The Thirteenth Amendment Enforcement Authority

Alexander Tsesis∗

∗Visiting Professor, University of Pittsburgh, atsesis@luc.edu
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Abstract

In the paper, I argue that the Thirteenth Amendment’s enforcement clause grants Congress the power to enact statutes to protect liberty. I trace the American concept of liberty, using archival research, through the writings of the revolutionary framers and abolitionists. I believe that the Thirty-Eighth Congress, 1864-1865, intended the Thirteenth Amendment to provide the power to enforce the Declaration of Independence’s and Preamble’s guarantees of equal liberty. The paper also places the enforcement clause of the Thirteenth Amendment into the contemporary setting of recent decisions on the Fourteenth Amendment and the Commerce Clause.
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Alexander Tsesis*
University of Pittsburgh School of Law

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* Visiting Professor, University of Pittsburgh School of Law; Visiting Assistant Professor,
Chicago-Kent College of Law (on leave); Affiliated Scholar, University of Wisconsin-Law
School, Institute for Legal Studies.
Introduction

The enforcement clause of the Thirteenth Amendment grants Congress the power to guarantee liberty by appropriate legislation. The clause is founded on the Preamble’s guarantee of a national government that is committed to protecting civil liberties for the general welfare. Congress, however, has rarely exercised its power under the Thirteenth Amendment. Instead, the enforcement clause remains a rarely used constitutional provision, and its reach remains little understood.

Thirteenth Amendment jurisprudence is also an underdeveloped area of law with enormous potential. The Supreme Court has determined the Thirteenth Amendment to be much more than an emancipation law. Pursuant to the Amendment, Congress can enact legislation that prohibits private discrimination in housing, education, and employment. Some scholars, too, have realized that the Thirteenth Amendment covers everything from labor practices to hate

1 The Thirteenth Amendment provides:

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.

U.S. CONST. amend. XIII.


4 Peonage and racist employment practices are both prohibited by federal legislation. See Anti-Peonage Act, 14 Stat. 546 (1867). Pollock v. Williams, 322 U.S. 4, 17 (1944) (“the undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States”); United States v. Reynolds, 235 U.S. 133, 146 (1914) (“compulsion of such service by constant fear of imprisonment under the criminal laws” violates the Thirteenth Amendment); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (finding a compulsory statute to work off debt to be an unconstitutional form of peonage which violated the Thirteenth Amendment). See also Theodore Eisenberg & Stewart Schwab, The Importance of Section 1981, 73 CORNELL L. REV. 596, 601-02 (1988) (discussing the relationship of employment race discrimination claims brought under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964). Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975) (holding that remedies under Title VII and § 1981 are “separate, distinct, and independent”).

5 Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 U. PA. L. REV. 437, 440 (1989) (stating that “[i]n addition to purely labor-based concerns, the Thirteenth Amendment debates reflected themes such as racial equality, the importance of access to education, the integrity of families, and the natural rights of mankind”); James G. Pope recently
speech. No one, however, has carefully elaborated the perimeters of liberty covered by the Thirteenth Amendment.

The heritage of the Amendment is grounded in liberty and equality principles that flourished among antislavery and abolitionist activists during the American Revolution and before the Civil War. Their perspectives on individual rights within a constitutional republic shaped the dialogue of congressmen who debated passage of the Thirteenth Amendment. The social and legal aspirations of Radical Republicans, whose principled stand against slavery was indispensable to the Amendment’s ratification, were never realized after the 1877 presidential abandonment of Reconstruction.7

The nineteenth century and early-twentieth century Court further intruded on Congress’s ability to use its Thirteenth Amendment power to end widespread, racist practices. The Court of that period only recognized congressional enforcement power to prevent overtly forced labor.8

wrote about the labor movement’s decision to base labor rights activism on the Commerce Clause instead of the Thirteenth Amendment. The Thirteenth Amendment Versus the Commerce Clause: Labor & the Shaping of American Constitutional Law, 1921-1957, 102 COLUM. L. REV. 1 (2002).


7 The Compromise of 1877 was an agreement between Democrats and Republicans to give Rutherford B. Hayes, rather than Samuel J. Tilden, the presidential election of 1876. In exchange, Hayes withdrew federal troops from the South. Thereby, what remained of Reconstruction, became unraveled. Concerning the regressive effect of the Compromise on civil rights efforts see GEORGE H. HOEMANN, WHAT GOD HATH WROUGHT: THE EMBODIMENT OF FREEDOM IN THE THIRTEENTH AMENDMENT 160 (1987). G. Sidney Buchanan, a legal historian, examined the effects of the Compromise of 1877 on judicial decisions, finding that they extended further than the immediate congressional abandonment of Reconstruction legislation. The Supreme Court, too, having sent the key member to the election committee, began determining opinions in line with the Compromise of 1877. Subsequent Court decisions became more averse to federal civil rights jurisdiction, until the Thirteenth Amendment was a hollow guarantee, remaining practically unenforceable. G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 HOUS. L. REV. 1, 367 (1974). From 1877, the Court began using the Constitution to avoid the enforcement of anti-discrimination laws. See, e.g., Hall v. DeCuir, 95 U.S. 485 (1877) (finding Louisiana violated the Commerce Clause by requiring the desegregation of public conveyance).

8 For decades after it rendered segregationist opinions like Plessy v. Ferguson, the Court rendered the Thirteenth Amendment a dead letter in all but peonage cases. See Anti-Peonage Act, 14 Stat. 546 (1867). Justice Brewer defined peonage “as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness.” Clyatt v. United States, 197 U.S. 207, 215 (1905). See also Pollock v. Williams, 322 U.S. 4, 17 (1944) (“[t]he undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary...
The Justices further undercut the purposes of Radical Reconstruction. The Court, for instance, found that Congress lacked the power to protect citizens’ fundamental rights under the Privileges and Immunities Clause of the Fourteenth Amendment.\(^9\) The narrow distinction between state and federal powers eventually gave way to the judicial and legislative protections of private liberties.

These precedents led to Congress’s resort to the Fourteenth Amendment Section 5 and the Commerce Clause to enact contemporary civil rights statutes. Several recent opinions have diminished Congress’s ability to rely on these two traditional sources for civil rights initiatives. The Rehnquist Court limited Congress’s power to address state violations of the Equal Protection and Due Process Clauses to legislation that is responsive.\(^10\) The Court also diminished Congress’s ability to penalize discriminatory conduct pursuant to its Commerce Clause power to regulate private conduct. Congress may now only use the latter power when it is acting to regulate an economic enterprise that substantially affects interstate commerce.\(^11\)

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\(^9\) Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (interpreting the Privileges or Immunities Clause of the Fourteenth Amendment to apply only to the rights of national citizenship). The *Slaughterhouse Cases*, drew a distinction between national and state citizenship. *Id.* at 73-74 (1873). The Fourteenth Amendment protects the privileges and immunities of federal citizenship, and Article IV protects the privileges and immunities of state citizenship. Federal privileges and immunities arose from citizens’ relation to the federal government, while state privileges and immunities arose from fundamental rights that are essential to a free society. Justice Miller’s majority opinion determined that the privilege of working in the vocation of one’s choice or traveling is not one that the federal government can affect but is at the sole discretion of state governments. *See also* Saenz v. Roe, 526 U.S. 489, 521-22, 527-28 (1999) (Thomas, J., dissenting).

\(^10\) In *City of Boerne v. Flores*, the Court invalidated the Religious Freedom Restoration Act, in part, because it found the statute “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior.” 521 U.S. 507, 532 (1997). The case limited Congress’s section 5 powers to passing congruent laws for remedying state violations of Fourteenth Amendment guarantee. *Id.* at 520 (“The Fourteenth Amendment’s history confirms the remedial, rather than substantive, nature of the Enforcement Clause.”) The Court reiterated this “responsive” standard in *Kimel v. Florida Board of Regents*, which limited Congress’s power to extend the applicability of the Age Discrimination in Employment Act to state actors. 528 U.S. at 86. *See also* Board of Trustees v. Garrett, 531 U.S. 356, 368 (2001); Nev. Dept Human Resources v. Hibbs, 538 U.S. 721, 728-29 (2003); Tennessee v. Lane, 124 S.Ct. 1978, 1981 (2004).

\(^11\) *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (determining that congressional commerce power does not extend to gender-motivated violence); United States v.
The recent cases have not diminished Congress’s Thirteenth Amendment enforcement power. It grants Congress the power to provide national protections for an expansive range of fundamental rights. The Amendment’s founders aimed to vest Congress with the power to assure liberty to the utmost reaches of the Preamble and Declaration of Independence. Congressional Thirteenth Amendment enforcement authority is not limited to responsive enactments, as is the Fourteenth Amendment; neither is the applicability of the Thirteenth Amendment limited to state actors. The Thirteenth Amendment, unlike the Commerce Clause, grants Congress the power to end human rights abuses, regardless of their economic impact.

This article draws upon the views of the country’s founders, abolitionists, and Radical Republicans to focus on the broad ranging implications of the Thirteenth Amendment. It explains how the Thirteenth Amendment protects persons against arbitrary treatment that obstructs their liberty rights. In the Congress’s and the judiciary’s continued neglect of the Amendment lies the practical failure of the advocates of freedom. The article is predominantly theoretical; I have dealt with practical implications of the Thirteenth Amendment elsewhere. The enforcement clause provided Congress with the power to provide for individual liberties and the general welfare that the Preamble and the Declaration only spoke of in idealistic terms.

I begin with an overview of the congressional debates on the proposed amendment. They took place near the end of the Civil War, in 1864 and 1865, and give perspective to the Amendment’s radical aims. The Amendment’s framers sought to enforce the goals of liberty that the Revolutionary founders embraced but failed to include in the Constitution. After considering the Radical’s constitutional expectations, I examine the concept of liberty as it was set out in revolutionary literature and then in abolitionist writings. Next, I show how Supreme Court

Lopez, 514 U.S. 549, 567 (1995) (concluding that Congress failed to demonstrate that the possession of handguns in a local school zone was an economic activity).


precedent and statutory law remain substantively gaunt. I conclude with an analysis of the Amendment’s meaning within the context of recent jurisprudence.

I. Congressional Debates on the Proposed Amendment

Soon after Ohio Representative James M. Ashley introduced the proposed Thirteenth Amendment in Congress, President Abraham Lincoln gave a speech in Baltimore on the uncertain nature of freedom. On April 18, 1864, the President observed that:

The world has never had a good definition of liberty, and the American people, just now, are much in need of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor. Here are two, not only different, but incompatible things, called by the same name, liberty.

Members of the Thirty-eighth Congress, who debated on passing the proposed Thirteenth Amendment, did much to dispel this paradoxical vagueness.

Supporters of the Thirteenth Amendment had a principled understanding of liberty. Even though their debates sometimes amounted to no more than political rhetoric, they constituted an essential part of a public debate aimed at persuading fellow congressmen and the newspaper reading public. Their speeches were often filled with a penetrating understanding of human rights that had seemingly eluded the founding generation with its concessions to slavery.

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15 Ashley introduced the proposal on December 14, 1863, during the 38th Congress, announcing his intent to submit an amendment “prohibiting slavery, or involuntary servitude, in all of the States and Territories now owned or which may be hereafter acquired by the United States.” Cong. Globe, 38th Cong., 1st Sess. 19 (1863). In the Senate, John Henderson of Missouri introduced the proposal on January 13, 1864. Cong. Globe, 38th Cong., 1st Sess. 145 (1864).


17 Richard L. Aynes, Refined Incorporation of the Fourteenth Amendment, 33 U. Rich. L. Rev. 289, 298 (1999) (mentioning that congressional debates, such as the one on Reconstruction, were reported in both the Congressional Globe and local newspapers).

18 The original Constitution contains several compromises that the Philadelphia Constitutional Convention of 1787 made to the supporters of slavery: The Three-Fifths Clause reduced blacks to three-fifths the value of whites for purposes of representation, the Fugitive Slave Clause prohibited non-slaveholding states from emancipating runaway slaves and required their return to slave owners, and the Slave Importation Clause countenanced the African slave trade to continue until 1808. See U.S. Const. art. I, § 2, cl. 3, partly repealed by U.S. Const. amend. XIV, § 2; id. art. IV, § 2, cl. 3, affected by U.S. Const. amend. XIII; & art. I, § 9, cl. 1 which lapsed. For a detailed explanation of this point, See Frederick Douglass, The Constitution & Slavery, in 1 Frederick Douglass, The Life and Writings of Frederick Douglass (Philip}
retrospect, Isaac N. Arnold, who was a member of the Congress during the Civil War, considered the debates on the Thirteenth Amendment to have been “the most important in American history. Indeed it would be difficult to find any others so important in the history of the world.”19 The drastic constitutional changes that the Thirteenth Amendment heralded brought into sharp relief the original Constitution’s protections of slavery. Even passage of the Bill of Rights failed to put an end to that institution.20 To others ending slavery through constitutional amendment was to be the logical conclusion of the “old fathers who made the Constitution” because they “fought for the rights of human nature, and they believed that slavery was at war with the rights of human nature.”21

Debates on an abolition amendment arose at a time when Southern secession had left Congress in the hands of members who wished to eradicate institutionalized slavery, which they understood to be the origin of the Civil War.22 The Emancipation Proclamation did not adequately deal with the problem. Indeed, congressmen and Lincoln recognized that the Proclamation was inadequate to eradicate slavery since its legal justification rested on the President’s wartime powers which would be ineffectual following the end belligerencies.23 The constitutional uncertainties surrounding the Emancipation proclamation gave rise to the political resolve to pass a constitutional amendment abolishing slavery.24

19 ISAAC N. ARNOLD, THE LIFE OF ABRAHAM LINCOLN 346 (1887).

20 Representative William D. Kelly, for instance, recognized the founders had “compromised with wrong” at the Constitutional Convention. CONG. GLOBE, 38th Cong., 1st Sess. 2983 (1864). Even opponents of the Thirteenth Amendment, like New York Representative Fernando Wood, saw it as a “change in the fundamental law [and] a material alteration.” CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).


23 Ira Berlin, Emancipation & Its Meaning, in UNION & EMANCIPATION: ESSAYS ON POLITICS & RACE IN THE CIVIL WAR ERA 109 (David W. Blight & Brooks D. Simpson eds., 1997) (discussing Lincoln’s understanding of the limited nature of the Emancipation Proclamation because it was based on his military powers as Commander and Chief).

24 On the decision to strengthen the principles associated with the Emancipation Proclamation see HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 222-23 (1913); J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 372-78, 390-91 (rev. ed. 1963); DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS & THE CONSTITUTIONAL ORDER,
Sustained debate on the proposed Thirteenth Amendment did not begin until mid-March of 1864 and concluded, with its passage, on January 31, 1865.25 During that period, several congressmen offered proposed resolutions.26 The most ambitious of these was Charles Sumner’s proposal proving that, “Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave.”27 When the Chairman of the Senate Judiciary Committee, Lyman Trumbull, reported language of the joint resolution, it lacked Sumner’s proposed wording on equality.28 This was a missed opportunity that would demand passage of another amendment, the Fourteenth Amendment, which did include an equal protection clause.29

In spite of their shortsightedness on how difficult it would be to secure equality,30 the


25 See passim CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864) to CONG. GLOBE, 38th Cong., 2d Sess. 531 (1865).

26 Beside’s Ashley’s resolution, Radical Representatives James E. Wilson of Iowa and Thaddeus Stevens of Pennsylvania and Missouri Senator John B. Henderson proposed varying, but substantively similar, amendment proposals. CONG. GLOBE, 38th Cong., 1st Sess. 21(1863); CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864); CONG. GLOBE, 38th Cong., 1st Sess. 1325 (1864). Henderson, who was a Democrat, was himself a slaveowner when the Civil War began. His support during the Senate debates on the proposed amendment was nevertheless steadfast. He recognized that slavery had caused the degradation of blacks’ talents and intellects. See id. at 1465 (“I will not be intimidated by negro equality. The negro may possess mental qualities entitling him to a position beyond our present belief. If so, I shall put no obstacle in the way of his elevation.”). Senator Garrett Davis of Kentucky unsuccessfully tried to include a clause that would have prevented African Americans from becoming citizens and civil and military. CONG. GLOBE, 38th Cong., 1st Sess.1370 (1864).

27 CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864) (emphasis added).

28 The Committee reported the proposal that would go on to become the Thirteenth Amendment on February 10, 1864. CONG. GLOBE, 38th Cong., 1st Sess. 553 (1864). The interchange involved Senators Sumner, Trumbull, and Jacob Howard of Michigan. Howard mistakenly thought Sumner’s language to be “utterly insignificant and meaningless.” CONG. GLOBE, 38th Cong., 1st Sess. 1482-83 (1864). Sumner withdrew his proposal since he considered Howard’s views to be based on a sincere commitment to abolition. Id. at 1488.

29 Many of the Amendment’s supporters seem to have consider the “equality” wording to be unnecessary since they believed that the very passage of the Thirteenth Amendment would mean that thereafter “all persons shall be equal under the law,” as Representative Elijah Ward of New York explained. CONG. GLOBE, 38th Cong., 2d Sess. 177 (1865).

30 Since the Thirteenth Amendment lacked any explicit recognition of equality, Congressmen who opposed granting blacks equal rights could argue that the Amendment was never meant to guarantee those rights. Senator Saulsbury, for instance, claimed during the Thirty-
thirty-eighth Congress adopted two powerful, though pithy, sections. The Thirteenth Amendment’s supporters expected section 2 to enable Congress to secure the benefits of national citizenship, including freedom to travel, to labor, and to alienate property. The Amendment, said Representative Russell M. Thayer of Pennsylvania, in retrospect, was meant to benefit freemen with the “great charter of liberty.” Massachusetts Senator Henry Wilson’s perspective that the proposed amendment would guard the “sacred rights” of whites and blacks was typical. Philadelphia Representative William D. Kelly sought to establish universal liberty that would allow everyone to enjoy the beneficent republican institutions. Slavery chiefly oppressed blacks, but it also brought white labor into an abject and servile state that was analogous to the condition of black slaves.

ninth Congress that the Amendment was only meant to affect blacks in slavery and not to make them or free blacks in the North and South legally equal to white men. Cong. Globe, 39th Cong., 1st Sess. 476 (1866).


35 The Chairman of Judiciary Committee, Representative James Wilson of Iowa, pointed out that, “non-slaveholding whites became alarmed at the bold announcement that ‘slavery is the natural and normal condition of the laboring man, whether white or black,’ seeing therein the commencement of an effort intended to result in the enslavement of labor instead of the mere enslavement of the African race.” Cong. Globe, 38th Cong., 1st Sess. 1202 (1864). Wilson was referring to an editorial from a South Carolina newspaper. The fuller text bode even more ominously for white laborers: “The great evil of Northern free society is that it is burdened with a servile class of mechanics and laborers unfit for self-government, and yet clothed with the attributes and powers of citizens. Master and slave is a relation as necessary as that of parent and child; and the Northern States will yet have to introduce it. Slavery is the natural and normal condition of laboring men whether white or black.” Quoted in Joseph G. Rayback, The American Workingman & the Antislavery Crusade, 3 J. Econ. Hist. 152, 162 (1943). Supporters of the proposed Thirteenth Amendment, like Representative Francis W. Kellogg of Michigan, were well aware the “leading men of the South” believed that “capitalists of the country should own the laborers, whether white or black.” Cong. Globe, 38th Cong., 1st Sess. 2955 (1864).

The most popular proslavery advocate of this view was George Fitzhugh who thought a northern worker “who contracts to serve for a term of days, months, or years, is, for such term, the property of his employer.” Cannibals All!, or, Slaves Without Masters 342 (1857). Historian Eugene D. Genovese has pointed out the classist logic of this point: “The notion that slavery was a proper social system for all labor, not merely for black labor, did not arise as a last-minute rationalization; it grew steadily as part of the growing self-awareness of the planter
Representative Arnold believed that liberty and equality for all citizens would be the Amendment’s “great cornerstone.” The Amendment was meant to transform American society by assuring civil liberty to all economic strata. Everyone, regardless of race or profession, was to be an equal before the law. For blacks, Radical Republican E. C. Ingersoll proclaimed, the Thirteenth Amendment would secure their natural and God-given rights. Ingersoll’s ideals were somewhat unspecific, as were the views of many of those who participated in the debate on the proposed amendment, but he exhibited typical empathy for persons in bondage. Ingersoll, drew attention to the inalienable rights of blacks to live in a state of freedom where they could “enjoy God’s free sunshine” and the right to reap the benefits of their labor. Poor white laborers too, Ingersoll believed, would benefit from emancipation since slavery kept them in ignorance, poverty, and degradation.

Such a social transformation could only be achieved where the national government could enforce freedom; a mere freeing from bondage would be inadequate. If “freedom” means nothing more than liberation from shackles, Representative and future president James A. Garfield pointed out in 1865, then it is “a bitter mockery” and “a cruel delusion.” For freedom to be the class.” THE WORLD THE SLAVEHOLDERS MADE 130 (1969). See also James L. Huston, A Political Response to Industrialism: The Republican Embrace of Protectionist Labor Doctrines, 70 J. AM. Hist. 35, 38 (1983) (“Southerners eagerly grasped the conclusion of English economists that all free labor was destined to live a beggarly existence and wielded this prediction like a club against northern defamers of the peculiar institution”); Russell B. Nye, The Slave Power Conspiracy, 1830-1860, in THE ABOLITIONISTS: REFORMERS OR FANATICS? 107, 110-111 (Richard O. Curry ed., 1965) (explaining the abolitionist and Republican dissemination of information on the Southern perception that white labor was a form of slavery).

