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Thirteenth Amendment Optimism

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Introduction

It has been proposed, including in this volume, that the Thirteenth Amendment may be read to prohibit not just slavery and involuntary servitude but also racial profiling,¹ felony disenfranchisement,² hate speech,³ child labor,⁴ child abuse,⁵ anti-abortion laws,⁶ domestic violence,⁷ prostitution,⁸ sexual harassment,⁹ the use of police informants,¹⁰ anti-discrimination laws,¹¹ the denial of health care,¹² the Confederate flag,¹³ the use of orcas at SeaWorld,¹⁴ and even laws

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¹ See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004).

² See Darrell A.H. Miller, *A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 291, 294 (Alexander Tsesis ed., 2010) [hereinafter PROMISES OF LIBERTY].

³ See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992); Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. LEGIS. 389 (2004).

⁴ See Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59 (2010).

⁵ See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

⁶ See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

⁷ See Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1998); *Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 80 (1991) (statement of Burt Neuborne, Professor of Law, New York University) [hereinafter Neuborne].

⁸ See Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GEND. & L. 13, 16 (1993).

⁹ See Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519 (1994–1995).

¹⁰ See Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977).

¹¹ See David P. Tedhams, *The Reincarnation of “Jim Crow:” A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994).

¹² See Akhil Reed Amar, Sterling Professor of Law, Yale Law School, Remarks at the Columbia Law Review Symposium: The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications (Jan. 27, 2012).

permitting physician-assisted suicide.¹⁵ Many of these arguments are conceptually sound. Several are consistent in principle with the received wisdom regarding the original understanding of Section 2 of the amendment, which has been read to empower Congress to eliminate the “badges and incidents” of slavery.¹⁶ Most are no less reasonable than the proposition, still good law, that the Thirteenth Amendment may be read to prohibit private housing discrimination.¹⁷ Still, it is nearly self-evident that neither the current U.S. Supreme Court nor any presently imaginable U.S. Supreme Court is likely to accept any of the arguments just described. Indeed, the same is true of virtually any conceivable federal appellate panel or state supreme court, and so it is quite unlikely that this or any presently conceivable Supreme Court will be moved even to entertain these questions. And yet here we are.

This article considers the uses of what I call Thirteenth Amendment optimism. Thirteenth Amendment optimism consists in arguing that the amendment prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as those terms are ordinarily understood. It is not essential to Thirteenth Amendment optimism that the opposed practice be otherwise constitutionally permitted—laws banning abortions are not, for example—but it is essential that the claim would, at first blush, puzzle both

¹³ ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 137–49 (2004).

¹⁴ See The PETA Files, *PETA Sues SeaWorld for Violating Orcas’ Constitutional Rights*, <http://www.peta.org/b/thepetafiles/archive/2011/10/25/peta-sues-seaworld-for-violating-orcas-constitutional-rights.aspx>.

¹⁵ Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774 (1998).

¹⁶ Such was the unanimous view of the Supreme Court that decided the *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *id.* at 34–35 (Harlan, J., dissenting), though it is not the unanimous view of scholars. Compare Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 203 (1951), with David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1177–78 (2006). Given that that Court applied this language in manifestly more narrow fashion than the Court that decided *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), one must wonder whether the term “badges and incidents” is polysemous and therefore misleading as precedent. See George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in PROMISES OF LIBERTY, *supra* note 2, at 163, 164 (“The inherent ambiguity in this phrase is the key to understanding its role, initially in political thought and then in constitutional interpretation.”). Lawrence Sager attaches significance to the fact that *Jones*, unlike the *Civil Rights Cases*, includes within Congress’s remedial power the authority to target not just the “badges and incidents” but also the “relics” of slavery. See Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150, 152 (2000).

¹⁷ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

reasonable contemporary audiences and audiences contemporaneous with the adoption of the Thirteenth Amendment.

Constitutional optimism, the broader set of which Thirteenth Amendment optimism is a subset, is common within our culture and indeed might be necessary to sustain democratic governance over time amid persistently divergent conceptions of the good.¹⁸ Such optimism is most prevalent in regard to the Constitution's "ink blots":¹⁹ the Equal Protection Clause, the Due Process Clause, and the Ninth Amendment most especially.²⁰ What is odd about Thirteenth Amendment optimism is its prevalence notwithstanding that the amendment appears to state a proposition that better approximates a rule than a principle. It refers to three specific practices—slavery, involuntary servitude, and punishment for crime—the scope of which was well understood (indeed, too-well understood) at the time of the amendment's adoption and which remains well understood today. The proposition that private use of racial slurs or a state prohibition on abortion qualifies as slavery or may be regulated as such does not merely feel technically incorrect as a matter of current legal doctrine; it intuitively seems to misunderstand the English language and the terms of art used within it.

Of course, much Thirteenth Amendment optimism fits within the best traditions of academic argument—the claims are interesting precisely because and to the degree to which they are *counterintuitive*, exposing our hunches to the rigors of principle.²¹ It is worth pondering, however, whether Thirteenth Amendment optimism is anything more than academic. We are gathered to discuss the amendment's contemporary implications within this universe, not an alternate one of our clever imaginings, but the non-academic payoff of Thirteenth

¹⁸ See JACK BALKIN, *CONSTITUTIONAL REDEMPTION* 10 (2011); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 350–51 (2001); cf. JEREMY WALDRON, *LAW AND DISAGREEMENT* 16 (1999).

¹⁹ The term, of course, is Robert Bork's. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990) ("A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot."); *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 117, 249 (1989) (testimony of Robert H. Bork) ("[I]f you had an amendment that says 'Congress shall make no' and then there is an ink blot and you can not read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you can not read it.").

²⁰ See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33 (1969) (quipping that, like gin, we "come close to using . . . the three celebrated prohibitory clauses in the Fourteenth Amendment" "for everything"); cf. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (calling tailoring arguments grounded in the Equal Protection Clause "the usual last resort of constitutional arguments").

²¹ *But see* Suzanna Sherry, *Too Clever By Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 926 (2001) (criticizing the phenomenon that "proposing counterintuitive ideas is the fastest way up the academic ladder").

Amendment optimism is not obvious. As Andrew Koppelman writes of his own argument, “[i]f you want to be taken seriously, you had better not make a Thirteenth Amendment argument on behalf of abortion.”²² Koppelman is quite right to suggest that any lawyer advancing such an argument before an actual court would sacrifice his credibility and would therefore be making a strategic (though perhaps not sanctionable) error. There may literally be no person, moreover, who currently believes that laws proscribing abortion are constitutionally permitted but would change his mind upon hearing Koppelman’s argument. And those who already believe abortion is constitutionally protected have no obvious need for Koppelman’s intervention. Part I generalizes that observation to other instances of Thirteenth Amendment optimism: it is almost uniformly unlikely to persuade a court or anyone who supports the challenged practice, and it is gravy to those who already oppose the practice. If Thirteenth Amendment optimism is indeed unpromising, insufficient, and unnecessary, then is it worth its weight in law review pages?²³

This essay does not attempt a complete answer to that question, but it offers, in Part II, a qualified reason for optimism about Thirteenth Amendment optimism. Successful creative uses of the Thirteenth Amendment in support of progressive arguments demonstrate not that the amendment’s definition of slavery is limitlessly malleable but rather that its broad empowerment of Congress lends constitutional support to political imagination. Part II focuses in particular on the Progressive-era “Labor Constitution” discussed in detail in the work of James Gray Pope.²⁴ By placing affirmative rights within a constitutional register, the Thirteenth Amendment can arm advocates with a powerful rhetorical resource. It thereby supplies to progressives what interpretivism has long supplied to conservatives: a language for arguing that the Constitution inspires, and perhaps even compels, their political objectives. Thirteenth Amendment optimism is, in this sense, a potential tool for progressive political mobilization.

But it is a limited tool, best deployed in legislative rather than judicial advocacy, and best tied to Section 2 of the amendment rather than Section 1. Thirteenth Amendment optimism about the self-executing scope of Section 1 may in some cases have significant epistemic or historical value, but such arguments have no other contemporary relevance and make little strategic sense. Affirmative rights arguments are not well-suited to judicial identification and development,

²² Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, in PROMISES OF LIBERTY, *supra* note 2, at 226, 227.

²³ See Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959, 979 (2004) (“Most . . . commentators . . . not to mention lawyers, judges, and politicians, dismiss [scholarly Thirteenth Amendment] musings as academic flights of fancy—the kinds of things only law professors, unconnected to reality, would think worth pursuing.”).

