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A Civil Rights Approach

Alexander Tsesis

Loyola University School of Law, atsesis@luc.edu

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A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment

Alexander Tsesis*

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* Visiting Assistant Professor, Chicago-Kent College of Law and Affiliated Scholar, University of Wisconsin Law School, Institute for Legal Studies. I am grateful to Mark Tushnet, Andrew Taslitz, Carolyn Shapiro, Robert Kaczorowski, and Richard Delgado for critiquing an earlier version of this article. I also received valuable advice from David Turner, Michael Scodro, George Rutherglen, and Daniel Hamilton.

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INTRODUCTION

During the preceding decade, the Rehnquist Court significantly limited Congress's Commerce Clause and Fourteenth Amendment authority over civil rights. The new trend in judicial oversight first appeared in *United States v. Lopez*, where the Supreme Court invalidated a statute because Congress failed to show the law congruently and proportionately regulated behavior with a substantial effect on the national economy.¹ In several cases, the Court relied on this congruency test to reduce Congress's ability to enact civil rights legislation.² On another front, beginning with *City of Boerne v. Flores*, the Court reduced Congress's ability to enforce Fourteenth Amendment due process and equal protection rights.³ *Boerne* interpreted the Fourteenth Amendment to be a responsive, rather than a proactive, federal empowerment.⁴ This

¹ *United States v. Lopez*, 514 U.S. 549, 561-63 (1995). Chief Justice Rehnquist's language also indicated that the Commerce Clause would henceforth only apply to cases involving "economic enterprise." *Id.* at 558-61. Curiously, during the most recent term, the Court deviated from its demand for extensive evidence collection, finding constitutional a federal statute that regulated the medical use of marijuana despite the lack of proof that it would have any substantial effect on interstate commerce. *Gonzales v. Raich*, 125 S. Ct. 2195, 2197 (2005) ("In assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."); *id.* at 2221 (O'Connor, J., dissenting).

² See, e.g., *United States v. Morrison*, 529 U.S. 598, 617 (2000) (striking down section of Violence Against Women Act that created private cause of action against perpetrators of gender-motivated violence).

³ *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (finding Religious Freedom Restoration Act unconstitutional, in part, because statute was "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").

⁴ *Boerne* limited Congress's Section 5 powers to passing congruent laws for remedying state violations of Fourteenth Amendment guarantees. *Id.* at 520. Section 5, the Court held, does not empower Congress to "enforce a constitutional right by changing what the right is." *Id.* at 519. The Court reiterated this "responsive" interpretation in several other cases, including *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. 62, 86 (2000); see also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (holding Congress infringed state sovereign immunity with Americans with Disabilities Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 634-48 (1999) (finding Congress overstepped its authority with provisions of Patent and Plant Variety Protection Remedy Clarification Act). *But see Tennessee v. Lane*, 541 U.S. 509, 511, 533-34 (2004) (determining Title II of Americans with Disabilities Act, dealing with access to courtrooms, to be valid use of Congressional power); *Nev. Dep't Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003) (holding that Family and Medical Leave Act was proportional and congruent statute under *Boerne*).

means Congress cannot “determine what constitutes a constitutional violation” in order to secure fundamental rights; it can only prevent judicially identified unconstitutional behavior.⁵ The Court thereafter reiterated this remedial interpretation in *United States v. Morrison*, finding that Congress overstepped its Fourteenth Amendment authority in enacting a civil cause of action for gender-motivated violence committed by private individuals as opposed to state actors.⁶

Interestingly, the Rehnquist Court has not similarly reduced Congress’s authority under the Thirteenth Amendment, making it an alternative source for federal civil rights statutes. This Article develops an approach that sidesteps the Court’s recently placed obstacles to national civil rights initiatives. The Thirteenth Amendment differs from the Fourteenth Amendment because it lacks a state action requirement.⁷ Similarly, it differs from the Commerce Clause because the Thirteenth Amendment’s central concern is liberal equality rather than economic transaction. The Thirteenth Amendment’s framers drew from antislavery and abolitionist writers to develop a constitutional provision for protecting individual rights essential for the common good of citizens.

Despite its far-reaching purposes, Thirteenth Amendment jurisprudence has remained woefully underdeveloped. The little jurisprudence that does exist interprets congressional power broadly. The Supreme Court has recognized the Thirteenth Amendment to be far more than a provision that emancipated slaves. Pursuant to Section 2 of the Amendment, Congress can enact statutes that prohibit private discrimination in housing,⁸ education,⁹ and employment.¹⁰ Some scholars have argued that the Thirteenth Amendment reaches conduct as diverse as collective bargaining¹¹ and hate speech.¹² In short, the

⁵ *Boerne*, 521 U.S. at 519.

⁶ 529 U.S. at 627.

⁷ U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

⁹ *Runyon v. McCrary*, 427 U.S. 160, 170 (1976).

¹⁰ *Johnson v. Ry. Express Agency Inc.*, 421 U.S. 454 (1975); see also *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).

¹¹ James G. Pope recently wrote about the labor movement’s decision to base labor rights activism on the Commerce Clause instead of the Thirteenth Amendment. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor & the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 14 (2002) (arguing that protections of Wagner Act on labor’s right to bargain collectively was based on same vision of freedom as framers of Thirteenth Amendment asserted); see also Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 440 (1989) (“In addition to

Amendment grants Congress the power to pass statutes for the advancement of a variety of civil liberties.

The Thirteenth Amendment authorizes Congress to provide for individual liberties and the general welfare that the Preamble to the Constitution and the Declaration of Independence made national creeds. Congress retains the constitutional power to pass laws that protect fundamental liberties, although it rarely uses this power. Congress's and the judiciary's virtual neglect of the Thirteenth Amendment has not lessened its significance. Indeed, the Rehnquist Court's recent jurisprudence, striking down civil rights legislation, has increased the Thirteenth Amendment's pertinence.

This Article draws upon the views of the country's founders, nineteenth-century abolitionists, and Radical Republicans to evaluate the significance of the Thirteenth Amendment. It explains how the amendment permits Congress to protect persons against arbitrary treatment that intrudes on liberty interests. The American Revolution had heralded principles of a coequal citizenry. Later, the abolitionists criticized the disjunction between Revolutionary purposes and constitutional protections of slavery. Radical Republicans then refined revolutionary abolitionism and gave Congress the power to regulate discriminatory conduct that the original Constitution had left to the discretion of each state.

Part I begins by tracing American Revolutionary analyses on the nature of a free citizenry. Revolutionary pamphlets are replete with discussions of liberty. The founding ideals of the Revolution were manifestly incompatible with slavery, but an enforceable guarantee of freedom for all did not gain constitutional recognition until the ratification of the Thirteenth Amendment. Even though Revolutionaries failed to eliminate the institutional practice of slavery, they left an intellectual legacy that the post-Civil War Congress drew from.

Part II connects abolitionist efforts to end slavery with the Revolutionary commitment, made years earlier, to liberal equality. Abolitionists interpreted the Preamble and the Declaration as manifestos against the institution of slavery. This understanding relied on the same

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.”).

¹² Akhil R. Amar, *The Case of the Missing Amendment: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 156 (1992) (asserting that hate speech is badge of servitude); see also Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389 (2004) (regarding Thirteenth Amendment and regulation of hate speech).

natural rights tradition that the country's founders had invoked. Part III describes how abolitionist thought evolved during the congressional debates on the Thirteenth Amendment. These debates took place at the end of the Civil War, in 1864 and 1865, and provide insight into how the Amendment's goal of universal liberty is connected to Revolutionary ideals that the Constitution's framers failed to secure.

Part IV details Supreme Court precedent on the Thirteenth Amendment which recognizes Congress's authority to pass wide-ranging laws that prohibit private and public discrimination. While Thirteenth Amendment jurisprudence has remained intact since the Warren and Burger Courts, the Rehnquist Court recently limited congressional power to act pursuant to other constitutional provisions. Part V explains how the erosion of Fourteenth Amendment and Commerce Clause powers, by such cases as *United States v. Morrison*¹³ and *United States v. Lopez*,¹⁴ has increased the pertinence of the Thirteenth Amendment. The article concludes by considering the extent of Congress's enforcement power under the Thirteenth Amendment.

I. REVOLUTIONARY FERVOR FOR LIBERTY

The Declaration of Independence and the Preamble to the Constitution declare life, liberty, and the pursuit of happiness to be innate human characteristics. This was a radical notion in the United States at a time when slavery was an established practice in most colonies. Neither the Declaration nor the Preamble, however, granted Congress the power to enforce the rights they mentioned. The liberal equality that many colonists envisioned only became an enforceable, national commitment in 1865 with the ratification of the Thirteenth Amendment.

To be sure, encouraging signs appeared immediately after the Revolution; for instance, northern laws ending slavery seemed, for a time, to move the entire country in the direction of abolition. The antislavery temperament of the Revolutionary age, however, did not translate into universal or national prohibitions against the institution. To the contrary, several constitutional provisions, including the Three-Fifths Clause, the Importation Clause, and the Fugitive Slave Clause, protected slavery.¹⁵ The founding documents of the American Revolution and their colonial antecedents, nevertheless, were essential to

¹³ *United States v. Morrison*, 529 U.S. 598, 617 (2000).

¹⁴ *United States v. Lopez*, 514 U.S. 549, 558-61 (1995).

¹⁵ U.S. CONST. art. 1, § 2; U.S. CONST. art. 1, § 8; U.S. CONST. art IV.

the framers of the Thirteenth Amendment in determining the characteristics of a free citizenry.

A. *Liberty in the Revolutionary Era*

The ideological justification for the American Revolution was irreconcilable with the Constitution's protections of slavery. Contemporary political and religious leaders regarded the Revolution as a struggle for natural liberties that the British government had infringed.¹⁶ That justification was incompatible 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.¹⁷

Some Revolutionary leaders drew attention to the incongruity between American demands for freedom from British rule and their rationales for 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

¹⁶ American revolutionists came from a British tradition that regarded freedom to be a natural birthright. See, e.g., WILLIAM PATTEN, A DISCOURSE DELIVERED AT HALLIFAX IN THE COUNTY OF PLYMOUTH, JULY 24TH 1766, at 12 (1766) ("We may from what has been said infer, in the first place, that FREEDOM is our natural right, equally with other men."); 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!"). Laws, the Revolutionaries believed, could not take away fundamental rights. See, e.g., John Adams, *A Dissertation on the Canon & Feudal Law*, in 3 THE WORKS OF JOHN ADAMS 445, 449 (Charles F. Adams ed., 1851) ("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 (1772), available at http://www.constitution.org/bcp/right_col.htm (last visited Apr. 18, 2006).

Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. . . . All men have a right to remain in a state of nature as . . . nature of a social compact, necessarily ceded, remains. All positive and civil laws should conform, as far as possible, to the law of natural reason and equity.

Id.

¹⁷ See 1 WILLIAM W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE & SPEECHES 266 (1891) (stating in March 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!").

vested him with it.”¹⁸ Thomas Paine, exhibiting a knack for bluntness in his first published article, 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.”¹⁹ Even though these sentiments were widely shared, chattel slavery would linger for almost a century in America after its independence.

1. Revolutionary Understanding of Political Slavery

Colonial pamphleteers often used the term “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 thought only white males possessed natural rights. This 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 U.S. 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; Henry embodied the Revolutionary project in his pithy statement “Give me liberty or give me death”; and Paine, as historian Eric Foner explained, believed America to be “the place where the principle of universal freedom could take root.”²⁰ Colonists often wrote they were under the British yoke of slavery because they considered it to be so incompatible with their aspirations.²¹

¹⁸ ALEXANDER HAMILTON, *A FULL VINDICATION OF THE MEASURES OF THE CONGRESS* 5 (1774).

¹⁹ Thomas Paine, *African Slavery in America*, in 1 *THE WRITINGS OF THOMAS PAINE* 4, 7 (Moncure D. Conway ed., 1894) (1775).

²⁰ See JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 23-25 (1982); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 10 (1985); Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 *J. AM. HIST.* 435, 439 (1994).

²¹ BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* 289-91 (1994).

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 controul of another, as to our actions and properties.”²² The opposite of being in servitude, defined by Richard Price in a work that enjoyed widespread popularity, was to be guided by one’s will.²³

The political conception of slavery appeared in colonial writings as early as the 1740s. An anonymous author of that decade contrasted the natural liberty of action and thought with the slavery of arbitrary power.²⁴ This contrast also appeared in the pamphlets that were printed during the War of Independence. One polemicist contrasted the felicity of liberty with 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.”²⁵ 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.²⁶ Despite the public outcry against the arbitrary use of British power, colonists committed even worse oppressions against their slaves.²⁷

²² MOSES MATHER, *AMERICA’S APPEAL TO THE IMPARTIAL WORLD* 48 (1775).

²³ Richard Price, *Observations on the Nature of Civil Liberty, in THE GENERAL INTRODUCTION TO THE TWO TRACTS ON CIVIL LIBERTY, THE WAR WITH AMERICA, AND THE FINANCES OF THE KINGDOM* 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*.”).

²⁴ See N.Y. EVENING POST, Nov. 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.”).

²⁵ JUDAH CHAMPION, *CHRISTIAN & CIVIL LIBERTY & FREEDOM CONSIDERED & RECOMMENDED: A SERMON DELIVERED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT, AT HARTFORD, ON THE DAY OF THEIR ANNIVERSARY ELECTION, MAY 9TH, 1776*, at 14 (1776).

²⁶ GAD HITCHCOCK, *A SERMON PREACHED AT PLYMOUTH DECEMBER 22, 1774*, at 17 (1775).

²⁷ The American Anti-Slavery Society’s Declaration, which the society drafted on December 4, 1833, pointed out the discrepancy between what the white colonists and black colonists achieved through the revolution:

We have met 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 subjected to the lash of brutal task-masters.

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 1760s and 1770s, 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."²⁸ Joseph Emerson also rejoiced about the repeal of the Stamp Act that had placed the colonists into "vile ignominious slavery."²⁹

Others also viewed the use of these parliamentary measures as absolutist attempts at their enslavement.³⁰ 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.³¹ "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.³² John Dickinson, who became 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."³³ The same year, 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."³⁴ The Tea Act, through

²⁸ HENRY CUMINGS, A THANKSGIVING SERMON PREACHED AT BILLERICA, NOVEMBER 27, 1766, at 21 (1767); see also ELISHA FISH, 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.").

²⁹ JOSEPH EMERSON, THANKSGIVING ON THE ACCOUNT OF THE REPEAL OF THE STAMP-ACT 9 (1766).

³⁰ 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) ("[T]he Minds of the People were filled with Anxiety, and they were justly alarmed with Apprehensions of the total Extinction of their Liberties . . . [N]othing is more evident, than that any People who are subject to the unlimited Power of another, must be in a State of abject Slavery.").

³¹ Townshend Revenue Act, 1767, 7 Geo. 3 (Eng.).

³² *Philadelphia Grand Jury* (Sept. 30 1770), BOSTON EVENING-POST, Nov. 5, 1770, at 4.

³³ 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.

³⁴ SILAS DOWNER, A DISCOURSE, DELIVERED IN PROVIDENCE, IN THE COLONY OF RHODE-

which Parliament imposed the tax on tea that spurred the Boston Tea Party in December 1773, was viewed as the “[e]nsign of their arbitrary Dominion and your Slavery.”³⁵ In dramatic fashion, Josiah Quincy proclaimed that “We are slaves!” of the British oppressors.³⁶ The implication, as another pamphleteer remarked, was that persons who were not treated as “subjects” — or “citizens,” in modern terminology — were slaves.³⁷ The use of absolute parliamentary power, Hamilton wryly remarked, resulted in colonial slavery.³⁸ The analogy was not lost on common folk. A private in the army wrote in a letter to his parents on July 4, 1777 that colonial courage and conduct would “determine whether Americans are to be free men or slaves.”³⁹ These were tragically paradoxical phrases given that hereditary slavery was then legal in all the colonies.

2. Colonial Statements Against Chattel Slavery

Despite the extensive spread of slavery, many colonial poeticists decried it. The blindness to colonial oppressions astonished one observer and prompted him to ask how “Men who feel the Value and Importance of Liberty as much as the In habitants of the southern States do that of their own, should keep such Numbers of the human Species in a State of so absolute Vassalage.”⁴⁰ 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 momentum for ratification, were raised in a tradition marked by a narrowly construed form of antislavery that waxed in the years leading up to the Revolution. One Harvard-educated Congregational minister, Nathaniel Appleton, concluded that the colonial protest in 1765 against the Stamp Act and its ultimate repeal would have been more glorious “if at the time

ISLAND, UPON THE 25TH DAY OF JULY, 1768. AT THE DEDICATION OF THE TREE OF LIBERTY, FROM THE SUMMER HOUSE IN THE TREE 10 (1768).

³⁵ HAMPDEN, *THE ALARM* (NO. III) (1773).

³⁶ JOSIAH QUINCY, JR., *OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL* 69 (1774).

