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# The Dangerous Thirteenth Amendment

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# PANEL I: THIRTEENTH AMENDMENT IN CONTEXT

## THE DANGEROUS THIRTEENTH AMENDMENT

*Jack M. Balkin\* and Sanford Levinson\*\**

*Through most of its history, the Thirteenth Amendment has been interpreted extremely narrowly, especially when compared to the Fourteenth Amendment and the Bill of Rights. The Thirteenth Amendment has been read in this way because it is “dangerous.” The demand that “neither slavery nor involuntary servitude . . . shall exist within the United States,” taken seriously, potentially calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself.*

*Our contemporary association of “slavery” with a very limited set of historical practices is anachronistic and the result of a long historical process. Yet at the time of the founding, the concept of “slavery” was far broader than currently understood. “Slavery” meant illegitimate domination, political subordination, and the absence of republican government; “chattel slavery” was only the most extreme and visible example of slavery.*

*The broader, antirepublican concept of slavery was narrowed to avoid awkward comparisons to the economic and political subordination of wage laborers and women. Once chattel slavery was abolished, labor activists and suffragists sought to revive the older, broader concept of “slavery.” But emancipation allowed defenders of the status quo to insist that American society was now “free.” Even today, calling an injustice “slavery” is generally seen as overheated hyperbole and even a presumptuous insult to the memory of the victims of African American chattel slavery. This Essay concludes by asking how our political imagination has been limited as a result of this history.*

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## INTRODUCTION

One of the ironies of the U.S. Constitution is that although it was clearly designed to accommodate the interests of slaveholding states, the word “slavery” first appears in the Constitution in the Thirteenth Amendment, which claims to abolish slavery forever. Given its text—and the background context of 250 years of American history—the Thirteenth Amendment seems to portend a major transformation in both law and society: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>1</sup> Moreover, Section 2 of the Amendment gave Congress its first new enumerated power since 1787: the “power to enforce this article by appropriate legislation.”<sup>2</sup>

What is noteworthy, however, is that although the text of the Thirteenth Amendment seems to promise much, it has, over its 150-year lifespan, delivered remarkably little beyond the initial elimination of African American chattel slavery. With few exceptions, the United States Supreme Court has read the Thirteenth Amendment, and especially Section 1, quite narrowly, at least in comparison to other amendments—including, most significantly, its immediate successor, the Fourteenth.<sup>3</sup> Consider, for example, Justice Sandra Day O’Connor’s 1988 summary of Thirteenth Amendment doctrine: “The primary purpose of the Amendment,” O’Connor explained, “was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose.”<sup>4</sup> What else, then, is included? O’Connor explains that the addition of the ban on involuntary servitude “was intended to extend ‘to cover those forms of compulsory labor *akin to African slavery* which in practical operation would tend to produce like undesirable results.’”<sup>5</sup> Thus, O’Connor concluded, “our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened

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1. U.S. Const. amend. XIII, § 1.

2. *Id.* § 2.

3. One might also compare the Nineteenth Amendment, which, like the Thirteenth, was the product of sustained social movements. Each has left relatively few traces in either case law or even the operative rhetoric of American political discourse. Reva Siegel has pointed out that a narrow reading of the Nineteenth Amendment was by no means required by the Amendment’s text, even though its language is arguably narrower than that of the Thirteenth. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *Harv. L. Rev.* 947, 953 (2002) (observing that immediately after ratification, “some courts understood the Nineteenth Amendment to have implications for practices other than voting, . . . [but] soon thereafter the Amendment came to be interpreted as a nondiscrimination rule governing voting with no bearing on questions of women’s citizenship outside the context of the franchise”).

4. *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

5. *Id.* (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)) (emphasis added).

use of physical or legal coercion.”<sup>6</sup> Nevertheless, O’Connor cautioned that “[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”<sup>7</sup> Presumably the Amendment does not protect people from being pressured to accept even the most toilsome—and inadequately rewarded—labor out of fear of absolute privation or starvation. O’Connor noted that the Thirteenth Amendment might someday mean more than this, but she was simply explaining what the Court had so far held in the first 120 years of the Amendment’s existence for purposes of applying a specific federal criminal statute, 18 U.S.C. § 241, which punishes conspiracies to violate established constitutional rights.<sup>8</sup>

It is worth emphasizing how narrow this interpretation is. Compare it with the evolving jurisprudence of the Fourteenth Amendment, which, among other things, was originally designed to establish equal citizenship for blacks and whites and to make unconstitutional the Black Codes, state laws that had sought to return the newly freed men and women to conditions little better than chattel slavery.<sup>9</sup> Suppose that in 1988 the Court had summarized 120 years of Fourteenth Amendment jurisprudence by asserting that the Equal Protection Clause extended only “to cover those forms of [denials of rights and liberties] . . . akin to [the Black Codes] . . . which in practical operation would tend to produce like undesirable results.”<sup>10</sup> Most people today would find this interpretation implausibly narrow, almost a parody of originalist argument.<sup>11</sup> If the

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6. *Id.* at 944.

7. *Id.*

8. See *id.* (“We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.”). Section 241 “creates no substantive rights, but prohibits interference with rights established by the Federal Constitution or laws and by decisions interpreting them.” *Id.* at 941. Fair warning requires that convictions under § 241 show “intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them.” *Id.* Hence it was necessary for the Court to recite the established law of Section 1 of the Thirteenth Amendment.

9. See Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* 164 (2011) (“Following the collapse of slavery, southern states attempted to reinstitute chattel slavery by another name through the Black Codes and through a campaign of terror against the freedmen and their white allies. The Fourteenth Amendment sought to outlaw these practices and promised equal citizenship.”); see also Cong. Globe, 39th Cong., 1st Sess. 588–89 (1866) (statement of Rep. Ignatius Donnelly) (describing legislation passed by various Southern states that reestablished conditions akin to slavery); *id.* at 474 (statement of Sen. Lyman Trumbull) (noting Southern legislatures “still imposed upon [the freedmen] . . . the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished”).

10. *Kozminski*, 487 U.S. at 942 (quoting *Butler*, 240 U.S. at 332).

11. Well, not quite a parody since one of the most famous originalist scholars argued something very much like this. See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 20–23, 29–31, 44, 117–33 (1977) (arguing that Fourteenth Amendment was designed to overturn Black Codes by guaranteeing basic

Thirteenth Amendment were taken as seriously as the Fourteenth has been taken, one would expect considerable political and legal efforts to make sense of its underlying purposes and apply its terms (and purposes) to new situations. Just as the Establishment Clause has been read to ban more than state-sponsored churches or government-salaried ministers, and the Free Speech Clause to protect all manner of expression, one would have asked how best to make sense of the terms “slavery” and “involuntary servitude” in a modern world. But, as *United States v. Kozminski* demonstrates, precisely the opposite has occurred. In the Supreme Court’s jurisprudence, at least, the more limited the meaning of these terms, the better.

Part I of this Essay describes the multiple and overlapping reasons why the Thirteenth Amendment has been read far more narrowly than the Fourteenth Amendment and the Bill of Rights. Part II explains why interpreting the Thirteenth Amendment in the same way contemporary interpreters read the Fourteenth Amendment or the Bill of Rights is “dangerous.” The demand that “neither slavery nor involuntary servitude . . . shall exist within the United States,” taken seriously, potentially calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself. Indeed, the Thirteenth Amendment’s ban on “slavery” is the flip side of Article IV Section 4’s guarantee of “republican government,”<sup>12</sup> another clause with enormous potential reach that has effectively been read out of the Constitution (and, not coincidentally, out of the standard canon of constitutional subjects taught at America’s law schools<sup>13</sup>).

Part III explains that our contemporary association of “slavery” with a very limited set of historical practices is anachronistic and the result of a long historical process. The language of the Thirteenth Amendment is taken from the 1787 Northwest Ordinance.<sup>14</sup> Yet at the time of the founding, the concept of “slavery” was far broader than currently understood. “Chattel slavery” was only the most extreme and visible example of “slavery,” which meant illegitimate domination, political subordination, and the absence of republican government. American colonists repeatedly argued that the British Empire had made them slaves because they

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common law civil rights protected by Civil Rights Act of 1866, and little more, and should be so interpreted today); Raoul Berger, *Selected Writings on the Constitution* 185 (1987) (“[T]he uncontroverted evidence, confirmed in these pages, is that the framers [of the Fourteenth Amendment] repeatedly stated that the amendment and the Civil Rights Act of 1866 were ‘*identical*’ . . .”).

12. U.S. Const. art. IV, § 4.

13. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 975 (1998) (describing “pedagogical canon” of key cases and materials taught in law schools).

14. See *infra* notes 80–93 and accompanying text (discussing provenance of Thirteenth Amendment).

lacked political freedoms and political representation in Parliament.<sup>15</sup> This eighteenth-century view opposing slavery to republicanism survives in Cold War arguments equating communism and totalitarianism to slavery and in twenty-first-century Tea Party rhetoric attacking big government.

Part IV describes how the broader, antirepublican concept of slavery was narrowed during the fight for abolition for political and strategic reasons. Southern defenders of slavery taunted abolitionists by arguing that wage workers in the North and in England were equally slaves, and early suffragists argued that women were also unjustly subordinated. These critiques gave abolitionists incentives to maintain a sharp divide between chattel slavery and other forms of economic subordination, as well as the treatment of women. Once chattel slavery was abolished, labor activists and suffragists sought to return to the older, broader understanding of “slavery.” But emancipation allowed defenders of the status quo to insist that American society was now “free.” Normal, everyday aspects of economic and family life could not be “slavery,” which was by definition the worst of evils and had already been eradicated by law. Today, calling an injustice “slavery” is generally seen as overheated hyperbole and even a presumptuous insult to the memory of the victims of African American chattel slavery. This Essay concludes by asking how our political imagination has been limited as a result of this history.

#### I. THE JURISPATHTIC TREATMENT OF THE THIRTEENTH AMENDMENT

The legal historian Robert Cover famously called processes that produce multiple legal doctrines and interpretations “jurisgenerative,” and processes that cut off lines of development “jurispathic.”<sup>16</sup> The Fourteenth Amendment is one of the most jurisgenerative parts of the Constitution. Yet there is little doubt that the history of the Thirteenth Amendment (and its twin, the Guarantee Clause) has been decidedly jurispathic.

Why has the Thirteenth Amendment been treated so differently from the Fourteenth? There are many overlapping reasons. Part of the explanation lies in the history of Reconstruction and its subsequent disparagement as the price of political reunion by Northern and Southern whites.<sup>17</sup> Moreover, precisely because the Thirteenth

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15. See *infra* text accompanying notes 117–121.

16. Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 11, 40 (1983).

17. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which limited the scope of the Fourteenth Amendment’s Privileges or Immunities Clause, also read the Thirteenth Amendment narrowly. The “obvious purpose” of the Amendment, Justice Miller explained, “was to forbid all shades and conditions of African slavery,” *id.* at 69, and any new form of slavery that might arise similar to that suffered by blacks:

Amendment did not seem to resolve the problems of post-war injustice and violence in the South, the Reconstruction Congress went on to ratify a Fourteenth Amendment.<sup>18</sup> This amendment not only largely displaced the Thirteenth in the public imagination, but also became an almost obsessive focus of attention for the Court and lawyers alike.<sup>19</sup>

But why did this occur? One of the most likely reasons is that the Fourteenth Amendment proved unexpectedly useful to a large number of powerful interests in post-Civil War America. Corporations and businesses were able to procure interpretations of the Fourteenth Amendment that served their purposes during the late nineteenth century and thereafter.<sup>20</sup> They could make little use of the Thirteenth Amendment or the Fifteenth Amendment, which seemed to focus more clearly on the interests of the former slaves.

In fact, the Thirteenth Amendment was particularly *unhelpful* to corporate interests. First, the Amendment might be the source of congressional power to pass laws designed to protect employees from overreaching employers.<sup>21</sup> Second, if corporations were persons under the meaning of the Thirteenth Amendment, much of the law governing for-profit corporations would probably be unconstitutional. In particular,

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Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.

Id. at 72. Justice Miller's opinion rejected the plaintiff butchers' broader argument that the New Orleans ordinance, by forcing butchers to work for a monopoly controlled by a small group of favored businessmen, was akin to feudal servitude. See also *infra* note 155 (discussing Thirteenth Amendment arguments of plaintiffs in *Slaughter-House Cases*).

18. See Joint Comm. on Reconstruction, 39th Cong., Report of the Joint Committee on Reconstruction, at xiii–xiv (1866) (explaining why new amendment was necessary to protect freed men and women); Laurent B. Frantz, Congressional Power To Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1354–58 (1964) (explaining Reconstruction Congress believed it needed new tools to deal with discrimination and violence in Southern states).

19. It is also possible that the Fourteenth Amendment limited the legal reach of the Thirteenth Amendment because it was ratified later in time. See Mark Graber, Subtraction by Addition?: The Thirteenth and Fourteenth Amendments, 112 Colum. L. Rev. 1501, 1506 (2012) (“[T]he proper inference may be that the Fourteenth Amendment repealed or modified crucial rights originally protected by the Thirteenth Amendment.”). But the bare texts of the two Amendments, considered by themselves, do not lead to this conclusion. If this occurred, it must be for other reasons.

20. See *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 394 (1886) (treating corporations as persons for purposes of Fourteenth Amendment).

