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INTRODUCTION

INTO THE LIGHT OF DAY: RELEVANCE OF THE THIRTEENTH AMENDMENT TO CONTEMPORARY LAW

*Alexander Tsesis**

Of the three Reconstruction Amendments, the Thirteenth Amendment has received the least attention from the Supreme Court. Articulation of the Amendment's relevance to civil rights policies only came during the Warren Court and Burger Court eras.

The interpretation of Congress's Thirteenth Amendment enforcement authority has evolved more slowly than its Fourteenth Amendment jurisprudential cousin. In the decades following the Civil War, the Court severely curtailed Congress's authority under both amendments.[1] For nearly a century, until the passage of the Civil Rights Act of 1964,[2] several

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1. Both Amendments contain enforcement clauses granting Congress the power to protect fundamental rights. U.S. Const. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

On the Supreme Court's constricting reaction to constitutional reconstruction, see Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1833–34 (2010) (asserting that post-Reconstruction cases limiting Congress's enforcement authority "reflected the prejudices of their time" and were decided after "the revolutionary spirit of Reconstruction had dissipated and reaction had set in"); Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330, 335 (2006) ("[A] reactionary Supreme Court . . . perverted the essential meaning of the Civil War Amendments and helped undermine Reconstruction."); Alexander Tsesis, Interpreting the Thirteenth Amendment, 11 U. Pa. J. Const. L. 1337, 1340–42 (2009) (analyzing how Supreme Court interpretation of Thirteenth Amendment in three decades following ratification limited Congress's ability to exercise Section 2 authority).

2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). Congress had relied both on the Fourteenth Amendment and Commerce Clause to justify passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations whose "operations affect commerce, or if discrimination or segregation by it is supported by State action." § 201(b), 78 Stat. at 243 (codified as amended at 42 U.S.C. 2000a(b)). But in upholding that law in *McClung* and *Heart of Atlanta Motel*, the Court only justified Congress's use of its power to regulate interstate commerce. Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (finding Congress had the authority to prohibit racial discrimination in restaurants whose business relies on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (holding Title II was appropriate exercise of commerce power as applied to public

infamous decisions foreclosed the possibility of federal redress against the segregation practices of private companies.[3] Narrow judicial construction also turned aside the possibility of bringing a successful equal protection challenge to state segregation laws that perpetuated white supremacy under the ruse of separate but equal accommodations.[4] In addition, the Due Process Clause of the Fourteenth Amendment was primarily a vehicle for protecting business rather than private interests pursuant to the doctrine of freedom of contract.[5] Only in the twentieth century did the Due Process and Equal Protection Clauses of the Fourteenth Amendment become principal sources of voting and civil rights protections.[6] The Supreme Court rejuvenated the equal protection doctrine in

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accommodation serving interstate travelers).

3. Despite these explicit statements of congressional empowerment, the post-Reconstruction Court found ways to limit Congress's ability to use the Thirteenth and Fourteenth Amendments to protect individual interests against private and state encroachment. See Giles v. Harris, 189 U.S. 475, 486–88 (1903) (stating that Supreme Court cannot mandate state election officials to register voters); Williams v. Mississippi, 170 U.S. 213, 223–25 (1898) (finding that Fourteenth Amendment does not limit state's ability to determine voter qualifications); Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896) (holding that Thirteenth and Fourteenth Amendments do not provide remedies against state racial segregation); The Civil Rights Cases, 109 U.S. 3, 24–25 (1883) (holding that neither Thirteenth nor Fourteenth Amendment enables Congress to prevent racial segregation by private actors); United States v. Cruikshank, 92 U.S. 542, 555–56 (1875) (determining that Fifteenth Amendment does not proscribe states from assigning voting qualifications, as long as they are not based on race, color, or previous condition of servitude); United States v. Reese, 92 U.S. 214, 217 (1875) (holding that "[t]he Fifteenth Amendment does not confer the right of suffrage upon any one"); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71–81 (1872) (narrowly interpreting Thirteenth, Fourteenth, and Fifteenth Amendments).

