitution as I understand it."[379] Therefore:

> If . . . any person should present himself before a court, in which I was acting as judge, and claim a human being as his property, I should require him . . . , as a condition [of] making his claim good, that he produce a bill of sale from the Almighty, and if he could not do this . . . I should cause him to be arrested as a kidnapper.[380]

Here, Ashley made it clear that he understood constitutional meaning to be diametrically opposed to the constitutional interpretations of the Court. As a member of Congress, he asserted his autonomy to do so.

Ashley's broad view of congressional power is reflected in the fact that he introduced a statute to enforce his version of the Thirteenth Amendment even though it lacked an enforcement clause.[381] Presumably, Ashley believed that an enforcement clause was not required. This would have been consistent with the Court's ruling in *Prigg v. Pennsylvania*.[382] When asked by a political opponent for precedents to support his first Reconstruction bill, Ashley simply replied, "[W]e make [our own] precedents here."[383]

H. Conclusion

Thus, James Ashley echoed the theories of the antislavery constitutionalists as he sought to amend the constitution to bring those theories to fruition. In speeches on the campaign trail and before Congress, Ashley articulated a broad view of the

378. *Id.* at 616.
379. *Id.* at 623.
380. *Id.*
381. *See* VORENBERG, *supra* note 8, at 50 (describing Ashley's proposed bill that lacked enforcement provisions).
382. *See supra* text accompanying notes 362–68.
383. SOUVENIR, *supra* note 38, at 361.

fundamental human rights that were denied to slaves, and diminished for all people due to the institution of slavery. By abolishing slavery, Ashley sought to restore those rights with a substantive model of freedom and equality. In their speeches and writings, James Ashley and his allies also rejected the argument that courts were the primary interpreters of the law. They asserted their own authority to determine the meaning of the Constitution. They viewed the political bodies, including Congress, as an important potential source for the protection of rights. This view was reflected in the Reconstruction debates, during which members of Congress repeatedly decried the *Dred Scott* decision and criticized the Court.[384] With the congressional enforcement clauses of the Reconstruction Amendments, Congress created an institutional role for popular constitutionalism in the creation and protection of individual rights.

IV. ANTISLAVERY CONSTITUTIONALISM, POPULAR CONSTITUTIONALISM, AND CONSTITUTIONAL DEVELOPMENT

This section uses the history of James Ashley and antislavery constitutionalism as a paradigm for understanding the role that popular constitutionalism plays in constitutional development. Popular constitutionalism entails a dialogue about constitutional meaning, a dialogue which is often contentious.[385] When that dialogue is effective, interpreters achieve a consensus that promotes constitutional legitimacy and stability.[386] The conflict over the constitutionality of slavery was violent, and led to a bloody Civil War.[387] The Union victory in the war enabled the proponents of freedom to constitutionalize their vision, a vision which they had developed over years of advocacy and dialogue. James Ashley and his antislavery constitutionalist allies understood that ending slavery alone would not be sufficient to end the racial discrimination and exploitation that characterized slavery, so they empowered Congress to legislate to remedy involuntary servitude and the badges and incidents of slavery.[388]

Popular constitutionalism is, broadly viewed, any form of constitutional interpretation that occurs outside of the courts.[389]

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384. *See* ZIETLOW, *supra* note 23, at 26–28, 33–39.

385. Siegel, *supra* note 6, at 1349.

386. *See id.* (explaining how constitutional dialogue and feedback mechanisms "anchor the legitimacy of government").

387. *See id.* at 1352–53 (discussing how the conflicting constitutional ideas about slavery "exploded in civil war").

388. *See* Zietlow, *supra* note 26, at 275–76.

389. *See* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV.

Some of the most successful political movements in our history have been shaped around enforcing constitutional values, from civil rights activists invoking the full rights of citizenship and equal protection to advocates of the right to bear arms invoking the Second Amendment.[390] Political movements like these can be highly effective at establishing a constitutional tradition and shaping the meaning of the Constitution.[391] Moreover, popular constitutionalism is not only important historically, but it also has a healthy impact on civic society. When people engage in popular constitutionalism, they invoke and strengthen the essential principles of our constitutional government.

