

THE RIGHTS OF CITIZENSHIP: TWO FRAMERS, TWO AMENDMENTS

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The framers of the Fourteenth Amendment had a very broad view of the meaning of the privileges and immunities of citizenship. Although they did not all agree about the precise definition of the rights of citizenship, they generally agreed that citizenship was a font of fundamental rights.¹ That view was elegantly articulated by the author of the original version of Section 1 of the Fourteenth Amendment, Representative John Bingham of Ohio. Many scholars have considered the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.² Less well recognized, however, is that the

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¹ I have written extensively elsewhere about the views of citizenship held by the Framers of the Fourteenth Amendment. See, e.g., REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 38–62 (2006) [hereinafter ZIETLOW, ENFORCING EQUALITY] (“The Reconstruction Amendments . . . represent a major departure from the constitutional protections for individual rights prior to the Civil War by naming Congress, not the courts, as the principle enforcer of those rights.”); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000) [hereinafter Zietlow, *Belonging, Protection and Equality*] (arguing that the Supreme Court’s recent federalist trend reflects the intent of the framers of the Fourteenth Amendment, who viewed federal citizenship as being where federalism and individual rights intersected); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717 (2003) [hereinafter Zietlow, *Theory of Citizenship*] (analyzing John Bingham’s view of the rights of national citizenship and arguing that Congress can rely on the Citizenship Clause of the Fourteenth Amendment to enact future civil rights legislation); Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015 (2008) [hereinafter Zietlow, *Rights of Citizenship*] (explaining that members of the Reconstruction Congress believed that citizenship inherently included fundamental human rights that slaves had previously been denied).

² See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 62 U. CIN. L. REV. 1 (1993); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV.

Reconstruction-era Congress did not consider the Fourteenth Amendment to be the only amendment protecting the rights of citizens. A majority of the Thirty-Eighth and Thirty-Ninth Congresses believed that the Thirteenth Amendment had already done the job of establishing freed slaves as citizens, and that the earlier provision itself was a broad font of individual rights, including the rights of citizenship.³ Representative James Ashley, also from Ohio, held this view as he introduced the first version of the Thirteenth Amendment and shepherded it through the rocky process of approval in the House of Representatives during the winter of 1865. In this Article, I consider the visions of citizenship held by the framers of the Thirteenth and Fourteenth Amendments. I focus on the views held by two of their principle proponents, Ashley and Bingham.

This Article is not intended to be a comprehensive review of the Reconstruction-era notion of the rights of citizenship, or of the contributions made by Bingham and Ashley. Nor do I believe that the intent of the framers is decisive in determining how the amendments should be interpreted today, or even in determining the original meaning of those amendments. However, contemporary interpretations of the amendments should at least be informed by the intentions of those who championed those amendments and the historical circumstances in which they lived.

Very little has been written about John Bingham and James Ashley, and the legal theories upon which they relied as they led the fight to change our Constitution.⁴ Unlike the men who attended the Constitutional Convention in 1787, these members of the Reconstruction Congress are largely unknown to the American public—indeed, even to constitutional scholars. This is a terrible oversight. The men in the Reconstruction Congress were responsible for the transformation of our nation, a veritable Second Founding altering our system of federalism and separation of powers, ending slavery and greatly ex-

1071 (2000); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

³ See CURTIS, *supra* note 2, at 48–49; Zietlow, *Rights of Citizenship*, *supra* note 1, at 1024–26 (explaining that many members of the Reconstruction-era Congress believed that the Thirteenth Amendment and the Civil Rights Act of 1866 established citizenship for freed slaves).

⁴ Fortunately, Richard Aynes has done much to fill our gaps in knowledge about John Bingham. See, e.g., Richard L. Aynes, *John A. Bingham*, in 2 AM. NAT'L BIOGRAPHY 792 (1999) [hereinafter Aynes, *Bingham*]; Aynes, *supra* note 2, at 70 (discussing Bingham's views on the privileges and immunities of citizenship, the Bill of Rights, and Article IV, Section 2 of the U.S. Constitution); Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003) [hereinafter Aynes, *Continuing Importance*].

panding individual rights and liberties for people throughout this nation. This Article is my effort to begin to remedy this oversight, and to aid in the understanding of the meaning of the provisions that they championed.

I. ASHLEY AND BINGHAM

James Ashley and John Bingham had a lot in common. Both were lawyers from Ohio and both were outspoken Abolitionists who spearheaded the drafting and approval of Reconstruction-era amendments. Both were allies of Salmon P. Chase and shared his “Freedom National, Slavery Local” philosophy.⁵ However, these two members of Congress were different in terms of temperament and strategy. Ashley was an outspoken radical whose opposition to slavery contributed to an itinerant lifestyle. Although he was admitted to the Ohio Bar, Ashley practiced law only briefly and spent his early career primarily as a publisher and newspaper editor.⁶ Bingham was more conservative than Ashley; he was a well-respected lawyer who fashioned an elaborate theory of why slavery was unconstitutional prior to the Civil War.⁷

The difference in temperament and style between these two framers of the Second Founding is reflected in the methods that they used to change the Constitution to reflect their egalitarian beliefs. Ashley used his outspoken “win at any cost” style to push the Thirteenth Amendment through a reluctant House of Representatives while the Civil War still raged. By contrast, it was Bingham’s caution about congressional power to protect the rights of the newly-freed slaves that led him to successfully advocate for the Fourteenth Amendment.

⁵ See generally Les Benedict, *James M. Ashley, Toledo Politics, and the Thirteenth Amendment*, 38 U. TOL. L. REV. 815, 820–22 (2007) (discussing how Ashley and Chase both hoped that the Democratic party would repudiate its defense of slavery and strive to achieve equal rights for all).

⁶ *Id.* at 817 (explaining that Ashley’s true ambitions were in politics, and that “[n]ewspaper editing and lawyering were common professions for politicians”).

