

THE THIRTEENTH AMENDMENT: AN EPILOGUE ON THE QUESTIONS OF REACH, FREEDOM, AND EQUALITY

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I

THE BANALITY OF SLAVERY

The Thirteenth Amendment served as a corrective to a vile, but strangely normalized, practice—human slavery. An institutionalized practice so common that at one point 40% of New York’s inhabitants were slaves.¹ Thus, on one hand, slavery’s reach can be marked by chilling statistics that speak to its scope and scale even in the North, East, and West.

Slavery’s statistical past resists the white-washing of history. By the commencement of the Civil War “the South was producing 75 percent of the world’s cotton and creating more millionaires per capita in the Mississippi River valley than anywhere” else in the United States.² As Beckert and Rockman explain, “slave-grown cotton was the most valuable export made in America.”³

The dramatic breadth of human slavery in the United States evidences the broad economic and social reach of the enterprise far beyond the confederacy—in essence, unabashed northern reliance, profit, and complicity. In fact, “[t]he slave economy of the southern states had ripple effects throughout the entire U.S. economy, with plenty of merchants in New York City, Boston, and elsewhere helping to organize the trade of slave-grown agricultural commodities—and enjoying plenty of riches as a result.”⁴

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¹ Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Modern Incarceration*, 104 CORNELL L. REV. 899, 1021(2019).

² Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Mar. 6, 2018), <https://www.history.com/news/slavery-profitable-southern-economy> [<https://perma.cc/5DZY-8MLR>].

³ SVEN BECKERT AND SETH ROCKMAN, *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 1 (2016).

⁴ Dina Gerdeman, *The Clear Connection Between Slavery and American Capitalism*, FORBES (May 3, 2017), <https://www.forbes.com/sites/hbsworkingknowledge/2017/05/03/the-clear->

On the other hand, we might think about slavery beyond its capitalist reach to study its banality. In this, perhaps, is slavery's most vile legacy. That which still haunts and festers. That is, the common, everyday type of practice of purchasing babies, children, women, and men, locking them in cages, securing iron rings around their necks, brutalizing them in the fields, and creating means to denigrate them physically and torment them psychologically—all of which were part of the social practice of Antebellum slavery, protected by American laws, legislatures, and courts. And perhaps in this, the odiousness of the institution becomes better realized and its stench and stain better studied and understood.

It is this normalcy, this new nation becoming immune to shackled children who are bid upon not simply for a day and not simply for one terrifying week. Rather, a day and week that flow into one month of bargaining for the renting, leasing, and purchasing of human flesh for the promise of its lasting, uncompensated servitude. And, one month of such a nightmarish enterprise: leveraging currency against men, women, and children would certainly corrupt the psyche of both the subject of the sale (rendered an object) and the bidder, broker, and ultimate purchaser or consumer of human flesh.

One month of this state of capturing, shackling, selling, haggling, bidding, renting, and selling inscribes an indelible mark—not only on the sold, the seller, and the purchaser, but also on the voyeurs. And what of the voyeurs? The bystanders of the trade: the calligraphers who beautifully pen the advertisements; the newspapers that print the advertisements; the builders of the platforms on which the terrified—often naked bodies stand for sale—otherwise known as the “auction block”; and others. Modern ignorance reduces the lexicon of slavery to slaves and owners, but in reality liens, lots, escrow, grading, consignee, consignor, caller, and commission contextualize and color the practice.

The reach of slavery must be interrogated beyond the typical statistical queries related to “how many?” or where (i.e., slavery was practiced East, North, West, and South)—even though that data matters and confirms that it did occur here. Such queries and answers reflect the pain and humiliation of slavery; the justifiable and understandable need for acknowledgment of a terrible wrong. An intellectual reckoning and political accountability not yet fully cultivated nor availed.

Southern states fought to maintain the chokehold on enslaved Africans, and northern states, and the federal government, cultivated a cruel complicity in the enterprise, most readily identified the congressional enactment of the Fugitive Slave Act on September 8, 1850. No exceptions existed for children or women. Instead, antebellum slavery in the United States was a finely-honed enterprise that legally equated children, women, and men with the chattel of the fields.

