

## Prologue

In the fall of 2003, I attended a conference on the Fourteenth Amendment in Philadelphia. Not far from our conference, I saw a historical marker commemorating the Republican Party's first nominating convention in 1856. That evening, I mentioned the marker to my friends from law school, Sarah Ricks and Tom Dolgenos. Tom responded that if I was learning about members of the early Republican Party, I might be interested in his great-great-grandfather, James Ashley, the first member of Congress to propose a constitutional amendment to end slavery. Tom pulled out a book with a picture of Ashley, and I saw for the first time the wild mane of hair and dark penetrating eyes of the radical Republican from Toledo, Ohio. According to Tom, his great-great grandad's version of the Thirteenth Amendment would have prohibited all bondage, including that of convicted prisoners.<sup>1</sup> I was intrigued by Tom's story. Yes, I said, I am very interested.

When I first heard of Ashley, I already knew about other leaders of the Reconstruction Congress, and was already engaged in learning about their accomplishments. Earlier that year, I had the pleasure of meeting

<sup>1</sup> This bit of family lore turned out to be inaccurate. Though Ashley's version of the Thirteenth Amendment differed slightly from that eventually adopted, it did include an exception for people duly convicted of a crime. ("Article. 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." See Letter from James Ashley to Benjamin Arnett, December 22, 1892, Benjamin Arnett, ed., *Duplicate Copy of the Souvenir from the Afro-American League of Tennessee to Hon. James M. Ashley of Ohio* (Philadelphia: Publishing House of the AME Church, 1894), 329, 331.

Richard Aynes and Michael Kent Curtis at a conference celebrating John Bingham and the Fourteenth Amendment. I was struck by Richard's and Michael's depth of knowledge about Bingham as well as their passion for educating people about the remarkable contributions that Bingham made to our constitutional history.<sup>2</sup> Later, I met Lea Vandervelde and learned about her work on Senator Henry Wilson, another influential member of the Reconstruction Congress and supporter of the Thirteenth Amendment.<sup>3</sup> I grew to share these scholars' passion for the members of the Reconstruction Congress. I admire the Reconstruction Congress members' work to end slavery, enact the first civil rights measures, and amend the Constitution to establish federal rights that are enforceable against state and federal governments. James Ashley was a leader among them, yet most constitutional scholars and many historians had never heard of him.<sup>4</sup>

My interest in Ashley deepened as I learned the extent of his radicalism and idealism. Ashley joined the antislavery movement as a young man, and he helped to found the Republican Party as an antislavery party. Ashley led initiatives to end slavery and other exploitative labor practices, establish fundamental rights for free blacks, and expand suffrage rights. As early as 1856, Ashley called for voting rights for free blacks. During Reconstruction he proposed a constitutional amendment that would have established voting rights for women. James Ashley's story is one of leadership and activism, of political engagement to advance the cause of human rights. He recognized that slavery was based on an ideology of white supremacy and racial subordination that facilitated the exploitation of slave labor and gross violations of their human rights. Ashley was

<sup>2</sup> John Bingham, another member of the House of Representatives from Ohio, was a leading member of the Reconstruction Congress, and a strong advocate for the rights of freed slaves. Bingham is best known as the principal author of Section 1 of the Fourteenth Amendment, with its Equal Protection, Due Process and Privileges or Immunities Clauses. See Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* 103 (1993); Gerard Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York: NYU Press 2013).

<sup>3</sup> See, e.g., Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138 (1989): 437; Lea S. Vandervelde, "Henry Wilson, Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment," *Georgetown Journal of Law and Politics* 15 (2017): 173.

<sup>4</sup> See Les Benedict, "James M. Ashley, Toledo Politics and the Thirteenth Amendment," *University of Toledo Law Review* 38 (2007): 815, 815 ("Although he was well known during the Civil War era, [Ashley] has largely faded from the historical record. Even historians of the Civil War and Reconstruction are not very familiar with him, and legal scholars are even less so.")

truly on the forefront of the fight for liberty as he developed a vision of rights that included racial equality and economic rights for workers.

