

# INTRODUCTION: REVIVING THE THIRTEENTH AMENDMENT

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Amendment XIII

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

What has been the legal significance of the Thirteenth Amendment? Section 1 outlawed slavery. Abraham Lincoln's Emancipation Proclamation declared this, but Lincoln knew the limited legal significance of that declaration. It is why he felt it essential that the Thirteenth Amendment be adopted before the end of the Civil War.

Section 2 has been interpreted by the Supreme Court as giving broad authority to Congress to prohibit racial discrimination, including by private entities. As the Court declared in *Jones v. Alfred H. Mayer Co.*, this provision "empowered Congress to do much more. For that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'"<sup>1</sup> A year after the ratification of the Thirteenth Amendment, Congress used this authority to pass the Civil Rights Act of 1866, which provided that any citizen has the same right that a white citizen has to make and enforce contracts, sue and be sued, give evidence in court, and inherit, purchase, lease, sell, hold, and convey real and personal

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<sup>1</sup> 392 U.S. 409, 439 (1968) (upholding the application of 42 U.S.C. § 1982, which prohibits racial discrimination in property transactions, to private conduct).

property.<sup>2</sup> Additionally, the Act guaranteed to all citizens the “full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and . . . like punishment, pains, [and] penalties.”<sup>3</sup>

The Thirteenth Amendment is thus enormously important in officially ending the tragic flaw on which American government was founded—slavery—and in providing the basis for federal laws to combat private race discrimination. Yet, as a matter of study by scholars, argument by advocates, and use by the courts, the Thirteenth Amendment has been far less significant than the Fourteenth Amendment, which was adopted three years later. In her stunning article, which is the basis for this symposium, Professor Michele Goodwin states: “[T]he Thirteenth Amendment stands in the shadows, seemingly invisible to legal scholars who invest in civil rights or social justice scholarship, who instead look to the Fourteenth Amendment to both describe and diagnose constitutional violations as well as to prescribe remedies.”<sup>4</sup>

This superb collection of articles focuses on the Thirteenth Amendment and asks two questions: (1) why has the Thirteenth Amendment been relatively neglected, and (2) how might the Thirteenth Amendment be used in the future? Professor Goodwin’s article tells the story of how the Thirteenth Amendment came into existence, a history that is important in analyzing its use and its potential.<sup>5</sup>

As for the former question, Professor Rutherglen suggests several reasons why the Thirteenth Amendment has not been the focus of legal theory.<sup>6</sup> He explains, “first, that the abolitionist principles embodied in the Amendment are too obvious; second, that the implications of these principles are too narrow; and third, that these features of the Amendment, as it has been interpreted, have resulted in scholarship that is too reactive—too dependent on sporadic innovations under the Amendment.”<sup>7</sup>

Each of these explanations is persuasive. The text of the Thirteenth Amendment seems limited. The Court’s initial interpretation of the Thirteenth Amendment in the

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<sup>2</sup> 42 U.S.C. § 1981 (2018); 42 U.S.C. § 1982 (2018).

<sup>3</sup> 42 U.S.C. § 1981 (2018).

<sup>4</sup> Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Modern Incarceration*, 104 CORNELL L. REV. 899, 975 (2019).

<sup>5</sup> *See id.* at 909–15.

<sup>6</sup> George Rutherglen, *The Thirteenth Amendment in Legal Theory*, 104 CORNELL L. REV. ONLINE 160 (2019).

<sup>7</sup> *Id.* at 160–61.

*Slaughterhouse Cases*<sup>8</sup> was very narrow, as it was in interpreting the key provisions of Section 1 of the Fourteenth Amendment. The Court declared:

[t]he most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times . . . [that there was] one pervading purpose found in them all . . . [:] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.<sup>9</sup>

The Thirteenth Amendment's purpose, according to this decision, was solely to end slavery of African Americans, and rarely has it been interpreted to do more than this. A decade later, in the *Civil Rights Cases*, the Court said that “[u]nder the Thirteenth Amendment, it has only to do with slavery and its incidents.”<sup>10</sup>

Each of the other essays points the way for a more expansive use of the Thirteenth Amendment. Professor Leah Litman suggests a starting place: using the “new textualism” to give a broader reading of the meaning of the Thirteenth Amendment.<sup>11</sup> She says that the new textualism “recognizes that the semantic meaning of texts can embody broad principles whose application to particular facts may change over time, and it welcomes the consideration of nontextual sources like structure or enactment history or historical context.”<sup>12</sup> Professor Litman suggests that looking at historical context and looking at the provision in relationship to others in the Constitution (“intertextualism”) offers a way to give new meanings to the Thirteenth Amendment.

Professor Goodwin's article describes in detail the enormous problem of prison labor. She persuasively shows that there is no way to understand it other than as a form of involuntary servitude. She focuses on the language in the Thirteenth Amendment—“except as a punishment for crime whereof the party shall have been duly convicted”<sup>13</sup>—telling its history and the abuses that it has engendered. It is a tragic history and one that, like so much, disproportionately affects

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<sup>8</sup> 83 U.S. 36 (1872).

<sup>9</sup> *Id.* at 67–71.

<sup>10</sup> 109 U.S. 3, 23 (1883).

<sup>11</sup> Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 138 (2019).

<sup>12</sup> *Id.*

<sup>13</sup> U.S. CONST. amend. XIII.

people of color. Professor Goodwin's article offers hope, though, that the Thirteenth Amendment might be interpreted, by Congress or even by the courts, to deal with this enormous problem.

My colleague, Professor Seth Davis, explores "a story of racial equality that connects demands for community control and collective self-determination with the Thirteenth Amendment's promise to abolish slavery."<sup>14</sup> He says that this might be a way to help deal with the problems of policing in minority communities. Collective self-determination, as Professor Davis argues, is quite different from the usual focus on individuals under the Constitution. He also suggests that the Thirteenth Amendment might be understood as a broader prohibition against domination by one group over another.

The final article by Professor Dov Fox looks at the Thirteenth Amendment as a vehicle for protecting reproductive freedom.<sup>15</sup> He argues that this most obviously can be used to challenge laws requiring women to continue their pregnancies by limiting abortions. But he goes further and suggests that the Thirteenth Amendment might also be used to challenge surrogacy agreements or the tort of wrongful birth liability.

It is thus a very exciting collection of essays that offers ways to use the Thirteenth Amendment to deal with a host of serious social ills: over-incarceration, prison labor, police abuse, reproductive rights, and more. Uniting these essays is the belief that the Thirteenth Amendment provides opportunities for progressive reform that might not occur under other Amendments. None of these authors is constrained by what is realistic from the current Supreme Court. All of these essays examine how the Thirteenth Amendment can be used by a future Congress and a future Court. They challenge other scholars to follow their creative lead. This symposium is thus legal scholarship at its very best: bold, innovative, and inspiring.

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<sup>14</sup> Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 89 (2019).

<sup>15</sup> Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 115 (2019).