4. See Louisiana v. United States, 380 U.S. 145, 149 (1965) (asserting that state's effort to maintain segregation was designed "to preserve white supremacy"). In *Plessy v. Ferguson*, the Court asserted that the Equal Protection Clause did not require states to end racial segregation but only to provide patrons with facilities of substantially equal quality. 163 U.S. at 551–52.

5. See, e.g., Lochner v. New York, 198 U.S. 45, 53 (1905) (finding unconstitutional on due process grounds a health and safety state regulation on bakers' work hours); Allgeyer v. Louisiana, 165 U.S. 578, 590–92 (1897) (holding that Due Process Clause protects the liberty to contract).

6. In his infamous decision in *Buck v. Bell*, Justice Oliver Wendell Holmes asserted that an Equal Protection claim "is the usual last resort of constitutional arguments." 274 U.S. 200, 208 (1927). The *Carolene Products* footnote, which initially appeared as dictum, later laid the groundwork for contemporary equal protection jurisprudence. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); see also Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (describing decision to include footnote four in *Carolene Products* as "the moment the Court began constructing modern equal protection doctrine"); William D. Araiza, New Groups and Old Doctrine: Rethinking Congressional Power To Enforce the Equal Protection Clause, 37 Fla. St. U. L. Rev. 451, 501 (2010) ("The most famous of the Court's formulas setting out its limited review of equal protection claims is, of course, its political process theory from *Carolene Products*."); Robert J. Cynkar, Dumping on Federalism, 75 U. Colo. L. Rev. 1261, 1297 (2004) (asserting that *Carolene Products* footnote four is "a statement from the Court of perhaps the single most important element of equal protection doctrine").

its seminal desegregation decision *Brown v. Board of Education* more than eighty-six years after the Fourteenth Amendment's ratification.[7] Even then, the Court continued to be cautious about expanding the doctrine of substantive due process, concerned not to repeat the judicial overreaching of the *Lochner* line of cases,[8] until its Due Process Clause analysis in cases like *Roe v. Wade*.[9]

Thirteenth Amendment doctrine also underwent a liberalizing transition in which principles played a central role.[10] The current, deferential standard for reviewing legislation that Congress passes pursuant to its Thirteenth Amendment enforcement authority has evolved far beyond its late-nineteenth-century judicial antecedents. The majority opinion in the *Civil Rights Cases* conceived the Thirteenth Amendment as extending to "fundamental rights which appertain to the essence of citizenship . . . the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."[11] But the holding in that case, which in part found that Congress abused its Thirteenth Amendment Section 2 power in passing a national desegregation law, drastically diminished legislative authority.[12] By the turn of the twentieth century, the approach to Section 2 had become so formalistic that the Court only regarded it to be relevant in cases of forced labor.[13] The Warren Court, on the other hand,

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7. 347 U.S. 483, 495 (1954).

8. Griswold v. Connecticut, 381 U.S. 479, 522–24 (1965) (Black, J., dissenting) (arguing majority's recognition of right to privacy was reinstatement of *Lochner*).

9. Roe v. Wade, 410 U.S. 113, 153 (1973) (stating majority view that woman's right to secure abortion is based on "right of privacy" that is "founded in the Fourteenth Amendment's concept of personal liberty"). In *Roe*'s forerunner on the right to privacy, *Griswold v. Connecticut*, the Court remained leery about relying on the Due Process Clause of the Fourteenth Amendment to avoid sitting as a super-legislature. 381 U.S. at 481–82. Instead, in *Griswold* the majority based its decision on penumbras of the Bill of Rights. Id. at 484. The dominant view today, however, is that Justice Harlan's concurrence, which is based on substantive due process, provides the better reasoning for striking the Connecticut anticontraceptive law. Id. at 500 (Harlan, J., concurring).

10. The framers of the Thirteenth Amendment gave voice to this principled vision. Leading Congressmen believed broad legislation was needed to make freedom a substantive reality. Senator Lyman Trumbull went so far as to say that without enforcement through Section 2 of the Amendment, the notions of equal and inalienable rights set out in the Declaration of Independence would be merely "abstract truths and principles." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull). In its seminal decision on the Thirteenth Amendment, *Jones v. Alfred H. Mayer Co.*, the Supreme Court adopted Trumbull's statement that principled application of the Thirteenth Amendment was needed to bring about "practical freedom." 392 U.S. 409, 431–32 (1968). Many congressmen shared Trumbull's perspective. The year after the states ratified the Amendment, Senator Lot Morrill asserted that the Amendment "wrought" a constitutional "change" that "was in harmony with the fundamental principles of the Government." Cong. Globe, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Lot Morrill).