36 CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).


38 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

39 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

40 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

41 James A. Garfield, Oration delivered at Ravenna, Ohio July 4, 1865, in 1 THE WORKS
triumphal end of slavery, the Thirteenth Amendment needed to provide government with the power to end all the concomitant detriments associated with the institution. Debates on the Thirteenth Amendment indicate that Congress believed that abolition would guarantee newly freed blacks and all American citizens with a variety of rights. Freedom would make blacks political players in the system that whites had administered since the country’s founding. Prohibiting blacks, and other disenfranchised groups, from holding political office violated the principles of the Declaration of Independence, Representative Thaddeus Stevens asserted, because the government of the United States was never meant to be under the sovereignty of races, dynasties, and families. The equal right to govern was rather innate to everyone “no matter what the shape or color.”

The proposed amendment was meant to give a practical effect to the Declaration of Independence’s self-evident truths “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.” The Declaration recognized the inalienable nature of civil and religious liberty and their centrality in founding a new country. The Thirteenth Amendment granted the missing

OF JAMES ABRAM GARFIELD 86 (Burke A. Hinsdale, ed., 1882).

42 CONG. GLOBE, 38th Cong., 1st Sess. 2618 (1864) (Statement by Mr. Kellogg of New York: “That slavery is dead presupposes and assumes that freedom triumphs.”).

43 CONG. GLOBE, 38th Cong., 2d Sess. 202 (1865). Near the end of the Congressional debate, Representative John R. McBride of Oregon addressed fears that emancipation would mean blacks would have political franchise. He thought that after liberation the “rights and status of the negro [should] settle themselves as they will and must upon their own just basis. If, as a race, they shall prove themselves worthy of elective right; they will demand and they will win it, and they ought to have it.” Id. While this statement is somewhat equivocal and blacks were not granted franchise until the Fifteenth Amendment was ratified, McBride envisioned the Thirteenth Amendment to be an empowerment for further political accomplishments.

Furthermore, Congress passed the Reconstruction Act of 1867 three years before the Fifteenth Amendment was ratified. That Act required Southern states to grant blacks suffrage rights. 14 Stat. 428 (1867); Chandler Davidson, The Recent Evolution of Voting Rights Law Affecting Racial & Language Minorities, in QUIET REVOLUTION IN THE SOUTH 21, 21 (Chandler Davidson and Bernard Grofman, eds., 1994); ERIC FONER, RECONSTRUCTION AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 277 (1989). Such bold reconstruction power indicates that McBride was not the only legislator who thought the Thirteenth Amendment empowered Congress to secure political rights. The Fifteenth Amendment put this power, with its limited qualification of racial protection, beyond legislative doubt.

44 CONG. GLOBE, 39th Cong., 1st Sess. 74 (1864).

45 CONG. GLOBE, 39th Cong., 1st Sess. 74 (1864).

46 CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865) (Indiana Representative Godlove S. Orth).
federal enforcement power to guarantee that birthright. The Amendment’s proponents assumed that slavery violated the fundamental principals of social contract, which they regarded as binding in spite of the constitutional protections of slavery. For them, the Preamble superceded the legal sanctions of slavery. Radicals incorporated the moral and political, natural truths of the Declaration and the Preamble into the Amendment.

Many in the Thirty-eighth congress recognized that laws that barred blacks from engaging in ordinary business, entering into contracts, and acquiring an education compromised the country’s founding principles. In spite of their idealistic flourishes, however, few Congressmen were willing to grant the reparations that Thaddeus Stevens championed.

The constitutional change of the Thirteenth Amendment was, nevertheless, much more than simply severing the de facto and de jure connections that bound slaves to their masters. As Representative Frederick E. Woodbridge of Vermont put it, passing the Amendment assured that at the end of the War “the goddess of Liberty . . . may look north and south, east and west, upon a free nation untarnished by aught inconsistent with freedom.”

Some of the ideals expressed during the congressional debates were visionary and were not realized even after the Thirteenth Amendment’s ratification. Senator James Harlan of Iowa, during the Senate debate of 1864, exposed a range of suppressions arising from the South’s peculiar institution. He was the first to coin the term “incidents of servitude,” a term that the Court has since adopted for identifying the range of oppressions the Thirteenth Amendment

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47 CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865) (New York Representative Thomas T. Davis).

48 See supra text accompanying note 16.

49 CONG. GLOBE, 38th Cong., 2d Sess. 222 (1865) (Representative George S. Boutwell of Massachusetts).

50 CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

51 See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865). Stevens reparation recommendation was commonly referred to as “Forty Acres and a Mule.” See Lance S. Hamilton, Note, Ethnomiseducationalization: A Legal Challenge, 100 YALE L.J. 1815, 1820 n.18 (1991). Stevens argued that the United States should make reparations to the former slaves by providing them with homesteads and creating laws to protect their property rights. CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865). Under President Andrew Johnson’s Proclamation of Amnesty, former slave owners reclaimed the plots of land that had been given to blacks by personnel from the Union Army and Freedmen’s Bureau. See Derrick Bell, The Civil Rights Chronicles, 99 HARV. L. REV. 4, 9 n.20 (1985). Representative George W. Julian was another radical supporter of land confiscation as a means of punishing the South and allaying the suffering of the newly freed through land distribution. WILLIAM L. RICHTER, AMERICAN RECONSTRUCTION, 1862-1877, at 240-41 (1996).

52 CONG. GLOBE, 38th Cong., 2d Sess. 244 (1865).
prohibits. Harlan listed interference with parental and marital relationships, the prohibition against participation on juries, restrictions against black property ownership, interference with the right to testify in court, and the suppression of free speech as examples of the incidents of slavery. Senator Henry Wilson believed that the abolition of those incidents would renew the United States commitment to its creed of liberty:

If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation it was scarred with moral desolation, from the bosom of the country it has reddened with the blood and strewn with the graves of patriotism. The incorporation of this amendment into the organic law of the nation will make impossible forevermore the reappearance of the discarded slave system, and the returning of the despotism of the slavemasters’ domination.

In place of shackles of slavery, federal law would respect natural rights by protecting family interests. Enforced ignorance, too, was incidental to involuntary servitude, and education was essential to ending the enforced subjugation of slaves.

There was, indeed, a consensus during the congressional debates that the Thirteenth Amendment would empower Congress to pass legislation directed at any of arbitrary practices associated with involuntary servitude and slavery. The rupture between the Confederacy and

53 Cong. Globe, 38th Cong., 1st Sess. 1439 (1864); Jones v. Alfred H. Mayer, 392 U.S. 409 (1968) (“this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery–its ‘burdens and disabilities’–included restrictions [sic] upon ‘those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens’”), quoting Civil Rights Cases, 109 U.S. 3, 22 (1883).


56 Cong. Globe, 38th Cong., 1st Sess. 1324 (1864). Senator Jacob M. Howard, who had been on the Senate Judiciary Committee that reported the language of the Thirteenth Amendment, likewise believed that the Thirteenth Amendment gave Congress the power to protect “the ordinary rights of a freeman,” including rights appertaining to the family. Cong. Globe, 39th Cong., 1st Sess. 503-04 (1866).


the Union empowered a federalist-minded group of legislators. During the Civil War, many Republicans adopted radical abolitionist principles about the federal government’s obligation to eradicate slavery, and many of the opponents of the Thirteenth Amendment decried their republican brand of federalism. Even President Lincoln, who also thought slavery was “a total violation” of the Declaration of Independence, initially held to a gradualist, state-by-state approach. His views changed only during the War when he realized that Southern states would not be appeased into abandoning their expansionist ambitions.

Reconstruction, which began to take shape after Lincoln’s death, provided an opportunity to address human rights violations through federal legislation. During that period, Congress passed three amendments, beginning with the Thirteenth, which granted the national government a degree of power to protect civil rights that it had never before possessed. The limited time

59 The congressional leadership, for a time, was populated with Radical Republicans who sought to gain equal status for blacks. On the House side, Thaddeus Stevens was the leader of the Committee on the Ways and Means during the debates on the Thirteenth Amendment and, then, the Committee on Appropriations during the debates on the Civil Rights Act of 1866. James A. Woodburn, The Attitude of Thaddeus Stevens Toward the Conduct of the Civil War, 12 AM. HIST. REV. 567, 567 (1907). Charles Sumner became the Chairman of the Senate Committee on Foreign Relations in 1861. Mark M. Krug, The Republican Party & the Emancipation Proclamation, 48 J. NEGRO HIST. 98, 103 (1963). Henry Wilson was Chairman of the Senate Committee on Naval Affairs. Id. Even more moderate leaders in the Republican party, like Senator Lyman Trumbull, Chairman of the Committee on the Judiciary, rejected gradual abolitionism. See e.g., CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (arguing the Thirteenth Amendment abolished slavery in all states and destroyed all “incidents to slavery”).

60 The Thirteenth Amendment is a rejection of a view that Democrats and Southern Whigs had long held, purporting that slavery was a state institution that only state authorities could limit. See e.g. CONG. GLOBE, 38th Cong., 1st Sess. 2991(1864) (stating that enforcing federal protections of civil rights “shall have any effect at all, must be fatal; fatal to the very life of the Constitution, fatal to the fundamental principles of the Republic, the right, the irrepressible rt of the States to domestic government”).


62 Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. REV. 1, 6 (1985) (“The Reconstruction Congresses vested individuals with three distinct kinds of protection against state governments, protections that were absent in the prewar structure: federal rights, federal remedies, and federal forums.”).

63 1 L AURENCE H. T RIBE, A MERICAN C ONSTITUTIONAL L AW § 7-1, at 1293 (3d ed. 2000) (“The Civil War, and the [Reconstruction] amendments that were its fairly immediate legacy . . . place the issue of personal rights--and the necessity of their direct protection against state interference--squarely within the cognizance of the federal Constitution and the federal
during which the Reconstruction Congress was able to exercise its authority, until the Compromise of 1877 brought it to an abrupt end, provided Congress the opportunity to pass legislation guaranteeing equal access to courts, the right to purchase and convey real and personal property, and power to enter and enforce contracts.

The Amendment process, under Article V of the Constitution, was the means Radicals used for altering the Constitution’s initially inimical provisions. The Thirteenth Amendment provides an enforceable right for the protection of those civil liberties that until its ratification had been valued but not implemented. The Amendment allows Congress to secure liberty, life, and the pursuit of happiness through positive laws.

The ideological goal behind the Thirteenth Amendment’s enforcement clause is a national commitment to secure individual liberty as the only means of providing civil welfare. Radical advocates of the first Reconstruction Amendment sought to remove all classist and racist barriers abridging civil rights. They regarded the Thirteenth Amendment as a means of restoring the natural rights long denied to blacks in particular and laborers in general. According to progressive reformers, the Amendment not only freed blacks from bondage, it also gave Congress the power to pass legislation protecting fundamental choices, including those about occupational and family life. Such power was needed to prevent the defeated South from legitimizing arbitrary forms of domination that the Civil War was meant to end. Congressman Martin Russell Thayer, who was a Pennsylvania representative to Congress between 1863 and 1867, expressed the same point in rhetorical terms: “What kind of freedom is that which is given by the amendment of the Constitution, and if it is confined simply to the exemption of the freedom from sale and barter? Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature?”

judiciary."

64 See supra note -------.

65 In relevant part, Ch. 31, § 1, 14 Stat. 27 (1866) (Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (currently codified as amended at 42 U.S.C. §§ 1981-1982 (2000)) provides: [t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, 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 ... 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.

66 See CONG. GLOBE, 38th Cong., 1st Sess. 142 (1864) (Godlove S. Orth of Indiana) (arguing for a practical application of natural rights principles via the Thirteenth Amendment).

67 CONG. GLOBE, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866).
Congressmen who worked against the proposed amendment realized that Republicans aimed to do much more than simply remove the shackles of forced labor. They feared that abolishing slavery would be tantamount to granting blacks political and civic rights, like the right to vote and to be part of a jury.\(^{68}\) A memorable exchange between Representatives William D. Kelley and John D. Stiles, both of whom were from Pennsylvania, indicates that the advocates of both sides of the argument realized the Thirteenth Amendment could be used to obtain equal citizenship rights for blacks, even though the Amendment never explicitly mentions them. Mr. Stiles inquired whether the Amendment would favor racial equality between the races.\(^{69}\) Mr. Kelly responded that arbitrary racist views should not be used to prevent blacks from exercising the same degree of political control as whites.\(^{70}\) The concern of losing white control over the government was also on Representatives Chilton A. White’s mind: “Do you propose to enfranchise them, and make them ‘before the law,’ . . . the equals of the white man; give them the right to suffrage; the right to hold office; the right to sit upon juries? Do you intend . . . to make this a mongrel Government, instead of a white man’s Government?”\(^{71}\)

Section 2 of the proposed amendment, containing the enforcement clause, gave the greatest pause to Congressmen who opposed passing it unto the states for ratification.\(^{72}\) The second clause, as its founders understood it and as the Supreme Court later interpreted it, went far beyond merely granting Congress the power to enact legislation against the exploitation of slaves. Ohio Senator John Sherman, who in later years was Secretary of the Treasury under

\(^{68}\) Ohio Representative Chilton A. White made this point cautiously through a series of questions designed to raise concerns about passing the proposed amendment: “What will be the effect of turning loose this mass of people? Where will they go? What do you propose to do with them? Do you propose to enfranchise them, and make them ‘before the law,’ as the gentleman from Pennsylvania [Thaddeus Stevens] says, the equals of the white man; give them the right of suffrage; the right to hold office; the right to sit upon juries? Do you intend, in other words, to make this a mongrel Government, instead of a white man’s Government? Do you intend to degrade the United States of America to the low condition of the provinces of Central America? Is it for that that we are wasting our blood and our treasure?” CONG. GLOBE, 38th Cong., 2nd Sess. 216 (1865)

\(^{69}\) CONG. GLOBE, 38th Cong., 2d Sess. 291 (1865).

\(^{70}\) CONG. GLOBE, 38th Cong., 2d Sess. 291 (1865).

\(^{71}\) CONG. GLOBE, 38th Cong., 2d Sess. 216 (1865); see also CONG. GLOBE, 38th Cong., 1st Sess. 2982 (1864) (protesting that Radical Republicans meant to make “Black free men . . . American citizens”).

\(^{72}\) See Howard D. Hamilton, The Legislative & Judicial History of the Thirteenth Amendment, 9 NAT’L B.J. 26, 45-46 (1951) (quoting concerns about the breadth of congressional power under the second section of the Thirteenth Amendment that were voiced by a delegate from Mississippi and the provisional governor of South Carolina).

\(^{73}\) On Court interpretation of the Thirteenth Amendment see Part ---- infra.
Rutherford B. Hayes and, later, Secretary of State under President William McKinley, considered the Thirteenth Amendment to be a “guarantee of liberty” and the second section to be “an express grant of power to Congress to secure this liberty by appropriate legislation.”\textsuperscript{74} Without the rights of citizens everywhere “freedom” was a meaningless concept: “Now unless a man may be free w/o the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power by the express terms of this amendment, to secure all these rights. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms.”\textsuperscript{75} Sherman linked the Reconstruction Congress’s decision to grant Congress the power to protect citizenship rights to the need of maintaining comity between the states for securing universal liberties.\textsuperscript{76}

Schuyler Colfax opened the Thirty-ninth Congress, as the incoming Speaker of the House in 1865, with a statement on fundamental rights protected under the Thirteenth Amendment: “[I]t is yours,” Colfax told the House, “to mature and enact legislation which . . . shall establish [state governments] anew on such a basis of enduring justice as will guarantee all necessary safeguards to the people, and afford what our Magna Carta, the Declaration of Independence, proclaims is the chief object of government –protection of all men in their inalienable rights.”\textsuperscript{77} His ideas were not only important because the powerful position he then held, but also because he had made it prior to the introduction of the proposed Fourteenth Amendment. His statement, therefore, indicates the congressional understanding of its power to protect liberty interests through the Thirteenth Amendment.

Senator Trumbull, in 1866, about a year after states had ratified the Amendment, reiterated that the second clause was meant to give Congress the power to adopt any legislation it deemed to be appropriate to actuate liberty.\textsuperscript{78} He regarded the ambit of congressional power to extend to ending interference with commercial transactions, ownership rights, and educational enrolment.\textsuperscript{79}

Both the supporters and adversaries of abolition relied on the founding fathers to bolster their respective arguments. Representative Francis W. Kellogg of Michigan asserted that the Thirteenth Amendment was meant to promote the general welfare, which is the primary object of the Constitution.\textsuperscript{80} Congressman Morris of New York held the contractarian perspective that the

\textsuperscript{74} CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

\textsuperscript{75} CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

\textsuperscript{76} CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

\textsuperscript{77} CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865).

\textsuperscript{78} CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866). Trumbull’s view, however, can in no way be characterized as equalitarian since on the very same page this moderate Republican proclaimed that laws prohibiting intermarriage were equitable and constitutional. See id.

\textsuperscript{79} CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

\textsuperscript{80} CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864).
Constitution could be amended to prohibit slavery since “each member upon entering society covenants to yield his particular to the general good, and to so comport as to infract none of the rights of others, and also not to incapacitate himself for the discharge of the duties growing out of the social relations.” Another Republican believed slavery was an evil the founders accepted but “regarded as temporary in its character and as tolerable only by reason of the exigencies of the hour.” Opponents of the proposed Amendment, on the other hand, claimed that its adoption was an impermissible assertion of power since the Amendment would materially alter government as the founders had envisioned it. The founders, Senator Willard Saulsbury of Delaware claimed, wanted to preserve the right to slave property not to give the the Union “control over the domestic relations existing in the state, not to regulate the right and title of property in the States.”

These differing views on the founders’ predilections on slavery must be analyzed to comprehend the significance of the Declaration and Preamble to the Thirteenth Amendment. A better understanding of American freedom can help guide Congress in using its enforcement power.

II. Revolutionary Fervor for Liberty

The ideological justification for the American revolution was irreconcilable with institutionalized slavery. Political and religious leaders regarded the revolution as a struggle for natural liberties that the British government had infringed. That justification was incompatible

81 Cong. Globe, 38th Cong. 1st Sess. 2614 (1865)

82 Cong. Globe, 38th Cong., 2nd Sess. 154 (1865).

83 Cong. Globe, 38th Cong., 1st Sess. 186 (1864) (“The change you propose is a fundamental change of your Government never before contemplated by its founders.”); id. at 2941 (“It will be, if adopted, a change in the fundamental law—a material alteration in the Constitution of the United States as formed by the founders of the Government”).


85 American revolutionists came from a British tradition that regarded freedom to be a natural birthright. See Arthur Young, Political Essays Concerning the Present State of the British Empire 19 (1772) (“Liberty is the natural birthright of mankind; and yet to take a comprehensive view of the world, how few enjoy it! What a melancholy reflection is it to think that more than nine-tenths of the species should be miserable slaves of despotic tyrants!”); William Patten, Discourse at Halifax in the County of Plymouth, July 24th 1766, at (1766) (“We may from what has been said infer, in the first place, that FREEDOM is our natural right, equally with other men.”). Laws, they believed, could not take away fundamental rights. See, e.g., John Adams, A Dissertation on the Canon & Feudal Law, in 3 Works of John Adams 445, 448-49 (Charles F. Adams ed., 1865) (1765) (Rights, that cannot be repealed or restrained by human laws—Rights, derived from the great Legislator of the universe.”). See also Samuel Adams, The Rights of the Colonists (Report of the Committee of Correspondence to the Boston Town Meeting Nov. 20, 1772) available at http://law.bepress.com/pittlwps/art9
with the exploitation of human chattel and the enforcement of slave codes. For slaves, the struggle for freedom was even more urgent than it was for white colonists who, like Patrick Henry, preferred death to a life of political bondage.\(^{86}\) Some revolutionary leaders drew attention to the incongruity between the American demand for freedom and its protection of slavery. Alexander Hamilton, for instance, wrote that “[n]o reason can be assigned why one man should exercise any power, or preeminence over his fellow creatures more than another; unless they have voluntarily vested him with it.”\(^{87}\)

Thomas Paine, in his first published article, also drew attention to this inconsistency. He entreated Americans to consider “[w]ith what consistency, or decency they complain so loudly of attempts to enslave them, while they hold so many hundred thousands in slavery; and annually enslave many thousands more, without any pretence of authority, or claim upon them.”\(^{88}\)

Colonial pamphleteers often used “slavery” figuratively in their opposition to the British Parliament’s intrusion against individual liberties. While their views on the despotism of slavery and on the boon of liberty were applicable to all Americans, many revolutionaries regarded only white males as possessed of natural rights. This illogical dichotomy was based on the prejudice of revolutionary times. Despite their disregard for the logical consequences of their political philosophy, the founders’ views on slavery and liberty help explain the meaning of those terms to the Reconstruction Congress, which relied heavily on revolutionary tenets. The enforcement clause of the Thirteenth Amendment was a product of the United States republican ideology as it emerged during the Revolution.