²⁴ See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002).

and creative judicial use of Thirteenth Amendment optimism can have unintended consequences. Part II argues, for example, that *Jones v. Alfred H. Mayer Co.*, the most celebrated case among Thirteenth Amendment optimists, may have been a mistake for their cause.²⁵ *Jones* did not need the Thirteenth Amendment to reach its result, it did not generate expansive Thirteenth Amendment case law, and it squandered an opportunity to build on a well-developed line of cases repudiating the state action doctrine.

Part III returns, tentatively, to the examples from Part I to suggest ways in which Thirteenth Amendment arguments may be useful in motivating progressive politics while avoiding some of the costs associated with addressing creative progressive arguments to judges.

I

The Thirteenth Amendment is fool's gold. Part of its allure is that it does not mean what it says. Its first section prohibits the existence of "slavery" and "involuntary servitude," except as a punishment for a crime, "within the United States, or any place subject to their jurisdiction."²⁶ Compulsory military service does not count as involuntary servitude²⁷ but being made to perform a service one has agreed contractually to perform does count.²⁸ The second section of the Thirteenth Amendment endows Congress with "power to enforce this article by appropriate legislation."²⁹ According to the Supreme Court, Congress exceeded this authority when it tried to ban racial discrimination in public accommodations,³⁰ a frequent target of criticism during Reconstruction,³¹ but it did not exceed this authority in banning racial discrimination in wholly private real estate transactions, a practice that was rampant in the *North* during Reconstruction and that was not specifically discussed in the debates over the relevant statute.³²

²⁵ *Jones* is, of course, a Section 2 case, but as Part II explains, it did not rest on a political infrastructure.

²⁶ U.S. Const. amend. XIII §1.

²⁷ See *Arver v. United States*, 244 U.S. 366 (1918).

²⁸ See *Bailey v. Alabama*, 219 U.S. 219 (1911).

²⁹ U.S. Const. amend. XIII §2.

³⁰ *Civil Rights Cases*, 109 U.S. 3 (1883).

³¹ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 368-72 (1988); PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION* 62 (1999).

³² See *Jones*, 392 U.S. at 454-73 (Harlan, J., dissenting); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 104; Louis Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 84-86 (1968).

It has been said, fallaciously it appears,³³ that the Chinese word for “crisis” is a compound of “danger” and “opportunity.” The danger, which some would call a crisis, in constitutional text not governing constitutional meaning is that it invites judges to commandeer the Constitution. But that invitation is also, of course, an opportunity. It is this opportunity that motivates Thirteenth Amendment optimism. This Part discusses three examples: Koppelman’s abortion argument; Akhil Amar’s arguments that the Thirteenth Amendment applies to child abuse and hate speech; and Marcellene Hearn’s and Burt Neuborne’s claims that Title III of the Violence Against Women Act was valid Thirteenth Amendment legislation. I use these arguments as archetypes in part because the deservedly respected status of their proponents requires that they be taken seriously.³⁴ (One needn’t be a fool to fall for fool’s gold.) This Part summarizes the arguments and explains, in brief, why I believe none is doctrinally promising, likely to persuade opponents of the underlying policy target, or necessary to convince its proponents.

A. *Abortion*

It is appropriate to begin with Koppelman because the notion that the most vexing constitutional question of our time may be resolved by reference to the text of the Thirteenth Amendment is, as Koppelman recognizes,³⁵ optimism on steroids. The argument, though, is straightforward. To subject a woman (or her physician) to criminal penalties if she elects to terminate a pregnancy is to conscript her into bearing a child and becoming a mother against her will.³⁶ Because abortion laws regulate women most directly, moreover, they “define women as a servant caste,” which Koppelman describes as “the same kind of injury that antebellum slavery inflicted on blacks.”³⁷ The style of the argument is textualist and, broadly speaking, originalist and doctrinal. The claim that

³³ See Victor H. Mair, Pīnyīn.info: a guide to the writing of Mandarin Chinese in romanization, <http://pinyin.info/chinese/crisis.html>.

³⁴ Indeed, one federal appellate court has cited Koppelman’s argument (in addition to related arguments advanced by Laurence Tribe and Donald Regan) as evidence that applying the Thirteenth Amendment to abortion rights is not frivolous, on which basis the district court had awarded attorney’s fees to the state of Utah. *Jane L. v. Bangertner*, 61 F.3d 1505, 1515 n.9 (10th Cir. 1995).

³⁵ See *supra* note 22 and accompanying text.

³⁶ Koppelman is far from the first abortion rights proponent to invoke the Thirteenth Amendment, but his argument is more detailed than most. For other discussions, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 15-10, at 1354 n.113 (2d ed. 1988), and Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1619 (1979). For examples of the use of Thirteenth Amendment arguments by advocates, see Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1884 n.34, 1891, 1896 n.98 (2010).

³⁷ Koppelman, *supra* note 6, at 485.

involuntary servitude encompasses “the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services”³⁸ is an appeal to the common sense meaning of the phrase, is consistent with the original meaning of the Thirteenth Amendment, and appears verbatim in the U.S. Reports.³⁹ No Supreme Court decision has applied this language to abortion rights, and there is no reason to believe that any American living in 1865 would have thought it applicable to abortion rights, but neither of those objections is dispositive within mainstream versions of both originalism and living constitutionalism.

In a recent book chapter revisiting his original article, Koppelman invites readers to explain the defect in his argument, which no one has done to his satisfaction.⁴⁰ But the answer, I think, has already been suggested by John McGinnis. McGinnis writes: “It is not only that no reasonable person at the time would have thought that unwanted pregnancy was a form of involuntary servitude. Even now such an argument would be treated at best as a pun on labor rather than seriously advanced in a court of law.”⁴¹ Koppelman answers this charge with the familiar objection that specific-intent originalism would require the preservation of laws requiring segregated schools and banning miscegenation.⁴² The difference is that the constitutional attack on segregated schools and anti-miscegenation laws proceeds from analysis of the Equal Protection Clause, which does not lend itself to specific-intent application. We can contrast the Equal Protection Clause with the congressional age requirement or the presidential oath, which few argue could be replaced by something practically equivalent but not contemplated by the founding generation.⁴³ Koppelman’s burden is to show why slavery and involuntary servitude are more like the Equal Protection Clause and less like the age requirement or the oath.

Meeting this burden is hardly a conceptual impossibility but it does not seem true either to original expectations about the words themselves or, more significantly, to the way we think of the words today.⁴⁴ The Supreme Court has spoken to these questions. Thirteenth Amendment optimists often cite the *Slaughter-House Cases*, in which Justice Miller wrote for the majority that “while

³⁸ *Id.* at 486.

³⁹ *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

⁴⁰ Koppelman, *supra* note 22, at 235.

⁴¹ John O. McGinnis, *Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman*, 20 CONST. COMM. 39, 56 (2003).

⁴² Koppelman, *supra* note 22, at 235.

⁴³ *Cf.* Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 92–93 (2010) (using the presidential oath, which is never in fact read verbatim, as an example of ways in which our “expectations” about constitutional practice may supplement or substitute for text).

⁴⁴ Jack Balkin has argued that originalism should pay careful attention to the level of specificity at which a constitutional command was originally understood. *See* BALKIN, *supra* note 18, at 229.

negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”⁴⁵ This reminder does not speak to the important question of the level of specificity at which we should understand “slavery,” though the *Slaughter-House* Court was quite clear that the term was bound up with the practice of chattel slavery.⁴⁶ The Court was more direct in *Robertson v. Baldwin*,⁴⁷ in which it held that the Amendment does not apply to seamen contracts:

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words “involuntary servitude” were said in the *Slaughterhouse* cases, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.⁴⁸

This reasoning was formally, if cryptically, extended to the military draft shortly after the *Robertson* case.⁴⁹ Compulsory military service is not “involuntary servitude” because, well, it just isn’t. As Koppelman notes, “the bounds of legitimate legal argument are not set by rules but by custom and usage,”⁵⁰ and we are unaccustomed to using Section 1 of the Thirteenth Amendment in the way he proposes.

⁴⁵ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

⁴⁶ *See id.* at 71–72.

⁴⁷ 165 U.S. 275 (1897).

⁴⁸ *Id.* at 282 (internal citations omitted).

⁴⁹ Justice White wrote for a unanimous Court in *Arver v. United States*, 245 U.S. 366 (1918):

[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment.

Id. at 390. Unless we understand the Thirteenth Amendment to describe a term of art, the Court’s failure of imagination baffles.

⁵⁰ Koppelman, *supra* note 22, at 238.