Popular constitutionalism helps to explain how constitutional meaning best develops and changes over time. There are strong normative arguments in favor of popular constitutionalism. Faith in the Constitution is central to our nation's political identity.[392] Popular constitutionalism is healthy for civic society because the Constitution is the foundation of our government. "Although they may disagree sharply about what the Constitution demands, Americans today are convinced that a commitment to constitutionalism in general, and to the core values of the United States Constitution in particular, are central to what it means to be a full-fledged member of the American community."[393] Our civic values are based in the Constitution, and our views of the Constitution are often based on what we believe our civic society should be. In a very real sense, one's views of the Constitution reflects what each individual believes to be his or

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959, 961 n.3 (2004) (defining popular constitutionalism as the idea that courts do not possess the exclusive authority to interpret the Constitution).

390. *See* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 10 (2002) (arguing that constitutional change requires "widespread and intense popular mobilization"); *see also* Michael J. Klarman, Brown, *Radical Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141–49 (1994) (recounting Dr. Martin Luther King's social movement that prompted civil rights legislation); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 235–40 (2008) (describing the National Rifle Association's Second Amendment argument and its influence on the Court's *Heller* decision).

391. *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) (writing on the labor movement, the Thirteenth Amendment, and the right to organize); Pope, *supra* note 390, at 104–05 (discussing how unionist activities in factories and on the streets could play a role in shaping the interpretation of the Thirteenth Amendment and its applicability to labor law); Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 311 (2001) (describing how movements can change the "social and political landscape within which courts interpret[ ] the Constitution").

392. Pettys, *supra* note 6, at 347.

393. *Id.*

her most fundamental values, such as freedom, equality, and the need for security. Because people are bound to differ in their beliefs about what the Constitution means, when people engage in popular constitutionalism, they engage in a debate over fundamental values. This debate is both healthy for civic society, and helpful to determining the content of those values.[394]

Acknowledging the impact of popular constitutionalism on constitutional development challenges the conventional view that there must be a distinction between law and politics.[395] This is a source of discomfort for some scholars considering popular constitutionalism,[396] but it need not be so. Scholars who insist that constitutional interpretation should be devoid of politics often invoke the countermajoritarian difficulty when unaccountable courts impose their values through constitutional interpretation.[397] The view of courts as countermajoritarian has been widely discredited.[398] More importantly, the concern about lack of accountability is greatly diminished when constitutional interpretation occurs in the political process. In the political realm, law is combined with politics through the process of constitutional construction.[399] Popular constitutionalists often rely on constitutional arguments to further a political agenda. This was certainly true of the antislavery constitutionalists, who used constitutional argument to justify their political agenda of ending slavery and establishing broad individual rights. That open relationship between politics and law in popular constitutionalism does not make it any less legitimate as a form of constitutional interpretation. Court rulings are also often consistent with the political will, but courts are considerably less transparent about acknowledging the impact

394. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 609–10 (2009).

395. *See* Siegel, *supra* note 6, at 1327.

396. *Id.* at 1348 (citing common criticisms of popular constitutionalism); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 678–85 (recognizing the flaws in the arguments for popular constitutionalism).

397. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 23–27 (Yale Univ. Press, 2d ed. 1986) (1962) (summarizing arguments against judicial review based on concerns that voters in a democracy cannot hold unelected judges accountable).

398. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE 370 (2009) ("The accountability of the justices . . . to the popular will has been established time and time again.").

399. *See* WHITTINGTON, *supra* note 6, at 1.

of politics on their rulings.[400] Crucially, the advocacy of popular constitutionalists is not an authoritative interpretation of constitutional meaning until those advocates are successful, either before the Court, or in the political process. For that reason, popular constitutionalism should not be feared as a threat to the stability of constitutional law. Instead, popular constitutionalism enhances the stability of constitutional law by strengthening our constitutional culture.[401]

James Ashley and the antislavery constitutionalists articulated a robust theory of constitutional meaning. Due in large part to the military victory of the Union, the antislavery constitutionalists achieved the ultimate victory—they amended the Constitution to comport with their constitutional theory. There is good reason for Courts to defer to broad interpretations of the Reconstruction Amendments that are adopted by popular constitutionalists, both in political movements and in Congress. Members of the Reconstruction Congress such as James Ashley were engaged in popular constitutionalism and strongly believed in their ability to interpret the Constitution themselves. They did not see the Court as the authoritative interpreter of the Constitution, but instead viewed the Court as a corrupt political actor which had served the slave power in rulings such as the *Dred Scott* decision.[402] They made this view clear not just in congressional debates over Reconstruction measures, but by amending the Constitution to give themselves and members of future Congresses broad authority to define and enforce individual rights. The Reconstruction Congress thus enshrined popular constitutionalism into the Constitution with the enforcement clauses of the Reconstruction Amendments. The Reconstruction Amendment enforcement clauses belie the view that those provisions have a fixed meaning. Instead, the enforcement clauses invite changing interpretations by calling on Congress to determine the meaning of the Reconstruction Amendments through enforcement.