The Fugitive Slave Act reified this notion of the human savage, destined for labor in the fields—just as mules, oxen, cows, and other cattle. At a time of heightened enlightenment and abolitionist activism, members of Congress forged a compromise with the South that denied any Blacks alleged to be slaves the right to even testify on their own behalf. The law maintained that all escaped, formerly enslaved persons in so-called “free” states were, under penalty of law, to be returned to their owners.⁵ Section 6 of the law captures its indifference to oppression, inequalities, privacy, and cruel and unusual punishment.

And be it further enacted, That when a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such labor or service may be due . . . may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, . . . or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken, forthwith before such court, judge, or commissioner . . . ; and upon satisfactory proof being made, . . . to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence⁶

In reality, the Fugitive Slave Act rendered vulnerable all Blacks living in the United States. Without the ability to defend their freedom by providing evidence of it in a court, the status of free Blacks was in a sense determined by bounty hunters or captors: individuals paid to not only recover slaves,

⁵ Fugitive Slave Act, 9 Stat. 462, 462 (1850) (repealed 1864).

⁶ *Id.* at 463.

but also find new ones.⁷

The federal government's complicity is what can appropriately be described as the fallibility of government. After all, Section 7 of the Fugitive Slave Act⁸ imposed criminal penalties in the forms of fines and incarceration: up to \$1,000 and six months imprisonment—roughly the equivalent of almost \$33,000, in contemporary terms—for those who violated the law by harboring or protecting people claimed to be slaves.⁹ As such, it potentially punished even those attempting to help free Black persons remain free in the so-called “free” states. In a deeply perverse sense, the Fugitive Slave Act spread the enterprise of slavery to every county and city and the United States. As no Black was safe from capture under the Fugitive Slave Act, so too was no state truly free of slavery's reach.

Slavery's colossal stain has much to do with the banality of enterprise—its lingering—which simply became ordinary and day-to-day. This makes victims of us all. The day-to-day of debating whether to place a child for sale; what price must or might she fetch; the transport and fees associated with the sale—or the barter—how many goats, cows, and pigs for a child? That this could last a month among peoples who fought desperately for freedom themselves could be startling. Yet months expanded, reaching into years, which flowed into decades: barter, bid, rent, lease, sell, invest, haggle, negotiate, and renegotiate. And these profound practices, rendered mundane and ordinary, lasted into centuries.

The horror is not simply in the cowardly lies that exalted the righteousness of slavery, of which Noel Rae reminds us.¹⁰ Rather, it is when the justifications were no longer necessary to relieve doubt of the wrongfulness involuntary human slavery. The ultimate horror of slavery, which the Thirteenth Amendment sought to relieve, was the banality of Americans believing that there was nothing wrong with it.

⁷ See generally CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865, at 6 (1994) (focusing “on the efforts to force into slavery black people who were legally free”); MILT DIGGINS, STEALING FREEDOM ALONG THE MASON-DIXON LINE 1 (2016) (discussing the acts of prominent Maryland “slave catcher” Thomas McCreary)

⁸ Fugitive Slave Act, 9 Stat. 462, 464 (1850) (repealed 1864).

⁹ An analysis of the value of \$1,000 in 1850 was conducted on July 14, 2019, using a common conversion tool: the CPI Inflation Calculator. CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1850?amount=1000> [https://perma.cc/B3YG-SDJE].

¹⁰ See NOEL RAE, THE GREAT STAIN: WITNESSING AMERICAN SLAVERY 1 (2018).

II

THE THIRTEENTH AMENDMENT: MODERN BADGES OF INEQUALITY

How far does the Thirteenth Amendment reach in correcting the burdens of disenfranchisement, inequality, and injustice past and present? What lessons and instructive insights might prior jurisprudence provide? Scholars in this symposium turn to the important question, can the Thirteenth Amendment provide an innovative, even if relatively unmined, legal framework to address and remedy the persisting vestiges of slavery while addressing other badges of inferiority, inequality, and oppression? In other words, to whom does it apply, under what circumstances, and does it have relevance in contemporary jurisprudence and political discourse?

