James Ashley and the Thirteenth Amendment

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I. Introduction

In the fall of 2010, the United States Constitution became a political issue. Tea party activists invoked the constitution as the foundation of their conservative philosophy of limited government.[2] They advocated a return to the constitutional interpretation of the past, in which the Court imposed limits on congressional power to regulate commerce and tax and spend for the general welfare.[3] The Constitution was thus front and center in the political debate. The Tea Party movement used popular constitutionalism to invoke originalism as constitutional method.[4] This is ironic, given that popular constitutionalism is generally considered to be antithetical to originalism as a method of constitutional interpretation.[5] The phenomenon of the Tea Party movement thus highlights the relationship between popular constitutionalism and originalism, which has been heretofore largely overlooked by constitutional scholars.[6] While the impact of the Tea Party activists and the candidates that they elected is yet to be determined, they represent just the latest chapter of a long history of politicians advocating constitutional change. This article considers a movement of popular constitutionalists who did have a profound impact on our constitutional development – the anti-slavery constitutionalists of the antebellum era. It explores the extent to which the context of the popular constitutionalism of the Framers of the Reconstruction Amendments shaped the meaning of the Thirteenth Amendments in contemporary context. The article focuses on James Ashley, an antislavery constitutionalist member of the Reconstruction Congress who played a pivotal role in enacting the Thirteenth Amendment. While the anti-slavery constitutionalist tenets of James Ashley and his Reconstruction colleagues are not binding on contemporary interpreters, they serve as an inspiration for future interpreters of those

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[2] See Jeffrey Rosen, *Radical Constitutionalism*, THE NEW YORK TIMES MAGAZINE (November 28, 2010) at 34.

[3] Id.

[4] Id. (quoting Utah Senator Mike Lee, who promised during the campaign that "As your U.S. senator, I will not vote for a single bill that I can't justify based on the text and the original understanding of the Constitution, no matter what the court says you can do."

[5] See Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the people Be Trusted?*, 86 WASH. U.L.REV. 313 (2008) (juxtaposing originalism and popular constitutionalism).

[6] But see Pettys, supra note ___; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM. L. REV. 545, 545 (2006).

Amendments, and provide guidelines for understanding the meaning of those amendments in contemporary context.[7]

The vision of fundamental rights protected by the Reconstruction Amendments was forged in the fire of popular constitutionalism. Prior to the Civil War, abolitionists were fiercely divided over the constitutionality of slavery.[8] While William Lloyd Garrison famously referred to the constitution as a "covenant with death,[9]" other advocates interpreted the constitution as an antislavery document. They insisted that slavery was unconstitutional because it violated fundamental human rights and constitutional provisions affecting those rights. This article focuses on those antislavery constitutionalists.[10] Though their argument failed in the courts, they influenced the Framers of the Reconstruction Amendments, and contributed meaning to those amendments. This article explores the impact of antislavery constitutionalists on those who definitively ended slavery by amending the Constitution. One of those men, James Ashley, was both a popular constitutionalist and active participant in amending the Constitution. Throughout his career, Ashley championed what started as a marginal constitutional philosophy, and he eventually transformed that philosophy into constitutional law.

Despite the influence of the antislavery constitutionalists on the Reconstruction Era, surprisingly little has been written about them. The scholars that have considered the impact of antislavery constitutionalism on the Reconstruction Congress have focused only on their influence on the

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[7] See Jacobus ten Broek, *Thirteenth Amendment to the Constitution of the United States: Consumation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. 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 the movement.")

[8] See WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, 248-252 (1977).

[9] See William Lloyd Garrison, *The Constitution: A Covenant with Death and an Agreement with Hell*, 12 LIBERATOR 71 (1842), reprinted in OLIVER JOSEPH THATCHER, THE LIBRARY OF ORIGINAL SOURCES (1907) at 97.

[10] The classic and authoritative works on antislavery constitutionalism include JACOBUS TEN BROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) (reprinted with expanded appendix as EQUAL UNDER LAW (1965)) and WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977). See also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 42-56 (1986) (discussing the impact of antislavery constitutionalism on the legal theories of the Republican Party); Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, http://ssrn.com/abstract=1538862 (2010); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970) (republished 1995); LEWIS PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT 188-208 (1973). Robert Cover wrote disparagingly about antislavery constitutionalists in JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154-158 (1975) See Barnett, *Section One* at 6.

Fourteenth Amendment.[11] 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 itself accomplished their primary goal of abolishing slavery and establishing fundamental human rights for freed slaves. The antislavery constitutionalists' broad vision of the human rights that adhered to freedom also influenced James Ashley, the driving force behind the Thirteenth Amendment. Despite the pivotal role that James Ashley played in our constitutional history, little has been written about him,[12] and he has until now been virtually ignored by constitutional scholars. [13] 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. Thus, the history of James Ashley and anti-slavery constitutionalism is not only helpful to understanding the meaning of the Thirteenth Amendment, it also provides an ideal heuristic for understanding the inter-relationship between originalism and popular constitutionalism.

The substantive interpretation of the Constitution held by the Tea Party activists is less clear than that of the anti-slavery constitutionalists, in part because of the diffuse nature of the movement. The main principles of the constitutional vision of the Tea Party seem to be limiting the power of the federal government and holding the 2010 health care reform act to be unconstitutional.[14] Tea Party activists also called for an originalist interpretation of the Constitution that would narrow the power of the federal government, and some have even called for a constitutional amendment that would require judges interpreting the constitution to apply originalist methods. Some Tea Party activists called for

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[11] See Curtis, No State Shall, supra note ___ at 42-56; Barnett, Section One, supra note ___. See also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (describing John Bingham's theory of Section One).

[12] But see ROBERT F. HOROWITZ, THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY (1979); Michael Les Benedict, James M. Ashley, Toledo Politics, and the Thirteenth Amendment, 38 U. Tol. L. Rev. 815 (2007). Ashley is also often mentioned in Michael Vorenberg's classic account of the history of the Thirteenth Amendment, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

[13] See Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. OF CONST. L. 1269 (2009). Jacobus tenBroek mentions Ashley in his article on the Thirteenth Amendment. See Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 173, 178 (1951). 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 his obsession with the tragic assassination of Lincoln. See Horowitz, supra note ___ at 141-142. 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. Id. at 50.

[14] Chris Schmidt??

changes to the existing constitution. They advocate a new constitutional amendment that would authorize two thirds of states to vote to repeal congressional acts.[15] Tea Party activists have also proposed repealing existing constitutional amendments, including the Sixteenth Amendment, which authorizes the federal income tax,[16] the Seventeenth Amendment, which provides for the direct election of United States Senators,[17] and to repeal or amend the citizenship clause of the Fourteenth Amendment, which guarantees birthright citizenship for people born in the United States.[18]

Like the Tea Party activists, the anti-slavery constitutionalists began as a movement on the margins of political debate. They argued that the institution of slavery violated both natural law and express limitations in the Constitution, and they claimed that Congress had the power to end slavery. At first, their theories had little political salience. Moreover, the Court rejected the claims of the anti-slavery constitutionalists in Dred Scott v. Sanford. Nonetheless, anti-slavery constitutionalists gained prominence as the political conflict over slavery escalated in the years leading up to the Civil War.[19] The platforms of the Republican Party in 1856 and 1860 contained elements of the anti-slavery constitutionalist ideology.[20] Along with Ashley, other prominent members of the Reconstruction Congress influenced by anti-slavery constitutionalism include Representative John Bingham, the chief author of Section One of the Fourteenth Amendment,[21] and Senator Lyman Trumbull, the sponsor and chief advocate of the 1866 Civil Rights Act.[22] 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 strong anti-slavery beliefs that had propelled them into office. They also mandated a role for popular constitutionalism in the interpretation of the Amendments by including broad congressional enforcement clauses in those amendments.

Part I of this paper considers the relationship between originalism and popular constitutionalism. While both methods of constitutional interpretation consider context to determine constitutional meaning, they differ in determining what context is relevant, and the degree to which

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[15] http://dailycaller.com/2010/10/02/tea-party-affiliated-group-seeks-constitutional-change/; http://hamptonroads.com/2010/10/tea-party-speech-mcdonnell-backs-repeal-amendment.

[16] http://theusconstitution.org/blog.history/?p=1857.

[17] http://lawprofessors.typepad.com/conlaw/2010/06/the-tea-party-and-the-seventeenth-amendment.html.

[18] http://charlestonteaparty.org/?p=6650.

[19] See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 43 (1986).

[20] See CURTIS, SUPRA NOTE 1 at 46-47.

[21] See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

[22] See CURTIS, SUPRA NOTE 1 at 49.

meaning varies depending on context. Part II of the paper explores the content in which the Thirteenth Amendment was forged, the debates over the constitutionality of slavery and the theories of individual rights articulated by opponents of slavery. The writings of anti-slavery constitutionalists illuminate the theory of the fundamental rights which were violated by slavery, and would be restored by ending slavery. Part III explores the speeches that James 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 anti-slavery constitutionalists and their broad theories of fundamental rights. Part IV considers the extent to which the context of anti-slavery constitutionalism, as practiced by James Ashley and his Reconstruction colleagues, impacts the meaning of the Thirteenth Amendment. Finally, Part V explores what the story of anti-slavery constitutionalism and James Ashley reveals about the relationship between originalism and popular constitutionalism in constitutional development.