Ashley's story is an inspiring one, and it aids in understanding a crucial period in our country's constitutional development, the Reconstruction Era. It is a fascinating time in the transformation of our nation's law and politics. However, my interest in the Reconstruction Era is not only historical. Although Reconstruction occurred 150 years ago, this crucial era of constitutional development still resonates in the United States today. In many ways, our national still has not resolved the conflicts that characterized that era. As my friend Leslie Goldstein once said at a constitutional law workshop, when it comes to understanding essential constitutional principles, "we always keep coming back to Reconstruction." This insightful statement also applies to understanding our nation's politics.

One hundred fifty years after the Reconstruction Era, racial divisions still plague our nation, and our country still depends on the exploitation of labor, especially workers of color. After Reconstruction ended, southern states resurrected slavery "in all but name" with the convict leasing and sharecropping systems.<sup>5</sup> Jim Crow laws not only treated blacks as second-class citizens lacking human rights, but also facilitated the exploitation of their low-wage and unpaid labor. Today, black men are incarcerated at such a high rate that legal scholar Michelle Alexander has referred to the mass incarceration phenomenon as the New Jim Crow.<sup>6</sup> Our national economy depends on the labor of millions of undocumented immigrants who are easily exploited by unscrupulous employers because they are afraid of being discovered.<sup>7</sup> The crackdown on immigration in early 2017 prompted many undocumented immigrants to flee to Canada,

<sup>5</sup> See Douglas A. Blackmon, *Slavery by Another Name: The Re-enslavement of Black Americans from the Civil War to World War II* (New York: Anchor Books, 2009).

<sup>6</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010). Ava Du Vernay's highly acclaimed film "13th" links the modern-day prison industrial complex directly to the institution of slavery. See Bethonie Butler, "Ava DuVernay's Netflix Film '13th' Reveals How Mass Incarceration Is an Extension of Slavery," *Washington Post*, October 6, 2016. Du Vernay's film focuses on the "exceptions clause" of the Thirteenth Amendment (which prohibits slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted"). *Ibid.*

<sup>7</sup> See Maria Ontiveros, "Immigrant Workers' Rights in a Post-Hoffman World: Organizing Around the 13th Amendment," 18 *Georgetown Immigration Law Journal* 18 (2004): 651; Maria Ontiveros, "Is Modern Day Slavery a Private Act or a Public System of Oppression?," *Seattle University Law Review* 39 (2016): 665.

following in the footsteps of fugitive slaves from the antebellum era. The Black Lives Matter movement has developed in response to police violence against the black community. A new group of black authors and artists have recently explored anew the meaning of slavery and racism to our national identity.<sup>8</sup> Their work highlights the importance of studying the Reconstruction Era to understand some of the most pressing legal and political issues confronting our society today.

Ashley's story was also important to me because it aids in revealing the history and promise of the Thirteenth Amendment. As a student at Yale Law School in the late 1980s, I was inspired by the Warren Court's enforcement of Fourteenth Amendment-based rights against state government.<sup>9</sup> We worshipped what I call the "*Brown* story" of civil rights – court enforcement of the Equal Protection Clause. By the time I learned about Ashley, however, I had grown skeptical of the *Brown* story and disillusioned by the Court's formal approach to equality under the Equal Protection Clause.<sup>10</sup> My dear friend Denise Morgan and I developed an alternative vision of rights that we called "rights of belonging," those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community.<sup>11</sup> Rights of belonging included both the right to be free

<sup>8</sup> See, e.g., Paul Beatty, *The Sell Out* (New York: Farrar, Strauss and Giroux, 2015); Ta-Nehisi Coates, *Between the World and Me* (New York: Spiegel & Grau, 2015); Yaa Gyasi, *Homegoing* (New York: Alfred A. Knopf, 2016); Colson Whitehead, *The Underground Railroad* (New York: Doubleday, 2016); and the art of Kerry James Marshall. See Darryl Pinckney, "Kerry James Marshall: Mastry," *New York Review of Books*, January 2, 2017.