Professors Seth Davis and Leah Litman tackle these questions, scrutinizing the reach, application, and text of the Thirteenth Amendment. In doing so, what emerges are nuanced insights and burgeoning frameworks to challenge the seeming limits and interpretation of the Thirteenth Amendment. Professor Litman acknowledges the perceived incommensurability problem of modern, eclectic interpretation of the Thirteenth Amendment. Viewed through an historic lens, the Thirteenth Amendment is concerned with racial discrimination and the Supreme Court's analyses in the *Civil Rights Cases* and *Slaughter-House Cases* bear this out.¹¹ However, a textual analysis suggests the Amendment's reach encompasses "more than just discrimination based on race."¹² After all, the text of the Thirteenth Amendment does not address race, nor does it confine its scope to Blacks, limit its category to Antebellum slaves, or exclude Native Americans, women, or, for that matter, white people.¹³

Even if historians were to remind us of the contexts and conditions which inspired the congressional debates in the first place, which ultimately resulted in the drafting of the Amendment, its passage, and, shortly thereafter, its ratification, the plain writing of the text says nothing about race. This neutral principle of opposition to slavery, as Litman points out, does not limit its scope to formerly enslaved Africans, laboring during the Antebellum period. Given this, how might a textualist approach to Thirteenth Amendment

¹¹ *Civil Rights Cases*, 109 U.S. 3, 23–24 (1883) (“[S]ubjection of one man to another . . .”); *Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (“[D]iscrimination against the negroes as a class, or on account of their race . . .”).

¹² Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 149 (2019).

¹³ U.S. CONST. amend. XIII.

interpretation serve to liberate other oppressed groups or conditions that reduce liberty to a concept that is more illusory than real?

The ultimate question, really, as Litman addresses, is “the legally operative constitutional meaning” of the Thirteenth Amendment.¹⁴ And while not stated explicitly, Litman reminds us, *who* gets to decide the meaning of the Thirteenth Amendment matters because whichever way the Thirteenth Amendment is interpreted involves making “several interpretive choices that cannot readily be boiled down to a simple formula.”¹⁵ And as such, she warns that textualist adherents cannot be shielded from an important truth: *textualism engages interpretive choices and further, “proponents of textualism [cannot] insist that their theory avoids the kind of interpretive choices that they sometimes implicitly or explicitly represent are uniquely part of other theories of interpretation.”*¹⁶

If a modern reading of the Thirteenth Amendment extends beyond Antebellum chattel slavery, might it also reach beyond its historic subjects: enslaved Africans? For example, Davis “sketches the Thirteenth Amendment’s potential to support . . . a ‘demosprudence’ of equality and self-determination.”¹⁷ In this, he builds on the framework articulated by Professors Lani Guinier and Gerald Torres, who argue, “[w]hereas jurisprudence examines the extent to which the rights of ‘discrete and insular’ minorities are protected by judges interpreting ordinary legal and constitutional doctrine, demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems.”¹⁸

At the core of Davis’s concern is the principle of collective self-determination and whether the Thirteenth Amendment might “support or reflect” the demand for collective self-determination generally, but more specifically for indigenous populations in the United States.¹⁹ *Why not?* Is it possible to open the gates too wide for Thirteenth Amendment protection?

¹⁴ Litman, *supra* note 12, at 149.

¹⁵ *Id.*

¹⁶ *Id.* at 150.

¹⁷ Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 89 (2019) (footnote omitted).

¹⁸ Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014) (footnote omitted).

¹⁹ Davis, *supra* note 17 at 89.

One sphere most obviously relevant for such questions and analyses relates to America's other chattel: women.²⁰ Antiquated coverture laws adopted by state legislatures in the United States and upheld by courts rendered women the property of their husbands.²¹ As legal subordinates and property of their husbands, women lacked recourse to contest and defend against marital rape, physical violence, and other deprivations sanctioned by law.²² Remedies to these ills emerged only in recent decades.

As Professor Dov Fox suggests in *Thirteen Amendment Reflections on Abortion, Surrogacy, and Race Selection*, there remains a longer road to emancipation in the wake of state laws that diminish or eviscerate reproductive rights.²³ Such laws challenge the very principles of autonomy, equality, and privacy. Further, while laws that undermine women's reproductive rights continue to significantly impact Black women, no woman is spared their reach. In essence, he warns about women's bodies, specifically their wombs, becoming the subject of state control. As recent scholarship suggests, his concerns are not misplaced.²⁴

What accounts for the limited ways in which the Thirteenth Amendment has been interpreted and applied?

²⁰ See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1382–85 (2000) (outlining women's legal status in the nineteenth century); Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AM. J. INT'L L. UNBOUND 326, 328 (2016) (explaining how women's sexuality and sexual independence were conceptually and legally "bundled within the ambit of property rights conferred to husbands").