Koppelman, as noted, is keen to the charge that his argument is a doctrinal nonstarter. In his book chapter he cites Katherine Taylor’s conclusion that courts are more likely to be sympathetic to an equal protection argument against abortion restrictions than a Thirteenth Amendment challenge.⁵¹ Koppelman expresses optimism, though, that the proliferation of Thirteenth Amendment optimism (my term, not his) may give his argument more doctrinal credibility.⁵² But Taylor’s challenge may be read as more than just skepticism about courts. Arguments grounded in equality are also both more likely to be adopted by abortion rights proponents and sufficient to persuade them that their position is constitutionally sound.

B. *Child Abuse and Hate Speech*

In separate *Harvard Law Review* articles written two decades ago, Amar made the case that the Thirteenth Amendment does indeed establish a broad anti-slavery constitutional regime that, accordingly, permits its language to extend to child abuse and to hate speech.⁵³ I consider these arguments together because Amar appears to have conceptualized them contemporaneously. Amar’s stature as a constitutional law scholar derives directly from two features of his scholarship—creativity and historical rigor—that reward attention to his Thirteenth Amendment arguments. Consistent with his constitutional positivism, his approach is to offer a conception of “slavery” that constitutes “a working definition suitable for judges and exemplified (though not necessarily exhausted) by the peculiar historical practices the Amendment was plainly meant to abolish.”⁵⁴ For him, chattel slavery serves as the paradigm case, but slavery within the meaning of the Thirteenth Amendment is more broadly “[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.”⁵⁵ Accordingly, an abused child with no right of exit is analogous to a slave: “Like an antebellum slave, an abused child is subject to near total domination and degradation by another person, and is treated more as a possession than as a person.”⁵⁶

Child abuse in the absence of actions a court is prepared to recognize as being under the color of state law is not constitutionally prohibited. The Court in *DeShaney v. Winnebago County Department of Social Services*,⁵⁷ which so held,

⁵¹ *Id.* (citing Katherine A. Taylor, *Compelling Pregnancy at Death’s Door*, 85 COLUM. J. GENDER & L. 85, 146 n.198 (1997)).

⁵² *See id.*

⁵³ Amar & Widawsky, *supra* note 5; Amar, *supra* note 3.

⁵⁴ Amar & Widawsky, *supra* note 5, at 1365 n.18.

⁵⁵ *Id.* at 1365.

⁵⁶ *Id.* at 1364.

⁵⁷ 489 U.S. 189 (1989).

did not view the negligence of Wisconsin public officials as rising to the level of state action sufficient to render the state federally liable for the horrific abuse suffered by Joshua DeShaney at the hands of his father.⁵⁸ The case for finding state action in *DeShaney* is not difficult to articulate, and indeed Amar and his co-author in the child abuse article make the case themselves: by structuring its family law so as to prevent Joshua from leaving his father's abusive home, Wisconsin effectively imprisoned him.⁵⁹ One problem with this theory is that it is limitless, potentially seeing state action underlying virtually every otherwise private transaction, but this is a familiar problem in the law of state action, considered and occasionally overcome in several cases since *Shelley v. Kraemer*.⁶⁰ The prospect that any court rejecting this theory would nonetheless feel moved by Amar's and Widawsky's Thirteenth Amendment argument is beyond dim. To imagine such a court is to imagine a judge or set of judges bothered by the slippery slope problem of finding state action in *DeShaney* but unbothered by the complexity in applying Amar's and Widawsky's theory to ordinary parent-child relationships,⁶¹ domestic labor by minors, numerous instances of common criminal behavior,⁶² apprenticeships, workplace harassment, domestic abuse among adults, and not an insignificant number of judicial clerkships. Again, there is no conceptual problem with using slavery as a metaphor to describe these relationships, but Amar and Widawsky, like Koppelman, do not make a persuasive case that the Thirteenth Amendment's language was intended to be metaphorical.⁶³

⁵⁸ *Id.* at 195–98.

⁵⁹ Amar & Widawsky, *supra* note 5, at 1362.

⁶⁰ 334 U.S. 1 (1948); *see* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (finding state action in a private civil litigant's racially discriminatory exercise of peremptory challenges); *Evans v. Newton*, 382 U.S. 296 (1966) (finding state action in the transfer of a park between private entities under a segregation covenant).

⁶¹ *See Robertson*, 165 U.S. at 282 (stating that the Thirteenth Amendment “was not intended . . . to disturb the right of parents and guardians to the custody of their minor children or wards”).

⁶² *Cf.* RICHARD A. POSNER, *OVERCOMING LAW* 213 (1995) (“DeShaney’s case could just as readily be analogized to one in which a mugger beats up his victim in the presence of a police officer who, having been inadequately trained, is unable to prevent the crime.”).

⁶³ *See id.* at 212 (“[I]t does not follow that every relation that is brutal, degrading, and dehumanizing is a form of slavery, any more than it follows from the fact that all judges are wise that all wise men are judges.”). In fact, Amar and Widawsky discuss some historical instances of cross-comparison between the master-slave and the parent-child relationship. For example, during the congressional debate over passage of the Thirteenth Amendment, several members of Congress drew analogies between these relationships. *See* Amar & Widawsky, *supra* note 5, at 1367 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood); CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White); CONG. GLOBE, 37th Cong., 2d Sess. 1636 (1862) (statement of Rep. Samuel Shellabarger). None of the statements Amar and Widawsky cite make the case that anyone of consequence believed the Thirteenth Amendment would in fact cover such parental relationships, and two come from

Amar originally advanced his argument that the Thirteenth Amendment might be invoked to prohibit certain forms of hate speech in an article responding to the Court's decision in *R.A.V. v. City of St. Paul*.⁶⁴ The *R.A.V.* Court invalidated a municipal ordinance that, as construed by the Minnesota Supreme Court, banned symbolic “fighting words” that were based on race, color, creed, religion, or gender. Justice Scalia's majority opinion held that, with limited exceptions, a government could not engage in content-based regulation even within a category of unprotected speech (like fighting words).⁶⁵ The concurring opinion of Justice White objected to the majority's reasoning but would have invalidated the statute as substantially overbroad.⁶⁶ For Amar, the missing piece in all of the opinions in the case was any discussion of the Reconstruction Amendments, including the Thirteenth. Even if the state may not generally regulate race-based fighting words, perhaps, Amar argued, it might do so by specifically invoking the Thirteenth Amendment and its commitment to the eradication of the badges and incidents of slavery.⁶⁷

This provocation makes for scintillating scholarship and, not incidentally, it leaves much room for quibbling.⁶⁸ Since my concerns are largely external to Amar's argument, I wish to focus on an aspect of *R.A.V.* to which he himself draws the reader's attention: the vote lineup. Amar notes that three of the four Justices in the minority—Justices White, Blackmun, and Stevens—had voted to uphold race-based affirmative action plans,⁶⁹ while no member of the majority had done so.⁷⁰ The concurring Justices also tended to invoke the specifics of the case before them,⁷¹ which involved white teenagers burning a cross on the lawn of a black family that had moved into a predominantly white neighborhood. These

opponents of the amendment and so do not represent especially reliable evidence of its intended scope.

⁶⁴ 505 U.S. 377 (1992).

⁶⁵ *Id.* at 383–84.

⁶⁶ *Id.* at 411 (White, J., concurring in the judgment).

⁶⁷ Amar, *supra* note 3, at 155–60.

⁶⁸ For a general critique, see Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1647–56 (1992).

⁶⁹ Justice O'Connor's later vote in favor of the University of Michigan Law School's plan in *Grutter v. Bollinger*, 539 U.S. 306 (2003), means that all four Justices who refused to join the majority opinion in *R.A.V.* have voted to uphold affirmative action plans.

⁷⁰ This is no longer so, as Justice Souter dissented in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), and voted with the majority in *Grutter v. Bollinger*. *R.A.V.* was decided at the end of Justice Souter's second term, and there is some evidence that Supreme Court Justices engage in unstable voting patterns early in their careers. See Lee Epstein, Kevin Quinn, Andrew D. Martin, & Jeffrey A. Segal, *On the Perils of Drawing Inferences About Supreme Court Justices From Their First Few Years of Service*, 91 JUDICATURE 168 (2008). The authors conclude that Souter in particular made a “180-degree turn[] from the preferences revealed in [his] first few terms.” *Id.* at 177.