³⁷ *ARGUMENT IN DEFENCE OF THE EXCLUSIVE RIGHT CLAIMED BY THE COLONIES TO TAX THEMSELVES* (1774), *quoted in* JOHN P. REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 49 (1988).

³⁸ ALEXANDER HAMILTON, *A FULL VINDICATION OF THE MEASURES OF CONGRESS* 4 (1774).

³⁹ PHILIP DAVIDSON, *PROPAGANDA AND THE AMERICAN REVOLUTION 1763-1783*, at 341 (1941).

⁴⁰ *Ebenezer Hazard's Travels Through Maryland in 1777*, 46 *MD. HIST. MAG.* 44, 50 (1951).

we are establishing Liberty for ourselves and children, we show the same regard to all mankind that come among us."⁴¹

Literature of this sort illustrates the shift in the colonial conscience during the 1760s and 1770s from an almost universal complacency about slavery to a widespread antagonism toward the institution.⁴² 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 2780 blacks remained enslaved in northern states.⁴³ In spite of this awareness, an Amendment abolishing slavery was necessary because during the Revolutionary War, most white founders advocated freedom only for those of their own propertied class.⁴⁴ 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."⁴⁵

The country's founders' definition of tyrannical oppression was unmistakably applicable to chattel slavery, but until 1865 there was no national consensus to end institutionalized bondage. The outcry about blacks' enslavement came from some of the most politically active and wealthy men in the colonies. Some of them realized the Revolution's ideological implications for 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 2000 black slaves.⁴⁶ The evident contradiction also evoked a response from Samuel Johnson, an English lexicographer and opponent of colonial independence. As he saw it, the "loudest yelps for liberty"

⁴¹ NATHANIEL APPLETON, *CONSIDERATIONS ON SLAVERY* 19 (1767). Seeing the liberal success against the Stamp Act, blacks paraded along Charleston, South Carolina's streets proclaiming: "Liberty!" MERTON L. DILLON, *SLAVERY ATTACKED: SOUTHERN SLAVES AND THEIR ALLIES, 1619-1865*, at 28-29 (1990).

⁴² See DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 41 (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.").

⁴³ ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 222 (1967).

⁴⁴ W. Robert Higgins, *The Ambivalence of Freedom: Whites, Blacks, and the Coming of the American Revolution in the South*, in 4 *SLAVERY, REVOLUTIONARY AMERICA, & THE NEW NATION* 128-29 (Paul Finkelman ed., 1989).

⁴⁵ DAVIS, *supra* note 42, at 286.

⁴⁶ JOHN MEIN, *SAGITTARIUS'S LETTERS AND POLITICAL SPECULATIONS* 38-39 (1775).

were heard from “drivers of Negroes.”⁴⁷

During the struggle with England, an increasing number of pamphlets denounced the inconsistency of retaining the institution of slavery with the battle 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, while we continue to keep our fellow creatures in slavery just because their color is different from ours.”⁴⁸ England would not accept the force of Revolutionary reasoning, wrote another author in 1774, until Americans ended the cruelty of slavery.⁴⁹ John Allen, who lacked Rush’s political ambitions, denounced slaveholders in even 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.”⁵⁰ He further pointed out that a duty on tea was of far smaller consequence than the bondage of a captive.⁵¹

Religious leaders, just as their secular counterparts, drew attention to the need for moral reform. Samuel Hopkins’s heart-wrenching plea on behalf of blacks asserted that Americans were enslaving many thousands of their “brethren, who have as good a right to liberty as ourselves.”⁵² 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.⁵³ In 1774, Reverend Nathaniel Niles of Newbury, Massachusetts, pointed out Americans’ shame in struggling for their freedom while continuing “to enslave their fellow men.”⁵⁴ Clergyman Appleton asked the “sons of liberty” to recognize that their principles did not comport with their participation in the slave trade.⁵⁵ If they persisted in this confounding callousness,

⁴⁷ 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*?”).

⁴⁸ DAVIS, *supra* note 42, at 274.

⁴⁹ RICHARD WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES 80 (1774).

⁵⁰ JOHN ALLEN, THE WATCHMAN’S ALARM TO LORD N---H 27 (1774).

⁵¹ *Id.* at 28.

⁵² SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS 50 (1776).

⁵³ *Id.* at 52.

⁵⁴ DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 74-75 (1971).

⁵⁵ APPLETON, *supra* note 41, at 19.

Appleton warned, mankind would laugh at their pretensions.⁵⁶

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,⁵⁷ but further 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 adequate instructions for becoming productive members of their communities.⁵⁸ Seeking to calm the whites' fears about free blacks, Benezet explained how liberation would help government achieve security and welfare: the tax burden would decrease because the obligation to pay taxes would fall on everyone, the trades and arts would advance, and productivity would increase since more vacant land would be cultivated.⁵⁹ 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 citizenship.

Some black contemporaries also were quick to seize on the egalitarian significance of Revolutionary thought to bolster their demand for 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."⁶⁰ Similarly, on April 20, 1773, black petitioners from Massachusetts expressed their hope for "great things from men who have made such a noble stand against the designs of their *fellow-men* to enslave them."⁶¹ The same year, in another petition, blacks from Boston and other Massachusetts provinces demanded relief from the manifold burdens of New England slavery: "We have no Property! We have no Wives! No Children! We have no City! No Country."⁶² Lemuel Haynes, a racially mixed minister, wrote that "an *African*, or, in

⁵⁶ *Id.*

⁵⁷ ANTHONY BENEZET, SOME HISTORICAL ACCOUNT OF GUINEA ch. 11 (1771) (providing eyewitness accounts of Africa in opposition to inaccurate accounts about enslavement of Africans).

⁵⁸ ANTHONY BENEZET, A SHORT ACCOUNT OF THAT PART OF AFRICA, INHABITED BY THE NEGROES 71 (3d ed. 1762).

⁵⁹ *Id.* at 71-72.

⁶⁰ WINTHROP D. JORDAN, WHITE OVER BLACK 291 (1968).

⁶¹ Thomas J. Davis, *Emancipation Rhetoric, Natural Rights, & Revolutionary New England: A Note on Four Black Petitions in Massachusetts, 1773-1777*, 62 *NEW ENG. Q.* 248, 255 (1989).

⁶² *Id.* at 252.

other terms, . . . a Negro, . . . has an undeniable right to his Liberty.”⁶³ A “Great Number of Blackes detained in the State of slavery” petitioned the Massachusetts Assembly in 1777.⁶⁴ They requested that the Massachusetts Assembly

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 arive at the age of twenty one years so may the Inhabitance of this State No longer chargeable with the inconsistency 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.⁶⁵

In Massachusetts, where slaves were regarded as both property and persons, blacks brought freedom suits against their masters.⁶⁶ During the decade before the Revolution, several litigants were successful in petitioning Massachusetts courts to grant them freedom.⁶⁷ Slavery’s death knell came in 1783 from the Massachusetts Supreme Court, which interpreted the state’s constitution to prohibit the institution.⁶⁸

Even the southern vanguard of the Revolution realized the anomaly between liberty’s cause and the inequitable institution Southerners chose

⁶³ Ruth Bogin, ‘Liberty Further Extended’: A 1776 Antislavery Manuscript by Lemuel Haynes, 40 WM & MARY Q. 85, 92 (3d ser. 1983).

⁶⁴ 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 9 (Herbert Aptheker ed., 1951).

⁶⁵ *Id.* at 10.

⁶⁶ See Benjamin Quarles, *The Revolutionary War as a Black Declaration of Independence*, in SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION 283, 290 (Ira Berlin & Ronald Hoffman eds., 1983).

⁶⁷ PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH 14 (1997).

⁶⁸ Commonwealth v. Jennison (Mass. 1783) (unreported), reprinted in 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY & THE NEGRO 480-81 (H. T. Catterall ed., 1936) (holding that slavery violated Massachusetts Constitution’s guarantee that all men are born “free and equal”). Though unreported, the case is mentioned in Chief Justice William Cushing’s notebook which is on file in the Cushing Family Collection, Massachusetts Historical Society. For three analyses of this case, see PHILIP S. FONER, 1 HISTORY OF BLACK AMERICANS 353-54 (1975); BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 47-48 (1961); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 113-15 (1967). More extensive treatment of the case is provided in John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 AM. J. LEGAL HIST. 118 (1961). Massachusetts was the only state where a judicial decree ended slavery. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “Yearning To Breathe Free”: Legal Barriers Against & Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1215 n.2 (1993).

to perpetuate after independence. Patrick Henry, for one, acknowledged his hypocrisy. After scrutinizing one of Benezet's abolitionist tracts, Henry wrote:

[I]s 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 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.⁶⁹

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.⁷⁰ The need for a federal union and the widely held belief in the inferiority of blacks and American 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 slaveholders legal concessions. It rejected racist biological views, which regarded blacks as less evolutionarily developed than whites.⁷¹

⁶⁹ Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443-44 (1937).

⁷⁰ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (William Peden ed., 1955) ("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 of Jefferson's paltry condemnation of slavery, see DAVIS, *supra* note 42, at 164-84; JORDAN, *supra* note 60, at 430-36; DUNCAN J. MACLEOD, SLAVERY, RACE, & THE AMERICAN REVOLUTION 126-29 (1974).

⁷¹ 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 EDWARD LONG, HISTORY OF JAMAICA 360, 365, 370 (1774). One anonymous author divided "Africans into five classes, as 1st, Negroes, 2d, Ourang Outangs, 3d, Apes, 4th, Baboons, and 5th, Monkeys," saying that "[t]here 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

Blacks and whites, wrote Benezet, are of the same species; therefore, they are on a naturally equal footing.⁷² “Hereditary tyrants,” stated an anonymous pamphlet from 1784, place whites on a pedestal with gods, while they degrade another part of humanity and treat them like brutes.⁷³ Before his nervous breakdown in 1764, James Otis asserted that all colonists, both white and black, were born naturally free.⁷⁴ He viewed the institution of slavery as a despoiler of civilization that prefers the interests of petty tyrants to the value of liberty.⁷⁵ Citizens were of white, brown, and black complexion, on all of whom the sun rose daily.⁷⁶ 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.”⁷⁷ Everyone, therefore, has a common stock of human rights.⁷⁸ 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: “[Y]ou are going to fight for your *liberty*, but I have none to fight for.”⁷⁹ These words cut Whipple to the quick, and he immediately freed the slave.⁸⁰

inequality in writings including THOMAS CLARKSON, AN ESSAY ON THE SLAVERY AND COMMERCE OF THE HUMAN SPECIES 113 (1786) (“[I]f [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 inferior link of the chain of nature, and designed for servitude,’ as far as it depends on the *inferiority of their capacities*, is wholly malevolent and false”); 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.”); JOHN WESLEY, THOUGHTS UPON SLAVERY 46-47 (1774) (“Certainly the *African* is in no respect inferior to the *European*.”).

⁷² BENEZET, *supra* note 58, at 52.

⁷³ THOMAS DAY, A LETTER FROM ***** IN LONDON . . . ON THE . . . SLAVE-TRADE 16 (1784) (“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!”).

⁷⁴ JAMES OTIS, RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 29 (1764).

⁷⁵ *Id.*

⁷⁶ JAMES OTIS, CONSIDERATIONS ON BEHALF OF THE COLONISTS 30 (2d ed. 1765). In opposition to the Stamp Act, Otis wrote: “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.” *Id.*

⁷⁷ ABRAHAM BOOTH, COMMERCE IN THE HUMAN SPECIES 22 (1792).

⁷⁸ *Id.*

⁷⁹ CHARLES W. BREWSTER, RAMBLES ABOUT PORTSMOUTH 155 (1st ser., 2d ed. 1873).

⁸⁰ *Id.*

Given the extent of ideological commitment to universal liberty, many Revolutionaries thought that the demise of slavery was near at hand. Historian Winthrop D. Jordan has pointed out that in the years preceding the Revolution, a general impression prevailed that slavery was a "communal sin."⁸¹ 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."⁸² He expected slavery in America to end within forty years.⁸³ That view, however, wound up being overly optimistic. Another ninety years and the Civil War would intervene before the Thirteenth Amendment's ratification.

B. Failure to Enforce the Ideology of Liberty

In spite of the widespread realization that slavery contradicted the Constitution's founders' moral stance against England, abolition was long in coming. This was, in large part, because many colonialists were unwilling to place human rights above economic self-interest and to overcome, or even to adequately confront, their own racial prejudices. Thomas Jefferson's experience typifies the loss of liberal idealism. Writing during the heyday of idealistic American expectations, Jefferson had wanted to end the importation of slaves into the colonies and follow that with the "abolition of domestic slavery."⁸⁴ 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."⁸⁵ That same year, in 1776, Jefferson's second and third drafts of the Virginia Constitution contained a provision that "[n]o person hereafter coming into this country shall be held in slavery under any pretext whatever."⁸⁶

In 1776, when Jefferson had actively worked to end slave importation, most colonial leaders were unwilling to go that far. South Carolina, which would later repeatedly appear as a leader of the antebellum

⁸¹ JORDAN, *supra* note 60, at 298.

⁸² Letter from Benjamin Rush to Granville Sharp (Oct. 29, 1773), in *Correspondence of Benjamin Rush & Granville Sharp*, 1 J. AM. STUD. 1, 5 (John A. Woods ed., 1965).

⁸³ *Id.*

⁸⁴ THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 16-17 (1774).

⁸⁵ Tania Tetlow, *The Founders & Slavery: A Crisis of Conscience*, 3 LOY. J. PUB. INT. L. 1, 11 (2001).

⁸⁶ 1 THE PAPERS OF THOMAS JEFFERSON 363 (Julian P. Boyd ed., 1950).

proslavery camp, expressed its opposition to a passage denouncing slave importation in the original draft of the Declaration, and the passage was not retained in the Declaration's final draft.⁸⁷ Thirty-eight years after independence, however, Jefferson had become complacent toward 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 kindle in the younger generation, leading to a popular movement against slavery, had not combusted.⁸⁸ Despite his avowed disappointment at this Revolutionary failing, Jefferson counseled Coles not to liberate his slaves.⁸⁹

Even without the proposed anti-importation passage, the Declaration of Independence established liberty as a primary national aspiration.⁹⁰ 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.⁹¹

Legal restrictions on the lives of slaves indicated how constricted the definitions of "liberty" and "equality" were to many colonists, especially Southerners. Slave codes regulated everything from matrimony and travel to living arrangements and the use of leisure time.⁹² While the

⁸⁷ WILLIAM W. FREEHLING, *THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR* 26 (1994).

⁸⁸ Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in 11 *THE WORKS OF THOMAS JEFFERSON* 416, 417 (Paul L. Ford ed., 1905). Coles, who was the one-time secretary of President James Madison and cousin of Dolly Madison, eventually set his own slaves free, but only after calling Madison out about his hypocritical conscience on slavery. See RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 551-52 (1971).

⁸⁹ Letter from Thomas Jefferson to Edward Coles, *supra* note 88, at 416, 419.

⁹⁰ See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROS* 129 (2d ed. 1956) ("The implications of the Declaration, however vague, were so powerful that Southern slaveholders 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.").

⁹¹ See ALEXANDER TSEHIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 43-44 (2002) (relating how ethnological rationalizations have been used to support claims of black inferiority).

⁹² See, e.g., KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 192-236 (1956); EDWARD R. TURNER, *THE NEGRO IN PENNSYLVANIA* 30 (1911) (matrimony); ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY*

theoretical referent of liberty was expansive for Revolutionaries, in practical terms it meant little for those who were enslaved. The philosophical principles on which the Revolution relied brought the despotism of American slavery into sharp relief.

Before the Revolution, slavery was legal in all thirteen colonies.⁹³ The nation's principled developments during the Revolutionary Period enervated antislavery sentiments in the North, where colonies ended the institution through legislative and judicial efforts. Pragmatism played a role, since it was easier to abolish the institution in the North, where ending slavery had little economic repercussion on the labor force, than in the South, where all manner of agricultural and commercial enterprises were dependent on it. The end of slavery in the North was nevertheless a decisive and lasting change born of authentic Revolutionary commitments to liberty.

In 1774, the Continental Congress required that the importation of slaves cease after December 1, 1775.⁹⁴ But the limited power that the colonies had granted to the Continental Congress made the body incapable of enforcing its decree.⁹⁵ As W. E. B. DuBois pointed out, the philosophy of freedom was one among several reasons for ending slave importation.⁹⁶ The 1787 Northwest Ordinance, though imperfect, was another nationwide effort against the spread of slavery to the West.⁹⁷

IN THE NORTH 12-24 (1967); *id.* at 86-87 (matrimony); *id.* at 170 (matrimony); 26 ARCHIVES OF MARYLAND 259-60 (William H. Browne ed., 1906) (matrimony); STATUTES AT LARGE: BEING A COLLECTION OF ALL LAWS OF VIRGINIA (William W. Hening, ed., 1823) (matrimony); 4 THE STATUTES AT LARGE OF PENNSYLVANIA 62-63 (1897) (matrimony); 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 352, 352-53, 363 (David J. McCord ed., 1840) (leisure).

⁹³ Eric Foner, *Expert Report*, 5 MICH. J. RACE & L. 311, 313 (1999).