21. James Gray Pope, The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957, 102 Colum. L. Rev. 1, 18 (2002) (“Unlike the Fourteenth Amendment, which applied only to state action, the Thirteenth made no distinction between governmental and private conduct, and thus could support legislation banning employers as well as government from interfering with labor rights.”).

it would be unconstitutional to buy or sell (for-profit) corporations, auction them off in public markets (sometimes called stock exchanges), or liquidate them in the interests of profit.<sup>22</sup>

Ironically, even the most determined opponents of slavery may have contributed to the Amendment's neglect. In Amy Dru Stanley's important book *From Bondage to Contract*, she points out that even such notable and courageous abolitionists as William Lloyd Garrison believed their work was largely over once chattel slavery was abolished: "Where are the slave auction-blocks," Garrison exclaimed, "the slave-yokes and fetters. . . . They are all gone! From chattels to human beings. . . . Freedmen at work as independent laborers by voluntary contract!"<sup>23</sup>

In *Nothing but Freedom: Emancipation and Its Legacy*, historian Eric Foner notes that all societies that have ended slavery have struggled over the meaning of the freedom that emancipation brings.<sup>24</sup> The title of his book is taken from the comment, by Confederate General Robert V. Richardson, that "[t]he emancipated slaves own nothing, because nothing but freedom has been given to them."<sup>25</sup> This was not merely the view of ex-rebels. Horace Greeley, the editor of the *New York Tribune*, fancied himself an avid opponent of slavery.<sup>26</sup> Yet Greeley dismissed calls for giving the freed men "forty acres and a mule" because it would have required the confiscation of slaveholders' land and redistribution to former slaves.<sup>27</sup> This, he argued, was "either knavery or madness. . . . People

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22. See Jack M. Balkin, Corporations and the Thirteenth Amendment, Balkinization (Jan. 28, 2012, 10:27 AM), <http://balkin.blogspot.com/2012/01/corporations-and-thirteenth-amendment.html> (on file with the *Columbia Law Review*) ("[F]or-profit corporations are by nature designed to be 'slaves' [of their owners]. That is what distinguishes them from natural persons."); Jack M. Balkin, More on Corporations as Slaves, Balkinization (Jan. 29, 2012, 3:31 PM), <http://balkin.blogspot.com/2012/01/more-on-corporations-as-slaves.html> (on file with the *Columbia Law Review*) ("Like slavemasters, [the owners of a for-profit corporation] . . . have the power of life or death over their corporations. On the other hand, the owners can sue other people who attempt to injure the corporation, and . . . take various steps to avoid hostile takeovers.").

23. Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 4 (1998). Garrison was far more sympathetic to the plight of exploited workers in a "free labor" system than this quote suggests. His point, rather, was to emphasize the importance of being able to own and sell one's own labor.

24. Eric Foner, *Nothing but Freedom: Emancipation and Its Legacy* 1 (1983) ("Whether accomplished by black revolution, legislation, or civil war, emancipation . . . raised intractable questions about the system of economic organization and social relations that would replace slavery.").

25. *Id.* at 55.

26. Greeley had, of course, penned a famous letter in the *Tribune* to Abraham Lincoln in August of 1862 pressing Lincoln for a quicker path to emancipation. Lincoln's equally famous reply was that his goal was to save the Union, whether with slavery or without it. But by September, Lincoln had announced plans for an Emancipation Proclamation to take effect on January 1, 1863. Robert C. Williams, Horace Greeley: Champion of American Freedom 233–34 (2006).

27. Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 431 (5th ed. 2006).



who want farms work for them. The only class we know that takes other people's property because they want it is largely represented in Sing Sing."<sup>28</sup> Southern blacks were relegated to the market with no resources besides their own labor, which white employers sought to control and exploit through labor contracts.

As Stanley notes, one of the recurrent debates within the tradition of "social contract" theory is whether freedom of contract gives individuals the right to make binding contracts that would effectively make them slaves and forfeit their liberty.<sup>29</sup> Although most theorists did indeed place a limit on what people could contract to, some did not; for the latter, contracts for slavery were no different from any other presumptively arm's-length transaction between consenting adults.<sup>30</sup> Versions of this tension sometimes appear in modern-day contracts courses. The principle of freedom of contract—and the concomitant rejection of principles of unconscionability and duress—when taken to an extreme, undermines confidence in an unregulated market's ability to deliver genuine freedom for all. That is especially so in a society with vast disparities of income, wealth, and bargaining power. Once the direct ownership of human beings is abolished, this is the question raised—and the danger posed—by the Thirteenth Amendment.

Pete Daniel, for example, notes how freedom of contract gradually developed into a system of peonage that ensnared Southern blacks after the Civil War:

Lacking land or capital of their own, blacks had little choice but to sign yearly contracts. . . . As military control became less strict in the South, a labor pattern emerged. Most blacks signed annual contracts. Improvident, they took advances on their expected share of the crop. When settlement time came the next fall, the laborers often discovered that their share of the crop did not cover what they owed the supply merchant or the planter. . . . [S]ome planters demanded that workers remain until they had worked out their entire debt, and when planters used indebtedness as an instrument of compulsion, the system became peonage.<sup>31</sup>

Foner and Daniel both indicate that peonage depended on the formal mechanism of contract, supplemented by the use of the criminal law to punish its breach. In the peonage cases at the turn of the twentieth

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28. *Id.*

29. See Stanley, *supra* note 23, at 6 ("Whether free persons could contract away all their rights and therefore voluntarily become slaves was a point of theoretical dispute.").

30. *Id.* (comparing Hobbes and Pufendorf, both of whom recognized legitimacy of contracts for slavery, with Locke, who did not).

31. Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901–1969*, at 19–20 (1972); see also Pete Daniel, *The Metamorphosis of Slavery, 1865–1900*, 66 *J. Am. Hist.* 88, 89 (1979) ("[P]eonage was widespread in the South by the turn of the century . . . . [S]lavery had indeed ended for some blacks, but for others it had endured, metamorphosed.").

century, the Thirteenth Amendment briefly made a reappearance to limit some of these developments, but doctrinal expansion did not go very far.<sup>32</sup> In *Bailey v. Alabama*, which invalidated the most onerous form of that state's peonage system, the Court nevertheless insisted that it made no difference that "the plaintiff in error is a black man. . . . The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. . . . [W]e may view the legislation in the same manner as if it had been enacted in New York or in Idaho."<sup>33</sup> Yet the development of the ideas of human freedom in the peonage cases was quite modest in comparison to the luxuriant flowering of other freedom of contract doctrines developed during the same period through the Fourteenth Amendment.<sup>34</sup>

It is also possible that connections between the use of judicial review in the peonage cases and *Lochner*-style jurisprudence created complications for progressive jurists. It is worth noting that Justice Oliver Wendell Holmes, Jr., whose *Lochner* dissent argued that the Fourteenth

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32. See *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911).

33. 219 U.S. at 231.

34. In two other cases, the Court was decidedly unsympathetic to Thirteenth Amendment claims that government practices were "involuntary servitude." *Butler v. Perry* involved a Florida law that required males between twenty-one and forty-five to work for six ten-hour days on roads and bridges each year. 240 U.S. 328, 329 (1916). They could avoid this task by providing an able-bodied substitute (evoking memories of the notorious system of conscription during the Civil War), or by paying three dollars in lieu of a day's labor to the county road and bridge fund. *Id.* Writing for a unanimous Court, Justice McReynolds explained that the Thirteenth Amendment was not designed to end the ancient tradition of requiring residents to provide labor for road upkeep: "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." *Id.* at 333.

A year later, the Court rejected a Thirteenth Amendment challenge to the Selective Draft Act of 1917, arguing that military service was a public duty. *The Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). Chief Justice White stated,

[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment.

*Id.*

The issue is still alive today in calls for enhancing Americans' sense of common commitment and duty through a compulsory service program (whether military or charitable) for American youth. Many people on the left and the right support such programs. Some argue that without compulsory service, for example, America will get into too many wars, and Americans will lose a sense of public duty.

Contemporary constitutional doctrine recognizes that "compelling state interests" can override otherwise clear constitutional prohibitions. Does this mean that, under sufficiently compelling circumstances, the Constitution allows slavery (in cases other than criminal punishment)? Or is the Thirteenth Amendment different from the Fourteenth in this respect—it protects far less, but what it does protect, it protects absolutely?

Amendment did not bar “tyrannical” legislation as such,<sup>35</sup> also dissented in *Bailey v. Alabama*. Alabama had created a legal presumption that anyone who ceased work after signing a contract for long-term employment and accepting an advance of wages had intended to defraud the employer and could be criminally punished for doing so, even though the accused was not permitted to testify to rebut the statutory presumption.<sup>36</sup> In Holmes’s view, such a law was simply a means of ensuring that contracts were enforced by creating proper incentives.<sup>37</sup> As such, Holmes believed that Alabama’s law was as much within the legislature’s power as New York’s decision to limit the maximum hours of bakers. “Peonage,” Holmes explained, “is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it.”<sup>38</sup>

To be sure, after emancipation, some activists made connections between the ban on slavery and the constitutional claims of the populists and the labor movement,<sup>39</sup> and still later on, the constitutional claims of the twentieth century movement for black civil rights.<sup>40</sup> However, it was the legal equivalent of swimming upstream against a vigorous current. Risa Goluboff has shown how Thirteenth Amendment claims were offered on behalf of black sharecroppers in the middle of the twentieth century, but these theories were eventually abandoned.<sup>41</sup> The NAACP’s legal strategy focused instead on undermining the logic of *Plessy v. Ferguson*’s “separate but equal” doctrine by bringing cases aimed at segregation in colleges and professional schools; it naturally focused on the interpretation of the Fourteenth Amendment.<sup>42</sup> In this strategy, the Thirteenth Amendment and the constitutional demand of freedom from oppressive working conditions did not fit particularly well.<sup>43</sup>

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35. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.”).

36. *Bailey*, 219 U.S. at 228.

37. *Id.* at 246 (Holmes, J., dissenting).

38. *Id.*

39. See *infra* text accompanying notes 155–162 (describing examples of arguments by labor activists following Civil War).

40. This history is described in Risa L. Goluboff, *The Lost Promise of Civil Rights* (2007).

41. *Id.* at 10–13, 217–18, 256–57, 259.

42. See Robert L. Carter, *The NAACP’s Legal Strategy Against Segregated Education*, 86 Mich. L. Rev. 1083, 1084–85 (1988) (reviewing Mark Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925–1950* (1987)) (explaining that NAACP’s strategy under Charles Houston and Thurgood Marshall was to focus on desegregating graduate and professional schools, followed by public schools).

43. See Goluboff, *supra* note 40, at 217, 228 (“Once [Thurgood] Marshall fixed his sights on *Plessy*, the labor cases that had once held out legal as well as institutional promise fell by the doctrinal wayside.”).

Later social movements, building on the NAACP's example—and the equal protection jurisprudence spawned by *Brown v. Board of Education*<sup>44</sup>—continued to focus on the Fourteenth Amendment rather than the Thirteenth.<sup>45</sup> In what might be a self-fulfilling prophecy, successive waves of social movements have gravitated to the Fourteenth Amendment, even though in theory they could also have used the concepts of nondomination and self-sufficiency implicit in the Thirteenth Amendment's prohibition against slavery.

Even so, it is not surprising that interest in the Thirteenth Amendment, and in particular the Enforcement Clause of Section 2, would make somewhat of a comeback during the civil rights revolution, when all three branches of the federal government got behind the movement for black civil rights. In a trio of cases, *Jones v. Alfred H. Mayer Co.*,<sup>46</sup> *Griffin v. Breckenridge*,<sup>47</sup> and *Runyon v. McCrary*,<sup>48</sup> the Warren and early Burger Courts held that Congress had extensive powers to reach racial discrimination (and later discrimination based on national origin and ancestry<sup>49</sup>) under Section 2 of the Thirteenth Amendment. What the Supreme Court did not do, however, was offer much discussion of the substantive meaning of Section 1. Rather, it broadly read Congress's powers to remedy the “badges and incidents of slavery,”<sup>50</sup> a phrase taken from the 1883 *Civil Rights Cases*, which had construed Congress's powers far more narrowly.

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44. 347 U.S. 483 (1954).

45. Major victories in the courts by social movements for the rights of women, gays, and noncitizens reflect this focus on the model of *Brown* and the Fourteenth Amendment rather than the Thirteenth Amendment. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (protecting gay rights under Fourteenth Amendment's Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (protecting gay rights under Fourteenth Amendment's Equal Protection Clause); *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that children of undocumented aliens are protected by Fourteenth Amendment's Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding Fourteenth Amendment's Equal Protection Clause requires heightened scrutiny of sex classifications); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (upholding abortion rights under Fourteenth Amendment's Due Process Clause); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding that preference for male over female administrators of estates violated Equal Protection Clause of Fourteenth Amendment); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding state statute denying welfare benefits to resident aliens violates Fourteenth Amendment's Equal Protection Clause).

46. 392 U.S. 409 (1968).

47. 403 U.S. 88 (1971).

48. 427 U.S. 160 (1976).

49. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (holding that Congress's remedial powers under Thirteenth Amendment allow it to ban discrimination against Jews, who were considered “race” at time of Thirteenth Amendment's enactment); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (applying 42 U.S.C. § 1981 to persons of Arab ancestry); cf. *United States v. Nelson*, 277 F.3d 164, 190–91 (2d Cir. 2002) (holding that Section 2 gives Congress power to reach some religious discrimination in order to eliminate badges and incidents of slavery).

50. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

## II. A "DANGEROUS" AMENDMENT

Perhaps the most basic reason for the Thirteenth Amendment's neglect, however, is that far from being useless to interest groups and social mobilizations, it is altogether *too* useful—it is so potentially far-reaching that it might justify a truly radical transformation of the American social and political order. If ending "slavery" and "involuntary servitude" means embarking on the project of ending domination in social life, and securing self-rule and self-sufficiency, then the imperative is too capacious. The Amendment puts too many features of society into question, ranging from the way that markets and government actually work to the way that family life is structured. Once chattel slavery is eliminated, the logical next step is to question what other forms of unjust exploitation and compulsion might exist in society and how best to eliminate them.

That question becomes disturbing precisely because so many other social arrangements are normally justified on the basis of freedom, consent, and social convention; therefore, it is generally assumed, the everyday experience of family, market, and state is the very opposite of unfreedom and slavery. The Thirteenth Amendment has been limited precisely because the idea of eliminating "slavery" or "involuntary servitude," taken seriously, promises far too much emancipatory potential for comfort, at least for those who benefit from the status quo and the ideologies that justify it.

The language of the Thirteenth Amendment is taken from the Northwest Ordinance of 1787.<sup>51</sup> But the idea of "slavery" at the founding was far broader than the chattel slavery that was the primary object of the Thirteenth Amendment in 1865. To the Founders, slavery was the very opposite of republican government. American revolutionaries argued that British tyranny and the unrepresentativeness of British institutions had reduced them to slaves.<sup>52</sup>

So understood, the Thirteenth Amendment ban on slavery is the mirror image of another much neglected clause: the Guarantee Clause of Article IV, Section 4, under which the United States endeavors to guarantee the states "a Republican form of Government."<sup>53</sup> If the Thirteenth Amendment has been read narrowly, the Guarantee Clause has virtually been read out of existence as raising only political questions inappropriate for judicial resolution,<sup>54</sup> while the implicit federal power to

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51. See *infra* text accompanying notes 80–93 (discussing debates over Thirteenth Amendment's language).

52. See *infra* text accompanying notes 103–107 (describing how concept of "slavery" was invoked by colonists protesting British rule).

53. U.S. Const. art. IV, § 4.

54. See *Luther v. Borden* 48 U.S. (7 How.) 1, 42, 46–47 (1849) ("For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."); see also *Baker v. Carr*, 369 U.S. 186, 223–29 (1962) (reaffirming that

secure republican government has, for the most part, lain unused.<sup>55</sup> Both clauses have been limited because both are “dangerous”: Their potential reach seems unlimited and, taken to their logical conclusions, they might require a serious rethinking of public and private power in the United States.

Sanford Levinson has recently published a book emphasizing the difference between the “Constitution of Conversation,” which consists of those clauses actively litigated and subjected to endless discussion in the legal academy, and the “Constitution of Settlement,” referring to a variety of textual provisions that establish our basic political structures and that are never litigated because their meanings are deemed “self-evident” as a practical matter.<sup>56</sup> There is a third possibility, though: the “Constitution of Silence,” consisting of those clauses of the Constitution that *could* be remarkably important, but which contemporary lawyers, judges, and scholars have, for one reason or another, chosen to ignore. The Thirteenth Amendment is perhaps the best example of the Constitution of Silence, along with such other provisions as the Guarantee Clause,<sup>57</sup> the Titles of Nobility Clause,<sup>58</sup> and the Bill of Attainder Clause.<sup>59</sup> The point is not that these clauses are irrelevant to modern life; rather, the point is that, taken seriously, they might be altogether too relevant.

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Guarantee Clause is nonjusticiable while holding that courts may review state legislative reapportionment schemes under Equal Protection Clause); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 148 (1912) (“The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since . . .”); *Taylor v. Beckham*, 178 U.S. 548, 578 (1900) (“It was long ago settled [by *Luther v. Borden*] that the enforcement of this guarantee belonged to the political department.”). Although *Luther* has come to stand for the general proposition that the Guarantee Clause is nonjusticiable, it could—and should—be read far more narrowly. See Jack M. Balkin, *Living Originalism* 241–42 (2011) [hereinafter Balkin, *Living Originalism*] (“[*Luther v. Borden*] holds only that some kinds of claims—those involving recognition of governments and deciding when domestic violence requires intervention by federal troops—are best determined by the political branches . . .”).

55. Senator Charles Sumner once called the Guarantee Clause “a sleeping giant in the Constitution,” because “[t]here is no clause which gives to Congress such supreme power over the States . . .” *Cong. Globe*, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Charles Sumner). It is precisely for that reason, William Wiecek has argued, that the Clause has largely been left undisturbed since Reconstruction. William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 295 (1971).

56. See Sanford Levinson, *Framed: America’s Fifty-One Constitutions and the Crisis of Governance* 17–27 (2012) (explaining distinction between mostly textual “Constitution of Settlement” and “Constitution of Conversation,” which concerns indeterminate aspects of Constitution). Examples of provisions in the Constitution of Settlement are the length of the president’s term, the timing of inauguration day, and the allocation of two senators to each state regardless of population.

57. U.S. Const. art. IV, § 4.

58. *Id.* art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1.

59. *Id.* art. I, § 9, cl. 3.

But precisely why is the concept of slavery in the Thirteenth Amendment so dangerous? There are several different overlapping reasons. First, the focus of the Thirteenth Amendment seems to be society as a whole, not merely state power. All of the Justices in the *Civil Rights Cases* noted that the Thirteenth Amendment contained no state action requirement;<sup>60</sup> for the majority, this was a reason to restrict its power and scope. As Justice Bradley (in)famously explained, “It would be running the slavery argument into the ground” to allow Congress to prohibit racial discrimination in places of public accommodation.<sup>61</sup>

Bradley’s metaphor suggests that calling these forms of race discrimination unjust domination would discredit the principle of eliminating the badges and incidents of slavery. But the reason it would discredit the principle is that it would discomfit too many whites. By 1883, many whites, in both the North and the South, had accepted the Compromise of 1877 that had ended Reconstruction and returned political power to white elites in the South.<sup>62</sup> Desiring sectional peace, Northern white majorities either acquiesced to—or actively supported—the unfettered return to power of white majorities in the South who were committed to white privilege and black inferiority.<sup>63</sup> Moreover, as Michael Les Benedict has observed, other factors drove the Compromise of 1877 as well. Northern white elites increasingly feared what they perceived as the threat of “socialism”—demands by freed blacks and their white sympathizers for redistributive programs.<sup>64</sup> Elites feared that newly empowered majorities would be led astray by “[w]eak-minded sentimentalists or cor-

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60. See *The Civil Rights Cases*, 109 U.S. 3, 23 (1883) (“Under the Thirteenth Amendment, the legislation . . . may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth . . . it must necessarily be . . . corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.”); *id.* at 35–36 (Harlan, J., dissenting) (“[U]nder the Thirteenth Amendment, Congress has to do with slavery and its incidents; and that legislation . . . may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.”).

61. *Id.* at 24–25 (majority opinion) (“It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.”).

62. See generally David Blight, *Race and Reunion: The Civil War in American Memory* 137–38 (2001) (describing terms of Compromise of 1877).

63. See C. Vann Woodward, *The Strange Career of Jim Crow* 67 (1955) (“[T]he liberals . . . felt themselves strongly drawn toward the cause of sectional reconciliation. And since the Negro was the symbol of sectional strife, the liberals joined in deprecating further agitation of his cause and in defending the Southern view of race in its less extreme forms.”).

64. See Michael Les Benedict, *Reform Republicans and the Retreat from Reconstruction*, in *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* 168, 168–72 (2006) (noting Northern reformers viewed redistributive policies as threat to human liberty and equal rights).

rupt demagogues” who would stir up discontent among the masses.<sup>65</sup> Benedict tellingly quotes a now-forgotten reformer, Abram S. Hewitt, who wrote that “[t]he problem . . . is, to make men who are equal . . . in political rights and . . . entitled to the [formal right of] ownership of property[] content with that inequality in its distribution which must inevitably result from the application of the law of justice.”<sup>66</sup>

Notions of blacks’ appropriate place in the social and economic hierarchies were embedded in social life and social practices in different parts of the country, but especially in the former Confederacy; these notions were defended either as the natural order of things or as necessary compromises to maintain social peace in the face of white objections. Constitutional law was enlisted to preserve these prerogatives. The most famous example, of course, is Justice Brown’s opinion in *Plessy v. Ferguson*, which asserted that if blacks objected to segregated railway carriages, it must be because they were hypersensitive.<sup>67</sup>

In his private notes, Justice Bradley went further. Not only would integrated facilities be “running the slavery argument into the ground,”<sup>68</sup> but such a requirement would also impose “slavery” on white people.<sup>69</sup> “Surely,” Bradley wrote, “Congress cannot guaranty to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery.”<sup>70</sup> The Civil Rights Act of 1866 “has already

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65. *Id.* at 172.

66. *Id.* (quoting Abram S. Hewitt, *The Mutual Relations of Capital and Labor: Speech at the Church Congress, Cincinnati* (Oct. 18, 1878), in *Selected Writings of Abram S. Hewitt* 277, 277 (Allan Nevins ed., 1937)). Compare this with the thundering pronouncement of the United States Supreme Court in *Coppage v. Kansas*, which invalidated a Kansas law that prevented employers from requiring their employees to sign “yellow dog” contracts under which employees promised not to join labor unions:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed, a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

236 U.S. 1, 17 (1915).

67. 163 U.S. 537, 551 (1896).

68. *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

69. 7 Charles Fairman, *The History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888*, pt. 2, at 564 (1987).

70. *Id.*



guaranteed to the blacks the right of buying, selling and holding property, and of equal protection of the laws. Are not these the essentials of freedom? Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party."<sup>71</sup> To be sure, "[t]he [Thirteenth A]mendment declares that slavery and involuntary servitude shall be abolished, and that Congress may enforce the enfranchisement of the slaves. Granted: but does freedom of the blacks require the slavery of the whites? [A]nd enforced fellowship would be that."<sup>72</sup>

This gives Bradley's famous metaphor an unexpected meaning: "running the slavery argument into the ground," would, like a plow, unearth or dig up features of social life that many whites wanted to maintain unquestioned and unchallenged. Unearthing these aspects of social life was dangerous precisely because it would undermine a basic compromise underlying the Reconstruction Amendments. Blacks were entitled to *civil* equality, such as the right to make contracts and own property, but not *social* equality—that is, the right to associate with whites as equals.<sup>73</sup> Even if blacks were equals in the abstract, whites should remain their superiors in civil society.<sup>74</sup> Hence Bradley's horror at the thought that white women would have to mix with blacks, and his conflation of places of public accommodation with private dances and dinner parties.

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71. *Id.*

72. *Id.*

73. On the distinction between civil and social equality, see, e.g., Cong. Globe, 42d Cong., 2d Sess. 901 (1872) (statement of Sen. Lyman Trumbull) (stating Civil Rights Act of 1866 was "confined exclusively to civil rights and nothing else, no political and no social rights"); Balkin, *Living Originalism*, supra note 54, at 222–26 (explaining Reconstruction Era distinctions between civil, political, and social equality); Harold M. Hyman & William W. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875*, at 277–78, 394–402 (1982) (explaining that whereas civil rights were "those rights essential to differentiate a slave from a free person," "the highest and most controversial stratum" of rights concerned "social equality," which, in the view of most whites, included equal access to public accommodations); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1024 (1995) ("It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to 'civil rights.' Political and social rights, it was agreed, were not civil rights and were not protected."); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 Loy. L.A. L. Rev. 1207, 1208 (1992) ("For Reconstruction legal thinkers civil, political and social rights were seen as three distinct categories. Civil rights attached to people simply because they were people . . . Social rights were exercised in the rest of the social order . . . [G]overnment had nothing to do with guaranteeing social rights . . .").

74. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality . . ."); *id.* at 559 (Harlan, J., dissenting) (noting superiority of white race socially "in prestige, in achievements, in education, in wealth and in power" but arguing that "[i]n respect of civil rights, all citizens are equal before the law").

Social inequality was justified as a feature of personal privacy—an inevitable consequence of private preferences and human nature—and was defended both in law and in constitutional doctrine. To dig up and expose these aspects of social life to criticism made the slavery argument—and the Thirteenth Amendment itself—far too dangerous.<sup>75</sup>

This leads to a second reason why the Thirteenth Amendment is so dangerous. The idea of slavery, focusing as it does on nondomination and self-sufficiency, can apply to many different societies, including modern ones. Nineteenth-century critics called slavery a form of barbarism (sometimes coupling it with polygamy), implying that slavery was a feature of premodern or ancient societies.<sup>76</sup> But domination and enforced social dependency do not disappear in modern societies. They merely reappear in new guises, sometimes through public power, sometimes through private power, and sometimes through a combination of both. One does not have to be a Marxist to recognize that unregulated capitalism might create its own forms of domination and oppression to replace the chattel slavery of older societies. Nor does one have to be a Hayekian to recognize that unchecked and unaccountable government power can reduce citizens to new forms of servitude. If domination can exist within markets and welfare states alike, and can be reproduced even in social systems that promise formal equality, then domination will appear—and reappear constantly—in modern societies.

Furthermore, eliminating pervasive and overlapping forms of domination might call for remedies that give people self-sufficiency, like the famous redistributive formula of “forty acres and a mule” for the former slaves that sent Horace Greeley into livid fury.<sup>77</sup> If so, then once again it might undermine market capitalism, making the attack on slavery as dangerous to market-based liberalism as it is to traditional status hierarchies.

Third, once it is acknowledged that “slavery” need not be identical to or closely resemble African chattel slavery, the attack on slavery might threaten not only modern capitalism and the modern state, but also any number of traditional social formations and traditional status relations.