⁷ See generally MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869*, at 31 (1974) (listing Bingham as a prestigious Republican member of the House of Representatives during the Reconstruction era); Aynes, *Continuing Importance*, *supra* note 4, at 590–91 (explaining that Bingham’s contemporaries, legal scholars, and U.S. Supreme Court Justice Hugo Black considered Bingham to be a gifted and brilliant statesman and scholar).

A. *James Ashley*

James Ashley was born in Allegheny, Pennsylvania in either 1822 or 1824, and he grew up a member of an extremely poor family in Portsmouth, Ohio, across the Ohio River from the slave state of Kentucky.⁸ Ashley was the son of a devout evangelical preacher and was schooled at home by his mother.⁹ He ran away from home at the age of fourteen and spent years as a cabin boy on a steamboat before he found work as a printer.¹⁰ Ashley apparently loved to travel, and he witnessed a number of the important events in his lifetime. As a relatively young man, he visited the home of former President Andrew Jackson. Later, he attended the inauguration of President William Henry Harrison, the Lincoln-Douglas debates, and the execution of John Brown.¹¹ Ashley was an avowed Abolitionist from his early teenage years. As an adult, he explained that his views stemmed from witnessing the treatment of slaves on and across the Ohio River.¹² Ashley was at least sympathetic to the Underground Railroad and may have been active in that network.¹³ He eventually moved from Portsmouth to Toledo, the northern Ohio city where residents were more sympathetic to his abolitionist beliefs and activities.¹⁴

In Toledo, Ashley became active in politics. He began as an anti-slavery Democrat who lionized the populist president Andrew Jackson.¹⁵ Ashley's abolitionist beliefs eventually prompted him to leave the Democratic Party and join first the Free Soil and then the Republican parties.¹⁶ As a Free Soiler, Ashley emphasized the degrading impact that slavery had on workers throughout the country, including

8 Benedict, *supra* note 5, at 816 (detailing Ashley's early life). The uncertainty as to Ashley's birth date is due to a discrepancy between the *Biographical Directory of the United States Congress* on the one hand, and the recollection of his son and the date on his tombstone on the other. *Id.* As Benedict points out, the discrepancy is evidence of Ashley's "hard-scrabble origins." *Id.*

9 *Id.*

10 *Id.*

11 *See generally id.* at 817 (describing Ashley's travels as a young adult).

12 *See generally* ROBERT F. HOROWITZ, *THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY* 7 (1979) ("One of Ashley's sons would later write that his father's detestation of slavery was increased during [his time spent working on steamboats] . . . by the way he saw free blacks and slaves treated on the boats and in the ports of southern rivers.")

13 Benedict, *supra* note 5, at 817 (explaining that Ashley narrowly lost in a mayoral election "in part because of his antislavery views and his sympathy, if not greater involvement, with the 'underground railroad'").

14 *Id.*

15 *Id.*

16 *Id.* at 818-19.

the white Southern working class. In pre-war congressional debates, Ashley maintained that class antagonism was “the real point of danger to the ruling class of the South.”¹⁷ Thus, Ashley believed that ending slavery was crucial not only to protect the human rights of the blacks who were enslaved in the South, but also to protect the integrity and dignity, and the right to work under decent conditions, of all workers in this country.¹⁸

Ashley also strongly believed that slavery was morally wrong. In 1859, he attended the execution of John Brown to bear “witness.”¹⁹ Ashley wrote an account of the event for the *Toledo Blade*, in which he explained why he believed people were so frightened and upset by Brown’s attempt to cause an insurrection of slaves: “[I]t is inseparable from the system of slavery. A servile insurrection is always to be feared, because it is the most terrible of all evils that can befall a people who claim to own their laborers.”²⁰

In 1858, Ashley ran for Congress as a staunch Abolitionist. He unsuccessfully proposed a platform to the district nominating convention that would have proclaimed that slavery was unconstitutional because “[t]he Constitution of the United States and the National Government which it created, was ordained and established, to secure the blessings of liberty to ourselves and to our posterity, and does not recognize or authorize the chattelization of men.”²¹ This statement evoked the Declaration of Independence, a document revered by many Abolitionists who believed that the Declaration was a legally enforceable document that established fundamental rights, including the right to freedom from slavery.²² Once elected to Congress, James Ashley was a “self-consciously radical Republican” who followed a “purist” model of politics and fiercely opposed more conservative Republicans who wanted to limit the party’s anti-slavery program.²³ Ashley was a follower of fellow Ohioan Salmon P. Chase, and agreed with Chase that freedom was a national, and slavery a local,

17 ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 120 (1995) (citing CONG. GLOBE, 36th Cong., 1st Sess. 364 (1859)).

18 *Id.* at 50.

19 HOROWITZ, *supra* note 12, at 49.

20 James M. Ashley, *The Execution—Interesting Particulars*, DAILY TOLEDO BLADE, Dec. 9, 1859, at 2, cited in HOROWITZ, *supra* note 12, at 49.

21 Benedict, *supra* note 5, at 819 (citing James M. Ashley, A Chapter on My Congressional Campaigns, at ch. X (on file with the Canaday Center, University of Toledo Library, Collection of the Papers of James M. Ashley, Box 1 (Memoirs), Folder 3, at 28½–29)).