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400. *See* Siegel, *supra* note 390, at 192 (arguing that Justice Scalia's majority opinion in *United States v. Heller* was more consistent with "the convictions of the twentieth century gun-rights movement" than it was with originalist constitutional interpretation).

401. *See* Siegel, *supra* note 6, at 1329 ("Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.").

402. *See* ZIETLOW, *supra* note 23, at 29–36 (describing the Reconstruction Congress's criticism of the *Dred Scott* decision).

V. LESSONS FOR UNDERSTANDING THE THIRTEENTH AMENDMENT

The history outlined in this Article illuminates two important points about the meaning of the Thirteenth Amendment. First, the Amendment not only prohibits slavery and involuntary servitude, but it also establishes freedom and serves as a source of the fundamental rights to which a free person is entitled. Second, the Amendment empowers Congress to enforce those rights. It is the first constitutional amendment to contain such an enforcement clause.[403] The Section Two enforcement power is broad, and it invites popular constitutionalism to define the meaning of the rights that inhere in freedom.

The antislavery constitutionalists had a broad theory of fundamental rights, and James Ashley echoed those broad theories in his speeches on the stump and before Congress. At the very least, it is clear that a cramped reading of the meaning of the Thirteenth Amendment is inconsistent with the meaning of that Amendment. That meaning is not limited to ending the chattel slavery of African Americans, nor is it limited to ending the involuntary servitude of those held by physical force. Instead, the Thirteenth Amendment protects a broad spectrum of workers' and civil rights, and gives Congress broad authority to enforce those rights.[404] Antislavery constitutionalism thus contributed to the original meaning of the Thirteenth Amendment. Their ultimate success also illustrates the value of popular constitutionalism to constitutional development. Thus, while twenty-first century interpreters of the Thirteenth Amendment should be inspired by the antislavery constitutionalists, they are not limited to the Amendment's meaning in 1865 because by its very nature, the Amendment's enforcement clause mandates changes in meaning over time.[405]

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403. *See* U.S. CONST. amend. XIII ("Congress shall have the power to enforce this article by appropriate legislation."); *see also* VORENBERG, *supra* note 8, at 132 (describing the Thirteenth Amendment's enforcement clause as "revolutionary").

404. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (concluding that the enabling clause of the Thirteenth Amendment empowers Congress to pass "*all laws necessary*" to regulate private individuals (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)) (internal quotation marks omitted)). Jennifer Mason McAward has recently argued that the Court should impose limits on Congress's power to enforce the Thirteenth Amendment that are consistent with the limitations that it imposed on the power to enforce the Fourteenth Amendment. *See* McAward, *supra* note 28, at 142–45.

405. The argument that I am making here is consistent with Jack Balkin's "framework originalism" argument that the Constitution is a "framework for governance that sets politics in motion and must be filled out over time through constitutional

A. *Establishing Freedom*

The history of James Ashley and the antislavery constitutionalists reveal that the Thirteenth Amendment did not solely eliminate the institution of chattel slavery or labor conditions that closely mirror chattel slavery. Instead, the Amendment established freedom for the newly freed slaves and other American people, and serves as a source of fundamental rights to which a free person is entitled. James Ashley and the antislavery constitutionalists who inspired him believed that freedom entailed a concrete baseline of rights that would enable the freed slave to live a full and complete life, and that those rights would be equal to those enjoyed by free people throughout the country. They also believed in the economic rights of workers, including the right to work free of undue exploitation and without discrimination based on race when negotiating the conditions of work.[406] The Thirteenth Amendment embodied their vision by establishing freedom for the slaves and other workers in this country. This section considers several interpretations of the Thirteenth Amendment, some narrow, and some broader. The broader interpretations are more consistent with the broad view of freedom held by James Ashley and his antislavery constitutionalist allies.