The revolutionary generation, at least in its rhetoric, sought to organize a free republic. The Sons of Liberty rallied colonists against taxation without representation; Liberty Polls were assembly places; Patrick Henry embodied the revolutionary project in his pithy statement “Give me liberty or give me death”; and Thomas Paine believed America to be “the place where the principle of universal freedom could take root.”\(^{89}\) Slavery was so incompatible with colonial

\(^{86}\) See 1 William W. Henry, Patrick Henry: Life, Correspondence & Speeches 266 (1891) (Mar. 23, 1775) (“Forbid it, almighty God! I know not what course others may take; but as for me, give me liberty or give me death!”).


aspirations that revolutionaries often declared they were under the British yoke of slavery.\(^{90}\)

Slavery symbolized the political oppressions from which colonists demanded relief. The meaning of “slavery” that Reconstructionists derived from the founders’ writings was “being wholly under the power and control of another, as to our actions and properties.”\(^{91}\) The opposite of being in servitude, defined Richard Price, in a work that enjoyed widespread popularity, was to be guided by one’s will.\(^{92}\) The political conception of slavery appeared in colonial writings as early as the 1740’s. An anonymous author of that decade contrasted natural liberty of action and thought to the slavery of arbitrary power.\(^{93}\) This contrast also appeared in the pamphlets that were printed during the War of Independence. One polemicist contrasted the felicity of liberty to the debasement of slavery, which “discourages industry, frugality, and every thing praise-worthy; introduces ignorance and poverty, with the most sordid vices, and universal misery.”\(^{94}\) Men who are deprived of their liberty, preached Gad Hitchcock, are debased to the “primitive standard of humanity,” becoming stupid, indolent, and indifferent to improvement.\(^{95}\) Despite the public outcry against the arbitrary use of British power, colonists committed even worse oppressions against their slaves.\(^{96}\)


\(^{91}\) MOSES MATHER, AMERICA’S APPEAL TO THE IMPARTIAL WORLD 48 (1775).

\(^{92}\) RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, in TWO TRACTS ON CIVIL LIBERTY, THE WAR WITH AMERICA 11 (1778) (“In general to be free is to be guided by one’s own will; and to be guided by the will of another is the characteristic of Servitude.”).

\(^{93}\) See New York Evening Post, November 16, 1747 (“Liberty is a natural Power of doing, or not doing, whatever we have a Mind . . . . Slavery is a force put upon human Nature, by which a Man is obliged to act, or not to act, according to the arbitrary will and Pleasure of another.”)

\(^{94}\) JUDAH CHAMPION, CHRISTIAN & CIVIL LIBERTY & FREEDOM CONSIDERED & RECOMMENDED 14 (1776).

\(^{95}\) GAD HITCHCOCK, A SERMON PREACHED AT PLYMOUTH DECEMBER 22, 1774, at 17 (1775).

\(^{96}\) The American Anti-Slavery Society’s Declaration, which it drafted on December 4, 1833 pointed out the discrepancy between what the white colonists and black colonists achieved through the revolution: “We have men together for the achievement of an enterprise, without which, that of our fathers is incomplete . . . Their grievances, great as they were, were trifling in comparison with the wrongs and sufferings of those for whom we plead. our fathers were never slaves—never bought and sold like cattle—never shut out from the light of knowledge and religion—never subject to the lash of brutal task-masters.” PROCEEDINGS OF THE ANTI-SLAVERY
Most pamphleteers were concerned with ending the slavery of parliamentary encroachment on colonial rights rather than the slavery that colonists practiced. Revolutionary sermonizers and political writers, during the 1760’s and 1770’s, decried several British parliamentary laws as attempts to enslave the colonists. A clergyman who gave a sermon at Billerica, Massachusetts, soon after the Stamp Act was repealed in 1766, spoke of the heavens recovering “their wonted serenity,. . . [and] reviving liberty,. . . . with heightened lustre and beauty” while slavery “vanishes out of sight.”97 Benjamin Throop, a Connecticut clergyman, also rejoiced about the repeal of the Stamp Act that had placed the colonists into “vile ignominious slavery.”98

Others decried the use of several parliamentary measures they regarded to be absolutist attempts at their enslavement.99 The Townshend Revenue Act of 1767, which imposed duties on a variety of items including tea and paper, was widely condemned because it tended to reduce Americans to slavery. “For what slavery can be more compleat” rhetorically asked a Philadelphia Grand Jury, “more miserable, more disgraceful, than that lot of a people,” that was governed by laws not of their own making.100 John Dickinson, who would become a central figure in the Continental Congress, wrote in a similar fashion that persons who were taxed without their consent were in “a state of the most abject slavery.”101 Silas Downer, the corresponding secretary of the Sons of Liberty for Rhode Island, denounced taxation without Americans’ consent to be the “the lowest bottom of slavery.”102

CONVENTION, ASSEMBLED AT PHILADELPHIA 12, 12-13 (1833).

97 HENRY CUMINGS, A THANKSGIVING SERMON PREACHED AT BILLERICA, NOVEMBER 27, 1766, at 21 (1767). See also ELISHA FISHER, JOY AND GLADNESS: A THANKSGIVING DISCOURSE . . . OCCASIONED BY THE REPEAL OF THE STAMP-ACT 10 (1767) (“Surely we have not so soon forgot the dark day, when the Sun of our Liberty set in a gloomy cloud, which, for a season, boded perpetual night.”)


99 THE SPEECHES OF HIS EXCELLENCY GOVERNOR HUTCHINSON, TO THE GENERAL ASSEMBLY OF THE MASSACHUSETTS-BAY. AT A SESSION BEGUN AND HELD ON THE SIXTH OF JANUARY, 1773, at 34, 44 (1773) (“the Minds of the People were filled with Anxiety, and they were justly alarmed with Apprehensions of the total Extinction of their Liberties . . . . nothing is more evident, than that any People who are subject to the unlimited Power of another, must be in a State of abject Slavery”).

100 Philadelphia Grand Jury (Sept. 24 1770), BOSTON EVENING-POST, Nov. 5, 1770, at 4.

101 JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 53 (1768). Dickinson believed that politically unrepresented persons were slaves, and since the colonists had been taxed without their consent they had, in effect, been enslaved. Id. at 38.

102 SILAS DOWNER, A DISCOURSE, DELIVERED IN PROVIDENCE 10 (1768).
Parliament imposed the tax on tea that spurred the Boston Tea Party to sabotage in December 1773, was viewed as the “[e]nsign of their arbitrary Dominion [and] of your Slavery.”\textsuperscript{103} In dramatic fashion, Josiah Quincy proclaimed: “WE ARE SLAVES!” of the British oppressors.\textsuperscript{104} The implication, as another pamphleteer remarked was that persons who were not treated as “subjects,” or citizens in modern terminology, were slaves.\textsuperscript{105} The use of absolute parliamentary power, Alexander Hamilton wryly remarked, resulted in colonial slavery.\textsuperscript{106} The analogy was not lost on common folk. A private in the army wrote his parents on July 4, 1777 that colonial courage and conduct would “determine whether Americans are to be free men or slaves.”\textsuperscript{107} These were tragically ironic phrases given that hereditary slavery was then legal in all the colonies.

The blindness to colonial oppressions drove one observed to the astonishment that “Men who feel the Value and Importance of Liberty as much as the Inhabitants of the southern States do that of their own, should keep such Numbers of the human Species in a State of so absolute Vassalage.”\textsuperscript{108} The Reconstruction would later try to reclaim the initial disgust with arbitrary oppression without the classist contradictions that had accompanied the drive for independence. The Radical Republicans, who gave the Thirteenth Amendment the inertia needed for its ratification, were raised in a tradition marked by a narrowly constructed form of antislavery that waxed in the years leading up to the Revolution. One Harvard educated Congregational minister, Nathaniel Appleton, realized that the colonial protest in 1765 against the Stamp Act and its repeal would have been more glorious “if at the time we are establishing Liberty for ourselves and children, we show the same regard to all mankind that come among us.”\textsuperscript{109} Literature of this sort shifted American colonial conscience during the 1760's and 1770's.

\textsuperscript{103} HAMPTEN, THE ALARM (NO. III) (Oct. 15, 1773).

\textsuperscript{104} JOSIAH QUINCY, JR., OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL (1774).


\textsuperscript{106} ALEXANDER HAMILTON, A FULL VINDICATION OF THE MEASURES OF CONGRESS 4 (1774).

\textsuperscript{107} Quoted in PHILIP DAVIDSON, PROPAGANDA AND THE AMERICAN REVOLUTION 1763-1783, at 341 (1941).

\textsuperscript{108} Ebenezer Hazard’s Travels through Maryland in 1777, 46 MARYLAND HISTORICAL MAGAZINE 44, 50 (Fred Shelley ed., 1951).

away from an almost universal complacency about slavery to a widespread antagonism toward the institution.110 Most of the North gradually came to understand the incongruity between racial slavery and the battle with England to secure colonists’ natural and civil liberties, and by 1830, only 2,780 blacks remained enslaved in Northern states.111 In spite of this awareness, an Amendment abolishing slavery would become necessary because during the Revolutionary War most white founders advocated freedom only for themselves and those of their own propertied class.112 Revolutionary liberals, as the renowned historian David Brion Davis pointed out, “may well have agreed that Negro slavery had no place in a free society. But their domestic views, like those of the majority of patriot lawyers and political leaders, were moderated by a concern for public order, for property rights, and for southern sensibilities.”113

The founders’ definition of tyrannical oppression was unmistakably applicable to chattel slavery, but until 1865 there was no national consensus to end institutionalized bondage. The revolutionaries’ outcry about their enslavement came from some the most politically active and wealthy men in the colonies and is tragically ironic given their eventual adoption of constitutional protections for slavery.

Many of them realized the Revolution’s ideological implications to involuntary servitude. John Mein, a British Loyalist, pointed out the disingenuousness of Bostonians who grounded their struggle in the immutable laws of nature, while they lived in a town with two thousand black slaves.114 The evident contradiction evoked a response from English lexicographer and opponent of colonial independence, Samuel Johnson. As he saw it, the “loudest yelps for liberty” were heard from “drivers of Negroes.”115

During the struggle with England, slavery drew an increasing number of pamphlets denouncing the inconsistency of continuing to maintain slavery while battling for the Rights of Man. Benjamin Rush, a physician with many political interests, wrote that “it would be useless for us to denounce the servitude to which the Parliament of Great Britain wishes to reduce us,

110 See David B. Davis, The Problem of Slavery in the Age of Revolution 1770-1823, at 41-42 (1975) (“What was unprecedented by the 1760s and early 1770s was the emergence of a widespread conviction that New World slavery symbolized all the forces that threatened the true destiny of man.”).


115 Quoted in Philip S. Foner, 1 History of Black Americans 303 (1975) (“How is that we hear the loudest yelps for liberty among the drivers of Negroes?”).
while we continue to keep our fellow creatures in slavery just because their color is different from ours.”116  England would not accept the force of revolutionary reasoning, wrote another author in 1774, until Americans ended the cruelty of slavery.117  John Allen, who lacked Rush’s political ambitions, denounced slaveholders in stronger terms, calling them “trifling patriots” and “pretended votaries for Freedom.” who trampled on the natural rights and privileges of Africans while they made a “vain parade of being advocates of the liberties of mankind”118  He further pointed out that a duty on tea was of far smaller consequence than the bondage of a captive.119  

Religious leaders, as their secular counterparts, drew attention to the need for moral reform. Samuel Hopkins plea on behalf of blacks was heart wrenching since he realized that Americans were enslaving many thousands of their “brethren, who have as good a right to liberty as ourselves.”120  The miserable oppressions of slavery, complained Hopkins, were contrary to the colonists’ plea of liberty and violated religious morality as well as the precepts of humanity and charity.121  Reverend Nathaniel Niles of Newbury, Massachusetts, in 1774, pointed out America’s shame in struggling for their while continuing “to enslave their fellow men.”122  Clergyman Nathaniel Appleton asked the “sons of liberty” to realize that their struggles for liberty did not comport with their continued maintenance of the slave trade.123  If they persisted in this confounding dumbness, Appleton warned, mankind would laugh at their pretensions.124  

The most far sighted of the religious opponents of slavery was the Quaker Anthony Benezet. He not only dispelled the notion that slavery was a benevolent institution,125  but further


117  RICHARD WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES 80 (1774).

118  JOHN ALLEN, THE WATCHMAN’S ALARM TO LORD N- - H 27 (1774).

119  JOHN ALLEN, THE WATCHMAN’S ALARM TO LORD N- - H 28 (1774).

120  SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS; SHEWING IT TO BE THE DUTY AND INTEREST OF THE AMERICAN COLONIES TO EMANCIPATE ALL THEIR AFRICAN SLAVES 50 (1776).

121  SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS; SHEWING IT TO BE THE DUTY AND INTEREST OF THE AMERICAN COLONIES TO EMANCIPATE ALL THEIR AFRICAN SLAVES 52 (1776)


123  NATHANIEL APPLETON, CONSIDERATIONS ON SLAVERY 19 (1767).

124  NATHANIEL APPLETON, CONSIDERATIONS ON SLAVERY 19 (1767).

125  ANTHONY BENZET, SOME HISTORICAL ACCOUNT OF GUINEA ch. 11 (1771) (providing
reflected on how to free those Africans who had been enslaved. He realized that without receiving some aid after their liberation, former slaves would be unable to compete with other free persons. Therefore, he recommended that both adults and children receive instruction adequate for becoming productive members of the community. Seeking to calm the fears of whites about free blacks, Benezet explained how liberation would help government achieve security and welfare: the tax burden would be decreased because the obligation to pay taxes would fall on everyone, the trades and arts would be advanced, and productivity would be increased since more vacant land would be cultivated. Abolition, therefore, would benefit the general welfare. Liberation, meant much more than just ending obligatory labor; it required colonists to grant blacks the opportunity to participate in the privileges of equal residency.

Some black contemporaries also adopted the egalitarian significance of revolutionary thought to their demand of freedom. A group of black New Hampshire petitioners used natural rights terminology to make their point “[t]hat freedom is an inherent right of the human species . . . [and] [t]hat private or public tyranny and slavery are alike detestable.” Similarly, on April 20, 1773 black petitioners from Massachusetts expressed their expectation of “great things from men who have made such a noble stand against the designs of their fellow-men to enslave them.” The same year, in another petition that blacks from Boston and other Massachusetts provinces demanded relief from the manifold burdens New England slavery placed upon them, “We have no Property! We have no Wives! No Children! We have no City! No Country.”

Lemuel Haynes, a racially mixed minister, wrote that “an African, or, in other terms, a Negro... has and undeniable right to his Liberty.” A“Great Number of Blackes detained in the State of slavery” petitioned the Massachusetts Assembly in 1777. They requested that the Massachusetts Assembly:

eyewitness accounts of Africa in opposition to inaccurate accounts about the enslavement of Africans).

126 ANTHONY BENEZET, A SHORT ACCOUNT OF THAT PART OF AFRICA, INHABITED BY THE NEGROES 71 (3d ed. 1768).
127 ANTHONY BENEZET, A SHORT ACCOUNT OF THAT PART OF AFRICA, INHABITED BY THE NEGROES 71-72 (3d ed. 1768).
128 JORDAN, supra note ----, at 291.
130 Id. at 252.
132 Quoted in 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 9 (1951).
give this petition its due weight & consideration & cause an act of the Legislatur to be past Wherby they may be Restored to the Enjoyments of that which is the Naturel Right of all men—and their Children who wher Born in this Land of Liberty may not be heald as Slaves after they arrive at the age of twenty one years so may the Inhabitance of this Stats No longer chargeable with the inconsistancy of acting themselves the part which they condem and oppose in others Be prospered in their present Glorious struggle for Liberty and have those Blessing to them.

In Massachusetts, where slaves were regarded as property and persons, blacks brought freedom suits against their masters. Several litigants were successful, during the decade before the Revolution, in moving Massachusetts courts to grant them freedom. The death knell came from the Massachusetts Supreme Court which, in 1783, interpreted the state’s constitution to prohibit slavery.

Even the Southern vanguard of the revolution realized the anomaly between liberty’s cause and the inequitable institution they chose to perpetuate after independence. Patrick Henry, for one, acknowledged his hypocrisy. After scrutinizing one of Benezet’s abolitionist tracts, Henry wrote:

is it not amazing, that at a time when the rights of Humanity are defined & understood with precision in a Country above all others fond of Liberty: that in such an Age and such a Country, we find Men, professing a Religion the most

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133 Quoted in 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 10 (1951).


humane, mild, meek, gentle & generous, adopting a Principle as repugnant to humanity . . . . Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it . . . I believe a time will come when an opportunity will be offered to abolish this lamentable Evil.137

Little could Henry know that the “lamentable Evil” would only be abolished after a bloody civil war. Thomas Jefferson also realized how incongruous slavery was in the age of revolution. Jefferson, indeed, had some premonition about the national catastrophe that slavery could create, believing that it would destroy the morals of the people.138 The need for a federal union and the widely held belief in the inferiority of blacks and Indians paved the way for a national compromise that kept slavery intact after the Revolution and set the country on a path to war against itself.

American antislavery literature of the eighteenth century relied on universalistic principles of natural law to make its case against granting slave owners legal concessions. It rejected racialist biological views, purporting blacks to be less evolutionarily developed than whites.139 Blacks and whites, wrote Benezet, are of the same species; therefore, they are on a


138 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (1955) (1787) (“The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. . . . With the morals of the people, their industry also is destroyed. . . . I tremble for my country when I reflect that God is just.”) For a further discussion Jefferson’s paltry condemnation of slavery see WINTHROP D. JORDAN, WHITE OVER BLACK 430-36 (1968); DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 164-84 (1975); DUNCAN J. MACLEOD, SLAVERY, RACE & THE AMERICAN REVOLUTION 126-29 (1974).

139 In his well-known account of Jamaica, for instance, Edward Long popularized the comparison of blacks with apes and helped develop it into scientific jargon. See HISTORY OF JAMAICA 360, 365, 370 (1774). One anonymous author began his bombast by describing all peoples on the West Coast of Africa as “the most stupid, beastly race of animals in human shape, of any in the whole world. The brutality, nastiness, indolence and other criminal propensities of the Hottentots, are a convincing proof of the truth of my assertion.” These unsubstantiated generalities were followed by a self-aggrandizing assumption, “I would subdivide the Africans into five classes, as 1st, Negroes, 2d, Ourang Outangs, 3d, Apes, 4th, Baboons, and 5th, Monkeys . . . There never was a civilized nation of any other complexion than white.” PERSONAL SLAVERY ESTABLISHED 18-19 (1773).

In response to this pseudo-anthropology, numerous colonial writers denied black inequality, including JOHN WESLEY, THOUGHTS UPON SLAVERY 46-47 (1774) (“Certainly the African is in no respect inferior to the European.”); BENJAMIN RUSH, ADDRESS TO THE INHABITANTS OF THE BRITISH COLONIES IN AMERICA, UPON SLAVE-KEEPING 2 (1775) (“The accounts which travellers give us of [African’s] ingenuity, humanity, and strong attachment to their parents, relations, friends and country, show us that they are equal to the Europeans”):
naturally equal footing.\textsuperscript{140} “Hereditary tyrants,” stated an anonymous pamphlet, place whites on a pedestal with gods while they degrade another part of humanity and treat them like brutes.\textsuperscript{141} Before his nervous breakdown, in 1764, James Otis asserted that all colonists, both white and black, are born naturally free.\textsuperscript{142} He viewed the institution of slavery as a despoiler of civilization that prefers the interests of petty tyrants to the value of liberty.\textsuperscript{143} Citizens were of white, brown and black complexion, on all of whom the sun rose daily.\textsuperscript{144} The commerce in humans was against nature, wrote Abraham Booth, because everyone, whether African or European, has an “equal claim to personal liberty with any man upon earth.”\textsuperscript{145} Everyone, therefore, has a common stock of human rights.\textsuperscript{146}

Individual colonists, like General William Whipple, who served the nation from Portsmouth, New Hampshire, acted on the logic of natural rights. In 1777, Whipple’s slave said, “\textit{you are going to fight for your liberty, but I have none to fight for.}”\textsuperscript{147} These words cut Whipple to the quick, and he immediately freed the slave.

To many who fought in the late eighteenth century to attain American freedom, the end of slavery did not seem so many years away. Historian Winthrop D. Jordan has pointed out that in

\begin{quote}
\textit{Thomas Clarkson, An Essay on the Slavery and Commerce of the Human Species} 113 (1786) (“\textit{if [Africans] had the same expectations in life as other people, and the same opportunities of improvement, they would be equal, in all the various branches of science, to the Europeans, and that the argument that states them ‘to be inferiour link of the chain of nature, and designed for servitude,’ as far as it depends on the \textit{inferiority of their capacities} is wholly malevolent and false”).
\end{quote}

\textsuperscript{140} \textit{Anthony Benezet, A Short Account of That Part of Africa, Inhabited by the Negroes} 52 (1762).

\textsuperscript{141} \textit{A Letter from ***** in London . . . on the . . . Slave-Trade} 16 (1784) (“\textit{Yes gentlemen, men of liberal minds like yours, acknowledge all mankind to be their equals. Leave hereditary tyrants and their flatterers to make distinctions unknown to nature and to degrade one part of the species to brutes, while they equal the other with gods!”}).

\textsuperscript{142} \textit{James Otis, Rights of the British Colonies Asserted and Proved} 29 (1764).