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75. Or, as contemporary opponents of the individual mandate might put it, the Thirteenth Amendment’s guarantees have “no limiting principle.”

76. The 1856 platform of the new Republican Party, for example, insisted on “both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.” Republican Platform of 1856, in *1 National Party Platforms, 1840–1956*, at 27 (Donald Bruce Johnson ed., Univ. of Ill. Press rev. ed. 1978) (1924).

77. See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *Harv. J.L. & Pub. Pol’y* 37, 37 (1990) (“[A] minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share.”).

These include traditional family structure, relationships of power and authority between the sexes, and relationships between parents and children.<sup>78</sup> Insisting that “slavery” shall not exist anywhere in a nation does more than end the practice of owning human beings. Once lawyers read the prohibition on “slavery” as broadly as they read parts of the Bill of Rights and the Fourteenth Amendment, the Thirteenth Amendment’s command to abolish slavery puts many different aspects of society into question.

Fourth, both the Thirteenth Amendment and the Guarantee Clause offer Congress the power to enforce them—explicitly in the case of the Thirteenth Amendment, and implicitly in the case of the Guarantee Clause. (After all, if the Constitution requires that United States guarantee republican government, it must have adequate powers to make that guarantee good in practice.) Yet enforcing these provisions consistent with the rule of *McCulloch v. Maryland*<sup>79</sup>—which offers a generous

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78. See Susan B. Anthony, *Is It a Crime for a United States Citizen To Vote?* (1872–1873), in 2 *History of Woman Suffrage, 1861–1876*, at 630–47 (Arno & The New York Times 1969) (Elizabeth Cady Stanton et al. eds., 1882) (arguing that because women had been subject to restrictions of coverture, denied rights of political participation, and prevented from pursuing their own ambitions in life, they had effectively been held in slavery by their fathers, brothers, and husbands); Akhil Reed Amar, *Remember the Thirteenth*, 10 *Const. Comment.* 403, 404–05 (1993) (“You might think that . . . slavery is about oppression of the Other and not about family. . . . [But] biology is in no way inconsistent with oppression.”); Akhil Reed Amar & Daniel Widawsky, *Commentary, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 *Harv. L. Rev.* 1359, 1364 (1992) (“Under ordinary circumstances, parental custody does not violate the Thirteenth Amendment . . . . But when a parent perverts this coercive authority by systematically abusing and degrading his ward[,] . . . the parent violates the Thirteenth Amendment and should be subject to suit.”).

The condition of slavery is normally thought to concern treating human beings like animals, but some animal rights activists have sought to extend the idea even to relations between humans and animals. Consider a lawsuit recently filed against SeaWorld parks in San Diego and Orlando for their confinement of five orca whales. See David Crary & Julie Watson, *PETA Lawsuit Seeks To Expand Animal Rights*, *Yahoo! News* (Oct. 25, 2011), <http://news.yahoo.com/peta-lawsuit-seeks-expand-animal-rights-222219887.html> (on file with the *Columbia Law Review*) (“People for the Ethical Treatment of Animals [PETA] is accusing the SeaWorld parks of keeping five star-performer whales in conditions that violate the 13th Amendment ban on slavery.”). According to the lawyer for PETA, “By any definition, these orcas are slaves—kidnapped from their homes, kept confined, denied everything that’s natural to them and forced to perform tricks for SeaWorld’s profit.” *Id.* Moreover, “[t]he males have their sperm collected, the females are artificially inseminated and forced to bear young which are sometimes shipped away.” *Id.* Not surprisingly, SeaWorld sees things quite differently, calling the use of the Thirteenth Amendment “baseless and in many ways offensive.” *Id.* In addition to the differences between keeping whales and human beings in captivity, the company explained that its treatment of the whales could not be like slavery because “SeaWorld is among the world’s most respected zoological institutions . . . . There is no higher priority than the welfare of the animals entrusted to our care and no facility sets higher standards in husbandry, veterinary care and enrichment.” *Id.*

79. 17 U.S. (4 Wheat.) 316 (1819).

interpretation of Congress's powers—would give the federal government broad new powers to attempt to reshape both law and society.

The connections between slavery and republicanism—with its triple focus on nondomination, self-sufficiency, and the accountability of power—and the potentially (and dangerously) broad scope of the concept of slavery have always proved too much for American judges and politicians to stomach. As a result, both the Thirteenth Amendment and the Guarantee Clause have been cabined and limited throughout the country's history—so that they do not require too much of either public or private institutions. It is well worth asking what is gained and what is lost by this jurisprudential treatment.

### III. THE REPUBLICAN ORIGINS OF THE THIRTEENTH AMENDMENT

The language of Section 1 is taken from Article 6 of the Northwest Ordinance of 1787: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . ." <sup>80</sup> Congress had used similar language in two 1862 acts, ending slavery first in the District of Columbia and then in all federal territories. <sup>81</sup> Senator Charles Sumner's proposal, borrowing language from the French Declaration of Rights of 1791, would have provided, "All persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdiction thereof." <sup>82</sup> But this language was quickly rejected by the Senate. Senator Jacob Howard objected that the equality formula was "utterly insignificant and meaningless," <sup>83</sup> adding nothing to the abolition of slavery.

One might think that the decision to reject Sumner's language should be quite significant: It would mean that the Thirteenth Amendment merely ends slavery but does not secure equality of any kind. But this does not appear to be what congressional Republicans actually believed. In the brief congressional debates over the Thirteenth Amendment, and later again in the much longer debates over the 1866 Civil Rights Act, Senators Lyman Trumbull (the author of the Thirteenth

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80. Northwest Ordinance of 1787, art. VI, 1 Stat. 51 n.(a).

81. An Act to Secure Freedom to All Persons Within the Territories of the United States, ch. 111, 12 Stat. 432, 432 (1862) (declaring "there shall be neither slavery nor involuntary servitude" in territories); An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376, 376 (1862) (proclaiming "neither slavery nor involuntary servitude" shall exist in District of Columbia). Similar language was also used in the Missouri Compromise of 1820, ch. 22, 3 Stat. 545, 548 (prohibiting "slavery and involuntary servitude" in territory north of compromise line).

82. Cong. Globe, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Charles Sumner).

83. *Id.* at 1488 (statement of Sen. Jacob Howard).

Amendment) and Jacob Howard insisted that they did not disagree with Sumner on matters of substance.<sup>84</sup> They believed, like many other Republicans, that once blacks were free, they became citizens, and therefore enjoyed equal civil rights under the law.<sup>85</sup> To be sure, this was not the universal view: Senator Edgar Cowan disagreed—in his view the Amendment granted only freedom, not equality of any sort.<sup>86</sup> But the idea that ending slavery meant citizenship and equal civil liberty was common among Republican supporters of the Thirteenth Amendment and the 1866 Civil Rights Act.<sup>87</sup> And therefore it is no surprise that the Civil Rights Act was written specifically to secure citizenship and equal civil rights.

Rather, Trumbull and his allies preferred the language of the Northwest Ordinance for a number of reasons. First, unlike Sumner's proposal, the language of the Ordinance had no foreign associations.<sup>88</sup> Second, the Northwest Ordinance had deep connections to the American political tradition.<sup>89</sup> These concerns are reminiscent of current debates about the use of foreign materials in constitutional interpretation, except that in this case the issue concerned drafting constitutional text, and not interpreting it.<sup>90</sup>

Third, and perhaps most importantly, the Northwest Ordinance offered familiar language that most supporters of the Amendment could agree on. During his debate with Sumner, Trumbull emphasized the

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84. See *id.* (discussing disagreement over precise wording, but not substance, of Thirteenth Amendment).

85. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 48 (1986) (“Republicans believed that the Thirteenth Amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens.”); Jack M. Balkin, *The Reconstruction Power*, 85 *N.Y.U. L. Rev.* 1801, 1816 (2010) [hereinafter Balkin, *Reconstruction Power*] (“The Reconstruction Republicans believed that once blacks became free, they enjoyed all the rights of citizens.”).

86. See Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Edgar Cowan) (“That amendment, everybody knows and nobody dare deny, was simply made to liberate the negro slave from his master. That is all there is of it.”); see also *id.* at 477 (statement of Sen. Willard Saulsbury) (“[T]he effect of that amendment is simply to say that a person who heretofore was a slave of another shall be no longer his slave, and it operates no further.”).

87. Curtis, *supra* note 85, at 48; Balkin, *Reconstruction Power*, *supra* note 85, at 1816.

88. See Cong. Globe, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Lyman Trumbull) (noting he was unsure that phrases “copied from the French Revolution[] are the best words for us to adopt”).

89. See *id.* at 1489 (statement of Sen. Jacob Howard) (stating he preferred “good old Anglo-Saxon language employed by our fathers in the ordinance of 1787” over “French constitutions or French codes”).

90. Compare *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (criticizing use of foreign materials in interpreting Eighth Amendment’s Cruel and Unusual Punishments Clause), with *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) (distinguishing between use of foreign examples in drafting constitution and interpreting existing one).

need to settle quickly on basic language that would get the job done, and the reason is not difficult to see.<sup>91</sup> Time was pressing. The legal force of the Emancipation Proclamation—arguably based on the President’s Commander-in-Chief powers—might last only so long as the war continued. Once the war ended, the status quo might unravel. Therefore, it was more important to agree on something quickly than to worry about achieving the perfect formula. The language of the Ordinance would do well in a pinch. Moreover, it perfectly symbolized the framing generation’s opposition to the evils of slavery and their hopes for its eventual elimination. What better way to end slavery in the United States than to extend the Framers’ formula to the entire nation?

Fourth, a distinct advantage of the language of the Northwest Ordinance was that it had been written by Thomas Jefferson, who was not only the author of the Declaration of Independence, but also the founder of what later became the Democratic Party. Such language might help—and probably did help—to win the support of War Democrats, including President Lincoln’s Vice President and successor, Andrew Johnson.<sup>92</sup> Accordingly, proponents of the Amendment routinely referred to it as incorporating the language of the “Jeffersonian” ordinance.<sup>93</sup>

But the choice of 1787 language leads to an interesting interpretive question: The 1864 language is based on an eighteenth-century ordinance that predates the Constitution itself. Does this mean that, in construing the Amendment, one should be guided by the understandings of “slavery” not only in 1864, but also those at the time of the Founding or the American Revolution?

In *District of Columbia v. Heller*, Justice Antonin Scalia had no difficulty reaching back to 1688 to decide whether, in 1791, the original public meaning of the right to bear arms included an individual right of self-defense.<sup>94</sup> (Indeed, he also reached forward to Reconstruction, but that raises a different set of interpretive problems for a method that claims fidelity to “original public meaning.”<sup>95</sup>) His fellow originalist, Justice

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91. See Cong. Globe, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Lyman Trumbull) (pointing out that even if proposed language was not perfect, “a majority of the committee thought they were the best words; they accomplish the object,” and that if senators bickered over minor changes in wording “we shall have very little legislation”).

92. Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery and the Thirteenth Amendment* 58–59 (2001) (“Trumbull played to the War Democrats by claiming that the committee simply borrowed the language of Thomas Jefferson . . .”).

93. See, e.g., Cong. Globe, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. James R. Doolittle) (“They are both in the Jeffersonian ordinance.”); see also Vorenberg, *supra* note 92, at 59 (“The ‘Jeffersonian’ label stuck to the Amendment throughout the congressional debates.”).

94. 554 U.S. 570, 608 (2008).

95. See Akhil Reed Amar, *Heller*, *HLR*, and Holistic Legal Reasoning, 122 Harv. L. Rev. 145, 173 (2008) (“[L]ater commentary is at best imperfect evidence of what the American people meant when they discussed, drafted, and ratified an arms-bearing

Clarence Thomas, has seen nothing wrong with looking to late-seventeenth-century manuals on childrearing to decide the original meaning of the First Amendment of 1791.<sup>96</sup> If such evidence is permissible, then perhaps constitutional interpreters should be able to consider the Framers' vision of slavery as well as the views of the Reconstruction founders when creating constructions of the Thirteenth Amendment.

To be sure, this Essay makes a far more modest claim than either Justices Scalia or Thomas when they have looked to late-seventeenth-century materials to interpret texts written at the close of the eighteenth century. They have pointed to this history as evidence of original public meaning at the time of ratification, which they regarded as binding on later generations. By contrast, this Essay merely suggests that because the Thirteenth Amendment quotes the Northwest Ordinance almost verbatim, evidence about the concept of slavery at the Founding might be a permissible source for constitutional construction to make sense of and apply the Thirteenth Amendment's general prohibition on "slavery" to the extent that the text is vague, abstract, or indeterminate. Such evidence, while helpful, need not be conclusive.<sup>97</sup>

When the constitutional text is abstract, vague, or indeterminate, later generations must engage in constitutional construction to apply it to current problems.<sup>98</sup> In constitutional construction, history serves not as a command, but as a resource for understanding and furthering a transgenerational project of self-governance.<sup>99</sup> Because the project of building out the Constitution over time is transgenerational, interpreters engaged in constitutional construction are not limited to the expectations, understandings, and statements of principle made roughly contemporaneous with the moment of ratification. Instead, interpreters may look later in the American tradition to fill out abstract or vague concepts

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amendment in the years between 1787 and 1791."); Jack M. Balkin, *Is Heller an Original Meaning Decision?*, Balkinization (July 2, 2008, 9:31 AM), <http://balkin.blogspot.com/2008/07/is-heller-original-meaning-decision.html> (on file with the *Columbia Law Review*) (arguing Scalia's best evidence comes from nineteenth-century views, which may be permissible constructions of text but should not be confused with its original meaning).

96. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2752–53 (2011) (Thomas, J., dissenting) (looking to Puritan childrearing practices to understand children's lack of First Amendment rights at Founding and arguing that "[a] complete understanding of the founding generation's views on children and the parent-child relationship must therefore begin roughly a century [earlier than the Founding] in colonial New England").

97. See Balkin, *Living Originalism*, *supra* note 54, at 228–29, 257–58, 333 (treating history as resource that helps interpreters generate permissible constructions consistent with original meaning of text).

98. *Id.* at 7 ("When adopters use [vague or abstract] language that delegates constitutional construction to future generations, fidelity to the Constitution requires future generations to engage in constitutional construction.").

99. *Id.* at 23, 199–200, 228–29, 256–58, 268–70, 333, 342 n.2 (describing use of history as resource for construction).

like “freedom of speech” or “equal protection of the laws.” Equally importantly, they can also look earlier in the American tradition to understand where these ideas came from and what they meant to people in an earlier era.

Looking back to the Founding, one discovers that the word “slavery” actually has a capacious meaning, far outstripping the practices of racialized chattel slavery that the Reconstruction Era framers sought to end in 1864.

Consider the January 1773 response of the Council Chamber in the Boston Province House to an address by colonial Governor Thomas Hutchinson. Hutchinson, of course, was named by the Crown and most definitely *not* elected by the good people of Massachusetts, and he defended the British theory of parliamentary sovereignty over the colonies in North America.<sup>100</sup> As Alison LaCroix notes, the members of the Council interpreted Hutchinson’s claim that Parliament had “supreme authority” as equivalent to proclaiming “unlimited authority,” which led the Bostonians to state, “[I]f Supreme Authority includes unlimited Authority, the Subjects of it are emphatically Slaves.”<sup>101</sup> That same year, the *Boston-Gazette and Country Journal* had printed a letter from “An Elector” who also took issue with Hutchinson’s (and the British) claims to “sovereign” authority. “NO Line can be drawn,” concluded the author, “between the usurped Power of Parliament, and a State of Slavery in the Colonies.”<sup>102</sup>

There is nothing aberrational in such language. Bernard Bailyn’s magisterial study of pamphlets written during the run-up to the American Revolution, which provided the basis for his deservedly famous *Ideological Origins of the American Revolution*, also emphasized the repeated invocation of “slavery” as the likely fate of the colonists if they submitted to the outrageous claims of their British would-be rulers. “Slavery,” he writes, “was a central concept in eighteenth century political discourse. As the absolute political evil, it appears in every statement of political principle, in every discussion of constitutionalism or legal rights, in every exhortation to resistance.”<sup>103</sup> As a “political concept,” slavery “had specific meaning which a later generation would lose.”<sup>104</sup> As an example, Bailyn quotes a 1747 newspaper writer who declared that those who are “under the absolute and arbitrary direction of one man are all *slaves*, for he that is obliged to act or not to act according to the arbitrary will and pleasure of a governor, or his director, is as much a *slave* as he who is

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100. See Alison L. LaCroix, *The Ideological Origins of American Federalism* 81–83 (2010).

101. *Id.* at 83.

102. *Id.* at 82.

103. Bernard Bailyn, *Ideological Origins of the American Revolution* 232 (enlarged ed. 1992).

104. *Id.* at 233.



obliged to act or not according to the arbitrary will and pleasure of a master or his overseer.”<sup>105</sup> “[T]he slaves of the latter,” the author wrote, “deserve highly to be pitied, the slaves of the former to be held in the utmost contempt.”<sup>106</sup> There was a spectrum of slavery, and some varieties might be worse than others. But, as Bailyn explains, “The degradation of chattel slaves—painfully visible and unambiguously established in law—was *only the final realization of what the loss of freedom could mean everywhere.*”<sup>107</sup>

The Americans were not particularly innovative in their rhetoric. By invoking ideas of slavery, the colonists drew on well-established rhetorical conventions within British thought. Both supporters and opponents of the seventeenth-century English revolutionaries drew on the imagery of slavery to justify their positions. A 1659 pamphlet justifying Oliver Cromwell’s anti-Monarchist followers described the “yoak of slavery” imposed by the executed King Charles I and his supporters that the Parliamentarians had “so long fought against.”<sup>108</sup> This was the “depriv[ation]” of their “proper and true birth-right” as Englishmen: “the Liberty of petitioning Parliaments.”<sup>109</sup> Conversely, supporters of the 1660 Restoration of monarchical rule denounced the wickedness of the Cromwellian regime as its own form of enslavement: Tracts in the late 1650s and early 1660s referred to the Cromwell years as “slavery and oppressions . . . more intolerable then [sic] the Egyptian bondage” in which “cunning Sophisters . . . deluded many thousand persons” with “pretended Liberty” that “proved nothing else but an imaginary Chymera.”<sup>110</sup> Another tract called upon God to “redeem” the country from the “more then [sic] Egyptian slavery” that had kept the “Lawful King” Charles II “from his just Rights.”<sup>111</sup> Yet another pamphlet referred to the “Egyptian darkness,” during which “zealous Puritans” “cr[ied] liberty and reformation” but “there was nothing but slavery and confusion.”<sup>112</sup> A 1659 pamphlet, shortly before the Restoration, decried “our Liberties scornfully trodden underfoot” during Cromwell’s rule, when “Treasures

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105. *Id.* at 234 (citation omitted).

106. *Id.*

107. *Id.* (emphasis added).

108. *The Humble Advice, and Tender Declaration, or Remonstrance of Several Thousands of Men Fearing God, in the County of Durham, Northumberland, and the Adjacent Parts of Westmerland and Cumberland, with the North Part of Yorkshire; to the Lord General Monk and Those with Him* (London, Henry Hills 1659).

109. *Id.*

110. T.J., *A Letter of Advice to His Excellency the Lord General Monck, Tending to the Peace and Welfare of this Nation* 3–4 (n.p. 1659).

111. John Penruddock, *Speech Delivered upon the Scaffold in Exon Castle* (May 16, 1655), in *England’s Black Tribunal Set Forth in the Tryal of King Charles I. By the Pretended High Court of Justice in Westminster-Hall* 161, 165 (London, H. Playford 4th ed. 1703).

112. *The Picture of the Good Old Cause Drawn to Life in the Effigies of Master Prais-God Barebone* (London, 1660).

[were] expended on Instruments of our slavery.”<sup>113</sup> Not surprisingly, “slavery,” much like the words “freedom” or “democracy” in our own day, was an “essentially contested concept” in these debates; it was available and useful to both sides in a political dispute. (Another example is Justice Bradley’s suggestion that requiring a white restaurateur to serve an African American would constitute “slavery” for the former.<sup>114</sup>)

Or consider the stirring refrain at the conclusion of each stanza of *Rule Britannia*, originally written in 1740 and quickly adopted as the anthem of the British Navy: “Rule, Britannia! Britannia, rule the waves! / Britons never, never, never shall be slaves.”<sup>115</sup> Stanzas two and four elaborate the theme of tyranny as slavery:

The nations not so blest as thee  
Must, in their turn, to tyrants fall,  
While thou shalt flourish great and free:  
The dread and envy of them all. . . .

Thee haughty tyrants ne’er shall tame:  
All their attempts to bend thee down,  
Will but arouse thy generous flame;  
But work their woe, and thy renown.

[Refrain] Rule, Britannia! Britannia, rule the waves!  
Britons never, never, never shall be slaves.<sup>116</sup>

When American colonists called their condition slavery, therefore, they were not simply engaged in overheated rhetoric. They were simply repeating what they had learned as part of their socialization as “free Englishmen.” One of the most famous slogans of the Revolution was the motto “no taxation without representation.” Consider John Dickinson’s 1768 comment, made in the form of a “letter” from a farmer in Pennsylvania: “*Those* who are *taxed* without their own consent expressed by themselves of their representatives are *slaves*. *We are taxed* without our consent expressed by ourselves or our representatives. *We are therefore—SLAVES.*”<sup>117</sup> Josiah Quincy concluded a 1774 diatribe against the British as follows: “I speak it with grief—I speak it with anguish—Britons are our oppressors. I speak it with alarm—I speak it with indignation—*we are slaves.*”<sup>118</sup> Even John Adams spoke of “the most abject sort of slaves,”

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113. To the Parliament of the Common-wealth of England, &c., The Humble Petition and Representation of Divers Well-Affected of the County of South-hampton (London, R.W. 1659).

114. See Fairman, *supra* note 69, at 564 (reporting Justice Bradley’s observations).

115. Rule, Britannia! Lyrics, <http://www.hymns.me.uk/rule-britannia-lyrics.htm> (on file with the *Columbia Law Review*) (last visited June 20, 2012). We are grateful to Eugene Fidell for suggesting the importance of these lyrics to us.

116. *Id.*

117. Bailyn, *supra* note 103, at 232–33 (emphasis in original).

118. *Id.* at 233.

referring not to chattel slaves in pre-revolutionary Massachusetts, but to the colonists chafing under British mistreatment.<sup>119</sup> A 1765 pamphlet reprinted in Bailyn's collection of pre-revolutionary writings exhorts his fellow "freemen of the colony of Connecticut" to "stand for their absolute rights and defend them," which meant, among other things, trying to persuade misguided supporters of British oppression to mend their ways.<sup>120</sup> Should they do so, they should be forgiven. However, if a supporter "is in any post that unjustly grinds the face of the poor or that contributes to your slavery, ask him peaceably to resign it, and if he refuses to, use him in such a manner that he will be glad to do anything for a quiet life. For Britons never must be slaves."<sup>121</sup>

Indeed, as Aziz Rana has suggested in his study of settler ideology, it was crucial to white colonists' sense of themselves within the British Empire that *they* not be regarded as slaves; their freedom depended on the existence of other classes of persons who were not free, who could not own property, and who could be forced to work against their will.<sup>122</sup> Therefore, it was natural to understand political grievances—including grievances about representation and property—in the language of slavery.<sup>123</sup>

The colonial vision that opposed slavery to republican liberty held that slavery meant more than simply being free from compulsion to labor by threats or physical coercion. Rather, the true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person. Algernon Sidney's *Discourses Concerning Government*,<sup>124</sup> which was highly influential in eighteenth-century America and which especially influenced Thomas Jefferson, defined slavery as arbitrary government, in which people could not make laws for themselves. "[W]e have no other way of distinguishing between free nations, and such as are not so," Sidney wrote, "than that the free are governed by their own laws and magistrates, according to their own mind, and that the others either have willingly subjected themselves, or are by force brought under the power of one or more men, to be ruled according to his or their pleasure."<sup>125</sup> It made no difference that the master was kind; what mattered was that at any moment he could subject the slave to his domination: "[H]e is a slave who serves the best and gentlest man in the world, as well as he who serves the worst; and he does serve him, if he

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119. *Id.* (citing John Adams, *Novanglus*, in 4 *The Works of John Adams* 11, 28 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851)”).

120. Benjamin Church, *Liberty and Property Vindicated, and the St-pm-n Burnt*, in *Pamphlets of the American Revolution, 1750–1776*, at 580, 596 (Bernard Bailyn ed., 1965).

121. *Id.*

122. Aziz Rana, *The Two Faces of American Freedom* 3, 12–14, 22–23 (2010).

123. *Id.*

124. Algernon Sidney, *Discourses Concerning Government* (London, A. Millar 3d ed. 1751).

125. *Id.* § 21, at 349.

must obey his commands, and depends upon his will.”<sup>126</sup> One might well prefer life under a “benevolent despot” to being under the thumb of a “tyrant,” but “despotism” it remained—a condition altogether different from the American Declaration’s vision of government by “consent of the governed.”

It thus can occasion no surprise at all that a young soldier in New York wrote his father, on July 12, 1776, that “I most heartily congratulate you on the Declaration of Independence, a Declaration which happily dissolves on Connexions with the Kingdom where the Name of King is synonymous to that of Tyrant, and the name of Subjects to that of Slaves.”<sup>127</sup> Nor should one be surprised that Samuel Adams wrote to Richard Henry Lee, complaining about the new Constitution proposed by the Philadelphia Convention: “The few haughty Families, think *They* must govern. The Body of the People tamely consent & submit to be their Slaves. This unravels the Mystery of Millions being enslaved by the few!”<sup>128</sup>

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126. *Id.* § 21, at 349–50.

127. Extract of a Letter from a Young Man in the Army at New-York, to His Father in Town, dated New-York, July 13, 1776, *Am. Gazette*, or, the *Const. J.* (Salem, Mass.), July 23, 1776, at 24, quoted in Alexander Tsesis, *For Liberty and Equality: The Life and Times of the Declaration of Independence* 27 (2012).

128. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 1 *The Founders’ Constitution* 267, 268 (Philip B. Kurland & Ralph Lerner eds., 1987). Nor are these isolated examples. Consider, for example, a survey of only the primary sources in the chapter on “Republican Government” in the first volume of Kurland and Lerner’s compendium:

“[W]hen republican virtues fail, slavery ensues.” Thomas Paine, *Common Sense* (1776), reprinted in *The Founders’ Constitution*, *supra*, at 103, 107.

“[T]here not being in the whole circle of the sciences, a maxim more infallible than this, ‘Where annual elections end, there slavery begins.’” John Adams, *Thoughts on Government* (1776), reprinted in *The Founders’ Constitution*, *supra*, at 107, 109.