⁷¹ See Amar, *supra* note 3, at 150.

facts tend to support Amar’s view, with which I agree, that “the [Justice] White Four may simply have more tolerance for minority-protective laws.”⁷²

Recall, though, that the judgment in *R.A.V.* was unanimous, and it was not so for want of a better argument for regulating racist hate speech. As noted, the concurring Justices believed that the St. Paul ordinance was substantially overbroad, and they were right. The ordinance as construed by the Minnesota Supreme Court conflated “displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias” with the “fighting words” recognized in *Chaplinsky v. New Hampshire*⁷³ as unprotected speech. This was not a fair reading of the Court’s doctrine, especially since *Chaplinsky*:⁷⁴ as Justice White wrote, “[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”⁷⁵ Reliance on the Thirteenth Amendment, even if otherwise doctrinally viable, would have at best made the ordinance slightly less overbroad, and indeed might have made it *more* overbroad in view of the fact that the ordinance was not limited to race-based fighting words.⁷⁶

There is every reason to believe that the concurring Justices would have voted to uphold a more narrowly drawn statute under standard First Amendment principles. Justice White’s opinion calls the majority opinion “transparently wrong”⁷⁷ because fighting words are categorically exempt from First Amendment scrutiny: a content-based restriction on fighting words is no more problematic than a content-based restriction on assault.⁷⁸ Two of the concurring Justices—Justice Stevens and Justice O’Connor—voted a decade later to uphold a Virginia statute that banned cross-burning with intent to intimidate.⁷⁹ Although that statute did not single out race-based intimidation, Justice White’s *R.A.V.* concurrence suggests that, for Justice Stevens and Justice O’Connor, it would not have changed the result if it had.⁸⁰

First Amendment doctrine has resources for addressing hate speech that anyone within the American mainstream is inclined to declare regulable: it can be

⁷² *Id.* at 147.

⁷³ 315 U.S. 568 (1942).

⁷⁴ See *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

⁷⁵ *R.A.V.*, 505 U.S. at 413 (White, J., concurring).

⁷⁶ Amar appears to recognize this problem: in a footnote, he drafts a “more defensible” ordinance that is tied much more specifically to the Thirteenth Amendment. See Amar, *supra* note 3, at 160 n.187. Amar’s proposed legislation includes “gender subordination” as a “badge of slavery,” but he seems to view it as a close question. See *id.* at 159.

⁷⁷ *R.A.V.*, 505 U.S. at 398 (White, J., concurring).

⁷⁸ See *id.* at 400–01; cf. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

⁷⁹ *Virginia v. Black*, 538 U.S. 343 (2003).

⁸⁰ Justice Stevens said so expressly in *Black*. See *id.* at 368 (Stevens, J., concurring).

labeled conduct,⁸¹ fighting words,⁸² a true threat,⁸³ or perhaps could be regulated under the captive audience⁸⁴ or secondary effects doctrines.⁸⁵ Advocates, including Amar,⁸⁶ have suggested that the imperatives of the Fourteenth Amendment might justify regulation of hate speech notwithstanding the First Amendment's protections for expressive activity.⁸⁷ That the Court has tended not to find these avenues compelling is not for want of clever argumentation. Those inclined to uphold hate speech regulation will be happy to use the existing tools. Those inclined not to do so are unlikely to accept Amar's invitation to craft a new doctrine based on a nineteenth-century constitutional amendment addressed most evidently to state-enforced ownership of human beings.

C. *The Violence Against Women Act*

The Violence Against Women Act (VAWA) provided a federal civil remedy for victims of gender-motivated violence. The Supreme Court invalidated this provision of VAWA in *United States v. Morrison* on the grounds that it exceeded the power of Congress under either the Commerce Clause or Section 5 of the Fourteenth Amendment.⁸⁸ The Court held that VAWA's civil enforcement provision was not valid Commerce Clause legislation because it regulated non-economic activity and that it was not valid Section 5 legislation because it targeted private rather than state action. Marcellene Hearn and Burt Neuborne separately have argued that the Thirteenth Amendment, which has no state action trigger, could have supplied the missing jurisdictional hook.⁸⁹ Specifically, and consistent with Amar's argument as to child abuse, Congress could regard domestic violence as a badge or incident of a power relationship akin to that of master and slave.⁹⁰

⁸¹ See *id.* at 388 (Thomas, J., dissenting); *Mitchell*, 508 U.S. at 487.

⁸² *Chaplinsky*, 315 U.S. 568.

⁸³ See *Watts v. United States*, 394 U.S. 705, 708 (1969).

⁸⁴ See J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999).

⁸⁵ See *Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Renton v. Playtime Theaters*, 475 U.S. 41 (1985); *Aguilar v. Avis Rent-A-Car System, Inc.*, 50 Cal. App. 4th 28 (1st App. Dist. 1996) (adopting a secondary effects rationale to reject a First Amendment challenge to an injunction against racial harassment in the workplace).

⁸⁶ Amar, *supra* note 3, at 51–55

⁸⁷ See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 193 (1993); Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 63 J. HIGHER EDUC. 485, 487 (1992); Charles R. Lawrence, *Crossburning and the Sound of Silence: Antisubordination Theory of the First Amendment*, 37 VILL. L. REV. 787 (1992).

⁸⁸ 529 U.S. 598 (2000).

⁸⁹ See Hearn, *supra* note 7; Neuborne, *supra* note 7.

⁹⁰ See Hearn, *supra* note 7, at 1144; see also Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEM. 207 (1992)

Hearn's argument is both textualist and originalist.⁹¹ She argues, first, that domestic violence, rape, and sexual assault constitute involuntary servitude and, second, that violence against women is a badge and incident of nineteenth-century coverture.⁹² Common law coverture rules still in effect at the time of the Thirteenth Amendment subjected married women to domination and control by their husbands, and violence within marriage was typically both legal and expected.⁹³ This connection was not lost on opponents of the Thirteenth Amendment, some of whom suggested concern (feigned, perhaps) that the proposed amendment might alter the marital relationship.⁹⁴ Neuborne's argument, which he offered in testimony before the Senate Judiciary Committee during the drafting of VAWA, is less specific but equally bold: "To the extent pervasive gender-based violence is denying women an equal status in society, it is precisely analogous to the badges and incidents of Afro-American slavery swept away by Congress and the courts in the cases following *Jones v. Mayer*."⁹⁵

These arguments are subject to prudential objections not unlike the objections to Amar's and Widawsky's child abuse argument, though here they may be even more formidable. Certainly the psychological coercion that keeps women in abusive relationships may contribute to a form of involuntary servitude, and rape is, paradigmatically, the violent exploitation of a power relationship; the woman is quite literally enslaved by her attacker. Moreover, the connection between common law rules that permitted husbands to inflict corporal punishment upon their wives and more modern lapses in prosecution of domestic violence is demonstrable.⁹⁶ But once we relax or reconceptualize the constraint that slavery

(arguing that battered women are subjected to a form of involuntary servitude cognizable under the Thirteenth Amendment).

⁹¹ See Hearn, *supra* note 7, at 1141.

⁹² See *id.* at 1144. Hearn also argues that modern violence against black women is a badge or incident of nineteenth-century chattel slavery. Cf. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that antidiscrimination law obscures the interaction between race and sex discrimination for black women).

⁹³ See, e.g., *State v. Rhodes*, 61 N.C. 453, 456 (Phil. Law 1868) (affirming acquittal of a husband in the unprovoked whipping of his wife, on the grounds that state government is subordinate to "family government"); see also Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (demonstrating in detail the ways in which repudiation of the chastisement regime preserved sexual status hierarchies within families).

⁹⁴ See CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White) ("A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. . . . All these rights rest upon the same basis as a man's right of property in the service of slaves."); cf. *id.* at 242 (statement of Rep. Cox) ("Should we amend the Constitution so as to change the relation of parent and child, guardian and ward, husband and wife, the laws of inheritance, the laws of legitimacy?").

⁹⁵ Neuborne, *supra* note 7, at 102.

⁹⁶ See generally Siegel, *supra* note 93.

or involuntary servitude must involve physical coercion and a captive audience, or take literally the absence of a state action requirement—such that the presence of applicable state criminal laws is not relevant to whether the challenged conduct is unconstitutional—the Thirteenth Amendment becomes at least a generative as the Fourteenth. For a judge in search of limiting principles, the Thirteenth Amendment is a distraction rather than a solution.

As in *DeShaney*, the state action to which VAWA is responsive is obvious to anyone looking for it.⁹⁷ As Chief Justice Rehnquist’s majority opinion in *Morrison* recognizes, the Congress that enacted VAWA compiled a “voluminous” record tending to show that gender-related stereotypes held by administrators of state criminal justice systems “often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.”⁹⁸ The *Morrison* majority backgrounds these findings, holding that the federal civil remedy is non-responsive because it does not call any state officials to account,⁹⁹ but the logic that compels this conclusion is obscure.¹⁰⁰ Imagine if a state discriminatorily refused to provide police protection to a predominantly black neighborhood. (That is, imagine if a state quite literally denied equal protection of the laws.) Would it exceed Congress’s Section 5 authority to authorize federal police to secure the area? One might criticize the remedy in VAWA as overbroad, but it is difficult to understand the objection that it is not concerned with state action. Anyone rejecting this view is even less likely to extend the Thirteenth Amendment to the entire field of gender-motivated violence.