11. 109 U.S. 3, 22 (1883).

12. Id. at 20–22.

13. See Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994) (abolishing peonage). The Court defined peonage "as a status or condition

recognized Congress's authority under the Thirteenth Amendment to pass laws against contract and property discrimination.[14]

The revival of Thirteenth Amendment scholarship is partly born from an effort to address the Supreme Court's shift in Fourteenth Amendment review.[15] Several recent cases circumscribed Congress's Section 5 enforcement power to pass civil rights legislation. Beginning with *City of Boerne v. Flores,* the Court increasingly reined in legislative efforts to independently define and protect individual liberties. The Court held that the federal cause of action under the Religious Freedom and Restoration Act (RFRA) exceeded Congress's power to protect religious freedoms against state and local actors.[16] The majority ruled that Congress cannot identify substantive rights of the Fourteenth Amendment without prior judicial articulation; legislators are only allowed to remedy constitutional violations.[17] In another case, *United States v. Morrison,* the Court struck down the civil remedies provision of the Violence Against Women Act (VAWA) because it provided a remedy against a private rather than a state actor.[18] The holdings in *Boerne* and *Morrison* limited Congress's efforts to protect citizens to the passage of statutes that are responsive to past state infractions against judicially established fundamental interests.[19] This construction of the Fourteenth

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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) ("The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor . . . ."); United States v. Reynolds, 235 U.S. 133, 146, 149–50 (1914) (distinguishing between voluntary and involuntary labor); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (invalidating state law that made refusal to work or perform service prima facie evidence of crime because law conflicted with Thirteenth Amendment's prohibition against involuntary servitude).

14. Runyon v. McCrary, 427 U.S. 160, 168–75 (1976) (finding that 42 U.S.C. § 1981, which Congress passed pursuant to its Thirteenth Amendment authority, prohibits schools from excluding potential students based on race); *Jones,* 392 U.S. at 443–44 (holding that 42 U.S.C. § 1982, another statute passed under Section 2 of Thirteenth Amendment, prohibited private real estate developer from discriminating against black purchaser).

15. See, e.g., Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment (Alexander Tsesis ed., 2010).

16. City of Boerne v. Flores, 521 U.S. 507, 511 (1997). In a subsequent opinion, the Court held that the RFRA continues to be enforceable against the federal government. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 & n.1 (2006).

17. *Boerne,* 521 U.S. at 519–20. The Court shifted away from the coequal standard of *Katzenbach v. Morgan,* which acknowledged that Congress could independently articulate rights encompassed in Section 1 of the Fourteenth Amendment. 384 U.S. 641, 651 & n.10 (1966). *Boerne* conceded, but did not endorse, that there is language in *Morgan* that "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *Boerne,* 521 U.S. at 527–28.

18. 529 U.S. 598, 601–02, 605, 625–26 (2000).

19. See *Morrison,* 529 U.S. at 619–21 (holding that, despite Congress's voluminous findings that state officials were denying adequate remedies to victims of sexual violence,

Amendment makes Congress the responsive arm of the cerebral judiciary, which the Court regards as alone capable of objective interpretation.

The Thirteenth Amendment has not suffered the same fate. It is doctrinally distinct from the Fourteenth Amendment, having never been judicially construed to include a state action requirement or an economic component.[20] In fact, since the 1960s, the Supreme Court has on several occasions confirmed that Congress has robust—some would say plenary[21]—power to pass any necessary and proper laws to end existing forms of discrimination that are connected to the badges and incidents of slavery or involuntary servitude.[22]

On January 27, 2012, the *Columbia Law Review*—under the leadership of then-Editor-in-Chief Maren Hulden and Symposium Editor Rashna H. Bhojwani—hosted a gathering of constitutional scholars, historians, and political scientists to discuss the relevance of the Thirteenth Amendment to contemporary constitutional and social issues. The Essays that emerged from that memorable occasion were marvelously directed through the editing and production stages by the new editorial board under the leadership of Editor-in-Chief Liliana Zaragoza. The Symposium explored the doctrinal relevance of the Thirteenth Amendment to the principles of liberty and equality.