1. Court Interpretations. In its early interpretations of the Thirteenth Amendment, the Court interpreted it narrowly, as merely ending the institution of slavery, disregarding its transformative effect. In the *Slaughter-House Cases*, the Court rejected the challenge brought by a group of butchers to a Louisiana law which created a monopoly that excluded the butchers from practicing their trade within the city of New Orleans.[407] The butchers had argued that the monopoly was a servitude that violated the Thirteenth Amendment because it prohibited them from practicing their trade in a certain geographic area.[408] The Court's rejection of this argument in and of itself is not problematic. There was no evidence that the butchers were forced to work involuntarily, nor did the monopoly impose a badge or incident of slavery on the white butchers.

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construction." Balkin, *supra* note 394, at 550, 555. This way of understanding constitutional interpretation is particularly appropriate when interpreting the Thirteenth Amendment, given both its roots in popular constitutionalism and its broad enforcement clause.

406. *See* VanderVelde, *supra* note 331, at 441, 489–95 (discussing the Republicans' opposition to the frequent post-slavery exploitation of workers).

407. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 43, 60 (1873).

408. *Id.* at 49–50.

What is striking, however, is Justice Miller's narrow portrayal of the meaning of the Thirteenth Amendment. Justice Miller observed, "The most cursory glance at [the Thirteenth and Fourteenth Amendments] discloses a unity of purpose," the abolition of slavery.[409] According to Justice Miller, the word "servitude" was intended to apply only to other slave-like conditions.[410] For additional guarantees of human rights, the butchers were required to petition the state.[411] And that, he said, was "all that we deem necessary to say on the application of that article."[412] Hence, in *Slaughter-House* the Court rejected the view that the Thirteenth Amendment protected the rights of workers outside the narrow confines of African chattel slavery or closely analogous labor conditions.[413]

In *Hodges v. United States*, the Court once again narrowly interpreted the rights of workers protected by the Thirteenth Amendment.[414] White workers at a lumber mill were indicted for conspiring to stop a group of persons of African descent from working at the mill, in violation of their Thirteenth Amendment right to work there for compensation.[415] The case was brought under recodified provisions of the 1871 Enforcement Act, which criminalizes conspiracies to deprive any individual of any right or privilege secured to him by the Constitution or laws.[416] The Court considered whether a conspiracy to deprive a person of his right to enter into a contract solely because of his race violated a right or privilege guaranteed by the Constitution. In an opinion by Justice Brewer, the Court rejected the claim. As it had in the *Slaughter-House Cases*, the Court construed the Thirteenth Amendment narrowly, holding that the Amendment did not protect workers from this type of racial discrimination because it merely ended the institution of slavery.[417] The Government

409. *Id.* at 67–69.

410. *Id.* at 69.

411. *See id.* at 67, 81–82 (concluding that because the butchers' claims were not "directed by way of discrimination against the negroes as a class," the action falls solely within the purview of state law).

412. *Id.* at 69.

413. *See id.* at 68–72 (concluding that "negro slavery alone was in [ ] mind" when Congress passed the Thirteenth Amendment).

414. *See* Hodges v. United States, 203 U.S. 1, 18 (1906) (stating that the "Thirteenth Amendment operates only to protect the African race"), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

415. *Id.* at 2–3.

416. *See id.* at 4–5 (citing multiple sections of the Revised Statutes of the United States of 1878).

417. *Id.* at 16–18 ("While the inciting cause of the Amendment was the emancipation

had argued that one of the indicia of slavery was the lack of power to make or perform contracts, so preventing the victims from performing their contract they reduced them to a condition of slavery.[418] The Court rejected this argument and cited the slippery slope, claiming that the Government's position would have the effect of transferring the protection of all individual rights from the state to Congress.[419]

It could not be clearer that the Amendment protects the rights that the workers asserted in *Hodges*. As Justice Harlan pointed out in his dissent, the Thirteenth Amendment did not just abolish slavery. "It also conferred upon every person within the jurisdiction of the United States . . . the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom."[420] Freedom to work for the employer of one's choice, and not be denied the right to do so on account of one's race, clearly falls squarely within the meaning of freedom as articulated by James Ashley and the antislavery constitutionalists.[421] Thus, once again, the Court wrongly interpreted the Amendment narrowly, as merely ending slavery and not protecting the rights of workers in a broader sense.