The contrapositive, logically, is also true. Anyone who accepts the Thirteenth Amendment argument would have no trouble accepting the Fourteenth Amendment argument. This is why Neuborne, in his testimony, listed four independent bases for upholding VAWA: in order, the Commerce Clause, Section 5 of the Fourteenth Amendment, the Privileges or Immunities Clause, and the Thirteenth Amendment.¹⁰¹ Although we cannot be sure, these appear to be listed in order of plausibility.¹⁰² Likewise, Lawrence Sager has argued that the principle of *Jones*, which permits Congress to address the legacy of slavery, applies equally to VAWA and the legacy of sex discrimination via the Fourteenth Amendment,

⁹⁷ This is quite apart from the equally obvious relationship between gender-motivated violence and the interstate labor market, which is subject to federal regulation under the Commerce Clause. The extensive evidence Congress compiled to this effect is summarized at *Morrison*, 529 U.S. at 628–34 (Souter, J., dissenting).

⁹⁸ *Id.* at 620.

⁹⁹ *Id.* at 626.

¹⁰⁰ *Id.* at 665 (Breyer, J., dissenting).

¹⁰¹ See Neuborne, *supra* note 7, at 87–89.

¹⁰² Neuborne testified that the Commerce Clause was the easiest ground for decision. See *id.* at 88.

unless *Jones* has been tacitly overruled by *City of Boerne v. Flores*.¹⁰³ “Like slavery, [the] long history of state-sponsored disablement and injustice [against women] has left behind harms that are enduring, pervasive, and tentacular. In this respect, the reasoning of *Jones* is fully apt to [*Morrison*].”¹⁰⁴ One could, in other words, make all of Hearn’s and Neuborne’s arguments but ground them in the more firmly established jurisprudence of the Fourteenth Amendment.

* * *

The claims discussed in this Part follow a similar pattern. Each proposes a conceptually available but doctrinally foreign application of the Thirteenth Amendment to a problem more commonly discussed under the rubric of other constitutional provisions, particularly the Fourteenth Amendment. Each grounds its argument in a broad-based form of textualism or originalism. None is likely to persuade anyone who finds the present rubrics unavailing and none is likely to be adopted by the Supreme Court in the foreseeable future. Should the political environment arise to mainstream a Thirteenth Amendment argument against abortion restrictions, child abuse, hate speech, or violence against women, that environment is equally or more likely to support a Fourteenth Amendment argument or, as likely, to obviate the need for constitutional argument altogether.

II

The legal academy has become something of a whipping boy of late.¹⁰⁵ This article does not endorse the view, stated or implied in high-profile attacks on legal education, that legal scholarship is without value unless it helps a judge resolve cases. I assume, and strongly believe, that good academic scholarship, including legal academic scholarship, has intrinsic worth. The arguments of Thirteenth Amendment optimists have vastly improved my understanding of the history leading up to the Thirteenth Amendment, of the court decisions interpreting that Amendment and the political episodes that generated those decisions, of the conceptual bounds of the culturally significant institution of slavery, of the treatment of women within marital relationships both before and after the abolition of rules of coverture. Epistemic value is as good as any, and it

¹⁰³ 521 U.S. 507 (1995) (limiting the reach of Congress’s Section 5 power to remedies congruent and proportional to an identified violation).

¹⁰⁴ Sager, *supra* note 16, at 153.

¹⁰⁵ See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at BU1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, Jul. 17, 2011, at BU1; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

would be ironic if the pursuit of truth, recognized time and again as a fundamental constitutional value,¹⁰⁶ were deemed worthless unless further instrumental to judicial doctrine. Encouraging scholars to advance colorable arguments about the text and history of the Thirteenth Amendment not only enriches our collective knowledge but also lends substance to vital modes of constitutional argument. The practice of constitutional law is no less than the practice of advancing arguments from text and history. There is nothing “wrong” with Thirteenth Amendment optimism; indeed, there is much to commend it.

This gathering’s charge, however, is to discuss the “contemporary implications” of the Thirteenth Amendment, and so I am obliged to judge Thirteenth Amendment optimism through a more discerning lens. I take the amendment’s implications to be measured by its impact on legal doctrine, legal practice, or constitutional politics. Part II suggested that the prospects for influencing legal doctrine or practice are bleak, but the argument is incomplete. Constitutional law can move slowly in our common law system.¹⁰⁷ Many mainstream constitutional arguments were off the wall before they were on it,¹⁰⁸ and in the case of the Thirteenth Amendment many arguments were on the wall before they were off it.

This is easier to see when we look for constitutional meaning outside the courts and within the *nomoi* of political and social movements.¹⁰⁹ That inquiry demonstrates that Thirteenth Amendment optimism signifies not new but *renewed* interest in and attention to the amendment. James Gray Pope has shown, for example, that the Thirteenth Amendment was a standard tool of pre-New Deal era unionist advocacy in favor of congressional legislation to protect labor rights and against *Lochner*-era economic substantive due process jurisprudence.¹¹⁰ For these advocates, the Thirteenth Amendment proved that labor rights were not mere “class legislation,” but were constitutionally inspired.¹¹¹ The Thirteenth

¹⁰⁶ See *Keyishian v. Board of Regents*, 438 U.S. 265, 312 (1967); *Chaplinsky*, 315 U.S. at 572; *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the judgment); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Regents of the University of California, Davis v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

¹⁰⁷ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

¹⁰⁸ In 1991 Warren Burger called the argument for grounding opposition to gun control in the Second Amendment “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime,” *MacNeil/Lehrer Newshour: First Freedoms* (PBS television broadcast Dec. 16, 1991), and in 1989 Robert Bork said all state gun control laws were “probably constitutional,” see Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. TIMES, Mar. 15, 1989, at B5. Cf. *McDonald v. City of Chicago*, 561 U.S. 3025 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁰⁹ I borrow this term from Robert Cover. See Cover, *supra* note 18.

¹¹⁰ See Pope, *supra* note 24, at 18–22.

¹¹¹ See *id.* at 22–25.

Amendment has also been a prominent location for Executive Branch constitutionalism. Risa Goluboff has chronicled the ways in which lawyers in the Department of Justice Civil Rights division invoked the Thirteenth Amendment in an expanding set of cases in the 1940s, beginning with traditional peonage but broadening to encompass other forms of economic coercion.¹¹² One must not be too quick, then, to universalize the contingent background assumptions of modern constitutional practice. As Larry Kramer writes, “work like Pope’s and [William] Forbath’s suggests that taking popular constitutionalism seriously might help to counter an otherwise unnoticed tendency to perceive the Constitution and its possibilities myopically.”¹¹³

It is also too quick, however, to assume that a once fecund but now dormant source of law will bloom again solely because of academic interest, and there are costs in making the effort. One significant difference between the 1930s and 1940s and today is the advent of modern civil rights law.¹¹⁴ Thirteenth Amendment optimism was a rather different project when segregation was legal; when the Bill of Rights remained largely unincorporated against the states; when the state action doctrine had not been tamed by *Shelley, Katzenbach v. McClung*,¹¹⁵ *Heart of Atlanta Motel v. United States*,¹¹⁶ and their progeny; and when, more generally, “understandings of civil rights [were] up for grabs.”¹¹⁷ The doctrinal resources to achieve Thirteenth Amendment optimism’s ends have already been mined. The obstacle to realization of those ends is less a failure of constitutional imagination than a failure of constitutional politics.

¹¹² See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1647–68 (2001).

¹¹³ Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 980 (2004). Koppelman writes:

At the time the [abortion] article was written, not much had been done with the Thirteenth Amendment by anyone in the legal academy. It had been a potent source of law as recently as the 1970s, but it had since gone out of fashion, and arguments that tried to invoke it as a major premise tended to be ruled out of order without a hearing, simply because that kind of thing is not done. . . . [But] [t]here is an increasing appreciation that the Thirteenth Amendment has potent current applications.

Koppelman, *supra* note 22, at 238.

¹¹⁴ See Goluboff, *supra* note 112, at 1612 (“[D]uring World War II and the years that followed, . . . ‘civil rights’ did not refer to a unified, coherent category; the content of the term was open, changing, and contradictory, carrying resonances of the past as well as of several possible contending futures.”).