II. Antislavery Constitutionalism and the Meaning of Freedom

This section considers popular constitutionalism within a particular historical context, the abolitionist movement of the 1830s through 1850s.[23] Those who opposed slavery made a variety of arguments against it, including those based on moral and religious objections to the institution.[24] This article focuses on another strand of argument against slavery, the argument that slavery was unconstitutional. It may seem surprising that anyone could have argued that slavery was unconstitutional prior to the adoption of the 13th 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.[25] Indeed, abolitionists were bitterly divided over the issue of the constitutionality of slavery.[26] Nonetheless, antislavery constitutionalism became a significant movement and had a major impact on the antislavery debate.[27]

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[23] Notwithstanding their influence on the Reconstruction Congress, very little has been written about the antislavery constitutionalists. For a comprehensive history of antislavery constitutionalism, see Wiecek, supra note ___. See also Alexander Tsesis, Antislavery Constitutionalism, Encyclopedia of the Supreme Court. For a discussion of the influence of antislavery constitutionalism on the Fourteenth Amendment, see Barnett, Section One, supra note ___; Richard Aynes, *Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (describing John Bingham's theory of Section One); and Curtis, supra note ___ at 42-56.

[24] See, e.g., William Lloyd Garrison, The Constitution: A Covenant with Death and an Agreement with Hell, 12 LIBERATOR 71 (1842).

[25] When Madison's notes from the Constitutional Convention were released in ____, they appeared to confirm the view that the Founders sought to preserve slavery in the Constitution. See _____.

[26] See Wiecek, supra note ___ at 203.

[27] See Curtis, supra note ___ at 43 (arguing that Joel Tiffany's views were similar to those adopted by the 39th Congress); Wiecek, supra note ___ at 274 (pointing out that antislavery constitutionalists "were the first to

Since the framing of the constitution, abolitionists had struggled with the question of whether the constitution was a pro-slavery or anti-slavery document. The 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.[28] As Garrison argued in an influential and widely publicized speech, they believed that the Constitution was so tainted by slavery that it represented a "covenant with death" and an "agreement with hell."[29] However, some abolitionists claimed that, to the contrary, the Constitution condemned slavery. These antislavery constitutionalists claimed that the Constitution was actually an antislavery document with structural provisions and protections for individual rights intended to bring about the downfall of slavery.[30] While the Garrisonians eschewed politics,[31] members of the other two groups became actively engaged in antebellum politics and influenced the political debate.[32] These men 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.

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 Party, joined the Free Soil and then the Republican Party.[33] Chase served twice as United States Senator, and twice as governor of the state of Ohio, and repeatedly contemplated running for president.[34] President Abraham Lincoln appointed Chase first as Secretary of the Treasury and Chief

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introduce concepts of substantive due process, equal protection, paramount national citizenship and the privileges and immunities of citizenship.")

[28] See FONER, FREE SOIL, supra note ___ at 74.

[29] William Lloyd Garrison, *The Constitution A Covenant with Death and an Agreement With Hell*, XII LIBERATOR 71 (1842), reprinted in OLIVER JOSEPH THATCHER, THE LIBRARY OF ORIGINAL SOURCES (1907) at 97. See VORENBERG, SUPRA NOTE ___ at 8.

[30] See WIECEK, supra note ___ at 112.

[31] Garrison claimed that any political activity, including voting, amounted to an act of allegiance to the pro-slavery, morally corrupted government. See William Lloyd Garrison, In Support of the American Antislavery Society,

[32] See Wiecek, supra note ___ at 265 (pointing out that by 1864, Goodell's annotated constitution listed at least half of the constitutional provisions as "actually or potentially antislavery."

[33] *Samuel P. Chase*, 2 AMERICAN BIOGRAPHY pt. 2 at 27.

[34] Id.

Justice of the United States Supreme Court.[35] Thus, Chase was clearly of the most influential antislavery constitutionalists.[36] Chase's close friend, James Gillespie Birney, was a journalist who articulated his antislavery views in his newspaper, *The Philanthropist*.[37] Because a former slave owner who had served on the state legislators in Kentucky and Alabama, Birney's views carried special weight.[38] 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.[39]

The chief architect of the argument that slavery violated the due process clause was Alvan Stewart.[40] Stewart was a prominent New York lawyer and leader of the New York state antislavery society.[41] In 1845, Stewart unsuccessfully argued against the unconstitutionality of slavery in the New Jersey Supreme Court.[42] Horace Binney, an expert on land title and leader of the Philadelphia Bar who served one year as a member of the United States House of Representatives.[43] Theodore Dwight Weld began his antislavery activism as a ministry student in Cincinnatti, Ohio.[44] In 1834, after transferring to Oberlin College in Ohio, Weld left his studies and became an agent for the American Anti-Slavery Society.[45] In his capacity as AASS agent, Weld is credited with recruiting James Birney, Harriet Beecher Syowe and Henry Ward Beecher to abolitionism.[46]

Two other influential antislavery constitutionalists were prominent journalists, Lysander Spooner and Joel Tiffany. A lifelong resident of Boston, Massachusetts, Spooner published a treatise

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[35] Id.

[36] See Foner, Free Soil at 73; Barnett, Section One at 45 (pointing out Chase's prominence in this era, and concluding that his "arguments were far from marginal.")

[37] Id.

[38] See Britannica Biographies, 10/1/2010, p. 1.

[39] Foner, supra note ___ at 78.

[40] See Wiecek, supra note ___ at 265; Curtis, supra note ___ at 42.

[41] See Curtis, supra note ___ at 42.

[42] Wiecek, supra note ___ at 90.

[43] See Britannica Biographies, 10/1/2010, p. 1.

[44] Britannica Biographies, 10/1/2010, p. 1.

[45] Id.

[46] Id.

entitled *The Unconstitutionality of Slavery* in 1845.[47] The treatise earned Spooner the wrath of Garrison's ally, Wendell Phillips, and they engaged in a highly public debate over the issue.[48] 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.[49] In 1849, Tiffany published his own *Treatise on the Unconstitutionality of Slavery*, in which he made the radical argument that slaves were "citizens" by virtue of having been born in the United States.[50]

Gerrit Smith was a reformer and philanthropist who provided financial support for John Brown.[51] 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.[52] Smith was elected to the United States House of Representatives in 1853, but he only served one year of his term.[53] William Goodell was a member of the New York Anti-Slavery Society who began as a supporter of colonizing freed slaves but became increasing radical over time.[54] Goodell also participated in the Radical Political Abolitionist Party, and spoke to the Liberty Party convention in 1845.[55] The editor of *The Radical Abolitionist*, Goodell also wrote a synopsis of the radical argument against slavery in 1844.[56] When the Republican Party was formed, Smith and Goodell refused to support it, because they insisted that they could not support a party that recognized the constitutionality of slavery anywhere in the Union.[57]

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[47] See Wiecek, supra note ___ at 256-257.

[48] See Barnett, Section One at ___.

[49] See Curtis, supra note ___ at 42.

[50] See Wiecek, supra note ___ at 269.

[51] Britannica Biographies, 10/1/2010, p. 1.

[52] Id. See Foner, supra note ___ at 134.

[53] Britannica Biographies, 10/1/2010, p. 1.

[54] See Wiecek, supra note ___ at 161.

[55] Wiecek, supra note ___ at 250-51.

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[57] See Foner, supra ntoe ___ at 302.

These antislavery constitutionalists made their arguments in a variety of contexts. The majority wrote pamphlets, which were widely distributed, and newspaper commentaries.[58] Some made speeches, and a few served in the antebellum Congress.[59] Others made arguments in courts, primarily while defending people who were accused of aiding fugitive slaves.[60] While the United States Supreme Court soundly rejected their theories in Dred Scott v. Sanford,[61] 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.[62] However, as time went by, their influence grew, and their theories were adopted by leading members of the Reconstruction Congress.

Anti-slavery 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.[63] 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. Others made a more textually based argument that slavery violated the Due Process Clause of the Fifth Amendment, and the Article IV Privileges and Immunities and Guarantee Clauses. Some antislavery constitutionalists also claimed that the constitution authorized Congress to prevent the

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[58] See, e.g., THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838); James G. Birney, *Can Congress, Under the Constitution, Abolish Slavery in the States?*, THE ALBANY PATRIOT, May 12, 19, 20 & 22, 1847), reprinted in TENBROEK, supra, at 296; Alvan Stewart, *A Constitutional Argument on the Subject of Slavery*, in 2 THE FRIEND OF MAN (Utica, 1937), reprinted in TENBROEK, supra note ___ at 282-295; LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY; WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY: A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES; WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES (1852); WILLIAM GOODELL, VIEW OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (2nd rev. ed. 1845); JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (1849).

[59] See, e.g., SALMON P. CHASE & CHARLES D. CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1855 AND 1855 (reprinted 1969); Horace Mann, *Speeches to the House of Representatives of the United States, in Committee of the Whole on the States of the Union, February 28, 1851, on the Fugitive Slave Law* in SLAVERY: LETTERS AND SPEECHES 457 (1853)

[60] See, e.g., WIECEK at 192 (describing a lawsuit challenging the constitutionality of slavery brought by Salmon Chase and Horace Binney).

[61] See Tsesis, Antislavery Constitutionalism, supra note ___ at ____.

[62] See WIECEK, SUPRA NOTE 6 at 171.