The Essays in this volume address four broad themes: (I) the

Congress overstepped its power because no state action was involved); *Boerne*, 521 U.S. at 519 (finding that "the power to decree the substance of the Fourteenth Amendment's restrictions on the States" is inconsistent with design of Amendment and text of Section 5).

20. See Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. Rev. 307, 350–68 (2004) (contrasting Congress's Thirteenth Amendment enforcement powers with its Fourteenth Amendment and Commerce Clause powers).

21. See, e.g., Robert J. Kaczorowski, The Supreme Court and Congress's Power To Enforce Constitutional Rights: An Overlooked Moral Anomaly, 73 Fordham L. Rev. 153, 232 (2004) (stating that by passing Civil Rights Act of 1866 one year after Thirteenth Amendment was ratified, statute's drafters "asserted that Congress possessed plenary power to remedy violations of citizens' rights by imposing criminal sanctions on anyone who violated them").

22. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968) (citing The Civil Rights Cases, 109 U.S. 3, 20 (1883)). The Warren Court decided *Jones*, deferring there to Congress's judgment that property discrimination was rationally related to an incident of involuntary servitude. Id. at 438–40. The Burger Court was even more liberal in its interpretation of Thirteenth Amendment enforcement authority. Whereas *Jones* dealt with property, in *Runyon v. McCrary* the Court determined that Congress's use of its Thirteenth Amendment power extended to the regulation of private contractual discrimination. 427 U.S. 160, 179 (1976). Later, the Rehnquist Court reaffirmed the Court's commitment to *Jones* and *Runyon*. See Patterson v. McLean Credit Union, 491 U.S. 164, 175–76 (1989) ("Our conclusion that we should adhere to our decision in *Runyon* that § 1981 applies to private conduct is not enough to decide this case."). More recently, the Roberts Court did the same in Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476 (2006) (interpreting contractual discrimination under 42 U.S.C. § 1981 on basis of Court's reasoning in *Runyon*).

Thirteenth Amendment in relation to other constitutional provisions, (II) the significance of the Amendment in restructuring federalism, (III) the limits of the Amendment's grant of congressional and judicial authority, and (IV) the implications to current affairs and contemporary constitutional theory.

PANEL I: THIRTEENTH AMENDMENT IN CONTEXT

Jack Balkin and Sanford Levinson query the potential political and legal benefits of applying the Thirteenth Amendment to new circumstances with the seriousness that is commonly afforded to Fourteenth Amendment interpretation. Such an approach, they believe, has tremendous potential. They insist that business interests have a vested interest in focusing litigation efforts on the Fourteenth Amendment because, ever since the nineteenth century, corporations have obtained interpretations to benefit their purposes. But they have not manipulated the Thirteenth Amendment in the same way.

Balkin and Levinson believe that social interest groups can rely on the Thirteenth Amendment to achieve positive results. They conceive of *slavery* in terms that draw from revolutionary and abolitionist understandings, encompassing more than chattel slavery.[23] Conceived in such broad terms, the Thirteenth Amendment is relevant for ending a variety of social and civil dominations that impede self-rule and self-sufficiency. Balkin and Levinson argue that *slavery* should not be understood literally but analogically. As with other constitutional protections—such as those on *speech* or *searches and seizures*—a crabbed meaning of *slavery* does no more than rob the Constitution of the full range of its vitality.

Mark Graber queries the abstract question of whether the Fourteenth Amendment may have moderated the radical foundations of the Thirteenth Amendment. For purposes of the Symposium, he accepts the premise that the Thirteenth Amendment protects different and more extensive rights than the Fourteenth Amendment but asks whether the later-in-time Amendment's limiting language may have actually been meant to diminish the scope of the Thirteenth.

Graber questions the accepted notion that the Constitution is built of provisions with ever-expanding protections on rights. His analysis of precedent and academic writings leads him to the conclusion that the Fourteenth Amendment modified or at least clarified the meaning of the Thirteenth Amendment. Graber's project helps to explain why the Thirteenth Amendment has not reached its promise, as well as to reassess the Amendment's significance to the structure of the Constitution.