\textsuperscript{143} \textit{James Otis, Rights of the British Colonies Asserted and Proved} 29 (1764).

\textsuperscript{144} \textit{James Otis, Considerations on Behalf of the Colonists} 30 (2d ed. 1765). In opposition to the Stamp Act, Otis wrote: “\textit{That I may not appear too paradoxical, I affirm, and that on the best information, the Sun rises and sets every day in the sight of five millions of his majesty’s American subjects, white, brown and black}.” \textit{Id.}

\textsuperscript{145} \textit{Abraham Booth, Commerce in the Human Species} 22 (1792).

\textsuperscript{146} \textit{Abraham Booth, Commerce in the Human Species} 22 (1792).

\textsuperscript{147} \textit{Charles W. Brewster, Rambles about Portsmouth} (1st series, 2d ed. 1873).
the years preceding the Revolution there was a general impression that slavery was a “communal sin.” Benjamin Rush noticed this tendency in a letter to Granville Sharp, a British abolitionist. “The cause of African freedom in America,” Rush wrote in 1774 “continues to gain ground.” He expected slavery in America to end within forty years. That view, however, wound up being overly optimistic. Another ninety years and Civil War would intervene before the Thirteenth Amendment’s ratification.

In spite of the widespread realization that slavery devalued the founders’ moral stance against England, abolition was so long in coming, in large part, because many colonialists were unwilling to place human rights above economic self-interest and unwilling to overcome, or even to adequately confront, their racial prejudices. Thomas Jefferson’s experience typifies the loss of liberal idealism. Writing during the heyday of American expectations, Jefferson had wanted to end the importation of slaves into the colonies and follow that with the “abolition of domestic slavery.” His original draft of the Declaration of Independence, accused King George of acting “against human nature itself” by keeping open an international slave trade which violated the “rights of life and liberty of persons of a distant people.” That same year, in 1776, Jefferson’s second and third drafts of the Virginia Constitution followed revolutionary logic and contained a provision that “No person hereafter coming into this country shall be held in slavery under any pretext whatever.” Thirty-eight years after independence, however, Jefferson had become complacent in the oppression that, by then, only a constitutional amendment could eliminate. In 1814, writing to Edward Coles, who later became the antislavery Governor of Illinois, Jefferson acknowledged that “the flame of liberty” that he had hoped would be kindled in the younger generation, leading to a popular movement against slavery, had not combusted. Jefferson’s


151 Thomas Jefferson, A Summary View of the Rights of British America 16 (1774).


153 1 The Papers of Thomas Jefferson 363 (Julian P. Boyd ed. 1950).

complacency with the plight of slaves, was stark. Despite his avowed disappointment at this revolutionary failing, Jefferson counseled Coles not to liberate his slaves.155

Even in 1776, when Jefferson had actively worked to end slave importation, most colonial leaders were unwilling to go that far. South Carolina, which would repeatedly appear as a leader of the antebellum proslavery camp, expressed its opposition to the draft Declaration’s original passage on slave importation, and it was not retained in the Declaration’s final draft.156

Even without the proposed anti-importation passage, the Declaration of Independence established liberty as a primary national aspiration.157 In the decades between the ratification of the country’s founding documents and the ratification of the Thirteenth Amendment, the Declaration’s universal guarantee of freedom posed a moral dilemma to politicians and citizens who tolerated and participated in an institution contrary to core national commitments. Its terms created for the founding generation the rhetorical dilemma of denying to persons of African descent the universal right of freedom.158

Legal restrictions on slave lives indicate how constricted the political norms of liberty and equality were for many colonists, most especially Southerners. Slave codes governed everything from matrimony and travel to living arrangements and leisure time. Penalties on intermarriage are a poignant example of how constrained black lives were. The end of slavery under the Thirteenth Amendment prohibited the arbitrary restriction on marriage since that had been

155 Letter from Thomas Jefferson to Edward Coles, Aug. 25, 1814, in 11 THE WORKS OF THOMAS JEFFERSON 416, 419 (Paul Leicester Ford, ed., 1905) (“But in the mean time are you right in abandoning this property, and your country with it? I think not. My opinion has ever been that, until more can be done for them, we should endeavor, with those whom fortune has thrown on our hands, to feed and clothe them well, protect them from all ill usage, require such reasonable labor only as is performed voluntarily by freemen, & led by no repugnancies [sic] to abdicate them, and our duties to them.”). For more on Jefferson’s racialism and devolution about the well-being of black slaves see DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 164-84 (1975); DUNCAN J. MACLEOD, SLAVERY, RACE & THE AMERICAN REVOLUTION 126-30 (1974); & WINThROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 430-36 (1968).


157 See JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 129 (2d ed. 1956) (“The implications of the Declaration, however vague, were so powerful that Southern slave owners found it desirable to deny the self-evident truths which it expounded and were willing to do battle with the abolitionists during the period of strain and stress over just what the Declaration meant with regard to society in nineteenth century America”).

158 See ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 43-44 (2002) (relating how ethnological rationalizations were used to support claims of black inferiority).
incident of servitude.\textsuperscript{159}

Laws prohibiting intermarriage and interracial sexual relations were enacted on the basis of a perverse stereotypes of black men and the objectification of black women.\textsuperscript{160} Laws punishing interracial sexual liaisons had existed in the North as early as the eighteenth century.\textsuperscript{161} Early colonial attitudes on the subject were made a part of a Massachusetts law from 1705-1706. Any blacks and whites who committed fornication together in the Province were to be punished by severe whipping, fining, and exclusion from public funding.\textsuperscript{162} The middle colony of Pennsylvania had a similar provision in a 1726 statute for “[b]etter regulating the Negroes in this province.”\textsuperscript{163} Men and women who cohabited in marriage with blacks would be fined and sold into servitude for up to seven years, the black spouse would be sold into lifelong slavery, and their children would be made servants until they turned thirty-one.\textsuperscript{164} Pennsylvania punished not only the offending couple, it also provided a fine against magistrates and clergy who presided over a mixed marriage.\textsuperscript{165}

The entire South also deemed intermarriages to be unlawful. Georgia granted courts the power to decide whether to fine or corporally punish white offenders.\textsuperscript{166} Maryland’s prohibition against intermarriage went back to the seventeenth century. The same 1664 law that codified hereditary servitude also provided that white women who “disgrace[d]” Maryland by intermarrying blacks did “great damage” to the master; therefore, the freeborn woman would become her husband’s master’s servant for life and the issue of that union would be slaves.\textsuperscript{167} By

\textsuperscript{159} For a detailed explanation of why arbitrary limitations on romantic relationships is an incident of servitude see Alexander Tsesis, \textit{Furthering American Freedom: Civil Rights & the Thirteenth Amendment}, 45 B.C. L. REV. 307, 372-73 (2004).

\textsuperscript{160} See \textsc{Peter Kolchin}, \textit{American Slavery}, 1619-1877, at 123-25 (concerning the sexual license and exploitation that bade under slavery). For insight into the white sexual exploitation and intimacy with blacks during the age of slavery see \textsc{Randall Kennedy}, \textit{Interracial Intimacies: Sex, Marriage, Identity, & Adoption} 41-69 (2003).

\textsuperscript{161} Winthrop D. Jordan, a historian, asserts that miscegenation was against the law in two northern and all plantation colonies. \textit{White over Black} 138 (1968).

\textsuperscript{162} 1 \textsc{Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay} 578-79 (1869)

\textsuperscript{163} 4 \textsc{The Statutes at Large of Pennsylvania} 62-63 (1897).

\textsuperscript{164} 4 \textsc{The Statutes at Large of Pennsylvania} 62-63 (1897).

\textsuperscript{165} The penalty amount was 100 pounds. 4 \textsc{The Statutes at Large of Pennsylvania} 62-63 (1897).

\textsuperscript{166} 1 \textsc{The Colonial Records of the State of Georgia} 56, 59-60 (Allen D. Candler compiler, 1904).

\textsuperscript{167} 1 \textsc{Archives of Maryland} 533-34 (William H. Browne ed., 1883).
1704, Maryland slightly ameliorated the punishment by providing a seven year term of servitude for any men or women who had children with black slaves. Colonial laws in Virginia and South Carolina likewise provided for terms of servitude for whites who had children from interracial unions. These laws illustrate the extent to which slavery impacted human lives. They help to understand the extent of the institution the Thirteenth Amendment ended. The Reconstruction Congress expected the Amendment to supercede all of slavocracy’s laws, not only to end forced labor.

Before the revolution, slavery was legal in all thirteen colonies. Yet some colonies had begun legislative efforts to end the institution. In 1774, the Continental Congress required that the importation of slaves cease after December 1, 1775. But the limited power the colonies granted to the Continental Congress made the body incapable of enforcing its decree. The 1787 Northwest Ordinance, though imperfect, was another nationwide effort against the spread of slavery to the West. Individual states in the North were also moving to put an end to slavery within their borders. Rhode Island, in 1774 restricted the slave trade, prefacing the law with, “those who are desirous of enjoying all the advantages of liberty themselves, should be willing to extend personal liberty to others.” Connecticut, that same year, passed, “An Act for prohibiting the Importation of Indian, Negro or Molatto Slaves.” The 1777 Vermont constitution explicitly outlawed slavery, and the New Hampshire Bill of Rights (1784) seems to have been the


175 A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT available at <http://www.yale.edu/lawweb/avalon/states/vt01.htm> (last visited June 19, 2004) (“THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one Years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are
primary legal impetus to ending slavery there. In Massachusetts, Chief Justice William Cushing for the Superior Court decreed slavery to be unconstitutional and against principles of natural rights since all men are born free and equal. Gradual emancipation plans were developed in Pennsylvania in 1780, Rhode Island and Connecticut in 1784, New York in 1799, and New Jersey in 1804.

These were only halting steps to making liberty universal; nevertheless, they were progressive enough to lead some contemporary observers to believe that soon after the Revolution slavery would no longer exist in America. All the Northern and middle states, where in 1830 less than 3,000 blacks remained enslaved compared to their 125,000 free blacks, had realized the incompatibility of slavery and American liberty principles. The social forces that acted against the anomaly of slavery joined in a dispute that only ended with the cessation of belligerence of the Civil War and the ratification of the Thirteenth Amendment. The colonists had, however, failed their ideals by placating Southern interests which were unwilling to ratify the Constitution without constitutional protections for slavery.

III. Constitutional Failure of Revolutionary Ideals

The hopes of a liberal equality that the Declaration of Independence sparked did not make its way into the Constitution until the ratification of the Thirteenth Amendment. There were, of course, positive signs immediately after the Revolution. Northerner laws abolishing slavery bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.”).

176 N.H. BILL OF RIGHTS art. 2 available at <http://www.state.nh.us/constitution/billofrights.html> (last visited June 19, 2004) (“All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”).


178 See, e.g., 10 Records of the State of Rhode Island and Providence Plantations in New England 132 (1865) (“every negro or mulatto child born after the first day of March, A.D. 1784, be supported and maintained by the owner of the mother of such child, to the age of twenty-one years, provided the owner of the mother shall during that time hold her as a slave; or otherwise, upon the manumission of such mother”). Lois E. Horton, From Class to Rae in Early America: Northern Post-Emancipation Racial Reconstruction, 19 J. Early Republic 629, 639 (1999); J. Franklin Jameson, The American Revolution Considered As A Social Movement 25 (1926).

moved the country in the direction of a constitutional republic. The antislavery temperament of the revolutionary age, with its emphasis on liberty, did not translate into universal or national prohibitions against the institution. To the contrary, many clauses in the Constitution were left ambiguous enough to protect slavery in those states where it remained legal.

Despite the public outcry against slavery, the Philadelphia Constitutional Convention of 1787 drafted an instrument more ameliorative to the economic interests of southern states than it was principled. The founders thereby secured Union, but at the cost of not ending the organized tyranny of chattel servitude. Their commitment to the protection of personal property overshadowed their hatred for slavery. The drafters of Constitution created an instrument whose propertied biases would later catapult the nation into a civil war that would make clear the divisiveness and non-compatibility of slavery to a constitutional republic.

South Carolina and Georgia delegates, at the 1787 Convention, demanded that the Constitution include protections for slavery. Gaining their votes, came at the cost of throwing over the Declaration of Independence’s universal values and taking on a national recognition of slavery as a form of property. The Constitution’s protections for the institution created a sectional rift on slavery that would lead the country into numerous internal conflicts. Even those Northern and Upper Southern delegates who had sought an immediate cessation of the slave trade gave in to the Deep South’s demands.

To their credit, the founders provided avenues for formal political change, including a method for proposing and amending the Constitution with Article V, which Radical Republicans later used to nullify the proslavery sections. However, the founders did little to alter oligarchical social relations that existed in their own time, granting a disproportionate amount of power to slave owners, rather than immediately producing the representative democracy that the Declaration heralded.

The Framers lack of concern for the human rights of slaves was reflected in numerous

\[\text{180 See supra text accompanying notes ------.}\]

\[\text{181 For a synopsis of the political compromises that made way for constitutional clauses protecting slavery see CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 140-50 (1988).}\]

\[\text{182 See HENRY H. SIMMS, A DECADE OF SECTIONAL CONTROVERSY, 1851-1861, at 33-34 (Greenwood Press 1978) (1942) (concerning Georgia’s and South Carolina’s objection to giving Congress power over slave commerce).}\]

\[\text{183 Beginning with the Missouri Compromise (1820), through the South Carolina Nullification Crises in Jacksonian America (1833), the Compromise of 1850, the Kansas-Nebraska controversy (1852-1854), and onto secession (1860) and Civil War (1861) all internal conflicts centered on slavery. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT & AMERICAN FREEDOM 23-33 (2004).}\]

\[\text{184 FREEHLING, supra note ------, at 14, 16-18 (claiming that the American Revolutionists intended a political but not a social revolution).}\]
constitutional clauses. The constitutional concessions to slavocracy were so extensive that the Thirteenth Amendment profoundly altered United States laws and society.185 The original Constitution was marked by a glaring contradiction—it was drafted waveringly enough to protect liberty and slavery.

Even though the Constitution did not use the terms “slave” or “slavery,” it contained numerous protections for the South’s peculiar institution. The clauses that legalized slavery used euphemisms to refer to bondsmen—the terms “person held to Service or Labour,” “such persons,” and “other persons” had clear referents—which made constitutional passage less contentious and alteration easier.

The Importation Clause, which prohibited Congress from abolishing the international slave trade for twenty years after state ratification of the Constitution,186 was a most obvious accommodation to oppression. This provision was so important to South Carolina and Georgia, Charles Cotesworth Pinckney declared, because, without the resupply of fresh slaves, those states could not be economically competitive.187 Achieving equality, for Pinckney, meant no more than establishing a confederation that gave each state commercial advantage for economic gain.188 Jonathan Rutledge, also of South Carolina, seconded Pinckney’s adamance to retain the Importation Clause in the final draft.189

The Importation Clause limited Congress’s authority to levying a ten-dollar head tax for each imported slave. Such a deviation from the republican ideals of a free society, to which Americans had otherwise committed themselves, was illogical and lead apologists of the incongruity to absurd rationales. A landholder, Oliver Ellsworth, in December 1787 claimed that the Constitutional Convention adopted the Importation Clause as the best means for future abolition.190

Even though some politicians opposed ratification, their stance against sanctioning slave importation, was often based on economic calculations rather than moral convictions. The best

185 Historian Jack Rakove recently questioned whether the constitutional concessions to South Carolina and Georgia were more extensive than was necessary to bring them into the Union, since those states had a significant interest in joining it. ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 58, 73-74, 93 (1996).


187 2 THE RECORDS OF THE FEDERAL CONVENTION ON 1787, at 371 (Max Farrand ed., 1911) (“S. Carolina & Georgia cannot do without slaves. As to Virginia she will gain by stopping the importations. Her slaves will rise in value, & she has more than she wants.”).

188 2 THE RECORDS OF THE FEDERAL CONVENTION ON 1787, at 371 (Max Farrand ed., 1911) (“It would be unequal to require S. C. & Georgia to confederate on such unequal terms.”).


known politician in this group was George Mason. He argued for ending slave importation and indicted slavery, as a whole, for harming both white migration and slaves’ creative impulses. Despite Mason’s attestations, his sincerity was dubious since he owned approximately three hundred slaves. This discrepancy between pronouncement and action, Ellsworth argued, indicated that Mason’s objection to the Importation Clause was based on his interest in maintaining high prices for slaves sold through the domestic slave market in Virginia, which the importation of Africans was likely to depress.

Not all opponents of the slave trade were so calculating. Many antifederalists genuinely sought to prevent the Constitution’s ratification because it would sanction the international trade in human cargo. One tract drew empathic attention to the plight of kidnapped Africans. What man, rhetorically asked the tract, would allow sons and daughters to be torn from him and doomed to hereditary slavery? The argument gave no credence to the claim that the importation of slaves was critical to Georgia and South Carolina to recoup the property losses of their residents during the War of Independence. No person could be the property of another since each was the proprietor of himself; therefore, no one had any basis for claiming compensation for the loss of slaves. Joshua Altherton, in New Hampshire, proclaimed that having the Importation Clause in the Constitution would make all states “consenters to, and partakers in, the sin and guilt of this abominable traffic.” Continuation of slave trade was in fact not exclusively the South’s fault. New Englanders and New Yorkers continued to participate in the shipping ventures across the Atlantic.


The Thirteenth Amendment was essential for ending slave importation in the United States. The Slave Importation Clause was no prohibition to the trade; it simply made the commerce immune until 1808 from congressional action. Article 5 even prohibited Congress was amending the Slave Importation Clause. After 1808, there was still a clamor reinstating the slave trade. Even though Congress passed laws in 1818 and 1820 that severely punished participants of the slave trade, calls for reopening the trade continued until the Civil War. At that time, supporters of the slave trade, particularly those from South Carolina and Louisiana, sought to decrease slave prices by flooding the market and thereby reducing the costs associated with labor. Only a constitutional abolition of slavery could conclusively put an end to the trade in human chattel.

The Three-Fifths Clause was more politically significant than the Importation Clause. Southerners relied on it from the first national election to gain disproportionate federal power. By 1803, the South had three more representatives in Congress and twenty-one more electoral college votes than the North, and this even though New York and New England had some sixty thousand more free inhabitants than the entire South. Southern gains through the Louisiana purchase further increased this imbalance. The representative majority favored slavery. It gave Southerners and their allies the power to offer proslavery bills for congressional debate and the numbers to enact them into law.

The Three-Fifths Clause also affected executive office. Paul Finkelman has pointed out


200 See Harvey Wish, The Revival of the African Slave Trade In the United States, 1856-1860, 27 MISS. VALLEY HIST. REV. 569, 569, 572 (1941) (discussing how in the years immediately preceding the Civil War powerful forces, particularly in Louisiana, South Carolina, and Georgia, were on the verge of reopening the slave trade to gain more laborers).

201 U.S. CONST. art. I, § 2, cl. 3.

202 See Michael Kent Curtis, A Story For All Seasons: Akhil Reed Amar on the Bill of Rights, 8 WM. & MARY BILL RTS. J. 437, 453 (2000) (book review) (explaining that the Three-Fifths Clause was meant to give the South a disproportionate representation in the House of Representatives); Ruth Colker, The Supreme Court’s Historical Errors In City of Boerne v. Flores, 43 B.C. L. REV. 783, 795 (2002) (explaining that the ratification of the Thirteenth Amendment increased Northern representation because it repealed the Three-Fifths Clause).

203 Forrest McDonald, States' Rights and the Union 60 (2000).

204 Forrest McDonald, States' Rights and the Union 60 (2000).
that Clause impacted presidential elections. Article II, section 1, clause 2 granted each state presidential electors whose number was equal to the states’ combined number of senators and representatives.\textsuperscript{205} The electors, who compose the body that votes for the president, played a consequential role in placing slaveholders rather than principled anti-slavery advocates into the executive branch, as happened in 1800 when Thomas Jefferson defeated John Adams for the presidency,\textsuperscript{206} and in seating Northerners willing to placate the slave South, as was the case with James Buchanan’s victory in 1856 over the Republican candidate.

Records of the Constitutional Convention reveal little opposition to the Three-Fifths Clause, indicating that the Thirteenth Amendment founders had a more inclusive vision of freedom than their revolutionary counterparts.

Southern delegates had wanted an even more favorable constitutional provision than the Three-Fifths Clause but were unable to muster the votes to get it. Pinckney and Pierce Butler, who both represented South Carolina, sought to count blacks and whites equally for representation,\textsuperscript{207} while granting them no opportunity for political participation. North Carolina delegate William R. Davie held equally strong convictions. He asserted that North Carolina “would never confederate on any terms” unless at least the three-fifths formula was adopted.\textsuperscript{208} Speaking on behalf of Virginia, Governor Edmund J. Randolph chimed in for the adoption of the Clause as a means of protecting slave property.\textsuperscript{209}

In opposition to the strong-arm tactics of the Deep South, James Wilson of Pennsylvania pointed out the absurdity of designating slaves property but using no other chattel but human chattel for representation.\textsuperscript{210} Another Pennsylvania representative, Gouverneur Morris, was more acerbic in his criticism. He refused to encourage those who profited from the slave trade “by allowing them a representation for their Negroses.”\textsuperscript{211} Relying on natural rights principles, he reeled at the idea that any “inhabitant of Georgia and S.C. who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and dam[n]s them to the most cruel bondages, shall have more votes in a Govt. Instituted for protection of the rights of mankind, than the citizens of Pa or N. Jersey who views with a laudable horror, so nefarious a practice.”\textsuperscript{212} He regarded slavery as a vestige of aristocracy


\textsuperscript{206} \textit{Id.}

\textsuperscript{207} 1 FARRAND ED., RECORDS, supra note --------, at 580.