[63] WIECEK at 112. See Lysander Spooner, Treatise on the Unconstitutionality of Slavery.

extension of slavery.[64] 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.[65] The third group, Free Soilers, focused on the economic impact of slavery and the harm that it caused to all workers by degrading the institution of free labor.[66] While the Free Soilers did not usually frame their arguments in constitutional terms, they did believe that people possessed fundamental economic rights that could not be deprived by the government. Thus, they contributed significantly to the debate over the meaning of freedom that consumed the Reconstruction Congress. [67]

In *Dred Scott*, the United States Supreme Court adopted the broad vision of citizenship rights advocated by abolitionists but held that those rights did not extend to freed slaves, or any other persons of African descent. Abolitionsts were infuriated by the *Dred Scott* decision, and accused the Court of representing the interests of the Slave Power.[68] Even before *Dred Scott*, however, antislavery constitutionalists saw Congress, and not the courts, as the institutional body most likely to end slavery. Some argued that Congress not only possessed the authority to abolish slavery, but also the duty to do so. Their emphasis on congressional power also influenced the Reconstruction Congress, who amended the Constitution to empower Congress to protect the rights of free people.

Leading members of Congress incorporated the theories of the anti-slavery constitutionalists into the Constitution with the Thirteenth and Fourteenth Amendments.[69] As Eric Foner explains, "Out of experiences in state legislatures, in constitutional conventions, and in the Oregon debate, a distinctive Republican position on the rights of free Negroes finally became clear. . . . Fundamentally it asserted that free Negroes were human beings and citizens of the United States, entitled to the natural rights of humanity and to such civil rights as would protect the natural rights of life, liberty and property."[70] Understanding the movement of antislavery constitutionalists helps to illuminate the meaning of the freedom that the Reconstruction Congress constitutionalized with the Thirteenth Amendment. Exploring this manifestation of popular constitutionalism thus serves to illuminate the original meaning of the Thirteenth Amendment.

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[64] 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 Proceedings of the Convention of Radical Political Abolitionists 43, cited in Tsesis, supra note ___ at ___.

[65] Article IV, §§3[1] (admission of states) & 3[2] (territories); Article IV, §4 (Guaranty Clause); Art. I, §9[1] (importation of slaves); WIECEK at 113-116.

[66] FONER, FREE SOIL, supra note ___ at 11.

[67] FONER, FREE SOIL, supra note ___ at 73.

[68] See Zietlow, Enforcing Equality at ___.

[69] ZIETLOW, ENFORCING EQUALITY, supra note ___ at 49-58.

[70] Id. at 290.

A. 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 states in which slavery was a thriving institution.[71] If the Constitution was interpreted according to the intent of the Framers, it was almost certainly a pro-slavery document, as Garrison and his allies maintained. 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.[72] However, most antislavery constitutionalists did not engage in arguments over the intent of the Framers. Instead, they claimed that the Framer's intent was irrelevant – what mattered were the words that the Framers had used in the actual document.[73]

Some antislavery constitutionalists acknowledged that the Framers of the Constitution had made compromises to accommodate the institution of slavery, but argued that the Framers had intended slavery to die out of its own accord. They argued that the Framers "attempted to subordinate their proslavery concession to the more exalted libertarian principles of the Revolution and the Constitution."[74]

Portraying the Framers of the Constitution as antislavery was a somewhat awkward endeavor, given that many of the Framers (including James Madison) owned slaves.[75] 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. 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 of the constitution itself" is binding regardless of the intent of the Framers.[76] Spooner explained, "It is not the intentions men actually had, but the intentions they constitutionally expressed; they make up the constitution."[77] 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, pro-slavery nature of the Constitution. [78] Phillips based his arguments primarily on Madison's notes

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[71] See PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996).

[72] See infra, notes ___ and accompanying text.

[73] See Barnett, Section One at 4 (arguing that the antislavery constitutionalists were original public meaning originalists).

[74] Wiecek, supra note ___ at 210.

[75] See PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996) (arguing that the original Constitution is a fundamentally pro-slavery document).

[76] See Barnett, Section One at 28-29 (citing Spooner, supra note ___ at 218).

[77] Spooner, supra note ___ at 117-18 n*.

[78] See WENDELL PHILLIPS, A REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY (1847).

from the constitutional convention, which described the compromises between representatives from slave and free states.[79] 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, "no intention, in violation of natural justice and natural right . . . can be ascribed to the constitution, in violation of natural justice and natural right."[80] 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 followed Spooner's lead in their method of interpretation. In his influential *Treatise on the Unconstitutionality of Slavery*, Joel Tiffany "expanded upon the original public meaning methodology advanced by Lysander Spooner."[81] 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."[82] 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."[83] Similarly, Gerrit Smith maintained that the meaning of the Constitution "is to be gathered 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."[84] Smith appealed to the democratic legitimacy of the Constitution, pointing out that only the document itself had been approved by the people.[85]

Thus, even as the antislavery constitutionalists engaged in popular constitutionalism, they advocated an originalist method of constitutional interpretation. Their method was arguably central to their position, since it allowed them to disregard the considerable evidence that the Constitution was

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[79] See WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS (1844).

[80] Spooner, supra note ___ at 58-59.

[81] JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (1849). William Wiecek called this document "the foundation of radical constitutionalism." See Wiecek, supra note ___ at 259. See also Curtis, supra note ___ at 43 (pointing out Tiffany's influence on the 39th Congress).

[82] Tiffany, supra note ___ at 48.

[83] Id.

[84] Gerrit Smith, speech in opposition to the Kansas Nebraska Act, Cong. Globe, 33d Cong. 1st Sess. Appendix 520 (April 6, 1854).

[85] See also Byron Paine, supra note ___ at 8 (citing Spooner for the proposition that "the intention of an instrument is to be gathered from its words.")

intended to perpetuate the institution of slavery. [86] Moreover, there are several constitutional provisions that furthered the institution of slavery, including the Fugitive Slave Clause,[87] the "three-fifths" clause,[88] and the limitations on congressional power to bar the importation of slaves.[89] Spooner and his allies 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.

Finally, anti-slavery constitutionalists eschewed courts as 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.[90] 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.[91]

B. 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, they relied primarily on the Declaration of Independence, with its grand proclamation of natural rights,[92] and 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

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[86] For a compelling argument that the Constitution was a pro-slavery document, See Finkelman, Imperfect Union, supra note ___, passim.

[87] 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 is due.")

[88] 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 a term of Service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.")

[89] 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.")

[90] See Zietlow, Enforcing Equality at ___.

[91] See Zietlow, Enforcing Equality at ___.

[92] See Declaration of Independence ("We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and Property.")

the blessings of Liberty to ourselves and to our posterity."[93] The belief in self-evident, universal rights was central to the philosophy of the antislavery constitutionalists.[94]

Antislavery constitutionalists argued that natural law had a legally binding force, and that superceded man made law.[95] For example, in 1847 journalist and lawyer James Gillespie Birney wrote a four 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."[96] While a member of the House of Representatives, prominent abolitionist Gerrit Smith invoked the same theory in a speech opposing the Kansas-Nebraska Act.[97] Smith pointed out that the Declaration of Independence states that governments are instituted "to secure these rights," and explained, "These 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 protect."[98] Smith concluded, "I understand the Declaration of Independence to say that men are born with an equal right to use what is respectively theirs."[99] 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.[100]

Some antislavery constitutionalists who invoked natural rights relied on the Preamble to the Constitution. They 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

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[93] U.S. CONST., PREAMBLE.

[94] See Tsesis, Antislavery Constitutionalism at ___; See also Daniel A. Farber & John E. Muensch, The Ideological Origins of the Fourteenth Amendment, 1 CONST. COMMEN. 235 (1984). (stressing the importance of natural rights in that ideology).

[95] See Wiecek, supra note ___ at 259.

[96] Birney, supra note ___ at 318.

[97] CONG. GLOBE, 33d Cong., 1st Sess, Appendix 520 (April 6, 1854) (Speech by Rep. Gerrit Smith). See Barnett, Section One at 60 (Gerrit Smith's "account of the elements that came to comprise Section One of the Fourteenth Amendment can be considered conventional wisdom among the abolitionists.") For a biography of Smith, see Gerrit Smith, in 9 AMERICAN BIOGRAPHY pt. 1 at 270.

[98] Id. at 525.

[99] Id.

[100] See Wiecek, supra note ___ at 264.

between types of people. "It does not declare . . . 'we, the *white* people,' or 'we, the *free* people.'" [101] 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 others, as well as for themselves."[102] In a speech before the House of Representatives, Horace Mann made a similar argument, concluding that therefore "the constitution of the United States creates no slaves, and can create none. Nor has it the power to establish the condition of slavery anywhere."[103] 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 law made for the 'people.'"[104]

Many antislavery constitutionalists argued that slavery violated the Due Process Clause of the Fifth Amendment.[105] The premise of this 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.[106] 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."[107] 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 56,000 'persons,' the annual increase in the slave population, are annually deprived of their liberty?"[108] 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."[109] Horace Mann agreed that the word

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[101] See SPOONER, UNCONSTITUTIONALITY OF SLAVERY, supra note ___ at 90.

[102] Id. at 91.

[103] Mann, supra note ___ at 415.

[104] Id. at 424.

[105] See, e.g., Charles Dexter Cleveland, Address of the Liberty Party of Pennsylvania, in CHASE & CLEVELAND, supra note ___ at 17; William Goodell, supra note ___ at 59; Joel Tiffany, Treatise on Unconstitutionality, supra note ___ at 79.

[106] See Byron Paine, _____ at 30. Alvan Stewart, A Constitutional Argument on the Subject of Slavery 286, in 2 The Friend of Man (Utica, 1937), reprinted in TenBroek at 282-295, cited in Barnett, Section One at 18 (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 common law, to vindicate their freedom."); William Goodell, supra note ___ at 59; Gerrit Smith, supra note ___ at 524.