²¹ Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460–61 (2002); Damian Corless, *When a Wife Was Her Man's Chattel*, INDEPENDENT (Jan. 4, 2015, 2:30 AM), <https://www.independent.ie/life/when-a-wife-was-her-mans-chattel-30871468.html> [<https://perma.cc/8RVZ-KWYV>].

²² *State v. Paoella*, 554 A.2d 702, 710–11 (Conn. 1989) (finding that Conn. Gen. Stat. § 53a-70(a) and § 53a-70a(a) exonerate married men from the crime of rape if the victim is his wife); see also Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105 (1983) (collecting and analyzing state and federal cases discussing "whether and under what circumstances, a husband may be convicted of the rape, or assault to commit rape, of his own wife").

²³ Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 115 (2019) (querying, "what the lens of reproductive slavery can teach us about three live controversies: abortion, surrogacy, and race selection").

²⁴ See Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and The State*, 127 YALE L.J. 1270, 1272 (2018); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 783 (2014); Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1189 (2017).

Ironically, according to Professor George Rutherglen, the answer may be found in what he sees as the Amendment's success.²⁵ After all, he points out "[u]nique among constitutional amendments, the Thirteenth Amendment has been eclipsed by its own success."²⁶

Rutherglen explains that the Thirteenth Amendment "gave rise directly to the Civil Rights Act of 1866, which was enacted under Section 2 of the Amendment; and the rights conferred by the 1866 Act, in turn, served as the model for Section 1 of the Fourteenth Amendment."²⁷ By this measure, Rutherglen suggests that the Thirteenth Amendment and perhaps its legacy have been far more significant, impactful, and resounding than some scholars may believe, and he persuasively conveys not only why, but emphasizes pressing current concerns that give rise to Thirteenth Amendment application today to address "residual forms of slavery."²⁸ As he notes, "[t]he Fourteenth Amendment prohibits only state action in violation of individual rights and the Commerce Clause still retains some limits . . . requiring an effect on economic activity."²⁹ By contrast, the "Thirteenth Amendment extends to all forms of involuntary servitude," thereby potentially reaching myriad forms of coercion.³⁰

The collective theoretical force of these essays urges a dynamic view of the Thirteenth Amendment not constrained by historical interpretation limited to the redress of "badges and incidents of slavery," or bounded by temporal constraints of the 1800s, or limited to race. These authors imagine and articulate the possibilities. In essence, their works are joined by an implicit concept: the pursuit of justice is timeless, and equally, the Thirteenth Amendment remains a vibrant tool for striking down injustice. This matters, not only for purposes of lofty intellectual debate, but also for redressing myriad contemporary challenges that strike at the heart of dignity, equality, and freedom.

My re-reading of these scholars' works concludes shortly after the Fourth of July—a day rich in symbolism, evoking deep contemplation on the meanings of freedom, equality, and autonomy. It is a day bounded in considerations about

²⁵ George Rutherglen, *The Thirteenth Amendment in Legal Theory*, 104 CORNELL L. REV. ONLINE 160 (2019).

²⁶ *Id.* at 160.

²⁷ *Id.* (footnote omitted).

²⁸ *Id.* at 168.

²⁹ *Id.*

³⁰ *Id.*

independence as well as labor, marked by a federal holiday that calls off work. Federal and state government offices shutter and municipalities celebrate this great mark of American independence and idealism with colorful marches and parades.

In this same period, congressional caucuses visit children, men, and women detained in what some members of Congress describe as the most deplorable conditions at the southern border of the United States.³¹ Many of these migrant families have fled appalling conditions and now seek refugee status in the United States. Chilling images make clear their plights are far from over. Legislators report many of the children have not bathed in weeks. They note the families eating ramen noodles on the floor; cells that can only be likened to jail, where in one case women were confined to a small cell, “which had a toilet but no running water to drink from or to wash.”³²

The stories of migrant families, dead at the border,³³ children seized from their parents at the border,³⁴ and little

³¹ Edward Helmore, *How a Congressional Trip Highlighted Migrants’ Detention Misery*, *GUARDIAN* (July 2, 2019), <https://www.theguardian.com/us-news/2019/jul/02/border-facility-alexandria-ocasio-cortez> [<https://perma.cc/4GSD-CNLB>] (quoting Joaquin Castro, chairman of the Congressional Hispanic Caucus, “Some had been separated from children, some had been held for more than 50 days. Several complained they had not received their medications, including one for epilepsy”); *Congressional Hispanic Caucus Chair Joaquin Castro on His Visit to Detention Facility, All Things Considered*, N.P.R. (July 2, 2019), <https://www.npr.org/2019/07/02/738146428/congressional-hispanic-caucus-chair-joaquin-castro-on-his-visit-to-detention-fac> [<https://perma.cc/9RCK-KMNE>].

