Modern Slavery and a Reconstructed Civil Rights Agenda

Baher Azmy
ARTICLES

UNSHACKLING THE THIRTEENTH AMENDMENT: MODERN SLAVERY AND A RECONSTRUCTED CIVIL RIGHTS AGENDA

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The talk about the Thirteenth Amendment is too silly for any practical lawyer's use.

Felix Frankfurter

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INTRODUCTION

Slavery in America is typically imagined as a peculiar but extinguished institution, situated in a particular time and place. Our vision of the institution is instinctively framed by images of the vast Southern plantation, auctioneer’s block, shackle, stockade and lash—all of which were vanquished following a violent Civil War and by a simple, textual commitment in the Constitution’s Thirteenth Amendment: “[N]either slavery nor involuntary servitude... shall exist in the United States.”2 Slavery, however, was not forever extinguished. In fact, it has reemerged in this country.

Every year, hundreds of thousands of humans, primarily women and children, are being bought and sold and transported from poor to rich countries, including the United States, as if they were simply an
underground commodity. Widespread coverage recently has documented that many thousands of these persons brought to this country are coerced to work exhausting hours as domestic servants, sex trade workers or sweatshop laborers. Most toil in dehumanizing conditions with little or no pay. Their lives are subject to complete control by their “bosses”; their passports are taken upon arrival, they are physically isolated and abused and are otherwise denied the basic freedoms essential to their personhood. The conditions of their servitude thus often resemble core elements of antebellum slavery.

These modern victims of slavery currently have no generally recognized Thirteenth Amendment remedy for what are quintessential violations of the Thirteenth Amendment right to be free from enslavement or involuntary servitude. In civil cases, victims can rely only on the New Deal-era Fair Labor Standards Act ("FLSA") or peripheral state common-law torts, all of which only target the incidental effects of involuntary servitude. This remedial gap is in part a consequence of the underdevelopment of Thirteenth Amendment jurisprudence reflected in the dismissive comments of even such a prominent progressive constitutional scholar as Felix Frankfurter. Frankfurter’s view that the Amendment is ineffectual in the service of civil rights can be traced to the Supreme Court’s earliest and simplified doctrinal treatment of it.

In Reconstruction-era cases such as the Slaughter-House Cases and the Civil Rights Cases, the Court reduced the Thirteenth Amendment’s significance to little more than a permanent guarantee of emancipation for former slaves. The Court further suggested that the Amendment grants no affirmative rights and was a comparatively inconsequential precursor to the guarantees enshrined in the Fourteenth Amendment. The Court thereafter avoided important opportunities to explicate the full meaning of the Thirteenth Amendment.

In this article I develop a different conception of the Amendment’s meaning and its usefulness for “practical lawyers.” The enactors of the Thirteenth Amendment, radicalized by the Civil War, intended the Amendment to do far more than permanently emancipate four million men. The Amendment was to restore the nation to the original natural rights ideals embodied in the Declaration of Freedom.

3. See infra text accompanying notes 52-90.
4. See infra text accompanying notes 72-89.
5. See infra text accompanying notes 77-87.
7. See infra text accompanying notes 317-24.
8. 83 U.S. (16 Wall.) 36 (1873).
10. See infra text accompanying notes 111-20, 132-43.
11. See infra text accompanying notes 239-85.
Independence and complete the "final step" toward full freedom, which guaranteed former slaves and free blacks, as well as whites, the equal enjoyment of all the fundamental rights of national citizenship. In addition, by prohibiting coercive private labor agreements, the enactors believed the Amendment would help to usher in a distinctive libertarian vision for society that promoted economic independence and social mobility.

The disconnect between the Supreme Court's hollow reading of the Thirteenth Amendment and its broad original intent and promise is a significant historical development that has received relatively little scholarly attention. There has been a tendency to submerge the Thirteenth Amendment's story into broader narratives about the Fourteenth Amendment or the Reconstruction era. The Supreme Court's now-conventional view of the Amendment has also diminished the possibilities that the Amendment affords courts, legislatures and lawyers to combat civil rights violations and severe forms of labor exploitation. Exploring the meaning of the Thirteenth Amendment, therefore, is not merely a means to engage in a historically interesting re-imagining of the Reconstruction Era under the constitutional regime that was intended to govern. Instead, the Thirteenth Amendment, once unshackled, stands alongside the Fourteenth Amendment to address civil rights problems in the United States today.

This article proposes that modern victims of slavery and involuntary servitude be authorized to sue private parties directly under the Thirteenth Amendment for damages pursuant to the remedial principles set forth in *Bivens v. Six Unknown Named Agents*. This solution will provide victims with a remedy more appropriate to the nature and seriousness of the harms they individually suffer and will help vindicate the collective, normative commitments expressed by the Thirteenth Amendment. More broadly, I hope to encourage courts, legislators and commentators to think expansively about the Amendment's values as they consider the increasing numbers of forced labor cases appearing in this country. To do this, we must appreciate the moral fervor that motivated its drafters, consider the modern possibilities for the particular vision of a free and egalitarian society its proponents attempted to realize, and thereby recognize the substantial promise this forgotten Amendment holds for supporting a broader civil rights agenda.

In Part I of this article, I describe the problem of modern slavery in the United States. After offering several narrative accounts from

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12. See infra text accompanying notes 181-85.
13. See infra text accompanying notes 186-214.
15. See infra note 104.
victims that are emblematic of the brutally demeaning and coercive conditions they endure, I demonstrate that the exploding phenomenon of slave trafficking, which transports up to 50,000 persons a year into the United States, essentially reduces humans into commodities. I describe the dehumanizing conditions of victims’ servitude as well as the total dominion exercised over them by their “bosses.” I suggest that this growing phenomenon resembles antebellum chattel slavery and its direct descendant, post Reconstruction-era peonage.

In Part II, I explore the rich interpretive possibilities offered by the Thirteenth Amendment against the background of the impoverished interpretations the Supreme Court has actually employed. I first examine the narrative of slavery presented by the Supreme Court in the *Slaughter-House Cases* and *Civil Rights Cases* in order to demonstrate that the Court submerged the story of the Thirteenth Amendment under a broader Fourteenth Amendment discussion and relegated the Thirteenth Amendment to the narrow goal of emancipation. The Court thereby made the Amendment insignificant to the larger Reconstruction project of equality and civil rights.

With that narrow and now-conventional conception of the Thirteenth Amendment in place, I look back, past these cases, to the Thirteenth Amendment ratification debates themselves. The debates reveal that the Amendment’s Republican enactors developed a far broader critique of slavery than the Reconstruction-era Supreme Court. As a consequence, they believed the Thirteenth Amendment, and the 1866 Civil Rights Act\(^\text{17}\) passed pursuant to its authority, would reclaim the corrupted promise of the Declaration of Independence and guarantee all persons—former slaves, free blacks, and whites—the equal enjoyment of the fundamental rights of national citizenship.\(^\text{18}\) They also hoped that the elimination of all of slavery’s evils would promote their distinctive “free labor” vision throughout the country, a vision in which people could enjoy the “fruits of their own labor,” become economically independent, and advance socially.\(^\text{19}\)

I then discuss the next major opportunity the Supreme Court had to consider the Amendment in the turn-of-the-century *Peonage Cases.*\(^\text{20}\) The cases struck down certain Southern Black Codes that had for years been keeping many blacks in perpetual labor bondage. While the Court missed an opportunity to explicate the deep egalitarian norms of the Thirteenth Amendment and its commitment to ending

\(^{17}\) Civil Rights Act of 1866, ch. 31, 14 Stat. 27-30.

\(^{18}\) See infra text accompanying notes 180-224.

\(^{19}\) See infra text accompanying notes 215-17.

racial caste systems, I contend that the cases nevertheless advanced a central concern of the Thirteenth Amendment framers: protecting the mobility of labor and meaningful opportunities for economic independence.

I conclude Part II with a history of the early years of the Civil Rights Section of the Justice Department ("Civil Rights Section") in the 1930s and 1940s in which lawyers pursued a civil rights agenda expressly predicated on the Thirteenth Amendment's dual concerns with labor exploitation and race. The Civil Rights Section's early work offers a good example of how a Thirteenth Amendment litigation strategy can be used to develop collateral themes in complementary constitutional provisions and ultimately support a firmer civil rights agenda. I hope to construct a framework for similar effects today.

In Part III of this article, I return to the issue of modern slavery by demonstrating the inadequacy of the current civil remedies that are available for its victims. First, I demonstrate that current civil rights statutes are not applicable to cases involving involuntary servitude perpetrated by private actors. Second, I contend that state common law torts address only the incidental effects of modern slavery and fail to adequately redress the full harm caused by perpetrators. Third, I argue that continued reliance on the most prominently used remedy in modern slavery cases, the Fair Labor Standards Act, perpetuates an unnecessary trend in modern civil rights law: the grounding of civil rights and human rights laws in the Commerce Clause rather than in the Reconstruction-era Amendments that are explicitly devoted to advancing civil and human rights.

Then, developing the "expressive law" model proposed by Richard Pildes and others, I argue that none of these options adequately remedy the precise harm suffered in cases of modern slavery. I contend that an adequate remedy must do more than merely materially compensate a plaintiff. It must also express an appropriate level of moral condemnation of the activity and vindicate the collectively shared normative values contained in the Thirteenth Amendment to end extreme labor exploitation and arrangements that perpetuate perceived caste status.

Finally, I argue that, unless, and until, Congress passes an adequate statutory remedy, victims of slavery or involuntary servitude should be able to sue under the Thirteenth Amendment directly for damages pursuant to the logic of *Bivens v. Six Unknown Named Agents.* I contend that criticisms of *Bivens* and its use against private actors in the Thirteenth Amendment context are either misplaced or clearly

21. See infra text accompanying notes 253-85.
22. See infra notes 366-76 and accompanying text.
outweighed by the benefits of allowing victims to vindicate directly the egalitarian and libertarian concerns of the Amendment’s drafters, concerns that have so far been undervalued by the courts. I conclude by suggesting that reinvigorating the Thirteenth Amendment in its core application—involuntary servitude—may encourage courts, legislators and commentators to consider the possibilities the Amendment holds to support a broader civil rights agenda related to race and labor exploitation.

I. COMMODIFICATION OF HUMANS: SLAVE LABOR IN AMERICA

This article focuses on the problem of modern slave trafficking, which I term “third generation slavery.” First generation slavery was, of course, antebellum chattel slavery in the United States, with its immediately recognizable and monstrous images of the auctioneer’s block, shackle and whip. Second generation slavery or involuntary servitude was a product of Reconstruction-era Black Codes that held American blacks—and eventually immigrant whites—to long periods of debt bondage, known as peonage. Peonage was chattel slavery’s direct descendant and generated nearly equally harsh images of convict labor and an all-black chain gang. Third generation slavery looks, at first glance, different than the earlier forms of slavery; it unquestionably differs also in intensity, duration and venality. Nevertheless, this form of slavery shares fundamental attributes with its antecedents—most notably, overwhelming coercion, total dominion over virtually all aspects of life, and horribly demeaning conditions endured during the period of servitude.  

Consider the following examples.

Marjina Khalifa, a poor, illiterate woman from Bangladesh, was persuaded by the owner of the textile factory in which she worked to become a domestic servant in his daughter’s home in Teaneck, New Jersey. Once Marjina arrived in New Jersey, she became enslaved.

24. By suggesting that the problem of modern slavery with which I am concerned resembles aspects of antebellum chattel slavery, I do not mean to suggest that the two wrongs are of equal magnitude. Chattel slavery was assuredly one of the greatest crimes in American history. Nevertheless, as such, it is a valuable frame of reference by which we can measure other institutions—whether before or after—which share its attributes. I do not need or intend to show that modern, third-generation slavery is as thoroughly evil as antebellum slavery to demonstrate that it is both wrong and worthy of redress under the Thirteenth Amendment.

25. Ms. Khalifa told her story in detail to the author during his representation of her in a civil action and is recorded in various memoranda prepared in the course of litigation as well as in affidavits rendered in her case (which has now settled), Khalifa v. Sadiquila, No. 99 Civ. 4968 (D.N.J. filed Nov. 30, 1999), all of which are on file with the author. Her story received attention from the media, producing articles that provide additional details. See Stephanie Armour, Many Immigrant Workers Flee Abuse Only to Fall Victim Again, USA Today, Nov. 20, 2001, at 1B; Adam Geller, No Longer Silent: Exploitation Domestic Workers Tell Of, The Rec. (N.N.J), May 28, 2000, at A1; see also Human Rights Watch, Hidden in the Home: Abuse of Domestic
Every day for six months, she toiled at length, usually for as many as eighteen hours, taking care of two infant children, elderly parents, cleaning, laundering and preparing elaborate meals for numerous extended family and visitors. She was forced to service the variety of demeaning demands made by household members on whim, such as massaging or washing the feet of the house mistress, repeatedly preparing tea until it was perfect, or shoveling snow in her cloth slippers. For all this, she was paid only $695.27.

The family regulated all aspects of her existence and responded to any resistance with threats of deportation. Her passport was taken from her upon arrival. She was forbidden to leave the house or speak to anyone outside of the family or even to attend a mosque for worship. As Marjina explained,

I couldn’t go out for even one second. . . . I wasn’t allowed to leave the house [alone] at all. [The family] told me that if I went outside, the police would arrest me because I did not have my papers [with me]. They said that without a green card, the police would arrest me. [They said] America is bad and that it would be bad if I went outside as a single woman, so I never went outside. I was like a bird in a cage.

Acquiescing to her rank in the home’s enforced caste hierarchy, she remained in the background. She was unable to eat until everyone else had finished and was then only permitted the others’ leftovers; unable to use the bathroom in the morning until all others had finished; and unable to sleep or even obtain any privacy until all others had gone to bed. She was forbidden from using the phone to contact relatives at home and was denied a visit to a doctor when she became ill. Any mistake or appearance of laziness brought her severe reprimand or dehumanizing insult. As Marjina explained, “[t]he family constantly humiliated me, made me feel ashamed of myself, like I was less than human and that I had no purpose in life other than to serve them.” Marjina finally escaped the house while


27. Id. ¶¶ 50-51.
28. Id. ¶ 42.
29. Id. ¶ 12.
30. Id. ¶ 43.
32. Id. ¶¶ 35-39.
33. Id. ¶¶ 42-46.
34. Id. ¶ 47
the family was away and eventually found her way to a community organization, which has assisted her in starting a life here.\textsuperscript{35}

\* \* \*

In several small towns in Mexico, a pair of brothers courted four young women, promising them love and eventual marriage.\textsuperscript{36} In the meantime, the women were persuaded to go to the United States to live and work with the courters' sisters for money and a better life.\textsuperscript{37} After being smuggled across the border and transported to New Jersey, the girls were forced by the sisters into prostitution with six to eight men a day. They were physically prevented from leaving the house, or from having contact with outsiders. A police raid uncovered the prostitution ring and freed the young women.\textsuperscript{38}

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Elma Manliguez, a young Philippino woman, was tricked into coming to the United States with her Malaysian employers, the Josephs, under the pretext that she would be accompanying them on a vacation.\textsuperscript{39} Once they arrived together in the United States the Josephs took her passport and coerced her to continue as a domestic servant in their home in Hollis, New York. She worked from 4 a.m. until 10:30 p.m. seven days a week, feeding, bathing and caring for three young children, cooking, cleaning and laundering for the entire household, and performing outdoor chores.\textsuperscript{40} She was paid the equivalent of six cents per hour.\textsuperscript{41} The Josephs sent all the money she earned over the course of two years, approximately $1,050, directly to

\textsuperscript{35} See Armour, \textit{supra} note 25.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} See John P. Martin, \textit{Four Mexican Girls Say They Were Enslaved as Prostitutes—Case Likely to be First Test of Law on Trafficking Immigrants}, The Star-Ledger (N.J.), Mar. 26, 2002, at 39. About a year prior, two Americans and a Russian conspired to bring six Russian dancers, including two minors, to Alaska by promising the women they would work as dancers at cultural events or Las Vegas-style showgirl events. Visas were forged and once the girls landed, their passports and return tickets were confiscated. The girls were forced to live in one room, and perform nude, against their wishes, for no pay. Brief for the United States as Appellee at 3-7, United States v. Kennard, No. 01-30346, 2002 U.S. App. LEXIS 18193 (9th Cir. 2001), available at http://www.usdoj.gov/crt/briefs/kennard.pdf; see also Robert Rudolph, \textit{Russian Trio Called Enslavers of Women— Allegedly Supplied Strip Clubs' Dancers}, The Star-Ledger (N.J.), Aug. 28, 2002 at 1 (describing federal indictment brought against “human trafficking” ring in Brooklyn that had been smuggling Russian women to perform in the sex industry as if they were “chattel”).
\textsuperscript{40} Manliguez, 2002 U.S. Dist. LEXIS 15277, at *4-6.
\textsuperscript{41} Marzulli, \textit{supra} note 39, at 3.
Elma's bank account in the Philippines so that she could not access it.\textsuperscript{42}

The Josephs also physically and emotionally isolated Elma. They denied her a key to the self-locking door and permitted her to leave their home only if accompanied by a family member or if she stayed within view of the house.\textsuperscript{43} They refused her permission to attend church, forbade her any days off and denied her medication for her illnesses.\textsuperscript{44} They prohibited interactions with non-family members and permitted her only one phone call home during her two years of service.\textsuperscript{45} In her daily interactions with the family, she endured constant insult and humiliation and threats of violence.\textsuperscript{46} She rarely ate more than one meal a day and was permitted only leftovers. She was forbidden the dignity of eating at the kitchen table and was forced to eat near the washing machine or on the floor.\textsuperscript{47} Elma finally escaped on a day that the Josephs left a set of house keys behind.\textsuperscript{48}

* * *

Over a period of several years in the late 1990s, approximately 250 Vietnamese and 15 Chinese men and women paid recruiters significant brokerage sums for placement in seemingly promising factory jobs in the U.S. protectorate of American Samoa. Housed in factory dormitories, the laborers slept two people to a bed, received paltry rations of food, and were subjected to a rigid curfew; the conditions were backed by force of hired company guards.\textsuperscript{49} They toiled long hours under hard, regimented conditions for less than $2.25 an hour and no overtime.\textsuperscript{50} In November 2000, when the laborers protested their conditions, company guards attacked them, causing multiple injuries.\textsuperscript{51}

A. The Market for Humans in the United States

These stories are merely emblematic\textsuperscript{52} of a phenomenal transformation of international labor markets, a transformation which

\begin{itemize}
\item \textsuperscript{42} Manliguez, 2002 U.S. Dist. LEXIS 15277, at *6.
\item \textsuperscript{43} Id. at *6-7.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. at *7.
\item \textsuperscript{46} Id. at *8.
\item \textsuperscript{47} Id. at *5.
\item \textsuperscript{48} Id. at *8.
\item \textsuperscript{50} Greenhouse, Apparel Maker, supra note 49.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} See Sean Gardiner & Geoffrey Mohan, Smuggled for Sex: The Sex Slaves from
has contributed to the conversion of many thousands of humans into simple commodities. Although governments do not keep official statistics on the number of persons trafficked into servitude, an interagency group under the auspices of the National Security Council conservatively estimated in 1998 that 700,000 women and children are trafficked annually across international borders; of these, approximately 50,000 are trafficked into the United States. Persons trafficked into the United States come most frequently from Southeast Asia (particularly Thailand, Vietnam and China), Latin America (particularly Mexico) and Eastern Europe (particularly Russia, Ukraine and the Czech Republic) and are most often discovered in New York, California and Florida. The primary markets for trafficked laborers in the U.S. are domestic service,

Mexico, Newsday (N.Y.), Mar. 12, 2001, at A5 (discussing sentences and restitution awards ordered by a Florida court against a family ring that brought over fourteen Mexican women to work in brothels); David Rosenzweig, Woman Gets 8 Years in Thai Slave Case, L.A. Times, Jan. 11, 2000, at B2 (describing the conditions as testified at trial of three female employees forced to work eighteen hours per day for the defendant in her home and restaurant including serving guests on their knees); Somini Sengupta, An Immigrant's Legal Enterprise; In Suing Employer, Maid Fights Diplomatic Immunity, N.Y. Times, Jan. 12, 2000, at B1 (describing a Bangladeshi woman's domestic servitude in which she was forced to work seven day work weeks, was prohibited from leaving the house and endured humiliating threats and physical abuse); Sandra Tan, Labor Camp Indictments, The Buff. News, June 21, 2002, at B1 (describing conditions of a labor camp in Western New York State in which dozens of Mexican workers received little food and the contractor deducted exorbitant amounts for expenses from their wages).

53. The U.S. government has defined trafficking as consisting of "[a]ll acts involved in the transport, harboring, or sale of persons within national or across international borders through coercion, force, kidnapping, deception or fraud, for purposes of placing persons in situations of forced labor or services, such as forced prostitution, domestic servitude, debt bondage or other slavery-like practices." Francis T. Miko, Trafficking in Women and Children: The U.S. and International Response, Cong. Res. Service Rep. 98-649 C (May 10, 2000), available at http://usinfo.state.gov/topical/global/traffic/crs0510.htm. Of course, not all domestic servants, sex trade workers and factory or garment workers, even those who are vulnerable and come from poor nations, are placed in involuntary servitude. For that reason, in the early part of this article I make use of the term "trafficked" labor as shorthand to connote a difference between voluntary forms of this kind of work and those that are coerced, involuntary and, ultimately, unconstitutional. The basis for that difference—between consensual labor and unconstitutional labor—is developed more thoroughly below.


sweatshops and the sex industry (prostitution, stripping, peep shows and massage parlors that include sexual services). 56

Global capitalism has organized countries into unequal participants and expanded broad structural, hierarchical links between poor, sending countries, and rich, receiving countries. 57 Within this international system, a major instrument for moving humans has been organized criminal enterprises of various sizes and degrees of sophistication. The human trafficking industry has become, in fact, one of the world’s most lucrative and fastest growing criminal enterprises, generating profits second only to profits from drugs and guns. 58 These enterprises are motivated in part by the low costs associated with the trade in humans. Humans have become “highly profitable, low risk, expendable, reusable, and resellable commodities.” 59 In other words, hundreds of thousands of these “commodities” are sold into slavery.