In the 1968 case of *Jones v. Mayer*, the Court overruled *Hodges*'s narrow interpretation of the Thirteenth Amendment, and acknowledged the transformative nature of the Thirteenth Amendment.[422] The Court upheld the constitutionality of 42 U.S.C. § 1982, a provision of the 1866 Civil Rights Act which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[423] The Court held that the statute could apply to private conduct because it was based on Congress's

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of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people.").

418. *Id.* at 17.

419. *Id.* at 18–19.

420. *Id.* at 27 (Harlan, J., dissenting).

421. *See* CONG. GLOBE, 38TH CONG., 2D SESS. 141 (1865) (statement of Rep. James Ashley) (arguing that the passage of the abolition amendment would provide advantages to the country and allow the migration of free labor); *see also* VanderVelde, *supra* note 331, at 443–46, 459–60 (discussing how the Republicans sought to create a "state of autonomy and empowerment" for all persons regardless of race).

422. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–44, 442–43 n.78 (1968) (concluding that the Framers of the Thirteenth Amendment envisioned that Congress would determine the scope of "the badges and the incidents of slavery").

423. *Id.* at 412–13, 422 (quoting 42 U.S.C. § 1982 (1964)) (internal quotation marks omitted).

power to enforce the Thirteenth Amendment.[424] The Court overruled *Hodges*, noting that the meaning of the Thirteenth Amendment went well beyond merely ending slavery.[425] Justice Stewart observed that "[t]he Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free."[426] Based on this reasoning, the Court in *Jones* created an opening for popular constitutionalism to define the meaning of the Thirteenth Amendment in a broad manner consistent with James Ashley and the antislavery constitutionalists.

2. Popular Constitutionalist Interpretation. In contrast to the sometimes narrow interpretations of the Court, popular movement have seized on a broader reading of the Thirteenth Amendment, invoking its promise of fundamental rights. During the first third of the twentieth century, some leaders of the burgeoning labor movement believed that they had a constitutional right to organize into unions and bargain collectively with their employers.[427] These activists believed that liberty included the right to strike, and that working without the right to strike was tantamount to involuntary servitude.[428] No court ever adopted labor's constitution of freedom, and few courts have held that the Thirteenth Amendment guarantees workers a right to strike.[429] However, members of Congress cited labor's vision of the Thirteenth Amendment approvingly during debates over the National Labor Relations Act.[430] Supporters of the Act frequently evoked the Reconstruction Era to argue in favor of the Act.[431] The view that the Thirteenth Amendment protects the

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424. *Id.* at 437–39.

425. *Id.* at 443 & n.78.

426. *Id.* at 441 n.78.

427. *See* Pope, *supra* note 391, at 942 (explaining the argument of union leaders that antistrike laws violated the spirit of the Thirteenth Amendment).

428. For example, in 1919, the American Federation of Labor issued a statement declaring that "[t]he right to strike . . . meant the difference between voluntary and involuntary servitude, between freedom and slavery." *Id.* at 958–59. These labor leaders argued that workers had a right to some control over their own lives, and that the right to organize was essential to enable them to exercise that control. *See id.* at 964.

429. *See id.* 963 (explaining that while only a few courts referenced the Thirteenth Amendment when adjudicating cases involving antistrike injunctions, most courts held that "individual liberty of contract would suffice").

430. 78 CONG. REC. 3678–79 (1934) (statement of Sen. Robert Wagner). The bill's sponsor, Robert Wagner, called the right to organize "a veritable charter of freedom of contract; without it there would be slavery by contract." *Id.* at 3679.

431. *See* 79 CONG. REC. 8537 (1935) (characterizing the labor situation as "virtual economic slavery," comparable to slavery on the cotton plantations prior to the Civil War);

right to organize and strike is consistent with Ashley's view that a broad scope of workers' rights is protected by that Amendment.[432] This is so even though Ashley and his colleagues did not take a position on industrial labor unions at the time that they enacted the Thirteenth Amendment. To expect them to take a position would be unrealistic, since the industrial revolution was just beginning in the United States, and the industrial labor movement did not take hold in the United States until after the Civil War.[433] However, Ashley and his Free-Soiler colleagues did believe that workers should have substantial autonomy and freedom from exploitation by their employers. The labor leaders who advocated for the right to organize self-consciously acted in the footsteps of their free labor predecessors.