⁹⁴ William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteenth States*, 31 U. RICH. L. REV. 111, 172 n.401 (1997).

⁹⁵ Michael Daly Hawkins, *John Quincy Adams in the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 5 (2000).

⁹⁶ W. E. B. DuBois, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870*, at 41-42 (1896) (noting other important reasons were fear of slave insurrections, slave breeders' monopolistic calculations, and strategy of harming British commerce).

⁹⁷ Whatever good came from the Ordinance's prohibition of slavery, which applied to lands northwest of the Ohio River, was counterbalanced by an ominous fugitive slave clause:

There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or services as aforesaid.

The Ordinance applied to an area that would include present-day Ohio, Indiana, Illinois, Michigan, and Wisconsin.⁹⁸

Individual states in the North were also moving to end slavery within their borders. Rhode Island, in 1774, restricted the slave trade, prefacing its new law with the statement that “those who are desirous of enjoying all the advantages of liberty themselves, should be willing to extend personal liberty to others.”⁹⁹ That assertion was only partly sincere since the state allowed slave traders not able to dispose of their cargo in the West Indies to bring it to Rhode Island as long as it was re-exported it within a year.¹⁰⁰ Connecticut, that same year, passed “[a]n Act prohibiting slave importation,”¹⁰¹ and Delaware (1776), Virginia (1778), and Maryland (1783) followed suit.¹⁰² As for South Carolina (1787) and North Carolina (1786), those two states made importation more difficult but showed no fundamental aversion to it.¹⁰³

An even more important step toward total abolition was the North’s decision to end slavery pursuant to core revolutionary commitments. The 1777 Vermont Constitution outlawed slavery.¹⁰⁴ It explicitly

Territory of the United States Northwest of the River Ohio, Ordinance of 1787, art. VI, reprinted in *THE CONSTITUTIONS OF OHIO* 52 (Isaac F. Patterson ed., 1912).

Drafted by Thomas Jefferson, the Northwest Ordinance illustrates his two-faced perspective on slavery. On the one hand, he spoke out against its immorality, on the other he maintained a racist attitude that was reflected in his personal slave ownership. See ANTHONY F. C. WALLACE, *JEFFERSON & THE INDIANS* 78-79 (1999) (discussing Jefferson’s contradictory statements about slavery and blacks).

⁹⁸ PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877*, at 78-79 (1993).

⁹⁹ BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* 41 (1961).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 40-41.

¹⁰² Patrick S. Brady, *The Slave Trade & Sectionalism in South Carolina, 1787-1808*, 38 J. S. HIST. 601, 602 n.2 (1972) (recounting that Maryland ended slave trade in 1783); William Cohen, *Thomas Jefferson & the Problem of Slavery*, 56 J. AM. HIST. 503, 508 (1969) (stating that Virginia outlawed slave trade in 1778); James Wilford Garner, *Amendment of State Constitutions*, 1 AM. POL. SCI. REV. 213, 217 (1907) (forbidding establishment of slavery constitutionally in Delaware).

¹⁰³ Brady, *supra* note 102, at 602 n.2 (providing information on North Carolina and South Carolina); Joyce E. Chaplin, *Creating a Cotton South in Georgia and South Carolina, 1760-1815*, 57 J. S. LEGAL HIST. 171, 191 (1991).

¹⁰⁴ VT. CONST. ch. I, art. 1 (1873) (amended 1924), available at <http://www.yale.edu/lawweb/avalon/states/vt01.htm>.

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

recognizes 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."¹⁰⁵ The New Hampshire Bill of Rights seems to have been the primary legal means of ending slavery in 1784.¹⁰⁶ It provides that the natural rights to life, liberty, and property "shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."¹⁰⁷ In Massachusetts, Chief Justice William Cushing for the Superior Court decreed slavery to be unconstitutional and against principles of natural rights.¹⁰⁸ He considered all men to be born free and equal.¹⁰⁹ These states' commitments made tangible the principles of the Declaration of Independence.

Nevertheless, Slavery lingered in some northern states. A gradual abolition law went into effect in Pennsylvania in 1780.¹¹⁰ Benezet, who lived to see its passage, could claim no more than partial success for his years of effort to achieve immediate emancipation. Rhode Island and Connecticut enacted similar laws in 1784, New York in 1799, and New Jersey in 1804.¹¹¹ New York and New Jersey took the extra step of

female, in like manner, after she arrives to the age of eighteen years, unless they are 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.

Id.

¹⁰⁵ *Id.*

¹⁰⁶ Guion Griffis Johnson, *The Impact of War Upon the Negro*, 10 J. NEGRO EDUC. 596, 598 (1941); Charles H. Wesley, *The Dilemma of the Rights of Man*, 38 J. NEGRO HIST. 10, 13 (1953) (regarding generally New Hampshire Bill of Rights).

¹⁰⁷ N.H. CONST. pt. 1, art. 2.

¹⁰⁸ *Commonwealth v. Jennison* (Mass. 1783) (unreported), quoted in PHILIP S. FONER, 1 HISTORY OF BLACK AMERICANS: FROM AFRICA TO THE EMERGENCE OF THE COTTON KINGDOM 353 (1975).

¹⁰⁹ *Id.*

¹¹⁰ John M. Mecklin, *The Evolution of Slave Status in American Democracy*, 2 J. NEGRO HIST. 229, 230 (1917); Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1045 n.45 (1997).

¹¹¹ See, e.g., J. FRANKLIN JAMESON, THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT 25 (1926); 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 Race in Early America: Northern Post-Emancipation Racial Reconstruction*, 19 J. EARLY REPUBLIC 629, 639 (1999). By 1830, fewer than 3000 blacks remained enslaved, while 125,000 blacks lived freely in the northern and middle states. GORDON S. WOOD, REVOLUTION AND THE POLITICAL INTEGRATION OF THE ENSLAVED &

providing for the support of abandoned slave children.¹¹² Gradualism aimed at minimal intrusion on present owners property rights while granting no immediate reprieve from a reprehensible practice.

The closest thing to abolition in the South, though woefully short of Revolutionary aims, came during the 1780s and 1790s when Virginia, Maryland, and Delaware relaxed laws allowing masters to free slaves as long as the former were willing to vouch that the latter would not become public wards.¹¹³ Those laws provided for the support of freed people. The newly freed slaves emerged from a lowly state without compensation for their years of labor and with few opportunities, still political slaves in a culture committed to keeping them out of power.¹¹⁴ Blacks who gained prominence, like portrait painter Joshua Johnston or poet Phillis Wheatley, overcame immense roadblocks.¹¹⁵

Changes to state laws did not alter the national situation. The federalist nature of the Union made it possible for southern states to bolster slavery, especially because constitutional compromises diminished federal power to stunt growth of the “peculiar institution.”

C. *Constitutional Failings*

Despite the public outcry against slavery, the Constitutional Convention of 1787 drafted an instrument that was more congenial to the economic interests of southern states than it was principled. The Constitution’s founders thereby secured the Union, but at the cost of continuing the organized tyranny of chattel servitude. Their commitment to the protection of personal property overshadowed their disdain for slavery. The drafters of the Constitution created an instrument whose propertied biases would later catapult the nation into a civil war that would make clear the divisiveness and incompatibility of slavery with a constitutional republic.¹¹⁶

DISENFRANCHISED 13 (1974).

¹¹² ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 180-82, 192-93 (1967).

¹¹³ PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877*, at 77 (1993).

¹¹⁴ IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 61-63, 96-97, 225-26, 229 (1974) (surveying state impediments to black property ownership, trade, and labor); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 103, 154, 157-59 (1979) (concerning difficulties free blacks finding decent employment opportunities faced).

¹¹⁵ PHILLIS WHEATLEY, *MEMOIRS AND POEMS OF PHILLIS WHEATLEY, A NATIVE AFRICAN AND A SLAVE* 7, 10 (1834); J. Hall Pleasants, *Joshua Johnston, The First American Negro Portrait Painter*, 37 *MD. HIST. MAG.* 120 (1942).

¹¹⁶ For a synopsis of the political compromises that made way for constitutional clauses

South Carolina and Georgia delegates at the 1787 Convention demanded that the Constitution include protections for slavery.¹¹⁷ Gaining their votes came at the cost of casting aside the Declaration of Independence's universal values and nationally recognizing slavery as a form of property. The Constitution's protections for the institution created a rift concerning slavery that would lead the country into numerous internal conflicts.¹¹⁸ Even those northern and upper southern delegates who had sought immediate cessation of the slave trade gave in to the Deep South's demands.

To their credit, the Constitution's founders provided avenues for formal political change, including a method for amending the Constitution with Article V. Radical Republicans would later use Article V to nullify the proslavery sections through the Thirteenth Amendment. However, the founders did little to alter the oligarchic social relations of their own time, granting a disproportionate amount of power to slaveholders, rather than immediately producing the representative democracy that the Declaration heralded.¹¹⁹

The constitutional protections of slavery compromised Revolutionary aspirations for freedom to such a degree, requiring a change greater than the simple abolition of physical bondage and forced labor. The Thirteenth Amendment meant to grant Congress the power to end all civil conditions related to slavery. Known as the Abolition Amendment, it liberated the entire Constitution. It rendered all clauses directly dealing with slavery null and altered the meaning of other clauses, such as the Insurrection Clause, to exclude their original design. The Thirteenth Amendment also relied on the abolitionist conviction that the Declaration of Independence guaranteed universal human rights to citizens, regardless of their race.

protecting slavery, see CALVIN C. JILLSON, *CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787*, at 140-50 (1988).

¹¹⁷ 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).

¹¹⁸ 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 the Civil War (1861), all internal conflicts centered on slavery. ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT & AMERICAN FREEDOM* 23-33 (2004).

¹¹⁹ WILLIAM W. FREEHLING, *THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR* 14, 16-18 (1994) (claiming that American Revolutionists intended political but not social revolution).

II. ABOLITIONIST INFLUENCES

Those abolitionists who called for the immediate end to chattel slavery traced their notions of liberty to Revolutionary ideology on fundamental rights. Drawing their ideas from Revolutionaries like Benjamin Rush and James Otis, abolitionists argued that blacks deserved the same privileges and immunities as any other Americans. 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.¹²⁰ The Society considered the grievances of constitutional fathers against Britain to be trifling when compared to the complaints of slaves.¹²¹

Abolitionists, just as the Thirteenth Amendment founders who followed them, conceived their campaign against slavery to derive from the colonial struggle for independence. William Lloyd Garrison, a prolific radical abolitionist,¹²² regarded immediate abolition to be implicit in the self-evident truths of the Declaration of Independence.¹²³ He and other nineteenth-century abolitionists, the "Garrisonians," relied on the Declaration in developing a republican agenda of national reform.

The exploitation of slaves, as the Garrisonians saw it, violated Congress's obligation under the General Welfare Clause to act for the betterment of all U.S. citizens.¹²⁴ Slavery, so ran this rather utilitarian argument, violated the Preamble's declared purpose of promoting the

¹²⁰ Am. Anti-Slavery Soc'y, *Declaration of the Anti-Slavery Convention, Dec. 4, 1833*, in PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA 12, 12-13 (1833).

¹²¹ *Id.*

¹²² Most abolitionists were either Garrisonians or radical constitutionalists. Both 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 legitimized 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 Anti-Slavery Society (Jan. 27, 1843), quoted in WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WILLIAM LLOYD GARRISON* 205 (1963).

¹²³ See WILLIAM L. GARRISON, AN ADDRESS DELIVERED BEFORE THE OLD COLONY ANTI-SLAVERY SOCIETY, AT SOUTH SCITUATE, MASS. 17 (1839) ("[I]f 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.").

¹²⁴ See, e.g., GEORGE W. F. MELLETT, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY 62 (1841) (asserting that U.S. 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").

general welfare and securing the blessings of liberty.¹²⁵ 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 that 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."¹²⁶ Slavery was incompatible with the goals of the Revolution as the founders expressed 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. Citizenship to them was the birthright of everyone born in the United States.¹²⁷ 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.¹²⁸

Many members of the Reconstruction Congress later expressed a similar perspective of fundamental rights during debates on the proposed Thirteenth Amendment.¹²⁹ Slavery was the deprivation of those rights, and following the ratification of the Thirteenth Amendment, Congress could provide redress against intrusions on civil liberties.

¹²⁵ 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.*

¹²⁶ MELLEEN, *supra* note 124, at 55, 63.

¹²⁷ See JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 91, 93 (1849).

¹²⁸ WILLIAM E. CHANNING, *SLAVERY* 21 (Edward C. Osborn ed., 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 abolitionist constitutionalism was based on Lockean and Jeffersonian principles). Abolitionists also relied on religious convictions. See Am. Anti-Slavery Soc'y, *supra* note 120, at 14 ("[A]ll 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 . . . [T]herefore they ought instantly . . . be abrogated").

¹²⁹ See *infra* Part III; cf. Akhil Reed Amar, *Architexture*, 77 *IND. L.J.* 671, 695 (2002) (stating that Reconstruction Congress intended Reconstruction Amendments to protect fundamental rights); Robert J. Kaczorowski, *Fidelity Through History & to It: An Impossible Dream?*, 65 *FORDHAM L. REV.* 1663, 1664 (1997) (finding that constitutional theory of Reconstruction Congress guaranteed fundamental rights).

Reconstructionists 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.¹³⁰ Not only did it infringe on slaves' vocational choices, but it also deprived them of their rights to transit, fair trial, and bodily integrity.¹³¹ The right to own and alienate property was likewise essential to human happiness, but it was denied to the enslaved.¹³² 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 they infringed on the natural right to contract.¹³³

Slavery withheld inalienable rights, which are common to all persons.¹³⁴ 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.¹³⁵ These documents guaranteed that right and any complementary inalienable rights equally for all, regardless of race.¹³⁶ The national government's obligation to abolish slavery required it to pass laws providing for an equality of "civil and political rights and privileges."¹³⁷

The existence of a U.S. covenant to protect equal rights was thus quintessential to the abolitionist understanding of national government. The Declaration was especially the cornerstone of the "temple of

¹³⁰ CHANNING, *supra* note 128, at 30-31.

¹³¹ RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES & THE SLAVERY CONTROVERSY 1830-1860*, at 197 (1949) (discussing abolitionist concept of rights in context of movement against fugitive slave law).

¹³² See Am. Anti-Slavery Soc'y, *supra* note 120, at 14 ("man cannot hold property in man"); *Powerful Language*, *LIBERATOR*, Jan. 8, 1831, ("[T]alk not of property of the planter in his slaves The principles, the feelings of our common nature, rise in rebellion against it."). 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).

¹³³ LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 98-99 (1845).

¹³⁴ *Principles of the Anti-Slavery Society*, in *THE AMERICAN ANTI-SLAVERY ALMANAC* 30-31 (1837) ("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.").

¹³⁵ See Theodore Parker, *The Dangers from Slavery (July 2, 1854)*, in 4 *OLD SOUTH LEAFLETS* (1897).

¹³⁶ See WILLIAM GOODSELL, *ADDRESS OF THE MACEDON CONVENTION* 3 (1847).

¹³⁷ See *Constitution of the New-England Anti-Slavery Society*, in 1 *THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY* 2 (1833).

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."¹³⁸ 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, prohibited the newly formed U.S. government from countenancing enslavement.¹³⁹

To radical constitutionalists, who disagreed with the Garrisonian abolitionist indictment of the original Constitution, it appeared that some constitutional provisions did prohibit slavery. Primarily, they relied on the Guarantee Clause to assert the United States's obligation to protect the life, liberty, and property of all persons born within any state.¹⁴⁰ For them, a government that countenanced slavery succumbed to an oligarchy of arbitrary disenfranchisement and enslavement, neither of which was consistent with a republican form of government.¹⁴¹ 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, and it was conducive to a concentration of power harmful to basic liberties.¹⁴² Crucially, however, abolitionist belief that the Declaration was a fundamental law of the United States overlooked that document's lack of an enforcement provision.¹⁴³ The Enforcement Clause of the Thirteenth Amendment would eventually fill that deficiency.

III. THIRTEENTH AMENDMENT CONGRESSIONAL EXPOSITION

The framers of the Thirteenth Amendment adopted abolitionist ideas on the universality of fundamental rights and made them constitutionally viable. The Thirty-Eighth Congress, which framed the

¹³⁸ Am. Anti-Slavery Soc'y, *supra* note 120, at 12.

¹³⁹ TIFFANY, *supra* note 127, at 29.

¹⁴⁰ 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.").

¹⁴¹ See SPOONER, *supra* note 133, at 106.

¹⁴² For a more detailed discussion of this point, see DANIEL J. MCINERNEY, *THE FORTUNATE HEIRS OF FREEDOM: ABOLITION & REPUBLICAN THOUGHT* 16-17 (1994).