¹¹⁵ 379 U.S. 294 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 as applied to a restaurant near an interstate highway).

¹¹⁶ 379 U.S. 241 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 as applied to a Georgia hotel).

¹¹⁷ Goluboff, *supra* note 112, at 1613.

Some of the costs are well-documented. There is, for example, a credibility cost. Arguments that fail to respect the bounds of conventional usage of language and history risk the charge of constitutional perfectionism.¹¹⁸ When Henry Monaghan coined that phrase in his critique of substantive due process he did so in defense of positivism,¹¹⁹ but arguments from text and history are hardly immune to charges of perfectionism.¹²⁰ There are also several different kinds of opportunity costs. First, constructing doctrinal architecture takes time and briefing space at the expense of firming up the doctrine already in place. Second, devoting resources to manipulation of judicial doctrine distracts the mind from the project of altering the political conditions that will ultimately be needed for that doctrine to be adopted and to crystallize into lasting precedent. It may be that what Robin West calls “adjudicative law” is existentially destined to greet the kinds of generative claims advanced by Thirteenth Amendment optimists with skepticism.¹²¹ West writes:

Progressives understand constitutional law as possibilistic and open-ended, as change rather than regularity and as freedom rather than constraint. This understanding of *constitutionalism* may be right, and it may even be right as an account of law, but as an account of *adjudicative*

¹¹⁸ See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (arguing that substantive due process proponents believe that “the constitution is essentially perfect” in aligning its guarantees of equality and personal autonomy with those “which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens”); see also Kozinski & Volokh, *supra* note 68, at 1657 (“Following the lengthening shadows of constitutional provisions as they recede ever further from the source is something to be undertaken cautiously, with a constant regard to the consequences. No matter how tempting or righteous the desired result may be, one must always be ready to recognize when the reading has become too tenuous, the proposed doctrine too vague, the implications too risky.”).

¹¹⁹ Monaghan, *supra* note 118, at 360.

¹²⁰ The virtual cottage industry in originalist defenses of *Brown v. Board of Education*, 347 U.S. 483 (1954), provides the most obvious example. See BORK, *supra* note 19, at 74–83; John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMM. 243 (1996); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). Originalist Steven Calabresi has a long history of refusing the bite the bullet on unattractive constitutional outcomes. See Steven G. Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (concluding that sex discrimination is “undoubtedly unconstitutional” under the Fourteenth Amendment’s original meaning); Steven G. Calabresi, *Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 655 n.138 (2006) (asserting that *Brown* was correct from an originalist perspective); *id.* at 656 (arguing that originalism can explain *Loving v. Virginia*, 388 U.S. 1 (1967)). I have personally heard Calabresi defend *Bolling v. Sharpe*, 347 U.S. 497 (1954), by way of the Necessary and Proper Clause, though I have never seen the defense in writing and it stands in some tension with Calabresi’s earlier writings. See Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403 (1982).

¹²¹ Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714 (1989).

law—of what courts in fact *do*—it is perverse. Adjudicative law is persistently authoritarian: demonstration of the “truth” of legal propositions (arguably unlike other truth statements) relentlessly requires shows of positive authority. . . . The lesson from this tension between the possibilistic Constitution envisioned by progressives and the authoritarian structure of adjudicative law is not necessarily that the conventional account of adjudicative law as requiring demonstrations of binding authority is wrong; rather, the important point may be that the identification of constitutional process and choices with the sphere of adjudicative rather than legislative legality—with law rather than politics—is misguided.¹²²

Thirteenth Amendment optimism, like progressive constitutionalism more generally, is aspirational. It seeks to broaden extant understandings of constitutional text to permit it to respond to constitutional problems not specifically contemplated by its drafters and misunderstood within modern discourse. This project may be well-suited to constitutionalism of a sort, but it is not well-suited to judicial practice because it turns limitation—the stuff of courts—into license—the stuff of legislatures.¹²³

All is not lost, however, or so I will argue. The redemptive orientation of Thirteenth Amendment optimism may in fact offer the key to its contemporary

¹²² *Id.*

¹²³ These observations point up a broader issue worthy of attention in future work. The conclusion that Thirteenth Amendment optimism entails conceptually plausible but nonetheless off-the-wall arguments is not simply a judgment about political viability; Thirteenth Amendment optimism also frequently violates what we might call second-order conditions for constitutional legitimacy. First-order conditions specify the form a constitutional argument must take in order to count as such. A claim about constitutional meaning that does not proceed from historical understanding, constitutional text or structure, precedent, prudential or policy argument, perhaps ethical argument or natural law, or some combination of these may be perfectly persuasive within some domain but does not likely count as constitutional argument and would not be understood as such by most constitutional lawyers. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 3–119 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189, 1189–90, 1194–1209 (1987). Less explored are the limitations particular to a given style of constitutional claim. It may be that constitutional argument need not only conform to a recognized first-order modality but must also attend to the relationship between form and function. Certain doctrinal claims may simply fail to “fit” with certain modalities. Thus, arguments that emphasize the generativity of language may not be compatible with originalism, which (by convention) seeks above all to constrain. See Jamal Greene, *Fourteenth Amendment Originalism*, 70 *MD. L. REV.* ____, ____ (forthcoming 2012). *But see* JACK BALKIN, *LIVING ORIGINALISM* (2012) (defending a dynamic, generative version of originalism). Because they must, at best, inspire politics, Thirteenth Amendment arguments must concede, indeed celebrate, the open-ended nature of the constitutional mandates they describe. Section 1, and especially originalist claims about Section 1, resist such concessions.

relevance. The two provisions of the Thirteenth Amendment have, without explanation, been treated differently by the Supreme Court. Section 1 has never been interpreted to prohibit, of its own accord, “badges and incidents” of slavery,¹²⁴ but Section 2 has been said to empower Congress to eradicate such badges and incidents almost from the beginning of Thirteenth Amendment interpretation. Some Thirteenth Amendment optimists understandably find this disjunction troubling,¹²⁵ but separating the two sections permits us to identify the amendment with two overlapping but distinct forms of constitutionalism: judicial and legislative. As West suggests, legislative constitutionalism is less authoritarian than judicial constitutionalism and therefore more compatible with progressive constitutional arguments. It also does not suffer from the same opportunity costs because Thirteenth Amendment-inspired legislation does not require a Thirteenth Amendment judicial justification. Expanding the political imagination by way of Thirteenth Amendment optimism may help, in small ways, to motivate the political process necessary to craft legislation ultimately grounded in other substantive provisions.

Two examples will help to clarify the argument. First, recall Pope’s discussion of unionist arguments in favor of a Thirteenth Amendment ground for Progressive-era labor rights legislation. Those arguments did not succeed in their particulars but they were vital to the legislation that eventually passed. The anti-injunction bill that eventually became the Norris-Laguardia Act was drafted by the labor reformer Andrew Furuseth, who specifically invoked the Thirteenth Amendment-inspired notion that management cannot have a property right in the labor of its workers.¹²⁶ Furuseth likewise urged Senator Robert Wagner to base the National Labor Relations Act (NLRA) on the Thirteenth Amendment, and in defending the legislation, Wagner drew on principles the labor movement had long tied to that provision, namely the right to freedom from economic as well as physical coercion. Other proponents of the bill spoke in similar terms.¹²⁷ Labor advocates addressed their Thirteenth Amendment claims to Congress rather than the Court out of distrust of lawyers¹²⁸ and, importantly, as Forbath notes, because they firmly believed that social and economic rights, though constitutionally grounded, “did not lend themselves to judicial enforcement.”¹²⁹

Congress eventually justified both the Norris-Laguardia Act and the NLRA on non-rights-based constitutional provisions, namely the power to control

¹²⁴ See *City of Memphis v. Greene*, 451 U.S. 100, 129 (1981) (reserving judgment on the scope of Section 1); *Jones*, 392 U.S. at 439 (same).

¹²⁵ See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1314–16 (2007).

¹²⁶ See Pope, *supra* note 24, at 34–35.

¹²⁷ See *id.* at 47–48.

¹²⁸ See *id.* at 32–34.