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23. See generally Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773, 1778–819 (2006) (discussing how revolutionary and abolitionist ideology influenced framers of Thirteenth Amendment).

George Rutherglen looks at the political implications of Section 2 of the Thirteenth Amendment through the lens of historical analysis. He regards Congress as the principal branch of government that should interpret the reach of Thirteenth Amendment authority. Judicial enforcement of the Thirteenth Amendment has, in turn, responded deferentially to legislative interpretation. Courts have repeatedly upheld reasonable congressional policies grounded in Section 2 principles. This differs significantly from Fourteenth Amendment interpretation, which primarily relies on Supreme Court decisions rather than congressional initiatives.

Despite his view that the Thirteenth Amendment is a powerful source of authority for legislative action, Rutherglen believes that in the current political climate there is only a remote possibility of the Amendment's revival in the near future. Rutherglen sees the possibility of extending the reach of the Thirteenth Amendment beyond race and ethnicity, but cautions against conceiving it to apply to every social ill. Congress can increase the likelihood of a Thirteenth Amendment-grounded statute surviving a facial challenge by creating a thorough record at the policy development stage of how the contemporary ill is analogous to the evils of slavery or involuntary servitude.

PANEL II: RECONSTRUCTION REVISITED

Eric Foner's central premise is that the Supreme Court has repeatedly based its historical understanding of Reconstruction on texts that historians have roundly condemned as misrepresentative of that period. Rather than relying on accepted historical texts, the Court has continued to quote or simply adopt the position of the Dunning School of history. This "disreputable" perspective, as Foner calls it, claimed that the Reconstruction was an unequivocal disaster. Foner is keenly concerned that the Dunning School's false premises have entered the case law despite its adoption of cultural racism and an artificially narrow perspective on federalism.

Foner also expresses his dismay at the Supreme Court's continued insistence that the Fourteenth Amendment applies only to state but not private forms of discrimination. The Court's recent holding that Congress abused its Fourteenth Amendment power by passing VAWA against private actors[24] accepted the judicially created state action doctrine on the basis of post-Reconstruction Era opinions—such as *Cruikshank* and the *Civil Rights Cases*—which long ago put a stop to Congress's Fourteenth Amendment approach to criminalizing discrimination.[25] Foner points out the irony of the Court's reliance on its

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24. See supra text accompanying notes 18–19 (discussing VAWA and *Morrison*, 529 U.S. 598).

25. See *The Civil Rights Cases*, 109 U.S. at 11 ("Individual invasion of individual rights

interpretation of Section 5 of the Fourteenth Amendment, which was a grant of authority, to whittle down congressional power. As the Court has continued to diminish federal authority to protect historically disempowered groups, Foner points out, it has expanded gun owners' rights[26] and rejected school busing plans meant to increase racial diversity.[27] Foner believes that academic efforts to revive the Thirteenth Amendment stem from the sparseness of precedent on the subject, which has diminished the range of judicial misinterpretation of history in this area of jurisprudence.

Aviam Soifer makes a strong case for understanding the Constitution as a whole, and the Thirteenth Amendment in particular, to grant the federal government authority to protect positive rights. He argues that the Supreme Court's model of negative Fourteenth Amendment rights is deeply flawed.

Soifer carefully evaluates statutes passed shortly after ratification of the Thirteenth Amendment and prior to the ratification of the Fourteenth. The laws codified between 1866 and 1867 went beyond the simple text of the Thirteenth Amendment to guarantee citizens the full and equal benefit of all laws and proceedings, demonstrating the Amendment's relevance to much more than peonage. The Fourteenth Amendment, Soifer believes, further augmented Congress's authority to advance civil rights. He concludes that impediments to congressional civil rights authority—especially the judicially created state action requirement—are false constructs that handicap Congress's ability to effectively enforce the Reconstruction Amendments.

Alexander Tsesis provides a doctrinal foundation for applying the Thirteenth Amendment to a variety of gender discrimination cases. According to him, the Thirteenth Amendment authorizes Congress to pass legislation it deems necessary and proper to provide redress against de facto and de jure forms of group subordination. Although, to date, Thirteenth Amendment legislation and litigation has focused on race, ethnicity, and nationality, Tsesis provides historical and doctrinal reasons for extending its reach to gender equality cases.