Like gun and drug traffickers, slave traffickers depend on basic forces of supply and demand for the human commodity. They find a ready supply of vulnerable persons susceptible to exploitation, most frequently women and children. Women are typically driven abroad by extreme poverty in their home country, which is exacerbated by low social status in patriarchal societies, and lack of access to economic opportunities, credit or ownership of property. 60 Children

56. Id.; Statement of Frank E. Loy, supra note 54, at 11 (noting that approximately half of U.S. bound trafficked labor is in domestic service and sweatshop labor); Samantha C. Halem, Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry, 36 San Diego L. Rev. 397, 398-99 (1999) (noting “growing problem” of exploited immigrant labor in sweatshops). Other related industries include mail order bride companies, which, though primarily legal, bring approximately 4000 to 6000 women to the U.S. annually, mostly from the Philippines and Newly Independent States. See Richard, supra note 55, at 27; see also Vanessa B.M. Vergara, Comment, Abusive Mail-Order Bride Marriage and the Thirteenth Amendment, 94 Nw. U. L. Rev. 1547, 1599 (2000) (arguing that inherent coercive aspects of mail order bride system resemble slavery). Another related trafficking industry involves importation of maids or servants for émigré businesses in the U.S. who are then worked under exhausting, uncompensated and abusive conditions. See Richard, supra note 55, at 27.

57. Rhacel Salazar Parreñas, Servants of Globalization: Women, Migration and Domestic Work 25 (2001) (explaining that migrant laborers are “part of the ongoing circulation of resources, both capital and labor, within the boundaries of a single global division of labor, that is between a dominant core and a dependent periphery” (quoting Kathie Friedman-Kasaba, Memories of Migration: Gender, Ethnicity, and Work in the Lives of Jewish and Italian Women in New York, 1870-1924 24 (1996))); see also Miko, supra note 53.

58. Statement of Frank E. Loy, supra note 54, at 11. In this industry, however, there is no necessary correlation between size and brutality or profits. See Richard, supra note 55, at 19-20 (describing enormous profits made by one or two-person operations); id. at vii (“The size or structure of the criminal group, however, has no bearing on the violence, intimidation, and brutality that is commonly perpetrated on the trafficking victims.”).

59. Richard, supra note 55, at 1; see also Parreñas, supra note 57, at 249-54.

60. See Statement of Frank E. Loy, supra note 54, at 11-12; Parreñas, supra note
whose families pull them from school in favor of menial employment and are made more susceptible to the international market for their work, and are sometimes even sold into the market by their own families. The governments of source countries have little power, and perhaps less interest, in protecting departing nationals. Though the vast majority of trafficked labor comprises foreign national women and children, men and even United States citizens also fall prey.

At the same time, increased demand in the United States for domestic service, sweatshop labor and sex workers absorbs the great supply of exploitable humans. A substantial demand for domestic workers comes from foreign diplomats or representatives of international organizations living in the United States, who import women from their home countries under false promises to abide by United States law. Many of the worst cases of abuse of domestic

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57, at 62-65; Janie Chuang, Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts, 11 Harv. Hum. Rts. J. 65, 68 (1998) ("Trafficking in women is fueled by poverty, sexism, and racism, all of which combine to create a situation of unequal bargaining power and vulnerability."); Miko, supra note 53, (major factor in trafficking is the "continuing subordination of women in many societies, as reflected in economic, educational, and work opportunity disparities between men and women"). Domestic abuse as well as physical violence, themselves persistent aspects of gender inequality in source countries, also drives women to migrate. Parrefias, supra note 57, at 66-68.

61. See Miko, supra note 53 ("Many societies still favor sons and view girls as an economic burden. Desperate families in some of the most impoverished countries sell their daughters to brothels or traffickers for the immediate payoff and to avoid having to pay the dowry to marry off daughters."); Statement of Frank E. Loy, supra note 54, at 12.

62. See Parrefias, supra note 57, at 48 ("[T]he denationalization of economies compels these [developing] nations to respond to the demand for low-wage labor and extend their range of exports to include their able-bodied workers.").


64. Thomas C. Tobin, For Slavery, Man to Serve Four Years, St. Petersburg Times (Fla.), Aug. 16, 2001, at A1 (describing scheme to enslave homeless African American men in Florida orange groves).

65. See Parrefias, supra note 57, at 71-72 (noting an increase in the demand for domestic servants); id. at 72-76 (explaining the inequality of class, race, gender and citizenship as essential to the dynamic of exploited domestic help); Miko, supra note 53 (noting increased demand for sex workers, domestic servants and sweatshop labor); see also Melanie Ryan, Swept Under the Carpet: Lack of Legal Protections for Household Workers—A Call for Justice, 20 Women's Rts. L. Rep. 159, 160-63 (1999) (describing the transformation of the composition of domestic workers from African American women to immigrant women and noting the continuity of power imbalance regardless).

66. See Hidden in the Home, supra note 25, at 7 (describing case with which foreign nationals can subvert visa requirements for bringing domestic servants into the United States); Richard, supra note 55, at 28 (noting that 3800 domestic servants
workers involve these foreign officials or businessmen who typically prefer to hire from their own countries, suggesting that these foreign nationals are attempting to import to the United States their own society's caste systems or hierarchical social relationships.\(^6\)

Trafficked women and children are initially vulnerable to such abuse due to their own desperation, isolation or ignorance. When they "consent" to domestic service or other labor arrangements, it is based on deceit or coercion. Their vulnerabilities are exacerbated by their circumstances once they arrive in the United States. Most are culturally isolated, unable to speak English, unfamiliar with American laws and customs, and unable to communicate with outsiders, let alone friends and family.\(^6\) Women forced into the sex industry may feel ashamed or guilty about their conduct and terrified about the consequences.\(^6\)

Domestic workers often feel trapped by employers come to the U.S. each year to work for foreign diplomats or non-U.S. staff members of international organizations).

\(^67\) See Armour, supra note 25 (describing obstacles to collecting back wage and damage awards after the employer returns to his home country leaving the employee with nothing); William Branigin, A Life of Exhaustion, Beatings and Isolation, Wash. Post, Jan. 5, 1999, at A6 [hereinafter Branigin, Life of Exhaustion] (describing slave-like conditions endured by Ethiopian woman in D.C. home of Ethiopian former staff member of IMF, including thousands of hours of work for an average of three cents an hour, being forbidden to leave the house, attend church, or receive medical assistance, and being made to endure physical abuse); William Branigin, Safeguards Proposed for Servants, Wash. Post, Feb. 16, 2000, at B4 [hereinafter Branigin, Safeguards] (describing slave-like conditions endured by Bolivian woman working in Washington, D.C. for an official from Organization of American States, which included having passport confiscated and being forbidden from leaving, working twelve hours a day for sixteen months for less than a dollar an hour, and rape by a family friend, which officials ignored); Steven Greenhouse, Embassies Enslaving Foreign Women, Pitt. Post-Gazette, June 17, 2001, at A10 (same) [hereinafter Greenhouse, Embassies Enslaving Foreign Women]; Chisun Lee, Trouble on the Home Front, Village Voice (N.Y.), Jul. 17, 2001, at 21 (describing conditions endured by Indian domestic servant in New York City apartment of prominent Indian businessman and woman); James Ridgeway, Unsables, Village Voice (N.Y.), Mar. 10, 1998, at 57 (describing slave-like conditions endured by Senegalese domestic servant in New York City home of head of African section of UN Population Office); Sengupta, supra note 52, at B1 (describing the conditions endured by a domestic servant used by a Bahraini diplomat). See generally Hidden in the Home, supra note 25, at 7-19 (documenting dozens of cases of physical, psychological, and emotional abuse of domestic servants by foreign diplomats and officials of international organizations).

\(^68\) Hidden in the Home, supra note 25, at 4; Rudolph, supra note 38, at A1 (describing threats made against Russian women forced to work in the sex industry, including threats of retribution against families at home and threats of murder). A trafficking victim explained:

We all suffer the same mistreatment. We come with illusions that they will pay a lot here. They offer us many things. They bring us here deceived. . . . They bring women who don't know anything about American laws. The only thing left for these women is to continue being abused. They don't know where to go.

Hidden in the Home, supra note 25, at 4 (omission in original).

\(^69\) See Chuang, supra note 60, at 69 ("Traffickers... can more easily subjugate
who convey to them that communication with outsiders or even leaving the home means danger, death or deportation, or because they are desperate to avoid losing an even minimal amount of income to help families in their home countries. Because of their immense vulnerability, typical victims are often barely able to resist the conditions of their labor.

B. Slavery-like Conditions

Once trafficked persons come to the United States to work, the process of transforming their humanity into a commercial product continues. It is a process that harkens to critical aspects of antebellum chattel slavery. Most obviously, workers are required to toil exhausting hours, without time off or medical care, performing all household chores, taking care of children and, in the case of sex trade workers, performing sexual services. A more fundamental ingredient of antebellum slavery that these modern individuals share is that the “master” has the power to deny those facets of life that constitute essential attributes of personhood and thereby transform persons into little more than property. Professor Akhil Amar has suggested that the critical attribute of slavery is “[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.” This “totalistic relationship

foreign women due to their inability to speak the language of the country in which they reside... and their fear of deportation to their native communities where they might be treated as criminals for having engaged in prostitution.”).


71. See, e.g., id., supra note 25, at 9-10.

I come from a poor family. My mother is a single mother. We don’t have anything... Sometimes one is pressured by the economic situation. It’s terrible what one suffers... Sometimes I ask myself why I put up with so much. It’s for this, for my mother and my daughters.

Id. (quoting Guatemalan domestic servant about why she continued to endure pain and humiliation of her involuntary servitude) (omission in original).

72. See Affidavit of Marjina Khalifa, supra note 26, ¶ 16, (stating that she worked eighteen-hour days for six months); Branigin, Safeguards, supra note 67, (noting that a Bolivian servant worked twelve hours a day for sixteen months, through untreated illnesses, at the approximate wage of one dollar per hour); Hidden in the Home, supra note 25, at 8 (describing a Guatemalan domestic servant who worked a minimum of twelve hours per day for seven days a week); Sengupta, supra note 52 (describing a Bangladeshi servant who worked fourteen hours per day, seven days a week for approximately $100 per month).

73. See Gardiner & Mohan, supra note 52 (noting that women were forced to have sex with up to thirty men a day, six days a week); Martin, supra note 38, (describing circumstances of young girls who were forced to work seven days a week performing “tricks”).

74. See Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney, 105 Harv. L. Rev. 1359, 1365, 1384 (1992) (explaining that slavery also includes “the reduction of humans beings to the status of things”).
between master and slave was established by force and reinforced by the masters' belief in the natural inferiority of the slave and their servile place in the world. These ingredients are also present in the forms of modern slavery in the United States.

In modern cases of slavery or involuntary servitude, bosses destroy laborers' control over their personhood. Passports are taken upon entry to the United States. Laborers are told that the alternative to their servitude is deportation, abuse by the police, or the violence of the American street. Workers are intentionally isolated, forbidden from exploring their new environment, communicating with outsiders or their own family, and are sometimes physically bound. As a United Nations official explained: "Women's movement is either overtly impeded through locks, bars and chains or less conspicuously (but no less effectively) restricted by confiscation of their passports and travel documents, stories of arrest and deportation, [or] threats of retaliation against family members ...." Essential aspects of a laborer's humanity is also destroyed. They are frequently denied the

76. See Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 145 (1956); Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 Yale J.L. & Feminism 207, 219 (1992) (describing that slaveholders' "belief in their moral right of ownership, in their natural superiority, and in the African Americans' natural inferiority provided the justification for daily degradation and subjugation"). Kenneth Stampp explained that the key step in maintaining slaves was
to implant in the bondsmen themselves a consciousness of personal inferiority. They had 'to know and keep their places,' to 'feel the difference between master and slave,' to understand that bondage was their natural status. They had to feel that African ancestry tainted them, that their color was a badge of degradation. Stampp, supra, at 145; see also David B. Davis, The Problem of Slavery in Western Culture 58 (1966). See generally A. Leon Higginbotham, Jr., In the Matter of Color: the Colonial Period (1978).
77. See generally Hidden in the Home, supra note 25, at 12-15.
78. See generally id. at 13; United States v. Alzanki, 54 F.3d 994, 999 (1st Cir. 1995); Manliguez v. Joseph, No. 01-CV-7574, 2002 U.S. Dist. LEXIS 15277, at * 2-3, 11 (E.D.N.Y. Aug. 15, 2002); Richard, supra note 55, at 5; see also Affidavit of Marjina Khalifa, supra note 26, ¶ 12; Greenhouse, Embassies Enslaving Foreign Women, supra note 67.
79. See Hidden in the Home, supra note 25, at 14-15; see also Richard, supra note 55, at 5; Alzanki, 54 F. 3d at 999.
opportunity to worship according to their faith. They are intentionally cut off from contact with their families in their home countries. Laborers' private lives are frequently co-opted by a boss's assertion of total control. Servants are often also denied medical treatment, perhaps reflecting a conclusion that such an investment is simply not worth the cost. Physical, sexual and psychological abuse is common, operating consciously or unconsciously to keep a woman worker "in her place." These forms of abuse create a system of complete domination hidden inside the home or the factory. As the court noted of the

82. See Manliguez, U.S. Dist. LEXIS 15277, at *7 (noting the refusal of masters to allow Manliguez to attend church); Affidavit of Marjina Khalifa, supra note 26, ¶ 43 (describing the assertions of masters that there were no mosques in America).

83. See Manliguez, U.S. Dist. LEXIS 15277, at *7 (describing the masters' success in hiding mail from Manliguez and permitting Manliguez to call home no more than once in two years); Hidden in the Home supra note 25, at 14 (describing the variety of limitations placed on ability of servants to contact family members).

84. See Hidden in the Home, supra note 25, at 18 (describing the means of invading privacy such as reading mail, listening to phone conversations, searching rooms or purses as an aspect of demeaning and controlling workers); see also Affidavit of Marjina Khalifa, supra note 26, ¶¶ 35, 40 (describing the lack of privacy, forced isolation and prohibition on using telephone).

85. See Manliguez, U.S. Dist. LEXIS 15277, at *6 (describing the denial of medication for various illnesses and explaining the requirement that Manliguez continue working while sick); Branigin, Safeguards, supra note 67, (noting that a worker did not receive medical treatment after allegedly being raped by her employer's friend); Hidden in the Home, supra note 25, at 16 (noting that in the three cases reviewed, the employer denied medical treatment to the worker and required them to continue their service); Ridgeway, supra note 67 (noting that a worker was left with a medical debt of $11,000 despite the fact that the employer promised to procure medical insurance for the worker).


87. United States v. Alzanki, 54 F.3d 994, 999 (1st Cir. 1995); see also Branigin, A Life of Exhaustion, supra note 67 (explaining a domestic servant's inability to leave the house or to attend church, and describing the beatings she endured when she cried or complained); Greenhouse, Embassies Enslaving Foreign Women, supra note 67 (stating that after a domestic servant was raped by a family friend her employer refused to acknowledge the possibility of a crime and failed to take the servant for medical assistance); Hidden in the Home, supra note 25, at 10 (quoting a domestic servant who explained that the climate of fear and abuse imposed by her bosses "made [her] feel inhuman").

88. See Hidden in the Home, supra note 25, at 18 (interview with Ai-jen Poo, Program Director, Women Workers Project, Committee Against Anti-Asian Violence (Mar. 6, 2000) regarding trafficked domestic servants). As Ai-jen Poo stated,

There's a lot of psychological warfare that goes on in the workplace. It's a really strange industry because the workers'... jobs are to raise children and care for intimate elements of people's lives. [There is] an emotional and psychological element to work that does not exist in any other industry, so the abuse [the women workers] face is very different [and] very similar to domestic violence—those power dynamics.... That... kind of control is
conditions of Elma Manliguez' servitude, they represent "acts of barbarism and unrelenting mental brutality reminiscent of the gulag memorialized by Aleksandr Solzhenitsyn in his novel entitled One Day in the Life of Ivan Denisovich." 98

The denial of basic personal freedom and subjugation is a severe degradation that therefore deserves a legal remedy more substantial than mere repayment of back wages. As explained below, 99 these wrongs should be remedied through the development of the provision that, though fallen into relative disuse since Reconstruction, represents the most compelling constitutional condemnation of labor and caste exploitation—the Thirteenth Amendment.

II. THE INTERPRETABLE THIRTEENTH AMENDMENT

The Thirteenth Amendment succinctly states,

Section 1: 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.

Section 2: Congress shall have power to enforce this article by appropriate legislation. 91

In its first attempt to evaluate the meaning of the Thirteenth Amendment, the Supreme Court referred to it as a "grand yet simple declaration" 92—a strong, but ultimately damning praise. The Court has never departed from the substance of its early, lofty dismissiveness. In particular, it has never struggled with the implications of the constitutional abolition of an institution that had been sown deeply in American soil for over 300 years and that ultimately tore the country apart. 93 Even in the modern era, the Court has balked at a substantive evaluation of the Amendment, cavalierly dismissing it as "simple" or a "skimpy collection of words" 94 and rejecting any suggestion that it grants positive rights. 95

"difficult to write about or document or create laws around, [but it is] such a key element of control and [of] how power operates.

Id.; see also id. at 10; supra note 87.

90. See infra Part III.B.
91. U.S. Const. amend. XIII.
93. See infra text accompanying notes 102-48.
95. See Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. L. Rev. 1, 28 (1995) (noting that in its first hundred years, scholars acquiesced to the Supreme Court's view that the Thirteenth Amendment grants no affirmative rights).
Scholars, by contrast, have recently begun to pay greater attention to the Thirteenth Amendment's remedial possibilities, suggesting that the prohibition of slavery and involuntary servitude in section 1 can be employed to combat aspects of child abuse, domestic violence, abortion restrictions, and corporate use of foreign slave labor. I endorse these projects and similarly propose that the Thirteenth Amendment should be used to attack the problem of modern slavery in the United States. I am concerned to the extent that some of this scholarship depends in part upon strained interpretations of basically flawed Reconstruction-era Supreme Court cases, rather than a fresh reading of the Amendment itself.

I propose that scholars should look also to the ratification debates surrounding the adoption of the Thirteenth Amendment and of the 1866 Civil Rights Act passed pursuant to its authority as a rich source for civil rights protections. Those debates reveal that the Thirteenth Amendment was meant to do far more than free four million slaves from bondage or guarantee workers the right to quit their jobs. Rather, the Amendment was heroically championed as the "final step" towards "full freedom" in the country for former slaves, free blacks and white laborers, and as a permanent guarantee of equality

96. See Amar & Widawsky, supra note 74.
97. See McConnell, supra note 76.
99. See Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 Colum. L. Rev. 973 (2002); see also Larry J. Pittman, Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups, 28 Seton Hall L. Rev. 774, 869 (1998) (arguing that a direct cause of action should exist under the Thirteenth Amendment for disparate health care treatment received by blacks as a "badge or incident of slavery"); Neal Kumar Katyal, Note, Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 Yale L.J. 791, 817-20 (1993) (arguing that women forced into prostitution or abused by their pimps should be able to sue municipalities under 42 U.S.C. § 1983 for failure to enforce Thirteenth Amendment prohibitions on such coercive arrangements); Vergara, supra note 56 (arguing that the Thirteenth Amendment prohibits abusive mail-order bride arrangements).
100. For example, Professor Amar relies on the Slaughter-House Cases to support his claim that the Thirteenth Amendment prohibits "any... kind of slavery," see Amar & Widawsky supra note 74, at 1368, but he does not account for the cases' disregard for the many attendant evils associated with the slavery the Thirteenth Amendment meant to extinguish. See infra text accompanying notes 102-48. Professor McConnell claims that "Congress, however, chose to limit the scope of the [Thirteenth] Amendment," to solve only those problems akin to African slavery, see McConnell, supra note 76, at 217, but does not address the broad egalitarian and free labor principles the Amendment's framers hoped to install. See infra Part II.B.2. But see Pamela D. Bridgewater, Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence, 7 Wash. & Lee Race & Ethnic Anc. L.J. 11, 19, 40 (2001) (noting that under the Slaughter-House decision, "slavery is so narrowly constructed that it made adding conditions of slavery, based on changing views of the ways in which slavery impacted all participants, nearly impossible").
101. See infra Part II.B.
in the enjoyment of all the fundamental civil rights of citizenship in a republic. These debates and the significant interpretive potential they offer provide a firm, true foundation for understanding the Thirteenth Amendment and construing a civil rights agenda based upon it.

A. Damning with Great Praise: Early Judicial Constriction of the Thirteenth Amendment

Separated by ten years, the two most famous Reconstruction-era cases, the *Slaughter-House Cases* and the *Civil Rights Cases*, operated as a judicial vise that squeezed the Thirteenth Amendment into a doctrinal sliver. It is useful to start the story of the Thirteenth Amendment with the cases that relegated it to the role of a jurisprudentially inconsequential precursor to the Fourteenth Amendment, and then look backwards to the Amendment's ratification debates. This perspective will highlight the significant interpretive potential of the Amendment that these cases ignored—a potential that has consequently been winnowed from constitutional law.

With apparent eagerness, the Court first considered the meaning of the Thirteenth Amendment in the *Slaughter-House Cases*. At issue

102. 83 U.S. (16 Wall.) 36 (1873).
103. 109 U.S. 3 (1883).
104. While the Supreme Court marginalized the Thirteenth Amendment's significance in the short years after its passage, the Amendment also, possibly as a result of the Court's treatment, receives comparatively little attention in the law school curriculum or among constitutional scholars. See Colbert, supra note 95, at 3-5 (1995) (criticizing lack of attention devoted to Thirteenth Amendment in law schools). Derrick Bell and Sanford Levinson have expressed considerable frustration towards the absence of meaningful discussion of slavery's effect on the Constitution's development. See Derrick Bell, Learning the Three 'l's of America's Slave Heritage, 68 Chi.-Kent L. Rev. 1037, 1040-41 (1993) (criticizing “constitutional apologists” who “see little present significance in the fact that the Framers of this country's Constitution saw fit to recognize slavery”); Sanford Levinson, Slavery in the Canon of Constitutional Law, 68 Chi.-Kent L. Rev. 1087, 1090 (1993) (arguing that the current constitutional canon, as developed by casebooks, neglects the fact that slavery and “its implications pervaded every single aspect of constitutional law (and constitutional interpretation)”). This article supports the general projects of Professors Bell and Levinson by demonstrating how multi-faceted Republican critiques of slavery dominated the enacting Congress's understanding of the Thirteenth Amendment's purpose.
105. The Court was actually presented with a question related to the Thirteenth Amendment two years earlier, in *Blyew v. United States*, 80 U.S. (16 Wall.) 581 (1871), but sidestepped a substantive review of the Amendment's meaning. After being convicted in federal court of brutally beating three blacks, the white defendants in *Blyew* challenged the constitutionality of the federal removal provision of the 1866 Civil Rights Act, which had been passed pursuant to the Thirteenth Amendment. *Id.* at 584. Over strong dissents by Justices Bradley and Swayne, the Supreme Court avoided passing on the constitutionality of the Civil Rights Act and reversed the convictions on a technical statutory interpretation of the limited grounds for federal removal. *Id.* at 594; see also *id.* at 595 (Bradley, J., dissenting) (expressly supporting constitutionality of the Act and chastising the majority for emphasizing statutory
was a Louisiana statute that had given monopolies to slaughter-houses operating in various parishes in the state. The petitioners advanced several constitutional theories to invalidate the monopoly law, including that it created an “involuntary servitude” upon the property of competitor slaughter-houses in violation of the Thirteenth Amendment; that it denied those slaughter-houses the essential “privileges and immunities” of fulfilling a livelihood protected by the Fourteenth Amendment; and that, by blatantly discriminating against their economic interests, the law denied them their Fourteenth Amendment guarantee of “equal protection of the laws.” The Slaughter-House Cases were obviously vital to the doctrinal development of the Fourteenth Amendment, particularly in its narrow construction of the Privileges and Immunities Clause. That aspect of the Court’s opinion has received voluminous academic attention. The Court’s relegation of the Thirteenth Amendment to a limited doctrinal significance has received comparatively little attention.