[107] Smith, supra note ___ at 524.

[108] James G. Birney, *The Philanthropist*, January 13, 1837, p.2, cited by Barnett, Section One at 16.

[109] Id.

"person" "embraces all, from the slave to the president of the United States."[110] 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.[111] This was consistent with the Court's ruling in Barron v. Baltimore that the Bill of Rights did not limit state governments.[112] However, some, including Binney, went further and claimed that slavery was not legitimate anywhere.[113]

Perhaps the most prominent antislavery constitutionalist to make a natural rights argument against slavery was Salmon P. Chase.[114] In a pamphlet restating an argument that he made before the United States 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 law and justice" and therefore can subsist nowhere without the sanction of positive law."[115] In a brief challenging the constitutionality of the Fugitive Slave Act, Salmon Chase argued that slaves were entitled to the protections of the Due Process clause because they were persons.[116] 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.[117]

The Reconstruction debates were replete with references to natural rights. During debates over the 1866 Civil Rights Act, members of Congress made it clear that they viewed the Act as enforcing the fundamental human rights of the newly freed slaves. For example, E.C. Ingersoll of Illinios argued that the Thirteenth Amendment would "secure to the oppressed slave his natural and God-givern rights . . . a right to live, and live in 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 joys of family ties." [118] Similarly, Godlove Orth claimed that the Thirteenth Amendment embodied the natural law principles of

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[110] Mann, supra note ___ at 172.

[111] See Cleveland, supra note ___; WIECEK at 192.

[112] See Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[113] WIECEK at 192.

[114] Historian Eric Foner identified Chase as the ideological leader of the Free Soil Party. See FONER, FREE SOIL at 73-102.

[115] SALMON P. CHASE, AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AS THE DECEMBER TERM, 1846: IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT 101 (1847).

[116] Chase, Argument, supra note ___ at 89.

[117] Id. at 100. See also WIECEK at 192.

[118] Cong. Globe, 38th Cong., 1st Sess. At 2289-90.

the Declaration of Independence.[119] Representative 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.[120]

C. 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.[121] In Congress, Representatives from free states argued that they had the power to make free Blacks citizens, and that slave states lacked the power to treat those people as non-citizens.[122] 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.

In the 1833 case of Corfield v. Coryell, Justice Bulrod 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 writ of habeas corpus . . (and) to institute and maintain actions of any kind in the courts of the state."[123] 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.[124] For example, Joel Tiffany relied on Corfield as support for his broad view of citizenship rights that, he argued, were violated by the institution of slavery.[125]

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,

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[119] Cong. Globe, 38th Cong., 2d Sess., pt. 1 at 142-43.

[120] Cong. Globe, 38th Cong., 1st Sess. At 1319, 1321, 1324.

[121] See ZIETLOW, ENFORCING EQUALITY, supra note ___ at ____.

[122] See ZIETLOW, ENFORCING EQUALITY, supra note ___ at ____.

[123] Corfield v. Coryell, 6 F. Cas. 546, 552-553 (C.C.E.D. Pa. 1823) (No. 3,230).

[124] See Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773, 1805 (2006).

[125] Tiffany, supra note -__ at 99.

with the right to travel throughout the nation.[126] The citizenship based right to travel became a cause célèbre of abolitionists after several free Blacks from Massachusetts were arrested in Charleston, South Carolina.[127] Samuel Hoar, the scion of a prominent Boston family, made a well publicized trip to Charleston only to be turned away by local officials.[128] Antislavery constitutionalists in and out of Congress decried what Charles Cleveland and Samuel Chase called "the imprisonment of free citizens of Massachusetts."[129] 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.[130] He explained that those rights were enforceable since "the whole Nation, individually and collectively, stand pledged to protect and defend him in the enjoyment of those rights."[131]

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."[132] Weld's contemporary, James G. Birney, agreed that the slaves' duty to obey the law entitled them to protection maintaining that "without this protection – this security – we have no right to try him for violation of the laws of the country which deprives him of both."[133] They argued that to be a citizen of the United States is to be like a Roman citizen, entitled to the protection of the government.[134]

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 United States citizens.[135] He continued, "if they would become

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[126] See Rebecca E. Zietlow, Belonging, Protection and Equality, at ___.

[127] See AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION ___ (1998).

[128] Id.

[129] See Charles Dexter Cleveland, supra note ___ at 47 n*; Chase, supra note ___ at 98.

[130] Tiffany, supra note ___ at 97.

[131] Id. at 97.

[132] Weld, supra note ___ at 45 (emphasis in original).

[133] Birney, supra note ___ at 318-19.

[134] See Curtis, supra note ___ at 44.

[135] See Barnett, Section One, supra note ___ at 34 (citing Spooner, supra note ___ at 94.

citizens then, they are equally citizens now – else it would follow that the State governments had had an arbitrary power of making citizens of the United States.[136] Spooner championed the concept if of full and equal national citizenship, which entitled each citizen to the protection of the law and informed the applicability of the Privileges and Immunities Clause of Article IV.[137] Joel Tiffany also maintained that "all persons, born within the jurisdiction of the United States, since the adoption of the federal constitution, became citizens of the United States . . . entitled to the benefits of all these guaranties for personal security and liberty." [138] Like Spooner, Tiffany linked his broad view of citizenship rights to "We the People" in the Preamble.[139]

Shortly after Congress approved the Thirteenth Amendment, they began debate on the 1866 Civil Rights Act, which declared all persons born within the United States to be citizens and established equal rights for those citizens.[140] In this way, members of the Reconstruction Congress adopted Spooner's and Tiffany's views of national citizenship even before they adopted the citizenship clause of the Fourteenth Amendment.

D. 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.[141] They argued that a state which had 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.[142] They maintained that the Guaranty Clause required states to operate consistently with the principles of the Declaration of Independence.[143] 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. It provided a constitutional basis for

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[136] Spooner, supra note ___ at 94.

[137] Barnett, Section One, supra note ___ at 36.

[138] Tifanny, supra note ___ at 88, 57.

[139] Id. at 89.

[140] See Rebecca E. Zietlow, *Free At Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 282 (2010).

[141] U.S. CONST, ART. IV, §4 ("The United States shall guarantee to every state in this Union a republican Form of Government.")

[142] See, e.g., Tiffany, supra note ___ at 114.

[143] See Wiecek, supra note ___ at 270.

the Republicans' belief that "the most cherished values of the free labor outlook – economic development, social mobility, and political democracy – all appeared to be violated in the south.""[144]

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.[145] As Joel Tiffany observed, "[A]ll citizens of the United States stand pledged to each citizen, that the State government under which he lives shall be to him Republican."[146] 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 of permission of the state in which he lives."[147] 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. 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.[148]

E. Economic Rights

Some of the anti-slavery constitutionalists also championed economic rights. Known as free soilers, they argued that slavery caused the degradation of all labor and was also responsible for the plight of poor white workers.[149] Prominent Ohio attorney Salmon Chase explained that the problem with slavery was "that it violated the free labor ideal of workers exchanging their labor for appropriate wages."[150] The degrading impact of slavery on all labor formed the central ideology of the Free Soil

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[144] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 40 (1995).

[145] Id.

[146] Id. at 114.

[147] Tiffany, supra note ___ at 114.

[148] See Benedict, supra note ___ at ___.

[149] FONER, FREE SOIL, supra note ___ 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).

[150] VORENBERG, supra note ___ at 14.

Party, whose members were among the founders of the Republican Party in 1856.[151] Members of that party emphasized the impact of slavery on white workers because they believed this argument would be more persuasive than moral arguments.[152]

The Free Soilers also strongly believed in the virtues of free labor. They believe that "A man who remained all his life dependant on wages for his livelihood appeared almost as un-free as a southern slave."[153] They emphasized the importance of mobility to workers, mobility that slaves obviously lacked.[154] Moderate and conservative Free Soilers believed that establishing economic rights would allow freed slaves the self-sufficiency to succeed.[155] Radicals argued that freed slaves would also need political rights, including the right to vote.[156] They all felt that freed slaves were entitled to essential human rights, such as the right to travel.[157] 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 anti-thesis of slavery and involuntary servitude, and central to the free soil ideology.

At times, the Free Soil rhetoric had a racist tinge, implying that not just slavery, but Blacks themselves were degrading labor.[158] However, many Free Soilers entered the Republican Party with a history of support for Black rights.[159] Some had endorsed Black suffrage, and others opposed Black exclusion, most notably during the debate over the admission of Oregon.[160] A number had defended fugitive slaves in court and some of them, including James Ashley, are reported to have participated in Underground Railroad.[161] In Congress, Free Soilers extolled the value of economic rights, 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

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[151] See Foner, supra note ___ at 11.

[152] FONER, supra note ___ at 61.

[153] Id. at 17.

[154] Id. at 38. Many Republicans also opposed limits on working hours and believed that workers should decide themselves how long they want to work. Id. at 49.

[155] See FONER, FREE SOIL, supra note ___ at 16.

[156] See MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 22 (1974).

[157] See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 28 (1986).

[158] Id. at 61.

[159] Id. at 281.

[160] Id. at 288-289. See also Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 725-729 (2003).

[161] FONER , supra note ___ at 282-283.

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.

F. Congressional Power

Prior to the Civil War, pro- and anti-slavery forces bitterly disagreed over whether Congress had the power to regulate, and thus limit, slavery in the territories. Indeed, the principle constitutional crisis of the early 19th century, which resulted in the Missouri Compromise, expressly involved the extent of congressional power to regulate slavery.[162] 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.[163] In Congress, that dispute was resolved in a compromise which allowed slavery in southern territories and forbade it in northern territories.[164] 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. Some antislavery constitutionalists argued that Congress had the power to abolish slavery. They articulated a broad theory of congressional power that was eventually adopted by the Reconstruction Congress.