Tsesis then discusses several types of gender discrimination that

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is not the subject-matter of the [Fourteenth] amendment."); United States v. Cruikshank, 92 U.S. 542, 554 (1875) ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.").

26. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036, 3050 (2010) (holding that Second Amendment right to keep and bear arms applies against state and local infringement); District of Columbia v. Heller, 554 U.S. 570, 622, 625–27 (2008) (holding that Second Amendment protects individual right to keep and bear arms against federal intrusion).

27. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729–32, 745–48 (2007) (finding that school districts' efforts to integrate schools on basis of race-conscious criteria unconstitutional).

Congress can redress through its Thirteenth Amendment enforcement authority. He proposes reauthorizing 42 U.S.C. § 1981,[28] a statute passed pursuant to the Thirteenth Amendment, to explicitly include gender employment discrimination. Next, he calls for a new gender-motivated violence act to replace the one the Court struck down in *Morrison* as an abuse of congressional Commerce Clause and Fourteenth Amendment authority.[29] Tsesis also calls for a modification in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act[30] to recognize that gender-related violence is a form of subordination that is cognizable by the Thirteenth Amendment.

Rebecca E. Zietlow begins her Essay with an exploration of the three primary perspectives on the scope of the Thirteenth Amendment. At the narrow end are those who argue that its exclusive purpose is to end the oppression of hereditary, exploitative labor. Another group advocates the use of congressional powers to end various forms of racial discrimination. The third group believes the Thirteenth Amendment should extend beyond insular minorities and apply more generally to labor grievances. Zietlow recommends an integration of the racial and class perspectives into a unified vision of human rights. She bases her theory on the advocacy of Representative James Ashley of Ohio, who was an influential Radical Republican of the Reconstruction period. Zietlow shows the importance of the integrated perspective to workers' collective bargaining rights.

PANEL III: THE LIMITS OF AUTHORITY

In his Essay, Jamal Greene probes the purpose, validity, and function of optimistic arguments about the scope of the Thirteenth Amendment. He seeks to explain why some academics have sought to relate the ban against slavery and involuntary servitude to contemporary problems like abortion, child abuse, and violence against women. While he does not think that Thirteenth Amendment optimists are likely to convince the judiciary, he acknowledges the value of a dialogue about the Amendment's relevance to contemporary debates.

The very hope for positive change that the Thirteenth Amendment inspires, Greene believes, can embolden legislative activism. His Essay probes the writings of optimists like Professors Akhil Amar and Andrew Koppelman. While Greene does not regard their premises to be "doctrinally promising," he believes that such arguments have an aspirational value that can help to broaden understanding of constitutional text and place it in a framework of social issues that the drafters never fathomed.

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28. 42 U.S.C. § 1981 (2006).

29. *Morrison*, 529 U.S. at 617, 627.

30. Pub. L. No. 111-84, div. E, §§ 4701–4713, 123 Stat. 2835, 2835–44 (2009) (codified in scattered sections of 18, 28, and 42 U.S.C.).

Jennifer Mason McAward expresses skepticism about expansive readings of the Thirteenth Amendment. She thinks that they tend to erode the separation of powers between remedial congressional authority and judicial interpretive discretion.

McAward disagrees with those participants of the Symposium who understand Section 2 to be a grant of authority for Congress to define what types of subordination are linked to the badges and incidents of servitude. She believes that a limited reading of *McCulloch v. Maryland*'s explication of congressional power, preserving a role for the judiciary to review both the ends of legislation and Congress's means to achieve those ends, informed the Thirteenth Amendment's framers and should frame interpretation of the Amendment today. Thus, she argues, the courts have a role in defining the badges and incidents of slavery. McAward expostulates the view that the Thirteenth Amendment is closely tied to labor bondage but not an expansive view of freedom.

Darrell Miller lays the groundwork for understanding the extent to which congressional enforcement power under the Thirteenth Amendment applies to customary forms of discrimination. His examination sheds light on legal definitions of terms that are associated with slavery's badges, incidents, and relics. The Thirteenth Amendment, Miller explains, grants Congress power not only to regulate labor subordination but also private behavior that has a colorable, historical relation to slavery. After having established this term of reference, Congress can enact statutes against conduct likely to violate a recognized right.