“Thus, if a man surrender [sic] all his alienable rights, without reserving a controul over the supreme power, or a right to resume in certain cases, the surrender is void, for he becomes a slave; and a slave can receive no equivalent.” *The Essex Result* (1778), reprinted in *The Founders’ Constitution*, *supra*, at 112, 115 (explaining rejection of draft Massachusetts Constitution).

“A city composed only of the rich and the poor, consists but of masters and slaves, not freemen . . .” John Adams, *Defence of the Constitutions of Government of the United States* (1787), reprinted in *The Founders’ Constitution*, *supra*, at 119, 121.

“[C]an a free and enlightened people create a common head so extensive, so prone to corruption and slavery, as this city probably will be, when they have it in their power to form one pure and chaste, frugal and republican.” *Federal Farmer*, No. 18 (1788), reprinted in *The Founders’ Constitution*, *supra*, at 132, 133 (expressing concern about Congress’s power to create new national capital).

Given these examples, one should not be shocked to read John C. Calhoun, in his Fort Hill address half a century later, arguing that suffrage was necessary to prevent enslavement:

If, without the right of suffrage, our rulers would oppress us, so, without the right of self-protection, the major would equally oppress the minor interests of the community. The absence of the former would make the governed the slaves of the rulers; and of the latter, the feebler interests, the victim of the stronger.<sup>129</sup>

However grotesque it may be to read Calhoun complaining that his white South Carolina compatriots are being reduced to the status of slaves, he was merely drawing on a well-established language by which those who deemed themselves the victims of illegitimate domination could describe their sad state as “enslavement,” and mobilize others to take up the cause of preventing it.

One can see echoes of these ideas in modern arguments. The 1956 platform of the Republican Party proudly proclaimed that under the Eisenhower Administration “[t]he advance of Communism and its enslavement of people has been checked . . . . Forces of freedom are at work in the nations still enslaved by Communist imperialism.”<sup>130</sup> Similarly, in his recent biography of John F. Kennedy, Chris Matthews notes that in 1946 John F. Kennedy “was calling the Soviet Union, our wartime ally, a ‘slave state’” during his successful inaugural run for office as a representative from Massachusetts.<sup>131</sup> Neither the Republicans nor JFK believed that people in the Soviet Union were owned, bought, and sold, with their children having the same status (and vulnerability) as chattel slaves. The use of “slavery” here meant the arbitrary domination characteristic of a police state, which is not too far distant from the colonists’ concerns.

The modern Tea Party has resuscitated the connections between government overreach and slavery.<sup>132</sup> Alabama Tea Party candidate Rick Barber explained in a video that government taxation (even with representation!) is a form of slavery “when someone is forced to work for months to pay taxes so that a total stranger can get a free meal, medical

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129. John C. Calhoun, *The Fort Hill Address* (1831), in *Theories of Federalism: A Reader* 135, 138 (Dimitrios Karmis & Wayne Norman eds., 2005).

130. Republican Party Platform of 1956 (Aug. 20, 1956), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25838#ixzz1cxgbkwcl> (on file with the *Columbia Law Review*).

131. Chris Matthews, *Jack Kennedy: Elusive Hero* 87 (2011).

132. See Noah Kristula-Green, *The Tea Party’s Growing Slavery Obsession*, *FrumForum* (Aug. 5, 2010, 3:30 PM), <http://www.frumforum.com/the-tea-partys-growing-slavery-obsession/> (on file with the *Columbia Law Review*) (linking to videos of town hall event on Affordable Care Act and Rick Barber commercial).

procedure, or a bailout.”<sup>133</sup> Kentucky Senator Rand Paul, explaining his opposition to the Affordable Care Act, noted that while he had no objection to tending to the poor as an act of personal charity, he rejected outright the idea of a government right to health care: “[Y]ou have to realize what that implies. It’s not an abstraction. I’m a physician. That means you have a right to come to my house and conscript me. It means you believe in slavery.”<sup>134</sup> Some lawyers have even suggested that compulsory *pro bono* requirements are akin to the “involuntary servitude” banned by the Thirteenth Amendment, though such protests have been met with general ridicule.<sup>135</sup>

How should these ideas from the American Revolution be understood today?<sup>136</sup> All of the pamphleteers and orators were familiar with chattel slavery; indeed, Bailyn’s and Rana’s point is that the colonists were all too familiar with it, for it marked precisely the status they wanted to avoid.<sup>137</sup> Chattel slavery was but one form of slavery (hence the addi-

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133. Barber4Congress, Slavery, YouTube (June 27, 2010), <http://www.youtube.com/watch?v=knI4RwuJJRg> (on file with the *Columbia Law Review*).

134. ThinkProgress5, Rand Paul Equates Universal Health Care and Slavery, YouTube (May 11, 2011), [http://www.youtube.com/watch?feature=player\\_embedded&v=u\\_HVyoT2PgM](http://www.youtube.com/watch?feature=player_embedded&v=u_HVyoT2PgM) (on file with the *Columbia Law Review*).

135. See Deborah L. Rhode, Pro Bono in Principle and in Practice: Public Service and the Professions 9–10, 38 (2005) (describing various unsuccessful Thirteenth Amendment arguments and criticizing those who use these arguments “to justify their refusal to provide a little legal help to those, who in today’s society, are most like the freed slaves”).

136. The most obvious association is to modern libertarian classics, such as Robert Nozick’s *Anarchy, State, and Utopia*. But Nozick’s work is far more radical than that of the Founders, who, after all, believed in the legitimacy of taxation *with* representation. See Robert Nozick, *Anarchy, State, and Utopia* 280–84 (1974) (describing thought experiment of “demoktesis” and showing inconsistency between democracy and libertarianism). One should also acknowledge the work of the indefatigable Randy Barnett, both with regard to his attempts to revive the works of such nineteenth-century anarchists as Lysander Spooner and his own work defending libertarianism, including its application to the United States Constitution. See generally Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004) (describing Barnett’s libertarian theory of constitutional interpretation); Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (2000) (describing Barnett’s libertarian political theory).

137. The Massachusetts colonists who feared that the British wished to reduce them to the status of “slaves” lived in a regime where slavery was legal. There were more than 400 slaves in Boston in 1705, and the Commonwealth did not abolish slavery until 1783. Black Heritage Trail, Museum of African American History, <http://www.maah.org/trail.htm> (on file with the *Columbia Law Review*) (last visited May 30, 2012). Slavery was effectively abolished by a 1783 Massachusetts state court decision interpreting the 1780 constitution, drafted in large measure by John Adams, which declared that “all men are born free and equal, and have . . . the right of enjoying and defending their lives and liberty.” *Commonwealth v. Jennison* (Mass. 1783) (unreported), in Paul Finkelman, *The Law of Freedom and Bondage* 36–37 (1986). Interestingly enough, the 1778 draft constitution that had been rejected by the populace both recognized slavery and deprived free blacks of suffrage. *Emancipation in Massachusetts, Slavery in the North*, <http://www.slavenorth.com/massemancip.htm> (on file with the *Columbia Law Review*) (last

tional qualifying adjective); it was the limiting case that symbolized the fullest loss of freedom. The colonists saw an obvious analogy between the arbitrary rule of a master (however kind, in Sidney's words<sup>138</sup>) and the arbitrary rule of the British Empire. Their language seems incredible today only because people have forgotten the connections between their language and the republican political theory that made the comparison obvious.

#### IV. THE ABOLITIONIST'S DILEMMA

During the nineteenth century, people employed the idea of slavery in multiple ways. Early abolitionists recalled the Declaration of Independence and invoked the struggle against British tyranny as a reason for Americans to abolish slavery, connecting slavery to republicanism.<sup>139</sup>

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visited Aug. 8, 2012). Vermont, not yet a state, had, as the independent "Commonwealth of Vermont," abolished slavery in 1777. Slavery in Vermont, Slavery in the North, <http://www.slavenorth.com/vermont.htm> (on file with the *Columbia Law Review*) (last visited Aug. 8, 2012).

138. See *supra* text accompanying note 126 ("[H]e is a slave who serves the best and gentlest man in the world.").

139. Just as the revolutionary generation opposed republicanism to slavery, early abolitionists opposed slavery to republicanism. This opposition was stated perhaps most forcefully in the early debates that led up to the Missouri Compromise. In 1819, Representative Timothy Fuller of Massachusetts argued that because the United States government was required to guarantee each state a republican form of government, Congress could not admit Missouri as a slave state, because a state whose constitution recognized slavery was not republican, and Fuller proceeded to quote the Declaration of Independence as proof. 33 *Annals of Cong.* 1179–80 (1819) (statement of Rep. Timothy Fuller). At this point, the report of the congressional proceedings continued:

Mr. F was here interrupted by several gentlemen, who thought it improper to question in debate the republican character of the slaveholding states, which had also a tendency, as one gentleman (Mr. Colston, of Virginia,) said, to deprive those states of the right to hold slaves as property, and he adverted to the probability that there might be slaves in the gallery listening to the debate.

*Id.* at 1180. Fuller, simply by putting together the language of the Guarantee Clause and the framers' idea that slavery was antirepublican, had thrown a rhetorical hydrogen bomb into the debate. If Fuller was right, not only should Missouri not be admitted as a slave state, but the United States had a duty to end slavery in all of the existing slave states as well. Fuller quickly backtracked, but only partly, "assur[ing] the gentlemen that nothing was further from his thoughts than to question on that floor the right of Virginia and other States, which held slaves when the Constitution was established, to continue to hold them." *Id.* Those states were grandfathered in, and Congress could do nothing to disturb them. Although Fuller did not wish "to excite local animosities," he nevertheless claimed that a republican government was a government without slavery, a government in which "all men are free, and have an equal right to liberty, and all other privileges." *Id.* at 1182. Out of necessity, and for the sake of preserving the Union, slaveholding states were permitted to make exceptions to this principle only so far as necessary "until they should think it proper or safe to conform to the pure principle by abolishing slavery." *Id.*; see Wiecek, *supra* note 55, at 143–47 (discussing role played by Guarantee Clause in debates over Missouri Compromise). Fuller's 1819 argument that the federal government lacked

But these comparisons—and the eighteenth-century rhetoric of slavery—complicated the abolitionist cause before the Civil War. Abolitionists sought to eliminate African chattel slavery; but what else constituted “slavery” and would have to vanish along with it? And would acknowledging these connections and entailments undermine the cause of abolition? For example, if slavery was the opposite of republicanism, did this mean that limits on suffrage—for example, property qualifications<sup>140</sup>—were also slavery? If marriage was slavery, as some early feminists argued,<sup>141</sup> did that mean that one could not eliminate chattel slavery without also altering the relations between the sexes? If wage labor was slavery,<sup>142</sup> did this mean that Northern factories would have to be transformed at the same time as Southern plantations? Such considerations gave abolitionists incentives to narrow the concept of slavery in order to win supporters and make their cause more plausible to the broadest group of Americans.

Ironically, it was Southern defenders of black chattel slavery who consistently emphasized the potential reach of critiques of “slavery” in order to discomfit their opponents, often employing the arguments made by contemporary reformers of the English labor system. English reformers, living in a country that had already abolished chattel slavery, sometimes compared the conditions of the working class to American treatment of blacks, with the goal of arguing for reform of working conditions in England. Southern defenders of black chattel slavery offered similar comparisons for precisely the opposite purpose—to stress the moral equivalence between chattel and wage slavery. This not only branded abolitionists with the charge of hypocrisy, but also portrayed them as dangerous revolutionaries who threatened the North as much as the South. In order to avoid these charges, Northern abolitionists had to sharply distinguish chattel slavery from other injustices, which, therefore, could no longer be called slavery.

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the power to create new slave states was eventually taken up by the Republican Party in the 1850s in a different form. Relying primarily on the Due Process Clause, Republicans argued that slavery could not exist in federal territories. See Jacobus tenBroek, *Equal Under Law* 140–41 & nn.5–6 (1965) (describing Due Process argument in Republican Party platforms); Republican Platform of 1856, *in* 1 *National Party Platforms*, supra note 76, at 27 (“[I]t becomes our duty to maintain this [due process] provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery in the Territories . . . by positive legislation . . . .”); see generally Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of The Fourteenth Amendment*, 3 *J. of Legal Analysis* 165, 177–83 (2011) (describing development of abolitionist and antislavery arguments based on Due Process Clause in antebellum era).

140. Cf. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 24 (2000) (noting gradual dismantling of property qualifications in United States in antebellum period).

141. See *infra* text accompanying notes 152, 167–169 (describing early suffragists’ comparison between marriage and slavery).