107. Id. at 50-51.
108. Id. at 53-55.
109. Id. at 56.
111. Few legal scholars have offered a detailed analysis of the ratification debates surrounding the adoption of Thirteenth Amendment, apart from a study of the broader vision of the Reconstruction Congress as a whole. In 1951, Professor Jacobus tenBroek offered the first and still classic account in which he emphasizes the natural rights philosophy of the Republican enactors. Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to Fourteenth Amendment, 39 Cal. L. Rev. 171 (1951) [hereinafter tenBroek, Thirteenth Amendment]. Almost forty years later, Professor Lea VanderVelde surveyed the arguments of the more radical Republicans for a broad “labor vision” of the Amendment that emphasized autonomy for workers in late nineteenth-century America. Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437 (1989). At about the same time, Professor Robert Kaczorowski offered a study of the Civil Rights Act of 1866 and the Fourteenth Amendment, in Congress and in the press, as well as the early enforcement of those provisions to demonstrate the Reconstruction Congress’s clear intent to revolutionize federalism by transferring the power over enforcement of civil rights to the national government. Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863 (1986) [hereinafter Kaczorowski, Revolutionary Constitutionalism]. These studies do not emphasize the role that larger slavery critiques had upon the ratification debates or place the Thirteenth Amendment framers’ intentions in the context of the judicial opinions that soon after distorted them.
Justice Miller opened his majority opinion by narrating the then-recent history of the Civil War, which was "fresh within the memory of us all."\textsuperscript{112} He characterized the slavery controversy at the heart of the Civil War as essentially a contest over the right of slave states to secede and resist federal authority:

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion . . . \textsuperscript{113}

Within that simply conceived struggle, "slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict."\textsuperscript{114} Justice Miller’s narrow understanding of the troubles caused by slavery may have been prevalent at the outbreak of war in 1861.\textsuperscript{115} By the time of the adoption of the Thirteenth

Many prominent scholars have studied the Congressional debates over the Reconstruction Amendments generally, but have clearly prioritized the meaning of the Fourteenth Amendment and have not studied the Amendment as an independent historical event. \textit{See, e.g.}, Akhil Reed Amar, \textit{The Bill of Rights: Creation and Reconstruction} (1998); Howard Jay Graham, \textit{The Early Anti Slavery Backgrounds of the Fourteenth Amendment}, 1950 Wis. L. Rev. 479. A recent work has examined how competing versions of the Fourteenth Amendment won out as the historically authoritative account; this work has been a helpful model in my attempt to discern the authoritative meaning of the Thirteenth Amendment. \textit{See} Pamela Brandwein, \textit{Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth} (1999).


\textsuperscript{112} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) at 68.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} In 1861, the War’s aims were expressly limited to preventing expansion of slavery into free territories (free soil) because Northern Democrats were primarily upset about increasing federal government involvement in the enforcement of the Fugitive Slave Act. Most Republicans believed that slavery had to grow to survive; if
Amendment in 1865 and the passage Civil Rights Act of 1866, however, proponents of those enactments incorporated the trauma of war and experiences with Southern recalcitrance after the Northern victory into far more complex narratives about the slave system they sought to destroy.\(^ {116}\)

Miller thus suppressed the numerous dangers of slavery that its ratifiers had believed the Thirteenth Amendment would eradicate.\(^ {117}\) Nevertheless, Miller continued with his diluted history by explaining that once the War ended, the victors needed to record in permanent and unquestionable fashion the outcome of the War and in particular the resultant emancipation of four million slaves:

But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.\(^ {118}\)

For Miller, the only “result” that needed to be put beyond question was the illegality of human bondage. This narrow conception of the evil of slavery was shared by the unsuccessful Northern Democratic opponents of the Thirteenth Amendment who argued that the Emancipation Proclamation and formal surrender did enough to destroy slavery and that the Amendment would go too far in granting blacks equality and revolutionizing federalism.\(^ {119}\)

Justice Miller praised the terms of the Amendment as embodying the highest ideals and accomplishing a necessary, but limited purpose: “this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration [which was] designed to establish the freedom of four million slaves.”\(^ {120}\) According to Miller’s narrative, the Amendment is “grand” in the sense that it is heroic; it accomplishes something triumphant, resounding and of great moment in history. The Amendment is also “simple,” as many heroic proclamations are. It is morally clear and unambiguous and ultimately uncomplicated in its promise—freeing four million persons from compelled service. “Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.”\(^ {121}\) Grand and

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\(^ {116}\) See Brandwein, Reconstructing Reconstruction, supra note 111, at 27.
\(^ {117}\) See infra text accompanying notes 179-80.
\(^ {118}\) See infra text accompanying notes 181-85.
\(^ {119}\) Slaughter-House Cases, 83 U.S. (16 Wall.) at 68 (emphasis added).
\(^ {120}\) Slaughter-House Cases, 83 U.S. (16 Wall.) at 69.
\(^ {121}\) Id.
simple, it is also frozen by Miller's opinion in its historical place, unadaptable and plainly not in need of interpretation.\textsuperscript{122}

Justice Field, dissenting, agreed with the central Thirteenth Amendment ruling, that "involuntary servitude" can only apply to humans, not property.\textsuperscript{123} However, Field took issue with the majority for ignoring the Thirteenth Amendment's complexity, correctly arguing that the Amendment was meant to guarantee a broad conception of liberty for all persons,\textsuperscript{124} and full equality in the enjoyment of fundamental rights.\textsuperscript{125}

Notwithstanding the logic of Field's dissent, Justice Miller's majority opinion established a now-conventional view of the Thirteenth Amendment: that it merely declared with permanence the illegality of the institution of slavery that the War and the Emancipation Proclamation had already established. According to this view, the Amendment was thereby only the first, intentionally incomplete step toward achieving equality for blacks, a process that had to be completed through the adoption of the Fourteenth and Fifteenth Amendments.\textsuperscript{126}

In \textit{United States v. Harris},\textsuperscript{127} the only case in which the Supreme Court considered the meaning of Thirteenth Amendment between the \textit{Slaughter-House Cases} and the \textit{Civil Rights Cases}, the Court reiterated the former's shrunken view of the Amendment's purpose. \textit{Harris} considered under the Thirteenth and Fourteenth Amendments, the constitutionality of section 2 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"),\textsuperscript{128} which criminalized conspiracies to deprive any person of the equal protection or privileges and immunities of the

\begin{itemize}
\item \textsuperscript{122} Justice Miller soon after partly undermines his position that no future "construction" could be given to the Amendment by considering the framer's choice to add the term "involuntary servitude" to the obvious prohibition on slavery. "The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country and the obvious purpose was to forbid all shades and conditions of African slavery." \textit{Id.}
\item \textsuperscript{123} \textit{See id.} at 89 (Field, J. dissenting).
\item \textsuperscript{124} \textit{See id.} at 90 (Field, J., dissenting).
\item The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman ... and to enjoy equally with [all others] the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex ... would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. \textit{Id.} (Field, J., dissenting).
\item \textsuperscript{125} \textit{Id.} at 91-92 (Field, J., dissenting) (declaring that the 1866 Civil Rights Act was premised on the Thirteenth Amendment theory that all citizens were entitled to equal enjoyment of basic rights guaranteed by the Act and that "the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom")
\item \textsuperscript{126} \textit{Id.} at 70-71.
\item \textsuperscript{127} 106 U.S. 629 (1882).
\item \textsuperscript{128} Civil Rights Act of 1871, ch. 22, 17 Stat. 13.
Ignoring the facts in the indictment before it, which involved white brutality against blacks, the Court reasoned that the Act, on its face, contemplated punishment for violence against whites as well. Such a law, the Court concluded, “cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.” The Court thus persisted in its “simple” classification of the Thirteenth Amendment’s goals of emancipation and additionally concluded that the Amendment does not and cannot concern the rights of whites—a conclusion deeply at odds with the enactors’ broad libertarian and egalitarian conception of the Thirteenth Amendment.

Next, in the Civil Rights Cases, the Supreme Court evaluated the constitutionality of section 1 and section 2 of the Civil Rights Act of 1875, which prohibited private acts of discrimination in the enjoyment of accommodations and public conveyances under the authority of both the Thirteenth and Fourteenth Amendments. The Court’s more famous ruling was that section 1 of the Fourteenth Amendment binds only state actors and, as such, Congress could not regulate private conduct by legislation passed pursuant to section 5. The Court recognized by contrast that the Thirteenth Amendment has no state action requirement, entitling Congress to regulate private conduct pursuant to section 2: “[F]or the [Thirteenth A]mendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” Its declaration of the Amendment’s purposes (one upon which several commentators rely to support its strong, modern applications) is ultimately as dismissive as that offered ten years prior: “By its own unaided force and effect [the Thirteenth Amendment] abolished slavery, and established universal freedom.”

130. Harris, 106 U.S at 641 (emphasis added).
131. See infra text accompanying notes at 203-04 (discussing goals of freeing and equalizing all citizens, white and black, north and south).
132. 109 U.S. 3 (1883).
134. The Act had a long and complex legislative history, where its constitutional authority was frequently debated. Even after its passage in 1875, it remained unclear whether the authority for the act was based primarily on section 5 of the Fourteenth Amendment’s authorization to secure equal protection of the law or on section 2 of the Thirteenth Amendment’s authorization to enforce the Amendment’s broad prohibition on slavery. See G. Sidney Buchanan, The Quest For Freedom: A Legal History of the Thirteenth Amendment 48-49 (1976).
136. Id. at 19-20 (describing the Amendment as self-executing).
137. Id. at 20.
138. Id.
is limited to its narrowest sense—freedom from state support and/or protection of a system of human bondage.

The Court’s limited conception of freedom’s guarantee is confirmed by its discussion of what it calls the Amendment’s “reflex character,” by which section 2 “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” The Court concedes that this power exists, but questions whether “denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?” The Court ignored the consensus of the Act’s supporters and the strong language of its most vocal proponents, the Court concluded that “badges and incidents of slavery” related only to those deprivations suffered during enslavement and did not “adjust what may be called the social rights of men and races in the community”—aspects of life that must be left to the individual states to regulate as they see fit.

To hold otherwise, the Court reasoned, would be “running the slavery argument into the ground.”

Justice Harlan issued a powerful, solitary dissent in which he summoned reason and evidence from the Amendment’s ratification debates. He chided the majority for its unrealistically narrow view of the “freedom” guaranteed by the Amendment, and advanced instead the natural rights and equality-based premises held by the Amendment’s framers. After a long proof of the Amendment’s broad goals, Harlan succinctly concludes, “The Thirteenth Amendment alone obliterated the race line, so far as all rights

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139. *Id.*
140. *Id.* at 21.
141. *See infra* text accompanying notes 181-85.
143. *Id.* at 24.
144. *Id.* at 34 (Harlan, J., dissenting).

But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide?

*Id.* (Harlan, J., dissenting) (emphasis added).

145. *Id.* at 36 (Harlan, J., dissenting) (explaining that freedom for Negroes “necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races”); *id.* at 40 (Harlan, J., dissenting) (stating that by denying blacks enjoyment of essential rights, equal to those of others, “a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence”).
As such, Congress was clearly authorized to prohibit private discrimination under section 2 of the Thirteenth Amendment.\textsuperscript{147} The Civil Rights Cases came six years after Reconstruction was effectively ended by the Compromise of 1877. Under that Compromise, Republicans agreed to back away from continued enforcement of civil rights, allowing Southern states “home rule,” in exchange for allowing the Republican candidate in the contested 1876 election, Rutherford B. Hayes, to assume the Presidency.\textsuperscript{148} The Civil Rights Cases can thus be seen as one part of the broad-based national decision to end Reconstruction, pursuant to which the Court limited the reach of the Civil War Amendments in order to accommodate the rigid political compromise already made.\textsuperscript{149} In doing so, the Slaughter-House Cases and the Civil Rights Cases enshrined an understanding of the Thirteenth Amendment that barely resembles the richness and promise its ratifiers intended.

**B. The Thirteenth Amendment: The Final Step to Full Freedom**

In clear contrast to the views of the majority in the Reconstruction era cases, the broad-based Republican majority in Congress that enacted the Thirteenth Amendment had been radicalized by the Civil War. As a result, it held much broader and more intense beliefs about the variety of harms associated with the institution of slavery. Accordingly, it believed the destruction of slavery by constitutional amendment would usher in the institution’s exact opposite—freedom—but, in a form full enough to counteract slavery’s long-term damaging effects to blacks and whites, and to the nation’s founding ideals. The debates over the ratification of the Thirteenth Amendment and the passage of the 1866 Civil Rights Act demonstrate that the Amendment was not merely a negative guarantee against physical bondage nor was it a one-dimensional precursor to the Fourteenth Amendment. Rather, the debates reveal the Thirteenth Amendment as an independent and affirmative source of rights.

Importantly, this understanding about the meaning of the Thirteenth Amendment and its corresponding revolutionary effects on federal-state relations was quite clear to all congressional members, Republican supporters and Democratic opponents alike.

\begin{footnotesize}
\textsuperscript{146} Id. at 40 (Harlan, J., dissenting).
\textsuperscript{147} Id. at 43 (Harlan, J., dissenting).
\textsuperscript{148} Foner, Reconstruction, supra note 111, at 574-87 (1988).
\textsuperscript{149} See Buchanan, supra note 134, at 70 (arguing that the burdensome task of "reconciling the Constitution with the political mandate of the Compromise of 1877" fell on the Supreme Court (quotation omitted)); see also C. Vann Woodward, The Strange Career of Jim Crow 71 (1966) (explaining that "[t]he Court, like the liberals, was engaged in a bit of reconciliation... achieved at the Negro's expense").
\end{footnotesize}
Republicans lauded the Amendment as a necessary response to the many evils of slavery and Democratic opponents, with their narrow view of slavery's harms, decried it as too far reaching in its substantive guarantees of freedom, in its usurpation of critical aspects of state sovereignty, and in its unnecessary risk to the peace they believed was complete after military victory and emancipation. My reading of the original intentions of the Amendment's enactors, therefore, is not merely based on isolated comments by only Congress's most radical members or by the advocacy of only the Amendment's earliest sponsors. Rather, the debates over the Amendment's ratification reveal disagreement over the Amendment's wisdom, not over its purpose of doing far more than emancipation and of granting substantial affirmative rights. Examining the enactors' intentions, therefore, is a particularly useful and valid method of understanding the Thirteenth Amendment's largely forgotten meaning and is necessary to unshackle the Amendment from its conventional, narrow understanding.

1. More Than Mere Emancipation

When the Thirty-ninth Congress met in early 1865, the formal surrender at Appomattox had not occurred. Congressmen nevertheless anticipated that the rebellious states and their "hateful" slave power, a "criminal" enterprise scornful of the "cherished institutions that tend to secure the rights and enlarge the privileges of mankind," would be vanquished. After the November 1864 elections, which also brought President Lincoln a re-election landslide, Congress became dominated by Republicans, a party composed of a rough amalgam of former Abolitionists and Free Soil party members. The more radical of the Republicans, led in the Senate by Charles Sumner and Henry Wilson (both of Massachusetts), and in the House by Thaddeus Stevens (also of Massachusetts), James Ashley of Ohio and James Wilson of Iowa, had made careers of opposition to slavery; they shared a vision of a nation of free, independent laborers whose absolute entitlement to civil and political equality would be secured by a strong federal government,

152. See Kolchin, supra note 111, at 202-08; see also Cong. Globe, 38th Cong., 2d Sess., 142 (1865) (statement of Rep. Orth) (arguing in January 1865 that slavery and the rebellion were "dying" and that nothing could save it from "inevitable doom").
153. McPherson, Battle Cry of Freedom, supra note 150, at 838 (stating that the Thirty-ninth Congress would have three-fourths Republican majority); Kaczorowski, Revolutionary Constitutionalism, supra note 111, at 863, 880 n.64.
rather than by the various states. More moderate Republicans, led by Lyman Trumbull of Illinois and John Sherman of Ohio and John A. Bingham, the father of section 1 of the Fourteenth Amendment, also from Ohio, had a less utopian social ideal and a more immediate concern with securing practical freedom and civil equality for freedmen. Reacting to unfolding events between 1861 and 1866—the rebellion of Southern States, the violence of the War, President Andrew Johnson's ambivalence over Reconstruction, and post-bellum Southern recalcitrance—the Republican party incorporated into its mainstream ideological platform “radical” ideas previously deemed “wild.”

Though there were obviously tensions within their Party, at the outset of the debates over the adoption of the Thirteenth Amendment Republicans shared a basic commitment to the core concerns of the free labor ideology. The commitment centered around opposition to “slave labor” and all that that entailed. The opposition to “slave labor” encompassed rejection of sapping the motivation of slaves by denying them incentives and education necessary to make work productive, and debasing the dignity of all manual work, particularly that done by poor whites, by associating it with the servility and ignorance of slaves. In stark ideological opposition to “slave labor” stood the Republican vision of free labor, a system, which, in its metaphorical essence, entitled men to enjoy “the fruits of their own labor.” Rather than relying on the wages or commands of another, free labor principles suggested that through hard work, self-reliance

155. Foner, Reconstruction, supra note 111, at 228-29. Professor Foner explains that these men all came from “rapidly growing communities of family farms and small towns, where the superiority of the free labor system appeared self-evident, antebellum reform had flourished, and the Republican party, from the moment of its birth, commanded overwhelming majorities.” Id. at 228.
157. See Foner, Reconstruction, supra note 111, at 230.
158. Id. at 244; Kolchin, supra note 111, at 206-09 (noting the revolutionary momentum that the War and its consequences caused in shifting public opinion to previously unimaginable “radical” positions); Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War, 92 Am. Hist. Rev. 45, 47 (1987) [hereinafter Kaczorowski, To Begin the Nation Anew]; VanderVelde, supra note 111, at 445 (noting that “[Henry] Wilson’s faction of the party, the so-called ‘Radical’ Republicans, is generally recognized as having carried the day.”).
159. The free labor ideology itself contained many ambiguities, as Professor Foner has explained. The ambiguities had to be maintained in part to preserve a broad political coalition. See Foner, Free Soil, supra note 111, at 130-33. It was even a central component of the anti-slavery platform. See Earl M. Maltz, Fourteenth Amendment Concepts in the Antebellum Era, 32 Am. J. Legal Hist. 305, 308 (1988) (“The right to freely buy and sell one’s labor was perhaps foremost in the antislavery pantheon.”).
160. See Foner, Free Soil, supra note 111, at 43-51; McPherson, Battle Cry of Freedom, supra note 150, at 55.
161. See infra text accompanying notes 215-17.
and discipline, a man could own his own property or the tools of his craft and continue to advance economically and socially.\textsuperscript{162} Abraham Lincoln had been an ideological father and rhetorical master of this core Republican ideology.\textsuperscript{163} Unlike the South's unhealthy dependence on slave labor, Lincoln explained, the North maintained "no such... thing as a free man being fixed for life in the condition of a hired laborer... Men, with their families... work for themselves on their farms, in their houses, and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand nor of hired laborers or slavers on the other."\textsuperscript{164} Republicans believed slave and free labor systems were inherently incompatible, and that slavery had to die out in order for the North's superior economic system, as well as the principles upon which the Union had originally been founded, to take hold.\textsuperscript{165}

A second major characteristic all Republicans shared at the outset of the debates over the Thirteenth Amendment was the perception that they had a unique opportunity to completely reconstitute the degrading and destructive Southern way of life and start the country anew in the Northern, free labor image.\textsuperscript{166} Indeed, this broad ambition was a central source of conflict with Northern Democratic opponents of the Thirteenth Amendment. To these opponents, slavery's central problem was its potential expansion into the western territories and the corresponding requirement of federal government intervention to enforce the Fugitive Slave Act. Formal emancipation, the South's military surrender, its renunciation of its secessionist rights and agreement to abide by the laws of the United States therefore defined for them the resolution to the crisis brought about by slavery.\textsuperscript{167}

\textsuperscript{162} Foner, Free Soil, supra note 111, at 23-35; see also VanderVelde, supra note 111, at 459-95 (1989) (arguing that the antebellum free labor ideology carried over into the Reconstruction debates and was defined in large part by a belief that with the help of free institutions, workers could elevate themselves to independence from employers and become their social equals).

\textsuperscript{163} See Foner, Free Soil, supra note 111, at 20. Even most ardent abolitionists such as Massachusetts Senator Henry Wilson came to regard Lincoln as the Republicans' intellectual leader. See Cong. Globe, 39th Cong., 1st Sess., 344 (1865) (H. Wilson) ("It was because Abraham Lincoln was our leader, the champion of our ideas, that the world wept over his fall.").

\textsuperscript{164} Foner, Reconstruction, supra note 111, at 28-29 (omissions in original).

\textsuperscript{165} Foner, Free Soil, supra note 111, at 313-17; Kolchin, supra note 111, at 197-99.

\textsuperscript{166} Eric Foner, The Story of American Freedom 100 (1998) (quoting Illinois Representative Isaac Arnold as claiming Northern victory would render "new nation" because country was now "wholly free"). The opportunity was also a function of political reality. The exclusion of ex-Confederates from the Thirty-ninth Congress was an obvious strategic step taken to prevent resuscitation of Old Southern institutions.