Members of Congress also adopted a broad view of workers' rights when they enacted the Trafficking Victims Protection Act of 2000 (TVPA), which prohibits the trafficking of sex and other workers and provides remedies for those workers who are the victims of trafficking.[434] The TVPA amended the section 1584 of Title 18 to make it clear that the "involuntary servitude" prohibited by the Act encompasses an employment relationship in which workers are held by psychological, as well as physical, coercion.[435] Intended in part to overrule the Court's narrow

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Zietlow, *supra* note 26, at 297.

432. *See* CONG. GLOBE, 38TH CONG., 2D SESS. 141 (1865) (statement of Rep. James Ashley) (explaining that the abolition of slavery and the passage of the abolition amendment would guarantee that the "labor of the country shall hereafter be unfettered and free"); VanderVelde, *supra* note 331, at 475–77 (explaining that the advocates of free labor sought to provide workers with "independence and autonomy").

433. *See* FONER, *supra* note 5, at 31 (explaining that the Republicans' concept of free labor was based on their experience with "a predominantly agricultural population, with small towns and independent farmers" and independent craftsmen and yeomen).

434. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 102(a), 107(a)(1), (b)(1), 114 Stat. 1464, 1466, 1474–75 (codified as amended at 22 U.S.C. §§ 7101, 7105 (2006 & Supp. IV 2006)). Members of Congress relied on the Thirteenth Amendment enforcement power and the commerce power. *See* Zietlow, *supra* note 26, at 301, 306 (explaining that in passing the TVPA, Congress appealed to the broad meaning of "involuntary" labor practices prohibited by the Thirteenth Amendment (internal quotation marks omitted)).

435. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 103(5), 112, 114 Stat. 1464, 1469, 1486 (codified as amended at 18 U.S.C. § 1584 (2006)); *see also* 22 U.S.C. § 7101(b)(13) (2006) (explaining that the Trafficking Victims Protection Act of 2000 was intended to overturn the Supreme Court's interpretation of 18 U.S.C. § 1584 in *United States v. Kozminski*). For an excellent discussion of the TVPA and the problem of human trafficking, see Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 962–64 (2007) (surveying the purpose and scope of the TVPA). The Act also prohibits "'debt bondage,' wherein a person can be enslaved to the money lender for an entire lifetime because of a $50 debt." 146 CONG. REC. 22,044 (2000) (statement of Sen. Sam Brownback).

reading of the Anti-Peonage Act in *United States v. Kozminski*,[436] the TVPA represents a comprehensive approach to the combined effect of economic, racial and gender subordination that characterizes the international trafficking of workers.[437] It is an excellent example of Congress acting to address the problem of slavery and involuntary servitude in a contemporary context, and is therefore a valid interpretation of the Thirteenth Amendment.

These broad interpretations of the Thirteenth Amendment are consistent with the fact that the Amendment established freedom for people in the United States, and serves as a source of the fundamental human rights inherent in freedom. James Ashley and the antislavery constitutionalists established this meaning over time through the process of popular constitutionalism. It is entirely appropriate that the broadest interpretations of Section One of the Thirteenth Amendment have been achieved through the popular constitutionalism that fostered it.

B. The Broad Enforcement Power

Instead of limiting the enforcement power to the courts, as was arguably the case with the Bill of Rights, the Thirteenth Amendment is the first rights-protecting amendment that expressly authorizes the political branches to enforce its promise.[438] Forged in the fires of popular constitutionalism, the Thirteenth Amendment enshrines that process in the Constitution and invites popular constitutionalists to participate in defining its meaning. When considering the scope of the enforcement power, it is useful to remember that the Section Two enforcement clause is the first clause that empowered Congress

436. United States v. Kozminski, 487 U.S. 931, 934, 948–50 (1988) (concluding that Congress intended to limit U.S.C. § 1584 to reach only cases involving the threatened use of "physical or legal coercion"), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended at 18 U.S.C. § 1584 (2006)); s*ee also* 146 CONG. REC. 22,059 (2000) (statement of Sen. Paul Wellstone) (explaining that the TVPA now protects "nonviolent and psychological coercion"); *id.* at 21,337 (2000) (statement of Rep. Henry Hyde) (explaining that the TVPA will remedy the discrepancy between the Supreme Court's decision and the reality of human trafficking).