22 See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 112 (1977); see also FONER, *supra* note 17, at 75.

23 Benedict, *supra* note 5, at 827.

matter.²⁴ Like Chase, he believed that slavery would die out if it failed to expand, and thus he fiercely opposed the introduction of slavery into the territories.²⁵ As Chase put it, Ashley believed that “[t]he very moment a slave passes beyond the jurisdiction of the state, . . . he ceases to be a slave . . . because he *continues* to be a man and *leaves behind* him the law of force, which made him a slave.”²⁶

As a Radical Republican, Ashley insisted that the abolition of slavery was the central principle of the Republican Party, and he supported abolition even at the expense of the Union.²⁷ After the War began, Ashley was adamant that slavery was its cause. In a speech that he delivered in Toledo in November 1861, Ashley insisted that the Southern Confederacy was founded on the principle “that slavery, subordination to the superior race—was the Negro’s natural condition.”²⁸ Ashley argued that ending slavery was crucial to the Union victory, and throughout the war he insisted that Congress’s war powers enabled them to confiscate slaves from their rebellious owners.²⁹ Ashley became chair of the House Committee on the territories, where he led the fight to abolish slavery in the territories, including the District of Columbia. As head of the House Committee, he prohibited any proposal to establish a new territory to pass through his committee unless it banned slavery.³⁰ Thus, it was not surprising that Ashley played such an active role in changing the Constitution to ensure that slavery would be abolished throughout the country. As Frederick Douglass later noted: “‘In every phase’ of the great conflict over slavery . . . [Ashley] ‘bore a conspicuous and honorable part.’”³¹

Ashley not only believed in freedom, he also believed in equal rights for the freed slaves. As early as the 1850s, Ashley “advocated

²⁴ *Id.* at 818–19.

²⁵ See FONER, *supra* note 17, at 75–76 (describing Chase’s philosophy).

²⁶ See FONER, *supra* note 17, at 77 (emphases added) (citing CONG. GLOBE, 33d Cong., 1st Sess. 421 (1854)); see also HOROWITZ, *supra* note 12, at 35 (describing Ashley’s belief that slavery was unconstitutional). Dred Scott based his claim for freedom on this argument, but he failed to convince the Supreme Court. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

²⁷ See FONER, *supra* note 17, at 138; Benedict, *supra* note 5, at 829–31.

²⁸ Abdul Alkalimat, *Why Is James Ashley Not in the History Books?*, 38 U. TOL. L. REV. 809, 811 (2007) (citing James M. Ashley’s address at College Hall on November 26, 1861).

²⁹ Benedict, *supra* note 5, at 829 (“Although Ashley conceded that Congress could not abolish slavery in the loyal states, he argued that its constitutional power to wage war to suppress the rebellion justified the confiscation of the slaves of disloyal owners, just as it justified confiscation of any other property.”).

³⁰ *Id.*

³¹ Benedict, *supra* note 5, at 815 (citing FREDERICK DOUGLASS, *Introduction to DUPLICATE COPY OF THE SOUVENIR FROM THE AFRO-AMERICAN LEAGUE OF TENNESSEE TO HON. JAMES M. ASHLEY OF OHIO* 3 (Benjamin W. Arnett ed., 1894)).

equal civil and political rights for men of all races.”³² In 1856, Ashley blamed slavery for the racism that he encountered in the northern part of the country. He wrote: “Wherever the negro is free and is educated and owns property, you will find him respected and treated with consideration.”³³ As a member of the Civil War and Reconstruction-era Congress, Ashley consistently supported measures granting rights to freed slaves, most notably advocating for their right to vote.³⁴ Ashley proposed numerous Reconstruction measures, all of which incorporated the right of freed slaves to the franchise.³⁵ In 1862, he introduced a bill to authorize the federal government to seize public land in the rebellious territories and bestow that land as compensation upon former slaves.³⁶ Ashley argued that the rebellious States had ceased to be States and had become federal territories, subject to congressional regulation. The bill failed, in part because President Lincoln opposed the territorialization concept of Reconstruction.³⁷ However, Ashley continued to insist that Congress must play a major role in reconstructing the territories, and that emancipation was a pre-requisite to Reconstruction measures.³⁸

Ashley voted in favor of the 1866 Civil Rights Act, but he did not believe that the Act went far enough. He pleaded with his fellow members of Congress to establish even broader rights for the freed slaves and consider Reconstruction measures “from the standpoint of the black man” who had been “enslaved and degraded . . . as no people were ever degraded before.”³⁹ In May 1866, Ashley attempted to make impartial suffrage a condition of readmission of the rebellious territories, requesting that the Judiciary Committee report a bill “that hereafter the elective franchise shall not be denied or abridged . . . on account of race or color.”⁴⁰ That bill failed, but four

32 *Id.* at 829.

33 Chas S. Ashley, *Governor Ashley's Biography and Messages*, 6 CONTRIBUTIONS TO HIST. SOC'Y OF MONT. 143, 153 (1907).

34 *See generally* Margaret Ashley, *An Ohio Congressman in Reconstruction* 38 (1916) (unpublished M.A. thesis, Columbia University) (on file with the Columbia University Library) (“Ever since the passage of the 13th Amendment, securing negro emancipation, Mr. Ashley had devoted himself to advancing the condition of the freedman, especially through his efforts to secure for him the right of suffrage . . .”).

35 *Id.* at 24.

36 *See* HOROWITZ, *supra* note 12, at 73–74 (citing CONG. GLOBE, 37th Cong., 2d Sess. 1193 (1862)).

37 *Id.* at 74.

38 *Id.* at 75.

39 Alkalimat, *supra* note 28, at 813 (citing James M. Ashley's speech to Congress on May 29, 1866).

40 CONG. GLOBE, 39th Cong., 1st Sess. 2429 (1866).

years later the same language was incorporated into the Fifteenth Amendment. By then, Ashley was no longer in Congress.