Many antislavery constitutionalists believed that Congress' 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.[165] 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.[166] Stewart claimed that this power extended to abolishing slavery "in every state and territory in the Union."[167] Stewart was the first to argue that Congress had the power to abolish slavery in the states.[168] Lysander Spooner and William Goodell agreed that the Due Process Clause empowered Congress to abolish slavery in the states.[169] In 1847, James Birney published a four part article in the Albany Patriot in which

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[162] See Wiecek, supra note ___ at 106.

[163] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829 at 234 (2001).

[164] Need Citation. The United States Supreme Court held the compromise unconstitutional in Dred Scott v. Sanford.

[165] See Wiecek, supra note ___ at 125.

[166] Stewart, supra note ___ at 282.

[167] Id.

[168] See Barnett, Section One, supra at 18 (citing Helen Knowles, at 315); Wiecek, supra note ___ at 255.

[169] See Barnett, Section One at 36. NEED CITATIONS FROM SPOONER AND GOODELL.

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.[170] Birney explained that abolishing slavery was the protection that Congress owed slaves in exchange for their allegiance and willingness to obey the law.[171] 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 Stewart's argument 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 Prigg v. Pennsylvania. [172] Ironically, *Prigg* involved, not a federal law championing liberty, but instead the 1793 Fugitive Slave Act. The case arose when Pennsylvania officials challenged the 1793 Act, which required state officials to cooperate in returning fugitive slaves. The Court upheld the federal law and found that it preempted the Pennsylvania Personal Liberty Act. The Court found that the 1793 Act was a proper use of Congress' power to enforce the Fugitive Slave Clause of Article IV even though Article IV did not contain a congressional enforcement provision. Justice Story stated, "the clause manifestly contemplates the existence of a positive, unqualified right on the part of an owner of a slave, which no state law or regulation can in any way qualify, regulate, control or restrain."[173] Hence, *Prigg* is one of the most deferential rulings to congressional power in the history of the Court.[174]

Abolitionists understandably hated the *Prigg* ruling, and antislavery constitutionalists bitterly criticized it.[175] However, some relied on Prigg to argue that Congress' 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.[176] Tiffany explained,

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[170] 318-19.

[171] Id. at 318-19.

[172] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

[173] Prigg, 41 U.S. at 612.

[174] See Paul Finkelman, *Sorting Out Prigg v. Pennsyl*vania, 24 RUTGERS L. J. 605, 658 (1993). It is also one of the most important rulings. See JUDITH BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 69 (1983) (arguing that "in its 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 liberties of an important class of persons under their jurisdiction.")

[175] See Tiffany, supra note ___ at 71 ("even if the Supreme Court had made such a decision, it by no means follows that such is the law. Decisions of Courts are not, necessarily, law.") Chase, Argument for Defendant, supra note ___ at 103.

[176] Tiffany, supra note ___ at 138-141.

"taking 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 have ample power to enforce those guarantees in every state of the Union."[177] Tiffany's theory influenced the Reconstruction 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.[178]

In Dred Scott v. Sanford, the Court rejected almost every argument of the antislavery constitutionalists. Like the antislavery constitutionalists, the Court adopted a broad reading of the rights of citizenship. However, the rest of the Court's ruling is virtually a point by point rejection of the antislavery constitutionalists' arguments. In his opinion, Justice Taney held that the rights of citizenship did not apply to slaves or anyone of African descent within the United States, because they were not, and could not be, citizens of either the United States or of any state. Taney explained that people of African descent were not part of "the People" covered by the Constitution, and were never intended to be so. The Court further held that Congress lacked the power to abolish slavery anywhere, because slave owners had a fundamental property right to own their slaves. The Court's rulings in *Prigg* and *Dred Scott* combined to create an anomaly: Congress could legislate virtually at will to protect the institution of slavery, but could not do anything to stop it. By the 1850s, an increasing number of abolitionists demanded the immediate abolition of slavery. Over time, members of Congress came to realize that they needed to amend the Constitution to give themselves that power.[179]

IV. James Ashley and the Thirteenth Amendment

James Ashley represented northwestern Ohio in the United States House of Representatives from 1858 to 1868.[180] He was a life-long abolitionist, a journalist and an avid reader.[181] Ashley was a close political ally of fellow Ohioan Salmon Chase, and along with Chase, he participated in the founding of the Republican Party. Ashley passionately believed that slavery was not only immoral, but also

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[177] Tiffany, supra note ___ at 139.

[178] See Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 HARV. J. LEG. 187 (2005); ZIETLOW, ENFORCING EQUALITY at 45-46.

[179] See Vorenberg, supra note ___ at 49.

[180] See Biographical Directory of the United States Congress, 1774 to present, http://bioguide.congress.gov/biosearch/biosearch1/asp.

[181] See ROBERT F. HOROWITZ, THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY (BROOKLYN COLLEGE PRESS 1979). Despite Ashley's importance in United States constitutional development, this is his only known biography. Ashley began writing his memoirs late in life, but died before they were completed. See Draft Memoir of James Ashley, John M. Morgan Papers relating to James Ashley, University of Toledo Libraries, Ward M. Canaday Center Manuscript Collection (Hereinafter "Ashley Memoir").

unconstitutional. In speeches given on the campaign trail and before Congress, Ashley articulated arguments against slavery that echoed those of the antislavery constitutionalists. While in Congress, he acted to amend the Constitution in accordance with that ideology. Ashley thus provides a link between popular constitutionalism and originalism during the Reconstruction Era.

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.[182] In 1862, Ashley introduced the first Reconstruction Act,[183] and in 1863, the first version of the Thirteenth Amendment to Congress.[184] With President Abraham Lincoln at his side, Ashley sheparded the Amendment through the approval process of the House of Representatives.[185]

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 ahs been recognized, Ashley is known primarily as the member of Congress who first called for the impeachment of President Andrew Johnson.[186] Ashley's active role in the impeachment effort caused his political downfall, and he lost his attempt at re-election in 1868.[187] 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 that oversight.[188]

A. James Ashley

James Mitchell Ashley was born in Alleghany, Pennsylvania, on November 14, 1824.[189] He was the son of an evangelical minister, and his early opposition to slavery stemmed from his religious

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[182] Horowitz at 76.

[183] Horowitz at 73.

[184] Vorenberg, supra note ___ at 49.

[185] See VORENBERG, SUPRA NOTE ___ at 179; DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 687 (2005).

[186] The title of the only known biography of Ashley, THE GREAT IMPEACHER, speaks to the significance of this role. See Horowitz, supra note ___ at 115.

[187] See Michael Les Benedict, *James M. Ashley, Toledo Politics, and the Thirteenth Amendment*, 38 TOL. L. REV. 815, 836 (1997).

[188] See also Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U.PA.J. OF CONST. L. 1269 (2009).

[189] Horowitz, supra note ___ at 1.

beliefs.[190] When he was 14, Ashley left home and went to live with a Quaker abolitionist family.[191] He worked as a cabin boy on the Ohio River, where he had frequent contact with slaves and their owners.[192] Ashley later attributed his deep opposition to slavery to the fact that he had witnessed the cruelty of slavery first hand so early in life.[193] Ashley was also an avid reader of political theory.[194] He studied law and was admitted to the bar, though he rarely practiced.[195] Ashley was involved in the underground railroad in southern Ohio and continued to aid fugitive slaves there until his activities became public.[196] In 1851, Ashley and his wife moved to Toledo, Ohio, a town more hospitable to their antislavery beliefs.[197] There, he set up a drug store and tried and failed to publish a newspaper.[198] In 1858, Ashley sold his newspaper and ran for Congress.[199]

Until the early 1850s, Ashley was a member of the Democratic Party. He considered himself a "Jefferson and Jackson" Democrat with a belief "in the wisdom and intelligence of the common man."[200] 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.[201] 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.[202] The Act "united the radicals, divided the moderates, and fragmented the entire American political party structure."[203] Ashley helped to organize

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[190] Id. at 2.

[191] Id. at 6.

[192] Id. at 7.

[193] See Draft Memoir of James Ashley, John M. Morgan Papers relating to James Ashley, University of Toledo Libraries, Ward M. Canaday Center Manuscript Collection (Hereinafter "Ashley Memoir"), Box 1, Folder 6 at 22.

[194] Horowitz, supra note ___ at 9.

[195] Id. at 9.

[196] Id. at 10.

[197] Id. at 11.

[198] Id. at 11.

[199] Horowitz, supra note ___ at 40.

[200] Id. at 20.

[201] Id. at 17.

[202] Id. at 17.

[203] Id. at 17.

the mass meetings in Ohio in January 1854 which led to the formation of the Ohio Republican Party. Ashley was one of the leaders of the party, along with his friend and ally, Salmon Chase.[204] 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 Republican Party."[205]

In the speeches which 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 Toledo in July 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."[206] He argued that Blacks should have the right to vote and hold office, and admitted that it might be necessary to amend the constitution to end slavery.[207] Ashley had evolved from a Democrat to a radical Republican. [208] Two years later, Ashley was elected to the House of Representatives.[209] He remained a strong advocate for the abolition of slavery and the rights of freed slaves, including Black suffrage, throughout his tenure in Congress.