¹²⁹ William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 179 (2001).

federal jurisdiction and the interstate commerce power. It did so in response to political pressure, both from pragmatist Progressive elites like Felix Frankfurter¹³⁰ and from anti-union Southern interests that controlled vital congressional vetogates but formed part of the New Deal coalition.¹³¹ But the text and history of the Thirteenth Amendment became, in Reva Siegel's words, "the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims on the Constitution's meaning."¹³²

The second example is more familiar to most constitutional lawyers, since on its face it represents the most spectacular success of Thirteenth Amendment optimism. In *Jones v. Alfred H. Mayer*, the Supreme Court held that 42 U.S.C. § 1982, which prohibits racial discrimination in the transfer of property, applied to private residential housing discrimination and, so applied, was valid Thirteenth Amendment Section 2 legislation. The Thirteenth Amendment holding in *Jones* was genuinely shocking but the result was expected. The state action doctrine, undermined in *Shelley*, had since been dealt a series of blows so severe that it was liable to collapse at the slightest tremor. In *Heart of Atlanta Motel* and *McClung* the Court had permitted Congress to evade state-action-based limitations on addressing private discrimination by upholding the legislation under the Commerce Clause. Just over a year later, in *United States v. Price*¹³³ and *United States v. Guest*,¹³⁴ decided the same day, the Court held that a statute aimed at conspiracies to deprive a person of the exercise of civil rights was valid Fourteenth Amendment legislation even as applied to private actors working either indirectly or in consort with a state actor ignorant of any discriminatory motivation. Although Justice Stewart's majority opinion in *Guest* avoided deciding the power to enact the statute under Section 5 of the Fourteenth Amendment if it reached purely private action, six members of the Court, over two separate concurring opinions, endorsed the view that Congress indeed possessed that power.¹³⁵

Heart of Atlanta Motel and *Guest* would have been sufficient to ground a holding in favor of the Joneses on either Commerce Clause or Fourteenth Amendment grounds. The *Jones* case itself was briefed and argued exclusively on statutory and Fourteenth Amendment grounds. Harry Blackmun, then an Eighth Circuit judge, ruled against *Jones* but cited numerous cases, including *Shelley*, the Civil Rights Act of 1964 cases, and *Guest*, to argue that "the reasoning of the

¹³⁰ See *id.* at 190–93; Pope, *supra* note 24, at 40–42.

¹³¹ See Forbath, *supra* note 129, at 170, 203–09.

¹³² Siegel, *supra* note 18, at 299.

¹³³ 383 U.S. 787 (1966).

¹³⁴ 383 U.S. 745 (1966).

¹³⁵ See *id.* at 761, 762 (Clark, J. concurring); *id.* at 774, 777 (Brennan, J., concurring in part and dissenting in part).

Civil Rights Cases is in the process of reevaluation, if not overruling, and that a court may not need to stretch to find state action if appropriate congressional legislation is present.”¹³⁶ Looking beyond doctrine, a constitutional ruling against *Jones* would have seriously called into question the constitutionality of the Fair Housing Act, which was enacted just days after oral argument in *Jones* and whose passage was urged by President Johnson amid the rioting following the assassination of Martin Luther King, Jr.¹³⁷ As Gerhard Casper wrote, “[T]he hot spring of 1968 was not an easy time to turn down a claim like that of the Joneses.”¹³⁸

There is little question, then, that assuming section 1982 applied to private discrimination in residential housing, the Supreme Court would have upheld its constitutionality with or without advancing a Thirteenth Amendment theory. Why, then, did the Court base its decision on the Thirteenth Amendment? The oral argument in *Jones* may provide a clue. The Thirteenth Amendment was invoked just once in either petitioner’s argument or in the argument of the United States as amicus curiae. Its first and only mention came some twelve minutes into Samuel Liberman’s argument for petitioner, during the following exchange with Justice Stewart, the author of the *Jones* majority opinion:

Liberman: In the holdings of this Court in *Katzenbach v. Morgan* and *United States v. Price* and the *Guest* case this limiting interpretation of the power of Congress under the Fourteenth Amendment Section 5 has been abandoned,¹³⁹ so that any dictum

Stewart: Except that this statute was enacted under the aegis of the Thirteenth Amendment, wasn’t it?

¹³⁶ 379 F.2d 33, 42 (8th Cir. 1967).

¹³⁷ The Fair Housing Act, which was based on the Commerce Clause and on Section 5 of the Fourteenth Amendment, Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. & Urban Affairs of the Senate Comm. on Banking & Currency, 90th Cong. 6-14, 23-24 (1967) (statement of Ramsey Clark, Att’y Gen. of the United States), was broader than section 1982, as it prohibited discrimination on a range of grounds that extended beyond just race and included an enforcement mechanism in cases of private discrimination.

¹³⁸ Casper, *supra* note 32, at 132.

¹³⁹ Liberman is here referring to limitations on Section 5 authority suggested in dictum in *Hurd v. Hodge*, 334 U.S. 24 (1948). The Court in *Hurd*, a companion case to *Shelley*, held that the courts of the District of Columbia may not enforce restrictive racial covenants in real estate transactions. In the course of so holding, however, Chief Justice Vinson indicated, in dicta, that the Civil Rights Act of 1866 “does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms” rather than, for example, by seeking court intervention against a seller who wishes to contract with a black purchaser. *Id.* at 31.

- Liberman: Originally it was enacted under the Thirteenth Amendment and reenacted
- Stewart: Reenacted after the adoption of the Fourteenth Amendment.
- Liberman: That's right.
- Stewart: Its original passage was under the aegis of the Thirteenth Amendment.
- Liberman: Yes. I was referring to the force, if any, of the dictum in *Hurd v. Hodge*, which I think did perhaps imply some limitation due to a Fourteenth Amendment construction which I was urging has been abandoned since that time by this Court in the *Guest* case and the *Price* case.
- Stewart: But if this were valid legislation under the Thirteenth Amendment, it escapes me why we have to worry about the Fourteenth Amendment and any limitations contained in it.
- Liberman: It's our opinion that we don't have to, that we're really engaged in a question of statutory interpretation.
- Stewart: And the power of Congress under the Thirteenth Amendment to enact this legislation.
- Liberman: Yes.¹⁴⁰

It appears that Stewart, unique among the Justices, believed both that section 1982 applied to private housing discrimination and that Section 5 of the Fourteenth Amendment could not be applied to such discrimination.¹⁴¹ A Fourteenth Amendment holding in *Jones* would likely have garnered six votes, but Justice Stewart's opinion in *Jones* garnered seven, all but those of Justices Harlan and White, who dissented on prudential grounds (because of the recent passage of the

¹⁴⁰ Oral Argument Audio, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (No. 645) (Apr. 1, 1968) (available at http://www.oyez.org/cases/1960-1969/1967/1967_645#argument-1).

¹⁴¹ Justices Stewart, Harlan, and White are the only three members of the *Guest* Court not to assert that Congress could reach private action via the Fourteenth Amendment.

Fair Housing Act) and who expressed deep skepticism about the Court's statutory holding.¹⁴²

The Thirteenth Amendment analysis in *Jones*, unnecessary either to the result in *Jones* or to the subsequent constitutionality of the Fair Housing Act, has done little important judicial work since. The closest we get is *Runyon v. McCrary*,¹⁴³ which upheld the constitutionality of the contracting section of the Civil Rights Act of 1866 as applied to racial discrimination in private school admissions, and *Griffin v. Breckenridge*,¹⁴⁴ which affirmed congressional power under Section 2 to pass the provision of the 1871 Ku Klux Klan Act that forbid conspiracies to deprive persons of equal protection of the laws or equal privileges and immunities.¹⁴⁵ *Runyon* strays at least as far as *Jones* from the original expected application of the Thirteenth Amendment but, like *Jones*, it could easily have been justified under the Commerce Clause or (but for *Jones*'s missed opportunity) under Section 5 of the Fourteenth Amendment. The *Griffin* Court concluded that an earlier construction of the Ku Klux Klan Act, in *Collins v. Hardyman*,¹⁴⁶ that held that it did not apply to private conspiracies was not binding because it was grounded needlessly in constitutional avoidance. Justice Stewart wrote: "it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist."¹⁴⁷ The Thirteenth Amendment holding in *Griffin* is far narrower than the holding in *Jones* (as evidenced by the Burger Court's unanimity on this point), and there is little reason to believe the former holding required the latter. The facts of *Griffin* involved a vicious premeditated assault on a group of black men traveling in Mississippi, on the (mistaken) belief that they were civil rights workers; this, more than private housing discrimination, is a "badge or incident" of slavery if ever there was one.

Post-*Jones*, Section 1 claims have continued their nearly unbroken futility streak outside the context of peonage. Thus, in *Palmer v. Thompson*,¹⁴⁸ decided one week after *Griffin*, the Court rejected a Thirteenth Amendment argument that the city of Jackson, Mississippi was not permitted to shutter its public swimming pools in response to a desegregation order, saying that the argument "would severely stretch [the amendment's] short simple words and do violence to its history."¹⁴⁹ In *City of Memphis v. Greene*,¹⁵⁰ the Court rejected the argument that

¹⁴² *Jones*, 392 U.S. at 450 (Harlan, J., dissenting).