\textsuperscript{167} See Brandwein, supra note 111, at 34 (1999) (quoting statement of Rep. Phelps from Kentucky who claimed that emancipation marked the "entire subversion of that institution" and that "only purblind patriots still 'predict the revival or even affirm the actual present existence of slavery'"'); see also Cong. Globe, 38th Cong., 1st Sess. 2985
Moreover, opponents of the Thirteenth Amendment argued that, because all the problems of slavery were now eliminated, the revolution to be wrought by the Thirteenth Amendment would only perpetuate disunion, undermine the Southern states' right to sovereignty, and threaten the "peace" finally achieved by emancipation and surrender. Justice Miller's narrative of the Civil War and its conclusion appears to adopt this narrow, Northern Democratic understanding of the harms of slavery and the corresponding concern that the Thirteenth Amendment would threaten a complete version of the peace the North finally obtained with the Civil War's conclusion.

To Republicans, however, slavery did more than precipitate an illegal secession. Slavery committed innumerable, deeply corrupting crimes against the "life of a free nation." It had undermined "democratic institutions" and "the dignity of free labor"; it had prevented the realization of every Republican principle espoused by the Founders and trampled the Declaration of Independence; it had spawned the "sumless agonies of civil war" and had crushed "institutions of learning, benevolence, and religion;" it had filled Southerners with a "dark and malignant hatred" for "the free states" and "the toiling masses"; it had enslaved both slave and master.

Elimination of all of slavery's evils, therefore, provided a much anticipated opportunity; adopting the Thirteenth Amendment would usher in a Northern system of free labor, permitting the realization of the ideals of the Declaration of Independence and protection of "the

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168. Cong. Globe, 39th Cong., 1st Sess. 258 (1865) (statement of Rep. Julian) (Thirteenth Amendment "cannot fail to add fuel to the flame, widen the breach already existing, further embitter the South, and prolong the sanguinary contest"); Cong. Globe, 38th Cong., 1st Sess. 2960 (1864) (statement of Rep. Holman) ("If you amend the Constitution simply to render it hostile to the institutions of the South, you will not restore the Union... [T]he experience of history warns us against this suicidal act."); id. at 2961 (arguing that the amendment will "provoke new and permanent causes of hostility on the part of men now loyal to the Union"); id. at 2987 (1864) (statement of Rep. Edgerton) ("If this Congress desires to prove to the people of the southern confederacy that they had a cause for beginning a war for their independence, the proof cannot more effectually be made than by the passage of this amendment.").
170. Id. at 1320-21 (statement of Sen. Wilson); Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (statement of Rep. Orth); see also id. at 138 (statement of Rep. Ashley) ("[Slavery] so constituted its courts that the complaints and appeals of these people could not be heard by reason of the decision 'that black men had no rights which white men were bound to respect.' [It] has for many years defied the Government and trampled upon the national Constitution."); id. at 155 (statement of Rep. Davis) ("Slavery... has undertaken to destroy our Government, to subvert our institutions, and to cause desolation and suffering and death throughout the length and breadth of the land."); id. at 193 (statement of Rep. Kasson); Cong. Globe, 38th Cong., 1st Sess. 1479-81 (1864) (statement of Sen. Sumner); id. at 1313 (statement of Sen. Trumbull).
sacred rights of human nature." It would allow the slave and the other "wronged victim of the slave system"—the poor white man, "impoverished, debased, dishonored by the system that makes toil a badge of disgrace"—to "begin to run the race of improvement, progress, and elevation." The adoption of the Thirteenth Amendment would breathe life into America and "change the destinies of nations." As Professor James McPherson describes, the final vote for adoption of the Amendment in the House set off "prolonged and unprecedented... cheering," inspired Republican House members to we[ep] "like children," and caused one member to feel that he was "in a new country." American business mogul Edward Atkinson recorded in his journal the next morning: "Year 1 of American Independence.

Yet, by the time of these debates, Southern slaves had already been freed two years earlier by the Emancipation Proclamation. Had not the evil slave system thus already been destroyed? Why the enormous elation and optimism if the Thirteenth Amendment accomplished nothing? The answer to this puzzle is that the enacting Republicans intended the Thirteenth Amendment to do much more than mere emancipation could. As James Garfield noted in 1865, "What is freedom?... Is it the bare privilege of not being chained? If this is all, then freedom is a bitter mockery, a cruel delusion." Opponents of the Amendment also recognized that "freedom" guaranteed by the Amendment would mean much more than the elimination of physical human bondage and made the Amendment's concededly broad goals the very basis of their opposition. The manumission of slaves

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171. Cong. Globe, 38th Cong. 2d Sess. 142 (1865) (statement of Rep. Orth) ("The effect of such amendment will be to prohibit slavery in these United States and be a practical application of that self-evident truth, 'that all men are created equal...'); id. at 154 (statement of Rep. Davis) (noting that slavery compromised the "great and cardinal purposes for which the Government was framed" which "in the language of that Declaration, had been proclaimed to the world as the inalienable inheritance of every man").

172. Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson); see also Cong. Globe 39th Cong, 1st Sess. 112 (1865) (statement of Sen. Wilson) ("We have had four years of bloody conflict. Slavery, everything that belongs or pertains to it, lies prostrate before us to-day, and the foot of a regenerated nation is upon it. There let it lie forever.").


174. Foner, Reconstruction, supra note 111, at 66 (quotation omitted).


177. See, e.g., Cong. Globe, 38th Cong., 1st Sess. 2962 (1864) (statement of Rep. Holman) ("What is the meaning of [the Thirteenth Amendment]? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government... . Mere exemption from servitude is a miserable idea of freedom. ... Then, sir, this amendment has some significance."); see id. ("You run the hazard of all that to gratify your visionary fanaticism, the elevation of the African to the august rights of citizenship."); see also infra text accompanying notes 225-38.
represent only part of the Thirteenth Amendment’s purpose. Republicans believed they had to “complete Emancipation . . . to see that it is wholly done. Slavery must be abolished not in form only, but in substance.” Thus, Congress set out to instill freedom in its fullest form.

2. The Essence of Freedom: The Thirteenth Amendment, the 1866 Civil Rights Act and the Guarantee of Civil Rights

The Thirteenth Amendment of course drove a stake through slavery’s most obvious manifestations—the physical “dominion of one man over the souls and bodies of his fellow men.” The Slaughter-House and Civil Rights Cases got that much right. Having already achieved emancipation of former slaves, however, the Amendment’s supporters believed they were attempting much more than providing a negative right against the physical compulsion to work. Rather, they considered the Amendment “the crowning act” or the “capstone upon the sublime structure” of the Constitution; it was “the final step” to full freedom, which included a positive guarantee to all persons the equal enjoyment of all fundamental rights.

a. Thirteenth Amendment Liberty

Members of Congress struggled to define liberty with reference to both history and constitutional theory. Indeed, they were often inseparable modes of argument. Senator Trumbull, Chairman of the Judiciary Committee, tried to define “liberty” by tautology: “Liberty and slavery are opposite terms; one is opposed to the other.” By abolishing slavery, the supporters of Thirteenth Amendment would restore the liberties and institutions eliminated or corrupted by the specific historical effects of the Southern slave power system. Primarily, however, they believed the Thirteenth Amendment would restore all the natural rights to which persons in a republic are entitled. Invoking Locke and Blackstone, Senator Trumbull explained that, while all persons give up some natural rights by

178. Cong. Globe, 39th Cong., 1st Sess. 91 (1865) (statement of Sen. Sumner); see also Cong. Globe, 39th Cong., 1st Sess. 1152 (1866) (statement of Rep. Thayer) (“[W]hat kind of freedom is that which is given by the amendment of the Constitution if it is confined simply to the exemption of the freedmen from sale and barter?”). Because of the racial quality of American slavery, emancipation could not be enough to guarantee freedom. If slavery was not racial, persons could pass from slavery to freedom relatively easily. But, because American freedmen were easily identifiable and considered less than human, a system of freedom needed more than mere emancipation. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1116-17 (1866) (statement of Rep. Wilson).
180. See tenBroek, Thirteenth Amendment, supra note 111, at 176 (1951).
182. See infra Part II.C.
entering into civil society, they are entitled to basic "civil liberty," "that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the [Thirteenth] amendment which has recently been adopted." Republicans could synthesize the historical and theoretical modes of argument by contending that the Southern slave system specifically corrupted the Founders' constitution so that its abolition was therefore necessary to restore the country to its original, high ideals. Massachusetts Representative Thaddeus Stevens described the Civil War as the inevitable result of "the vicious principles incorporated into the institutions of our country." He continued,

Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now. But the public mind has been educated in error for a century. How difficult in a day to unlearn it. In rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice.184

This restorative, natural rights theory of the Thirteenth Amendment was shared by many of its framers.185

The Thirteenth Amendment framers would have a chance to refine their broad conception of natural liberty during debates over the authority for the Freedman's Bureau and the 1866 Civil Rights Act. The proposed legislation and the corresponding debates over them arose in response to a recalcitrant South's refusal to comply with Section One of the Thirteenth Amendment's grand command; these post-emancipation efforts to oppress freedman were viewed as a continuation of the threat of slavery and helped Republicans distill freedom's essence.

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184. Id. at 2459 (statement of Rep. Stevens).
185. See, e.g., Cong. Globe, 39th Cong., 2d Sess. 142 (1865) (statement of Rep. Orth) (explaining that "the Amendment will be a practical application of that self-evident truth 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness'"); Cong. Globe, 39th Cong., 1st Sess. 1152 (1866) (statement of Rep. Thayer) (arguing that the Thirteenth Amendment requires that "all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever."); id. at 1293 (statement of Rep. Shellabarger); id. at 2779 (statement of Sen. Eliot).
b. Guaranteeing Practical Freedom

Republicans in the Thirty-ninth Congress soon learned that, despite the formal adoption of the Thirteenth Amendment in December 1865, their work was not entirely finished. Southern legislators enacted a series of laws—Black Codes—to stabilize the emancipated black work force and retain their labor cheaply.\(^{186}\) Mississippi's legislative effort, for example, entitled "An Act to Confer Civil Rights on Freedmen," barred freedmen from acquiring their own land and required them to produce written evidence of employment (i.e., a labor contract) or be subject to labor, a fine, or arrest by a white person.\(^{187}\) In South Carolina, contract breach was deemed a crime and freedmen could not work on their own in a store or as craftsmen without the approval of a judge attesting to his moral character and the payment of a licensing fee of up to one hundred dollars.\(^{188}\) Ex-Confederate States criminalized vagrancy, defining the punishable conduct variously as "disorderly conduct," "idleness," "lewdness in speech," "misspending earnings," "impudence or disrespect to an employer," or simply failing to comply with a term of contract. Whites would routinely purchase the labor of a convicted vagrant from the state and hold them to a term of bondage.\(^{189}\) States prohibited the "enticement" of a servant from his current employment, thereby constraining workers' ability to leave an oppressive labor arrangement.\(^{190}\) Apprenticeship laws allowed whites to take the children of "unfit" freedman and hold them to labor until adulthood.\(^{191}\)

Republicans were outraged by the recalcitrance of the South manifested by these Codes and described their obviously oppressive

\(^{186}\) Foner, Reconstruction, supra note 111, at 198-99.

They have enacted a law in the State of Mississippi that will not allow the black man to lease lands or to buy lands outside of the cities. Where in God's name is he to go? Into the public highway? Then he is a vagrant; then he is taken up under the vagrant laws and sold into bondage.

\(^{188}\) Id., supra note 187, at 4.

\(^{189}\) Id. at 2-8 (surveying various state vagrancy laws).

\(^{190}\) Id. at 4-5.

\(^{191}\) Id. Many of the laws were facially discriminatory or, if facially neutral, gave whites a host of defenses. See id. Because of Northern outrage, by the end of 1866, Southern states repealed many facially discriminatory laws. Nevertheless, the all-white justice and law enforcement system simply enforced vagrancy, enticement, and apprenticeship laws only against blacks. See Foner, Reconstruction, supra note 111, at 203. Republicans became aware of this discriminatory enforcement. Their enactment of the Enforcement Acts of 1870 and 1871 to prohibit discriminatory application of laws, though passed primarily pursuant to the Fourteenth Amendment, suggests that Republicans advocated for more than a mere formal equality model even in 1866. See Brandwein, supra note 111, at 48.
features on the record. Far from “accepting the situation” of Northern victory, Southerners were seeking “to again enslave [freedmen], not perhaps by a sale on the auction-block as in the olden time, but by vagrant laws and other laws and regulations concerning the freedman.” Southern recalcitrance convinced Republicans that they had to finish the job that the passage of the Thirteenth Amendment commenced. They assumed a moral obligation to restore the Union to a state of true freedom and to end the oppression of “the men we have made free.” Senator Sumner explained that their obligation was an essential aspect of enforcing a permanent peace in the Union, beyond the mere surrender of arms that Northern Democrats, and eventually the Slaughter-House Court, believed was sufficient. Senator Sumner stated:

The knot which politicians could not untie during eighty years of peace, the sword of Mr. Lincoln cut at with one blow. The power to liberate, which is now confessed, involve[s] the duty to protect. . . . Wherever we turn in our legislative path, we encounter questions of freedmen and freedman’s rights. No peace will come that will ‘stay’ until the Government that decreed freedom shall vindicate and enforce its rights by appropriate legislation.

Congress was thus presented with a real “practical question” if slavery should linger or if freedom could exist in reality; or, in other words, if freedman in fact “shall have the benefit of this great charter of liberty given to them.”

Because almost all Republicans agreed the Civil War was “a war for the establishment of free labor, call it by whatever other name you will,” the Southern effort to establish “slavery, less the protection which the master formerly afforded his chattel,” radicalized Republicans and energized their efforts for Reconstruction. Once-moderate Senator Trumbull introduced a civil rights bill that would

192. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2084 (1866) (statement of Rep. Perham) (“They may accept the fact of emancipation, but they still believe that slavery is the best condition for the colored race, and it is but reasonable to suppose that as far as possible this idea would, if they were allowed to govern, be embodied in law . . . .”); id. at 589 (statement of Rep. Donnelly) (describing Black Codes of Alabama, Mississippi, Tennessee and Virginia).
193. Id. at 2404. (statement of Rep. Ingersoll).
194. Id. at 112 (statement of Sen. Wilson); Id. at 41 (statement of Sen. Sherman) (“I believe it is the duty of Congress to give to the freedmen of the southern States ample protection in all their natural rights.”); id. at 74 (statement of Rep. Stevens) (“The infernal laws of slavery have prevented [the freedmen] from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life. Thus Congress is bound to look after them until they can take care of themselves.”).
196. Id. at 1151 (statement of Rep. Thayer).
197. Id. at 589 (statement of Rep. Donnelly).
198. See supra note 111.
give citizenship to freedmen and prohibit all "discrimination in civil rights or immunities." His goal was to "give effect" to the Thirteenth Amendment's "abstract truths and principles" and to "secure to all persons within the United States practical freedom." 199

The debate over the authority under section 2 of the Thirteenth Amendment 200 to enact what would become the Civil Rights Act of 1866 highlighted the Republican's broad conception of freedom enshrined by section 1. Representative Thayer explained the reciprocal nature of the two sections:

I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. And when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them. 201

Thus, the relatively broad powers of enforcement in section 2 point to the relatively broad scope of protection afforded by section 1. 202 Section 2 could not have been intended to grant Congress the narrow and unnecessary power to enforce emancipation. Rather, it was intended to grant Congress the power to enforce those rights afforded by section 1.

What rights were those? The right to make or break labor contracts—"to work when and for whom he pleases"; 203 the right to

200. "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2.
sue and be sued and to testify in court and to have equal access to the common law; and the right to buy and sell and convey property. In addition, liberty secured by the Thirteenth Amendment included the right to equal protection of the laws of the country. All of these rights were ultimately included in section 1 of the Civil Rights Act of 1866. Republicans still predominantly regarded voting as a privilege, rather than a right and accordingly, most did not believe that the Thirteenth Amendment or the Civil Rights Act would protect such privilege.

Importantly, Republicans understood that slavery wrought more than degradation upon slaves and free blacks. It hurt free white men, debased the dignity of the labor of the “toiling masses,” and poisoned democratic institutions. It also negated the civil rights of thousands of white opponents of slavery. The Thirteenth Amendment, 204 Id. at 111 (statement of Sen. Wilson).

205 Id. Some Republicans saw these guarantees as necessary incidents of the national citizenship the proposed civil rights bills provided:

Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are the rights of citizenship. As necessary incidents of these absolute rights, there are others, such as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of the laws for the security of person and property.

Id. at 1756 (1866) (statement of Rep. Lawrence).

206 Id. at 340 (statement of Sen. Wilson) (explaining that a former slaveowner “must deal with his former slave as a man having equal rights with himself before the laws of the country”); id. at 1152 (statement of Rep. Thayer); see also id. at 92 (statement of Sen. Sumner) (noting that the civil rights bills proposed by Republicans include “the absolute obliteration of all legal discriminations founded on color”). Professor tenBroek suggests that the right to equal protection in enjoyment of all civil rights was “itself counted among men’s fundamental ‘civil rights and immunities.’” tenBroek, Thirteenth Amendment, supra note 111, at 187.

207. section 1 of the 1866 Civil Rights Act provided,

That all persons born in the United States... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

208. See Foner, Reconstruction, supra note 111, at 245; tenBroek, Thirteenth Amendment, supra note 111, at 181.

209. See infra text accompanying note 280-82.

210. As just one example of this articulated concern, Iowa Representative James Wilson, clearly referring to white abolitionists who were harassed in Southern States declared, “Twenty million free men in the free States were practically reduced to the condition of semicitizens of the United States; for the enjoyment of their rights, privileges, and immunities as citizens depended upon a perpetual residence north of
therefore, was meant to protect all "citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."211 Moreover, securing these rights was essential not just for the thousands of liberty-deprived persons. The Republican ideology and understanding of their place in history included a conviction that the rights they were guaranteeing were, in a fundamental sense, collective. As Senator Wilson explained, "we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country . . . The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man."212 The grant of fundamental rights and the national protection of civil rights and equality would remake, reconstitute or reconstruct the entire country.213 Vindicating these rights would advance deep collective, normative commitments to equality now embedded in the Constitution by the Thirteenth Amendment.214

Mason and Dixon's line." Therefore, he concluded, "It is quite time, sir, for the people of the free States to look these facts squarely in the face and provide a remedy which shall make the future safe for the rights of each and every citizen." Cong. Globe, 38th Cong., 1st Sess. 1202-03 (1864); see also Cong. Globe, 38th Cong., 2d Sess. 138 (1865) (statement of Rep. Ashley) ("[S]lavery] has silenced every free pulpit within its [terrible] control, . . . [i]t has denied the masses of poor white children within its power the privilege of free schools, and made free speech and a free press impossible within its domain."); id. at 237 (statement of Rep. Smith) (complaining that the principle of "equal privileges" among the states "was denied to the whole North by the South unless the man adhered to the sentiments of the South" and that "men from the North could not go to the South and to speak their real sentiments"); id. at 13 (statement of Rep. Kasson) (explaining that "numbers of men who have been driven from their farms . . . because in opinion they did not agree with those who adhere to the institution of slavery").

Though beyond the scope of this article, Republicans' recognition of chronic Southern violations of the civil liberties of whites supports the view that the Fourteenth Amendment's guarantee of "privileges and immunities" was meant to apply most of the guarantees of the Bill of Rights to the states. See Amar, supra note 111, at 181-215.

211. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); id. at 343 ("[W]e mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land."); tenBroek, Thirteenth Amendment, supra note 111, at 187 ("The Civil Rights Bill was intended to be permanent, truly countrywide and inclusive of 'persons of all races.'"); Kaczorowski, Revolutionary Constitutionalism, supra note 111, at 897 n.153 (demonstrating that contemporary newspaper opinions recognized that Republicans were attempting to secure rights of all Americans, not just black Americans).


213. See, e.g., id. at 589 (statement of Rep. Donnelly) ("[I]f the object of all government, is to advance the prosperity of the people, can you do so by ruining one eighth of the entire population? The true issue before the South is justice or anarchy. We must save the South from herself.").

214. See infra text accompanying notes 372-76.
c. A Distinctive Libertarianism

In addition to the egalitarian vision of the Thirteenth Amendment, in which all persons would be guaranteed equal enjoyment of all the minimum entitlements and incidents of freedom, Republicans advanced a distinctive libertarian vision as well.\(^{215}\) As previously described, Republicans were energized by the opportunity to replace the Southern slave labor system with a free labor system. Freedmen in the South needed the same prospects for economic independence and social advancement as laborers had in the North, which was reiterated after the Civil War as a right "to enjoy the fruits of their own labor."\(^{216}\) This concept embodied a right to control one's basic life choices free from constraints put in place by private actors. Thus, freedmen should be free "to work when they please, to play when they please, to go where they please, to work at what they please, and to use the product of their labor."\(^{217}\) A core libertarian guarantee was thus the right to quit one's job free from negative consequences.

To carry out this vision concretely, the Thirty-ninth Congress passed additional legislation to liberate laborers from highly coercive peonage arrangements. Peonage had actually earlier appeared in the United States in 1846 with the acquisition of the New Mexico territory; a system of peonage had long been established there as an aspect of Spanish rule.\(^{218}\) In 1867, Congress finally criminalized peonage in New Mexico and all other parts of the United States with the federal Anti-Peonage Act which was, like the 1866 Civil Rights Act, passed pursuant to section 2 of the Thirteenth Amendment.\(^{219}\)

\(^{215}\) Professor VanderVelde suggests the term "labor vision" to describe this more radical part of the Republican agenda. VanderVelde, supra note 111, at 437. I prefer the term "libertarian vision" because "labor" was primarily incidental to achieving independence. If one could control his own labor, he would not be subject to wages or a master and would control his own destiny as an autonomous person. Thus, labor was instrumental to the larger goal of independence.

\(^{216}\) See, e.g., Cong. Globe, 39th Cong., 1st Sess. 42 (1865) (statement of Sen. Wilson); id. at 504 (statement of Sen. Howard) (arguing that each of the freedmen had the right to "own the bread he earn[s] and [eats]").

\(^{217}\) Id. at 41 (statement of Sen. Wilson).


\(^{219}\) Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (1948)). The Act provided in relevant part,

[T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all ... laws ... which have heretofore established, maintained, or enforced ... the voluntary or involuntary service ... of any persons as peons, in liquidation of any debt or obligation ... are hereby [] declared null and void; and any person ... who shall hold ... or return ... any person ... to a condition of peonage, shall ... be punished by fine ... or by imprisonment ... .