James Ashley was always a controversial character both in Washington and in his home district. His early and outspoken role in the impeachment of President Andrew Johnson for his opposition to Reconstruction measures earned him the nickname "The Great Impeacher."⁴¹ Moderates and conservatives in his party resented Ashley's outspoken ways.⁴² As Frederick Douglass later explained, Ashley had been "a controversial figure, 'the subject of the most violent attacks,' . . . [because] '[h]e was, so to speak, ever far out on the skirmish line, in the most exposed position.'"⁴³ Ashley was often accused of being too radical, and he made many enemies in his home district, including the publisher of the *Toledo Blade*.⁴⁴ Ashley was also accused of using under-handed techniques and threats to win votes for his amendment abolishing slavery.⁴⁵ Others accused him of using his position on the Territories Committee to win favors for family members.⁴⁶ In 1868, Ashley lost his bid for re-election. He never returned to Congress.⁴⁷

B. John Bingham

Like Ashley, John Bingham was born in Pennsylvania in 1815, but lived most of his life in what was then the frontier state of Ohio.⁴⁸ Bingham's childhood appears to have been more prosperous than that of Ashley. His father served as clerk of courts in Mercer County, Pennsylvania, and Bingham was one of few men in his generation to

41 Benedict, *supra* note 5, at 815. The only known biography of Ashley is entitled "The Great Impeacher." See HOROWITZ, *supra* note 12. Sadly, Ashley has earned little credit for the major role that he played in abolishing slavery and establishing individual rights for the newly freed slaves. See Benedict, *supra* note 5, at 815 (wryly noting that "[s]omeone else is known as The Great Emancipator," which of course is President Abraham Lincoln).

42 See HOROWITZ, *supra* note 12, at 80–82; see also Benedict, *supra* note 5, at 825–26.

43 Benedict, *supra* note 5, at 815 (citing DOUGLASS, *supra* note 31, at 3).

44 Benedict, *supra* note 5, at 830.

45 See 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 36 (1968).

46 See HOROWITZ, *supra* note 12, at 80; Benedict, *supra* note 5, at 826.

47 Ashley did try to run for Congress after his loss in 1868. In 1874, he received the second largest number of votes for the Democratic nomination. Benedict, *supra* note 5, at 836 (citing HISTORY OF THE CITY OF TOLEDO AND LUCAS COUNTY, OHIO 357 (Clark Waggoner ed., 1888)). Ashley's return to the Democratic Party reflects both the decline of Radical Republicanism in the North, and his lifelong dream of a Democratic Party that was committed to equal rights for all. See *id.* at 821, 836.

48 See Aynes, *Continuing Importance*, *supra* note 4, at 592–94.

attend college.⁴⁹ There is evidence that Bingham was raised in an abolitionist household. When Bingham was a child, his father belonged to the anti-Mason party, which was led by the radical Abolitionist Thaddeus Stevens and Pennsylvania Governor, John R. Ritner, who was well known for his opposition to slavery.⁵⁰ At the age of twelve, Bingham moved to live with his uncle in Cadiz, Ohio, a town with many prominent abolitionist leaders.⁵¹ Bingham attended Franklin College, which was then led by Reverend John Walker, an alleged member of the Underground Railroad and “advocate of the ‘anti-slavery doctrine in its most ultra-secessionist form.’”⁵² Bingham was a classmate of Titus Basfield, a former slave who was one of the first African Americans to attend college in Ohio, and was reported to have been a friend of Basfield’s.⁵³ Thus, there is ample reason to believe Bingham’s later claim that he learned that slavery was an “infernal atrocity” at his “mother’s knee.”⁵⁴

Bingham began his political career as a member of the nationalist Whig Party. He attended the 1848 Whig National Convention, where he startled the participants by proposing an anti-slavery platform which would have provided “[n]o more slave states, no more slave territories, the maintenance of freedom where freedom is and the protection of American industry.”⁵⁵ Bingham’s effort was unsuccessful, but his efforts earned him national attention.⁵⁶ He was elected to Congress in 1854 as a member of the Opposition Party, and then became a member of the Republican Party during the next session of Congress.⁵⁷ Once in Congress, Bingham soon earned a reputation as a strong orator and he was chosen to be chair of the House Judiciary Committee as soon as the Republicans won control of the House, an indication of the respect he had earned as a lawyer from his colleagues.⁵⁸

49 *Id.* at 593, 595.

50 *Id.* at 592–93.

51 *Id.* at 594.

52 *Id.* at 595 (citing CHARLES A. HANNA, HISTORICAL COLLECTIONS OF HARRISON COUNTY, IN THE STATE OF OHIO 137–38 (Genealogical Publ’g Co. 1975) (1900) (describing the buildings in which fugitive slaves could hide)).

53 *Id.* at 596–97.

54 *See id.* at 592 (citing CONG. GLOBE, 37th Cong., 2d Sess. 1203 (1862)).

55 *Id.* at 601 (quoting Aynes, *Bingham*, *supra* note 4, at 792).

56 *Id.*

57 Bingham, John Armor: Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000471> (last visited May 8, 2009).

58 Aynes, *Continuing Importance*, *supra* note 4, at 603 (citing WM. A. TAYLOR, OHIO IN CONGRESS 207 (1900)).

Like Ashley, Bingham was a vocal and consistent opponent of slavery throughout his years in Congress, as well as an early proponent of equal rights for blacks. Bingham articulated his opposition to slavery as a comprehensive constitutional theory. He argued that the Guaranty Clause made slavery unconstitutional because it was incompatible with a republican form of government.⁵⁹ Bingham also claimed that slavery violated the Fifth Amendment because it deprived people of their right to life without due process of law.⁶⁰ The Supreme Court had held that the Bill of Rights was not applicable to the States, but Bingham disagreed with the Court and insisted that both the Fifth Amendment and the Article IV Citizenship Clause prohibited States from sanctioning slavery. Unlike most of his colleagues, Bingham also believed that slaves had a natural right to use force to obtain their liberty.⁶¹

Bingham had a broad view of the rights of citizenship, which he articulated often. He was influenced by Abolitionist Joel Tiffany, who argued in his *Treatise on the Unconstitutionality of American Slavery* that national citizenship was paramount, and entitled one to the protection of the federal government.⁶² Bingham believed that the privileges and immunities of citizens included, at the very minimum, the Bill of Rights.⁶³ However, Bingham's vision of the rights of citizenship was not limited to the Bill of Rights. In an 1858 speech opposing the admission of Oregon as a state because of anti-black provisions in its constitution, Bingham explained that he believed that the proposed Oregon Constitution violated the citizenship rights of free blacks. He explained, "The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the produce of their toil, is the rock on which that Constitution rests—its sure foundation and defense."⁶⁴

Bingham's most strident critique of the proposed Oregon Constitution focused on provisions which would have prohibited free blacks from entering the state and from using the state courts.⁶⁵ Neither of these rights is included in the Bill of Rights. However, Abolitionists considered the right to travel a fundamental right, one that was obviously violated by the institution of slavery itself and by the Fugitive

⁵⁹ *Id.* at 604 (citing CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857)).