\textsuperscript{208} 1 FARRAND ED., RECORDS, supra note --------, at 593.

\textsuperscript{209} 1 FARRAND ED., RECORDS, supra note --------, at 594.

\textsuperscript{210} 1 FARRAND ED., RECORDS, supra note --------, at 587-88.

\textsuperscript{211} 1 FARRAND ED., RECORDS, supra note --------, at 587-88.

\textsuperscript{212} 2 FARRAND ED., RECORDS, supra note --------, at 222.
that the proposed Clause would require the North to defend militarily.\footnote{213}{2 FARRAND ED., RECORDS, supra note ---------, at 222.}

No other Northern delegate was as principled as Morrison. Most favored unification to disunion and saw concession to slave power as a necessary means of gaining Southern concessions. Roger Sherman of Connecticut, for instance, considered the slave trade “iniquitous” but refused to vote against the passage of the Three-Fifths Clause into the proposed constitution.\footnote{214}{2 FARRAND ED., RECORDS, supra note ---------, at 220-21.}

Other constitutional provisions guarded slave owners against recalcitrant slaves and required federal involvement in maintaining the peculiar institution. The Insurrection Clause\footnote{215}{U.S. CONST. art. I, § 8 cl. 15.} gave Congress power to call up the militia to suppress revolts, including slave rebellions such as the Nat Turner Rebellion. Another constitutional provision, The Fugitive Slave Clause, made “the whole land one vast hunting ground for men,” making felons out of persons who broke the fetters of slavery.\footnote{216}{Frederick Douglass, The Constitution & Slavery, in 1 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (Philip S. Foner ed., 1950) (first published in The North Star, Mar. 16, 1849).} There was not a single dissenting vote to protest passage of the Fugitive Slave Clause. Before the Thirteenth Amendment was ratified, it required that fugitives be returned “on demand” and prohibited free states from liberating them.\footnote{217}{See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).} The amendment provision in Article V required two-thirds of both congressional houses to propose the amendment and three-fourths of state legislatures or conventions to ratify it. This made the passage of an anti-slavery amendment wholly impossible in the United States before the Civil War, since, in 1860, slavery was legal in fifteen of the thirty-three states then in the Union.\footnote{218}{In 1860, there were fifteen slave states and eighteen free states. Robert R. Russel, The General Effects of Slavery Upon Southern Economic Progress, 4 J. S. HIST. 34, 40 (1938); Paul Finkelman, The Centrality of the Peculiar Institution in American Legal Development, 68 CHI.-KENT L. REV. 1009, 1024 (1993). See also Samuel Marcosson, Colorizing the Constitution of Originalism: Clarence Thomas At the Rubicon, 16 L. & INEQ. 429, 469 (1998) (arguing that Art. V can be viewed as “the Framers’ insurance policy against the possibility that then-excluded groups, including women, blacks and free blacks, could one day change the power structure the Founders had erected without regard for the needs, views, and priorities of the members of those groups”).}
such as the Insurrection Clause, to exclude their original design. The Thirteenth Amendment further relied on the abolitionist conviction that the Declaration of Independence guaranteed universal human rights to citizens, regardless of their race.

IV. Abolitionist Influences

Those abolitionists who called for the immediate end to chattel slavery traced their notions of liberty to revolutionary ideology on fundamental rights. Abolitionists drew their ideas from revolutionaries who, like Benjamin Rush and James Otis, argued that blacks deserve the same privileges and immunities as any other American. As early as 1833, at the inception of the radical abolitionist movement, the American Anti-Slavery Society announced its affinity for the founders’ ideals but renounced their political enterprise because of the concessions to slavery. The Society considered the grievances of constitutional fathers to be trifling when compared to those of enslaved victims. Radical Republicans eventually incorporated abolitionist natural rights rhetoric into the Thirteenth Amendment and gave Congress the power, through the enforcement clause, to pass any laws necessary for the protection of equal liberty.

A. Abolitionist Views on Liberty

The Thirteenth Amendment’s founders, just as abolitionists, whether they were radical constitutionalists and Garrisonians, traced their campaign against slavery to the colonial struggle for independence. Garrison, a prolific, radical abolitionist, regarded immediate abolition


221 See William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760-1848, at 274-75 (1977) (explaining that radical constitutionalism influenced the natural rights theory that Republicans eventually made part of their constitutional agenda).

222 Both of these groups called for an immediate end to slavery. They differed in their views of the original Constitution. Radical constitutionalists believed that the Constitution forbade slavery and the Garrisonians believed that it legitimizes slavery. Radical constitutionalists, such as Lysander Spooner, Frederick Douglass, and Charles Sumner, argued that, read correctly, the Fifth Amendment required immediate abolition. See Timothy Sandefur, Liberal Originalism: A Past for the Future, 27 HARV. J.L. & PUB. POL‘Y 489, 498 (2004). William Lloyd Garrison, on the other hand, considered the Constitution the covenant with death. Resolution Adopted by the Antislavery Society, Jan. 27, 1843, quoted in Walter M. Merrill, Against Wind and Tide: A Biography of Wm. Lloyd Garrison 205 (1963).
to be implicit in the self-evident truths of the Declaration of Independence. He and other nineteenth-century abolitionists relied on the Declaration for developing a republican agenda of national reform.

The exploitation of slaves, as they saw it, violated Congress’s obligation under the General Welfare Clause to act for the betterment of all United States citizens. Slavery, so ran this rather utilitarian argument, violated the Preamble’s declared purpose to promote the general welfare by securing the blessings of liberty. The national government violated its constitutional obligation to institute impartial laws for the general welfare by its failure to stop the exploitation of hundreds of thousands of laborers. Radical abolitionists recognized the nation’s founders had “separated from the mother country” and had declared independence in order to resist “the attempt of Great Britain to impose on them a political slavery.” Slavery was incompatible with the goals of the Revolution and with the founders’ statement of them in the Declaration.

Many abolitionists regarded the Declaration as a statement of congressional obligation to protect natural rights against arbitrary exploitation. The abolitionists adopted the creed that natural rights were intrinsic to citizenship. And citizenship to them was the birthright of all those alive in the United States at the time of the revolution and all those who had thereafter been born in the United States. Their political rhetoric extolled the American project to protect human rights. Natural rights, argued numerous abolitionist publications, are intrinsic to individuals and precede society. Civil societies, explained Unitarian abolitionist William E. Channing, are organized to protect those rights.

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223 See William L. Garrison, An Address Delivered before the Old Colony Anti-Slavery Society, at South Scituate, Mass., July 4, 1839, at 17 (1839) (“if we advocate gradual abolition, we shall perpetuate what we aim to destroy, and proclaim that the self-evident truths of the Declaration of Independence are self-evident lies”).

224 See, e.g., George W. F. Mellen, An Argument on the Unconstitutionality of Slavery 62 (1841) (asserting that the United states compact “is a declaration before the world, and this nation has committed itself, that this country shall be ruled by impartial laws, and that the congress of the United States shall consult in all things the general welfare of the people”).

225 An example of this line of reasoning is found in Charles Olcott, Two Lectures on Slavery and Abolition 88 (1838). Olcott considered slavery to be against “the whole spirit” of the Preamble. Id.

226 George W. F. Mellen, An Argument on the Unconstitutionality of Slavery 55, 63 (1841).

227 See Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery 91, 93 (1849).

228 William E. Channing, Slavery 21 (Edward C. Osborn: reprint 1836). Channing, as other abolitionists, was philosophically inclined to the views of John Locke. See Jacobus Tenbroek, Equal Under Law 94 (Collier Books 1965) (1951) (writing that the abolitionist
Many members of the Reconstruction Congress later expressed a similar perspective of fundamental rights during debates on the proposed Thirteenth Amendment.\textsuperscript{229} Slavery was the deprivation of those rights, and, following the ratification of the Thirteenth Amendment, Congress could provide redress against intrusions on civil liberties. Reconstructions based their understanding of freedom, in large part, on abolitionist views.

For the Reconstruction Congress as for abolitionists, slavery was the worst of all robberies because it misappropriated people’s toils, talents, and strengths.\textsuperscript{230} Not only did slavery infringe on people’s vocational choices; it also deprived them of their right to transit, fair trial, and bodily integrity.\textsuperscript{231} The right to own and alienate property was likewise essential to human happiness, and the ownership of humans went against common, human nature.\textsuperscript{232} Slavery also prevented people in bondage from entering into binding agreements. According to some antislavery advocates, such as Lysander Spooner, even without an abolition amendment, the Contract Clause of the original Constitution prohibited states from passing slave codes because constitutionalism was based on Lockeian and Jeffersonian principles. Abolitionists also relied on religious convictions. See Declaration of Sentiments of the American Anti-Slavery Society in Philadelphia, 1833, available at \textless http://www.civnet.org/resources/teach/basic/part4/18.ht\textgreater  (last visited May 25, 2004) (“all those laws which are now in force, admitting the right of slavery, are therefore, before God, utterly null and void; being an audacious usurpation of the Divine prerogative, a daring infringement on the law of nature, a base overthrow of the very foundations of the social compact, a complete extinction of all the relations, endearments and obligations of mankind, and a presumptuous transgression of all the holy commandments; and that therefore they ought instantly to be abrogated”).


\textsuperscript{230} WILLIAM E. CHANNING, SLAVERY 30-31 (Edward C. Osborn: reprint 1836).

\textsuperscript{231} RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860, at 197 (1949) (discussing an abolitionist concept of rights in the context of the movement against fugitive slave law).

\textsuperscript{232} See Brougham, The Liberator, Jan. 22, 1831, LIBERATOR, at 13, cl. 1 (“talk not of property of the planter in his slaves . . . The principles, the feelings of our common nature, rise in rebellion against it”); American Anti-Slavery Society, Declaration of the Anti Slavery Convention, Dec. 4, 1833, PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA 12, 14 (1833) (“man cannot hold property in man”). Abolitionists, like those in Oberlin College and the Noyes Academy, wanted nothing less than to enable blacks to become educated and prosperous. SAMUEL J. MAY, SOME RECOLLECTIONS OF OUR ANTI-SLAVERY CONFLICT 29 (1869).
they infringed on the natural right to contract.\textsuperscript{233}

Slavery withheld inalienable rights, which are common to all persons.\textsuperscript{234} Theodore Parker and other abolitionist authors located the right to live a free and happy life in the Declaration of Independence and in the Preamble.\textsuperscript{235} That right, and any of complementary inalienable rights, was guaranteed equally for all, regardless of their race.\textsuperscript{236} The national government’s obligation to abolition slavery required that it pass laws providing for an equality of “civil and political rights and privileges.”\textsuperscript{237}

The existence of a United States covenant to protect equal rights was quintessential to abolitionist understanding of national government. The Declaration, especially, was the cornerstone of the “temple of freedom” for which “[a]t the sound of their trumpet-call, three millions of people rose up as from the sleep of death, and rushed to the strife of blood; deeming it more glorious to die instantly as freemen, than desirable to live an hour as slaves.”\textsuperscript{238} When the revolutionary generation denied to Great Britain the right and power to violate the colonists’ privilege to enjoy their natural rights, that generation, according to constitutional attorney Joel Tiffany, precluded their newly formed government to countenance enslavement.\textsuperscript{239}

Abolitionist belief that the Declaration was a fundamental law of the United States overlooked that documents lack of enforcement provision.\textsuperscript{240} The Enforcement clause of the Thirteenth Amendment would eventually fill that deficiency.

To radical constitutionalists, who disagreed with the radical abolitionist indictment of the original Constitution, it appeared that some constitutional provisions did prohibit slavery.

\textsuperscript{233} LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 98-99 (1845).

\textsuperscript{234} Principles of the Anti-Slavery Society, in THE AMERICAN ANTI-SLAVERY ALMANAC 30-31 (1837 ed.) (“It is for the rights of MAN that we are contending—the rights of ALL men—our own rights—the rights of our neighbor—the liberties of our country—of our posterity—of our fellow men—of all nations, and of all future generations.”).

\textsuperscript{235} See Theodore Parker, The Dangers from Slavery (July 2, 1854), in 4 OLD SOUTH LEAFLETS 1-3 (1897).

\textsuperscript{236} See WILLIAM GOODELL, ADDRESS OF THE MACEDON CONVENTION 3 (1847).


\textsuperscript{238} American Anti-Slavery Society, Declaration of the Anti Slavery Convention, Dec. 4, 1833, PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA 12, 12 (1833).

\textsuperscript{239} JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 29 (1849).

Primarily, they relied on the Guarantee Clause to assert the United States obligation to protect the life, liberty, and property of all persons born within any States. For them, a government that countenance slavery in any state was succumbing to an oligarchy of arbitrary disenfranchisement and enslavement, neither of which were compatible with a republican form of government. The social order of owning slaves was incompatible with a polity committed to the protection of civil liberties through representation. Slavery was analogous to the despotism against which the colonies rebelled. Slavocracy was conducive to a concentration of power that can harm basic liberties.

B. Abolitionist Influence on Thirteenth Amendment Debates

Abolitionists deeply influenced Reconstruction Republican thought. Several of the principal congressional leaders during the Thirteenth Amendment debates had long been committed to abolitionism. Representative Thaddeus Stevens, had actively participated in abolitionism from his early years when he represented fugitive slaves for free. He entered politics in 1849, at age fifty-seven, in response to the agitation over slavery after the cession of Mexican lands. Stevens was the chairman of the powerful Committee on the Ways and Means during the debates on the Thirteenth Amendment and, later, the Committee on Appropriations during the debates on the Civil Rights Act of 1866.

Senator Charles Sumner was another early convert to abolitionism. Sumner’s convictions against slavery were born of his experience with its unyielding practices and ideology. He had been an involved abolitionist since 1835, when he first subscribed to Garrison’s Liberator. Sumner was the chairman of the Committee on Foreign Relations throughout the debates on the Thirteenth Amendment and on the Civil Rights Act of 1866.

241 See, e.g., Alvan Stewart, Argument, on the Question Whether the New Constitution of 1844 Abolished Slavery in New Jersey, in WRITINGS & SPEECHES OF ALVAN STEWART, ON SLAVERY 272, 336-37 (Luther R. Marsh ed., 1860) (“a republican form of government was born free and equal, and entitled to life, liberty, and the pursuit of happiness. This, we knew, would by force of this provision in the constitution of the United States, if faithfully honored, blot out slavery from every State constitution”).

242 See LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 106 (1845).

243 For a more detailed discussion of this point see DANIEL J. McINERNEY, THE FORTUNATE HEIRS OF FREEDOM: ABOLITION & REPUBLICAN THOUGHT 16-17 (1994).

244 JAMES F. RHODES, 5 HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850, 541-44 (1904); 1 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD WITH A REVIEW OF THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860, at 25 (1884); WILLIAM L. RICHTER, AMERICAN RECONSTRUCTION, 1862-1877, at 371-72 (1996).

245 1 JAMES F. RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE FINAL RESTORATION OF HOME RULE AT THE SOUTH IN 1877, 227-28 (1892).
Both Stevens and Sumner brought the natural rights tradition to the debates on the Thirteenth Amendment and made those principles a part of the Constitution. Sumner’s arguments against passage of the Kansas-Nebraska bill were representative of the ideas he continued to espouse during the debates on the Thirteenth Amendment. “Slavery,” he stated in one speech, “is an infraction of the immutable law of nature, and, as such, cannot be considered a natural incident to any sovereignty, especially in a country which has solemnly declared, in its Declaration of Independence, the inalienable right of all men to life, liberty, and the pursuit of happiness.”

During the Civil War, many Republicans adopted radical abolitionist principles about the federal government’s obligation to eradicate slavery. The Thirteenth Amendment’s grant of power to Congress over matters resembling the incidents of servitude signaled a break from moderate anti-slavery leanings. Moderates wanted states to gradually and separately end slavery. For a short time, at the end of the Civil War, a radical form of abolitionism held the reins of Congress.

President Lincoln, abandoned gradualism by 1863 and eventually supported immediate abolition through the Thirteenth Amendment. He had embraced natural rights philosophy years before he sat in the oval office. Lincoln believed that the Declaration’s guarantees applied equally to whites and blacks. He asserted that blacks were never meant to be excluded from the human rights guarantees of the Declaration.

The Declaration’s recognition that “all men are created equal” influenced a generation of Republicans, who like Lincoln, played vital roles in passing the proposed Thirteenth Amendment

246 CONG. GLOBE, 33rd Cong., 1st Sess., Appendix 268 (Feb. 24, 1854).


248 See text accompanying notes ----- {dealing with Radical leadership in the 38th Congress}.

249 See supra text accompanying notes ----.


252 Speech at New Haven, Conn., in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 16-17 (Roy P. Basler et al. ed., 1953) (Mar. 6, 1860) (“To us it appears natural to think that slaves are human beings; men, not property; that some of the things, at least, stated about men in the Declaration of Independence apply to them as well as to us.”)
through Congress. They intended the Thirteenth Amendment to protect the self-evident natural rights to which the Declaration had committed national government. This perspective appears repeatedly in the Congressional debates on the proposed Amendment.

A Representative, who advocated passage of the Amendment, regarded it as the legal means for ending a variety of injustices connected to slavery:

What vested rights so high or so sacred as a man’s right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother-man?”

253

Slavery violated principles of the American Revolution that sparked opposition to British infringement on American civil liberties. Within this national history, the Thirteenth Amendment brought the Constitution, which originally protected the institution of slavery, into harmony with the Declaration of Independence. 254 As Charles Black pointed out, “The thirteenth amendment had lain latent in the Declaration of Independence. . . . The generation that abolished slavery made such a choice, as to the matter wherein the hypocrisy of the Declaration had seemed most startling. But the Declaration of Independence is still here.” 255 Radical Republicans, pursuant to their abolitionist roots, altered the Constitution to reflect the practical implications of Revolutionary ideology.

The Thirteenth Amendment provides an enforceable right for the protection of those civil liberties that until its ratification had been valued but not implemented. The Amendment allows Congress to secure liberty, life, and the pursuit of happiness through positive laws. 256

The Declaration could only provide an inspirational token for abolitionists and Reconstructionists since it did not end slavery and lacked any legal authority to require its constitutional protection. 257 The Thirteenth Amendment’s enforcement clause became the

253 CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (Representative Farnsworth).


256 See CONG. GLOBE, 38th Cong., 1st Sess. 142 (Jan. 8, 1864) (Godlove S. Orth of Indiana).

257 The remark of Alvan Stewart, an antislavery attorney, on the Declaration is revealing of its limited power to alter the status of slavery. His remarks warrant extensive reproduction: “The Declaration is a summary of colonial and personal injustice. The sword in seven years cut loose the colonies from their bondage. The dismemberment was ratified. Our country took her seat at the council board of nations. The young Sovereignty limped up into the temple of nations, with the Declaration of Independence spread, in her right hand, with a whip and fetter in her left,
constitutional vehicle for ending any vestiges of slavery and involuntary servitude. More importantly from a contemporary perspective, the Thirteenth Amendment was the establishment of a positive guarantee of freedom into the Constitution. Without the power granted under the Thirteenth Amendment, Stevens believed the Constitution had protected slavery and had not granted the federal government the power to regulate it.258

Behind its enforceable provisions lies the national commitment to secure personal autonomy as the best path to civil welfare. Progressive advocates of the first reconstruction amendment made an earnest effort to remove impediments standing in the way of civil rights. They regarded the Thirteenth Amendment as a means of restoring the natural rights long denied to blacks in particular and wage earners in general. According to Radical Republicans, former slaves were not only freed from bondage, they also obtained the right to make fundamental choices regarding matters affecting their jobs and families. Congressman M. Russell Thayer of Pennsylvania expressed the same point in general, rhetorical terms: “What kind of freedom is that which is given by the amendment of the Constitution, and if it is confined simply to the exemption of the freedom from sale and barter? Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature?”259

Radical Republicans relied on the Declaration of Independence to elucidate the proposed amendment. Representative Godlove S. Orth from Indiana expected the Amendment to “be a practical application of that self-evident truth,” of the Declaration “that [all men] are endowed by their creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.”260 Its more progressive advocates made an “earnest effort” to remove impediments standing in the way of human rights.261 Francis W. Kellogg, Representative of Michigan, traced the sources of the proposed amendment both to the Declaration and to the Constitution’s Preamble, with its requirement that government promote the general welfare and secure liberty.262 Illinois Representative Ebon C. Ingersoll, who was elected to the Thirty-eighth Congress to fill the vacancy created by the death of legendary abolitionist Owen Lovejoy, voiced the desire to secure slaves “natural” and “inalienable” rights because blacks have a right to “live

followed by a slave, while the blush mantled on her cheek, and revealed the struggles of her shame; and what she lacked in the sincerity of intent, she contrived to countervail by a certain impudence pretence—and what she lost by force of position, she would fain make up, by the ingenuity of her abstractions. Theoretically, the relation of slave and master, king and people, was dissolved.” Letter from Alvan Stewart to Dr. [Gamaliel] Bailey, Apr. 1842, in WRITINGS & SPEECHES OF ALVAN STEWART, ON SLAVERY 250-51 (Luther R. Marsh ed., 1860).