³² Helmore, *supra* note 31.

³³ Patrick Timmons et. al, *Shocking Photo of Drowned Father and Daughter Highlights Migrants’ Border Peril*, *GUARDIAN* (June 26, 2019), <https://www.theguardian.com/us-news/2019/jun/25/photo-drowned-migrant-daughter-rio-grande-us-mexico-border> [<https://perma.cc/H2UB-TJJP>] (“The images, taken on Monday, show Óscar Alberto Martínez Ramírez, 26, and his daughter Valeria, lying face down in shallow water. The 23-month-old toddler’s arm is draped around her father’s neck, suggesting that she was clinging to him in her final moments.”); Azam Ahmed & Kirk Semple, *Photo of Drowned Migrants Captures Pathos of Those Who Risk It All*, *N.Y. TIMES* (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/father-daughter-border-drowning-picture-mexico.html> [<https://perma.cc/B57Z-XBVK>] (“The father and daughter lie face down in the muddy water along the banks of the Rio Grande, her tiny head tucked inside his T-shirt, an arm draped over his neck.”).

³⁴ Editorial Board, *Seizing Children from Parents at the Border Is Immoral. Here’s What We Can Do About It.*, *N.Y. TIMES* (June 14, 2018), <https://www.nytimes.com/2018/06/14/opinion/children-parents-asylum-immigration.html> [<https://perma.cc/QTR7-WULF>] (“It may be hard to believe that this is happening in the United States in 2018, that hundreds of children are being snatched from their parents, frequently under false pretenses, often screaming, and placed in vast warehouselike centers like the former Walmart in

girls and boys raped in U.S.-funded detention centers³⁵ expand the questions about freedom and dignity—the core principles and values upholding not only the Thirteenth Amendment, but also American democracy. A 2019 report reveals that “[t]he federal government received more than 4,500 complaints in four years about the sexual abuse of immigrant children who were being held at government-funded detention facilities, including an increase in complaints while the Trump administration’s policy of separating migrant families at the border was in place.”³⁶ Over 1,300 such cases were referred to the Justice Department.

Reporters’ video images capture the atrocities at facilities in McAllen, Texas: metal fencing; standing room only; no space for cots or mattresses. Concerned members of Congress describe it thus: “overcrowded cells, rampant disease, and asylum seekers who had not washed or brushed their teeth for weeks.”³⁷ Representative Annie Kuster of New Hampshire told reporters that the food provided by the government consisted mostly of cold sandwiches and she noted, “[t]he lights are on 24/7, so people are disoriented—they don’t know the difference between day or night.”³⁸

This is not slavery, but it is strangely familiar.

CONCLUSION

Modern, severe incidents and badges of inferiority demand a response from law. Indeed, they beg the question about basic human dignity—a central force of the Thirteenth Amendment. And while the Fourteenth Amendment has long stood in for remedying wrongs based on status, its limitations are well described by authors in this symposium. This symposium calls for an appeal to the Thirteenth Amendment, and even while “[a]ppealing to the Thirteenth Amendment offers no panacea for current or future problems,” as Professor

Brownsville, Tex., where nearly 1,500 boys now spend their days.”).

³⁵ Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/ZD4W-3H3S>].

³⁶ *Id.*

³⁷ Betsy Klein & Caroline Kelly, *‘They Have Not Washed in 40 Days’: House Democrats Decry ‘Inhumane’ Conditions at Texas Border Facilities*, C.N.N. (July 13, 2019), <https://www.cnn.com/2019/07/13/politics/congressional-democrats-visit-texas-border-facilities-migrants/index.html> [<https://perma.cc/3WNN-SD2Q>].

³⁸ *Id.*

Rutherglen warns,³⁹ this tool may be a worthwhile instrument to revisit.

³⁹ Rutherglen, *supra* note 25, at 171.