In November, 1859, Ashley set off to Washington to begin his term in Congress.[210] On the way there, Ashley went to Harper's Ferry, Virginia, to attend John Brown's execution and to comfort Brown's widow.[211] 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."[212] Once in Congress, Ashley was appointed to the House Committee on the Territories.[213] 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

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[204] Id. at 18.

[205] Id. at 32.

[206] Souvenir p. 605.

[207] Souvenir at 615.

[208] Horowitz, supra note ___ at 48.

[209] Horowitz, supra note ___ at 41.

[210] Id. at 49.

[211] Id.

[212] Robert L. Stevens, Ed., "John Brown's Execution – An Eye Witness Account," NOQ, 21 (Autumn 1949) 140-48; National Anti-slavery Standard, June 16, 1860, cited in Horowitz, supra note ___ at 49.

[213]Horowitz, supra note___ at 50.

jurisdiction. He began a lasting friendship with Massachusetts Representative Charles Sumner, and after whom he named his third son.[214]

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.[215] He argued that if a Civil War broke out, the federal government would have the authority to declare marshall law and restore a republican form of government in the seceding states by abolishing slavery.[216] From the start of the Civil War, Ashley insisted that "the war should bring about complete emancipation." He fiercely resisted claims that the war was intended solely to restore the Union.[217] Ashley traveled to the battle field to visit General Benjamin Butler, who was confiscating slaves from the rebels and emancipating them.[218] Ashley heartily endorsed Butler's approach. In Congress, Ashley became the leading proponent of the territorial theory of Reconstruction.[219] Under this theory, states ceased to be states when they rebelled, and upon re-capture by federal troops, reverted to territories, under full federal control.[220] This would enable federal troops to expropriate "property," including slaves, from the rebel troops.[221]

In 1862, Ashley introduced the first Reconstruction Bill in the House of Representatives. 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.[222] All loyal

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[214] Id. at 51.

[215] Id. at 61.

[216] Id. at 61.

[217] See, e.g., Patriotic Address of J.M. Ashley, At the Great Union War Meeting of Northwestern Ohio, at White's Hall, Toledo, Ohio, March 18, 1863, in Souvenir, supra note ___ at 248, 254 ("I have demanded from the first, that our soldiers should fight for Liberty and Union, instead of Slavery and Compromise."); Speech of James M. Ashley of Ohio, College Hall in the City of Toledo, Nov. 26, 1861, http://digital.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery ("slavery is the gem from which this rebellion sprang."). See also Horowitz, supra note ___ Id. at 64, 69.

[218] Id. at 65.

[219] Id. at 67.

[220] See James Ashley, "The Liberation and Restoration of the South, Speech in the House of Representatives, March 30, 1864, in Souvenir, supra note ___ at 264, 272 (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 ___ at 73.

[221] Id. at 67.

[222] See John M. Morgan Papers, Box 2, Folder 10; Horowitz, supra note ___ at 73-74.

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.[223] Radical for its time, the bill had little chance of passage.[224] However, after the Civil War, Congress enacted Reconstruction measures similar to Ashley's proposal, with the notable exception of authorizing the confiscation of land or limiting the work day.[225] In December, 1863, Ashley again proposed a bill to establish military governments over rebellious states.[226] This time, he was acting as a member of a committee on rebellious states, which had been established at the behest of President Lincoln.[227] Ashley's bill would have allowed rebellious states to re-join the Union as states if they formed a republican form of government by abolishing slavery. [228] Ashley's bill would also have given voting rights to freed slaves.[229]

In December 1861, Senator Lyman Trumbull introduced a bill that would authorize the confiscation of slaves.[230] Ashley supported it, arguing that it was properly based on Congress' war powers. In a speech in Congress citing John Quincy Adams, he 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.'" [231] Ashley supported a similar bill in the House.[232]

While the war was going on, Ashley demanded that slavery be abolished in the District of Columbia.[233] Ashley's bill contained no provision for compensation, but he was forced to compromise

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[223] Id.

[224]Horowitz, supra note ___ at 74.

[225] Northern Democrats and Radical Republicans allied to support a bill to establish an 8 hour work day for federal employees. See ERIC FONER, RECONSTRUCTION 481 (New York: 1988).

[226] Horowitz, supra note ___ at 92.

[227] Id.

[228] Id. at 93.

[229] Id. at 94.

[230] Id. at 78.

[231] Cong Globe, 37th Cong. 2d Sess. Appendix 225-227, cited in Horowitz at 78.

[232] Horowitz, supra note ___ at 78,

[233] 76-77.

on this issue because the Senate bill did allow for it.[234] On June 17, 1862, Congress abolished slavery in the territories.[235] By then, Ashley was chair of the Committee on Territories, and he was "deeply gratified" that he had achieved this monumental goal.[236] Ashley was of course thrilled when President Lincoln issued his Emancipation Proclamation on January 1, 1863. In a letter to the *Toledo Commercial*, Ashley proclaimed, "Today 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."[237] However, the Proclamation did not itself abolish slavery because it did not apply to areas not controlled by the Union.[238]

On December 14, 1863, Ashley was the first to propose a constitutional amendment that would abolish slavery.[239] His amendment would have provided, "Slavery or involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted, is hereby forever prohibited in all the States of this Union, and in all Territories now owned or which may be hereafter be acquired by the United States."[240] Although Ashley's proposed Amendment did not contain a congressional enforcement clause, he apparently believed that such a clause was not necessary.[241] He accompanied the proposed amendment with a Reconstruction statute that would have established voting rights for the freed slaves.[242] The combined amendment and enforcement statute was a compromise to garner the votes of both moderates and radicals.[243] In the Senate, Lyman Trumbull proposed another version

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[234] Id. at 76.

[235] Id. at 77.

[236] Id. at 77.

[237] Mr. Ashley's Letter on President Lincoln's Emancipation Proclamation, Toledo Commercial, January 1, 1863, in Souvenir, supra note ___ at 240, 241.

[238] See Horowitz, supra note ___ at 84; MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 1 (2001).

[239] CONG. GLOBE, 38th Cong., 1st Sess. 19.

[240] CONG. GLOBE, 38th Cong., 1st Sess. 19.

[241] 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 supra, note ___ and accompanying text.

[242] VORENBERG, SUPRA NOTE ___ at 49.

[243] Id. at 50. See also MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 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.

of the amendment, with language modeled on the Northwest Ordinance.[244] Trumbull hoped that the northern Democrats would be swayed by his choice of language, since the Ordinance had been written by Thomas Jefferson.[245] It was Trumbull's version that eventually prevailed.

The Thirteenth Amendment passed the Senate on a 38-6 vote on April 8, 1864, but the battle in the House was much more difficult. [246] In the summer of 1864 the war effort was not going well, and it was unclear whether President Lincoln would be re-elected.[247] The House vote on June 15, 1864 was along partisan lines, and the amendment lost.[248] 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."[249] Ashley spent the next year of his life insuring that his prophecy came true.

The Republican Party declared the Amendment a central issue in the presidential election.[250] However, most of those who ran in close races chose not to emphasize the issue of Black freedom.[251] 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.[252] 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.[253] He was joined by the President, who declared his re-election to be a popular mandate for the anti-slavery movement.[254] 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.

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[244] Vorenberg, supra note ___ at 59.

[245] Vorenberg at 59.

[246] Vorenberg at 112.

[247] Vorenberg at 116.

[248] CONG. GLOBE, 38th Cong., 1st Sess. at 2295 (1864). See Vorenberg at 138.

[249] CONG. GLOBE, 38th Cong., 1st Sess. at 3357.

[250] Vorenberg at 139.

[251] Vorenberg at 171.

[252] Vorenberg at 171. See citations.

[253] Vorenberg at 179.

[254] Vorenberg at 174.

In January, 1865, House Republicans were divided over whether to vote for the Amendment. Some antislavery constitutionalists were concerned that the Amendment undermined their claim that slavery was already unconstitutional.[255] Others, including Charles Sumner, claimed that the amendment merely reaffirmed the Constitution's antislavery character.[256] Ashley attempted to reconcile the two theories by arguing that although the constitution was anti-slavery, the courts had perverted its meaning with their pro-slavery interpretations.[257] Ashley drew up a list of 36 Democrats and border state Unionists who had voted against the Amendment in the summer, and worked to persuade them to change their minds.[258] Lincoln and Ashley engaged in hard hitting behind the scenes lobbying.[259] Indeed, according to historian Michael Vorenberg, "No piece of legislation during Lincoln's presidency received more of his attention than the Thirteenth Amendment."[260]

The final vote on the Thirteenth Amendment occurred on January 31, 1865.[261] Ashley led the proceedings, which he began by quoting President Lincoln, "If slavery is not wrong, then nothing is wrong." [262] Ashley then articulated his vision of antislavery constitutionalism. He said, "nothing can be clearer to the reader of history that the men who made our Constitution never expected nor desired our nation to remain half slave and half free. . . . 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."[263] Ashley insisted, "If the national Constitution had been rightly interpreted, and the Government organized under it properly administered, slavery could not have 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 today to pass the amendment now under consideration."[264] Insisting that

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[255] Vorenberg at 193.

[256] Vorenberg at 192.

[257] See _____

[258] Horowitz at 102.

[259] Vorenberg at 198-203.

[260] Vorenberg at 180.

[261] CONG. GLOBE, 38TH CONG., 2ND SESS. 531 (1865).

[262] CONG. GLOBE, 38TH CONG., 2ND SESS. 138 (1865). SEE Vorenberg at 206.

[263] CONG. GLOBE, 38TH CONG., 2ND SESS. 138 (1865).