⁶⁰ *Id.*; see also CURTIS, *supra* note 2, at 47.

⁶¹ See Aynes, *Continuing Importance*, *supra* note 4, at 607–08 (citing CONG. GLOBE, 37th Cong., 2d Sess. 1203 (1862)).

⁶² CURTIS, *supra* note 60, at 42–43; see also Aynes, *supra* note 2, at 70 & n.70.

⁶³ Aynes, *supra* note 2, at 71 & n.73.

⁶⁴ CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

⁶⁵ See Zietlow, *Theory of Citizenship*, *supra* note 1, at 727–28.

Slave Act.⁶⁶ They had long protested against the Southern States' practice of enslaving freed blacks who entered their territories, arguing that the practice violated the citizenship rights of freed blacks.⁶⁷ The right to use the courts, also not contained in the Bill of Rights, was listed as one of the fundamental rights of citizenship by Justice Bulrod Washington in his influential Circuit Court opinion, *Corfield v. Coryell*, which linked citizenship to the possession of fundamental rights.⁶⁸ During the Reconstruction-era debates, other members of Congress often referred to *Corfield* as they explained what rights they were trying to protect.⁶⁹

The concept of citizenship was highly contested throughout the antebellum era, intertwined with the debate over slavery and fugitive slaves.⁷⁰ Two years prior to Bingham's Oregon speech, the Supreme Court held that people of African descent could not be citizens.⁷¹ Moreover, prior to the Civil War, it was widely believed that the type of fundamental rights championed by Bingham inhered in state, rather than federal, citizenship.⁷² However, Bingham remained steadfast and his belief in the rights of citizenship prevailed during Reconstruction, embodied in both the 1866 Civil Rights Act and Section 1 of the Fourteenth Amendment.⁷³

John Bingham remained in Congress until 1872. His stance on Reconstruction was conservative, but he supported efforts to extend suffrage to the freed slaves.⁷⁴ Bingham spoke in favor of the constitutionality of the 1871 Enforcement Act, one of the farthest reaching civil rights statutes ever enacted by Congress. The Force Act, also known as the Klu Klux Klan Act, imposed civil and criminal penalties on anyone, including state and private parties, who infringed on the

66 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 57.

67 *Id.* at 27–29.

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

69 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 57 (“For example, when Senator Howard introduced Section One of the Fourteenth Amendment to the Senate, he indicated that in order to find the privileges and immunities of federal citizenship, one should look to the Bill of Rights and to the Circuit Court’s opinion in a well known case, *Corfield v. Coryell* . . .”).

70 See *id.* at 26–28 (“Members of Congress had debated the extent and nature of the rights of citizenship from the very beginning of our nation.”).

71 *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856); see also Zietlow, *Theory of Citizenship*, *supra* note 1, at 728–29 & n.67.

72 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 26–30 (“The uncertain relationship between slaves, free blacks, and citizenship rights continued to haunt Congress and sparked numerous contentious debates.”).

73 CURTIS, *supra* note 2, at 46–49.

74 See BENEDICT, *supra* note 7, at 223–26 (describing Bingham’s political efforts and the opposition he encountered).

citizenship-based rights of individuals. Bingham explained: “The people of the United States are entitled to have their rights guaranteed to them by the Constitution of the United States, protected by national law.”⁷⁵ Bingham also served as the unsuccessful prosecutor of President Andrew Johnson during the impeachment effort. After he left Congress, Bingham became United States minister to Japan, where he remained from 1872 to 1884.⁷⁶ After he returned to the United States, Bingham continued to speak out in favor of equal rights.⁷⁷ Unfortunately, by the mid-1880s, Ashley’s and Bingham’s vision of equality for blacks seemed a distant dream, as segregation and Jim Crow consolidated their hold on our country.

II. THE THIRTEENTH AMENDMENT

At the beginning of the Civil War, Abolitionists in this country hoped that the war would lead to the end of slavery. In January 1863, President Abraham Lincoln issued his Emancipation Proclamation, which freed the slaves in the rebellious States, but did nothing for the slaves that lived in the border States that had remained loyal to the Union. By itself, Lincoln’s Proclamation did not free any slaves, but it did signal that the Union forces were committed to the end of slavery. “Americans understood that the proclamation was but an early step in putting black freedom on secure legal footing.”⁷⁸ By 1864, members of Lincoln’s Republican Party had committed themselves to securing the end of slavery by amending the Constitution.⁷⁹ In April 1864, Representative James Ashley introduced the first version of the Thirteenth Amendment.⁸⁰

Ashley’s proposed amendment also did not include an enforcement clause. It is possible that Ashley did not believe an enforcement clause was necessary. The United States Supreme Court had twice upheld Federal Fugitive Slave Acts despite the fact that the Fugitive Slave Clause lacked an enforcement provision. Other members of Congress expressly made this argument.⁸¹ Moreover, it is clear that

⁷⁵ CONG. GLOBE, 42d Cong., 1st Sess. app. 85 (1871).

⁷⁶ Aynes, *Continuing Importance*, *supra* note 4, at 611.

⁷⁷ *Id.*

⁷⁸ MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT I* (2001).

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 49.