Id. Neither the original Anti-peonage Act nor 18 U.S.C. § 1581 provide for a private
The Anti-Peonage Act further demonstrates the Republican congressional commitment to upending the traditional barriers to individual economic autonomy.

The Republican libertarian vision also included a positive, aspirational quality. Led by Senator Wilson, many Republicans considered the Black Codes deeply degrading, oppressive and arbitrary. Though prominent Republicans were not free from the widely shared notions of racial inferiority, they thought that was largely beside the point. Responding to arguments that former slaves were not fit to have freedom, Republicans countered by arguing that, if a former slave is as ignorant or brutish as some claimed, it would do him no good to deny him rights essential for self-improvement. “If he is not to remain a brute,” Minnesota Representative Donnelly argued, “you must give him that which will make him a man—opportunity.” Accordingly, a man in a free society should not be condemned until he has had a chance to fail on his own; he should be free from private or public oppression. Donnelly explained,

If he is, as you say, not fit to vote, give him a chance; let him make himself an independent laborer like yourself; let him own his homestead; let the courts of justice be opened to him; and let his intellect, darkened by centuries of neglect, be illuminated by all the glorious lights of education. If after all this he proves himself an unworthy savage and brutal wretch, condemn him, but not till then.

“No man” he continued, “can rest with safety upon the mercy and generosity of any other man.”

Thus, as a central part of their vision of a good society, Republicans believed that a man, on his own, unconstrained by private coercion or legal obstacle, must have the opportunity to move up in the world. He should have the chance to own land or work for himself, to educate himself and his children, and ultimately to fulfill the basic human, natural desire to protect and better himself. In the words of Senator Wilson, a man should be able to “walk[] the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, civil cause of action. See Turner v. Unification Church, 473 F. Supp. 367 (D.R.I. 1978).

220. Cong. Globe, 39th Cong., 1st Sess. 40 (1865); see also id. at 340 (“The tendency of such legislation as that is to continue him an ignorant, degraded and dependent laborer.”).

221. Id. at 589 (statement of Rep. Donnelly).

222. Id. [W]e must offer equal opportunities to all men.... If you give the negro an equal opportunity with the white man, he becomes perforce a property—holder and a law-maker, and he is interested with you in preserving the peace of the country. If you hand him over to oppression, if you deprive him of all hope, if you debase him into a brute, you can expect nothing from him but poverty, turbulence, and wretchedness.

Id. (statement of Rep. Donnelly).

223. Id.
however humble, is protected by the just and equal laws of his country." Republicans enacting the Thirteenth Amendment were morally committed to that vision.

3. Civil Rights, the Fourteenth Amendment and the Revolution in Federalism

The dominant concern of opponents of the Thirteenth Amendment and the 1866 Civil Rights Act, beyond what they saw as its seemingly absurd promise of equality for freedmen, was the apparently revolutionary transformation it would render in federal-state relations. Representative Holman contended that the creation of federal power to guarantee Negroes equal rights would be "fatal to the Constitution, fatal to the fundamental principles of the Republic, the irrepressible right of the States to domestic government." Having opposed the Thirteenth Amendment on the grounds that it would authorize the federal government to supplant state authority, the same opponents later reversed course and claimed the Thirteenth Amendment could not authorize the 1866 Civil Rights Act or the Freedman's Bureau. The Thirteenth Amendment, claimed Edward Cowan, an outspoken Conservative Republican Senator from Pennsylvania, "was not intended to overturn this Government and revolutionize all the laws of the various States everywhere."

224. Id. at 111. Senator Wilson could even summon empirical proof for his libertarian vision. During the debates over outlawing the peonage system in New Mexico, in which men were held to a degrading state of debt bondage, Wilson described that men freed from that oppressive system did in fact thrive in a state of freedom: The peonage system "has disappeared in the large [New Mexican] towns, and peons who once worked for two or three dollars a month are now able to command respectable wages, to support their families, elevate themselves, and improve their condition." Cong. Globe, 39th Cong., 2d Sess. 1571 (1867).

225. Cong. Globe, 38th Cong., 1st Sess. 2961 (1864); see id. at 186 ("The change you propose is a fundamental change of your Government never before contemplated by its founders.").

It proposes a revolutionary change in the Government. It seeks to draw within the authority of the Federal Constitution and the Federal Congress a question of local or internal policy belonging exclusively to the slaveholding States, and is in conflict with the principles on which the Union was originally formed, and with the whole theory and spirit of the Constitution as to the rights of the States.

Id. at 2986 (statement of Rep. Edgerton).

226. See tenBroek, Thirteenth Amendment, supra note 111, at 189-91.

227. Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan); see id. ("If under color of this constitutional amendment we have a right to pass such a law as this, we have a right to overturn the states themselves completely."); id. at 1154 (statement of Rep. Eldridge) (stating that the Civil Rights Bill "is another of the measures designed to take away the essential rights of the States"); id. at 185 (statement of Sen. Davis) (objecting that the Civil Rights Act would "wholly absorb all reserved state sovereignty and rights"); id. at 478 (statement of Sen. Saulsbury) (stating that this bill positively deprives "the States of their power of police regulation").
The Republican congressional majority did not disagree with their opponents' characterization of their enactments; they fully recognized that a revolution was indeed in place and necessary. After conceding that the Civil Rights Act was "absolutely revolutionary," Maine Senator Thomas Morrill asked, "But are we not in the midst of revolution?" In order to enforce the new civil rights agenda, the federal government permitted states to retain authority over ordinary civil and criminal affairs; however, all matters related to enforcement of civil rights would be subject to federal supervision. The Thirteenth Amendment and Civil Rights Act of 1866 meant that state officials and state courts could no longer be trusted to guarantee the equality of fundamental rights bestowed by national citizenship and the Thirteenth Amendment's guarantee of freedom.

The Civil Rights Act authorized federal district attorneys, marshals and Freedman's Bureau officials to bring suit to remedy violations of the Act's broad natural rights guarantees and made all persons, including local officials, liable to fine or imprisonment. It did not create a permanent national police force. Rather, it left enforcement primarily for the federal courts. The federal government had previously been considered by many to have the greatest potential for tyranny and the states the greatest bulwark against it. As part of the constitutional revolution rendered by the Civil Rights Act and later, the Fourteenth Amendment, the Federal Government would become, in Senator Sumner's words, the new "custodian of freedom."
Because Republicans had obtained nearly unanimous consent in passing the Civil Rights Act, it came as quite a surprise to many that the Republican President Andrew Johnson vetoed it. In his veto message, he warned that the Bill represented

an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the states. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government.

Republicans believed the Bill was clearly right, and so, in April 1866, for the first time in American history, Congress overrode a President's veto.

When Congress considered the adoption of the Fourteenth Amendment soon after, what was still most controversial about the Civil Rights Act, especially in light of the political battles with the new President, was its authority to transform federal-state relations; the substantive equality or freedom guarantees of the Amendment or its enacting legislation was not as significantly at issue. There remained a nagging question of whether a single legislative act could take the protection of civil equality away from the states and give it to the federal government and its agents. More controversial still was whether Congress itself could, through the Civil Rights Act, grant full citizenship with its attendant privileges and immunities, to a class of persons. The Fourteenth Amendment is thus in one obvious sense a strategic device to resolve these controversies conclusively. Professor Foner explained that, as the split with the President deepened, "Republicans grappled with the task of fixing in the Constitution, beyond the reach of Presidential vetoes and shifting political majorities, their understanding of the fruits of the Civil War."

The Fourteenth Amendment certainly overlaps some critical aspects of the Thirteenth Amendment, and grounds the legislation passed pursuant to section 2 of the Thirteenth Amendment on even firmer constitutional footing. However, the political reality that a subsequent congressional session felt it pragmatically wise to enact the Fourteenth Amendment should not, by itself, render the Thirteenth Amendment devoid of independent meaning or force. To the

233. Foner, Reconstruction, supra note 111, at 246-47.
234. Kaczorowski, Revolutionary Constitutionalism, supra note 111, at 904 (citing Cong. Globe, 39th Cong., 1st Sess. 1681 (1866)).
235. Foner, Reconstruction, supra note 111, at 250-51.
236. Kaczorowski, Revolutionary Constitutionalism, supra note 111, at 903-06.
237. Foner, Reconstruction, supra note 111, at 251; see also tenBroek, Thirteenth Amendment, supra note 111, at 201 ("[T]he Thirteenth Amendment played an important part in the evolution of the Fourteenth Amendment... because, after its passage, doubts about its adequacy became so serious as to make it seem advisable to try do the same job all over again by another amendment.").
contrary, the Thirteenth Amendment debates in the Thirty-eighth and Thirty-ninth Congresses reflect the firm intentions of the Amendment's enactors, without any expectations that their intentions would change or that they would have to enact additional or more substantive constitutional protections in the future. Those intentions were clearly not limited to the narrow goal of setting slaves free from their masters. Proponents believed, as did opponents, that the Thirteenth Amendment would secure broad affirmative rights, including the equal enjoyment of all the minimum entitlements of freedom necessary to national citizenship.238

Unfortunately, the submergence of the Thirteenth Amendment under supposedly broader Fourteenth Amendment goals has left the interpretive possibilities offered by the Thirteenth Amendment and its deep commitment to equality and freedom from various forms of labor exploitation relatively unexplored. Once resuscitated, however, the Amendment can be used to solve concrete human rights problems and can provide a valuable foundation for broader civil rights protections.

C. The Thirteenth Amendment and Free Labor

After the Civil Rights Cases, the Court's next significant opportunity to interpret the Thirteenth Amendment came at the turn of the nineteenth century, after a period of racial retrenchment in the South.239 In the Peonage Cases,240 the Court struck down, on Thirteenth Amendment grounds, two updated variations of the Black Codes designed to keep blacks in a state of labor bondage.241 The Peonage Cases failed to directly address the manifest racial purpose and impact of the Southern laws at issue or to make explicit the laws' antebellum pedigree. As a result, the cases missed an opportunity to fully explicate the Thirteenth Amendment concern of ending caste oppression. Nevertheless, the Court did advance one central concern of the Thirteenth Amendment framers in striking down the peonage laws: the unacceptability of coercive private labor arrangements that inhibit the mobility of labor and the corresponding opportunities for achieving personal and economic independence.

238. See supra notes 174-79 and accompanying text. Most congressmen agreed that voting was a privilege rather than a right that national citizenship required. See supra notes 151-77.

239. See infra text accompanying notes 240-85.


241. See infra notes 242-50 and accompanying text.
1. Peonage: Slavery's Second Generation

After the end of Reconstruction and the Court's perverse announcement in the *Civil Rights Cases* that blacks must "cease[] to be the special favorite of the laws," Southern states empowered with "home rule" wasted little time in sparking a counterrevolution and resuscitating one favorite aspect of the Southern economy—cheap black labor. During the 1880s and 1890s, "the variety of legal structures designed to keep [black agricultural] worker[s] in a state of quasi slavery were refined, strengthened, and made a part of the fabric of southern life and law." For example, Southern Redeemers in the South Carolina legislature criminalized simple breach of contract, and other states used broad false pretenses statutes to criminalize breaking of a contract without repaying advances. Furthermore, reconstruction era vagrancy laws, enticement laws and apprenticeship laws were still in place and were upheld under constitutional challenge, no doubt in part as a result of dismissive Reconstruction-era Supreme Court precedent.

The most repressive feature of the Redeemer South, however, was the convict leasing system. Men, almost universally black, served on chain gangs leased to private Southern planters, or were simply bonded by surety contracts to a period of servitude to a white employer, almost always for petty or trumped-up charges. If the convict failed to complete the required period of servitude, he would be reimprisoned for this additional violation. In effect, the

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243. See Foner, Reconstruction, supra note 111, at 564-601, 602. After the Compromise of 1877, one Republican politician announced that "the policy of the new administration will be to conciliate the white men of the South. Carpetbaggers to the rear, and niggers take care of yourselves." Id. at 581.
244. Novak, supra note 187, at 29.
245. Id. at 34. The South Carolina Supreme Court was typical of state courts during the era in rejecting claims that these laws forced "involuntary servitude" in violation of the newly enacted Thirteenth Amendment. Ignoring the fact that imprisonment would not actually relieve the underlying debt at issue, the South Carolina court reasoned that every one who undertakes to serve another in any capacity parts for a time with that absolute liberty which it is claimed that the constitution secures to all, but, as he does this voluntarily, it cannot be properly said that he is deprived of any of his constitutional rights; and, if he violates his undertaking, he thereby, of his own accord, subjects himself to such punishment as the law-making power may have seen fit to impose for such violation. State v. Williams, 10 S.E. 876, 877 (S.C. 1890).
246. See infra notes 275-78 and accompanying text.
247. Novak, supra note 187, at 33 (noting that, in Mississippi, "most of the convicts (ninety-two percent) are negroes of the lowest class. They are generally overworked, and the death rate is high" (quoting 1886 Labor Commission report on convict labor)).
248. See id. at 35 (citing a study by U.S. District Court Judge Emery Speer, an opponent of the peonage system in the South, which concluded that in one—Georgia
Southern court system operated as an employment agency for white plantation owners, making the state-enforced bonded labor of blacks and the prison system enormously profitable. The South had metamorphosed the slave psychology by simply adjusting its legal apparatus to the toothless constraints of the Reconstruction Amendments as interpreted and had replicated critical economic features of the antebellum slave system. As W.E.B. DuBois concluded in his history of Reconstruction: "[t]he slave went free; stood a brief moment in the sun; then moved back again toward slavery."

2. The Thirteenth Amendment Response

In Bailey v Alabama, the Supreme Court considered the constitutionality of the conviction of an itinerant black farm laborer, Alonzo Bailey, under an Alabama fraud law. Bailey had accepted an advance of $15 in exchange for a promise to work for one year. He left after a little over one month without paying the remaining obligation of his advance. He was then convicted under an Alabama law that made breaking an employment contract without repaying an advance prima facie evidence of criminal fraud. Alabama argued that this law was simply a variation on the established crime of theft by false pretenses and that the evidentiary presumption was necessary because of the difficulty of proving criminal intent to defraud. The Court, however, reasoned that the statute improperly reversed the defendant's presumption of innocence and exposed Bailey "to conviction for fraud upon evidence only of breach of contract and failure to pay."

In practical effect, the law compelled performance of a contract under the threat of criminal prosecution which, the Court concluded,
violated the Thirteenth Amendment. The Court declared that the Amendment was meant "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit." More broadly, the Court proclaimed that the Thirteenth Amendment was a "charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag" and that it intended to "abolish slavery" and "to make labor free."

Three years later in United States v. Reynolds, the Supreme Court confronted the harshness of Alabama's criminal surety system. Ed Rivers, a black man, had pleaded guilty to petit larceny in Alabama county court. Because he could not afford the fine or court costs imposed by the judge, he was sentenced to almost sixty days of hard labor. A white Southerner named Reynolds paid the fine in exchange for Rivers' promise to work approximately ten months as a farmhand. After one month, Rivers quit and was again imprisoned pursuant to Alabama's criminal surety law and fined double what he had been originally fined by the court. In order to avoid the equivalent 115-day stint in a chain gang, Rivers entered into a different surety contract to work on a plantation for fourteen months. According to Professor Benno Schmidt's calculations, Rivers "was by now committed to work more than seven times as long as he would have been required to had he elected to work off his original conviction."

Recognizing that criminal surety system had become an engine of oppression of blacks, the U.S. Department of Justice chose to prosecute Reynolds under the 1867 Anti-Peonage Act. Reynolds argued that criminal surety laws did not compel service in obligation of a debt, but punished for a crime and thereby fell within the Thirteenth Amendment's allowance for involuntary servitude after criminal conviction. Indeed, according to Reynolds' lawyers, the

258. Id. at 241.
259. Id.
260. 235 U.S. 133 (1914).
261. Schmidt, supra note 249, at 692.
262. Id. at 692-93.
263. Id. at 695. In Clyatt v. United States the Supreme Court upheld the constitutionality of the Act under the enforcement power of section 2 of the Thirteenth Amendment. 197 U.S. 207, 218 (1905). The Court defined peonage as "a status or condition of compulsory service, based upon the indebtedness of thepeon to his master. The basal fact is indebtedness." Id. at 215. The case involved the conviction of a white man, Clyatt, who had forcibly returned two black men to a condition of peonage in violation of the Act. Id. at 209. Over a strong opinion by Justice Harlan, who criticized the Court for ignoring the racially oppressive reality of the emerging Southern peonage system, id. at 223 (Harlan, J., concurring in part and dissenting in part), the Court reversed the conviction on a technical reason that the two blacks had never been in its narrowly defined condition of peonage to which they could be returned. Id. at 222.
system offered the convict a "humane" choice between the forced labor of a chain gang and private labor, which tended to be easier work.\textsuperscript{265} The Court's opinion upholding Reynolds' conviction was a highly formalistic response to this argument and, like the opinion in Bailey, disregarded the inherent racial element of the peonage system at issue.

The Court reasoned that the state was not involved in setting the terms of the surety contract or ultimately supervising the labor for which the parties privately contracted. The debt thus ran to private surety and the laborer was compelled to work under fear of criminal punishment.\textsuperscript{266} Performance of service under the constant fear of imprisonment renders the work compulsory, "as much so as authority to arrest and hold his person would be if the law authorized that to be done."\textsuperscript{267} Far from offering the attractive or humane choices, the Court concluded that the criminal surety system operated to keep the convict "chained to an everturning wheel of servitude."\textsuperscript{268}

To modern, realist eyes, a striking feature of the Court's decisions in both Bailey and Reynolds is its failure to acknowledge the strong sectional and racial features inherent to the peonage system under its review. The Court was certainly aware that these laws persisted only in the South as a relic of antebellum slavery.\textsuperscript{269} Bailey's lawyers also pressed the Court to consider the racially oppressive nature of Alabama's peonage system.\textsuperscript{270} Indeed, faced with evidence of the

\textsuperscript{265} Id.
\textsuperscript{266} Id. at 146.
\textsuperscript{267} Id.
\textsuperscript{268} Id. at 146-47.
\textsuperscript{269} These features were public knowledge. The horrors of the peonage system were salaciously reported in the Progressive newspapers of the era. See Schmidt, supra note 249, at 655-56.

Urban newspapers and leading magazines had a journalistic field day with the characters and melodrama of peonage: sinister overseers, baleful whipping bosses, pathetic victims, conniving officials, desperate midnight dashes for freedom, frantic chases, cruel horseback captures, and all the antebellum paraphernalia of bondage—whips, chains, guns, hounds, clubs, and filthy, overcrowded stockades.

\textit{Id.} A widely-cited Justice Department report catalogued abuses suffered by blacks as a result of peonage. See Charles Russell, Report on Peonage (1908). In addition, although the Court in Clyatt v. United States also failed to consider the race of the two black victims in the case, Justice Harlan's dissent took special note of this practical reality. 197 U.S. 207, 223 (1905) (Harlan, J., dissenting) (noting how the case disclosed "barbarities of the worst kind against these negroes").

\textsuperscript{270} Bailey's brief to the Court asserted that the law applied to "service rendered by the commonest laborer or the poorest tenant of the farmlands" because, "as a matter of common knowledge in Alabama, such laborers and such tenants are, as a class, negroes." Schmidt, supra note 249, at 680. The Attorney General's brief included a statement from a U.S. Attorney in Louisiana stating that "I do not believe that there is a well-advised man in the State, lawyer or layman, that does not know that this act was passed in order to give the large planters of the State absolute dominion over the negro laborer." Id. at 681. Specifically, lawyers argued that the law violated the principle of Yick Wo v. Hopkins that the law must not be administered
racial feature inherent in the Alabama scheme and the broad Thirteenth Amendment values it undermined, the Court’s opening lines in Bailey appear almost defensive: “We at once dismiss from consideration the fact that the plaintiff in error is a black man.”271 Disregarding the practical reality of Southern life, the Court continued:

No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. . . . Opportunity for coercion and oppression, in varying circumstances, exists in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved.272

The system of enforced racial oppression of the earlier Black Codes had outraged enactors of the Thirteenth Amendment even when they assumed a facially neutral form, because the Codes represented recalcitrant attempts to reenslave the class of freedmen.273 The obvious intended effects of the Codes convinced Congress the enforcement of the Thirteenth Amendment was necessary through the Civil Rights Act in order to liberate freed blacks from the southern racial caste system and to secure them equality and “practical freedom.”274 The Southern schemes at issue thus clearly conflicted with the egalitarian principles that Republicans believed the Thirteenth Amendment’s declaration of full freedom ushered in.

Perhaps the Court’s reluctance to consider the racial inequality enforced by the peonage laws can be explained by the Court’s then-hostility to claims for racial justice brought against facially neutral laws275 or perhaps it can be explained as a lingering consequence of the Court’s conciliatory role in carrying out the Compromise of 1877.276 It can also be explained as a deliberate strategic decision by

with “an evil eye and an unequal hand.” 118 U.S. 356, 373-74 (1886).
272. Id.
273. See supra notes 243-52 and accompanying text.
274. See supra text accompanying notes 193-214; see also Cong. Globe, 39th Cong., 1st Sess. 589 (1866) (statement of Rep. Donnelly) (“[I]t is as plain to my mind as the sun at noonday, that . . . we must break down all walls of caste . . . ”).
275. See Williams v. Mississippi, 170 U.S. 213 (1898) (holding that Mississippi’s grand jury qualification scheme, which granted broad discretion to administrative officers and had wildly disparate impact against blacks, did not violate the Fourteenth Amendment’s guarantee in absence of proof of actual discrimination); Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that separate facilities for African Americans did not deprive them of equal protection of the laws under the Fourteenth Amendment); see also Pace v. Alabama, 106 U.S. 583 (1882) (upholding prohibition on interracial marriage and enhanced punishment for interracial fornication); see generally Michael J. Klarman, The Plessy Era, 1998 Sup. Ct. Rev. 303.
276. See supra text accompanying notes 132-49; see also Randall Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 86 Colum. L. Rev. 1622, 1647 (1986) (claiming that the suppression of race and sectional
the Court to avoid antagonizing the South with recriminations over race. In any event, by ignoring the racial dynamic at issue in the Peonage Cases the Court merely lost an opportunity to explicate an additional dimension of the Thirteenth Amendment. It did not, however, foreclose any future interpretation that recognizes the Thirteenth Amendment's egalitarian and anti-caste norms.