¹⁴³ See *Liberty Platform of 1844*, reprinted in NATIONAL PARTY PLATFORMS, 1840-1956, at 5 (Donald B. Johnson ed., 1978).

terms of the Amendment, meant to enforce the Declaration of Independence's statement of equal liberty and to provide for the general welfare promised under the Preamble to the Constitution. The Amendment gave Congress the power, through the Enforcement Clause, to pass national laws in furtherance of civil rights. This approach increased federal authority over acts of discrimination. The Amendment was a radical break from the antebellum deference to states in matters of group relations.

A. *On the Coattails of the Declaration of Independence and Abolition*

Abolitionists deeply influenced the thinking of Republican Reconstructionists. Several of the principal congressional leaders during the Thirteenth Amendment debates had long been committed to abolitionism. Representative Thaddeus Stevens, for one, had actively participated in abolitionism since his early years. As an attorney, he represented fugitive slaves for no fee. In 1849, at age fifty-seven, he entered politics in response to the agitation over slavery after the cession of Mexican lands.¹⁴⁴ Stevens was the chairman of the powerful Committee on the Ways and Means during the debates on the Thirteenth Amendment and, later, of the Committee on Appropriations during the debates on the Civil Rights Act of 1866.¹⁴⁵

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 a dedicated abolitionist since 1835, when he first subscribed to Garrison's *Liberator*.¹⁴⁶ Sumner was the chairman of the Committee on Foreign Relations throughout the debates on the Thirteenth Amendment and on the Civil Rights Act of 1866.¹⁴⁷

Both Stevens and Sumner brought the Revolutionary natural rights tradition to the debates on the Thirteenth Amendment and made those

¹⁴⁴ JAMES G. BLAINE, 1 *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); JAMES F. RHODES, 1 *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850*, at 541-44 (1904); WILLIAM L. RICHTER, *AMERICAN RECONSTRUCTION, 1862-1877*, at 371-72 (1996).

¹⁴⁵ Biographical Directory of the United States Congress, *Thaddeus Stevens*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000887> (last visited Apr. 18, 2006) (providing biographical information on Thaddeus Stevens).

¹⁴⁶ JAMES F. RHODES, 1 *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE FINAL RESTORATION OF HOME RULE AT THE SOUTH IN 1877*, at 227-28 (1892).

¹⁴⁷ Biographical Directory of the United States Congress, *Charles Sumner Webpage*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001068> (last visited Apr. 18, 2006) (providing biographical information about Charles Sumner).

principles a part of the Constitution.¹⁴⁸ Sumner's arguments against passage of the Kansas-Nebraska Bill were representative of the ideas he continued to champion during the debates on the Thirteenth Amendment.¹⁴⁹ "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."¹⁵⁰

During the Civil War, many Republicans adopted radical abolitionist principles concerning the federal government's obligation to eradicate slavery. The Thirteenth Amendment's grant of power to Congress over matters resembling incidents of servitude signaled a break from moderate antislavery leanings.¹⁵¹ Moderates wanted states to gradually and separately end slavery. But, for a brief time at the end of the Civil War, a radical form of abolitionism held the reins of Congress.¹⁵²

President Abraham Lincoln abandoned gradualism by 1863 and eventually supported immediate abolition through the Thirteenth Amendment.¹⁵³ He had embraced natural rights philosophy years before he sat in the Oval Office.¹⁵⁴ Lincoln believed that the Declaration's guarantees applied equally to whites and blacks.¹⁵⁵ He asserted that

¹⁴⁸ Lucinda M. Finley, *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understanding of Equality*, 13 TEMP. POL. & CIV. RTS. L. REV. 429, 436-37 (2004) (describing Stevens and Sumner as enervated by natural rights principles of Declaration of Independence).

¹⁴⁹ For background on the Kansas-Nebraska Controversy, see ARTHUR C. COLE, *THE IRREPRESSIBLE CONFLICT 1850-1865*, at 272-75 (1934); AVERY CRAVEN, *THE COMING OF THE CIVIL WAR* 325-26, 328-31 (1942); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 121, 123 (Ballantine Books 1989) (1988); ALLAN NEVINS, *2 ORDEAL OF THE UNION* 86-88, 92, 98, 103-05, 107-08, 121 (1947); ROBERT R. RUSSET, *CRITICAL STUDIES IN ANTEBELLUM SECTIONALISM* 25 (1972); LAWRENCE R. TENZER, *THE FORGOTTEN CAUSE OF THE CIVIL WAR: A NEW LOOK AT THE SLAVERY ISSUE* 89 (1997); James Ford Rhodes, *Antecedents of the American Civil War*, in *THE CAUSES OF THE AMERICAN CIVIL WAR* 56 (Edwin C. Rozwenc ed., 2d ed. 1972).

¹⁵⁰ CONG. GLOBE, 33d Cong., 1st Sess., app. 268 (1854).

¹⁵¹ DAVID A. J. RICHARDS, *CONSCIENCE & THE CONSTITUTION: HISTORY, THEORY, & LAW OF THE RECONSTRUCTION AMENDMENTS* 98-99 (1993).

¹⁵² See *supra* text accompanying notes 121-39 (dealing with Radical leadership in 38th Congress).

¹⁵³ See *infra* text accompanying notes 172-80.

¹⁵⁴ President Lincoln's earliest recorded indictment of slavery came during a speech about mobocracy on January 27, 1838, before the Young Men's Lyceum of Springfield, Illinois. ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1832-1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS: THE LINCOLN-DOUGLAS DEBATES* 28 (Don E. Fehrenbacher ed., 1989).

¹⁵⁵ Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858), in 3 *THE COLLECTED*

blacks were never meant to be excluded from the human rights guarantees of the Declaration.¹⁵⁶

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 through Congress. They intended the Amendment to protect the self-evident natural rights to which the Declaration had committed the national government. This perspective appears repeatedly in the Congressional debates on the proposed amendment.

A U.S. 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 I can another man alienate them without being himself a robber of the vested rights of his brother-man?¹⁵⁷

Slavery violated principles of the American Revolution that sparked opposition to British infringement on American 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.¹⁵⁸ 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."¹⁵⁹ By passing the Thirteenth Amendment, Radical Republicans, pursuant to their abolitionist roots, altered the Constitution to reflect the practical implications of Revolutionary ideology.

WORKS OF ABRAHAM LINCOLN 327 (Roy P. Basler et al. eds., 1953).

¹⁵⁶ Abraham Lincoln, Speech at New Haven, Conn. (Mar. 6, 1860), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 16 (Roy P. Basler et al. eds., 1953) ("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.").

¹⁵⁷ CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (Ill. Rep. John F. Farnsworth).

¹⁵⁸ W. R. BROCK, AN AMERICAN CRISIS: CONGRESS & RECONSTRUCTION 1865-1867, at 267-68 (1963); STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 185-213 (1967) (concerning question of slavery and Constitutional Convention).

¹⁵⁹ Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103 (1986).

The Thirteenth Amendment provides a method of enforcement for the protection of those civil liberties that, until the Amendment's ratification, had been valued but not implemented. The Amendment allows Congress to secure life, liberty, and the pursuit of happiness through positive laws.¹⁶⁰ The Declaration could only provide an inspirational token for abolitionists and Reconstructionists since it did not end slavery and the Constitution lacked any clear recognition of its principles.¹⁶¹ The Thirteenth Amendment's Enforcement Clause became the constitutional vehicle for ending any vestiges of slavery and involuntary servitude. More importantly, from a contemporary perspective, the Amendment established a constitutional guarantee of freedom. Without the power granted under the Thirteenth Amendment, Stevens pointed out, the Constitution protected slavery and the federal government lacked any power to regulate it.¹⁶²

Behind the Thirteenth Amendment's enforcement provision lies a 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 to 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 not only were freed from bondage, but also gained the right to make fundamental choices regarding matters affecting their jobs and families. Congressman M. Russell Thayer of Pennsylvania expressed the meaning of liberty for these former slaves 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

¹⁶⁰ See CONG. GLOBE, 38th Cong., 2d. Sess. 142 (1865) (Ind. Rep. Godlove S. Orth).

¹⁶¹ 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 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, 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 of pretence.

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).

¹⁶² See CONG. GLOBE, 38th Cong., 2d Sess. 265 (1865).

you allow him to be deprived of those great natural rights to which every man is entitled by nature?¹⁶³

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’s decree “that [all men] are endowed by their creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.”¹⁶⁴ The Amendment’s more progressive advocates made an “earnest and determined effort” to remove impediments standing in the way of human rights.¹⁶⁵ 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 requirements that government promote the general welfare and secure liberty.¹⁶⁶ 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 the right to “live in a state of freedom.”¹⁶⁷ 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.¹⁶⁸

Representative Thomas T. Davis believed that the framers had anticipated that slavery would eventually end since they secured civil and religious liberty through the Declaration of Independence.¹⁶⁹ 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.”¹⁷⁰ On the other hand, Representative William D. Kelley of Pennsylvania thought the “errors” of the founding fathers

¹⁶³ CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

¹⁶⁴ CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865).

¹⁶⁵ CONG. GLOBE, 38th Cong., 1st Sess. 1200 (1864).

¹⁶⁶ *Id.* at 2955.

¹⁶⁷ *Id.* at 2990.

¹⁶⁸ *See id.*

¹⁶⁹ CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865). Likewise, during the Senate debate, Reverdy Johnson, who had represented one of Dred Scott’s owners, argued that had the framers known how much sectional strife would result from slavery, they would have opposed it. *The Anti-Slavery Amendment to the Constitution*, N.Y. TIMES, Apr. 6, 1864, at 1.

¹⁷⁰ CONG. GLOBE, 38th Cong., 1st Sess. 2978 (1864).

for compromising with wrongs were being expiated by “blood and agony and death.”¹⁷¹

Congressional debates on the proposed Thirteenth Amendment sometimes explained the specific freedoms it meant to guarantee. Those debates indicated that the Enforcement Clause grants Congress a broad-ranging power to construe and protect civil rights in accordance with American commitments to fundamental liberties.

B. Insight from Debates on the Thirteenth Amendment

Debates on the Thirteenth Amendment provide insight into the extent of Congress’s reach under its Section 2 enforcement power. Both the Senate and the House determined to expand federal constitutional authority enough to make the national government responsible for ending infringements on fundamental rights. Congressional debates shed light on how the Thirteenth Amendment changed the dynamic between the federal and state governments in the area of civil rights.

Soon after Ohio Representative James M. Ashley introduced the proposed Thirteenth Amendment in Congress,¹⁷² President Lincoln gave a speech in Baltimore on the uncertain nature of freedom. On April 18, 1864, the President observed:

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.¹⁷³

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

¹⁷¹ *Id.* at 2983.

¹⁷² 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.” *Id.* at 19. In the Senate, John Henderson of Missouri introduced the proposal on January 13, 1864. *Id.* at 145.

¹⁷³ William L. Westermann, *Between Slavery & Freedom*, 50 AM. HIST. REV. 213, 213 (1945).

Supporters of the Thirteenth Amendment had a principled aim of securing liberty, even though their arguments were sometimes tempered by political considerations.¹⁷⁴ Their speeches were often filled with a penetrating understanding of human rights that seemingly eluded the founding generation with its concessions to slavery.¹⁷⁵ In retrospect, Isaac N. Arnold, who had served in 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.”¹⁷⁶ The revolutionary constitutional changes that the Thirteenth Amendment heralded brought into sharp relief the original Constitution’s protections of slavery. Even the Bill of Rights had failed to end that institution.¹⁷⁷ To others, ending slavery through a constitutional amendment was a logical extension of the work of the “old fathers who made the Constitution” because the framers “fought for the rights of human nature, and they believed that slavery was at war with the rights of human nature.”¹⁷⁸

Debates on an abolition amendment arose at a time when the South’s secession had left Congress under the leadership of members who wished to eradicate institutionalized slavery, which they understood to be the origin of the Civil War.¹⁷⁹ The Emancipation Proclamation did not

¹⁷⁴ Richard L. Aynes, *Refined Incorporation of the Fourteenth Amendment*, 33 U. RICH. L. REV. 289, 298 (1999) (mentioning that congressional debates, on topics such as Reconstruction, were reported in both *Congressional Globe* and local newspapers).

¹⁷⁵ 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 nonslaveholding states from emancipating runaway slaves and required their return to slaveholders, 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; U.S. CONST. art. I, § 9, cl. 1 (lapsed); U.S. CONST. art. IV, § 2, cl. 3, affected by U.S. CONST. amend. XIII. For a detailed explanation of this point, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 62-63 (1977); Frederick Douglass, *The Constitution & Slavery*, in 1 FREDERICK DOUGLASS, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 352 (Philip S. Foner ed., 1950) (first published in *THE NORTH STAR*, Mar. 16, 1849); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 971 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)).

¹⁷⁶ ISAAC N. ARNOLD, *THE LIFE OF ABRAHAM LINCOLN* 346 (1887).

¹⁷⁷ Representative William D. Kelley, for instance, recognized that 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.” *Id.* at 2940.

¹⁷⁸ *Id.* at 2978 (Ill. Rep. John F. Farnsworth).

¹⁷⁹ Howard D. Hamilton, *The Legislative & Judicial History of the Thirteenth Amendment*, 9

adequately deal with the problem. Indeed, congressmen and President Lincoln recognized that the Proclamation was inadequate to eradicate slavery since its legal justification rested on the President's wartime powers and would be ineffectual following the end of conflict.¹⁸⁰ The constitutional uncertainties surrounding the Emancipation Proclamation gave rise to the political resolve to pass a constitutional amendment abolishing slavery.¹⁸¹

Sustained debate on the proposed Thirteenth Amendment did not begin until mid March of 1864 and concluded with its passage on January 31, 1865.¹⁸² During that period, several congressmen proposed resolutions.¹⁸³ The most ambitious of these was Charles Sumner's proposal proving that, "[e]verywhere 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."¹⁸⁴ When the Chairman of the Senate Judiciary Committee, Lyman Trumbull, reported the language of the House and Senate's joint resolution, it lacked Sumner's proposed wording on equality.¹⁸⁵ This was a missed

NAT'L B.J. 26, 33 (1951).

¹⁸⁰ 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 President Lincoln's understanding of limited nature of Emancipation Proclamation because it was based on his military powers as Commander and Chief).

¹⁸¹ On the decision to strengthen the principles associated with the Emancipation Proclamation, see DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS & THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 55 (1991); J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 372-78, 390-91 (rev. ed. 1963); HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 222-23 (1913).

¹⁸² See CONG. GLOBE, 38th Cong., 2d Sess. 531 (1865); CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).

¹⁸³ Beside 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, 145, 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 the fears of 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.").

¹⁸⁴ *Id.* at 521 (emphasis added).

¹⁸⁵ On February 10, 1864, the Committee reported the proposal that became the Thirteenth Amendment. *Id.* at 553. The interchange involved Senators Sumner, Trumbull, and Jacob Howard of Michigan. Howard mistakenly thought Sumner's language to be "utterly insignificant and meaningless." *Id.* at 1482-83, 1488. Sumner withdrew his proposal since he considered Howard's views to be based on a sincere commitment to abolition. *Id.* at 1488.

opportunity that required the passage of another amendment, the Fourteenth, which did include an equal protection clause.¹⁸⁶

Despite their inability to foresee how difficult it would be to secure equality for blacks,¹⁸⁷ the 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 the freedom to travel, labor, and alienate property.¹⁸⁸ In retrospect, Representative Thayer said that the Amendment was meant to benefit freemen with the "great charter of liberty."¹⁸⁹ Massachusetts Senator Henry Wilson's perspective that the proposed amendment would guard the "sacred rights" of whites and blacks was typical among the Amendment's supporters.¹⁹⁰ Philadelphia Representative Kelley sought to establish universal liberty that would allow everyone to enjoy the "beneficent republican institutions."¹⁹¹ Blacks were the main victims of slavery, but many Republicans also blamed the institution for degrading all labor, including white labor.¹⁹²

¹⁸⁶ Many of the amendment's supporters seem to have considered 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).

¹⁸⁷ 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 Willard Saulsbury, for instance, claimed during the Thirty-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).

¹⁸⁸ HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866, at 120 (1976).

¹⁸⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866).

¹⁹⁰ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

¹⁹¹ *Id.* at 2985.

¹⁹² The Chairman of the 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." *Id.* at 1202. Wilson was referring to an editorial from a South Carolina newspaper. The full 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.

Representative Arnold believed that liberty and equality for all citizens would be the Amendment's "great cornerstone."¹⁹³ The Amendment was meant to transform American society by guaranteeing civil liberty to all racial and economic strata of the population. Everyone, regardless of race, occupation, or resources, was to be an equal before the law.¹⁹⁴ Radical Republican Ingersoll proclaimed that the Thirteenth Amendment would secure natural and God-given rights.¹⁹⁵ Although Ingersoll's statement was vague, as were those of many participants in the debates, it expressed an expectation that future congressional policies on behalf of the general welfare would be predicated on the country's foundational principles. Forced servitude itself was a violation of freedom to "enjoy God's free sunshine" and the right to reap the benefits of labor.¹⁹⁶ Poor white laborers, much like their black bretheren, Ingersoll believed, would benefit from emancipation since slavery kept them in ignorance, poverty, and degradation. He and other Congressmen thus conceived of slavery in broad terms, much as Revolutionaries had. The Thirteenth Amendment was to end the individual- and state-sponsored

162 (1943). Supporters of the proposed Thirteenth Amendment, like Representative Francis W. Kellogg of Michigan, were well aware that 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 that a northern worker "who contracts to serve for a term of days, months, or years, is, for such term, the property of his employer." GEORGE FITZHUGH, *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 class." EUGENE D. GENOVESE, *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, 110-11 (Richard O. Curry ed., 1965) (explaining abolitionist and Republican dissemination of information on southern perception that white labor was form of slavery).