<sup>9</sup> In *Brown v. Board of Education*, the US Supreme Court held that racially segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). Many of my professors viewed this decision as the catalyst for the civil rights movement of the 1960s. Indeed, it seemed to me that every professor at Yale Law School could remember the day that the US Supreme Court decided the landmark case of *Brown v. Board of Education*. Historians see a more complex relationship. See, e.g., Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* 82 (1996): 1 (describing the differing views held by law professors and historians of the relationship between the *Brown* decision and the civil rights movement).

<sup>10</sup> Under the formal equality approach, the Court applies the same level of scrutiny to legislation that is intended to help racial minorities as that which discriminates against minorities. See, e.g., *Parents Involved in Community Schools v. Seattle District No. 1*, 551 U.S. 701 (2007).

<sup>11</sup> See Denise C. Morgan and Rebecca E. Zietlow, "The New Parity Debate: Congress and Rights of Belonging," *Cincinnati Law Review* 73(2005): 1347; I discuss rights of belonging at length in my first book. See Rebecca E. Zietlow, *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights* (New York: NYU

of discrimination based on immutable characteristics and the positive economic rights needed to be an active member in one's community. However, the Supreme Court had refused to find any economic rights in the Equal Protection Clause.<sup>12</sup> In Risa Goluboff's classic book, *The Lost Promise of Civil Rights*, I learned the history of the New Deal era labor-focused vision of civil rights based primarily on the Thirteenth Amendment.<sup>13</sup> As I learned more about Ashley, I discovered the ideological continuity between Ashley's ideology and that of the New Deal era movement. I turned to the Thirteenth Amendment, with its promise of economic and racial equality.

My interest in economic rights grew out of the four years I spent as a legal services attorney in the South Side of Chicago, representing clients who were primarily African American. Many of my clients had migrated from the Deep South, hoping to escape the virulent racism and violence of the Jim Crow era and find a better life in the North. Unfortunately, in the North they encountered racial segregation, the lack of economic opportunity, gang violence, and a police force that was indifferent, if not hostile, to their needs. Clearly, the civil rights revolution of the 1960s had achieved minimal gains for my clients. They were engaged in a daily struggle for economic survival and physical safety. Many of my clients were descended from slaves, and they still suffered from slavery's legacy of race discrimination and economic subordination.

Later, I became a law professor in James Ashley's home town, Toledo, Ohio. There I learned first-hand about the importance of rights for workers, black and white, who worked for the automobile industry. The city of Toledo has a special place in labor history because of the 1934 Toledo Auto-Lite strike, a catalyst for congressional approval of the National Labor Relations Act. The Auto-Lite workers fought for the right to organize, strike, and bargain collectively.<sup>14</sup> They succeeded, and their

Press, 2006). Tragically, Denise Morgan died in 2006 and we were unable to complete our work together.

<sup>12</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding no right to a minimum income under the Equal Protection Clause of the Fourteenth Amendment). See Julie A. Nice, "Whither the Canaries? On the Exclusion of Poor People from Equal Constitutional Protection," *Drake Law Review* 60 (2012): 1023.

<sup>13</sup> Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007).

<sup>14</sup> James Gray Pope and Rebecca E. Zietlow, "The Auto-Lite Strike and the Fight against 'Wage Slavery,'" *University of Toledo Review* 38 (2007): 839, reprinted in Kenneth M. Casebeer, ed., *American Labor Struggles and Law Histories* (Durham, NC: Carolina Academic Press, 2011).

union jobs earned good wages, enough to buy a home and a car, raise children, and send them to college. By the 1990s when I moved to Toledo, however, union density was on the decline, as was the automotive industry. General Motors was once the leading employer of workers in Ohio, but now Walmart has far surpassed GM. The new, nonunionized, jobs available to high school graduates pay minimum wage and lack benefits and job security. Moreover, workers are often scheduled on demand, which makes it impossible for them to plan from day to day. The decline in wages and quality of life for low wage workers has contributed to the despair reflected in increased drug and alcohol abuse and declining life expectancy of the working class in the United States.<sup>15</sup> The Reconstruction Era promise of free labor also has failed for these workers.