More important, the Peonage Cases did advance several important components of the Republican Thirteenth Amendment vision. First, by proclaiming that the Thirteenth Amendment was intended to prohibit "that control by which the personal service of one man is disposed of or coerced for another's benefit," the Court was advancing a central Republican insistence that men be able to enjoy the "fruits of their own labor." This distinctive libertarian vision required that labor be mobile and untethered to absolute control of another private person and that men must have the right to control basic life choices, including when and for whom they work. In such a free system, Republicans believed that men could partake in the continuing, natural process of progressing toward economic independence and social improvement. The Peonage Cases thus recognized that the Southern peonage system severely impeded labor mobility and recreated the stagnant Southern economy dependent upon "slave labor" that had motivated Thirteenth Amendment framers.

Second, by correctly describing the Thirteenth Amendment as a "charter of universal civil freedom" that applies equally to all races and classes, the Court recognized that the Amendment was enacted to end the many degradations the slave system perpetrated against all Americans—slaves, free blacks and whites. Third, by invalidating agreements that Alabama claimed were entered into voluntarily by blacks, or that were at least not as transparently coerced as antebellum slave labor, the Court recognized that freedom from slavery is an inalienable right; that no matter his economic differences in the Peonage Cases should be seen as "twin aspects of the tacit deal that was struck in American political culture after the destruction of Reconstruction in the late 1870's").

277. See Schmidt, supra note 249, at 715 (arguing that Justice Hughes' colorblind opinion was evidence that "the Court was now willing to attack the racist institution of peonage with a constitutional principle of resilient neutrality and that a race-silent approach was the best tactic to win over a majority of the Justices to the cause of intervention").

278. See Koppelman, supra note 98, at 502-03 (observing that Bailey failed to explicitly advance Thirteenth Amendment's egalitarian premise and anti-caste goals).


280. See supra text accompanying note 274.

281. See supra text accompanying notes 151-79.


283. See supra Part II.B.
In desperation or immediate need, one cannot consent to or sell oneself into slavery-like labor agreements.\(^{284}\)

In addition, the *Peonage Cases* implemented the Republican free labor conviction that coercive labor arrangements, even if they appear voluntary, degrade both the worker and the master, as well as the nation as a whole and that such arrangements impede collective progress to a good society.\(^{285}\) The *Peonage Cases* thus vindicate an important, collective value that the Thirteenth Amendment’s enactors intended it to enshrine.

**D. The Thirteenth Amendment and Equality at Mid-Century**

Professor Risa Goluboff has recently demonstrated the prominent, though underreported, role that the Thirteenth Amendment played in the Justice Department’s civil rights strategy in the period between the end of World War II and the Supreme Court’s decision in *Brown v. Board of Education*.\(^{286}\) The story she tells is important because it offers a model for an expanded, modern view of the Thirteenth Amendment, which suggests its still-underutilized promise for civil rights advocacy.

At the end of the War, concern for Cold War appearances and real political pressure from African-American groups turned the recently-formed Civil Liberties Section of the Department of Justice toward the protection of civil rights of African-Americans, particularly in the South.\(^{287}\) Lawyers in the Civil Rights Section faced considerable doctrinal obstacles in the way of enforcing civil rights guarantees contained in the Fourteenth Amendment; namely, the requirement of state action,\(^{288}\) the narrow zone of jurisdiction in which the federal government could operate in place of the states,\(^{289}\) and the long shadow of *Plessy v. Ferguson*’s separate but equal principle.\(^{290}\) The lawyers recognized that the Thirteenth Amendment, by contrast, allowed prosecution of private action and clearly authorized federal jurisdiction over peonage as a result of the federal Anti-Peonage Act.\(^{291}\)

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284. Justice Holmes based his dissent in *Bailey* in part on the uncharacteristically “Lochneresque” view that desperate people should not be denied the option of entering into contracts they think will make them better off, no matter how bad that seems to others. Specifically, he contended that laws criminalizing breach of contract actually in are in the best interest of poor laborers who could use the guarantee of enforcement to negotiate for better contract terms. *Bailey*, 219 U.S. at 249-50 (Holmes, J., dissenting).
285. See supra Part II.C.
287. Id. at 1619-28.
289. See id. at 17-18.
With considerable success in the lower courts, lawyers in the Civil Rights Section attempted to deemphasize elements of voluntariness that had traditionally governed assessment of peonage and involuntary servitude. Instead, the lawyers focused on the actual status of the laborer, emphasizing the isolation, vulnerabilities and other indicia of coercion as well as the conditions of their servitude.\textsuperscript{292} The lawyers also emphasized the impact that certain informal structures had on the life of Southern black laborers, such as lack of education, physical or sexual violence, and the harshness of the work;\textsuperscript{293} these features were disregarded by the \textit{Peonage Cases}.\textsuperscript{294} The Civil Rights Section thus framed the problem of coercive labor arrangements as a civil rights issue under the Thirteenth Amendment rather than as a free labor issue as conceived by the \textit{Peonage Cases}, and employed the Thirteenth Amendment in order to relieve some of the oppression and caste status endured by blacks in the South.\textsuperscript{295}

The Justice Department’s success in the lower courts in deemphasizing elements of indebtedness or voluntariness and presenting the real, practical obstacles to the equal enjoyment of the rights of citizenship and conditions that inhibit the mobility of labor captured some of the central concerns of Republican framers of the Thirteenth Amendment. In \textit{Pollock v. Williams},\textsuperscript{296} a case prosecuted by the Civil Rights Section, the Court struck down a Florida fraud scheme nearly identical to the one at issue in \textit{Bailey}. Justice Jackson’s majority opinion explicitly emphasized one additional aspect of the Republican free labor dogma—the corrosive effects forced labor has on all labor:

> When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and

\textsuperscript{292} \textit{Id.} at 1663-68.

\textsuperscript{293} \textit{See id.} at 1663 (describing affidavit of Elizabeth Coker, who complained that she worked hard, “never ate a meal at the table the whole time” and had “no clothes, no shoes, and but seventy cents in money”); \textit{id.} (describing allegations of Polly Johnson, who complained that “she slept in a hen house and suffered sexual abuse, beatings, no wages, poor conditions and treatment, and work too strenuous for a young woman” and “was not allow[ed] ... to have any playmates ... was never sent to school nor allowed to visit anyone, nor to attend church”) (alteration in original) (omissions in original); \textit{id.} at 1665 (describing the Department’s interest in prosecuting man who held a laborer’s son as a way to prevent her from leaving her employment).

\textsuperscript{294} \textit{See supra} notes 239-51 and accompanying text.

\textsuperscript{295} Goluboff, supra note 286, at 1665-68; \textit{see also id.} at 1664 (“Metaphorical meanings and nonlegal understandings of words like slavery, peonage, and involuntary servitude converged with the Justice Department’s aspirations for the Thirteenth Amendment.”).

\textsuperscript{296} 322 U.S. 4 (1944).
living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.297

The Civil Rights Section's success in reviving a fuller, Republican conception of the Thirteenth Amendment had beneficial collateral effects as well. Goluboff explains that a doctrinal "convergence" occurred between the Justice Department's Thirteenth Amendment civil rights strategy and the New Deal's emphasis on broad protections for laborers and the expanded authority for the federal government interventions it ushered in.298

Whether the link was causal or symptomatic, the new baselines created by the New Deal for the conditions in which people worked paralleled expanding definitions of involuntary servitude, and the Section's civil rights practice used different legal tools to address various forms of coercion to work. Peonage and involuntary servitude represented more extreme forms of unfree labor, with redress through the Thirteenth Amendment. The abridgement of the rights to organize, to strike, or to receive decent wages constituted more mundane manifestations of legal and economic coercion; the Department of Justice combined New Deal labor legislation with Reconstruction civil rights statutes to ensure the integrity of those rights.299

Indeed, because New Deal legislation such as the Fair Labor Standards Act expressly excluded from coverage categories of predominantly black agricultural and domestic labor,300 the Civil Rights section used the Thirteenth Amendment to fill in the gap and to combat racial hierarchy and labor exploitation at the same time.301

The Civil Rights Section's use of the Thirteenth Amendment eventually faded in the 1950s as a result of an internal Justice Department decision to rely on the Fourteenth Amendment.302 Since the Brown v. Board of Education decision,303 the civil rights establishment has largely committed itself to using the Equal Protection Clause of the Fourteenth Amendment to remedy racial inequality. The Thirteenth Amendment as a civil rights tool has thus fallen largely into desuetude.304 Nevertheless, the litigation strategy

297. Id. at 18; see also Goluboff, supra note 286, at 1669-70 (recognizing Republican free labor "pedigree" in Justice Department's broad conception of the Thirteenth Amendment).
298. Goluboff, supra note 286, at 1674.
299. Id. at 1676-77.
300. See infra Part III.A.2.
301. Goluboff, supra note 286, at 1679-80.
302. Id. at 1681-82.
304. But see Runyon v. McCrary, 427 U.S. 160 (1976) (holding that section 2 of the Thirteenth Amendment authorizes legislation banning discrimination in private schools as a badge or incident of slavery); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding that section 2 of the Thirteenth Amendment authorizes legislation
and successes of the Civil Rights Section’s early years demonstrates the doctrinal flexibility of the Thirteenth Amendment, and its natural applicability to situations involving the often-related issues of race and labor. The story also demonstrates how the Amendment’s application in a core category of cases can highlight and make available connections with complementary constitutional theories. It suggests that the Thirteenth Amendment can again be used to develop a dynamic and broad-based civil rights strategy.

III. THE CONSTITUTION AS A SWORD: VINDICATING THE THIRTEENTH AMENDMENT

The modern, third-generation form of slavery described in Part II implicates the core concerns of the Thirteenth Amendment. Modern victims’ work is performed under various forms of physical or psychological threat as well as under conditions that deprive victims of essential aspects of their humanity, rendering their labor coerced rather than free. In addition, victims are most typically exploited as a result of their unequal social or economic status. These cases call for the invocation of the broad egalitarian and distinctive libertarian promise of the Amendment.

Compared to this broad constitutional promise, currently available civil remedies for modern victims of slavery and involuntary servitude are neither adequate nor appropriate. Section 1983 cannot be used against the private defendants in slavery cases because this statutory vehicle only prohibits unconstitutional conduct by state or local officials. In addition, the use of the primary remedy currently employed by victims of modern slavery, the FLSA, continues the awkward fiction in constitutional law of grounding civil and human rights remedies in the commerce clause, recently made vulnerable to judicially enforced federalism, rather than the Reconstruction amendments which are obviously dedicated to attacking human and civil rights deprivations.

Moreover, while the FLSA and the patchwork of related state law causes of action might in coordination materially compensate victims as much as a single Thirteenth Amendment remedy, they all address only the incidental harms associated with slavery or involuntary servitude. As such, they are inadequately expressive remedies; they fail to communicate the appropriately strong message of moral condemnation that the unconstitutionally exploitative activity in these

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305. See supra Part II.D.
306. See infra text accompanying note 312.
308. See infra text accompanying notes 317-41.
cases demands. Finally, limiting plaintiffs to state common law remedies would subvert a central transforming purpose of the Thirteenth Amendment—to create a federal liberty interest independent of state law protection.

Congress could exercise its considerable powers under section 2 of the Thirteenth Amendment to provide a comprehensive civil remedy that addresses the panoply of harms and communicates the appropriate moral condemnation of slavery and involuntary servitude. Failing that, however, courts should recognize a direct cause of action under the Thirteenth Amendment for damages, following the logic of *Bivens v. Six Unknown Named Agents* in order to adequately enforce the vision of the Thirteenth Amendment enactors. My argument is not that these men themselves would have authorized or even contemplated private causes of action for damages under the Thirteenth Amendment. Rather, I contend that courts should employ a relatively modern procedural mechanism of a *Bivens*-type action to carry out the substantive views of the framers of the Thirteenth Amendment. Private plaintiffs should be allowed to use the Thirteenth Amendment as a sword, to commence litigation that will construct a positive constitutional law of the Thirteenth Amendment and ultimately, like the Civil Rights Section over a half-century ago, develop a broader and firmer foundation for civil rights protections.

A. Inadequacy of Current Remedies

1. The Current Patchwork

   a. Inapplicable Civil Rights Statutes

   Congress has not yet created a civil cause of action for violations of the Thirteenth Amendment. The relevant constitutional actors in most cases of slavery or involuntary servitude are private actors. Therefore, litigants cannot sue for deprivations of their Thirteenth Amendment rights under 42 U.S.C. § 1983 because that statute authorizes suits against only state or local government officials. Another civil rights statute, 42 U.S.C. § 1985(3) authorizes civil suits against private conspirators who intentionally deprive persons of equal protection of the laws. However, this statute does not permit

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309. See infra text accompanying notes 372-76.
310. See infra text accompanying notes 321-24.
311. See infra text accompanying notes 375-79.
313. 42 U.S.C. § 1985(3) (2000) provides, in relevant part, If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal
suits for underlying Thirteenth Amendment violations, nor does it apply to discriminations not motivated by race or class based animus.\textsuperscript{314} Although race and social class inequalities are certainly relevant in cases of modern slavery,\textsuperscript{315} perpetrators are typically motivated by economic considerations, rather than the class based prejudice of the kind the Supreme Court requires under section 1985(3).\textsuperscript{316}

b. Inadequate State Law Torts

A variety of state common-law torts can be employed to remedy certain aspects of the slavery or involuntary servitude experience. The tort of false imprisonment can be used to compensate victims for periods in which they are physically bound.\textsuperscript{317} The tort of intentional infliction of emotional distress can be used to compensate victims if the concededly outrageous conduct toward them results in actual physical injury.\textsuperscript{318} The tort of fraudulent inducement can be used to

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\textsuperscript{314} See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (holding that under § 1983, plaintiff must demonstrate that defendant was motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus” (emphasis added)).

\textsuperscript{315} See infra text accompanying note 400.

\textsuperscript{316} See Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993) (holding that discriminatory animus against abortion seekers or women in general is not covered under § 1985(3)); United Bd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 833, 839 (1983) (holding that § 1985(3) does not apply to conspiracies motivated only by commercial or economic animus and that “group actions generally resting on economic motivations should be deemed beyond the reach of § 1985(3)”; Bryan v. City of Madison, 213 F.3d 267, 276 (5th Cir. 2000) (stating that § 1985(3) requires “an allegation of a race-based conspiracy”); Addisu v. Fred Meyer, Inc., 198 F.3d 1130 (9th Cir. 2000) (holding that § 1985(3) claims must have some racial or otherwise class based discriminatory animus behind the alleged conspirators’ action); Gagliardi v. Village of Pawling, 18 F.3d 188, 194 (2d Cir. 1994) (explaining that the Supreme Court in Griffin included a class-based animus requirement to prevent § 1985 from being used as a “general federal tort law” for any conspiratorial interferences with the rights of others).

\textsuperscript{317} The tort of false imprisonment generally requires: (i) an intent to confine a person to fixed boundaries; (ii) actual confinement; (iii) awareness of confinement. See Restatement (Second) of Torts § 35 (1965). Initial consent to the working arrangement, the acceptance of minimal wages and the physical opportunity to escape over the typically long period of the servitude, might preclude a successful claim of false imprisonment. See Lopez v. Winchell’s Donut House, 466 N.E.2d 1309 (Ill. App. Ct. 1984). The elements of the tort also vary from state to state. Compare Lorensen v. State, 249 A.D.2d 762, 763 (N.Y. App. Div. 1998) (finding that lack of consent is expressly required), with Johnson v. Weiner, 19 So. 2d 699 (Fla. 1944) (finding that lack of consent is not required).

\textsuperscript{318} The tort of intentional infliction of emotion distress generally requires that (1) the defendant causes severe emotional distress; (2) intentionally or recklessly, (3) by
compensate victims for financial losses resulting from misrepresentations made to them.\textsuperscript{319} Employed independently, the torts do not cover the full range of harms experienced by victims. Used collectively and depending on the particular factual circumstances, these torts could provide damages in an amount equal to a comprehensive Thirteenth Amendment remedy. In either case, however, these state common-law causes of action would not vindicate the important \textit{federal} values enshrined by the Thirteenth Amendment, nor do they communicate the appropriate level of moral condemnation required by the Amendment’s prohibition on such conduct.\textsuperscript{320}

Indeed, a central and concededly revolutionary aspect of the Thirteenth Amendment was its intended transformation of federal-state relationships. Most all members of the Thirty-ninth Congress, proponents and opponents alike, recognized that the Amendment and the 1866 Civil Rights Act passed pursuant to its authority would take primary responsibility for the protection of civil rights away from the states and place it with the federal government.\textsuperscript{321} The federal government was designated the “new custodian of freedom” and the broad new federal rights enshrined by the Amendment and the Civil Rights Act were subject entirely to federal supervision.\textsuperscript{322} Therefore, restricting victims of slavery and involuntary servitude to background state common-law torts to remedy violations of obviously federally protected interests would subvert a central purpose of the Thirteenth Amendment.

2. FLSA, the Commerce Clause Fiction and the Need for a Natural Linkage Between Rights and Remedies

The primary civil remedy employed in modern slavery cases is the Fair Labor Standards Act.\textsuperscript{323} The FLSA is an obvious doctrinal choice

\textsuperscript{319} The tort of fraudulent inducement compensates only for economic harms caused by misrepresentations. See Dobbs, supra note 318, § 349 (defining fraudulent inducement as a “stand-alone economic or commercial tort that causes financial harm without causing physical harm either to person or property”).

\textsuperscript{320} See infra text accompanying note 372; see also Manliguez v. Joseph, No. 01-CV-7574, 2002 U.S. Dist. LEXIS 15277, at *19 (E.D.N.Y. Aug. 15, 2002) (creating a private cause of action for involuntary servitude and using the statute of limitations for civil rights actions rather than for false imprisonment actions because “classifying Plaintiff’s claim as a false imprisonment claim would not address Plaintiff’s forced labor or its constitutional implications”).

\textsuperscript{321} See infra text accompanying note 350.

\textsuperscript{322} See infra text accompanying note 350.

\textsuperscript{323} 29 U.S.C. §§ 201-19 (2000); see Joey Asher, \textit{How the United States Is Violating Its International Agreements to Combat Slavery}, 8 Emory Int’l L. Rev. 215, 220 (1994) (explaining that lawyers are using the FLSA as the primary remedy for involuntary
for lawyers, in part because of its beneficial evidentiary presumptions and straightforward damages scheme to award unpaid minimum wages due and in part because of a lack of clear alternatives. Aside from its simple compensatory formula, however, the FLSA does little to advance Thirteenth Amendment values. Moreover, its deployment in slavery cases continues an undesirable fiction of grounding human rights protections in the language and theory of the commerce power.

Passed in 1938, the FLSA was part of the New Deal progressive market reform. Around the time of its drafting the Roosevelt administration was in a pitched battle against the Supreme Court's commitment to state sovereignty and formalist conceptions of the commerce power. Despite support among labor constitutionalists for grounding New Deal labor reforms in a broad reading of the Thirteenth Amendment's prohibition of coercive labor arrangements, the Roosevelt administration rested the FLSA on

servitude cases); Hidden in the Home, supra note 25, at 27, 30-31 (describing predominance of FLSA as civil remedy in involuntary servitude cases). Various states have analogous state minimum wage and hour provisions that can be employed as well to obtain unpaid back wages. See, e.g., California Minimum Wage for All Industries, Cal. Lab. Code § 1182.11 (West 2002); New Jersey Wage and Hour Laws, N.J. Stat. Ann. 8, 34:11-56(a) et seq. (West 2002); New York Minimum Wage Act, N.Y. Lab. Law § 652 et seq. (McKinney 2002).

324. Under the FLSA, if a defendant fails to keep records of hours of employment and deductions for room and board as is required by 29 U.S.C. § 211(c), a court should presumptively accept a plaintiff's testimony regarding hours worked and award back wages, even if such an award is merely approximate. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).

325. An employer's failure to pay the statutory minimum wage entitles an employee to collect back wages for all unpaid hours worked, plus an equal amount in liquidated damages. See 29 U.S.C. § 216 (b); Martin v. Selker Bros., 949 F.2d 1286, 1299 (3d Cir. 1991).

326. The FLSA was passed in 1938, but had been conceived much earlier out of Labor Secretary Perkins' concern about the constitutionality of the wage and hour provisions of its predecessor, the National Industrial Recovery Act (NIRA). It effectively replaced NIRA after the Supreme Court ruled NIRA unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). See John S. Forsythe, Legislative History of the Fair Labor Standards Act, 6 Law & Contemp. Probs. 464, 464-65 (1939); see also George E. Paulsen, A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards 1933-1941 (1996).

327. See Peter H. Irons, The New Deal Lawyers 276-80 (1982). The FLSA was a component of Roosevelt's response to the ideological dominance of laissez-faire capitalism in the courts, in which he made realist arguments about the imprisonment that poverty and bargaining weaknesses impose on working men and women. See Foner, Story of American Freedom, supra note 166, at 200-10 (describing Roosevelt's attempt to reclaim the word "liberty" from conservatives and make it a rallying cry for New Deal reforms); Cass R. Sunstein, The Partial Constitution 56-60 (1993) (explaining that New Deal reforms depended on successfully demonstrating that government protection of individuals living standards was as important to freedom as Lochner era insistence on protection from the government).

328. See infra text accompanying notes 354-60.
various theories of Congress's commerce clause power. The Act was primarily justified as a means of remedying the market-distorting effects of unequal bargaining power between industrial workers and management, and providing a minimum income for survival. Save for some sparing but characteristic references by Roosevelt to freedom and fairness, the FLSA has since its adoption been justified as an important part of federal macro-economic policy by stabilizing markets and increasing consumer spending, all without triggering unemployment or inflation.

329. Then-Assistant Attorney General Robert Jackson testified to Congress that “This act combines everything, and is an effort to take advantage of whatever theories may prevail on the Court at the time the case is heard.” Forsythe, supra note 326, at 467 n.21. Jackson proffered over a half dozen constitutional theories, all based on variations of the commerce power, to support the FLSA; none related to the Thirteenth Amendment. Id.; see also United States v. Darby, 312 U.S. 100 (1941) (upholding the FLSA as constitutional exercise of congressional commerce power).

330. Senator Hugo Black reported out of the Senate Labor and Education Committee that

It is . . . those low-wage and long-working hour industrial workers who are the helpless victims of their own bargaining weakness, that this bill seeks to assist . . . [A] start should be made at the present session of the Congress to protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.

S. Rep. No. 75-884, 3-4 (1937); see also Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 706 (1945) (explaining that the purpose of the FLSA’s minimum wage provision is to “protect certain groups of the population from sub-standard wages . . . due to . . . unequal bargaining power”).