⁸¹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *see e.g.*, CONG. GLOBE 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson); *id.* at 1836 (statement of Rep. Lawrence); *see also* Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 188 (2005) (argu-

Ashley believed not only that congressional enforcement of the amendment's promise of freedom was important, but also that it was broad. In December 1861, Ashley introduced a bill which would have authorized the federal government to set up territorial governments in states conquered during the rebellion, emancipate the slaves in those territories, seize all public lands and lease or give such lands to the emancipated slaves. When asked where he found the precedent for his bill to establish such governments, Ashley replied: "Sir, we make precedents here."⁸² Ashley also repeatedly argued that Congress's war powers were sufficient to justify Reconstruction measures.

Other evidence of Ashley's broad view of the enforcement power is the fact that at the same time that he introduced his amendment, Ashley proposed a statute to enforce it. The statute would have given blacks the right to vote and taken that right away from the rebels.⁸³ Ashley's statute was an early attempt at a Reconstruction measure, and a leading example of the Radical advocacy of voting rights for the freed slaves. The question of whether freed slaves had the right to vote caused conflict between the Republicans, and many Reconstruction-era debates focused on this issue. Ashley's proposed statute indicates that he, at least, believed that once a slave was free, he was automatically entitled to the right to vote by virtue of his status as a free person.

Ashley's amendment and statute did not get far in the House of Representatives. Meanwhile, in the Senate, Senator Lyman Trumbull proposed another version of the amendment, based on the language of the Northwest Ordinance.⁸⁴ Trumbull's choice of the Northwest Ordinance invoked the Abolitionists' reverence for that ordinance, which prohibited slavery in the Northwest Territories. It had formed one of the bases for the anti-slavery constitutionalist's argument that the Constitution already prohibited slavery.⁸⁵ Trumbull also relied upon the Northwest Ordinance because it had been written by the Democrats' hero, Thomas Jefferson, and Trumbull hoped that this would help him to garner the Democratic support needed to approve the amendment.⁸⁶ The Senate Judiciary Committee chose Trumbull's proposal over the proposed language of his radical colleague, Sena-

ing that the 1866 Civil Rights Act remedies were modeled on the Fugitive Slave Act and based on the Court's reading of congressional power in *Prigg*).

82 See Ashley, *supra* note 34, at 361.

83 See VORENBERG, *supra* note 78, at 49.

84 See CONG. GLOBE, 38th Cong., 1st Sess. 1483-90 (1864).

85 See WIECEK, *supra* note 22, at 112 (discussing the role of the Declaration of Independence and the Northwest Ordinance in anti-slavery constitutionalism).

86 VORENBERG, *supra* note 78, at 59.

tor Charles Sumner of Massachusetts. Sumner had proposed an amendment that would have simply provided that all people were "equal before the law."⁸⁷ While the committee chose Trumbull's language in part for strategic reasons, during debates over the 1866 Civil Rights Act, Trumbull and others indicated that they had accomplished Sumner's goal by ending slavery.⁸⁸ Sumner's express language of equality eventually became part of the Constitution in the Equal Protection Clause of the Fourteenth Amendment.

Trumbull's amendment had also differed from Ashley's in that it included Section 2 of the Fourteenth Amendment, authorizing Congress to enforce the provisions of the amendment. This change indicates that Trumbull, as a careful lawyer, did not want to leave Congress's power in doubt. Less than a decade earlier, the Supreme Court had held that Congress lacked the power to abolish slavery in the notorious *Dred Scott* decision. Thus, Trumbull and the other members of the Reconstruction Congress wanted to make it clear beyond a doubt that they now had the power to accomplish what many of them had hoped to do for years. They used the language "appropriate" in order to invoke the broad construction of congressional power from the Court's *McCulloch v. Maryland* opinion.⁸⁹ Although the members of the Thirty-Eighth Congress said little more about the enforcement power during debates over the Thirteenth Amendment, no doubt in part to avoid alienating their moderate allies, debates over the 1866 Civil Rights Act reflect the fact that they thought their enforcement power was broad indeed, and that it extended to proclaiming freed slaves as citizens and extending to them the rights of citizenship.

The Thirteenth Amendment was approved by the Senate by an overwhelming vote on April 8, 1864.⁹⁰ However, its success in the House of Representatives required a heroic effort. It failed on the first vote, during an uneasy summer in which the war effort seemed to be failing and the question of who would be the Republican nominee for president was still up in the air.⁹¹ Lincoln eventually declared his support for the measure and made it a defining issue in his presidential campaign.⁹² Because the war effort was uncertain, few Repub-

87 CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864); see also VORENBERG, *supra* note 78, at 55.

88 VORENBERG, *supra* note 78, at 59.

89 See CONG GLOBE 42d Cong., 1st Sess. 693, 728 (1871); CONG. GLOBE, 38th Cong., 1st Sess. 21, 1118, 1199 (1864) (statement of Rep. James Wilson).

90 See VORENBERG, *supra* note 78, at 112.

91 *Id.* at 152-53.

92 *Id.* at 125, 142.

licans joined Lincoln in his mission to end slavery during that fall. However, James Ashley was unique in his strong, continued advocacy for abolition, repeatedly affirming “man’s equality before the law,” and boasting that he had written the anti-slavery amendment.⁹³ Once Ashley and Lincoln won, they both declared the election a popular mandate for the anti-slavery amendment.⁹⁴ However, it still required considerable lobbying and arm-twisting to get enough votes for the amendment in the House. Behind the scenes, Ashley and Lincoln managed to convince enough members of Congress to vote in favor of their amendment.⁹⁵ The final, successful House vote was on January 31, 1865. Ashley wired his local paper, the *Commercial*: “Glory to God in the Highest! Our country is free!”⁹⁶

III. THE FOURTEENTH AMENDMENT

Bingham supported the substance of the 1866 Civil Rights Act, stating that he wanted the Bill of Rights to be enforced “in every State and Territory of the United States.”⁹⁷ Bingham was worried that Congress lacked the authority to enact the statute.⁹⁸ He did not agree with his colleagues who felt that the power to enforce the Thirteenth Amendment was an adequate basis. Bingham believed that the Act did nothing more than to state the rights of citizenship that the newly-freed slaves already possessed.⁹⁹ What worried him was the lack of a constitutional provision authorizing Congress to make those rights enforceable against state governments.¹⁰⁰ Bingham’s fear that the Court would find the statute unconstitutional was not surprising given that in his experience, the Court had always represented the interests of the slave power, most notably with its notorious *Dred Scott* ruling.¹⁰¹ Therefore, Bingham introduced another amendment, which became the Fourteenth.