¹⁹³ CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).

¹⁹⁴ Representative James F. Wilson envisioned the new Republic to be a place where persons of humble stations would be legally equal to kings and princes. *Id.* at 1319. Radicals hoped the Thirteenth Amendment would improve labor conditions for whites and blacks. The Republican party regarded efforts on behalf of a free white labor force to be central for equality. "Free labor," as Eric Foner has pointed out, meant not being subject "to the coercions of slavery and enjoying the opportunity for physical mobility and social advancement." Foner, *supra* note 20, at 453.

¹⁹⁵ CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

¹⁹⁶ *Id.*

despotism abolitionists had analogized to the oppressiveness the country's framers fought against.¹⁹⁷

A civil transformation should have occurred at the time of the Revolution, but the pragmatics of nation-making had crippled reform. The failure of conviction had allowed local biases to trump individual rights. Only the national government could achieve the broad-ranging reform. The Thirty-Eighth Congress determined to supersede sectional sensitivities with a legislative power over racist and classist behavior. To only free slaves by amendment and leave them at the mercy of state prejudices was likely to create an underclass. Federal power would need to extend beyond abolition, to matters affecting the daily lives of individuals. If "freedom" was to mean nothing more than liberation from shackles, Representative and future president James A. Garfield pointed out in 1865, then it would be "a bitter mockery" and "a cruel delusion."¹⁹⁸ For freedom to be a triumphant 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 Amendment indicate that Congress believed that abolition would guarantee newly freed blacks and all American citizens a variety of rights. Freedom would make blacks active participants in a political system that whites had dominated since the country's founding.¹⁹⁹

¹⁹⁷ *Id.*

¹⁹⁸ James A. Garfield, *Oration Delivered at Ravenna, Ohio, July 4, 1865*, in 1 THE WORKS OF JAMES ABRAM GARFIELD 86 (Burke A. Hinsdale ed., 1882).

¹⁹⁹ 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. Reconstruction Act of 1867, ch. 153, 14 Stat. 428, 249; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 277 (1989); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial & Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 21, 21 (Chandler Davidson & Bernard Grofman eds., 1994). 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.

Freedom also had political implications since Revolutionaries had denounced British despotism for excluding them from political participation. Prohibiting blacks and other disenfranchised groups from holding political office violated the principles of the Declaration of Independence, Representative Stevens asserted, because the government of the United States was never meant to be under the sovereignty of races, dynasties, and families.²⁰⁰ The equal right to govern was innate to everyone “no matter what [their] shape or color.”²⁰¹

The Declaration recognized the inalienable nature of civil and religious liberty and their centrality in founding a new country.²⁰² The Thirteenth Amendment was to grant the missing federal enforcement power to guarantee that birthright.²⁰³ Proponents assumed that slavery violated the fundamental principles of the social contract, which they regarded as binding in spite of the constitutional protections of slavery. For them, the Preamble superseded the legal sanctions of slavery.

Radicals incorporated the natural truths of the Declaration and the Preamble into the Amendment.²⁰⁴ 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.²⁰⁵ The Thirteenth Amendment, therefore, did much more than simply sever the de facto and de jure connections that bound slaves to their masters.²⁰⁶ As Representative Frederick E. Woodbridge of Vermont put it, passing the

²⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 74 (1864).

²⁰¹ *Id.*

²⁰² CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865) (Ind. Rep. Godlove S. Orth).

²⁰³ *See id.*

²⁰⁴ *Id.* at 222 (Mass. Rep. George S. Boutwell).

²⁰⁵ CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

²⁰⁶ In spite of the congressmen’s idealistic flourishes, many of them did not support radical bills, such as Thaddeus Stevens’s proposal of reparations. *See id.* Stevens’s 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.19 (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 slaveholders 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).

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.”²⁰⁷

Some of the ideals expressed during the congressional debates were visionary and not realized even after the Thirteenth Amendment’s ratification. Senator James Harlan of Iowa, during the Senate debate of 1864, exposed the suppression arising from the South’s peculiar institution of slavery. He was the first to coin the term “incidents of servitude,” which the Court has since adopted for identifying the range of oppressions the Thirteenth Amendment prohibits.²⁰⁸ 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 servitude.²⁰⁹ Senator Henry Wilson, who had opposed slavery from his youth,²¹⁰ believed that the abolition of those incidents would renew the United States’s 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 reappearing of the discarded slave system, and the returning of the despotism of the slavemasters’ domination.²¹¹

²⁰⁷ CONG. GLOBE, 38th Cong., 2d Sess. 244 (1865).

²⁰⁸ CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864); see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (“[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery — its ‘burdens and disabilities’ — included restraints 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))).

²⁰⁹ *Jones*, 392 U.S. at 441; CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

²¹⁰ For Senator Wilson’s longstanding commitment to ending slavery, see 2 ALLAN NEVINS, *ORDEAL OF THE UNION* 412-13 (1947) and WILLIAM R. BROCK, *AN AMERICAN CRISIS 1865-1867*, at 83-84 (1963).

²¹¹ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (emphasis added).

In place of slavery's chains, federal law would respect natural rights by protecting family interests.²¹² Enforced ignorance, too, was a hallmark of involuntary servitude, and education was essential to dispelling it.²¹³

A consensus grew during the congressional debates that the Thirteenth Amendment would empower Congress to pass legislation directed at any arbitrary practice associated with involuntary servitude and slavery.²¹⁴ The rupture between the Confederacy and the Union empowered a federalist-minded group of legislators to make America's founding assertions enforceable.²¹⁵ 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 this republican brand of federalism.²¹⁶ Even President Lincoln, who believed slavery was "a total violation" of the Declaration of Independence, initially held to a gradualist, state-by-state approach.²¹⁷ His views changed only during the Civil War when he realized that southern states would not abandon their expansionist ambitions.²¹⁸

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 possessed before.²¹⁹ During the Reconstruction Congress's brief hold on

²¹² *Id.* Senator Jacob M. Howard, a member of 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).

²¹³ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864). Numerous antebellum southern states made it a criminal offence to educate blacks. James W. Fox, Jr., *Citizenship, Poverty, & Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 487 (1999).

²¹⁴ See RICHARDS, *supra* note 151, at 97-98.

²¹⁵ The congressional leadership, for a time, was populated with Radical Republicans who sought to gain equal status for blacks. See *infra* text accompanying notes 172-90.

²¹⁶ See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2962 (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 right of the States to domestic Government").

²¹⁷ Abraham Lincoln, Speech at Peoria, Illinois, in Reply to Senator Douglas (Oct. 16, 1854), in THE WORKS OF ABRAHAM LINCOLN 208-10 (Arthur B. Lapsley ed., 1905).

²¹⁸ *Id.*

²¹⁹ 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 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

power, it passed legislation guaranteeing equal access to the courts, the right to purchase and convey real and personal property, and the power to enter and enforce contracts.²²⁰

A national commitment to individual liberties and civil welfare is the basis of Congress's Thirteenth Amendment Enforcement Clause authority. Radical advocates of the first Reconstruction Amendment granted federal legislators the power to decide what liberties are essential to a fulfilling life, debated the means of securing those fundamental interests, and then passed laws punishing their abridgement. Freedom without the "great natural rights," as Congressman Thayer called them, would be chimerical.²²¹ Radicals overlooked the stalemates that could result from diverging views on natural rights and only came to understand the need for additional constitutional guarantees after repeated civil rights clashes with President Andrew Johnson. The Fourteenth Amendment was meant to fill the missing specificity. Despite the Thirteenth Amendment's broad language, contemporaries understood that it dramatically shifted power away from the states to the federal government.²²²

Congressmen who worked against the proposed Thirteenth Amendment realized that Republicans aimed to do more than simply end forced labor. The proposal's opponents 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.²²³ A memorable exchange between Representatives William D. Kelley and John D. Stiles, both from Pennsylvania, indicates that the advocates on 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 mentioned them. Stiles inquired whether the Amendment

against state interference — squarely within the cognizance of the federal Constitution and the federal judiciary.”).

²²⁰ In relevant part, see Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (2000)).

²²¹ CONG. GLOBE, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866).

²²² HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 386-438 (1982) (analyzing links between Thirteenth and Fourteenth Amendments); TENBROEK, *supra* note 128, at 196-97 (finding that Thirteenth Amendment's framers regarded as "doing the whole job — not merely cutting loose the fetters which bound the physical person of the slave, but restoring to him his natural, inalienable, and civil rights, or, in other words, guaranteeing to him the privileges and immunities of citizens of the United States").

²²³ Ohio Representative Chilton A. White made this point cautiously through a series of questions designed to raise concerns about passing the proposed amendment. CONG. GLOBE, 38th Cong., 2d Sess. 216 (1865).

would favor racial equality between the races.²²⁴ Kelley responded that blacks should not be excluded from political power because of arbitrary, racist views.²²⁵ The concern of losing white control over the government was also on Representative 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 on juries? Do you intend . . . to make this a mongrel Government, instead of a white man's Government?²²⁶

Section 2 of the proposed amendment, containing the Enforcement Clause, gave the greatest pause to Congressmen who opposed passing it onto the states for ratification.²²⁷ The section, as its drafters understood it and as the Supreme Court later interpreted it,²²⁸ went far beyond merely granting Congress the power to enact legislation against the exploitation of slaves. It went to the core purposes of government and used the broad language of liberty that the country's founding generation had also adopted. Ohio Senator John Sherman, who went on to be Secretary of the Treasury under Rutherford B. Hayes and, later, Secretary of State under President William McKinley, considered the Thirteenth Amendment to be a "guarantee of liberty" and its second section "an express grant of power to Congress to secure this liberty by appropriate legislation."²²⁹ Unless the rights of citizens everywhere were the same, "freedom" was meaningless.²³⁰

Schuyler Colfax, the incoming Speaker of the House for the Thirty-Ninth Congress, opened the session in 1865 with a statement on Congress's power under the Thirteenth Amendment. "[I]t is yours," Colfax told the House,

²²⁴ *Id.* at 291.

²²⁵ *Id.*

²²⁶ *Id.* at 216; see also CONG. GLOBE, 38th Cong., 1st Sess. 2982 (1864) (protesting that Radical Republicans meant to make "Black free men . . . American citizens").

²²⁷ See Howard D. Hamilton, *The Legislative & Judicial History of the Thirteenth Amendment*, 9 NAT'L B.J. 26, 45-46 (1951) (quoting concerns about breadth of congressional power under second section of Thirteenth Amendment voiced by delegate from Mississippi and provisional governor of South Carolina).

²²⁸ On the Court's interpretation of the Thirteenth Amendment, see *infra* Part IV.

²²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

²³⁰ See *id.* ("Now unless a man may be free without 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.").

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.²³¹

His ideas reflected the dominant congressional view on the Thirteenth Amendment's scope prior to the beginning of debates on the proposed Fourteenth Amendment. Senator Trumbull, in 1866, about a year after the states ratified the Amendment, reiterated that Section 2 gives Congress the power to adopt any legislation necessary for achieving liberty.²³² He regarded the ambit of congressional power to extend to ending interference with commercial transactions, ownership rights, and educational enrollment.²³³

Both the adversaries and supporters of abolition relied on the founding fathers to bolster their respective arguments. Opponents of the proposed amendment charged that its adoption was an impermissible assertion of power since the amendment would materially alter government as the founders had envisioned it.²³⁴ The founders, Senator Willard Saulsbury of Delaware insisted, wanted to preserve the right to slave property, not to give the Union "control over the domestic relations existing in the States, [and] not to regulate the right and title to property in the States."²³⁵

Representative Kellogg asserted, to the contrary, that the Thirteenth Amendment was meant to promote the general welfare — the primary object of the Constitution.²³⁶ Congressman Morris of New York held the contractarian perspective that the 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."²³⁷ Another

²³¹ *Id.* at 5.

²³² *Id.* at 322. Senator Trumbull's view, however, can in no way be characterized as equalitarian since, on the same page, this moderate Republican proclaimed that laws prohibiting intermarriage were equitable and constitutional. *See id.*

²³³ *Id.*

²³⁴ *See, e.g., id.* at 2940 ("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.").

²³⁵ *Id.* at 1366.

²³⁶ *Id.* at 2955.

²³⁷ *Id.* at 2614.

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.”²³⁸

C. *The Civil Rights Act of 1866*

Soon after ratification of the Thirteenth Amendment, cases interpreting the Civil Rights Act of 1866, which Congress passed pursuant to its enforcement authority, began to proceed through the courts.²³⁹ Surveying the legislative history of this statute is critical for evaluating the Supreme Court cases that 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 during the years prior to the ratification of the Thirteenth Amendment.²⁴⁰ They regarded the protection of civil rights to be a primary purpose of government. The Act reflected Congress’s commitment to enacting legal protections for blacks that would do more than merely unshackle them from their masters’ control. It explicitly prohibited violations against civil rights, such as the right to contract.²⁴¹ Furthermore, 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.²⁴² Senator Sherman argued that real liberty was more than mere emancipation; therefore, a law passed pursuant to the Thirteenth Amendment would have to secure citizens’ rights to testify at trial, to own property, to profit from their labor, to raise a family, to acquire an education, and to travel.²⁴³

²³⁸ CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865).

²³⁹ The Reconstruction Congress enacted four statutes pursuant to its Thirteenth Amendment power, even before the states ratified the Fourteenth Amendment. *See* Peonage Act of 1867, ch. 187, 14 Stat. 546; Act of February 5, 1867, ch. 27, 14 Stat. 385 (expanding scope of habeas corpus statutes); Slave Kidnapping Act, ch. 86, 14 Stat. 50 (1866); Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

²⁴⁰ *See* TENBROEK, *supra* note 128, at 157-58.

²⁴¹ The Act concerns a variety of contract, property, and procedural rights. Violators were subject to imprisonment for up to one year and a fine of no more than \$1000. Civil Rights Act of 1866, ch. 31.

²⁴² 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, 39th Cong., 1st Sess. 599 (1866).

²⁴³ *Id.* at 42. Senator Howard held a similarly broad construction of the Thirteenth Amendment’s guarantee of freedom, considering: “[W]hat are the 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,

The Enforcement Clause of the Thirteenth Amendment changed the federalist dynamic between states and the federal government, making Congress, rather than state legislatures, the supreme protector of civil liberties. Senator Wilson regarded civil rights to be “the true office of Government to protect” and believed that their possession “by the citizen raises by necessary implication the power in Congress to protect them.”²⁴⁴ Senator Sherman argued that the power to enact civil rights legislation was even more explicitly found 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.”²⁴⁵ The Thirteenth Amendment granted Congress the enforcement authority it needed to authorize enactments on behalf of the nation’s citizenry.²⁴⁶

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 expanding on the Amendment’s grant of enforcement authority. These sources indicate that the Amendment grants Congress the power to put into effect the principles of the Declaration of Independence and the Preamble to the Constitution. What is needed to achieve progress in civil rights is a clarification of the Thirteenth Amendment’s notion of nationally guaranteed liberal equality.

IV. THIRTEENTH AMENDMENT JURISPRUDENCE

The new standards that the Supreme Court has placed on the Commerce Clause and the Fourteenth Amendment make it more difficult for Congress to rely on them for the passage of civil rights legislation. The Thirteenth Amendment is an alternative constitutional grant of authority for regulating discrimination against identifiable groups. The Thirteenth Amendment, as Part V will point out, can sometimes better protect against unequal treatment because, unlike the

home? What definition will you attach to the word ‘freeman’ that does not include these ideas?” *Id.* at 504. Any lesser guarantee of freedom, Howard asserted, would be worse than the bondage from which blacks emerged. *Id.*

²⁴⁴ *Id.* at 1118, 1119.

²⁴⁵ *Id.* at 41.

²⁴⁶ Robert J. Kaczorowski has similarly pointed out that *Dred Scott* 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. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War & Reconstruction*, 61 N.Y.U. L. REV. 863, 894-95 (1986).

Fourteenth Amendment, it has no state action requirement making private discrimination actionable. Further, unlike the Commerce Clause, it is not an economic constitutional provision, but one established on revolutionary and abolitionist notions of liberty and equality.

The Court's earliest interpretations of the Thirteenth Amendment prevented the full implementation of abolitionist ideals, and only the Civil Rights movement of the 1960s led to an understanding of liberty approaching that of the Radical Republicans. Finally, the Warren and Burger Courts' Thirteenth Amendment holdings, which the Rehnquist Court did not truncate, embraced a broad understanding of Congress's enforcement power.