437. *See* 22 U.S.C. § 7101(b)(1)–(4) (2006) (finding that impoverished women and children are the primary victims of the global human trafficking trade); *Guidelines on International Protection: The Application of Article 1A(3) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, 19 INT'L J. REFUGEE L. 372, 384 (2007) ("[W]omen and girls may also be especially targeted as a result of market demands for a particular race . . . .").

438. TSESIS, *supra* note 11, at 45 (explaining that the passage of the Thirteenth Amendment "granted the national government a degree of power . . . it had never had before").

to protect individual rights. Many members of the Reconstruction Congress (apparently including James Ashley) believed that after *Prigg*, no such enforcement power was necessary.[439] At that time, there was no tradition of courts protecting individual rights, with the notable and widely reviled exception of protecting the rights of slaveholders. When drafting the enforcement clause, Congress borrowed the phrase "Congress shall have power" from Article I, Section 8, indicating that they wanted the Section Two power to be at least as broad as Congress's other powers.[440] Lest there be any doubt about this, note also that they chose the term "appropriate" to define the power, invoking the Court's deference to congressional power in the case of *McCulloch v. Maryland*.[441] All of this evidence supports the view that the Section Two power is both primary and broad, building on the practice established by James Ashley and the antislavery constitutionalists.

In the *Civil Rights Cases*, the Court for the first time considered the scope of congressional authority to enforce the Thirteenth Amendment.[442] At stake was the constitutionality of the Civil Rights Act of 1875,[443] which prohibited race discrimination in privately owned places of public accommodation.[444] The Court observed that the Thirteenth Amendment "[b]y its own unaided force and effect [ ] abolished slavery, and established universal freedom," and empowers Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[445] However, the Court narrowly construed the meaning of the term "badges and incidents of slavery," limiting it in a manner never envisioned by James Ashley or his antislavery constitutionalist allies. The Court rejected the link between private race

439. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1346 (2007) (explaining that some congressional representatives cited to the holding in *Prigg v. Pennsylvania* to argue that congressional enforcement power under the Thirteenth Amendment stems from the "doctrine of implied powers").

440. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–09 (2010) (comparing Congress's powers pursuant to Article I, Section 8 of the Constitution and the powers granted pursuant to the Reconstruction Amendments).

441. *Id.* at 1810–11; *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415–16, 421 (1819) (describing the Framers' intent to grant Congress broad power to carry out its enumerated powers).

442. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (concluding that the Thirteenth Amendment is "undoubtedly self-executing without any ancillary legislation"); TSESIS, *supra* note 11, at 70.

443. *The Civil Rights Cases*, 109 U.S. at 4.

444. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

445. *The Civil Rights Cases*, 109 U.S. at 20.

discrimination and slavery, which had long ago been established by James Ashley.[446] The opinion narrowly construed congressional power to identify and remedy violations of the Thirteenth Amendment, including the badges and incidents of slavery, by rejecting Congress's apparent conclusion that private race discrimination was a badge or incident of slavery.[447] After almost one hundred years of Jim Crow in the south and segregation in the north, the Court overturned this aspect of the *Civil Rights Cases* in *Jones v. Alfred H. Mayer Co.*[448]

In *Jones v. Alfred H. Mayer Co.*, the Court upheld the provision of the 1866 Civil Rights Act that prohibited discrimination in private real estate transactions.[449] Justice Stewart noted that Congress intended the scope of the 1866 Civil Rights to be both sweeping and broad.[450] Stewart observed that Congress intended the Act to achieve "a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment."[451] Stewart emphasized the breadth and scope of the Section Two power. "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[452] Stewart concluded:

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446. *See id.* at 20–24 (concluding that the Civil Rights Act of 1875 had "nothing to do with slavery or involuntary servitude"). *But see* tenBroek, *supra* note 7, at 178–80 (identifying the view of James Ashley and other abolitionists that the Thirteenth Amendment reached beyond the narrow confines of slavery to guarantee natural rights and equality under the law).

447. *The Civil Rights Cases*, 109 U.S at 23–25.

448. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–40 (1968) (stating that the Thirteenth Amendment grants Congress the authority to "eliminate all racial barriers to the acquisition of real and personal property"); *see also* TSESIS, *supra* note 11, at 74–76, 82 (explaining that the Supreme Court's decision in *Plessy v. Ferguson* led to Jim Crow segregation and that it was the Court's decision in *Jones v. Alfred H. Mayer* that finally brought "dignity and the right to self-governance"); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1340 (1996) (discussing the accepted practice of segregation in the North after the abolition of slavery).

449. *Jones*, 392 U.S. at 413, 422.

450. *See id.* at 423–24.

451. *Id.* at 433.

452. *Id.* at 440. Notably, the Court decided *Jones* in the midst of a congressional debate over the Fair Housing Act of 1968, which also prohibited race discrimination in real estate transactions but included a broader array of remedies than the 1866 statute. 42 U.S.C. §§ 3601–3631 (2006) (providing punitive damages and injunctive relief); *see also Jones*, 392 U.S. at 415–17 (noting that the debates within the Senate Subcommittee on Housing and Urban Affairs over a "detailed housing law" coincided with the appeal of the case); United States v. Stewart, 65 F.3d 918, 927 (11th Cir. 1995) (holding that

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[453]

This reasoning was consistent with the philosophy of James Ashley and the antislavery constitutionalists.

In the 1997 case of *City of Boerne v. Flores*, the Court imposed restrictions on congressional power to enforce the Fourteenth Amendment.[454] So far, however, the Court has continued to defer to the Section Two power.[455] Recently, Jennifer Mason McAward has suggested that the Court should overrule *Jones v. Mayer*, calling *Jones* "a remnant of the past" because it is arguably inconsistent with *Boerne*.[456] If the Court were to overrule *Jones*, however, that would signal an unfortunate return to an earlier era in which the Court wrongly narrowly interpreted the enforcement power. McAward claims that the Court should impose restrictive standards to reign in Congress from overstepping its power.[457] Given the salience of popular constitutionalism during the Reconstruction Era, however, interpreting Section Two to impose limits on Congress is anachronistic. James Ashley and the antislavery constitutionalists championed congressional power to end slavery and protect individual rights. Section Two of the Thirteenth Amendment enshrines that practice into constitutional law. Born from popular constitutionalism, this Amendment mandates a role for popular constitutionalism in

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defendants who were being prosecuted for hate crimes could be held liable under section 3631 of the Fair Housing Act); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 119–20 (5th Cir. 1973) (concluding that the antiblockbusting provision of the Fair Housing Act of 1968 "effectuate[s] the purpose of the Thirteenth Amendment"); Zietlow, *supra* note 26, at 302–03 (discussing the antiblockbusting provision of the Fair Housing Act of 1968). Justice Stewart noted these debates in his ruling establishing broad congressional power, embracing the popular constitutionalism that led to establishing that power. *Jones*, 392 U.S. at 415–17.

453. *Jones*, 392 U.S. at 443.

454. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

455. Most recently, the Court deferred to the will of Congress in holding that remedies for violations of 42 U.S.C. § 1981, which prohibits race discrimination in contracts, also provides a cause of action for retaliation claims. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 451, 457 (2008); *see also* 42 U.S.C. § 1981 (2006); McAward, *supra* note 28, at 97 (explaining that the Court's interpretation of the Thirteenth Amendment in *Jones* provides a "highly deferential" standard to Congress).

456. *See* McAward, *supra* note 28, at 80–81, 142.

457. *Id.* at 142.

enforcing the rights that it established. The *Jones* opinion enables this to take place.

VI. Conclusion

Reasonable minds may differ about to the extent that we feel bound by the past. Nonetheless, we agree that the past is important, and useful to determining contemporary meaning. The history of James Ashley and the antislavery constitutionalists well illustrates the role that popular constitutionalism plays in constitutional development. James Ashley was a pragmatic politician who also valued political theory because he believed that theory explained the meaning of the concrete constitutional provisions that governed in his day. While the institution of slavery starkly violated the fundamental rights championed by James Ashley and his allies, they knew that ending slavery alone was not going to be sufficient to guarantee those rights. They knew that subsequent political leaders would need the tools to apply the Thirteenth Amendment to guarantee those rights in contexts that would change over time. That flexibility is essential to the strength of the Thirteenth Amendment, and its promise of freedom in the future.