93 VORENBERG, *supra* note 78, at 171; Benedict, *supra* note 5, at 834. The boast was inaccurate. Although Ashley was the first to introduce a version of the amendment, Congress had adopted different language. VORENBERG, *supra* note 78, at 171 & n.109.

94 VORENBERG, *supra* note 78, at 174, 187.

95 *Id.* at 180.

96 Benedict, *supra* note 5, at 835 (citing HOROWITZ, *supra* note 12, at 102–05).

97 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866); see Aynes, *supra* note 2, at 72.

98 CURTIS, *supra* note 2, at 82–83.

99 See Aynes, *supra* note 2, at 70.

100 ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 48 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866)).

101 *Id.* at 29–36 (describing the various court decisions that found for slave owners during this time period).

Bingham's version of the Fourteenth Amendment would have empowered Congress "to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."¹⁰² In his speech in support of the Fourteenth Amendment, Bingham explained why congressional enforcement power was so important:

It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do . . . that is, to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State.¹⁰³

The Amendment was changed before it was adopted, but its supporters continued to argue in favor of broad congressional power to enforce the rights of citizenship.¹⁰⁴

Bingham's amendment was referred to the Joint Committee on Reconstruction, where it was substantially rewritten.¹⁰⁵ Bingham's section one was divided into two sections: section one, a self-enforcing provision that included the equal protection, due process, and privileges or immunities clause, and section five, which gave Congress the power to use "appropriate" measures to enforce the provisions of the amendment. The citizenship clause was added during the Senate debate over the Act in order to reinforce the Citizenship Clause of the 1866 Civil Rights Act and to ensure that *Dred Scott* was overruled.¹⁰⁶ These sections are the portions of the Fourteenth Amendment that are most relevant today. However, at the time that it was debated before Congress, the most controversial provisions of the Fourteenth Amendment were its sections two through four, which governed the voting rights of freed slaves and former rebels.¹⁰⁷ Bingham remained

102 CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866) (statement of Rep. John A. Bingham).

103 *Id.* at 2542; see also CURTIS, *supra* note 2, at 87.

104 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 50-51 (noting that despite changes in the Fourteenth Amendment, supporters pushed for a strong congressional power that could enforce the fundamental liberties contained in the Fourteenth Amendment against the States).

105 CURTIS, *supra* note 2, at 87-91.

106 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 42-47 (noting that *Dred Scott* was the "elephant in the room" throughout [the] debates" over the Amendment). Some members of Congress believed that the Thirteenth Amendment had already overruled *Dred Scott*. See CURTIS, *supra* note 2, at 48.

107 See BENEDICT, *supra* note 7, at 182-85 (discussing the contentious proceedings in the House concerning impartial suffrage); CURTIS, *supra* note 2, at 91.

a staunch proponent of the Fourteenth Amendment, and served as its floor manager in the House of Representatives.¹⁰⁸ Unlike the Thirteenth Amendment, the Fourteenth easily cleared both Houses of Congress.¹⁰⁹ The easy passage of the Fourteenth Amendment is due in large part to the notorious Black Codes enacted by Southern States, which purported to deprive freed slaves of basic legal rights. By mid-1866, even the conservative members of Congress recognized that federal power was necessary to prevent States from reinstating slavery in all but name.¹¹⁰

IV. RECONSTRUCTION AND THE RIGHTS OF CITIZENSHIP

The debates of the Reconstruction Congress resonated with the language of citizenship. By 1866, many members of Congress had adopted Bingham's theory of citizenship rights.¹¹¹ They wanted, first and foremost, to make it clear that freed slaves were United States citizens, and that citizenship entitled them to a broad array of fundamental rights.¹¹² Those rights included at least the right to life, liberty, and property, as well as the rights derived from the Bill of Rights.¹¹³ Some members of Congress, such as Senator Jacob Howard, argued that the rights of citizenship included all fundamental human rights.¹¹⁴ Regardless of how they defined those rights, what united most members of the Reconstruction Congress was their desire to en-

108 See Aynes, *supra* note 2, at 590 (“[O]ne cannot read the journal of the Joint Committee on Reconstruction without seeing conclusive evidence that Bingham was not only the drafter of this language, but also the relentless champion of engrafting these concepts into the Constitution.”).

109 See CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866) (stating that the House vote was 128 to 37, with 19 not voting); see also *id.* at 3042 (recording the Senate vote to approve at 42 to 1 with 6 absent).

110 See CURTIS, *supra* note 2, at 35.

111 *Id.* at 54.

112 See ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 43–46 (noting that most supporters of the Act had adopted a broad reasoning of federal citizenship rights proposed by Bingham and others before the Civil War).

113 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866) (recording Representative Donnelly's speech in which he argued that the Constitution's “sacred pledges of life, liberty, and property” should not be left unprotected because of a debate over whether Congress has the power to enforce these rights); Zietlow, *Belonging, Protection and Equality*, *supra* note 1, at 314 (stating that the framers of the bill meant for the “right to life, liberty and property” to be included along with “a body of fundamental rights that cannot be taken away by the government”).

114 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (recording Representative Howard's statement in which he cites *Corfield*, which affirmed the right of every United States citizen to be accorded fundamental privileges and immunities).

force them, and to empower members of futures Congresses to do the same.