A. 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*²⁴⁷ was the first federal decision on the constitutionality of the Act. It asserted that the abolition amendment "consecrates the entire territory of the republic to freedom, as well as to free institutions."²⁴⁸ Supreme Court Justice Noah Swayne,²⁴⁹ presiding over the case as a designated circuit court justice, held that 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."²⁵⁰ The case was litigated in a federal district court because Kentucky law forbade blacks from testifying against whites in state courts.²⁵¹ In dictum, Justice Swayne posited that without congressional power to enforce the Thirteenth Amendment, "simple abolition . . . would have been a phantom of delusion."²⁵² The Amendment reversed the policy of the original Constitution and gave

²⁴⁷ *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

²⁴⁸ *Id.* at 793.

²⁴⁹ Justice 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) BIOGRAPHICAL CYCLOPEDIA AND PORTRAIT GALLERY 101 (1880). As an attorney, Justice 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. See *Ex parte Bushnell*, 9 Ohio St. 77 (1859); *Ex parte Bushnell*, 8 Ohio St. 599 (1858).

²⁵⁰ *Rhodes*, 27 F. Cas. at 786.

²⁵¹ *Id.* at 785.

²⁵² *Id.* at 794.

Congress authority to prohibit discrimination.²⁵³

The Supreme Court ruled very differently in *Blyew v. United States*, which commenced a judicial trend that downplayed the Thirteenth Amendment's pertinence to Revolutionary and abolitionist notions of freedom.²⁵⁴ It was the first blow to the use of the Thirteenth Amendment for ending centuries of racial intolerance. The two defendants were indicted in 1868, when Kentucky still forbade black witnesses from testifying against whites.²⁵⁵

Both the oral and physical evidence at trial showed that in one night John Blyew and George Kennard, two white men, murdered three generations of a black family.²⁵⁶ The case had been removed to district court pursuant to section 3 of the Civil Rights Act of 1866.²⁵⁷ That section 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."²⁵⁸ The U.S. Solicitor General argued that the right to testify protected persons and property and was a freedom the Thirteenth Amendment authorized Congress to secure for all citizens regardless of their race.²⁵⁹

The Supreme Court declined to rule on the defendant's assertion that the 1866 Civil Rights Act's removal provision was unconstitutional, instead deciding *Blyew* on a technical, statutory ground. The Court held that the district 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.²⁶⁰ All those who had been affected by the crime, according to the Court's interpretation of section 3 of the Act, had been murdered. 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 defendants.²⁶¹ Litigation could not

²⁵³ *Id.* ("The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits.")

²⁵⁴ *Blyew v. United States*, 80 U.S. 581, 590-95 (1871).

²⁵⁵ *Id.* at 581 (citing 1860 Ky. Acts 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.*

²⁵⁶ *Murder: Particulars of the Late Tragedy in Lewis County*, LOUISVILLE DAILY J., Sept. 9, 1868, at 3.

²⁵⁷ *See Blyew*, 80 U.S. at 597 (Bradley, J., dissenting).

²⁵⁸ *See id.*

²⁵⁹ *Id.* at 589.

²⁶⁰ *Id.* at 593.

²⁶¹ *Id.* at 593-94.

affect the murder victims and, therefore, the Court reversed the defendants' federal convictions without even remanding the case.

Justice Joseph Bradley, dissenting with Justice Swayne, criticized both the majority's "narrow" reading of the Civil Rights Act and its disregard for the liberal ideals surrounding the statute's passage.²⁶² Justice Bradley argued that Congress broadly intended to prevent wanton, racist conduct from being committed against the black community.²⁶³ The Thirteenth Amendment attempted to "do away with the incidents and consequences of slavery" and to replace them with "civil liberty and equality."²⁶⁴ His dissent further concluded that the Amendment's primary aim was to instate blacks to the "full enjoyment" of civil rights.²⁶⁵ 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."²⁶⁶

B. Segregationist Decisions

While *Blyew* turned on a procedural matter, the *Civil Rights Cases* initiated a substantive period of decline.²⁶⁷ It drew the country back to countenancing intolerance for the sake of national tranquility, much like the founding generation had decided to countenance slavery despite its eloquent denunciation of despotism. The abolitionist forces in Congress had succeeded in making remarkable change to the Constitution, but the Supreme Court found a way of interpreting the instrument according to the views of its opponents in the Thirty-Eighth Congress.²⁶⁸ Justice Bradley, who wrote for the majority, qualified his earlier dissent in *Blyew*, essentially abandoning the Radical Reconstructionist project to animate the Declaration of Independence's statement of equal freedom.²⁶⁹

²⁶² See *id.* at 599 (Bradley, J., dissenting).

²⁶³ *Id.* at 595.

²⁶⁴ See *id.* at 601.

²⁶⁵ See *id.*

²⁶⁶ See *id.* at 599.

²⁶⁷ See generally Civil Rights Cases, 109 U.S. 3 (1883).

²⁶⁸ Cf. Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congress*, 34 LAW & SOC'Y REV. 315, 316 (2000) (arguing that in *Slaughterhouse Cases*, forerunner to *Civil Rights Cases*, "the Supreme Court adopted crucial elements of the Northern Democratic narrative, even though the Democrats were the legislative losers").

²⁶⁹ See generally John Anthony Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552 (1971) (analyzing Justice Bradley's change of jurisprudence).

The *Civil Rights Cases* evaluated the constitutionality of the Civil Rights Act of 1875,²⁷⁰ the Reconstruction Congress's last major piece of civil rights legislation.²⁷¹ 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. The country had failed to provide the protections of fundamental rights that abolitionists had advocated. Among the most racist institutions designed to retain the burdens of slavery were segregation, peonage, the use of adhesion contracts for sharecropping, and the convict lease system.²⁷²

The *Civil Rights Cases* concerned five joint cases from various parts of the country.²⁷³ The first four were reviews of criminal prosecutions.²⁷⁴ 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, and another with refusing access to a New York opera house.²⁷⁵ The fifth case was a civil case from Tennessee about a railroad company whose conductor denied a black woman access to "ride in the ladies' car."²⁷⁶ Attorneys for four of the five defendants did not even bother coming to argue the cases before the Court.²⁷⁷ The Court nevertheless handed their clients a favorable ruling rooted in the emerging national consensus against civil rights reform.²⁷⁸

²⁷⁰ The full name of the Civil Rights Act of 1875 was, "An act to protect all citizens in their civil and legal rights." Civil Rights Act of 1875, 18 Stat. 335 (repealed 1883).

²⁷¹ Douglas L. Colbert, *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 Sumner's centrality in securing passage of the Act, see ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 226 (1990); JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP 16, 20-21 (2d ed. 1995). On the role of President Ulysses Grant in the controversy, see WILLIAM B. HESSELTINE, ULYSSES S. GRANT, POLITICIAN 368-71 (1935).

²⁷² 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, THE DISPOSSESSED 107 (1992). On the convict lease system, see DAVID OSHINSKY, WORSE THAN SLAVERY (1996); see also ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COAL FIELDS, 1871-1896 (1998).

²⁷³ *Civil Rights Cases*, 109 U.S. 3, 4 (1883).

²⁷⁴ *Id.* at 4.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 4-5.

²⁷⁷ LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES & THE NEGRO 137-38 (1966).

²⁷⁸ *Civil Rights Cases*, 109 U.S. at 25-26.

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 *Civil Rights Cases*' holding to diminish congressional civil rights powers.²⁷⁹

In the *Civil Rights Cases*, the Court held that Congress had overstepped its Fourteenth Amendment power when it prohibited private place of accommodation discrimination.²⁸⁰ 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 discrimination was farfetched. Justice Bradley made an artificial dichotomy, although one that was common in post-Reconstruction United States, between civil rights and social rights.²⁸¹ It was this same dichotomy that Senator Sumner, who was the Act's main supporter, had said was raised at every stage of civil rights reform.²⁸² It went hand in hand, he said, with the "vain" argument that "there is no denial of Equal Rights when this separation is enforced."²⁸³ Justice Bradley was unable to see through the artificiality of rejecting integration as a form of social equality. In the *Civil Rights Cases*, he held that the Fourteenth Amendment covered economic rights such as making contracts and leasing land, but not social rights, which pertained to using public accommodations.²⁸⁴ Thus, as Angela P. Harris pointed out: "The Court had curtailed the power to protect American citizens against racial domination in the name of federalism."²⁸⁵

²⁷⁹ *United States v. Morrison* relied on the *Civil Rights Cases* for the proposition that Congress can only prohibit state actions through its Fourteenth Amendment enforcement power. *United States v. Morrison*, 529 U.S. 598, 621-22 (2000); see also *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); Aviam Soifer, *Disabling the ADA: Essences, Better Angels, & Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1333-34 (2003) (stating that the current Court continues to follow *Civil Rights Cases* holding on restraints of Congress's Fourteenth Amendment enforcement power).

²⁸⁰ *Civil Rights Cases*, 109 U.S. at 17-19 ("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.").

²⁸¹ *Id.* at 22.

²⁸² CONG. GLOBE, 42d Cong., 2d Sess. 382-83 (1872).

²⁸³ *Id.*

²⁸⁴ James W. Fox, Jr., *Re-Readings & Misreadings: Slaughter-House, Privileges or Immunities, & Section Five Enforcement Powers*, 91 KY. L.J. 67, 160-61 (2003) (explaining distinction made during mid-nineteenth century between social, civil, and political rights).

²⁸⁵ Angela P. Harris, *Equality Trouble: Sameness & Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1961 (2000).

The only member of the Court who disagreed with the majority was Justice John Marshall Harlan.²⁸⁶ His view of congressional enforcement power was analogous to Radical Republican principles of Reconstruction. His robust understanding of liberty was compatible with abolitionist efforts to integrate the country. The fifth section of the Fourteenth Amendment, Justice Harlan wrote in dissent, enabled Congress to enact any “appropriate legislation” to prohibit states, individuals, and corporations from discriminating on account of race.²⁸⁷ Justice Harlan determined that neither states nor licensed businesses could arbitrarily curtail inalienable rights intrinsic to national citizenship. In his mind, citizens could not be deprived of “rights inhering in a state of freedom” for which all generations, from the country’s founding, had struggled.²⁸⁸

The plaintiffs also brought the *Civil Rights Cases* 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 farther than simply releasing slaves from their masters’ control.²⁸⁹ In fact, Justice Bradley reiterated his conviction that the Thirteenth Amendment granted Congress the power to pass “all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents.”²⁹⁰ Justice Bradley even conceded that the Thirteenth Amendment prohibited state and private violations.²⁹¹ However, he rejected the plaintiffs’ claim that public accommodation discrimination was a vestige of servitude.²⁹²

As in the Fourteenth Amendment part of its opinion, the Court again differentiated between social rights and the “fundamental rights which appertain to the essence of citizenship.”²⁹³ The ruling thereby limited

²⁸⁶ *Civil Rights Cases*, 109 U.S. at 27.

²⁸⁷ *Id.* at 32.

²⁸⁸ According to Justice Harlan, the majority’s opinion so “construed” the “state of freedom . . . belonging to American citizenship” as to “defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.” *Id.* at 33 (Harlan, J. dissenting).

²⁸⁹ *See id.* at 20 (majority opinion).

²⁹⁰ *Id.* at 20-21.

²⁹¹ *See id.* at 20.

²⁹² *Id.* at 25.

²⁹³ *Id.* at 22. Justice 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.” *Id.* at 23. His conclusions deviate from his dissent to *Blyew v. United States*, in which he recognized Congress’s power to pass the Civil Rights Act of 1866. Provisions of the Civil Rights Act of 1866 indicate that

congressional Thirteenth Amendment power to the protection of civil rights. Federal legislation could only end practices directly related to institutional slavery, including impediments to black court testimony and property ownership.²⁹⁴ 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.²⁹⁵

Justice Bradley's minimization 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 deprived blacks of the ability to exercise preferences, while perpetuating a white supremacism intrinsically linked to slavery. Their lot remained even worse than that of the Revolutionaries who had analogized British despotism to enslavement. Fifty years after William Lloyd Garrison had published the *Liberator*, which enervated the abolitionist movement,²⁹⁶ the country remained unwilling to recognize black's claims to freedom. The Court's holding in the *Civil Rights Cases* showed a callousness toward the private and public impediments that prevented blacks, even after the end of slavery, from enjoying the freedom of citizenship. Justice Bradley's dismissive opinion furthered the social tensions that the Radical Republicans expected Congress would end through the Enforcement Clause of the Thirteenth Amendment. Homegrown militias and private business owners who refused to provide blacks with goods and services were now protected by state indifference or outright

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*, 18 AM. U. L. REV. 553, 556 (1969) (discussing courts' differentiation between social and civil rights).

²⁹⁴ See *Civil Rights Cases*, 109 U.S. at 22.

²⁹⁵ Justice 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.

²⁹⁶ HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON & THE ABOLITION OF SLAVERY* (1998).

support for their practices.²⁹⁷

In dissent, Justice Harlan understood the Court to be countenancing state-sponsored abridgements of freedom.²⁹⁸ The majority's opinion, he argued, was "narrow and artificial" and inimical to the "substance and spirit" of the Thirteenth Amendment.²⁹⁹ Justice Harlan understood that since the myth 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.³⁰⁰ This principle, for Justice 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.³⁰¹

While Justice Harlan saw no need to dispute Justice Bradley's assertion that Congress lacked authority over social rights, he considered the use of public accommodations to be intrinsic to civil life and, therefore,

²⁹⁷ See *id.* at 25. Justice 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.

²⁹⁸ See *id.* at 53-54 (Harlan, J., dissenting).

²⁹⁹ *Id.* at 26.

³⁰⁰ See *id.* at 36.

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.

Id.

³⁰¹ *Id.*

amenable to regulation.³⁰²

After the *Civil Rights Cases*, the Thirteenth Amendment fell into virtual disuse. Indeed, the Court continued to chip away at the sparse legislation Congress managed to pass prior to the collapse of Reconstruction. Following the *Civil Rights Cases*, the Court maintained the distinction between social and civil rights in *Plessy v. Ferguson*.³⁰³ This step revealed a judicial aversion to abolitionist notions of freedom and equality.³⁰⁴ 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 deal socially with other races in "matters of intercourse or business."³⁰⁵ Taking a literalist approach to slavery, *Plessy* attacked the assumption that enforced separation of the two races stamped African Americans with a badge of inferiority.³⁰⁶ Justice Henry Brown's narrow construction of "slavery" was far removed from the broad Revolutionary notions of freedom, regarding the term as strictly a matter of forced labor.³⁰⁷ He ignored the American Revolutionary tradition, which abolitionists and Radical Republicans had adopted, that understood real freedom to mean far more than simply being able to choose an employer. It implicated a right to participate in the life of the community, especially in political matters, which segregation made virtually inaccessible to blacks.

As he did in the *Civil Rights Cases*, Justice Harlan wrote the dissent to *Plessy*. He regarded the right of persons to travel by rail, unimpeded by racial limitations, to be inherent in the concept of liberty.³⁰⁸ His

³⁰² See *id.* at 56.

³⁰³ 163 U.S. 537 (1896).

³⁰⁴ See *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.

Id.

³⁰⁵ *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)).

³⁰⁶ *Id.* at 551. Only in 1954 did the Supreme Court find the "separate but equal" doctrine unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (rejecting language in *Plessy* suggesting "separate but equal is constitutional").

³⁰⁷ *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

³⁰⁸ *Id.* at 555 (Harlan, J., dissenting). On the importance of Justice Harlan's dissent in

perspective on liberty not only was more expansive than that of the founders', but it also provided an even higher degree of detail on national rights than the Garrisonian abolitionists had formulated. At the turn of the twentieth century, Justice Harlan understood better than the politicians and theorists before him the extent of harm a segregated society would cause ostracized minorities. Justice Harlan was prescient in foreseeing that the separate but equal doctrine would not be limited to rail travel but would harm blacks' ability to engage in many other meaningful public activities.³⁰⁹

C. Modern Supreme Court Decisions

Jones v. Alfred H. Mayer, which the Court decided in 1968, went a long way toward recognizing that congressional power to prevent the incidents of involuntary servitude extends far beyond the prohibition of hereditary forced labor.³¹⁰ *Jones* rejected the *Civil Rights Cases*' parochial view that Congress lacks the power to prevent exclusionary, racist practices. *Jones* found that a federal law based on the Civil Rights Act of 1866 was "necessary and proper" for preventing private and public racial discrimination in real estate transactions.³¹¹ While the *Jones* Court 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 to because of their race was an abridgement of the rights associated with slavery.

The Court acknowledged Congress's wide latitude to pass legislation for preventing 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."³¹² Pursuant to the Enforcement

Plessy to principled legal discourse, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 146 (1991) and T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1076 (1991).

³⁰⁹ Justice Harlan understood the wide-ranging implication of the holding:

If a state can 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).

³¹⁰ 392 U.S. 409 (1968) (upholding Congress's power to prevent private housing discrimination under 42 U.S.C. § 1982).

³¹¹ *Id.* at 438-39.

³¹² *Id.* at 440.