258 See CONG. GLOBE, 38th Cong., 2d Sess. 265 (Jan. 13, 1865).

259 CONG. GLOBE, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866).

260 CONG. GLOBE, 38th Cong., 2d Sess. 142 (January 6, 1865).


262 Id., 38th Cong., 1st Sess. 2955 (June 14, 1864).
in a state of freedom."  He asserted that they have a right to profit from their labors and to enjoy conjugal happiness without fear of forced separations at the behest of uncompassionate masters.

Representative Thomas T. Davis of New York similarly expounded on the nature of civil liberty: “Liberty, that civil and religious liberty which was so clearly beautifully defined in the Declaration of Independence. . . . African slavery was regarded as temporary in its character. . . . Our fathers predicted that the time would soon come when the interests of the country would demand that slavery should pass away.” Representative John F. Farnsworth of Illinois thought the “old fathers who made the Constitution . . . . believed that slavery was at war with the rights of human nature”; on the other hand, Representative William D. Kelly of Pennsylvania thought the “errors” of the Founding Fathers for compromising with wrongs were being expiated by blood and agony and death.

The Thirty-eighth Congress expected the Thirteenth Amendment to provide national government with the power to protect fundamental civil liberties. The Amendment’s second section placed the power to protect civil rights in the hands of federal legislators, shifting the balance of power away from the states. Yet the Supreme Court decisions that followed Reconstruction made the Amendment virtually ineffectual, and it was only at the end of the twentieth century that the Court corrected itself.

V. The Judiciary on Freedom from Slavery

Abolitionist and revolutionary notions of freedom and slavery have informed contemporary Thirteenth Amendment jurisprudence. The Court’s holdings manifest how the judiciary can be carried with the prejudices and aspirations of its times. Its earliest post-Reconstruction decisions prevented the full implementation of abolitionist ideals, and only the Civil Rights movement of the 1960's led to an understanding of liberty approaching that of the revolutionary generation. The Warren and Burger Courts’ holdings about the Abolition Amendment rejected the racially insular concept of liberty that became a part of the 1787 Constitution and led to a civil war over slavery.

A. The Civil Rights Act of 1866

Soon after ratification of the Thirteenth Amendment, cases involving the interpretation of the Civil Rights Act of 1866, which Congress passed pursuant to its enforcement authority,

263 Id., 38th Cong., 1st Sess. 2990 (June 15, 1864).

264 Id.

265 CONG. GLOBE, 38th Cong., 2d Sess. 154. Likewise during the Senate debate Reverdy Johnson, who had represented one of Dred Scott’s owners, argued that had the framer’s known how much sectional strife would result from slavery they would have opposed it. N.Y. TIMES, Apr. 6, 1864, at 1.

266 CONG. GLOBE, 38th Cong., 1st Sess. 2978 (June 15, 1864).
began to proceed through the courts.\textsuperscript{267} Surveying the legislative history of this statute is critical for evaluating the Supreme Court cases that later interpreted it.

During debates preceding the Act’s passage, congressmen continued to rely on the same radical abolitionist conception of fundamental rights that they had relied on the year before in passing the Thirteenth Amendment. They regarded the protection of civil rights to be a primary purpose of government. The Act reflects Congress’s commitment to legal protection for blacks that would do more than merely unshackle them from their master control. It explicitly prohibited violations against civil rights, such as the right of contracting.\textsuperscript{268}

What’s more, Congress meant to make freedom universal. The Act was primarily intended to end injustices against blacks, but it likewise protected the rights of all citizens, regardless of their race.\textsuperscript{269} The universal rights, Senator Sherman explained contained the real enjoyment of liberty, not merely the emancipation of slaves, “the right to testify [is] . . . an inevitable incident of liberty, without which liberty would be but a name . . . . We should secure to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of free men.”\textsuperscript{270}

\textsuperscript{267} The Reconstruction Congress enacted four statutes pursuant to its Thirteenth Amendment power, even before the states ratified the Fourteenth Amendment. ch. 31, 14 Stat. 27 (1866) (Civil Rights Act of 1866); ch. 86, 14 Stat. 50 (1866) (Slave Kidnapping Act); ch. 187, 14 Stat. 546 (1867) (Peonage Act of 1867); ch. 27, 14 Stat. 385 (Act of February 5, 1867, expanding the scope of habeas corpus statuses). These diverse laws indicate the fallacy of the revisionist argument that the Thirteenth Amendment meant no more “for the Negro than exemption from slavery.” JAMES Z. GEORGE, THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES 114 (1915).

\textsuperscript{268} In its enacted form, the Act recognized the rights 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.” The Act further provided them with the “full and equal benefit of all laws and proceedings for the security of person and property.” It granted federal courts jurisdiction to hear cases of any alleged violations. Moreover, anyone who was denied the right to enforce his or her rights under the Act in a state court was permitted to transfer the case to a federal court. State officials who violated the Act under color of law or pursuant to custom were also subject to criminal prosecution. Violators were subject to imprisonment for up to one year and a fine of no more than $1,000. Civil Rights Act, 14 Stat. 27 (1866).

\textsuperscript{269} Senator Lyman Trumbull, who was chairman of the Senate Judiciary Committee, stated that the Civil Rights Bill, was intended to “guaranty to every person of every color the same civil rights.” CONG. GLOBE, 39\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 599 (Feb. 2, 1866).

\textsuperscript{270} CONG. GLOBE, 39\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 42 (Dec. 13, 1865). Senator Howard held a similarly broad construction of the Thirteenth Amendment’s guarantee of freedom, “what are the

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The unique opportunity to pass the civil rights legislation came from the 1865 ratification of the enforcement clause of the Thirteenth Amendment. This power changed the federalist dynamic between states and the federal government, making Congress, rather than state legislatures, the supreme protector of civil liberties. Senator Henry Wilson, who like Sumner and Stevens adopted abolitionism far before the Civil War, considered civil rights to be “the true office of Government to protect” and their possession “by the citizen raises by necessary implication the power in Congress to protect them”. Senator Sherman found this power even more explicitly in the second section of the Thirteenth Amendment: it “is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation.” The Thirteenth Amendment granted Congress the enforcement authority it needed to authorize enactments on behalf of the nation’s citizenry.

Given the extensive congressional record of debates about the Thirteenth Amendment and the Civil Rights Act of 1866, radical Congressmen might have believed they had altered the dynamic of American politics and jurisprudence. The Supreme Court soon thwarted their expectations in a series of decisions that showed little care for protecting fundamental rights, instead, opting for sectional reconciliation.

B. Early Judicial Interpretation

The earliest interpretation of the Civil Rights Act of 1866 boded well for ending practices associated with slavery and involuntary servitude. United States v. Rhodes was the first federal decision on the constitutionality of the Act. Supreme Court Justice Noah Swayne, presiding attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word ‘freeman’ that does not include these ideas?” Id. at 504 (Jan. 30, 1866). Any lesser guarantee of freedom, Howard asserted, would be worse than the bondage from which blacks emerged. Id.


272 CONG. GLOBE, 39th Cong., 1st Sess. 1118, 1119 (Mar. 1, 1866).


274 Robert J. Kaczorowski has made the similar point. Kaczorowski has pointed out that Dred Scott had made the natural rights theory of the Declaration unenforceable without the ratification of the Thirteenth Amendment and the enactment of the Civil Rights Act of 1866. Revolutionary Constitutionalism in the Era of the Civil War & Reconstruction, 61 N.Y.U. L. REV. 863, 894-95 (1986).

275 27 F. Cas. 785 (C.C.D. Ky. 1866).

276 Swayne was an established abolitionist even before the Civil War, at one time he and his wife freed slaves they received by marriage. Joseph Fletcher Brennan, 1 THE (OHIO)
over the case as a designated circuit court justice, held the Thirteenth Amendment empowered Congress to pass the Act and federal courts to adjudicate cases arising out of it. The white defendant was charged with committing burglary against Nancy Talbot, “a citizen of the United States of the African race.”277 The case was litigated in a federal district court because Kentucky law forbade blacks from testifying against whites in state courts.278 In dictum, Swayne posited that without congressional power to enforce the Thirteenth Amendment, “simple abolition, would have been a phantom of delusion.”279 Granting federal courts subject matter jurisdiction over civil rights cases was critical for ending the incidents of servitude since it made judicial redress available where it was foreclosed in state courts.

The Supreme Court ruled very differently in Blyew v. United States. Even though it addressed procedural matters rather than substantive ones, Blyew was the beginning of a judicial trend that downplayed the Thirteenth Amendment’s pertinence to revolutionary and abolitionist notions of freedom. It was the first blow to the use of the Thirteenth Amendment for ending centuries of racial intolerance. Blyew, like Rhodes, was a federal removal case. The two defendants were indicted in 1868, at a time when Kentucky still forbade black witnesses from testifying against whites.280

Both the oral and physical evidence showed that in one night John Blyew and George Kennard murdered three generations of a black family.281 The case had been removed to district court pursuant to section 3 of the Civil Rights Act of 1866.282 Section 3 of the Act permitted removal “of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality where they may be.”283 The United States Solicitor General argued that the right to testify protected persons and property and was a

Biographical Cyclopaedia and Portrait Gallery 101 (1880). As an attorney, Swayne had even represented several fugitive slaves. William Gillette, Noah H. Swayne, in 2 The Justices of the United States Supreme Court 1789-1978: Their Lives & Major Opinions 990 (Leon Friedman & Fred L. Israel eds. 1980). His most famous representation came in the Oberlin rescue cases, involving the Fugitive Slave Law. Ex parte Bushnell, 8 Ohio St. 599 (1858) and Ex parte Bushnell v. Ex parte Langston, 9 Ohio St. 77 (1859).

277 Id. at 786.

278 Id. at 785.

279 Id. at 794.

280 Blyew, 80 U.S. at 581, citing 1860 Ky. Acts, § 1, ch. 104, vol. 2, at 470. The law only permitted blacks and Native Americans to act as “competent witnesses” in civil suits to which the only parties were blacks or Native Americans. Id. at 581.

281 Murder: Particulars of the Late Tragedy in Lewis County, Louisville (Ky.) Daily J., Sept. 9, 1868, at 3.

282 See id. at 597 (Bradley, J., dissenting).

283 See id. at 597 (Bradley, J., dissenting).
freedom the Thirteenth Amendment authorized Congress to secure for all citizens regardless of their race.\(^{284}\)

The Court found that the Act only gave a federal court removal jurisdiction when a state prohibited blacks from testifying in a case that might affect their personal, relative, or property rights.\(^{285}\) In *Blyew*, the Court held that the federal court had no jurisdiction to hear the case because the murder had not directly affected the two surviving witnesses to the crime, who were both black.\(^{286}\) The Court considered it irrelevant that even if the black victims had survived the assault, they could not have testified in a Kentucky court against the white suspects.\(^{287}\) Litigation could no longer affect the murdered; therefore, the Court reversed the defendants’ federal convictions without remanding the case.

Justice Bradley wrote the dissenting opinion to *Blyew*, criticizing the majority’s “narrow” reading of the Civil Rights Act and its disregard for the liberal ideals surrounding the statute’s passage.\(^{288}\) Bradley argued that Congress broadly intended to prevent wanton, racist conduct from being committed against the black community.\(^{289}\) The Amendment attempted to “do away with the incidents and consequences of slavery” and to replace them with “civil liberty and equality.”\(^{290}\) The dissent concluded further that the the Abolition Amendment’s primary aim was to instate blacks to the “full enjoyment” of civil rights.\(^{291}\) He also recognized that the majority opinion legitimized Kentucky’s practice of prohibiting blacks from testifying against whites; thereby, the state branded all blacks “with a badge of slavery.”\(^{292}\)

While *Blyew* involved a procedural matter, the *Civil Rights Cases* initiated a substantive period of decline. Bradley drafted the majority opinion. He qualified his earlier dissent in *Blyew*, essentially abandoning Radical Reconstructionist aspirations to animate the Declaration of Independence’s statement of equal freedom.

The *Civil Rights Cases* evaluated the constitutionality of the Civil Rights Act of 1875,\(^{293}\)

\(^{284}\) *Id.* at 589.

\(^{285}\) *Id.* at 592-93.

\(^{286}\) *Id.* at 593.

\(^{287}\) *Id.* at 593-94.

\(^{288}\) See *id.* at 599 (Bradley, J., dissenting).

\(^{289}\) *Id.* at 595 (Bradley, J. dissenting).

\(^{290}\) See *id.* at 601, 599 (Bradley, J., dissenting).

\(^{291}\) See *id.* at 601 (Bradley, J., dissenting).

\(^{292}\) See *id.* at 599 (Bradley, J., dissenting).

\(^{293}\) The full name of the Civil Rights Act of 1875 was “An act to protect all citizens in their civil and legal rights.” 18 Stat. 335.
the Reconstruction Congress’s last piece of civil rights legislation.\textsuperscript{294} By the time the case came before the Supreme Court, in 1883, Reconstruction had ground to a halt despite the many remaining institutions and practices that resembled involuntary servitude. Among these racist institutions were segregation, peonage, the use of adhesion contracts for sharecropping, and the convict lease system.\textsuperscript{295}

The \textit{Civil Rights Cases} involved five joint cases from various parts of the country. The first four were reviews of criminal prosecutions. Two of the defendants had been charged with denying blacks access to an inn or hotel, a third with prohibiting a black individual access to the dress circle of a theater in San Francisco, another with refusing someone access to a New York opera house. The fifth case was a civil case from Tennessee involving a railroad company whose conductor denied a black woman access to “ride in the ladies’ car.”\textsuperscript{296} Attorneys for four of the five defendants did not even bother coming to argue the cases before the Court.\textsuperscript{297} The Court nevertheless handed their clients a favorable ruling that was rooted in the emerging national consensus against sweeping civil rights reform.

The decision had far ranging implications on congressional Thirteenth and Fourteenth Amendment enforcement powers. The effects have been so long lasting that two recent Supreme Court opinions relied on the \textit{Civil Rights Cases}’s holding to diminish congressional civil rights powers.\textsuperscript{298}

\textsuperscript{294} See Douglas L. Colbert, \textit{Liberating the Thirteenth Amendment}, 30 Harv. C.R.-C.L. L. Rev. 1, 22 (1995) (discussing debate about Reconstruction that arose in passing Civil Rights Act of 1875). Concerning Charles Sumner’s centrality in securing passage of the Act see James M. McPherson, \textit{The Abolitionist Legacy: From Reconstruction To the NAACP} 16, 20-21 (2d ed. 1995); Eric Foner, \textit{A Short History of Reconstruction} 226 (1990). Benjamin Butler, the manager of the Bill in the House, described his task as defending “the rights of these men who have given their blood for me and my country.” \textit{Id.} On the role of President Ulysses Grant in the controversy see William B. Hesseltine, Ulysses S. Grant, Politician 368-71 (1935).

\textsuperscript{295} One author recently found that in Alabama, Mississippi, and Georgia, as many as one-third of all sharecropping farmers “were being held against their will in 1900.” Jacqueline Jones, \textit{The Dispossessed} 107 (1992). On the convict lease system see David Oshinsky’s \textit{Worse Than Slavery} (1996). \textit{See also} Karin A. Shapiro, \textit{A New South Rebellion: The Battle Against Convict Labor in the Tennessee Coal Fields}, 1871-1896 (1998); Alex Lichtenstein, \textit{Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South} (1996).

\textsuperscript{296} \textit{Civil Rights Cases}, 109 U.S. at 4-5.

\textsuperscript{297} Loren Miller, \textit{The Petitioners: The Story of the Supreme Court of the United States & the Negro} 137-38 (1966).

\textsuperscript{298} \textit{United States v. Morrison} relied on the \textit{Civil Rights Cases} for the proposition that Congress can only prohibit state actions through its Fourteenth Amendment enforcement power. \textit{United States v. Morrison}, 529 U.S. 598, 621-22 (2000); \textit{see also} City of Boerne v. Flores, 521
In the *Civil Rights Cases*, the Court held that Congress had overstepped its Fourteenth Amendment power when it prohibited private place of accommodation discrimination. The Court, therefore, found the first two sections of the Civil Rights Act of 1875 to be unconstitutional. In the unreconstructed South, the idea that states would regulate private discriminations was farfetched. Bradley made an artificial dichotomy, although one that was common in post-Reconstruction United States, between civil rights and social rights. In the *Civil Rights Cases*, he held that the Fourteenth Amendment covered the former, which included making contracts and leasing land, but not social rights, which pertained to using public accommodations. Thus, as Angela P. Harris pointed out, “[t]he Court had curtailed the power to protect American citizens against racial domination in the name of federalism.”

The only member of the Court who disagreed with the majority was Justice John Marshall Harlan. His view of congressional enforcement power was analogous to Radical Republican principles of Reconstruction. It relied on a conception of freedom that was derived from revolutionary and abolitionist thought. The fifth section of the Amendment, Harlan wrote in dissent, enabled Congress to enact any “appropriate legislation” to prohibit states, individuals, and corporations from discriminating on account of race.

The *Civil Rights Cases* were also brought pursuant to the Thirteenth Amendment. The Supreme Court’s holding was the first substantive interpretation of the Thirteenth Amendment’s guarantee of liberty. The Court recognized that the Amendment went somewhat farther than simply releasing slaves from their masters’ control. In fact, Bradley reiterated his conviction that the Thirteenth Amendment granted Congress the power to pass all laws “necessary and

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299 *Civil Rights Cases*, 109 U.S. at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope”); id. at 18 (“This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.”).


302 *Civil Rights Cases*, 109 U.S. at 20.
proper for the obliteration and prevention of slavery, with all its badges and incidents.”  
Bradley even conceded that the Thirteenth Amendment prohibited state and private violations.
The Court, however, rejected the claim that by denying equal access to public accommodation,
the defendants practices were vestiges of servitude. The Court again differentiated between social rights and the “fundamental rights which appertain to the essence of citizenship.” The ruling thereby limited congressional Thirteenth Amendment power to the protection of civil and political rights. Federal legislation could only end practices directly related to institutional slavery; including, impediments against black court testimony and property ownership. Based on this line of reasoning, the Court held that Congress had overreached its Thirteenth Amendment authority when it passed the Civil Rights Act of 1875 to prohibit social discrimination.

Bradley’s dismissiveness of the extent to which a public carrier can infringe on civil liberties through exclusionary social practices left virtually no recourse against segregation. Social discrimination limited the plaintiffs’ ability to travel comfortably, enjoy an opera, reserve a room at an inn, or watch a play. Such bigotry degraded victims and marked them with a badge of inferiority. Social exclusion disempowered blacks from exercising preferences and perpetuated the white supremacism that was intrinsically linked to slavery. The Court’s holding in the Civil Rights Cases showed a callousness about the private and public impediments that prevented blacks, even after abolition, from enjoying the freedom of citizenship. Bradley’s dismissive opinion in the Civil Rights Cases furthered the social tensions and misery that the Radical Republicans expected Congress to end through the enforcement clause of the Thirteenth Amendment.

303 Id. at 20-21.
304 Id. at 20.
305 Id. at 25.
306 Id. at 22. Bradley went on to say that the Thirteenth Amendment “simply abolished slavery” while the Fourteenth Amendment “prohibited the states from abridging the privileges or immunities of citizens of the United States.” See id. at 23. His conclusions deviate from his dissent to Blyew v. United States, see supra text accompanying notes -----, where he recognized Congress’ power to pass the Civil Rights Act of 1866. Provisions of the Civil Rights Act of 1866 indicate that congressmen regarded the Thirteenth Amendment as a conduit of equal rights legislation. See George A. Schell, Note, Open Housing: Jones v. Alfred H. Mayer Co. & Title VIII of the Civil Rights Act of 1968 556 (1969) (discussing the courts differentiation between social and civil rights).
307 See id. at 22.
308 Bradley put this point in the form of a reductio ad absurdum: “It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.” Id. at 24-25.
Amendment. Homegrown militias, such as the KKK, and private business owners who refused to provide blacks with goods and services were now protected by state indifference or outright support for their practices. 309

In dissent, Justice Harlan understood the Court to be countenancing state sponsored abridgements of freedom. 310 The majority’s opinion, he argued, was “narrow and artificial” and inimical to the “substance and spirit” of the Thirteenth Amendment. 311 Harlan understood that since the dogma of black inferiority was integral to maintaining slavery, the Thirteenth Amendment’s guarantee of freedom required the federal government to pass laws punishing the abridgment of freedom, especially when that abridgment was based on racism. 312 This principle, for Harlan, carried a practical implication:

Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, on account of their race, of any civil rights enjoyed by other freemen in the same state; and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state. 313

While Justice Harlan agreed with Justice Bradley that Congress could not regulate social rights, he proclaimed that the rights the Civil Rights Act of 1875 protected were civil since the use of public accommodations was an intrinsic aspect of civic life. 314

After the Civil Rights Cases, the Thirteenth Amendment was relegated to virtual disuse. Indeed, the Court continued to chip away at the limited use of its enforcement powers that Congress had exercised before the collapse of Reconstruction. Following the Civil Rights Cases,

309. See id. at 25. Bradley explicitly argued that equal access to public amenities is unconnected to the enjoyment of fundamental rights: “There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement.” Id.