142. See *infra* text accompanying notes 143–150, 156–166 (describing arguments comparing wage labor to slavery).



For example, Southern defenders of chattel slavery pointed to—and strongly criticized—forms of wage slavery that were developing in industrial societies. Southern defenders of slavery argued that abolitionists were hypocrites because they did not attack white wage slavery. Indeed, defenders argued, masters took far better care of their slaves than factory owners took care of their employees. Abolitionists complaining about slavery in the South, they charged, should tend to conditions in the North (and in Great Britain) first. In an 1845 “Letter to an English Abolitionist,” South Carolina Senator James Hammond claimed that there was “perhaps a less humane system of Slavery in countries continually supplied with fresh laborers at a cheap rate.”<sup>143</sup> A sick or malnourished worker could be ruthlessly fired and replaced with another, healthier employee, whereas on a properly run slave plantation the master had incentives to keep his slaves healthy.<sup>144</sup> Thus, Hammond argued that there was a “spirit of discontent wherever nominal free labor prevails, with its ostensive privileges and its dismal servitude.”<sup>145</sup> In fact, Hammond argued, making English workers into chattel slaves would constitute their “emancipation”:

[I]n Great Britain the poor and laboring classes of your own race and color, not only your fellow-beings, but your *fellow-citizens*, are more miserable and degraded, morally and physically, than our slaves; to be elevated to the actual condition of whom, would be to these, your *fellow-citizens*, a most glorious act of *emancipation*.<sup>146</sup>

Hammond also chastised abolitionist reformers:

When you look around you, how dare you talk to us before the world of Slavery? For the condition of your wretched laborers, you, and every Briton who is not one of them, are responsible before God and man. If you are really humane, philanthropic, and charitable, here are objects for you. Relieve them. Emancipate them. Raise them from the condition of brutes, to the level of human beings—of American slaves, at least. Do not for an instant suppose that the *name* of being freemen is the slightest comfort to them, . . . the most abject and degraded wretches that ever bowed beneath the oppressor’s yoke.<sup>147</sup>

The most brilliant Southern defender of chattel slavery was undoubtedly the Virginian George Fitzhugh, whose magnum opus was

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143. James Henry Hammond, Letter to an English Abolitionist (Jan. 28, 1845), in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830–1860*, at 168, 171 (Drew Gilpin Faust ed., 1981).

144. See George Fitzhugh, *Cannibals All!, or Slaves Without Masters* 28 (C. Vann Woodward ed., Harvard Univ. Press 1960) (1857) [hereinafter Fitzhugh, *Cannibals All*] (“Masters treat their sick, infant, and helpless slaves well, not only from feeling and affection, but from motives of self-interest.”).

145. Hammond, *supra* note 143, at 177.

146. *Id.* at 193.

147. *Id.* at 196.

*Cannibals All!*<sup>148</sup> Like Hammond, he denounced as hypocrites European abolitionists who were “loud in their abuse of our form of slavery, whilst they are busily adopting worse forms”<sup>149</sup> that constituted “white slavery.” “[T]he white laboring class,” Fitzhugh argued, “are remitted to slavery to capital, which is much more cruel and exacting than domestic slavery.”<sup>150</sup>

Defenders of slavery argued that chattel slaves were better treated for another reason. Unlike factory workers, who were bound by contract to their employers, chattel slaves were protected by familial benevolence; a master’s connection to his slaves was compared to family relationships, which were by stipulation benign.<sup>151</sup> (Ironically, at the same time, early suffragists were trying to argue in the opposite direction—that family relationships were relationships of unjustified domination, and that the condition of women, especially in marriage, was akin to slavery.<sup>152</sup>)

All of these critiques, whatever their motivation—or their accuracy—gave abolitionists incentive to maintain a sharp divide between chattel slavery and other forms of economic injustice, as well as between slavery and the treatment of women. The elimination of African slavery was paramount; remedying other injustices would have to wait. Moreover, calling these other practices and conditions “slavery” only confused matters. The easiest approach was to argue that the differences between them were matters of kind and not merely of degree. Ideology and political prudence alike seemed to converge on a limited notion of “slavery.”

Thus, the attempt by slavery’s most devoted opponents to distinguish Southern slavery from newly emerging forms of economic inequality assisted the cabining of the concept of slavery before the Civil War. Massachusetts Senator Charles Sumner in his “Barbarism of Slavery” speech, for example, defined slavery by reference to a host of Southern slave codes that, among other things, allowed masters to buy and sell other human beings and to treat as their property the issue of their chat-

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148. Fitzhugh, *Cannibals All*, supra note 144; see Eugene D. Genovese, *The World the Slaveholders Made: Two Essays in Interpretation* 124–31 (1969) (providing extensive discussion of George Fitzhugh and his defense of chattel slavery).

149. George Fitzhugh, *Southern Thought*, XXIII De Bow’s Rev. 337 (1857), reprinted in *The Ideology of Slavery*, supra note 143, at 274, 275.

150. *Id.* at 277. Had Fitzhugh wished, of course, he could have borrowed extensively from Friedrich Engels’s masterwork, *The Condition of the Working-Class in England in 1844*, which described the travails of workers in Birmingham. Friedrich Engels, *The Condition of the Working-Class in England in 1844* (Florence Kelley Wischnewetzky trans., George Allen & Unwin 1950) (1892). Richard Hofstadter long ago referred to John C. Calhoun as “the Marx of the master class,” Richard Hofstadter, *The American Political Tradition, and the Men Who Made It* 87 (1946), but that title really should go to Fitzhugh.

151. See Fitzhugh, *Cannibals All*, supra note 144, at 205 (“[B]esides wife and children, brothers and sisters, dogs, horses, birds and flowers—slaves, also, belong to the family circle. . . . [T]he interests of the master and slave are bound up together, and each in his appropriate sphere naturally endeavors to promote the happiness of the other.”).

152. Stanley, supra note 23, at 179 (quoting Elizabeth Cady Stanton on “nearly parallel” status of slave codes and laws governing married women).

tels.<sup>153</sup> In 1847, William Lloyd Garrison dismissed those who would analogize the treatment of the white working class to slavery:

If the white laboring men in America are *slaves*, whose fault is it? They are Slaves that hold the sceptre of Sovereignty in their own hands. Why do they not use it for their own emancipation? They have nobody to blame but themselves. . . . Is is [sic] so with the chattel Slaves?<sup>154</sup>

After the Civil War, however, with chattel slavery abolished, some activists sought to return to the older understanding and describe other conditions as instantiations of “slavery.”<sup>155</sup> Speaking at a reunion of anti-

153. Cong. Globe, 36th Cong., 1st Sess. 2591–92 (1860) (statement of Sen. Charles Sumner).

154. William Lloyd Garrison, *Chattel Slavery and Wages Slavery*, *The Liberator*, Oct. 1, 1847, at 17, 40. Labor organizer William West disagreed with Garrison, arguing that “[t]his apparent freedom of the wage slaves is wholly fictitious.” Stanley, *supra* note 23, at 20.

155. In the very first case construing the Thirteenth Amendment, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the plaintiff butchers argued that the Thirteenth Amendment’s ban on “involuntary servitude” was designed to throw off all vestiges of European feudalism. A New Orleans ordinance required that butchers practice their trade only in slaughterhouses run by seventeen named individuals who ran a state-created monopoly. *Id.* at 59; *id.* at 83 (Field, J., dissenting). This, the plaintiffs argued, was like European feudal rules that bound serfs to engage in agriculture only on an assigned plot of land owned by a feudal lord. New Orleans had made the butchers subject to the arbitrary will of a corporation just as peasants had been subject to the arbitrary will of an overlord:

Is not this “a servitude?” Might it not be so considered in a strict sense? It is like the “thirlage” of the old Scotch law and the *banalités* of seigniorial France; which were servitudes undoubtedly. But, if not strictly a servitude, it is certainly a servitude in a more popular sense, and, being an enforced one, it is an involuntary servitude. Men are surely subjected to a servitude when, throughout three parishes, embracing 1200 square miles, every man and every woman in them is compelled to refrain from the use of their own land and exercise of their own industry and the improvement of their own property, in a way confessedly lawful and necessary in itself, and made unlawful and unnecessary only because, at their cost, an exclusive privilege is granted to seventeen other persons to improve and exercise it for them. We have here the “servients” and the “dominants” and the “thralldom” of the old seigniorial system. The servients in this case are all the inhabitants in any manner using animals brought to the markets for sale or for slaughter. The dominants are “the seventeen” made into a corporation, with these seigniorial rights and privileges. The masters are these seventeen, who alone can admit or refuse other members to their corporation. The abused persons are the community, who are deprived of what was a common right and bound under a thralldom.

*Id.* at 50–51 (reporting plaintiffs’ argument). Justice Field’s dissent, while not conclusively resolving the Thirteenth Amendment issue, agreed that the comparison to feudalism was apt: “The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France . . .” *Id.* at 92–94 (Field, J., dissenting).

The majority dismissed the butchers’ Thirteenth Amendment argument curtly, labeling it “a microscopic search . . . to find in [the Thirteenth Amendment] . . . a reference to

slavery activists in 1874, George W. Julian argued, “The abolition of poverty is the next work in order and the Abolitionist who does not see this fails to grasp the logic of the Anti-Slavery movement, and calls a halt in the inevitable march of progress.”<sup>156</sup> “African slavery was simply one form of the domination of capital over the poor,” Julian explained. “The system of Southern slavery was the natural outgrowth of that generally accepted political philosophy which makes the protection of property the chief end of Government. . . .”<sup>157</sup> Julian called for workers to “wage war against the new forms of slavery which are everywhere insidiously intrenching themselves behind the power of combined capital, and barring the door against the principle of equal rights.”<sup>158</sup>

Julian was not unique. A member of the Knights of Labor testified before the Senate in 1883 that “[t]he working people feel that they are under a system of forced slavery.”<sup>159</sup> Terence Powderly, the leader of the Knights of Labor, described a “new slavery . . . reach[ing] out with a far stronger hand than the old,” because “[t]he lash of gold” fell “upon the backs of millions.”<sup>160</sup> An anonymous trade unionist at the New England Labor Reform Convention opined that “[i]n the earliest historical period it was total slavery. . . . [A]nd then from serfdom into villenage, and now at last we have another form of slavery, which is the wages slavery.”<sup>161</sup> Even Samuel Gompers, the founder of the American Federation of Labor, who is usually described as distinctly nonradical, argued in an article on cigar manufacturing in tenements that families were being sacrificed “to the Moloch of wage slavery.”<sup>162</sup>

Suffragists also took up the comparison. Elizabeth Cady Stanton wrote in 1868 that “[a]ccording to man’s idea, as set forth in his creeds and codes, marriage is a condition of slavery.”<sup>163</sup> Earlier, in a letter to her

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servitudes, which may have been attached to property in certain localities.” *Id.* at 69 (majority opinion). Justice Miller, writing for the majority, reasoned that only servitude to a *person* was covered by the Amendment, not a servitude to land, and “the obvious purpose was to forbid all shades and conditions of African slavery.” *Id.* In this way, Justice Miller neatly sidestepped the plaintiffs’ real argument—that a revival of feudal practices, because they were inherently antirepublican, would also violate the Thirteenth Amendment.

156. George W. Julian, *The Lessons of the Anti-Slavery Conflict*, Address Before the Anti-Slavery Reunion (June 10, 1874), *in* *Chi. Trib.*, July 11, 1874, at 10.

157. *Id.*

158. *Id.*

159. 1 *Comm. of the Senate, 48th Cong., Report of the Committee of the Senate upon the Relations Between Labor and Capital, and Testimony Taken by the Committee* 219 (1885).

160. T.V. Powderly, *Thirty Years of Labor: 1859 to 1889*, at 545 (Columbus, Excelsior Publ’g House 1890).

161. Stanley, *supra* note 23, at 86.

162. 1 Samuel Gompers Papers 185 (Stuart B. Kaufman ed., 1986).

163. 2 *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony* 178 (Ann D. Gordon ed., 2000); see also Nancy Isenberg, *Sex and Citizenship in Antebellum America* 107–08 (1998) (describing various comparisons suffragists made between married women and slaves, including “civil death” that both slaves and married women suffered).

cousin, Stanton had declared that “[t]he rights of humanity are more grossly betrayed at the altar than at the auction block of the slaveholder.”<sup>164</sup> Susan B. Anthony, in a speech delivered in 1875, asserted that “the first and only efficient work must be to emancipate woman from her enslavement.”<sup>165</sup>

Before chattel slavery was abolished, such comparisons might have been dangerous to the cause of abolition. After the Thirteenth Amendment, they could be useful to a wide range of groups who sought to show that the condition of laborers or women was akin to a practice already condemned in the United States. Nevertheless, the fact of emancipation also had rhetorical effects in the opposite direction. Defenders of the status quo could now claim that, with the abolition of chattel slavery, American society was more or less “free.” Evoking Henry Maine, one could argue that “status” had given way to “contract.”<sup>166</sup> Workers now enjoyed the freedom to enter (or refuse to enter) into binding commitments for their labor. However objectionable to labor activists and feminists, the normal operations of markets and family life could not be slavery, which was by definition the worst of evils and had already been eradicated by law. Asserting that anything else could be “slavery,” therefore, had to be hyperbole.

For example, by 1918, Congress tried successively to ban child labor using the commerce power and the taxing power,<sup>167</sup> but it was apparently unthinkable to use its powers under Section 2 of the Thirteenth Amendment to eliminate another form of “slavery” or “involuntary servitude” in American society.<sup>168</sup> After all, invoking the Thirteenth

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164. Stanley, *supra* note 23, at 177 (quoting Letter from Elizabeth Cady Stanton to Gerrit Smith (1851)).

165. 2 Ida Husted Harper, *Life and Work of Susan B. Anthony* 1011 (1969).

166. Henry Sumner Maine, *Ancient Law* 170 (London, John Murray 11th ed. 1887) (“[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”).

167. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (overturning Child Labor Tax Act); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (overturning Keating-Owen Act of 1916).