Clause of the Thirteenth Amendment, Congress can prevent state and private encroachments on fundamental rights. Moreover, *Jones* required courts to analyze human rights violations in a manner distinct from the state action analysis under the Fourteenth Amendment.³¹³ 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 on which private parties cannot trample, but the opinion fails to explore the noneconomic harms associated with slavery.

In the Supreme Court cases that followed *Jones*, the Court continued to hold that Congress can prohibit private racial discrimination pursuant to its Thirteenth Amendment power. The Court further broke down racial barriers that had 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 even beyond the Amendment's framers' notions.³¹⁴ *Runyon* addressed the narrow issue of whether 42 U.S.C. § 1981 prohibited private schools from refusing to enroll students based on their race. The critical part of the statute provided that "all 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."³¹⁵ Justice Potter Stewart for the majority determined that the school violated interested parents' contract rights because it used racial criteria to deny their children enrollment.³¹⁶ The Court found that even though parents whose children attended the school had the right not to associate with blacks in their private relations, their associational right could not legitimize school discrimination.³¹⁷ The abolitionists had argued that slavery violated the intrinsic right to raise and educate children, and *Runyon* considered discrimination in school enrollment to be tied to the continued vestiges of slavery.³¹⁸

³¹³ See *infra* Part V.A (distinguishing congressional Fourteenth and Thirteenth Amendment enforcement power).

³¹⁴ *Runyon v. McCrary*, 427 U.S. 160 (1976).

³¹⁵ *Id.* at 160 (quoting 42 U.S.C. § 1981(a) (2004)).

³¹⁶ *Id.* at 172-73. ("The parents . . . sought to enter into contractual relationships . . . for educational services. . . . But neither school offered services on equal basis to white and nonwhite students."). Justice Byron White, writing for the dissent, argued that section 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 194-95 (White, J., dissenting).

³¹⁷ *Id.* at 177-78.

³¹⁸ *Id.* at 170-72 (describing section 1981's and section 1982's prohibitions against incidents of involuntary servitude, and applying that premise to private school setting).

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 as a protection of only their contractual rights. Constitutional liberation from slavery granted Congress the power to protect parental autonomy, which slave codes and individual slave masters had decimated.³¹⁹ Parents' fundamental right to educate their children is more compelling than their commercial right to enter into a contract.

The use of civil rights history for interpreting the Enforcement Clause is also helpful in understanding other associational cases. The Court found a basis for congressional action in *Tillman v. Wheaton-Haven Recreation Ass'n*.³²⁰ Litigation in that case arose when a private swimming club refused to allow blacks to join as members or to visit as guests.³²¹ Three adversely affected African Americans sought damages from the swimming club and asked the court to enjoin its practices.³²² They raised their claims pursuant to 42 U.S.C. §§ 1981-1982, both of which prohibit racist leasing and rental practices.³²³ Based on the

³¹⁹ HERBERT G. GUTMAN, *BLACK FAMILY IN SLAVERY & FREEDOM, 1750-1925*, at 207-09 (1976) (concluding that, despite 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 difficulties faced by slaves who married slaves of other owners); Mary Beth Norton et al., *Afro-American Family in the Age of Revolution*, in *SLAVERY & FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION*, *supra* note 66, at 186-87 (explaining that slavery compromised family integrity because masters could sell their slaves for economic, subduing, or whimsical reasons). For more regional information about the slave family that has been developed since the 1980s, see LARRY E. HUDSON JR., *TO HAVE & TO HOLD: SLAVE WORK & FAMILY LIFE IN ANTEBELLUM SOUTH CAROLINA* (1997); ANN PATTON MALONE, *SWEET CHARIOT: SLAVE FAMILY & HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA* (1992). After 1865, in an effort to retain slavery through legal ruse, several states instituted child apprenticeship laws. These statutes required slave children to serve for a term of indenture away from their 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 child apprenticeships, as Leon Litwack pointed out, amounted to legalized kidnapping and de facto slavery. LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 191, 237-38 (1979).

³²⁰ *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973).

³²¹ *Id.*

³²² *Id.*

³²³ The Court found no need to examine whether sections 1981 and 1982 applied to private discrimination, determining that it was sufficient that the "operative language" of

dichotomy of rights in the *Civil Rights Cases*, the Court might have found the use of the swimming pool to be a social, rather than a civil right, and provided the plaintiffs no relief. The Court, instead, decided that §§ 1981 and 1982 prohibited the club from excluding people based on race.³²⁴ The plaintiffs entered into the real estate purchases partly based on their expectation of joining the recreation center.³²⁵ The swimming club interfered with the applicants' right to enter into contracts by denying them access to a public place of accommodation.³²⁶ Just as with *Runyon*, the holding in *Tillman* is narrow, being grounded on contract principles rather than on the federal enforcement power to prevent violations of fundamental rights associated with the general welfare. A more principled Court rationale could have articulated a notion of national citizenship that includes the right to freely partake of community amenities without the burden of racism. Prohibiting the use of racist association qualifications is a legitimate aim of a post-Reconstruction Congress in its overall commitment to the general welfare.

An overview of case law decided since *Jones* shows just how far the Thirteenth Amendment can reach, even when litigants rely on ancient civil rights statutes — in particular, sections 1981 and 1982 — that are modeled after the Civil Rights Act of 1866. 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 the discretionary power to analyze and end impediments to civil liberties. Congress can go much further than these nineteenth-century statutes by passing new statutes pursuant to its Enforcement Clause authority. The policy behind civil rights initiatives must be predicated on contemporary sensibilities that do not violate the commitment to liberal equality adopted into the Thirteenth Amendment.

V. CONTEMPORARY SIGNIFICANCE AND FUTURE POTENTIAL OF THE THIRTEENTH AMENDMENT

Recent Supreme Court decisions have limited Congress's ability to rely on its traditional Fourteenth Amendment and Commerce Clause powers to pass civil rights legislation. Sections A and B demonstrate that recent decisions have not eroded Thirteenth Amendment authority for securing

both was "traceable" to section 1 of the 1866 Civil Rights Act. *Id.* at 439-40.

³²⁴ *Id.* at 438-39.

³²⁵ *Id.* at 437.

³²⁶ *Id.* at 439-40.

the liberal equality first promised to all citizens during the Revolution, elaborated through abolitionists, and made part of the Constitution in the aftermath of the Civil War. Section C then evaluates the extent to which the Thirteenth Amendment permits Congress to enforce civil rights.

A. *Relationship Between the Thirteenth and Fourteenth Amendments*

1. Recent Judicial Fourteenth Amendment Approach

Recent Fourteenth Amendment jurisprudence has limited Congress's ability to pursue civil rights initiatives. The Rehnquist Court has crafted a "responsive," rather than substantive, interpretation of Congress's Section 5 authority.³²⁷ In *City of Boerne v. Flores*, the Court found unconstitutional the Religious Freedom Restoration Act, as applied to state and local governments. The Court explained that the statute was "so out of proportion to a supposed remedial or preventative object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."³²⁸ The case limited Congress's Section 5 authority to passing congruent laws for remedying state violations of Fourteenth Amendment guarantees: "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause."³²⁹

The *Boerne* Court based its rationale on statements made during congressional debates over the proposed Fourteenth Amendment to the effect that Congress should not be given affirmative power to make civil rights laws since that would intrude on powers traditionally vested in the states.³³⁰ Ruth Colker has researched and debunked the Court's misleadingly selective reliance on speeches made by congressmen who opposed the Amendment's ratification.³³¹ The Court failed to mention that of the four congressmen on whose views it predicated its responsive reasoning in *Boerne*, only one supported the Fourteenth Amendment.³³²

³²⁷ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

³²⁸ *Id.* at 532 (emphasis added).

³²⁹ *Id.* at 520.

³³⁰ *Id.* at 520-21.

³³¹ See Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 797-817 (2002).

³³² See *id.* at 792. Specifically, in *Boerne* the Court quoted Representatives Hale, Hotchkiss, and Rogers and Senator Stewart. *Boerne*, 521 U.S. at 520-21. "Of the Representatives quoted by the Court, only Representative Hotchkiss voted for ratification

Relying on the understanding of ratification opponents to bolster constitutional interpretation is a dubious method of judicial interpretation, particularly if the method claims to adhere to the framers' original intent.

The Court reiterated this remedial interpretation in *Kimel v. Florida Board of Regents*, finding that Congress overstepped its Section 5 enforcement authority by extending the Age Discrimination in Employment Act's applicability to state and local governments.³³³ The Court held the statute's breach of state sovereign immunity to be "out of proportion to its supposed remedial or preventive objectives."³³⁴ Other cases dealing with Section 5 have applied this responsive "proportionality and congruency" test to the Patent Remedy Act,³³⁵ the Violence Against Women Act,³³⁶ the Americans with Disabilities Act,³³⁷ and the Family and Medical Leave Act.³³⁸

2. Comparing Thirteenth and Fourteenth Amendment Powers

Both the Thirteenth and Fourteenth Amendments contain enforcement provisions for enacting federal laws that protect liberty and equality interests essential to the general welfare. They are based on a civil rights tradition grounded in revolutionary assertions of liberty against the British yoke of slavery and radical abolitionist goals of using the Constitution to end chattel servitude and all its associated practices. Union victory in the Civil War heralded, in President Lincoln's words, "a new birth of freedom."³³⁹ That nascent hope for change was partly embodied in the Thirteenth and Fourteenth Amendments. These amendments were passed to provide all Americans, regardless of their race, with the equal opportunity to live self-directed lives.³⁴⁰ The two

of the Amendment. Representative Hale abstained and Representative Rogers voted against the measure." Colker, *supra* note 331, at 792.

³³³ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

³³⁴ *Id.* at 82.

³³⁵ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999).

³³⁶ *United States v. Morrison*, 529 U.S. 698, 625-26 (2000) (quoting *Fla. Prepaid*, 527 U.S. at 647, and *Boerne*, 521 U.S. at 533).

³³⁷ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

³³⁸ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (quoting *Garrett*, 531 U.S. at 368).

³³⁹ Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), available at <http://www.law.ou.edu/hist/getty.html>.

³⁴⁰ See Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 422 (1994) (writing that Equal Protection Clause of Fourteenth

amendments differ, however, in scope and application. These differences are significant for formulating civil rights policy.

The Fourteenth Amendment's state action requirement, for instance, sets limits on what discriminatory conduct Congress can regulate. The Supreme Court has narrowly construed the applicability of the Enforcement Clause of the Fourteenth Amendment since the *Civil Rights Cases*. The Thirteenth Amendment, on the other hand has no such limitation on statutory authority. *Boerne* took the state action requirement for granted³⁴¹ and even further straightjacketed Congress by finding that Section 5 allows it "to enforce" but not "to determine what constitutes a constitutional violation."³⁴² The Supreme Court also embraced the Fourteenth Amendment's state action requirement in *United States v. Morrison*.³⁴³ Writing for the majority, Justice William Rehnquist explained that the Court would not deviate from "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."³⁴⁴ *Morrison* claimed that it was based on the doctrine of stare decisis and the "insight attributable to the Members of the Court at that time," since they had "intimate knowledge and familiarity with the adoption of the Fourteenth Amendment."³⁴⁵

Statutes passed pursuant to the Thirteenth Amendment, on the other hand, need not concern themselves with state actors. While the American Revolution was against state-sponsored tyranny perpetrated by agents of the British government, abolitionists used the founding generation's broad notions of liberty in their advocacy against private actors who owned slaves or facilitated the institution of slavery. The Thirteenth Amendment prohibits slavery regardless of whether it is practiced by state actors or private parties and irrespective of whether it is legally tolerated or unlawfully perpetrated. The *Civil Rights Cases* recognized that Congress can criminalize private discrimination though its Thirteenth Amendment enforcement powers. Decades later, the

Amendment stands for promise of good life); Robin West, *Universalism, Liberal Theory, & the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 706 (1998) (writing about rationalist conception of human nature, considered to be characteristic of liberty secured under Fourteenth Amendment).

³⁴¹ *Boerne*, 521 U.S. at 533.

³⁴² *Id.* at 519. Both *Boerne* and *United States v. Morrison* failed to evaluate the Court's interpretation of "enforce" in Thirteenth Amendment cases, relying, instead, on the *Civil Rights Cases*' "niggardly" interpretation of that term. Jed Rubenfeld, *The Anti-Discrimination Agenda*, 111 YALE L.J. 1141, 1155-56 (2002).

³⁴³ *United States v. Morrison*, 529 U.S. 598, 625-26 (2000).

³⁴⁴ *Id.* at 621.

³⁴⁵ *Id.* at 622.

Warren and Burger Courts, in *Jones v. Mayer* and *Runyan v. McCrary* respectively, confirmed that the Thirteenth Amendment enables Congress to pass criminal and civil laws against private party defendants.³⁴⁶ Thus, civil rights laws passed under congressional Thirteenth Amendment authority can enjoin innumerable private acts that the Fourteenth Amendment does not reach.

The Thirteenth Amendment has the further advantage of providing the authority for unequivocal regulation that need not be responsive. The Fourteenth Amendment, however, has a “responsive” role, according to the most recent line of cases. In *Boerne*, the Court found that Congress could not choose to act unless it was responding to unconstitutional behavior.³⁴⁷ Again, in *Kimel*, the Court held that Fourteenth Amendment Section 5 power could not be used to abrogate sovereign immunity where there was no indication that passage of a statute was meant to respond to discriminatory state conduct.³⁴⁸

Thirteenth Amendment-based statutes may likewise respond to discrimination, but they may also interpret the meaning of “liberty” in the Constitution and act upon it. Pursuant to this scheme, the Court remains the final arbiter of what the Constitution means, but Congress can act on its own findings, which may be constructive and not merely responsive. The Thirteenth Amendment standard of review is a low-level, rational basis scrutiny.³⁴⁹ Under the Thirteenth Amendment, the federal legislature may, and indeed should, pass laws that are conducive for autonomy to thrive.

Such a perspective should not merely be confined to currently existing statutes. Congress may pass civil legislation more sensitive to human rights concerns than the property-centered sections 1981 and 1982. 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,³⁵⁰ but

³⁴⁶ *Runyan v. McCrary*, 427 U.S. 160, 176 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429-30 (1968).

³⁴⁷ *Boerne*, 521 U.S. at 532.

³⁴⁸ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (“[J]udged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is ‘so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.’” (quoting *Boerne*, 521 U.S. at 532)).

³⁴⁹ See *Jones*, 392 U.S. at 440.

³⁵⁰ 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

also enables the federal government to actualize the ideals of the Declaration of Independence and the Preamble.

B. Thirteenth Amendment and Commerce Clause

1. Pre-Lopez Commerce Clause Approach

Besides making it more difficult for Congress to achieve civil rights reform through the Fourteenth Amendment, the Court has placed new constraints on traditional Commerce Clause power. Prior to *Lopez* in 1995, Congress virtually had plenary power to pass laws that were rationally related to the national economy.³⁵¹ The wave of judicial deference, which began during the New Deal, crested during the 1960s when Congress passed a series of civil rights statutes, most notably the Civil Rights Act of 1964, pursuant to its Commerce Clause authority.³⁵² The Warren Court supported Congress's creative strategy for circumnavigating around the eighty-year-old state action restrictions in *United States v. Harris*³⁵³ and the *Civil Rights Cases*.³⁵⁴ Civil rights leaders, just as their legislative allies, thought that the federal government should

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). The Court found that the Clause 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 government's 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)).

³⁵¹ *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942) (upholding Agricultural Adjustment Act of 1938 because family farm consumption had cumulative effect on national wheat market). *United States v. Lopez* did not overrule *Wickard*, but called it "the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Lopez*, 514 U.S. 549, 560 (1995).

³⁵² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

³⁵³ 106 U.S. 629 (1883) (invalidating Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13, which punished private conspiracies).

³⁵⁴ 109 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 Fourteenth Amendment provisions "all have reference to State action exclusively, and not to any action of private individuals").

make private discrimination actionable in federal courts.³⁵⁵ The Supreme Court, under the leadership of Chief Justice Earl Warren, relied on the Commerce Clause to find the Civil Rights Act of 1964 constitutional rather than overturn post-Reconstruction jurisprudence that established the Fourteenth Amendment state action requirement.

Some of the most important cases establishing the standard of review for evaluating the constitutionality of civil rights laws arose under Title II of the Act, which enjoins private businesses from withholding public services on the ground of race, color, religion, or national origin.³⁵⁶ *Heart of Atlanta Motel v. United States*, a 1964 watershed case, determined that Congress could prevent a motel from racist interference with the interstate travel of black patrons wanting to rent a room.³⁵⁷ Without second-guessing the extent of congressional findings, the Court determined that the Senate and House made a rational enactment in light of overwhelming evidence that hotels and motels were obstructing interstate commerce.³⁵⁸ That same year, the Court found in *Katzenbach v. McClung* that the Civil Rights Act of 1964 constitutionally prohibited a family-owned restaurant from discriminating against potential patrons.³⁵⁹ In that 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.³⁶⁰ These cases were based on the de minimis review of interstate commerce regulations that, in *Wickard v. Filburn*, had even upheld a federal law that applied to privately-grown wheat intended for private consumption.³⁶¹

³⁵⁵ Many people, including Attorney General Robert F. Kennedy and constitutional scholars like Gerald Gunther, counseled Civil Rights leaders to use the Fourteenth Amendment. However, 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 and the Role of the 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. *Id.*

³⁵⁶ 42 U.S.C.A. § 2000a (West 2000). Title II is applicable to four categories of "places": (1) "establishment[s] which provid[e] lodging to transient guests," (2) "facilit[ies] principally engaged in selling food for consumption on the premises," (3) "place[s] of exhibition or entertainment," or (4) "any establishment . . . which is physically located within the premises of any establishment" listed in this statute. *Id.* § 2000a(b).