[264] Id.

the "great majority" of the Framers of the Constitution "desired the speedy abolition of slavery," Ashley called on his colleagues to do just that.[265]

In that speech, Ashley explained what he believed enacting the Thirteenth Amendment would mean. First, and most obviously, the amendment would abolish slavery, "a system at war with human nature, so revolting and brutal, and is withal so at variance with the precepts of Christianity and every idea of justice, so absolutely indefensible in itself."[266] The Amendment would create a constitutional right to free labor, "a pledge that the labor of the country shall hereafter be unfettered and free."[267] 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."[268] Many of his colleagues agreed.[269]

When the vote in favor of the Amendment was announced, the House exploded into cheers. [270] 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 male spectators in the galleries, which were crowded to excess, who waived their hats and cheered loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their hankerchiefs."[271] "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 world was overflowing with beauty and joy."[272] Ashley sent a telegram to the Toledo Commercial: "Glory to

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[265] Id. at 139.

[266] Id. at 138.

[267] Id. at 139.

[268] Id. at 139.

[269] See Ten Broek, supra note ___ at 176. For example, E.C. Ingersoll of Illinios argued that the Thirteenth Amendment would "secure to the oppressed slave his natural and God-givern rights . . . a right to live, and live in 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 joys of family ties." Cong. Globe, 38th Cong., 1st Sess. At 2289-90. Godlove Orth claimed that the Thirteenth Amendment embodied the natural law principles of the Declaration of Independence. Cong. Globe, 38th Cong., 2d Sess., pt. 1 at 142-43. 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. At 1319, 1321, 1324.

[270] CONG. GLOBE, 38TH CONG., 2ND SESS. 531 (1865).

[271] Id.

[272] Vorenberg at 208.

God in the Highest! Our country is free!"[273] 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 passage of the Joint Resolution."[274]

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."[275] This bill reflects Ashley's view that the freedom established by the 13th 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.[276]

Ashley spent his remaining two years in Congress fighting for the 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."[277] Several years later, when Ashley was no longer in Congress, Congress adopted the Fifteenth Amendment, which largely achieved Ashley's goal.[278]

Unfortunately, Ashley's congressional career came to an end in 1868, in the midst of Reconstruction. Ashley had become enmeshed in the attempt to impeach President Andrew Johnson. He was distraught when Lincoln was assassinated and served as one of Lincoln's pall bearers when his cortege traveled through Cleveland.[279] Ashley was the first to move that Johnson be impeached.[280] Some historians later argued that Ashley was motivated by a conspiracy theory that Johnson had participated in the plot to assassinate Lincoln.[281] While Ashley may have believed this, he never said so

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[273] Horowitz at 104.

[274] See Horowitz at 106.

[275] Horowitz at 107.

[276] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§1981-1983). See Rebecca E. Zietlow, *Free At Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 281.

[277] Cong. Globe, 39th Cong., 1ts Sess. 2879.

[278] One notable difference is that Ashley's proposed amendment arguably would have established the right to vote for women. See Horowitz, supra note ___ at 119. Ashley was a long time proponent of women's suffrage, due in part to the influence of his wife, Emma. Id. at 11.

[279] Horowitz at 111.

[280] Horowitz at 123.

[281] Horowitz at 124.

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."[282] Ashley's loss was also due to local politics and the vocal opposition of the editor of the Toledo Blade.[283]

After he left Congress, James Ashley was appointed as the first governor of the territory of Montana.[284] There, he angered residents by calling for an end to cheap coolie labor, comparing it to slavery, and condemning discrimination against the Chinese.[285] President Grant removed him as governor based on the residents' complaints.[286] In 1875, Ashley moved to Ann Arbor, where his son was attending law school.[287] He founded a railroad from Ann Arbor to Toledo, which eventually expanded into Wisconsin.[288] Ashley continued to be progressive as owner of the railroad. In 1887 he introduced profit sharing to his work force, and he also promised accident insurance for employees and death benefits to widows.[289] Three years before his death in _____, the Afro-American league of Tennessee paid tribute to Ashley and published a bound volume of his speeches.[290] In the introduction to the volume, Frederick Douglass observed, "in every phase" of the conflict over slavery, Ashley "bore a conspicuous and honorable part."[291]

B. James Ashley – Antislavery Constitutionalist

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[282] Horowitz at 126.

[283] See Michael Les Benedict, *James M. Ashley, Toledo Politics, and the Thirteenth Amendment*, 38 TOL. L. REV. 815, 836 (1997).

[284] Horowitz at 158.

[285] Id. at 161.

[286] Id. at 162.

[287] Id. at 166.

[288] Id. at 167.

[289] Id. at 168. Ashley was unable to fulfill these promises because his railroad went out of business during the economic slump of 1893. Horowitz at 167.

[290] Duplicate Copy of the Souvenir from The Afro-American League of Tennessee to Hon. James M. Ashley of Ohio (Benjamin Arnett, Ed.) (Publishing House of the AME Church, Philadelphia 1894).

[291] Frederick Douglass, Introduction to the Duplicate Copy of the Souvenir from the Afro-American League of Tennessee to Hon. James M. Ashley of Ohio 3 (Benjamin W. Arnett ed., 1894), cited in Benedict, supra note ___ at 815.

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.[292] 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.[293] Ashley was devoted to ending slavery and establishing fundamental rights. While reserving the right to amend the constitution if necessary,[294] Ashley consistently argued that slavery was not only immoral, but also unconstitutional. 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."[295] He referred to the Constitution as a "charter of national liberty."[296] 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."[297]

Unfortunately, most of Ashley's papers were destroyed in a fire.[298] Therefore, what is known about Ashley's ideology is discernable primarily from the speeches that he gave during his lifetime.[299] Until the end of his life, Ashley continued to insist that slavery was unconstitutional even before the Thirteenth

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[292] See Horowitz, supra note ___ at 4.

[293] Id. at 18.

[294] See, e.g., Montpelier speech, Souvenir, supra note ___ at 627 ("If this can be done in no other way, then we must amend the Constitution.")

[295] Closing Portion of Stump Speech Delivered in the Grove near Montpelier, Williams County, Ohio, September, 1856, by James M. Ashley, in Souvenir, supra note ___ at 601, 623.

[296] Mr. Ashley's Letter on President Lincoln's Emancipation Proclamation, *The Toledo Commercial*, January 1, 1863, in Souvenir, supra note ___ at 243.

[297] James Ashley draft Memoir, Morgan papers Box 1, Folder 3 at 43.

[298] See Horowitz, supra note ___ at xi.

[299] Other sources include the draft of an unfinished memoir that Ashley was working on at the time of his death, and letters from Ashley in the collections of other people's papers. See John M. Morgan papers relating to James M. Ashley, University of Toledo libraries, Ward M. Canaday Center Manuscript Collection (hereinafter "Morgan papers") See also Margaret Ashley, An Ohio Congressman in Reconstruction (1919) (Unpublished M.A. Thesis, Columbia University) (on file with the Columbia University Library).

Amendment.[300] 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 because he made these statements to the public in order to garner support. From the perspective of an original public meaning originalist, Ashley's speeches are also the most valuable evidence 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.

1. Constitutional Interpretation

To support his constitutional arguments, Ashley often invoked the rules of interpretation championed by the antislavery constitutionalist scholars. Like them, Ashley refused to acknowledge that the Fugitive Slave clause referred to slaves.[301] He pointed out that the clause uses the word "person" rather than slave, and observed that "The slave code of every Slave state, denies that slaves are "persons," and describes them as chattels personal, or as property."[302] Ashley maintained that the clause, which refers to persons who are bound to labor, "cannot possible 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."[303] Here, Ashley arguably employed original meaning originalism to support his antislavery point.

Ashley also invoked the intent of the Framers to support his interpretation, and insisted that the intent of the Framers was consistent with his anti-slavery 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.[304] 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.'"[305] Ashley asked rhetorically, "Are we to believe, that a majority of the members of that memorable convention, who had just passed through

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[300] See James Ashley draft memoir, Morgan papers, Box 1, Folder 7, at 13; Id. at Folder 3, at 43.

[301] He also insisted that Congress lacked the power to enforce the clause since it had no enforcement provision. See Montpelier speech, Souvenir, supra note ___ at 624.

[302] See Souvenir at 625.

[303] Id. at 625.

[304] Id. at 625.

[305] Id. at 625-626.

the fire and blood of the Revolution – a revolution conceived and 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?"[306] His answer? "[N]ot one jot or tittle of evidence" could be found to sustain this claim.[307] Here, Ashley expresses the view of anti-slavery constitutionalists that the Framers expected slavery to end of its own accord.

2. The Declaration of Independence and Natural Rights

Ashley repeatedly insisted that slavery violated the natural rights of man, and therefore could not be authorized by any government, including the United States government. Ashley's belief in natural rights was rooted in his religious heritage.[308] 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. 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 the law of nature and the human race are entitled."[309] 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."[310] 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, which claims that they are entitled to the

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[306] Id. at 627.

[307] Id. at 627.

[308] See Horowitz, supra note ___ at 2.

[309] James Ashley draft Memoir, Morgan papers Box 1, Folder 7 at 13.

[310] Closing Portion of Stump Speech Delivered in the Grove near Montpelier, Williams County, Ohio, September, 1856, by James M. Ashley, in Souvenir, supra note ___ at 601, 605.

protection of life and liberty, by every law of man's enactment."[311] Once in Congress, Ashley worked to fulfill this promise.