Miller's presentation recognizes that incidents of slavery can manifest in legal institutions and discriminatory customs. Unwritten codes of conduct extended far beyond labor to attitudes and disabilities, government-sanctioned conventions of interracial relations, familial structures, and vigilante violence. Miller's Essay is meant to facilitate political dialogue about the meaning of slavery and freedom in the national conscience.

PANEL IV: CONTEMPORARY IMPLICATIONS

William M. Carter, Jr. provides an account of how the framers of the Thirteenth Amendment sought to safeguard individuals who are not members of a persecuted minority but nevertheless speak out against racial injustice. As he explains, Thirteenth Amendment framers were well aware of the dangers abolitionists faced from their work to rectify discriminatory customs and regulations. These men and women faced violent and exclusionary retaliation because they fought for the equal rights of others. Carter describes the current state of civil rights retaliation law and explains its inadequacy. He believes that the Thirteenth Amendment provides Congress with the needed authority to expand antiretaliation law even to those circumstances when the offending party is technically acting legally but nevertheless harming others through overt or subtle

forms of discriminatory custom. A new statute would not only provide redress but serve a communicative role of signaling society's commitment to justice.

Richard Delgado cautions that the Thirteenth Amendment analogy to civil rights violations might not adequately capture the range of discriminations experienced by nonblack minorities. For instance, the Thirteenth Amendment might not be the appropriate source for the redress of language discrimination, Native American displacement, and foreigner profiling. Other guarantees of rights might be better suited for those situations.

Delgado seeks to demonstrate that the over-reliance on the historical milestones of slavery might actually impede forward progress for some other minority groups, like Latinos, whose experience with racism can better be traced to nineteenth-century xenophobia than the brutality of chattel slavery. Delgado relies on Juan Perea's black-white binary paradigm[31] to articulate the inadequacy of relativizing all civil rights in the United States to the white subordination of blacks. American land misappropriation without due process from Native Americans and Latinos is one of the wrongs Delgaldo finds to be unrelated to slavery and, therefore, requiring treaty remedies rather than Thirteenth Amendment challenges.

Andrew Koppelman's contribution begins with theory and transitions to specific application. He first explores whether the Thirteenth Amendment should be interpreted according to originalist criteria. He finds this to be an impossible task because the "originalist" school of thought is irreconcilably fragmented, with its adherents taking the differing approaches of intentionalism, textualism, original meaning, and redemptive originalism. These divergent schools of thought, Koppelman believes, belie the claim that originalism is an objective approach that alone can lead to interpretational certainty. He adopts a particularist method of constitutional interpretation, which prefers a flexible method to one grounded in universal principles. From this perspective, the Thirteenth Amendment is a heuristic tool for resolving specific legal conundrums rather than a statement of universal rules.

Having established this theoretical foundation, Koppelman goes on to argue that the Thirteenth Amendment is applicable to a range of harmful conduct, not merely antebellum slavery. Koppelman's understanding of the Amendment allows for reasoning by analogy between the institution of slavery and social policy. He believes that forced pregnancy is analogous to the disabilities slave women suffered at the hands of mas-

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31. See Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Calif. L. Rev. 1213, 1219–22, 1224 (1997) (noting writers who focus only on blacks and whites "replicate the belief that there are only 'two prominent players' . . . in debates about race" and that this works to erroneously characterize nonwhite and nonblack groups as invisible and passive).

ters who forced them to engage in sex and to endure compulsory childbearing. Women's right to abortion, he believes, is particularly tied to the Thirteenth Amendment guarantee of freedom from forced labor.

CONCLUSION

Nearly 150 years after its ratification, the Thirteenth Amendment remains the subject of great reflection and debate. This Symposium has provided an opportunity to consider the Amendment's significance to the issues of separation of powers, federalism, and national authority. The enlightening Essays of this collection give some direction for fulfilling the U.S. promises of liberty. The Thirteenth Amendment is part of a constitutional firmament that provides the people with the constitutional means to demand social betterment through their representatives in Congress.