168. See Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress To Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 *Rutgers L. Rev.* 59, 63 (2010) (“Throughout this period, Congress never once attempted to enact child labor legislation pursuant to its power under [Section 2 of] the Thirteenth Amendment.”). Mishra notes two interesting facts about Progressive-era attempts to outlaw child labor at the federal level. First, “[t]hroughout this early stage of the movement to federally limit child labor, members of Congress failed to conceive of the Thirteenth Amendment’s prohibition of involuntary servitude as a legislative basis.” *Id.* at 75. Second, “the descriptions of child labor in congressional hearings and debates during this period invoked terminology and concepts underlying the Thirteenth Amendment.” *Id.* at 76. Indeed, a few members of Congress even compared child labor to slavery and to peonage systems, which Congress could surely reach under Section 2 of the Thirteenth Amendment. *Id.* at 79, 93. Yet congressmen and senators were either unable or unwilling to connect the dots. Indeed, the House Judiciary Committee refused even to

Amendment to ban child labor would have cast the charge of slavery against two different features of American life simultaneously: the coercion of the market on the one hand, and coercion within family relations on the other.<sup>169</sup>

Of course, things did not have to happen in this way. The Thirteenth Amendment—and the idea of slavery—might have been read more broadly. The fact that Jim Crow has been eradicated has not prevented people on the left from attacking policies of racial separation and racial discrimination today,<sup>170</sup> or people on the right from invoking comparisons between affirmative action policies and the segregated South.<sup>171</sup>

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consider a Thirteenth Amendment theory in a bill proposed by Samuel Gompers, president of the American Federation of Labor, and drafted by a government attorney, James F. Lawson. *Id.* at 89 & n.193. Nor did Congress invoke its Thirteenth Amendment power in passing the Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424), the “White Slave Traffic” Act that originally banned transportation of women across state lines for “immoral purposes.” *Id.* at 83 n.143.

Mishra offers several different explanations for why Congress was unwilling to consider Thirteenth Amendment theories, but ultimately concludes that the failure is “surprising.” *Id.* at 91. Mishra’s study is evidence of the multiple and overlapping forms of thought and practice that have limited the Thirteenth Amendment’s reach.

169. Although the Thirteenth Amendment, by its terms, excludes criminal punishments from its reach, it is worth noting that American prisoners have sometimes been treated worse than antebellum slaves. David Oshinsky’s important book about the Parchman prison system in Mississippi compares conditions at Parchman to chattel slavery and finds the slaves better off. David M. Oshinsky, “Worse than Slavery”: Parchman Farm and the Ordeal of Jim Crow Justice (unpaginated opening page) (1996). L.G. Shivers, writing in 1930, stated that “[t]he convict’s condition [following the Civil War] was much worse than slavery. The life of the slave was valuable to the master, but there was no financial loss . . . if a convict died.” *Id.* at unpaginated opening page; cf. Sanford Levinson, Slavery and the Phenomenology of Torture, 74 Soc. Res. 149, 150 (2007) (arguing torture, like slavery, depends on creation of perception that victims have “no rights’ that the rest of us are ‘bound to respect’” (quoting *Scott v. Sandford*, 60 U.S. 393, 407 (1857))).

The Thirteenth Amendment’s exclusion of criminal punishments has also been used to justify chain gangs and other forms of convict labor, especially in the South. See, e.g., Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2009) (offering a history of systems of convict labor). Blackmon notes that his book, examining convict labor in Birmingham, Alabama, was inspired by asking a “provocative question”: “What would be revealed if American corporations were examined through the same sharp lens of historical confrontation as the one then being trained on German corporations that relied on Jewish slave labor during World War II and the Swiss banks that robbed victims of the Holocaust of their fortunes?” *Id.* at 3.

170. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 2 (2010) (“[W]e use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.”).

171. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (opinion of Roberts, C.J.) (“Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts . . . have not . . . demonstrat[ed] that we should allow this once again—even for very different reasons.”); *id.* at 773–80 (Thomas, J., concurring) (“The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected those arguments, today’s dissent replicates them to a distressing extent.”).

In any case, at some point in the nineteenth century “slavery” became identified with the particular practice of “chattel slavery,” and the qualifying adjective was dropped. This meant that other forms of domination were described as akin to slavery or with their own qualifying adjectives, like “wage” slavery or “white” slavery, rather than being slavery itself. This shift in meaning has had significant consequences for the development of American political thought and political discourse, including in the twenty-first century.

#### V. THE COMPARISON WE HAVE LOST

It is not simply that people assume that by slavery one means “chattel slavery.” Rather, it means that using the term to refer to anything else, even if one includes a differentiating adjective like “wage slavery” or compares slavery to the abuses leveled on a helpless child by an all-powerful parent,<sup>172</sup> is thought to be “off the wall” or a grievous insult to the “real slaves”—generations of African Americans—on whose backs these rhetorical claims rest.

One result of this rhetorical shift is that one cannot simply affirm that “chattel slavery” is the worst form of a larger concept called “slavery” that includes a variety of practices. Rather, one must deny that almost anything else could possibly count as “slavery.” Compare this to our treatment of the First Amendment. People do not find it particularly difficult to acknowledge that imprisoning dissidents is the worst example of a larger class of free speech violations. Restricting “slavery” only to its worst instantiation—the evil of “chattel slavery”—is a bit like adopting John Yoo’s infamous definition of “torture” as requiring a degree of pain and debilitation equal to facing the risk of death or organ failure.<sup>173</sup> One can easily agree that what Yoo describes is a form of “torture”; the dispute is whether his description exhausts the concept. It does not, and neither should “chattel slavery” be treated as exhausting the meaning of “slavery,” especially if one examines the history of the idea during the American Revolution and the Founding.

To be sure, antipeonage laws passed in the aftermath of the Thirteenth Amendment have been applied, even in the present, to certain exploitative practices directed against almost helpless workers.<sup>174</sup> In addition, there is the phenomenon of “white slavery” as a euphemism

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172. See Amar & Widawsky, *supra* note 78, at 1363–65 (analogizing parental child abuse to antebellum slavery and arguing that Thirteenth Amendment provides remedy).

173. See Memorandum from Jay C. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf> (on file with the *Columbia Law Review*) (adopting very narrow construction of “torture” in federal statutes in order to insulate certain interrogation practices from liability under domestic and international law).

174. See Peonage Abolition Act, ch. 187, 14 Stat. 546, 546 (1867) (codified as amended at 18 U.S.C. § 1581, 42 U.S.C. § 1994).

for organized prostitution.<sup>175</sup> By and large, however, anyone using the term “slavery” is expected to demonstrate that the circumstances involved are almost as dire as those depicted in Harriet Beecher Stowe’s *Uncle Tom’s Cabin*<sup>176</sup> or Toni Morrison’s *Beloved*.<sup>177</sup>

The real question is whether this construction of political meaning has been good for American constitutional and political culture, or whether something valuable was lost when it became impossible to take the founding generations’ claims about slavery and republicanism as anything other than tin-foil-hat thinking, or metaphors run riot. One can understand the reaction of people who object to Tea Party claims about slavery in precisely this way. People offended by Tea Party comparisons between government overreach and slavery might make three objections: First, Tea Partiers are engaged in hyperbole or paranoid fantasies of persecution; second, Tea Partiers do injury to the memory of the millions who died in the Middle Passage and suffered on Southern plantations; and third, Tea Partiers are somehow perversely compensating for racialized stereotypes about the recipients of government programs and their own anxieties about an increasingly multiracial society.<sup>178</sup>

One can acknowledge the founding generation’s view of slavery as antirepublicanism and unjustified domination, however, without having to accept all of the contemporary Tea Party’s arguments. Neither the modern state nor the Affordable Care Act constitutes slavery. Quite to the contrary, access to basic necessities like health care may be necessary to self-sufficiency and equal opportunity in a modern republic. Market

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175. See Mishra, *supra* note 168, at 82 (describing purposes of Mann Act).

176. Harriet Beecher Stowe, *Uncle Tom’s Cabin* (Signet Classic 1962) (1852).

177. Toni Morrison, *Beloved* (1987).

178. Sensitivity about political uses of the term “slavery” is not merely a matter of liberal objections to Tea Party rhetoric. Republicans pounced on Vice President Joseph Biden when he suggested during a campaign speech in Virginia before an audience including many African Americans that “Romney wants to let . . . the big banks once again write their own rules, unchain Wall Street. They’re going to put you all back in chains.” Rebecca Berg, *Biden Warns Romney Policies Would Put Crowd “Back in Chains,”* N.Y. Times The Caucus (Aug. 14, 2012, 2:14 PM), <http://thecaucus.blogs.nytimes.com/2012/08/14/biden-warns-romney-policies-would-put-crowd-back-in-chains/> (on file with the *Columbia Law Review*) (last updated Aug. 14, 2012, 9:43 PM). Former Mayor of New York Rudolph Giuliani, although proclaiming that “I don’t think . . . [Biden is] nuts,” nevertheless went on to “wonder if he’s got the kind of balance—probably what I should have said is the balance to be president of the United States.” Brian Knowlton, *Giuliani and Santorum Assail Biden for Virginia Speech,* N.Y. Times The Caucus (Aug. 19, 2012, 1:30 PM), <http://thecaucus.blogs.nytimes.com/2012/08/19/giuliani-and-santorum-assail-biden-for-virginia-speech/> (on file with the *Columbia Law Review*). Former Pennsylvania Senator Rick Santorum was less charitable; he denounced Biden’s language as “horrendous” and accused the Vice President of playing “the race card.” *Id.* Noting that a conservative politician who had made similar remarks “would be pilloried for racial insensitivity,” the reliably liberal *Boston Globe* argued in an editorial that Biden should apologize for this “gaffe.” Editorial, *Biden Should Apologize: “Back in Chains,”* *Bos. Globe* Aug. 17, 2012, at A14.



forces make health care expensive, and when serious health problems arise, they can be catastrophic for families without adequate insurance. Universal health care—and corresponding public duties to participate in government programs that provide it—may be a valuable amelioration of the forms of domination and unfreedom that markets can produce. As Solicitor General Donald Verrilli put it in his final remarks before the United States Supreme Court after three days of defending the Affordable Care Act, “[A]s a result of the health care they will get,” persons who were condemned to untreated illnesses because of lack of health insurance or access to Medicaid “will be *unshackled* from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty.”<sup>179</sup> Thus, far from being a form of slavery, universal health care—if and when it comes to America—will “unshackle” millions who, without coverage, may be only one serious illness away from destitution or death. Individual mandates to purchase health insurance may not be the best policy solution, but they are not antirepublican even if members of the modern political party called “Republican” mostly disagree. If it is slavery to be put to the choice of buying health insurance or paying a tax, then, presumably, so too would being forced to pay taxes to the state for a health insurance program like Medicare or Medicaid that one would prefer not to support. Unless one is a radical libertarian indeed, that is neither a plausible political theory nor, more importantly, a faithful rendering of the American constitutional tradition.

A categorical rejection of the idea of slavery in modern political discourse may throw out the baby with the bathwater. The fact that at present only so-called fringe elements in American political discourse are willing to connect concerns about overweening government power to slavery and antirepublicanism should be cause for sorrow, not disdain. It shows how far removed basic themes of American democracy are from the discussion of “reasonable” people. Slavery as tyranny and unjust domination, either at the hand of public or private power, is an idea with deep roots in the American political tradition. The connection between slavery and threats to republicanism is important, particularly in a world of deep political corruption, unresponsive and dysfunctional government, and growing inequalities of wealth that in turn make government increasingly alienated from the concerns of any but the wealthiest and most powerful interests in society.<sup>180</sup> As Larry Bartels has concluded in a book-length study of responsiveness in American democracy, the degree to which politicians respond to the policy preferences of citizens is highly

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179. Transcript of Oral Argument at 80, *Florida v. Dep’t of Health & Human Servs.* (No. 11-400), decided sub nom. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (emphasis added).

180. For a recent *cri de coeur*, see Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan To Stop It* (2011) (arguing for campaign finance reform to prevent political corruption).

correlated to citizens' income.<sup>181</sup> Politicians are pretty good at responding to the policy preferences of the very rich, and virtually ignore the preferences of the poorest Americans.<sup>182</sup> This has had self-reinforcing effects: Greater inequality in the United States has led to increasing unresponsiveness by politicians to the interests of poor and working-class Americans, which in turn has led to more income inequality, and so on.<sup>183</sup> American revolutionaries had a name for a system in which distant governments made arbitrary decisions that were unresponsive and unconcerned with the interests of the governed: They called it slavery. And, as this Essay has shown, social movements in the nineteenth century were sometimes more honest than Americans today in recognizing unfreedom in bedrock institutions of market and family and daring to call this unfreedom slavery.

This is not to claim that American history would have been miraculously transformed for the better if Americans took seriously the founding generation's conception of "slavery." But, at the very least, it is possible that American political rhetoric would be different and that certain issues would be on the table for discussion in different ways. Among other things, it might then be possible to read the Thirteenth Amendment aspirationally to abolish many different forms of antirepublican domination and involuntary servitude, without being limited by the specific examples in the minds of the Reconstruction framers. To an astonishing degree, the black letter law of the Thirteenth Amendment is a parody of originalist particularism. As noted at the beginning of this Essay, modern Americans would never stand for such crabbed readings of "speech" or "searches" and "seizures," much less "equal protection" or "due process." An alternate tradition of constitutional interpretation might have made—and might still make—the Thirteenth Amendment a truly vital part of the Constitution instead of relegating it to the dustbin of history. Chattel slavery may be gone in the United States, but the problems of slavery and republicanism that moved American colonists to revolution are still very much alive.

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181. Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 286 (2008); see also Timothy Noah, *The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It* (2012).

182. See Bartels, *supra* note 181, at 253, 275, 286 (testing this hypothesis in context of U.S. Senate); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 *Pub. Opinion Q.* 778, 794 (2005) ("[I]nfluence over actual policy outcomes appears to be reserved almost exclusively for those at the top of the income distribution.").

183. See Bartels, *supra* note 181, at 286 (noting "the potential for a debilitating feedback cycle linking the economic and political realms").