³⁵⁷ The Court found that the 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, Inc. v. United States*, 379 U.S. 241, 243 (1964).

³⁵⁸ *Id.* at 257.

³⁵⁹ *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

³⁶⁰ *Id.* at 299.

³⁶¹ *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

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.³⁶² The Court did not second guess congressional fact-finding when a statute met this minimum threshold.³⁶³ This commitment to upholding economically predicated regulations extended so far that, in *Daniel v. Paul*, even selling hot dog buns at a concession stand and playing a jukebox for entertainment made an otherwise private club into a regulated business involved in interstate commerce.³⁶⁴ 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, the Court never categorically required Congress to provide evidence about the economic consequences leading it to enact statutes on the basis of its Commerce Clause prerogative.³⁶⁵ Such a requirement, Harold Krent argued, “unquestionably would fundamentally alter the relationship between the judiciary and the legislature.”³⁶⁶

2. Rehnquist Court Commerce Clause Approach

By the 1990s, use of the Commerce Clause was a well established approach to protecting civil rights. The Court altered the dynamic of judicial review in *United States v. Lopez*, where it found unconstitutional a federal criminal statute prohibiting the possession of firearms near schools,³⁶⁷ and in *United States v. Morrison*, where it found Congress overstepped its authority in creating a federal civil remedy for gender-motivated violence.³⁶⁸ In the name of federalism, the Court increased its oversight of the legislative process.³⁶⁹

³⁶² *Katzenbach*, 379 U.S. at 303-04; *Heart of Atlanta Motel*, 379 U.S. at 261-62.

³⁶³ *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.”).

³⁶⁴ *Daniel v. Paul*, 395 U.S. 298, 305, 308 (1969).

³⁶⁵ See *United States v. Lopez*, 514 U.S. 549, 606 (1995) (Souter, J., dissenting).

³⁶⁶ Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 732-33 (1996). For an earlier rendition of the same point, see Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 105 (1966) (“The Court does not review the sufficiency of the evidence in the record to support congressional action. . . . No case has ever held that a record is constitutionally required.”).

³⁶⁷ In similar fashion, the Court encroached on Congress’s Fourteenth Amendment Section 5 authority both in *Morrison*, 529 U.S. at 619, and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83 (2000).

³⁶⁸ *Morrison*, 529 U.S. 613-14.

³⁶⁹ A. Christopher Bryant and Timothy J. Simeone have canvassed Supreme Court

Rather than use the rational basis test, the *Lopez* Court determined that the Gun-Free School Zones Act was unconstitutional because it sought to prevent an activity that did not have a “substantial effect” on interstate commerce.³⁷⁰ Unlike the post-1937 New Deal Court, in cases like *United State v. Darby*³⁷¹ and *Wickard*, or Warren Court interpretations, like *Heart of Atlanta Motel* and *McClung*, the Rehnquist Court criticized policymakers for not making an adequate showing that guns carried near schools were connected to any “economic enterprise.”³⁷² Justice Stephen Breyer, dissenting in *Lopez*, found no basis for deviating from the accepted rational basis test, meaning that Congress should be able to regulate any activity “significantly (or substantially)” affecting national commerce.³⁷³ Congress’s ability to pass a law covering the use of guns, at least those with parts that had gone through interstate commerce, would have seemed more secure than its ability to pass the federal regulation found constitutional in *Daniel*, but the Rehnquist Court made an unambiguous shift away from Warren Court precedents.

Chief Justice Rehnquist, who wrote the majority opinion in *Lopez*, also spoke for the Court in *Morrison*. Unlike the congressional record offered on the Gun-Free School Zones Act, Congress provided overwhelming information about the interstate effects of gender-motivated violence.³⁷⁴ Yet, the Court rejected Congress’s policy explanation that violence against women substantially affects interstate commerce.³⁷⁵ The lawmakers had relied on a “mountain of data,” including information from no less than nine congressional hearings and reports from gender

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.” A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 395 (2001).

³⁷⁰ *Lopez*, 514 U.S. at 563.

³⁷¹ *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

³⁷² *Lopez*, 514 U.S. at 558-61.

³⁷³ *Id.* at 618 (Breyer, J., dissenting). Justice 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. From an opposite 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).

³⁷⁴ *United States v. Morrison*, 529 U.S. 598, 619-20 (2000).

³⁷⁵ *Id.* at 614-15.

bias task forces in twenty-one states, which had been amassed over four years.³⁷⁶

The Court disregarded the compiled data, finding the Violence Against Women Act unconstitutional because gender-motivated crimes “are not, in any sense of the phrase, economic activity.”³⁷⁷ The reassessment of congressional evidence was reminiscent of *Lochner*-era substantive due process review.³⁷⁸ Gender-motivated violence, the Court found, “not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”³⁷⁹ The Court concluded that Congress may not regulate conduct solely based on its “aggregate effect on interstate commerce,” but only on the basis of either the defendant’s effect on the national economy or the activity’s economic nature.³⁸⁰

The new line of Commerce Clause and Fourteenth Amendment cases has created a problem for civil rights activists. It threatens to slow the legislative process by making data gathering cost-prohibitive and potentially futile, given that the Court can now disregard the quantity and quality of Congress’s findings by invoking constitutional-sounding language. Neither can Congress identify which constitutional rights it can protect without the Court’s prior guidance. Given these constraints on legislative powers, civil rights leaders need to develop a strategy for enforcing civil rights that can avoid these new hurdles.

3. Distinguishing the Thirteenth Amendment from the Commerce Clause

The recent developments in Commerce Clause cases indicate that there are significant obstacles to relying on congressional authority over interstate commerce to develop a legislative civil rights approach. Statutes passed to end arbitrary discrimination and relying on Commerce Clause authority remain vulnerable to counterarguments

³⁷⁶ *Id.* at 628-31 (Souter, J., dissenting).

³⁷⁷ *Id.* at 613 (majority opinion).

³⁷⁸ *Id.* at 644 (Souter, J., dissenting) (“[I]n 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, 165-67 (1996) (Souter, J., dissenting) (comparing recent Supreme Court federalist approaches to *Lochner v. United States*, 461 U.S. 931 (1983)).

³⁷⁹ *Morrison*, 529 U.S. at 617-18.

³⁸⁰ *Id.* at 617.

about their effect on the national economy. Federal laws relying on the Thirteenth Amendment, on the other hand, deal primarily with conduct rationally related to oppressive control, not interstate commerce. Abolitionists sought and achieved an end to all slavery, not only the type that could be reasonably linked to the interstate economy. The Thirteenth Amendment even prohibits involuntary servitude occurring entirely within one state and having absolutely no economic benefit to slaveholders. For instance, the keeping of a sex slave would be egregious even if the kept person were never taken out of state nor used for any material gain.

While economic arguments can be of little consequence to policies based on the Thirteenth Amendment, they can be dispositive when it comes to civil rights legislation predicated on the Commerce Clause. The Court's determination in *Morrison* that misogynistic violence has no substantial effect on national commerce is irrelevant to evaluating whether the Thirteenth Amendment grants Congress the power to prevent such violence. The *Jones* rational basis inquiry has never been altered in the way that *Lopez* and *Morrison* altered Commerce Clause analysis. Had Congress relied on its Thirteenth Amendment enforcement power in passing the Violence Against Women Act, the Court might have deferred to legislators as long as they had found that gender-motivated violence was rationally analogous to arbitrary domination 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."³⁸¹

Another advantage of the Thirteenth Amendment is its unequivocal stand against despotism that goes back to the philosophy that revolutionaries included in the Declaration of Independence and the Constitution's Preamble. The Commerce Clause, on the other hand, 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*,³⁸² determined that Congress had the power to regulate any commerce between states, slavery continued unabated and exploited interstate commercial outlets. One can even find indications from debates of the Philadelphia Constitutional Convention that the Commerce Clause was part of the founders' compromise with

³⁸¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (explaining use of rational basis test in context of Commerce Clause).

³⁸² *Gibbons v. Ogden*, 22 U.S. 1 (1824).

the slave states.³⁸³ 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 even owned slaves.³⁸⁴

By its very terms, the Thirteenth Amendment is not given to a neutral reading on the subject of private- or state-sponsored discrimination. The Congressional debates leading to the Amendment's ratification referred often to the unfulfilled vision of the nation's founders. There is nothing neutral about a constitutional provision containing a moral stance against the exploitation of human lives. Understanding the Supreme Court's holding on Congress's Thirteenth Amendment power by filtering regulations through the broad definition of "slavery" provides an understanding of what the Amendment stands for. It provides Congress with the means to continue the work of the Reconstruction Congress, using contemporary sensibilities to understand what fundamental rights the national government can protect. This does not mean that a Thirteenth Amendment civil rights approach should displace Commerce Clause efforts under the Civil Rights Act of 1964. Rather, it brings into bold relief the continued vitality of *Jones* in establishing Congress's broad interpretive power at a time when *Lopez* and *Morrison* have made the passage of new civil rights legislation under the Commerce Clause more onerous.

C. *Construing Thirteenth Amendment Liberty: How Far Might It Extend?*

The ideas of the Thirteenth Amendment's framers, while invaluable, cannot be the endpoint of construction. Its framers were men of their time whose social and political backgrounds made them incapable of foreseeing every potential application of the Amendment. Their ideas and those of their abolitionist mentors are nevertheless essential for comprehending the Amendment's significance to contemporary incidents of involuntary servitude, such as the forced sex trade, the

³⁸³ PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 24 (1981).

³⁸⁴ Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 123 (1998) (stating that Congress had power under Commerce Clause to regulate "incoming slave trade" and failure to do so was sign of "bad faith of the American people"); 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 interstate level).

exploitation of domestic workers, and the peonage of migrant farmers.³⁸⁵ Judicial opinion is likewise essential for formulating a constructive interpretation of the Thirteenth Amendment. Historical and precedential examination, when supplemented with normative analysis, is useful to establish the constitutional limitations of congressional power.³⁸⁶

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

The second section of the Thirteenth Amendment also provides 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

³⁸⁵ For a contemporary instance of involuntary servitude, see TESIS, *supra* note 118, at 137-60.

³⁸⁶ See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1350-51 (1997) (discussing importance of aspirational principles to constitutional fidelity).

and equal citizenry. The framers of the Thirteenth Amendment, under the influence of abolitionist theorists, determined that liberty was a national right and provided the federal government with the constitutional authority to secure it against all racist discrimination.

Importantly, 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.³⁸⁷ 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.³⁸⁸ Since then, a variety of cases have defined who can bring suit under legislation promulgated pursuant to the Thirteenth Amendment. In the *Slaughter-House Cases*, the Court held that the Amendment applies to "Mexican peonage and the Chinese coolie labor system."³⁸⁹ 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 Congress passed the Civil Rights Act of 1866, Jews and Arabs were among the groups classified as distinct races.³⁹⁰ The Court, therefore, concluded that the Act prevents property discrimination reminiscent of servitude from being committed against Jews and Arabs.³⁹¹

The Amendment's protections apply to anyone who is subject to arbitrary restraints on the enjoyment of freedom. The Abolition Amendment freed slaves from much more than their obligation to engage in unrequited labor. A constricted understanding of its purposes would be ahistorical: The country's framers understood that there were different gradations of slavery — a variety of infringements on equal liberty that were incidental to chattel servitude. The Thirteenth Amendment prohibits full-blown slavery as well as conduct depriving

³⁸⁷ Civil Rights Act of 1866, 8 U.S.C. § 42; see Ku Klux Klan Act of 1871, CONG. GLOBE, 42d Cong., 1st Sess., 317.

³⁸⁸ See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 878 (1986) (stating that post-bellum civil rights legislation was intended to protect blacks and whites).

³⁸⁹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

³⁹⁰ Civil Rights Act of 1866, 8 U.S.C. § 42.

³⁹¹ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987); see *id.*; see also *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987).

individuals of the fundamental rights that catalyzed the American Revolution. The Reconstruction Congress made the protection of those rights against state prejudices obligatory on the country. Following the ratification of the Thirteenth Amendment, the Declaration and Preamble were no longer aspirational statements but enforceable aims that provided guidance and placed the primary onus for civil rights on the federal government.

The Thirteenth Amendment ended all practices incidental of servitude, including arbitrary limitations on association, travel, and employment.³⁹² The Thirteenth Amendment, inferentially, prohibited all repressive conduct rationally related to the impediments of freedom, not simply racist labor practices. Congress is empowered to act against the arbitrary restraint of freedom, and its enactments are subject to rational level judicial review.

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

The Thirteenth Amendment requires that the federal legislature and 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 among an infinite variety of domestic options. A free society allows persons to make plans for 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 choose that trade. Teaching one's own children only English differs from being prohibited from teaching them foreign languages. Living in a predominantly Jewish neighborhood by choice is different than being forbidden 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

³⁹² KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 208 (1956).

government. One of the federal government's primary functions is to protect the common good — laws must aim to pragmatically improve people's lives and to help them flourish as self-directed individuals. The coequal freedoms of self-determination and self-realization are 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. Thus, a policy designed to promote liberty as a means of achieving the common good has an antidiscriminatory principle built into it: one cannot arbitrarily restrict another's liberty and credibly insist that such an act benefits everyone.

Civil liberties are not absolute; rather, they may be limited by the 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 Thirteenth 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 a national commitment to provide legal redress for arbitrary constraints on independent and unobtrusive choices.³⁹³ The Thirteenth Amendment prevents the exploitation of personal liberty that interferes with others' legitimate pursuits. 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 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. This conclusion follows not only from the theoretical construct of liberty but also 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 unobstructed by acts of arbitrary domination. In drafting civil rights bills, legislators should assess any remaining arbitrary infringements on the meaningful assertion of individual and group liberties. Congress's task is dynamic, requiring it to evaluate contemporary circumstances and to craft vigorous responses to modern or ancient forms of discrimination.

³⁹³ I derive the distinction between "license" and "independence" from Ronald Dworkin, who distinguishes "liberty as license" from "liberty as independence." RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 262 (1977).

Federal laws against such practices should be drafted in ways that would best benefit all citizens, rather than a particular interest group.³⁹⁴ The nation rises or falls as a whole. The Thirteenth Amendment makes 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 prevent congressional power from being hijacked for autocratic purposes.

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 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 exerted 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 constitutional amendment for the national protection of liberty. For the Amendment's framers, the concept of slavery, and its concomitant harms, was nearly as broad as that notion was for Revolutionaries and abolitionists.

The Reconstruction Congress developed the Thirteenth Amendment into a far-reaching guaranty of any fundamental right essential to human liberty. Section 2 of the Thirteenth Amendment aims to provide legislators with the means for implementing protections of fundamental liberties, such as the rights to travel and 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

³⁹⁴ On how to make a neutral decision to best benefit society, see F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 32 (1960).

legislation to meet civil rights ends.

In the years following the Civil War, the Supreme Court rejected a comprehensive reading of liberty in favor of a narrow understanding that was more closely linked to the Amendment's opponents than to its supporters.³⁹⁵ The Supreme Court subscribed to this narrow interpretation for many years. The Court eventually changed course, realizing that the Amendment grants Congress the right to prevent many obstructions to freedom, such as discriminatory contractual practices, that are not literally connected to forced labor. Despite the Court's recognition of broad congressional authority to define the incidents and badges of involuntary servitude, Congress has rarely exercised its enforcement power under the Thirteenth Amendment. Notwithstanding this oversight the Amendment offers a wealth of possibilities for enacting civil rights legislation predicated on the nation's historic commitment to liberal equality.

Using its Thirteenth Amendment power, Congress can deal with such nationwide harms as hate crimes,³⁹⁶ hate speech directed against identifiable groups,³⁹⁷ and oppressive labor practices.³⁹⁸ The Thirteenth Amendment's national guarantee of freedom is a powerful alternative to the Fourteenth Amendment and Commerce Clause for passing civil rights legislation. That alternative has taken on greater import since the Rehnquist Court reduced congressional effectiveness under the Commerce Clause and Section 5 of the Fourteenth Amendment. To achieve the goal of coequal liberty, Congress may use its Thirteenth Amendment Enforcement Clause power to pass statutes against private and public discrimination.

³⁹⁵ See Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 LAW & SOC'Y REV. 315, 316, 354 (2000).

³⁹⁶ TESIS, *supra* note 118, at 149-54.

³⁹⁷ TESIS, *supra* note 12, at 389.

³⁹⁸ James G. Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941 (1999); James G. Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).