310 See id. at 54 (Harlan, J., dissenting).

311. Id. at 26 (Harlan, J., dissenting).

312 See id. at 36 (Harlan, J., dissenting) (“I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom 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.”).

313 Id. (Harlan, J., dissenting).

314 Id. at 56 (Harlan, J., dissenting).
the Court maintained the distinction between social and civil rights in *Plessy v. Ferguson.*\(^{315}\) This step showed judicial aversion for abolitionist notions of freedom and equality.\(^{316}\) In finding that separate public accommodations did not violate the Thirteenth Amendment, the Court quoted the *Civil Rights Cases* for the proposition that the end of slavery did not require anyone to socially deal with other races in “matters of intercourse or business.”\(^{317}\) The opinion in *Plessy* took a literalist approach to slavery, attacking the assumption that the enforced separation of the two races stamped African Americans with a badge of inferiority.\(^{318}\) Justice Brown’s narrow construction of “slavery” was far removed from the broad revolutionary notions of freedom, regarding strictly as a matter of forced labor. He ignored the American revolutionary tradition, which abolitionists and Radical Republicans had adopted, that real freedom meant far more than simply being able to choose an employer. It meant being able to participate in the life of the community, especially in political matters, which segregation made virtually inaccessible to blacks.

Just as in the *Civil Rights Cases,* Justice Harlan wrote the dissent to *Plessy.* He regarded the right of persons to share railroad cars to be inherent in the concept of liberty.\(^{319}\) Curiously, while the majority’s understanding of liberty in a civil society was significantly more reserved than the founders’, Harlan’s perspective was not only more expansive than that of the founders’ but even that of abolitionists. From his standpoint, at the turn of the nineteenth century, Harlan understood better than the politicians and theorists that came before him that a segregated society was bound to diminish opportunities for the ostracized minority. Harlan was prescient in foreseeing that the separate but equal doctrine would not be limited to rail travel, but would expand to include many other aspects of meaningful activity.\(^{320}\)

\(^{315}\) 163 U.S. 537 (1896).

\(^{316}\) *Id.* at 551-52 (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane”).

\(^{317}\) *Id.* at 543 (“‘It would be running the slavery argument into the ground,’ said Mr. Justice Bradley, ‘to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will . . . deal with in other matters of intercourse or business.’” (*quoting* Civil Rights Cases, 109 U.S. at 24-25)).


\(^{320}\) Justice Harlan understood the wide-ranging implication of the holding: “If a state can
C. Modern Supreme Court Decisions

*Jones v. Alfred H. Mayer*, which the Court decided in 1968, went a long way to recognizing that congressional power to prevent the incidents of involuntary servitude extended well beyond hereditary forced labor. Jones implicitly overruled the *Civil Rights Cases*s's parochial view that Congress lacks the power to prevent exclusionary, racist practices. *Jones* found that a federal law, the Civil Rights Act of 1866, was “necessary and proper” for preventing private and public racial discrimination in real estate transactions. While the Court in *Jones* did not directly overrule the social and civil dichotomy of the *Civil Rights Cases* and *Plessy*, it recognized that preventing people from living where they want because of their race was a demagogical practice associated with slavery.

The Court acknowledged Congress’s wide latitude to pass legislation to prevent civil rights violations: “Surely 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.” Congress can prevent state and private acts that encroach on fundamental rights. The Court’s refusal to address discrimination in public places was, however, disappointing since the Thirteenth Amendment is a more direct means of preventing private practices than resorting to the economic formulation of the Commerce prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other?” *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).


322 Id. at 439 (quoting *Civil Rights Cases*, 109 U.S. 3, 20) (“the Enabling Clause. . . clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States’”). The Court read section 1 of the Civil Rights Act of 1866 (42 U.S.C. §1982 (2002)), to prohibit private actors from discriminating against real property purchasers: “[T]he fact that §1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.” *Jones*, 392 U.S. at 438-39. For a survey of civil rights cases arising under nineteenth century statutes, the Civil Rights Act of 1964, and the Civil Rights Act of 1968 see Note, *Federal Power To Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum. L. Rev. 449, 466-505 (1974).

323 Id. at 440.
Moreover, Jones required courts to analyze human rights violations in a way significantly different from the state action analysis under the Fourteenth Amendment. The opinion shows a nascent understanding that slavery and its vestiges affected society as a whole and it makes some hesitant steps toward accepting the abolitionist perspective of freedom. The right to contract is treated as a natural right that private parties cannot trample.

In the Supreme Court cases that followed Jones, the Court continued holding that Congress can prohibit private racial discrimination pursuant to its section 2 Thirteenth Amendment power. The Court further broke down racial barriers that continued to inhibit freedom over a hundred years after the end of the Civil War.

The next landmark Thirteenth Amendment case, Runyon v. McCrary, reflected the Court’s willingness to extend the principle of liberty beyond the founders’ notions. Even though Runyon addressed the narrow issue of whether § 1981 prohibited private schools from refusing to enrol students based on their race, the Court’s holding had broad ramifications on the integration of private schools. The critical part of the statute provided that, “[A]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Justice Steward for the majority determined the school violated interested parents’ contract rights because it used racial criteria to deny their children enrolment. The Court found that even though parents whose children attended the

324 On the distinction between congressional Commerce Clause and Thirteenth Amendment powers see infra text accompanying notes. Justice Steward, writing for the Court, however, expressly avoided reaching the issue of whether the Thirteenth Amendment granted Congress authority to prevent discrimination in places of public accommodations, finding that the Civil Rights Act of 1964 had made that issue moot. Jones, 392 U.S. at 440-41, 441 n.78 (“The Court did conclude in the Civil Rights Cases that ‘the act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation’ cannot be ‘justly regarded as imposing any badge of slavery or servitude upon the applicant’ . . . . Whatever the present validity of the position taken by the majority on that issue--a question rendered largely academic by Title II of the Civil Rights Act of 1964”).

325 See infra Part ----, distinguishing congressional Fourteenth and Thirteenth Amendment enforcement power.


328 Id. at 172-73 (“[i]t is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of § 1981. The parents . . . . sought to enter into contractual relationships with . . . for educational services . . . . Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments . . . . But neither school offered services on equal basis to white and nonwhite students”). Justice White, writing for the dissent, argued that § 1981 could not be used to force people to enter into contracts, no matter what their motives were for refusing to do so. Id. at 194-
school had the right not to associate with blacks in their private relations, their associational right could not legitimize school discrimination.

As favorable as the Court’s holding was for the desegregation of schools, it could have sent an even stronger message about the nation’s commitment to individual liberty and the general welfare. The Court should have used normative, rather than contractual, reasoning. It would have done better to understand the Thirteenth Amendment as a prohibition against arbitrary interference with parents’ educational decisions rather than simply their contractual rights. Constitutional liberation from slavery granted Congress the power to protect parental autonomy, which slave codes and individual slave masters had encroached. Parents’ fundamental right to educate their child is more compelling, and makes for more sympathetic plaintiffs, than does their commercial right to enter into a contract.

The use of history for interpreting the enforcement clause is also helpful in other associational cases. The Court found basis for congressional action in Tillman v. Wheaton-Haven Recreation Assn. Litigation in that case arose when a private swimming club refused to allow blacks to join as members or to visit as guests. Three adversely affected African Americans sought damages from the swimming club and asked the court to enjoin its practices. They raised their claims pursuant to §§ 1981 and 1982, both of which prohibit racist leasing and rental practices. Based on the dichotomy of rights in the Civil Rights Cases, it might have been

95 (White, J., dissenting).

329 Mary Beth Norton et al, Afro-American Family in the Age of Revolution, in Slavery & Freedom in the Age of the American Revolution 186-87 (Ira Berlin & Ronald Hoffman eds., 1983) (explaining that slavery compromised family integrity because masters could sell their slaves for economic, subduing, or whimsical reasons); Herbert G. Gutman, Black Family in Slavery & Freedom, 1750-1925, at 207-09 (1976) (concluding that, despite the risk of being forcefully separated by sale, slaves were able to develop cohesive family structures); Peter Kolchin, Reevaluating the Antebellum Slave Community: A Comparative Perspective, 70 J. Am. Hist. 579, 584 (1983) (discussing the difficulties faced by slaves who married the slaves of other owners). For more regional information about the slave family that has been developed since the 1980’s see Ann Patton Malone, Sweet Chariot: Slave Family & Household Structure in Nineteenth-Century Louisiana (1992); Larry E. Hudson Jr., To Have & To Hold: Slave Work & Family Life in Antebellum South Carolina (1997). After 1865, in an effort to retain slavery through legal ruse, several states instituted child apprenticeship laws. These statutes required children to serve for a term of indenture away from parents, so long as a white judge determined that such service was in the children’s best interest. Peter Kolchin, American Slavery, 1619-1877, at 220-21 (1993). These children apprenticeships, as Leon Litwack pointed out, amounted to legalized kidnaping and de facto slavery. Been in the Storm So Long: The Aftermath of Slavery 191, 237-38 (1979).


331 The Court found no need to examine whether §§ 1981 and 1982 applied to private discrimination, determining that it was sufficient that the “operative language” of both was “traceable” to section 1 of the 1866 Civil Rights Act. Id. at 439-40.
expected for the court to find the use of the swimming pool to be a social, rather than civil right, and to provide the Plaintiffs no relief. The Court, instead, decided §§ 1981 and 1982 prohibited the club from excluding people based on race. Part of the Plaintiffs’ valuation of the real estate purchases was based on their expectation to join the recreation center. The swimming club, which was a private party, interfered with the applicants’ right to enter into contract by denying them access to the public place of accommodation. Just as with Runyon, the holding in Tillman is too narrow, being grounded on contract principles rather than on the federal enforcement power to prevent acts of private racism resembling the incidents of servitude. All free people have the national citizenship right to freely partake of community amenities without the burden of racism. Prohibiting the use of racist associational standards is a legitimate aim of a post-Reconstruction Congress in its overall commitment to the general welfare.

The Court’s narrow construction of Thirteenth Amendment liberty, which has been partly constrained by the limited scopes of §§ 1981 and 1983, was nevertheless sufficient for finding that employment discrimination is analogous to involuntary servitude. In Johnson v. Railway Express Agency the Court determined that section 1981 applies to private employers’ discrimination. The case provides a distinction between employment discrimination claims filed under § 1981 and Title VII, which is the traditional avenue of relief for employment discrimination. The Court’s holding illustrates why filing a cause of action under section § 1981 is sometimes preferable to filing under Title VII.

Title VII’s statute of limitations is typically shorter than the filing period for § 1981. Section 1981 does not contain any statute of limitations, therefore courts apply the statute of limitations of analogous state statutes. In Johnson, the Court applied Tennessee’s one year limitation period, which was significantly longer than Title VII’s 180 day requirement to file the employment claim with the EEOC or 300 days to file with a state EEO. Other courts commonly apply two or three year state personal injury statutes of limitations to § 1981 cases.

332 Id. at 437.


334 Title VII ordinarily requires an aggrieved party to file a charge with the EEOC within 180 days of the alleged unlawful employment practice or 300 days after the unlawful practice if the aggrieved party files a discrimination complaint in a state or local agency. 42 U.S.C. § 2000e-5(11) (2003). Filing a Title VII action with the EEOC does not toll the statute of limitations on § 1981 claims. Johnson, 421 U.S. at 465.

335 There are a variety of recent decisions applying analogous state statutes of limitations to § 1981 claim sand thereby extending plaintiffs’ ability to recover for harassment occurring before the Title VII statutory 300-day deadline. See Anthony v. BTR Auto. Sealing Sys., Inc., 339 F.3d 506 (6th Cir. 2003); Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003); Huckabay v. Moore, 142 F.3d 233, 238 (5th Cir. 1998).

336 Johnson, 421 U.S. at 462.
thereby allowing claims to proceed that have been long barred by Title VII. Thereby, more employment discrimination claims can be judged on the merits instead of being dismissed on technicality grounds. Title VII’s timing provision is more protective of employer’s while § 1981 is centered on providing injured parties with adequate time for redress. Congress passed Title VII pursuant to its Commerce Clause authority. That Clause permits Congress to pass statutes regulating behavior with a substantial effect on the national economy. Section 1981, on the other hand, was passed pursuant to Thirteenth Amendment authority, which permits Congress to regulate behavior that arbitrarily infringes the natural rights revolutionaries and abolitionists relied on. Two other advantages of a § 1981 claim are that it can include employers who are improper parties under Title VII and that § 1981 claims can be brought without having to first exhaust administrative remedies.

An overview of case law decided since Jones v. Alfred H. Mayer shows just how far the Thirteenth Amendment can reach, even when litigants rely on ancient civil rights statutes, in particular §§ 1981 and 1982, that are modeled after the Civil Rights Act of 1866. Congress can go much further than these, especially with the sensibility against discrimination that has burgeoned in the United States since the 1960’s, by passing new statutes pursuant to its enforcement clause authority. Certainly discrimination in real estate transactions and private schools is not, in and of itself, literally slavery nor involuntary servitude; rather, the Court interpreted the Thirteenth Amendment as granting Congress discretionary power to determine

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337 See, e.g., Alexander v. Fulton County Georgia, 207 F.3d 1303, 1346 (11th Cir. 2000) (applying a two-year personal injury statute of limitations to both § 1981 and § 1983 claims); Rogers v. Barkin, 20 Fed.Appx. 360, 361, 2001 WL 1218413, at 1 (9th Cir.) (unpublished opinion) (finding that Nevada’s two year personal injury statute of limitations applied to § 1981 claims); Thomas v. Denny’s, Inc., 111 F.3d 1506, 1514 (7th Cir. 1997) (recognizing that based on damages awarded for a § 1981 claim were limited by the state’s two year personal injury statute). Some courts have also applied three year personal injury statues of limitations. See, e.g., King v. American Airlines, Inc., 284 F.3d 352, 356 (2d Cir. 2002); Carney v. American University Excerpt, 151 F.3d 1090, 1096 (D.C. Cir. 1998). The Eleventh Circuit even found a four year statute of limitations applied to a § 1981 claim. Baker v. Gulf & Western Indus., Inc., 850 F.2d 1480, 1481 (11th Cir.1988).

338 Johnson, 421 U.S. at 460 (asserting that “[s]ection 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U.S.C. § 2000e(b)”). The Supreme Court stated this matter more positively in a footnote to a 1994 case. See Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 n.3 (1994) (“[e]ven in the employment context, § 1981′s coverage is broader than Title VII′s, for Title VII applies only to employers with 15 or more employees, see 42 U.S.C. s 2000e(b), whereas § 1981 has no such limitation”). Likewise, in a concurring and dissenting opinion to Patterson v. McLean Credit Union (Patterson II), 491 U.S. 164 (1989), Justice Brennan wrote that “§ 1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, cf. 42 U.S.C. s 2000e(b), and hence may reach the nearly 15% of the workforce not covered by Title VII.”

what forms of discrimination are rationally related to the incidents and badges of servitude. The Court’s analyses in *Jones, Runyon, Tillman*, and *Johnson* indicate that Congress can pass effective laws rationally designed to end any remaining incidents and badges of servitude.

VI. Constructive Liberty

Congress has rarely used the sweeping powers of the enforcement clause to protect civil rights. The Court has therefore rarely had to interpret the second section of the Thirteenth Amendment.

The congressional debates on the Thirteenth Amendment and Civil Rights Act of 1866 along with the handful of Supreme Court opinions on Reconstruction era statutes provide the best sources for developmental analysis. These sources indicate that the Amendment granted Congress the power to put into effect the principles of the Declaration of Independence and the Preamble to the Constitution. Recent Rehnquist Court limitations on congressional Fourteenth Amendment and Commerce Clause power are inapplicable to the Constitution’s national assurance of freedom through the Thirteenth Amendment.

A. Thirteenth Amendment, Fourteenth Amendment, and Commerce Clause

1. Fourteenth Amendment & Thirteenth Amendment

The abolition of slavery was only meant to be Congress’s point of legislative departure. The Thirteenth Amendment provides Congress with the authority to pass any necessary and proper laws for securing citizens’ right to live uncoerced, self-directed lives.

The Fourteenth Amendment too secures normative values essential to living a good life, yet the state action requirement sets limits on its effectiveness that the Thirteenth Amendment does not impose. The Supreme Court has narrowly construed the applicability of the enforcement clause of the Fourteenth Amendment since the *Civil Rights Cases*. As to Thirteenth Amendment enforcement authority, the Court has for over a century recognized that Congress has the power to prohibit private discrimination.


341 *Civil Rights Cases*, 109 U.S. at 25 (holding that Congress only has the power to provide relief against state actions violating section 1 of the Fourteenth Amendment and that section 5 does not grant Congress the power to enact laws affecting private rights). The Court has consistently maintained the state action requirement, stating in *Morrison* that it will not deviate from “the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.” *Morrison*, 529 U.S. at 621.

The Thirteenth Amendment scheme is an even more unambiguous federal mandate than the Fourteenth Amendment for protecting liberty to achieve the common good. The prohibition against involuntary servitude is absolute, thus Congress can proscribe any incidents or badges of it. The Thirteenth Amendment vests Congress with the power to protect the unobtrusive exercise of freedom against arbitrary infringement. In at least some cases, such as those involving instances of peonage, not even a compelling state interest can justify a state or private infringement of autonomy.

On the other hand, where there is an overriding public interest, the state may infringe on the personal liberties otherwise secured under the Fourteenth Amendment. The Supreme Court, in *City of Cleburne v. Cleburne Living Center*, carved out this Fourteenth Amendment exception to the usual prohibition against the use of race, alienage, and national origin classifications. Such laws “are subjected to strict scrutiny” analysis and will only be found constitutional if they “serve a compelling state interest.”\(^{343}\) The Court later clarified that governmental restraints on fundamental freedoms must be “specifically and narrowly framed to accomplish” the compelling purpose.\(^{344}\) Such a restrictive law cannot be “merely rationally related, to the accomplishment of a permissible state policy.”\(^{345}\) From the Fourteenth Amendment perspective, even fundamental liberty interests can be abridged for compelling public reasons.\(^{346}\)

From the Thirteenth Amendment side, Congress can only place curbs on liberties when their exercise would diminish the general welfare. We can infer that general welfare is not treated aggregately since the Amendment clearly prohibits the enslavement of a minority for the increased benefit of the majority. The enslavement of even one person diminishes the overall welfare, at least by a denominator of one, and the Thirteenth Amendment does not allow for the exploitation of even one person for the benefit of others.

Recent Fourteenth Amendment jurisprudence further highlights the limiting factors on Congress’s power under it and on the non-applicability of those factors to the enforcement clause of the Thirteenth Amendment. The Court has adopted the “responsive,” rather than a pro-active, reading of congressional section 5 powers. In *City of Boerne v. Flores*,\(^{347}\) the Court invalidated the Religious Freedom Restoration Act, in part, because it found the statute “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or

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\(^{347}\) 521 U.S. 507 (1997).
designed to prevent unconstitutional behavior.” The case limited Congress’s section 5 powers to passing congruent laws for remediifying state violations of Fourteenth Amendment guarantees. The Court reiterated this “responsive” interpretation in Kimel v. Florida Board of Regents in finding that section 5 of the Fourteenth Amendment does not authorize Congress to extend the Age Discrimination in Employment Act to states.

Laws passed pursuant to the Thirteenth Amendment may also be responsive to discrimination, but their purpose can be more pro-active. Pursuant to it, the standard for passing “effective legislation” is that it be “rationally” related to “the badges and the incidents of servitude.” Under the Thirteenth Amendment, the federal legislature may, and indeed should, pass laws that are conducive for autonomy to thrive. My point is that Congress may use its section 2 power to pass laws that protect the non-intrusive use of personal freedom and punish its abridgment. Moreover, Congress may pass civil legislation, more sensitive to human rights concerns than §§ 1981 and 1982, allowing for private compensation even where contractual rights have not been abridged. Congress’s enforcement power under the Thirteenth Amendment not only aims to prevent interference with fundamental rights, which is the extent of Congress’s authority under the Fourteenth Amendment, it also enables the federal government to instantiate the ideals of the Declaration of Independence and the Preamble. Debates on the substance of liberty should be dynamic and based on the United States’s continued sensitivity to the rights of minorities rather than exclusively confined to the Amendment’s framer’s precise definitions of liberty. Yet their understandings are part of the narrative that provides continuing legislative value to the Thirteenth Amendment.

348 Id. at 532 (emphasis added).
349 Id. at 520.
351 Jones, 392 U.S. at 440.
352 U.S. CONST. amend. XIV, § 1 (“[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). The Court first connected governmental interference with the Privileges and Immunities Clause in the Slaughter-House Cases, 83 U.S. 36 (1872), finding that it only protected citizens from state interference with the privileges and immunities of national, but not state, citizenship. Id. at 61-62. Likewise, the Equal Protection Clause prevents the interference with the exercise of fundamental rights “unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” See, e.g., Zablocki v. Redhail, 434 U.S. 374, 388 (1978). “The Fourteenth Amendment's Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests’” Troxel v. Granville, 530 U.S. 57, 57 (2000), quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
Since the *Slaughterhouse Cases*, *Civil Rights Cases*, and *United States v. Harris* the Court has severely handicapped national power in the area of the Fourteenth Amendment, but the Thirteenth Amendment remains available for legislative actions augmenting freedom, not merely barring interference with it. The schema I propose authorizes Congress to pass laws that allow people to freely choose their pursuits so long as they do not arbitrarily interfere with the coequal rights of others. This schema is both a positive grant of freedom, in so far as it recognizes that freedom is a substantive right that the Thirteenth Amendment assures, and a negative right the Thirteenth Amendment prevents from being infringed. Such a perspective makes more obvious Congress’s authority to pass laws assuring women’s rights by preventing violence or enabling older and disabled workers the right to pursue their avocations without state or private intrusion.