Like the other antislavery constitutionalists, Ashley invoked the Declaration of Independence, explaining that "If the government was organized for any purpose, it was to secure the blessings of liberty to ourselves and to our posterity, and not to enslave any man, nor to become the defenders of slavery."[312] 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."[313]

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.[314] 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 labor. In short, I demand that all of God's children shall have an even chance in the race of life." [315] Here, Ashley made it clear that he believed the natural rights of man included the material pre-conditions of success in civil society and the guarantee that the government could protect the exercise of those rights.

3. The Rights of Citizenship

Unlike many of the anti-slavery 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.

4. The Guaranty Clause and a Republican Form of Government

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[311] Address delivered at Charloe, Ohio (January 31, 1859), in Souvenir, supra note ___ at 24.

[312] Id. at 29.

[313] Cong. Globe, 38th Cong. 2nd Sess. 138 (1865) (Speech of Rep. Ashley).

[314] See Montpelier speech, Souvenir at 620.

[315] 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. at 20 (1863).

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,[316] and Ashley strongly believed in Jackson's populist version of democracy. Ashley discussed his theory of sovereignty in a speech to the House of Representatives on January 17, 1861, explaining, "Both these governments, the State and Federal, derive all the power they possess directly from the people."[317] In his speeches, Ashley repeatedly decried what he called "Congress granting privileges to the few which are denied the many."[318] To Ashley, a society based on slavery was the anti-thesis of democracy because the elite prospered by exploiting the labor of slaves and poor whites.

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."[319] The Republican Party was organized "To meet and resist the aggressions of this privileged class."[320] Because a society based on slavery could never have a republican form of government, slavery corrupted the government and made it unconstitutional.

Ashley differed from many antislavery constitutionalists in his championing of the right to vote. While most abolitionists, including anti-slavery constitutionalists, avoided the subject of voting rights, Ashley embraced the cause early on.[321] In Ashley's view, the right to vote was one of the natural rights denied to slaves. He insisted that impartial suffrage was the only safe basis for Reconstruction.[322] Ashley called the right to vote "a natural right, a divine right if you will, a right to which the Government cannot justly deprive any citizen except as punishment for a crime."[323] Ashley repeatedly affirmed the

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[316] See Horowitz, supra note ____ at ____.

[317] James M. Ashley, "The Union of the States: The Majority Must Govern: It is Treason to Secede," Speech to the House of Representatives, January 17, 1861, _____.

[318] Address delivered in German Township, Fulton County, Ohio (November 1, 1859), Souvenir, supra note ___ at 34.

[319] Id. at 616.

[320] Id. at 29.

[321] See Horowitz, supra note ___ at 36 (characterizing Ashley's advocacy of voting rights for blacks in 1856 as "as a radical a statement as an orator dared to make.")

[322] See "Impartial Suffrage the Only Safe Basis for Reconstruction, Speech in the House of Representatives, Samuel J, May Anti-Slavery Collection).

[323] Id. at 11.

importance of the right to vote. In a speech given in Montpelier, Ohio, he insisted, "If this can be done in no other way, it will become our duty to amend the 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 people, white and colored, shall be fairly represented in State legislative assemblies and in the national Congress."[324] 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.[325]

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.[326] Ashley maintained that the only way to end this tyranny would be to expand suffrage rights. He insisted, "the ballot is the only sure weapon of protection and defense for the poor man, whether white or black. It is the sword and the buckler and shield before which all oppressions, aristocracies, and special privileges bow."[327]

5. Economic Rights

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."[328] In his speech introducing the Thirteenth Amendment on the day of the final vote in the House of Representatives, 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."[329] Thus, ending slavery would help all workers by bringing up the bottom and acknowledging the value of free labor.

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,

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[324] Id. at 616.

[325] See speech in Gilead, Wood County, Ohio, 1865, in Souvenir, supra note ___ at 634, 636.

[326] See Montpelier speech, supra note ___ at 627.

[327] Impartial Suffrage, supra note ___ at 11.

[328] Cong. Globe, 36th Cong. 1st Sess. App. 364, cited by FONER, FREE SOIL, supra note ___ at 120.

[329] CONG. GLOBE, 38th Cong., 2d Sess. at 141 (Speech of Rep. Ashley).

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

Ashley's economic critique went beyond criticizing slavery. He explained, "I therefore repeat, that I am utterly 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. I do not care whether that capital is in the hands of one man or in the hands of many men combined."[331] 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."[332]

6. Congressional power

Throughout his career, Ashley was a supporter of strong congressional power.[333] Ashley believed that courts had distorted the constitution by upholding slavery.[334] Ashley also distrusted the Presidency because of the concentration of power in that branch.[335] Ashley insisted that the power to institute Reconstruction "is vested by the Constitution in Congress, and not in the President."[336] Ashley

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[330] Souvenir, supra note ___ at 606-607.

[331] Souvenir, supra note ___ at 622.

[332] James Ashley draft Memoir, Morgan Papers Box, Folder 7 at 18.

[333] See Horowitz, supra note ___ at ___.

[334] See, e.g., Cong. Globe, 38th Cong., 2nd Sess. 138 (1865) (speech of James Ashley) ("If the national Constitution had been rightly interpreted, and the Government organized under it properly administered, slavery could not have 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 today to pass the amendment now under consideration.")

[335] See Horowitz, supra note ___ at 20.

[336] Souvenir, supra note ___ at 282. See also Speech at Gilead, Wood County, Ohio, 1865, in Souvernir, supra note ___ at 634 ("Under 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.")

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.[337]

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.[338] Presumably, Ashley believed that an enforcement clause was not required. This would have been consistent with the Court's ruling in Prigg v. Pennsylvania.[339] When asked by a political opponent for precedents to support his first Reconstruction bill, Ashley simply replied, "we make our own precedents here."[340]

Ashley expressly rejected the precdential value of the rulings of the United States 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 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 Constitution would have been possible."[341] 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.[342]

To counter the pro-slavery 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 the footsteps of General Jackson, and interpret the constitution as I understand it."[343] 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

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[337] Horowitz, supra note ___ at 20.

[338] See Vorenberg, supra note ___ at 51.

[339] See supra, notes ___ and accompanying text.

[340] Margaret Ashley, An Ohio Congressman in Reconstruction 361 (1919) (Unpublished M.A. Thesis, Columbia University) (on file with the Columbia University Library).

[341] Id. at 614.

[342] Montpelier speech, Souvenir p. 616.

[343] Id. at 623.

cause him to be arrested as a kidnapper."[344] 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. This was consistent with Ashley's belief in participatory democracy.

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 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.

V. Lessons for Understanding the Thirteenth Amendment

What does understanding James Ashley and the other antislavery constitutionalists tell us about the meaning of the Thirteenth Amendment in the Twenty-First Century? An original intent originalist might argue that because Ashley intended the Thirteenth Amendment to establish fundamental human rights, that Amendment embodies the broad array of rights articulated by the antislavery constitutionalists. An original public meaning originalist might argue that the writings of the antislavery constitutionalists and the speeches of James Ashley and his colleagues help to reveal the original public meaning of abolishing slavery and involuntary servitude, and show that they believed that to be free entailed the freedom to exercise a broad array of fundamental rights.[345] Both camps of originalists insist that the meaning of the Thirteenth Amendment in the Twenty-First Century is limited to what it meant at the time that it was adopted.

This section considers the role that the influence of antislavery constitutionalism on the Framers of the Thirteenth Amendment plays in a non-originalist interpretation of that Amendment. To what extent is a non-originalist bound by the intentions and understandings of James Ashley and the antislavery constitutionalists when interpreting the Thirteenth Amendment in the Twenty-First Century? To answer this question, this article draws on the insights of originalists that history is valuable in constitutional interpretation, while also embracing the significance of contemporary context in the constitutional constructions of popular constitutionalism. I argue that the original meaning of the Thirteenth Amendment should guide the interpreter, who may properly interpret the Amendment in a manner consistent with that meaning. However, the original meaning serves only as a guide, not a limitation, on contemporary interpreters of the Thirteenth Amendment. After all, those Framers themselves embraced popular constitutionalism and believed that freedom had a broad, open-ended meaning that could vary depending on the context of the times. For example, they understood that

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[344] Id. at 623.

[345] See Barnett, Section One, supra note ___ at ___ (arguing that the writings of the antislavery constitutionalists help to reveal the original public meaning of Section One of the Fourteenth Amendment).

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 the badges and incidents of slavery. Therefore, interpretations of that Amendment are not precluded unless they were expressly rejected by the Framers of the Amendment.

At the very least, interpretations of the Thirteenth Amendment that coincide with that of James Ashley and his colleagues in the Reconstruction Congress are valid interpretations of that Amendment. When they amended the Constitution, Ashley and his allies not only ended slavery, but they also constitutionalized the fundamental rights that had been violated by the institution of slavery and its impact on society. This original meaning gives significant guidance in determining valid and invalid interpretations of that Amendment. The antislavery constitutionalists had a broad theory of fundamental rights, and 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 original public meaning of that Amendment. That meaning is not limited to ending the chattel slavery of African Americans,[346] nor is it limited to ending the involuntary servitude of those held by physical force.[347] Instead, the Thirteenth Amendment protects a broad spectrum of workers' and civil rights, and gives Congress broad authority to enforce those rights.

III. Conclusion

Recent years have seen a rise of interest in legal history among constitutional theorists. Originalists and those who study popular constitutionalism share an interest in legal history because studying history is so helpful to understanding constitutional development. While we may differ to the extent that we feel bound by the past, we agree that the past is important, and useful to determining contemporary meaning. 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.

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[346] See Slaughterhouse Cases.

[347] See U.S. v. Kozminski.