And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.

Id. (“A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours.”).

332. See S. Rep. No. 75-884, at 2 (1937) (Statement of President Roosevelt) (explaining that the FLSA will help “to reduce the lag in the purchasing power of industrial workers and to strengthen and stabilize the markets for the farmers’ products” and that “both working simultaneously will open new outlets for productive capital”); H.R. statement of Rep. No. 93-913, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2818 (citing President Truman’s statement at the signing of the Fair Labor Standards Amendments of 1949) (stating that the FLSA “has proved to be wise and progressive remedial legislation for the welfare not only of our wage earners but of our whole economy”); id. at 2818-19 (citing President Kennedy’s message to Congress on Feb. 2, 1961) (explaining that an increase in FLSA’s minimum wage rate will “improve the income, level of living, morale, and efficiency of many of our lowest paid workers, and provide incentives for their more productive utilization. This can actually increase productivity and hold down unit costs, with no adverse effects on our competition in world markets and our balance of payments”).
As primarily a tool of national economic policy, the FLSA is hardly an obvious source for a strong civil rights or human rights program. Indeed, in order to accommodate powerful Southern voting interests in Congress committed to preserving the racial hierarchy in their home states, the FLSA was drafted and passed excluding from coverage the two primary sources of African-American labor at the time, domestic service and agriculture. Southerners' arguments for such exclusions were grounded, as usual, in the need to respect state sovereignty—the standard rhetorical proxy for preserving a southern caste system. As Florida representative Mark Wilcox explained:

There has always been a difference in the wage scale of white and colored labor. So long as the Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted. . . . You cannot put the Negro and the white man on the same basis and get away with it. . . . There just is not any sense in intensifying the racial problem in the South, and this bill cannot help but produce such a result. . . . This is just another misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South.

Despite pleas from Negro leaders that the discriminatory exclusions of such categories of predominately Negro labor would perpetuate a relic of slavery, Roosevelt acceded to Southerners' political leverage with a superficial nod to federalism—by making accommodations to

333. David M. Potter, The South and The Concurrent Majority 70 (1972) ("[T]he South's misgivings about social change derived in considerable measure from the fact that almost any kind of change might challenge the bi-racial system. Wage and hour laws were resisted partly because they might mean equal wages for Negroes and whites."); Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev. 1335, 1373 (1987) (describing the strong voting power that Southerners wielded during the New Deal and their fear "that if the benefits of such [New Deal social welfare] programs were extended on an equal basis to whites and blacks, the southern racial and economic caste system would be destroyed").


335. 82 Cong. Rec. 1, 404 (1937); see also 81 Cong. Rec. 7, 881 (1937) (South Carolina Senator Ed "Cotton" Smith objecting that the FLSA, would overwhelm the "splendid gifts of God to the South" which included warm climate, ability to work outside without much clothing and which, therefore, made black labor cheap).

336. John P. Davis, of the National Negro Congress, testified that the exclusion would continue the helplessness that Negro labor felt during the NRA code hearings against the demands from southern industry for "those occupations, industries and geographic divisions of industries in which the predominant labor supply was Negro." This helplessness, he explained, was an essential remnant of slavery. See Mark Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev. 1335, 1374 n.260 (1987) (quoting Fair Labor Standards Act of 1937: Joint Hearings on S. 2474 and H.R. 7200, Before Senate Comm. on Education and Labor and House Comm. on Labor, 75th Cong. 571 (1937) (statement of John P. Davis, member, National Negro Congress)).
Indeed, it was in part a response to the FLSA’s exclusions that the Civil Rights Section in the 1940s employed the Thirteenth Amendment to help African-Americans in exploitative labor conditions. In 1974, Congress finally expanded the FLSA’s coverage to domestic servants. Nevertheless, in light of its early accommodations of federalism and its racial entailments, the FLSA presents an awkward pedigree for remedying the civil and human rights violations committed against persons trafficked into slavery.

Moreover, because interpretations of congressional power under the Commerce Clause have consistently been tied to historically shifting definitions of “commerce” and conceptions of the proper limits on federal power to interfere with concerns typically governed by the states, the FLSA’s coverage of domestic workers does not rest on the firmest constitutional foundation. The 1974 Amendments could conceivably fall to the Supreme Court’s recent revival of judicially enforced federalism announced in United States v. Lopez and United States v. Morrison. Lower court cases decided prior to Lopez had routinely upheld commerce clause challenges to FLSA’s application to domestic servants. However, the regulation of domestic service implicates zones of traditional state authority that might make the Rehnquist Court suspicious that Congress is regulating commerce only indirectly and is overtaking areas of life that are “truly local”.

337. See Linder, supra note 333, at 1373 (quoting Roosevelt as saying, “Even in the treatment of national problems there are geographic and industrial diversities which practical statesmanship cannot wholly ignore”).
338. See Goluboff, supra note 286, at 1678-89 (explaining that the New Deal exclusion of African Americans prompted the Civil Rights Section to use the Thirteenth Amendment “to justify federal intervention into employment relationships that Congress had deemed local, private, and off-limits to the federal government” and to thereby compensate for the constitutional limitations of the commerce power).
344. See Morrison, 529 U.S. at 617-18 (“The Constitution requires a distinction between what is truly national and what is truly local.”).
345. See id. at 615 (finding that government’s arguments in support of Violence Against Women Act would impermissibly justify federal regulation over “family law and other areas of traditional state regulation”); Lopez, 514 U.S. at 564 (noting that
In addition, the congressional findings regarding the constitutional authority for these amendments, which simply state that, "Congress further finds that the employment of persons in domestic service in households affects commerce," are dangerously scant and conclusory for this Court. Ultimately, the amendments would likely survive a Commerce Clause challenge particularly because the conduct that the Act is meant to regulate—the non-payment of wages—can be characterized, even in the Court's elusive calculus, as essentially "commercial."

Nevertheless, the persistence of potential federalism objections beg a deeper question: why should human and civil rights protections solely derive from a connection, substantial or otherwise, to mere "commerce among the states"—a connection that has been doctrinally restricted by vacillating conceptions of state autonomy and definitions of "commerce" and that has a less than obvious historical link to the purposes of the commerce clause. Instead, human and civil rights protections should also emanate from an obvious and constructive source—the Reconstruction Amendments, particularly the Thirteenth Amendment, which unambiguously reaches private conduct. From a doctrinal perspective, arguments about extending civil and human rights protections grounded in the Reconstruction Amendments, which rendered a revolutionary constitutional reordering of federal-state relations in the domain of civil rights, are not susceptible to federalism-based objections.

From a conceptual perspective, commerce and human rights are mismatched; their connection is strained and artificial. The commerce power exists to advance the instrumental goals of national unity, economic progress, and interstate commercial harmony.

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347. See Lopez, 514 U.S. at 563 ("Congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . .").

348. See Khalifa v. Huda, No. 99-5593, slip op. at 5 (D.N.J. filed Dec. 29, 2000) ("While the impact of the employment of domestic servants on interstate commerce is indirect, the court finds that it is not as indirect as those matters which the Supreme Court has identified as beyond Congress's commerce powers, such as domestic violence or weapons possession near a school.").

349. See Pope, supra note 1, at 6 ([H]uman rights statutes are . . . misclassified as exercises of the commerce power . . . .").

350. See supra text accompanying notes 225-38.

351. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 11 (1824) (explaining that the great objects of the commerce clause were to place commerce "under the protection of a uniform law" and prevent "a perpetual jarring and hostility of commercial
contrast, the Reconstruction Amendments aim to advance abstract but fundamental moral values of equality, freedom and human dignity.\textsuperscript{352} Vindicating civil or human rights in Congress or in court should express or advance a corresponding constitutional norm; in the case of modern slavery, this is not the norm of broad commercial or anti-protectionist regulatory powers embodied by Article I, Section 8, but those of equality and freedom embodied in the Thirteenth Amendment.

Surprisingly, relatively little scholarly attention has been devoted to the project of divorcing civil rights remedies from authority under the commerce clause.\textsuperscript{353} Constitutional lawyers, by contrast, have previously exhorted lawmakers to develop a natural linkage between rights and remedies. In the 1920s and 1930s, labor activists had developed a full theory of Thirteenth Amendment protections of labor rights, which included the right to organize, strike and bargain collectively.\textsuperscript{354} Labor leaders became critical of attempts by
progressive lawyers in the Roosevelt administration to ground labor protections in various New Deal statutes such as the NIRA, the Norris-LaGuardia Act, and the Wagner Act in the commerce power, rather than the Thirteenth Amendment. Specifically, they regarded the attempt to describe labor with the constitutional vocabulary of commerce as disjointed, unnatural, dishonest\(^5\) or, in the words of Samuel Gompers, as “an outrage upon our language.”\(^6\) In the labor rights orientation, labor inhered to an individual and could not be stripped from a worker as if it were a commercial artifact:

We protest against the use of such definitions for the purpose of bringing labor, employment and industrial relations under the power granted to Congress to regulate interstate commerce, and under [the] guise of such definition place labor, the service of free men, under the same restraints and limitations as well as under the same classification as articles of trade to be bargained for in like principles and practices as commodities of commerce.\(^6\)

During the flurry of legislative activity in the 1930s, labor activists convinced Senator Norris to base an early version of the Norris-LaGuardia Anti-Injunction Act expressly on the Thirteenth Amendment.\(^5\) The final version of the Act omitted any reference to the Thirteenth Amendment, primarily, Professor Pope contends, because of the considerable influence of Felix Frankfurter.\(^5\) Frankfurter had long dismissed the Amendment as insignificant and uninterpretable perhaps as a result of the flattened out account of the Amendment proffered by the *Slaughter-House Cases*.\(^5\) Frankfurter claimed, without explanation and inconsistent with the enactors' at all is protected and that right is inviolate.”), *rev’d* on other grounds, 332 U.S. 1, 13 (1947) (“The Union contends that the statute . . . violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude.”).

\(^{55}\) Pope, *supra* note 1, at 4.

\(^{56}\) Id. at 23.

\(^{57}\) Id. at 20 (quoting AFL, Report of Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor 194 (1929)); *see also* id. at 24 n.92 (citing 51 Cong. Rec. 9672 (1914) (statement of statement of Rep. Buchanan) (noting a “difference between commodities and living human beings; in other words, that . . . humanity was in a different class from a ton of coal, a bolt of cloth, or a pile of bricks”)); id. (quoting AFL, Report of Proceedings of the Forty-Sixth Annual Convention of the American Federation of Labor 311 (1926) (statement of Andrew Furuseth) (“[H]uman labor . . . grows with the growth of the child or boy or young man, it lessens in sickness and it ceases at death . . . and no one inherits it, no one can buy it, no one can sell it without buying or selling the body in which that labor power is.”)).

\(^{58}\) In its statement of purpose, the bill included the idea that “every human being has under the Thirteenth Amendment . . . an inalienable right to the disposal of his labor free from interference, restraint or coercion by or in behalf of employers of labor.” Id. at 39; *see also* id. at 41 n.190 (citing 75 Cong. Rec. 4502 (1932) (statement of Senator Norris) (arguing that labor injunctions constituted “involuntary servitude on the part of those who must toil in order that they and their families may live.”)).

\(^{59}\) Id. at 38-46.

\(^{60}\) *See supra* Part II.A.
Thirteenth Amendment vision, that the prospect of using the Thirteenth Amendment in support of the anti-injunction provisions of the Norris bill "seems to me of a simplicity that borders on the fantastic," and that "the talk about the Thirteenth Amendment ... is too silly for any practical lawyer's use."

Government lawyers thus passed on an opportunity to present to the Supreme Court a modern, robust conception of the Thirteenth Amendment's protection of labor and dignity. Instead, in what Professor Pope calls "one of the great curiosities of American law," the progressive lawyers charged with "defend[ing] the constitutionality of [New Deal labor reform], downplayed or eschewed altogether the language of rights and freedoms. Instead, they dressed the statutes in the language of economics so that they could be justified as exercises of the commerce power."

During the debates over the 1964 Civil Rights Act, Professor Gerald Gunther also noted the unfortunate mismatch created by grounding the authority for the Act in the Commerce Clause rather than the Reconstruction Amendments. Doing so, he argued in congressional testimony, would obscure the Act's obviously moral force in an "artificial commercial façade," and it would be wiser for Congress to "channel its resources of ingenuity and advocacy into the development of a viable interpretation of the Fourteenth Amendment, the provision with a natural linkage to the race problem." Although congressmen echoed his concerns, the Act was passed pursuant to the congressional commerce power.

As a result of the efforts of the Roosevelt and Johnson administrations, many of the human and civil rights protections of the

361. Pope, supra note 1, at 40.
362. Id. at 5.
364. In response to Professor Gunther's testimony on the Civil Rights Act of 1964, a Rhode Island Senator Pastore explained:

[I] believe in this bill because I believe in the dignity of man, not because it impedes our [commerce].... But I like to feel that what we are talking about is a moral issue. [And] that morality, it seems to me, comes under the 14th Amendment, where [we] speak about equal protection of the law. [I] am saying that we are being a little too careful, cagey, and cautious.

Id. at 150-51 (alterations in original). Supreme Court justices have also noted the conceptual divergence of rights and commerce. Criticizing the Court's decision to base the constitutional right to interstate travel on the commerce clause, Justice Douglas argued that human movement "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal," Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring), and Justice Jackson explained that to gauge human rights by commerce power would likely "result eventually either in distorting the commercial law or denaturing human rights." Id. at 182 (Jackson, J., concurring).

365. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (concluding "the adoption of the Act ... is within the power granted [to Congress] by the Commerce Clause").
last sixty years have curiously, unnaturally, and even dishonestly employed fictional conceptions of commerce to justify their creation. By contrast, the Thirteenth Amendment provides a rich vocabulary of freedom, equality and human dignity. It supports a natural connection between constitutional authority and civil rights protections. The Amendment should be revived to solve the problem of modern slavery and to help reconstruct a broad, firm civil rights agenda.

B. The Need for an Expressive Thirteenth Amendment Remedy

Recent scholarship has emphasized that the expressive value of law, as distinguished from its utilitarian or instrumental value, is and should be of primary concern to courts and litigants. Expressive harms are social, not individual; they convey a social meaning independent of material consequences that can and should be measured against some collective moral consensus or constitutional norm. The expressivist argues that law conveys social meaning—that appearances matter. By corollary, the choice of legal remedies and the corresponding collective sanction of the behavior at issue communicates social norms as much as do legislative or executive conduct. Expressive legal remedies therefore are important because “they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant [social] relationships are to be constituted.” The expressive value of the FLSA and other state common-law remedies are simply a mismatch for the individual harm suffered by the victims of slavery and involuntary servitude or for the collective, social harm inflicted by its perpetrators.

The social relationship at issue in modern slavery cases involves more than merely unequal bargaining power of the kind contemplated


368. Cf. David B. Cruz, “Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925 (2001) (arguing that symbolic importance of “marriage” label is essential to concept’s social value and as such, institution should be available to same sex couples as a First Amendment right).

by the FLSA’s remedial scheme. The relationship cannot colorably be characterized as a bargain; it involves total control—physical, psychological and economic—by one private person over another. Professor Tushnet marked an important distinction between a market relationship of the kind the FLSA presumes and the quality of total dominion that is exercised over a slave:

Social relations in slave society rest upon the interaction of owner with slave; the owner, having total dominion over the slave, relates to the entire personality of the slave. In contrast, bourgeois social relations rest upon the paradigmatic instance of market relations, the purchase by a capitalist worker’s labor power.... Slave social relations are total, engaging the master and slave in exchanges where each must take account of the entire range of belief, feeling, and interest embodied in the other; bourgeois social relations are partial, requiring only that participants in the market evaluate their general productive characteristics without regard to aspects of personality unrelated to production.  

A remedy must express meaningful reprobation of undesired conduct, which “requires not [just] a mere utterance, . . . but a practice of punishment socially understood to express condemnation effectively.” The harm committed—coercing another human in violation of our basic constitutional commitment—must be expressed in no less a damning form than by constitutional pronouncement. Indeed, a perverse effect of relying on the FLSA as a remedy for modern slavery is that it actually legitimizes a relationship ex ante that is unconstitutional pursuant to Thirteenth Amendment by classifying plaintiff and defendant as “employer” and “employee.”

In addition, the adequacy of a particular legal remedy should be evaluated not merely by its remunerative promise, but also by how well it illustrates the moral and constitutional norms at issue. For example, by awarding nominal damages for violations of constitutional rights even absent proof of actual injury, “the law recognizes the importance to organized society that those rights be scrupulously observed.”

370. Tushnet, supra note 75, at 6; see State v. Mann, 13 N.C. (2 Dev.) 263, 266 (N.C. 1829) (“Such obedience [of a slave to a master] is the consequence only of uncontrolled authority over the body . . . . The power of the master must be absolute, to render the submission of the slave perfect.”); McConnell, supra note 76, at 219 (“[T]he system of American slavery is best understood as the absolute control by white slaveholders over all aspects of the lives of their slaves.”); see also David Brion Davis, The Problem of Slavery in Western Culture 57-58 (1966) (“[Slaves] have been subject to the will and autonomy of a private or institutional owner; their labor and services have been totally at the disposal of others.”).


law causes of action can hardly be considered as an appropriate remedy for the conduct at issue in modern slavery cases, even if they provide precisely the same material reward.

The expressive model is helpful in another obvious respect. It is concerned with expressive harms communicated by government actors, inconsistent with a constitutional norm. The relevant constitutional actors at issue in modern slavery cases are private individuals. By enslaving another human, a private actor communicates a message that is not merely inconsistent with state law or federal economic policy, but rather, with basic normative commitment of the Thirteenth Amendment.

Moreover, treating the harm done in these cases as of constitutional and moral dimension will do more than vindicate the individual right of the victim. It will vindicate the collective rights of a society that fundamentally condemns the relationship at issue. "[R]ights also realize the interests of others, including the construction of a political culture with a specific kind of character." This understanding is deeply consonant with that of the Thirteenth Amendment ratifiers, who regarded slavery not just as inhumanity perpetrated upon individual African Americans, but also as a collective, social harm resulting from exploiting human labor.

C. Direct Actions Under the Thirteenth Amendment: Developing Positive Rights

Congress certainly has the authority under the broad grant of power under Section Two of the Thirteenth Amendment to create a civil remedy for slavery that adequately effectuates and expresses the Amendment's purposes. Should Congress decide to address the problem of modern slavery and involuntary servitude through the creation of a new civil remedy or by amending 42 U.S.C. § 1985(3), a judicially created remedy would not be necessary. As the first court in the country finally acknowledged, the existence of some adequate remedy for Thirteenth Amendment violations is required. Even

373. Pildes, Why Rights Are Not Trumps, supra note 366, at 731. "[T]he weight and importance of [a] right depends on its value to those others, and not on the benefit that this in turn secures to the right-holder." Id. (quoting Joseph Raz).

374. See infra notes 208-17 and accompanying text.

375. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."); Tribe, supra note 340, at 927 (suggesting that "Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and prescribe such infringement as a violation of the Thirteenth Amendment").

376. See supra text accompanying notes 305-22.

this court, however, misread a critical feature of the Thirteenth Amendment, demonstrating that the jurisprudence surrounding this otherwise promising enactment remains underdeveloped.

Federal courts have long had the power to create equitable remedies for direct constitutional violations that have assumed structurally significant and certainly controversial forms. In the 1971 ruling in *Bivens v. Six Unknown Named Agents*, the Supreme Court likewise decided that a direct damages remedy was available for constitutional violations in the absence of congressional authorization and where some state tort remedy was available but not adequate. Although some ambivalence has since surfaced regarding the *Bivens* enterprise, the court’s power to create remedies where Congress has not provided them still exists. In exercising the power to remedy violations of Thirteenth Amendment rights, courts would simply be fulfilling their central function of vindicating and elaborating constitutional values as well as performing a crucial adjudicative function announced in *Marbury v. Madison* to provide a remedy for violations of citizens’ rights.

1. *Bivens* Remedies for Thirteenth Amendment Violations

Mr. Bivens alleged that FBI agents stormed his house in the middle of the night, manacled him in front of his family then took him to the federal courthouse, interrogated and strip searched him, all without probable cause, in violation of the Fourth Amendment. Because he was never brought to trial, excluding the unconstitutionally obtained evidence was not an available remedy; because the agents were not state officials, they could not be sued for damages under 42 U.S.C. § 1983.

Bivens was thus the rare victim of a Fourth Amendment violation and was left with no remedy other than a state law tort action for trespass which, in New York, would provide only actual damages and fail to compensate him for his alleged stress and humiliation. The Second Circuit conceded the theoretical possibility of inferring

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382. 5 U.S. (1 Cranch) 137, 177 (1803).
damage remedies directly from the constitution, but concluded that a judicially created damage action is not essential to the effectuation of the Fourth Amendment, particularly since injunctive relief, state tort remedies and congressionally authorized actions against state officers would be available in the vast majority of cases.\textsuperscript{385}

The Supreme Court reversed. The Brennan majority opinion first rejected the officers’ argument that the Fourth Amendment confers no substantive rights independent of state law and that it was meant only to foreclose a federal defense of justification in state tort actions. Rather, the Court concluded, the Fourth Amendment confers an independent, substantive and affirmative right.\textsuperscript{386} The existence of that affirmative right bars all government officials from abusing it and empowers courts to vindicate it.\textsuperscript{387}

The Court next assessed whether courts possess the power to create causes of action directly under the Constitution\textsuperscript{388} or if, as several dissenters argued, such power rested only with the legislature.\textsuperscript{389} In his oft-cited concurrence, Justice Harlan correctly responded that if the general congressional grant of federal question jurisdiction pursuant to 18 U.S.C. § 1331(a) authorizes equitable remedies for cases arising under the Constitution, then “the same statute is sufficient to empower a federal court to grant a traditional remedy at law.”\textsuperscript{389} Similarly, the question of whether to grant a damage remedy rather than an equitable remedy is not related to the established power of federal courts; it turns only on the appropriateness of that choice.\textsuperscript{391} Exercising the choice to award damages for violations of

\textsuperscript{386} Bivens, 403 U.S. at 392.
\textsuperscript{387} Id. (citing Bell v. Hood, 327 U.S. 678, 684 (1946)); id. at 400 (Harlan, J., concurring) (“The interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest.”).
\textsuperscript{388} Id. at 401-02 (Harlan, J., concurring) (“The question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress’ hands.”).
\textsuperscript{389} See id. at 412 (Burger, J., dissenting) (“Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”); id. at 430 (Blackmun, J., dissenting) (“It is the Congress and not this Court that should act.”).
\textsuperscript{390} Id. at 405 (Harlan, J., concurring); see also Dellinger, supra note 384, at 1541-42 (“The Court's authority to create a particular remedy in such a case thus follows if the remedial innovation sought is within the ... tightly packed phrase [from Article III] ‘the judicial power,’ for it is that power which extends to all cases arising under the Constitution.”); Susan Bandes, Reinventing Bivens: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 300 (1995) (“Given the existence of 28 U.S.C. § 1331, conferring general federal question jurisdiction, the jurisdictional predicate for Bivens actions does exist.”).
\textsuperscript{391} Bivens, 403 U.S. at 406 (Harlan, J., concurring); id. at 408 n.8 (Harlan, J., concurring) (“A court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies.”); Dellinger, supra note 384, at 1543 (“[N]either the
substantive constitutional rights “should hardly seem a surprising proposition.”