Reconstruction is not generally viewed as relevant to the white working class. However, James Ashley drew a connection between the plight of southern slaves and northern white workers. James Ashley recognized the link between racial and economic justice. He saw commonality of interest between white workers and black slaves. He drew a connection between the exploitation of slaves and poor wages and working conditions for white workers. Many northern workers participated in the antislavery movement and joined the antislavery Republican Party. Northern workers fought for the Union Army, and helped fugitive slaves to escape across enemy lines. After the war, Ashley's Thirteenth Amendment abolished not only slavery but also involuntary servitude, ending the northern institution of indentured servitude and establishing a paradigm of free labor. In fact, the Reconstruction Era transformed the all of work for all workers, including my clients in Chicago and the automobile workers in Toledo. As I wrote this book, I always had both groups of people in mind.

Finally, the Reconstruction Era still resonates in the political arena. In 2008, white workers helped to elect the first black president of the United States, Barack Obama. Working with the Obama campaign in Toledo, I saw how Obama inspired workers of all races who were suffering during the Great Recession. The night that Obama was elected, I listened to The Band song, "The Night They Drove Old Dixie Down." I joked (well, half

<sup>15</sup> See Jessica Body, "The Forces Driving Middle-Aged White People's 'Deaths of Despair,'" NPR, March 23, 2017, [www.npr.org/sections/health-shots/2017/03/23/521083335/the-forces-driving-middle-aged-white-peoples-deaths-of-despair](http://www.npr.org/sections/health-shots/2017/03/23/521083335/the-forces-driving-middle-aged-white-peoples-deaths-of-despair); Anne Case and Sir Angus Deaton, "Mortality and Morbidity in the 21st Century," [www.brookings.edu/bpea-articles/mortality-and-morbidity-in-the-21st-century/](http://www.brookings.edu/bpea-articles/mortality-and-morbidity-in-the-21st-century/).

joked) that the Union had finally won the Civil War. Eight years later, however, many of those same workers voted for the openly racist Donald Trump for president. In part, the election of Trump reflected a general disillusionment with politicians and a desire for change. However, it is undeniable that Trump's election coincided with an increase in racist hate speech and racial violence and that voters were largely divided across racial lines. Electoral College maps superimposed over the map of the Confederate states showed a striking overlap between the states that voted for Trump and those that seceded to protect slavery. The margin of victory, however, depended on the northern industrial states marked by the decline in well-paying union manufacturing jobs. Race had divided the working class, and white workers voted against both their economic interests and those of their co-workers of color.

Thus, as I was writing about the political battles of the past and the idealism of James Ashley and his Reconstruction Era allies, I witnessed the polarized and challenging political battles of the early twenty-first century and thought about the parallels between the past and the present. Ashley and his allies grew up in a country with an economy dependent on the brutal, inhuman, racist institution of chattel slavery. They formed coalitions and engaged in constitutional politics to outlaw an institution that they saw as incompatible with our nation's fundamental values. Ashley and his allies used the upheaval of the Civil War to further their mission to outlaw slavery and establish fundamental human rights. Their mission was successful, but in some ways their success was fleeting. One hundred fifty years later, our economy continues to depend on underpaid and exploited labor, mostly performed by racial minorities. On the other hand, the laws that embodied Ashley's vision largely remain on the books too, including most notably the Thirteenth Amendment and its promise of free labor. Ultimately, I hope that my book can serve as a resource for those, like Ashley, who are working for the cause of racial and economic justice.