2. Commerce Clause & Thirteenth Amendment

The Rehnquist Court has constricted congressional power to pass civil right laws pursuant to the Commerce Clause just as it limited Congress’s Fourteenth Amendment authority. Prior to 1997, Congress has virtually plenary power to pass laws that were rationally related to the national economy.\(^{353}\)

This trend, which began during the New Deal, crescendoed during the 1960’s when Congress passed a series of civil rights statutes, most notably the Civil Rights Act of 1964, pursuant to its Commerce Clause authority.\(^{354}\) Congress’s aim, in part, was to adopt creative strategies for getting around the eighty-year-old state action restrictions in *United States v. Harris*\(^{355}\) and the *Civil Rights Cases*.\(^{356}\) Civil rights leaders, too, recognized that private acts of discrimination violated the individual right of self-determination and wanted the federal government to provide a remedy against private actors.\(^{357}\) The Supreme Court, under the

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\(^{356}\) *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883) (holding that Congress’s Fourteenth Amendment section 5 enforcement powers are limited to state action); *see also* *Virginia v. Rives*, 100 U.S. 313, 318 (1880) (stating that the Fourteenth Amendment provisions “all have reference to State action exclusively, and not to any action of private individuals”).

\(^{357}\) Even though many, including the Attorney General Robert F. Kennedy and constitutional scholars, like Gerald Gunther, counseled to use the Fourteenth Amendment, the Solicitor General, Archibald Cox, understood that without overruling the *Civil Rights Cases* such a suggestion was a nonstarter. Seth P. Waxman, *Twins At Birth: Civil Rights & the Role of the*
leadership of Chief Justice Earl Warren, turned to the Commerce Clause for justifying the use of congressional power to enact laws against private discrimination rather than overturning the post-Reconstruction jurisprudence that established Congress’s Fourteenth Amendment authority.

The Court found Congress could constitutionally prohibit discrimination by private providers who engage in an industry affecting interstate commerce. A 1964 watershed case, *Heart of Atlanta Motel*, determined Congress could prevent a motel from interfering with the interstate travel of black patrons wanting to rent a room there. Without investigating the extent of congressional findings, the Court determined the Senate and House had made a rational use of overwhelming evidence that hotels and motels were obstructing interstate commerce. That same year, the Court found in *Katzenbach v. McClung* that the Civil Rights Act of 1964 constitutionally prohibits a family-owned restaurant from discriminating against potential patrons. In the latter case, the Court explicitly stated that Congress was not required to make any formal findings as to the economic effect of legislation passed pursuant to the Commerce Clause. For decades, *Heart of Atlanta Motel* and *McClung* stood for the deferential principle that Congress could pass any necessary laws rationally connected to interstate commerce. The Court did not second-guess congressional factfinding when a statute met this minimum threshold. So long as the legislature did not pass a law based on arbitrary and concocted findings, the Court time and again found statutes constitutional. Prior to 1997, as Harold J. Krent pointed out, the Court did not categorically require that all legislation with constitutional implications be supported by legislative findings. Such a requirement, Krent went on to say “unquestionably would fundamentally alter the relationship between the judiciary and the legislature.”

*Solicitor General, 75 Ind. L.J. 1297, 1312 (2000).* Since *stare decisis* indicated that the likelihood of overruling the 1883 decision was small, Cox convinced the President to follow the Commerce Clause strategy.

358 The Court found that Heart of Atlanta Motel was engaged in interstate commerce since it advertised nationally and attracted part of its business from persons using interstate highways. *Heart of Atlanta Motel*, 379 U.S. at 243.

359 *Id.* at 257.


361 United States v. Morrison, 529 U.S. 598, 666 (2000) (Breyer, J., dissenting) (“[t]his Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution”).

By the 1990's, use of the Commerce Clause was a well established civil rights strategy; however, the Court altered the dynamic of judicial review in United States v. Morrison, where it struck down a national law prohibiting gender motivated violence, and United States v. Lopez, where it found unconstitutional a federal statute against the possession of firearms near a school. In the name of federalism, the Court increased its oversight of the legislative process.

Beginning with Lopez, the Court weakened Congress’s Commerce Clause authority. Rather than using the rational basis test, the Court determined that the Gun Free School Zones Act was unconstitutional since it sought to prevent an activity that did not have a “substantial effect” on interstate commerce. Unlike Heart of Atlanta Motel and McClung, the Court second-guessed policymakers in finding that lawmakers had not made an adequate showing that guns carried near schools were connected to an “economic enterprise.” Justice Breyer, writing in dissent, found no basis for deviating from the rational basis test, meaning that Congress should be able to regulate any activity “significantly (or substantially)” affecting national commerce.

The Chief Justice, who wrote the majority opinion in Lopez, also spoke for the Court in Morrison. Unlike the congressional record on the Gun-Free School Zones Act, Congress had provided abundant information about the interstate effects of gender-violence, but the Court did not find sufficient evidence to prove that violence against women substantially affected interstate commerce. The legislative history revealed a “mountain of data,” including information from no less than nine congressional hearings and reports from gender bias task forces in twenty-one states, which were amassed over four years.

In similar fashion, the Court encroached on Congress’s section 5 Fourteenth Amendment authority both in Morrison and Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

A. Christopher Bryant and Timothy J. Simeone have canvassed Supreme Court precedents and found that the Court’s recent trend of striking laws because of a purportedly inadequate congressional record “is highly questionable on precedential, constitutional, and practical grounds.” Remanding to Congress: The Supreme Court's New “On the Record” Constitutional Review of Federal Statutes, 86 CORNELL L. REV. 328, 389 (2001).

Lopez, 514 U.S. at 558-61.

Id. at 618 (Breyer, J., dissenting). Breyer pointed out that, contrary to the majority’s holding, Commerce Clause cases have not consistently used the “substantial effects” label: “I use the word ‘significant’ because the word ‘substantial’ implies a somewhat narrower power than recent precedent suggests . . . . But to speak of ‘substantial effect’ rather than ‘significant effect’ would make no difference in this case.” Id. at 616 (Breyer, J., dissenting). From a different perspective, Justice Thomas considered the substantial effects text to be a virtually limitless grant of congressional power: “We must . . . respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.” Id. at 593 (Thomas, J., concurring).

Morrison, 529 U.S. at 628-31 (Souter, J., dissenting).
The Court disregarded the compiled data because it found that violent gender motivated crimes “are not, in any sense of the phrase, economic activity.” This, itself, seems to be a return to judicial scrutiny reminiscent of Lochner era substantive due process review. To further curtail congressional overreaching, the Court concluded that Congress could not enact laws “based solely on that conduct’s aggregate effect on interstate commerce.” The aggregation doctrine, the Court held, was inapplicable in cases of gender-motivated violence “not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”

All told, the recent developments in Commerce Clause cases illustrate the chief problem with relying on that part of the Constitution to support Congress’s power to end arbitrary intolerance. That strategy leaves open economic counterarguments about a lack of substantial connection between an intolerant act and interstate commerce. But federal laws relying on the Thirteenth Amendment need only be rationally related to the vestiges of slavocracy, not to the national economy.

The Court’s determination that misogynistic violence has no substantial effect on national commerce is irrelevant in evaluating whether the Thirteenth Amendment grants Congress the power to prevent such violence. The Jones rational basis inquiry has never been altered the way the Lopez and Morrison altered the Commerce Clause analysis. Had Congress relied on its Thirteenth Amendment enforcement power in passing the VAWA, the Court would have had to defer to legislators as long as they had found that gender-motivated violence is rationally related to the incidents of servitude and that the statute was a necessary and proper means of dealing with it. The only question left for the Court would have been whether the statutory means chosen by Congress were “reasonably adapted to the end permitted by the Constitution.”

The Commerce Clause is a morally neutral provision that could just as readily be used in a slave society as in a liberal republic. Its history bears this out. Even though by 1824 the Court, in Gibbons v. Ogden, determined that Congress has the power to regulate any commerce between states, slavery continued unabated and exploited commercial outlets. There is even

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368 Morrison, 529 U.S. at 613.

369 Morrison, 529 U.S. at 644 (Souter, J., dissenting) (“in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism”); Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“[t]he resemblance of today's state sovereign immunity to the Lochner era's industrial due process is striking.”); Seminole Tribe v. Florida, 517 U.S. 44, 165-69 (1996) (Souter, J., dissenting) (comparing recent Supreme Court federalist approaches to Lochner).

370 Morrison, 529 U.S. at 617.

371 Heart of Atlanta Motel, 379 U.S. at 262 (explaining, in the context of Commerce Clause, the use of the rational basis test).

372 22 U.S. 1 (1824).
indication from debates of the Philadelphia Constitutional Convention that the Commerce Clause was part of founders’ compromise with the slave states. Even though the Clause presumably granted Congress the power to regulate the slave trade between states, the national government tolerated the practice, and some antebellum congressmen owned slaves.

By its very terms, the Thirteenth Amendment is not given to a neutral reading on the subject of private or state sponsored discrimination; indeed, it gives the federal legislature the power to enforce the liberty guarantees of the Declaration of Independence and Preamble to the Constitution. Further, the Thirteenth Amendment extends to interstate and intrastate activities, regardless of whether they have any effect on commerce. The Amendment grants Congress the legal authority to prohibit arbitrary restriction of freedom, regardless of their impact on the economy. This does not mean that a Thirteenth Amendment civil rights approach should displace Commerce Clause efforts under the Civil Rights Act of 1964. Rather, I mean to stress the continued vitality of Jones in establishing Congress’s broad interpretive power, at a time when the Court in Lopez and Morrison has made the passage of new civil rights legislation under Commerce Clause more onerous.

B. Construing Thirteenth Amendment Liberty

Judicial opinion is only a factor in formulating a constructive interpretation of the Thirteenth Amendment. Even the ideas of the Amendment’s framers, while invaluable, cannot be the endpoint of construction since its framers were men of their times whose social and political backgrounds made them incapable of foreseeing every potential application to the amendment they passed. Their ideas and those of their abolitionist mentors are nevertheless invaluable in comprehending the Amendment’s significance to contemporary incidents of involuntary servitude such as the forced sex trade, the exploitation of domestic workers, and the peonage of migrant farmers. Historic examination, when supplemented with normative analysis, is useful for defining constitutional limitations of congressional power.


374 Robert J. Pushaw, Jr. & Grant S. Nelson, A Critique of the Narrow Interpretation of the Commerce Clause, 96 NW. U. L. REV. 695, 702 n.54 (2002) (stating that even if Congress could not regulate intrastate slave trade it certainly could have done so on an interstate level); Charles H. Cosgrove, The Declaration of Independence in Constitutional Interpretation: A Selective History & Analysis, 32 U. RICH. L. REV. 107, 123 (1998) (stating that Congress had power under the Commerce Clause to regulate “incoming slave trade” and failure to do so was a sign of “bad faith of the American people”).


The second section of the Thirteenth Amendment grants Congress the enforcement power to effectuate the moral principles of the Preamble to the Constitution and the Declaration of Independence. In this regard, the Thirteenth Amendment was both a new beginning for the nation and a constructive means for enforcing its foundational principles of liberty and general well-being.

The Thirteenth Amendment was a drastic brake from the clauses of the 1787 Constitution that protected slavery. Section 2 expanded the federal government’s ability to protect individuals by granting Congress the power to protect civil liberties, rather than relying on states to do so. The Thirteenth Amendment is the bridge between a constitution beholden to the aristocratic practices of slavocracy and one beholden to coequal liberty. The Thirteenth Amendment, thereby, secured the Preamble’s principled grant of governmental power. The Amendment protects the right to unobtrusive autonomy for carrying out deliberative decision, limiting autonomy whenever it arbitrary interfere’s with the reasonable purposes of other citizens. The assurance of freedom protects dignity rights as long as they do not infringe on the equal liberty rights of others. This approach balances autonomy with welfare to achieve a liberating sense of mutual purpose for congressional initiative.

The second section of the Thirteenth Amendment provided an enforceable national guarantee of freedom that is not subject to state prerogative. Federal legislative power is available against any form of arbitrary domination. The scheme protects more than the freedoms enumerated in the Bill of Rights and extends to any intrinsic freedom, such as the ability to freely travel between states. Fair civil rights initiatives must balance individual liberties against the national interests of a diverse but equally free people. The enforcement clause of the Thirteenth Amendment provides lawmakers with the power to craft laws that are tied to the Declaration of Independence’s vision of a free and equal citizenry. The framers of the Thirteenth Amendment determined that liberty was a national right and provided the federal government the constitutional authority to secure it against all racist discrimination.

It is important to note that the Supreme Court has extended the Thirteenth Amendment’s applicability to coercive acts committed against members of any race, not only against blacks. In the years following the Amendment’s ratification, Radical Republicans passed civil rights legislation, such as the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871, to protect their black and white allies. The risk to missionaries, teachers, and politicians who came to the South after the Civil War was almost as great as the danger blacks faced from mob violence. Since then a variety of cases have defined who can bring suit under legislation promulgated pursuant to the Thirteenth Amendment. In the Slaughterhouse Cases, the Court held that the

377 See Sanford Levinson, Constitutional Faith 139 (1988) (“the conflict of 1861, among other things, divides our constitutional history, and some historians refer to the ‘first’ and ‘second’ Constitutions. The first Constitution—that of 1787—was predicated, among other things, on federalism and recognition of slavery, and the second Constitution, on an enhanced national government and individual liberty”).

378 See Robert J. Kaczorowski, Revolutionary Constitutionalism In the Era of the Civil War & Reconstruction, 61 N.Y.U. L. REV. 863, 878 (1986) (stating that postbellum civil rights legislation was intended to protect blacks and whites).
Amendment applies to “Mexican peonage and the Chinese coolie labor system.” Even though race is a fluid term, the Supreme Court later held that contemporary racial classifications should not constrict the Amendment’s applicability. In Shaare Tefila Congregation v. Cobb, a 1987 case arising from the private desecration of a synagogue, the Court found that when the 1866 Congress passed the Civil Rights Act of 1866, Jews and Arabs were among the groups classified as distinct races. The Court, therefore, conclude that the Civil Rights Act prevents property discrimination reminiscent of servitude from being committed against Jews and Arabs.379

The Amendment’s protections apply to anyone who is subject to arbitrary restraints against the enjoyment of freedom. The Abolition Amendment freed slaves from much more than their obligation to engage in unrequited labor. It ended all incidents of servitude such as the forced limitations on slaves’ right to practice religion, hire out their labor, and leave their plantations without permission.380 The Thirteenth Amendment, inferentially, prohibits all repressive conduct rationally related to the impediments of freedom, not simply racist labor practices. Congress can act against any restraint on liberty resembling the badges and incidents of involuntary servitude.

Statutes should protect free and equal persons’ right to pursue qualitatively good lives. Masters had suppressed slaves’ life aspirations, prohibiting them from entering into marital contracts, from choosing professions, and from making a host of other important life decisions. Slavery devalued the Preamble’s governmental commitment to respect the right of citizens to be free of arbitrary intrusions on their freedom. Consequently, laws that are passed under section 2 must make it easier for people to express their individuality and prevent arbitrarily domineering, private and state actions.

As is already clear, I accept as axiomatic that persons have the right to live as happy, autonomous agents within a diverse polity. The Thirteenth Amendment requires that the federal legislature and the judiciary provide the security necessary for citizens to direct their lives pursuant to unique plans, relationships, and interests. Slavery denies persons the opportunity to creatively engage with the world by restricting their right to pursue professions, choose how to raise their children, and make reasonable choices between an infinite variety of domestic options. A free society allows persons to make plans about their lives rather than externally necessitating them to act on undesired alternatives. Becoming a carpenter because of an interest in the craft is significantly different from having no option but to chose that trade. Teaching ones own children only English differs from being prohibited from teaching them foreign languages. Living in a predominantly Jewish neighborhood by choice is different, under the Thirteenth Amendment, than being foreclosed from living elsewhere.

The Thirteenth Amendment shifts the balance of authority for protecting these civil rights away from states and in favor of the national government. A federal polity must protect individual opportunities to pursue self-defined goals and establish reciprocal rights for fair


dealing. One of the federal government’s primary functions is to protect the common good; that is, laws must aim to pragmatically improve people’s lives and to help them flourish as self-directed individuals.

This reasoning presupposes that the coequal freedom of self-determination and self-realization is conducive to the overall good of U.S. society. Laws that require citizens to deal fairly can reduce individual conflicts and, thereby, increase social tranquility. So, a policy designed to promote liberty as a means of achieving the common good has an anti-discriminatory principle built into it: One cannot arbitrarily restrict another’s liberty through the badges or incidents of servitude and credulously insist that such an act benefits everyone.

Civil liberties are not absolute; rather, they may be limited by the coequal rights of others. People living in an organized society may not exercise their liberty to intentionally cause more than a trivial amount of harm to others. The Amendment is not a right for license but rather for independence of choice. It does not sanction indiscriminate behavior that disregards the rights of others. Instead, it provides national assurance of legal redress against arbitrary constraints on independent and unobtrusive choices. The Thirteenth Amendment prevents the use of liberty to interfere with other people’s quest for a good life. This constraint on the Amendment’s significance derives from slavers’ abuse of freedom. After all, masters had abused their property right to possess and sell slaves. The Amendment ended this atomistic and domineering perspective of constitutional liberty because its implementation denied the Declaration’s and Preamble’s assurances to a host of persons for whom the drive for a good life was just as fundamental as it was for their tormentors. The Amendment was meant to counteract that abuse of power by enabling Congress to prohibit any abridgments on people’s rights to be self-directed and self-motivated. I draw this conclusion not only from the theoretical construct of liberty but from the denigrating nature of the master servant relationship.

Laws based on the Thirteenth Amendment should safeguard the right of citizens to live meaningful lives that are unobstructed by acts of arbitrary domination. In drafting civil rights bills, legislators should assess whether the United States has eliminated all vestiges of involuntary servitude. With those vestiges that remain, Congress must pass enforcement laws designed to end them.

Federal laws against such practices should be drafted to best benefit the entire populace, rather than a particular interest group. The nation rises or falls as a whole. The Thirteenth Amendment made available to all the full enjoyment of the rights essential to a free society. It does not take for granted that each person will act with reciprocal concern and respect for fellow citizens. Instead, the Thirteenth Amendment grants Congress the power to enact laws against arbitrary domination. By securing personal safety and stability, the Amendment protects the nation’s citizenry against whimsical coercion. Judicial review serves to check congressional power from being hijacked for autocratic purposes.

381 I derive the distinction between license and independence from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 262-63 (1977), who distinguishes “liberty as license” from “liberty as independence.”

Congress has thus far done little to fulfill its legislative obligation to liberty rights under the Thirteenth Amendment, and only a handful of cases interpret congressional power. Congress’s failure to act has reduced the Amendment’s effectiveness but not its enormous potential for civil change. In spite of more than a century of virtual neglect, the congressional authority to pass a variety of civil rights laws remains viably intact.

Conclusion

The enforcement clause of the Thirteenth Amendment grants Congress the power to provide for the general welfare by protecting civil liberties. The ideology of revolutionary founders and abolitionists had a profound effect on the Amendment’s proponents. Abolitionist perspectives about the Declaration of Independence and the Preamble influenced Radical Republicans in their decision to pass a comprehensive amendment for the national protection of liberty. For the Amendment’s framers, the concept of slavery and its concomitant harms was as broad as that notion was for revolutionaries and abolitionists.

The Reconstruction Congress developed the Thirteenth Amendment to be a far-reaching guaranty of any fundamental right essential to human liberty. Section 2 of the Thirteenth Amendment was included to provide legislators with the means for implementing protections of fundamental liberties such as the right to travel and the right to marry. Today section 2 still empowers Congress to reflect on contemporary conditions that are analogous to involuntary servitude and slavery and to pass federal legislation for their end.

In the years following the Civil War, the Supreme Court rejected the comprehensive reading of liberty in favor for a narrow understanding of it that was more closely linked to the Amendment’s opponents than to its supporters. After years of narrow construction, the Court realized that the Amendment grants Congress the right to prevent many obstructions to freedom, such as discriminatory contractual practices, that are not literally connected to force labor.

The Thirteenth Amendment’s national guarantee of freedom remains an alternative for passing civil rights legislation. That alternative has taken on greater import since the Court recently reduced congressional effectiveness under the Commerce Clause and Section 5 of the Fourteenth Amendment. Congress’s primary focus under the Thirteenth Amendment is achieving coequal liberty, not the national economy. To achieve that end, the Thirteenth Amendment’s enforcement clause authorizes Congress to pass statutes against private and public discrimination, unlike the Fourteenth Amendment.

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See Pamela Brandwein, Slavery as an Interpretive Issue in the Reconstruction Congress, 34 LAW & SOC’Y REV. 315, 316, 354 (2000) (analyzing Northern Democratic view, expressed during the 1864 and 1865 debates, for a limited reading of the Thirteenth Amendment and linking it to later Supreme Court opinions).

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