Though the Court provides little analysis for its conclusion that damages have historically been regarded as the ordinary remedy for an invasion of personal interests in liberty, its conclusion is certainly correct. Indeed, damages are the presumptive common law remedy for litigants; courts are to impose equitable remedies only where there is no remedy available at law.

In Bivens, the court thus determined that: (i) a violation of a substantive constitutional provision occurred; (ii) there is a legal entitlement or cause of action for relief for that violation directly from a court in the absence of congressional authorization; and (iii) damages are an appropriate remedy to vindicate the Fourth Amendment harms suffered. Importantly, in reversing the Second Circuit, the Supreme Court recognized that the availability of other remedies for most other plaintiffs is not sufficient to refuse to recognize a cause of action for the litigant before the court. In addition, the Court recognized that a New York state law action for trespass, while affording some monetary damages, was not constitutionally adequate. A court’s central constitutional concern should be whether the particular plaintiff before the court has an adequate remedy available to vindicate the constitutional provision at issue.

source of the right (the Constitution) nor the nature of the (rather customary) remedy (money damages) would seem to require that the judiciary await explicit legislative authorization before employing the remedy to vindicate the right.”).


393. Id. Justice Harlan simply concludes that damages are one of an available battery of remedies from which judges can choose to “make good the wrong done,” and that if courts can effectuate statutory rights by imposing damage remedies, they can do the same for constitutional rights. Id. at 408 n.8 (Harlan, J., concurring). He also notes that the character of the claim Bivens advanced is of the kind that “would be properly compensable in damages.” Id. at 408 (Harlan, J., concurring).

394. See Gene R. Nichol, Bivens, Chilicky and Constitutional Damages Claims, 75 Va. L. Rev. 1117, 1135 (1989) (arguing that hesitancy to award damages for constitutional violations is misplaced in light of the historical preference for damages over equitable remedies at common law).

395. See infra text accompanying notes 320, 396-409; see also Corr. Servs. Corp. v. Malesko, 122 S. Ct. 515, 525-26 (2001) (Stevens, J., dissenting) (“In Bivens, however, even though the plaintiff’s suit against the Federal Government under state tort law may have been barred by sovereign immunity, a suit against the officer himself under state tort law was theoretically possible.”).

396. See Dellinger, supra note 384, at 1551.

As a prerequisite to supplying a remedy, the court must first determine that the implicated constitutional provision provides substantive protection to one in the position of the plaintiff. . . . [T]he fact that persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress.

Id.; see Bandes, supra note 390, at 304 (“Bivens stands for the proposition that the existence of remedies for others is beside the point: The particular plaintiff before the
Bivens thus supplies strong authority for the availability of a cause of action for damages directly under the Thirteenth Amendment even in the absence of congressional authorization. The Thirteenth Amendment, like the Fourth Amendment, creates a substantive federal right. At the core, that right includes freedom from conditions of coerced labor. The right also most definitely exists independent of state common law. The Amendment and its enforcing legislation deliberately supplanted state laws and designated federal courts as the primary enforcement mechanism for the vindication of rights promulgated by Thirteenth Amendment civil rights legislation.

Damages are likewise often the only remedy available to vindicate the constitutional interests of victims of slavery and involuntary servitude. The state law tort of false imprisonment and the civil damage remedy under the Fair Labor Standards Act simply do not vindicate constitutional interests, even if they target some of the incidental effects or component aspects of modern slavery or involuntary servitude. Similarly, the statutory remedies under § 1985(3) will not help most victims of modern slavery who would not be able to demonstrate the requisite class-based animus on the part of the defendants. Thus, the need for a damage remedy is just as strong for victims of Thirteenth Amendment violations as it was for Bivens.

Indeed, a constitutional tort for slavery or involuntary servitude is even more properly remediable through damages than a Fourth Amendment violation. As Professor Jeffries explains, some constitutional duties are like ordinary tort duties. To the extent that damages incentivize behavior, a premise in tort doctrine, violations of Thirteenth Amendment rights should be compensable because the wrong—enslavement—is directly related to injuries that causally flow from it. Some constitutional duties, such as the prohibition on unreasonable searches and seizures and protection of free speech are “prophylactic” and “strategic,” and so it is hard to match individual harm to constitutional wrong. The Thirteenth Amendment, by contrast, is like the Fifth Amendment’s prohibition on takings without just compensation. Because they both guard “individuals against specified harms by directly prohibiting the infliction of such harms,” violations of these provisions are likely to create the exact damage the provision is designed to award. Thus, violations of the Thirteenth Amendment

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397. See supra Part II.C.
398. Id.
399. See supra text accompanying notes 306-14.
400. See supra text accompanying notes 313-18.
402. Id. at 1471-72.
403. Id. at 1470.
Amendment work well in the narrow doctrinal sense as a constitutional tort.

Moreover, the availability of such a remedy demonstrates the inexorable logic of Harlan's concurring opinion in Bivens about the power of courts equally to issue equitable or legal relief.\textsuperscript{404} If someone currently held in a condition of slavery or involuntary servitude were to sue, that person would assuredly be able to obtain the equitable remedy of an injunction releasing her from servitude.\textsuperscript{405} Accordingly, a court would have the equal power to choose a damage remedy for the same victim suing retrospectively for compensation.

Creating a remedy in these cases would also acknowledge the importance of the otherwise unvindicated underlying Thirteenth Amendment right. The recognition of these rights serves an important social function by demonstrating that the government is committed to eradicating a problem that so severely undermines collective norms.\textsuperscript{406} As the Court explained in \textit{Davis v. Passman},\textsuperscript{407} which recognized a \textit{Bivens} action for violations of the Fifth Amendment:

\begin{quote}
[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.\textsuperscript{408}
\end{quote}

Recognizing such a right would also validate the humanity of individual victims and would help transform them from a commodified labor resource into three-dimensional persons deserving of equal dignity and respect.\textsuperscript{409}

\textsuperscript{404} See \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388, 405-06 (1971) (Harlan, J., concurring in judgment).

\textsuperscript{405} See, e.g., \textit{In re Turner}, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

\textsuperscript{406} See \textit{supra} Part III.B.

\textsuperscript{407} 442 U.S. 228 (1979)

\textsuperscript{408} \textit{Id.} at 242.

\textsuperscript{409} See Donald H. Zeigler, \textit{Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts}, 38 Hastings L.J. 665, 679 (1987) (tracing the evolution of the principle that rights must have remedies, and arguing that failure to enforce underlying rights causes "[t]he dignity of the individual [to be] diminished and people [to be] less able to achieve their goals"). "People feel insecure and they lose self-respect. If the legal system tells a person that it is acceptable for his rights to be violated, the implicit message is that the person lacks worth." \textit{Id.}
2. The Irrelevance of the Ambivalence About \textit{Bivens}

In the decade following \textit{Bivens}, the Supreme Court recognized the existence of direct causes of action for violations of the First,\footnote{Bush v. Lucas, 462 U.S. 367 (1983) (accepting the general existence of \textit{Bivens} remedies for First Amendment violations but refusing to create one in particular case because Congress had created adequate alternative remedies).} Fifth\footnote{See \textit{Davis}, 442 U.S. at 234 (expanding \textit{Bivens} action to a suit under the Fifth Amendment brought by congressman's aide for discriminatory termination).} and Eighth Amendments,\footnote{Carlson v. Green, 446 U.S. 14 (1980) (recognizing \textit{Bivens} action under Eighth Amendment for prisoner's allegations of inadequate medical treatment, despite existence of available remedy under Federal Tort Claims Act).} and lower courts have recognized \textit{Bivens} actions for various constitutional violations as well.\footnote{See \textit{Wells v. FAA}, 755 F.2d 804 (11th Cir. 1985) (recognizing the potential for \textit{Bivens} action under the Fourth Amendment); \textit{Dellums v. Powell}, 566 F.2d 167 (D.C. Cir. 1977) (expanding \textit{Bivens} action to the First Amendment); \textit{Wounded Knee Legal Def./Offense Comm. v. FBI}, 507 F.2d 1281, 1284 (8th Cir. 1974) (expanding \textit{Bivens} actions to the Sixth Amendment); \textit{Kwoun v. Southeast Mo. Prof'l Standards Review Org.}, 622 F. Supp. 520 (D. Mo. 1985) (recognizing \textit{Bivens} action for Fifth Amendment violation).} In more recent years, the Supreme Court has expanded upon the two narrow circumstances, set forth in \textit{Bivens}, where courts should decline to create direct causes of action for constitutional violations: where there are "special factors" counseling hesitation in the absence of congressional authorization; or where there is a congressional declaration that persons injured may not recover damages for the particular constitutional harm suffered.\footnote{Bivens v. Six Unknown Named Agents, 403 U.S. 380, 396-97 (1971). The Court has blurred the two distinct exceptions to \textit{Bivens} actions by finding that the existence of congressional remedies is itself a "special factor" counseling judicial hesitation, rather than evaluating the congressional remedy on its own terms to assess its adequacy in effectuating the constitutional right at issue. See \textit{Schweiker v. Chilicky}, 487 U.S. 412 (1988) (refusing to create a \textit{Bivens} remedy for Fifth Amendment due process violations in light of a broad regulatory social security scheme, which nevertheless failed to address harms at issue); United States v. Stanley, 483 U.S. 669 (1987) (declining to create a \textit{Bivens} remedy under the Eighth Amendment, even where plaintiff would be left with no adequate remedy, in part because Congress had specifically excluded the particular class of victims—military personnel—from its statutory provisions); \textit{Bush}, 462 U.S. at 368 (holding that the existence of alternate remedies under the federal Civil Service Commission regulations precluded \textit{Bivens} suit under First Amendment, without assessing if regulations would make an equally effective remedy); see also Bandes, \textit{supra} note 390, at 360-61 (criticizing Court's deference to congressionally created remedial schemes without assessing their adequacy in cases such as \textit{Bush v. Lucas}, \textit{Schweiker v. Chilicky}, and \textit{United States v. Stanley}).} The Court has, therefore, revealed a deep but ultimately unwarranted ambivalence about the \textit{Bivens} enterprise out of a reluctance to interfere with the "legislative sphere."\footnote{See \textit{Nichol}, \textit{supra} note 394, at 1142-43; see also Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1508-09 (1987) [hereinafter Amar, \textit{Of Sovereignty and Federalism}] (noting that judicial reluctance about \textit{Bivens} "probably stems from a lingering doubt about whether remedy-fashioning is a more legislative
only two courts, to conclude that there can be no Thirteenth Amendment *Bivens* actions against private actors reveal an unsurprising unfamiliarity with the scope and operation of the Thirteenth Amendment, which unambiguously reaches private conduct.

### a. Separation of Powers

Objectors to *Bivens* actions often argue that judicially created constitutional remedies wrongfully usurp the “legislative sphere,” or that legislatures are far more competent than courts to sift and evaluate competing constitutional claims. Both of these objections make little sense, however, when one considers that judges in *Bivens* actions are fulfilling their narrowest adjudicative function by merely attempting to “make good the wrong done” to an individual plaintiff in a single case or controversy brought before the court. In such actions, the court is fulfilling its most basic duty to “say what the law is” and actually protecting the constitutional scheme of separation of powers. Indeed judges are traditionally superior at fashioning remedies for violations of substantive rights brought before the court. Thus, far from impinging on the so-called legislative domain, providing an individual remedy for an individual wrong is performing a quintessentially judicial function, and will advance one of the highest adjudicative principles announced in *Marbury v. Madison*:

> “the right of every individual to claim the protection of the laws, whenever he receives an injury.”

More important, however, arguments about the legislative role or superior legislative competence to fashion remedies for constitutional wrongs are beside the point. Congress certainly has the power under

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418. See, e.g., id. at 36; *Bivens*, 403 U.S. at 428-29 (Black, J., dissenting).


421. 5 U.S. (1 Cranch) at 163; see also Amar, *Sovereignty and Federalism*, *supra* note 415, at 1486 (“The proposition that every person should have a judicial remedy for every legal injury done him was a common provision in the bill of rights of state constitutions; [and] was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality . . . .”).
the broad grant of power under section 2 of the Thirteenth Amendment to create an adequate remedy for slavery that effectuates the Amendment's purposes.\textsuperscript{422} Therefore, \textit{unless and until} Congress chooses to provide one, the debate about relative institutional competence will continue to be academic. Victims of slavery and involuntary servitude will go without adequate constitutional remedies and important Thirteenth Amendment values will remain unvindicated.

b. Private Actors

The only two cases, \textit{Turner v. Unification Church}\textsuperscript{423} and \textit{Manliguez v. Joseph}\textsuperscript{424} to directly confront the possibility of a \textit{Bivens} action for Thirteenth Amendment violations raise an additional concern about extending the \textit{Bivens} doctrine to private actors;\textsuperscript{425} those concerns are misplaced. In \textit{Turner}, the court concluded that damages for a plaintiff who alleged she was brainwashed, enslaved and forced to work by Reverend Moon's Unification Church were neither "necessary" nor "appropriate" under the Thirteenth Amendment.\textsuperscript{426} In \textit{Manliguez}, the

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\textsuperscript{422} See supra text accompanying notes 136-47.
\textsuperscript{424} No. 01-CV-7574, 2002 U.S. Dist. LEXIS 15277, at *1 (E.D.N.Y. Aug. 15, 2002).
\textsuperscript{425} In \textit{Channer v. Hall}, 112 F.3d 214, 217 (5th Cir. 1997), the Fifth Circuit rejected the argument that only Congress can provide remedies for violations of the Thirteenth Amendment and assumed \textit{arguendo}, without analysis "that the Thirteenth Amendment directly gives rise to a cause of action for damages under the analysis articulated in \textit{Bivens} and its progeny" for cases involving compulsory labor. Several other courts have concluded that no direct cause of action exists under section 1, and that plaintiffs must resort to remedies created by Congress. The analyses in these decisions, however, are so cursory that it is difficult to determine if courts are concerned about the implications of creating a \textit{Bivens}-type remedy, or if courts have concluded that the conduct at issue could not rise to the level of involuntary servitude. See, e.g., Bascomb v. Smith Barney, Inc., 1999 U.S. Dist. LEXIS 353, at *18 (S.D.N.Y. Jan. 15, 1999) (holding in an employment discrimination case that, "[i]t is well-settled law that there is no direct private cause of action under the Thirteenth Amendment") \textit{rev'd on other grounds}, Lauture v. Int'l Bus. Machines Corp., 216 F.3d 258 (2d Cir. 2000); Sanders v. A.J. Canfield Co., 635 F. Supp. 85, 87 (N.D. Ill. 1986) (holding, in an employment discrimination case, that "[t]here is no direct private cause of action under the Thirteenth Amendment"). Plaintiffs, instead, must resort to statutory remedies created by Congress under the power granted to it by that amendment"); Westray v. Porthole, Inc., 586 F. Supp. 834, 839 (D. Md. 1984) (holding that no direct cause of action exists under Thirteenth Amendment and concluding that \textit{Bivens} and its progeny "arose out of different considerations"); Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1012 (S.D. Tex. 1981). Other cases expressly hold that there is no cause of action under the Thirteenth Amendment in the specific context of employment discrimination. See Matthews v. Freedman, 128 F.R.D. 194, 201 n.2 (E.D. Pa. 1989) (holding that "[c]ourts across the country have uniformly rejected the existence of a Thirteenth Amendment cause of action in the context of employment discrimination" and imposing Rule 11 sanctions), aff'd 919 F.2d 135 (3d Cir. 1990).
\textsuperscript{426} Turner, 473 F. Supp. at 374.
court also declined to create a Bivens remedy for a plaintiff clearly alleging facts sufficient to make out a case of involuntary servitude; instead, the court implied a civil cause of action from the criminal involuntary servitude statute, 18 U.S.C. § 1584, an approach I endorse.

Both cases agree that courts have the power to imply constitutional damage remedies, but both suggest that a Bivens remedy should not be created for Thirteenth Amendment violations because the defendants are private actors. Turner simply concludes, without explanation, that Bivens only applies to government actors. This is a manifestly illegitimate distinction since the relevant constitutional actors under the Thirteenth Amendment are in most cases private persons or entities. There is no less of a need to vindicate the Thirteenth Amendment's interests than the Fourth Amendment's interests or to reward a constitutionally aggrieved plaintiff a different kind of remedy depending on the status of the defendant. Indeed, to the extent that traditional objections to the creation of general constitutional torts—overdeterrence of aggressive but legitimate activity by government officials and inappropriate judicial interference with legislative control over public funds—do not apply

427. See supra text accompanying note 416.

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

429. Courts are empowered to create private rights of action from criminal statutes. See Cort v. Ash, 422 U.S. 66, 79 (1975). The primary inquiry in deciding whether to create such a private right of action is congressional intent. See Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979). Congressional intent to create a private cause of action under 18 U.S.C. § 1584 (2000) would be hard to discern because the statute's antecedent form was passed in 1874, during an era that bears little resemblance to our modern administrative state. Nevertheless, creating a cause of action for damages under the criminal involuntary servitude statute is certainly consistent with the Reconstruction Congress's desire to root out involuntary servitude. In addition, the victims of involuntary servitude are the same intended beneficiaries of the criminal law. Moreover, the creation of such private rights of action would not interfere with any area of law traditionally left to the states. See Cort, 422 U.S. at 84-85. Further, such a remedy, because it is premised on the Thirteenth Amendment, would adequately express the appropriate moral condemnation of the conduct at issue and would vindicate the relevant constitutional interests of the Thirteenth Amendment that are at stake.

432. See John Jeffries, Disaggregating Constitutional Torts, 110 Yale L.J. 259 (2000) (discussing traditional overdeterrence and separation of powers objections to general
to private defendants, the case for a Bivens remedy is made stronger where the defendant is a private actor.\textsuperscript{433} Manliguez relied on the recent Supreme Court decision in Correctional Services Corp. v. Malesko,\textsuperscript{434} ("CSC") to suggest that the "purpose of providing a cause of action under Bivens was to deter federal officers from abusing their constitutional authority, not necessarily to provide an individual with a remedy for the violation of a constitutional right."\textsuperscript{435} Manliguez misreads CSC and the Thirteenth Amendment. In CSC, the Court refused to create a Bivens action against a private corporation administering a federal prison for the unconstitutional acts of its employee.\textsuperscript{436} The basis of the Court's refusal, however, was decidedly not the private status of the defendant. The Court relied on FDIC v. Meyer,\textsuperscript{437} in which the Court refused to create a Bivens action against a federal agency for constitutional violations allegedly committed by the agency's individual officials. In Meyer, like in CSC, the Court concluded that a central purpose of Bivens—deterring unconstitutional conduct by "the individual federal officer, not the agency"—would be undermined by allowing plaintiffs to sue employers with deeper pockets.\textsuperscript{438} Therefore, in CSC the Court declined to create a cause of action because the defendant was an employer rather than an individual, not because the defendant was a private entity.\textsuperscript{439}

Indeed, to the extent that CSC suggests that Bivens is primarily concerned with deterring unconstitutional conduct most effectively,
the case lends support for the application of *Bivens* to Thirteenth Amendment violations. In the vast majority of slavery or involuntary servitude cases, the relevant constitutional actor whose illegal conduct must be deterred is a private individual. To advance the goals of remedying constitutional rights, vindicating a constitutional protection and deterring unconstitutional conduct, *Bivens* applies equally to Thirteenth Amendment prohibitions on private action as it does to Fourth Amendment prohibitions on government conduct.

*Manliguez* and *Turner* fail to apprehend this fundamental Thirteenth Amendment reality perhaps because, as the court itself notes in *Manliguez*, involuntary servitude cases have been very rare in this country. But, these cases are rare no more. Slavery or involuntary servitude has reemerged and *Manliguez* and *Turner* reflect the courts’ uncertainty about how to deal with it. The uncertainty is unsurprising to the extent that the Thirteenth Amendment has been so little used or appreciated. In response to the emergence of third generation slavery and its entailments, however, courts will soon be presented with significant opportunities to interpret the Thirteenth Amendment, to struggle with its meaning and hopefully to reveal its applicability to modern slavery as well as the substantial support it provides for a broad, firm civil rights agenda.

**CONCLUSION**

For too long, the Thirteenth Amendment has been regarded as a simple statement of a narrow constitutional prohibition against chattel slavery—a pronouncement too foundational to be either interpretable or practical as a doctrinal tool for the protection of civil rights in the modern era. Once the Amendment is unshackled from this pervading and simplistic view, it emerges vital and open to substantive interpretation. The debates surrounding its ratification reveal that the Amendment, and the 1866 Civil Rights Act enacted upon its authority, were meant to be a broad source of affirmative rights for all Americans; to guarantee all persons, white and black, the equal enjoyment of all fundamental rights; and to enshrine a vision of labor freedom that would promote economic independence and social mobility.

The scope and severity of the problem of modern slavery calls out for a congruent remedy grounded in the Thirteenth Amendment’s broad egalitarian and distinctive libertarian promise. Such a remedy, whether created by Congress or by the judiciary through a *Bivens* action, would vindicate the strong federal interests advanced by the Thirteenth Amendment and would express the appropriate moral condemnation that the Amendment’s prohibition on forced labor requires.

In addition, I hope that consideration of the compelling problem of modern slavery against the background of a still-vital Thirteenth Amendment will awaken courts, commentators and legislators to the long-dormant interpretive possibilities that Thirteenth Amendment jurisprudence holds. I hope that modern actors will appreciate the moral passion that motivated its enactors, and recognize that this passion undergirds a meaningful constitutional guarantee of freedom and equality. We will then be in a position to recognize the Amendment's special constitutional authority to reach private conduct, and to support a broad, reconstructed civil rights agenda.