The Thirteenth Amendment does not expressly refer to citizenship. However, in congressional debates, James Ashley made it clear that he believed in the rights of citizenship. During a debate over a proposed Reconstruction measure, Ashley declared: "I want the national Constitution to be the shield of every citizen, so that when a man truthfully declares, 'I am an American citizen,' it shall command the respect of the world."¹¹⁵ Moreover, it is clear that many members of that Congress believed that by enacting the Thirteenth Amendment, they had bestowed the rights of citizenship upon the freed slaves. Immediately following the ratification of the Thirteenth Amendment, Senator Lyman Trumbull introduced the 1866 Civil Rights Act, a bill which purported to establish freed slaves as citizens.¹¹⁶ Debates over the 1866 Act reveal that a majority of the members of the Reconstruction Congress believed that to be free was to be a citizen, and to be entitled to fundamental human rights.¹¹⁷ There was little disagreement on this issue among supporters of the Reconstruction measures.

The Citizenship Clause of the 1866 Act provided:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s], in every State and every Territory in the United States.¹¹⁸

It also provided that such citizens would enjoy the "full and equal benefit of all laws and proceedings for the security of person and property."¹¹⁹ The rights enumerated in the Act include the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."¹²⁰ Thus, the 1866 Civil Rights Act linked citizenship to civil rights,¹²¹ as Senator Jacob Howard explained in a speech in support of the Act:

115 CONG. GLOBE, 40th Cong., 2d Sess. 118 (1867).

116 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (proposing that former slaves be declared American citizens in order to ensure freedom to all persons within the United States).

117 See CURTIS, *supra* note 2, at 48 ("Republicans believed that the Thirteenth Amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens.").

118 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified in 42 U.S.C. §§ 1981–1982 (2000)).

119 *Id.*

120 *Id.*

121 See Kaczorowski, *supra* note 81, at 204 ("[T]he framers of the Fourteenth Amendment incorporated the Civil Rights Act into section 1 of the Amendment.").

And what are the attributes of a freeman according to the universal understanding of the American people? . . . I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race.¹²²

Introducing the 1866 Act, Senator Trumbull explained that Congress's power to enact the bill came from Section 2 of the Thirteenth Amendment, as well as Congress's naturalization power and the Article IV Privileges and Immunities Clause.¹²³ Other members of Congress echoed his view. For example, Senator James Lane added that former slaves "are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States."¹²⁴ House Judiciary Chair Representative James Wilson explained, "It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen," affirming that he believed that the newly freed slaves had become citizens once they were emancipated.¹²⁵ These members of Congress expressed an inclusive vision of citizenship rights—that once slaves were freed, they immediately became entitled to the fundamental human rights that inhered in citizenship.

Representative John Bingham agreed with Wilson's and Lawrence's theories of the inherent rights of citizenship.¹²⁶ Although he disagreed that Congress had the power to enforce those rights against state governments absent express authorization, the vast majority of his colleagues did not share his concern. The 1866 Civil Rights Act was approved by an overwhelming margin over the veto of President Andrew Johnson.¹²⁷ The overwhelming vote in favor of the 1866 Act

122 CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

123 *Id.* at 475 ("I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.").

124 *Id.* at 602. Lane argued that the 1866 Act was an example of "appropriate legislation, to carry out [the] emancipation" of the Thirteenth Amendment. *Id.*

125 *Id.* at 1117.

126 Introducing his version of the Fourteenth Amendment, which lacked a citizenship clause, he explained: "Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States." CONG. GLOBE, 37th Cong., 2d Sess. 1034 (1866); see Aynes, *supra*, note 2, at 61 (arguing that "Bingham intended the Fourteenth Amendment to enforce the Bill of Rights against the states and that many of his contemporaries shared his belief regarding the Amendment's purpose"). However, Bingham disagreed with the view of many of his contemporaries that Congress had the power to enforce those rights before they enacted the Fourteenth Amendment. See *supra*, notes 2, 4, 7, 48–52 and accompanying text.

127 See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; see also CONG. GLOBE 39th Cong., 2d Sess. 348 (1867); CONG. GLOBE 39th Cong., 2d Sess. 1861 (1868).

reflects the fact that the vast majority of the Reconstruction Congress believed that both the Thirteenth and Fourteenth Amendments protected the fundamental rights of newly freed slaves and others in our society.

V. CONCLUSION

This Article is intended to familiarize the reader with two of the leaders of the Reconstruction Congress, and to stimulate thinking about the similarities and differences between the two Amendments. Was the Thirteenth Amendment a more radical measure than the Fourteenth? One indication of the Thirteenth Amendment's radical nature is its mandatory language which applies to both state and private action.¹²⁸ By contrast, the statement of rights in the Fourteenth Amendment begins with the phrase: "No state shall," and it has been interpreted as only applying to state action.¹²⁹ Another is the fact that the Thirteenth Amendment clearly protects economic rights, and authorizes Congress to establish fundamental economic rights. By contrast, the Fourteenth Amendment guarantees only procedural rights against government deprivations of property. Finally, because the Court has been significantly more deferential to Congress in its interpretation of Section 2, than it has with regard to Section 5, Congress retains considerable autonomy to decide for itself which rights are protected by the Thirteenth Amendment. The Reconstruction Congress believed that the Thirteenth Amendment protected fundamental rights, including the rights of citizenship. I hope that this Article will prompt more discussion about what those rights might be.

128 See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367 (2008) ("Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment restrains not only government actors, but also private individuals.").

129 However, debates over the 1871 Enforcement Act reflect the fact that at least some members of the Reconstruction Congress believed their power to enforce the Fourteenth Amendment extended to private action. Michael Kent Curtis and Judith Baer argue convincingly that the state action requirement is an incorrect interpretation of that Amendment. CURTIS, *supra* note 2, at 168–70.