¹⁴³ 427 U.S. 160 (1976).

¹⁴⁴ 403 U.S. 88 (1971).

¹⁴⁵ 42 U.S.C. § 1985.

¹⁴⁶ 341 U.S. 651 (1951).

¹⁴⁷ *Griffin*, 403 U.S. at 95–96.

¹⁴⁸ 403 U.S. 217 (1971).

¹⁴⁹ *Id.* at 226.

¹⁵⁰ 451 U.S. 100 (1981).

closing a street that traversed a white neighborhood to prevent predominantly black motorists from passing through violated either section 1982 or Section 1 of the Thirteenth Amendment. But the most frustrating recent decision for those who seek an expansive Thirteenth Amendment might be *United States v. Kozminski*,¹⁵¹ in which the Court interpreted the phrase “involuntary servitude” as used in federal statutes preventing conspiracies to deprive civil rights as not contemplating psychological coercion but only “the use or threatened use of physical or legal coercion.”¹⁵² *Kozminski* was a statutory case but the Court surveyed its Thirteenth Amendment cases to reach its decision. Justice O’Connor cited favorably to the dicta in the 1916 case of *Butler v. Perry*, which upheld a state law requiring uncompensated citizen labor on public roads, that the “general intent” behind the words “involuntary servitude” was “to prohibit conditions akin to African slavery.”¹⁵³

Under the circumstances it is fair to ask whether, from a progressive perspective, *Jones* was a mistake. The political process that produced the Civil Rights Act of 1964 and the Fair Housing Act had settled on viable doctrinal hooks to which the Court had tentatively provided its blessing. But rather than accept the outcome of that process, the *Jones* Court struck out, idiosyncratically, on its own. *Jones* has virtually no significant doctrinal progeny and represents a missed opportunity to build upon the slow erosion of the Fourteenth Amendment state action doctrine that, by 1968, was nearly complete. Dealing in counterfactuals is always perilous, but it seems reasonable to say that, had the *Jones* Court upheld section 1982 as a valid exercise of Section 5 authority, the *Runyon* Court might have relied on the Commerce Clause, thereby complicating the later anti-progressive holding in *United States v. Lopez*,¹⁵⁴ and the *Morrison* Court would have had to overrule *Jones* (and perhaps *Runyon*) to reach its result. A Fourteenth Amendment holding in *Jones* might also have emboldened Congress to more aggressively test the boundaries of its expanding authority over private action.

By contrast, the labor movement might have earned a victory, despite itself, in failing to persuade Congress and the Court to rely more explicitly on the Thirteenth Amendment in passing the Norris-Laguardia Act and the Wagner Act. Although the decisions in *A.L.A. Schechter Poultry Corp. v. United States*¹⁵⁵ and *Carter v. Carter Coal Co.*¹⁵⁶ cast doubt on the viability of the Commerce Clause as a jurisdictional tie to labor relations, the Court famously reversed course in

¹⁵¹ 487 U.S. 931 (1988).

¹⁵² *Id.* at 944.

¹⁵³ *Id.* at 942 (quoting *Butler v. Perry*, 240 U.S. 328, 332–33 (1916)).

¹⁵⁴ 514 U.S. 549 (1995).

¹⁵⁵ 295 U.S. 495 (1935).

¹⁵⁶ 298 U.S. 238 (1936).

*NLRB v. Jones & Laughlin Steel Corp.*¹⁵⁷ Would the post-*Jones & Laughlin Steel Corp.* Court have blessed a Thirteenth Amendment-based NLRA? Felix Frankfurter called Furuseth’s Thirteenth Amendment arguments “too silly for any practical lawyer’s use.”¹⁵⁸ It is difficult to imagine that the Roosevelt Court, packed with like-minded New Deal pragmatists, would have shepherded into being a Labor Constitution protective of social and economic rights in the teeth of the kind of politics that produced the Taft-Hartley Act in 1947.¹⁵⁹

These two examples suggest that the most productive use of Thirteenth Amendment optimism lies not in encouraging appellate lawyers and judges to incorporate Thirteenth Amendment arguments into briefing and judicial decisions but rather in stimulating a political movement to broaden its imagination and understand its ends in Thirteenth Amendment terms. The Thirteenth Amendment may be especially useful for this purpose because it may be read to embody a national commitment to social and economic justice. This is its comparative advantage over competing constitutional rights frames. Its Section 2—which on this view is far more important than Section 1¹⁶⁰—may therefore be read to burden Congress with a constitutional responsibility to root out pervasive and demeaning inequality and subjugation even in the absence of local governmental action.¹⁶¹ I have argued elsewhere that progressives are less apt than conservatives to structure their policy demands as constitutional imperatives, and are therefore less successful at motivating their base to seek to influence constitutional politics.¹⁶² Thirteenth Amendment optimism can be a vehicle for doing so and may thereby, indirectly, influence the political process in ways that lead to

¹⁵⁷ 301 U.S. 1 (1937). We can tell a parallel story about the role of Thirteenth Amendment arguments in the failed Child Labor Amendment and the Fair Labor Standards Act, which was upheld as valid Commerce Clause legislation in *United States v. Darby*, 312 U.S. 11 (1941). See Mishra, *supra* note 4, at 73–107.

¹⁵⁸ Pope, *supra* note 24, at 40 (quoting Letter from Felix Frankfurter, Professor, Harvard Law School, to Roger N. Baldwin, Director, ACLU (Dec. 9, 1931)).

¹⁵⁹ The Act broadened the NLRA’s definition of unfair labor practices to include certain labor-side collective actions, authorized right-to-work legislation in states, and permitted the President to authorize anti-labor injunctions under certain circumstances.

¹⁶⁰ It is telling that, apart from cases involving peonage, quasi-peonage, or literal servitude, Section 1 of the Thirteenth Amendment has never, standing alone, been applied by the Supreme Court to invalidate any practice. For examples of the Court’s treatment of Section 1, see *Pollock v. Williams*, 322 U.S. 4 (1944) (invalidating a Florida law that made failure to perform a service prima facie evidence of fraudulent securing of property on promise to perform); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Butler v. Perry*, 240 U.S. 328 (1916) (dismissing a Thirteenth Amendment challenge to forcing work on public highways); *United States v. Reynolds*, 235 U.S.133 (1914) (holding that Alabama’s peonage system violates the Thirteenth Amendment).

¹⁶¹ See James Gray Pope, *What’s Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 194–96 (2011).

¹⁶² See Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1195–96 (2011).

significant constitutional change. That change need not be grounded expressly in Thirteenth Amendment language, and indeed, the radical promise of the amendment makes that possibility rather unlikely.

III

Part I provided four examples of Thirteenth Amendment optimism and argued that, in each case, the arguments advanced were too fanciful to be accepted by a court, too radical to persuade opponents of the targeted policy outcome, and not needed to persuade policy proponents. Part II outlined some potential benefits and costs to advancing arguments of this character and suggested that the best way to preserve the benefits while mitigating the costs was to use Thirteenth Amendment optimism to motivate politics rather than directly to influence judicial doctrine. This Part applies the insights of Part II to the examples in Part I. It should be clear by now that what each case is missing is not an argument—these are in abundance—but a movement fit to integrate those arguments into higher law. Thirteenth Amendment optimism will not itself perform the integrative work but it may be able to help build the movement.

The right to terminate a pregnancy is, at its core, a negative right; so long as we are speaking the language of negative rights, Thirteenth Amendment discourse stands at a comparative disadvantage. It is particularly unhelpful to compare pregnant women to slaves or involuntary servants if the goal is to reach consensus with political opponents of abortion rights, whose likely reaction to comparing a fetus to a slave master is horror. The Thirteenth Amendment ends reproductive rights conversations that any viable political process must facilitate. To the extent that abortion-related rights may be framed in positive terms, there may be a role for Thirteenth Amendment optimism, but it is bound to be limited for the reasons just discussed. One possibility is in advocacy over access of low-income women to family planning services, which is hampered by state and federal laws that channel public funding away from abortion-related services.¹⁶³

¹⁶³ The Hyde Amendment restricts the use of Medicaid funds for abortion services, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976), and Title X, which provides federal funding for family planning services, cannot be used directly to fund abortions. 42 U.S.C. § 300a-6 (2006). Other indirect limitations on funding of abortions frequently occur, ad hoc, through the appropriations process. See, e.g., Robin Fretwell Wilson, *Empowering Private Protection of Conscience*, 9 AVE MARIA L. REV. 101, 109 n.43 (2010) (discussing appropriations riders that prohibit funding of government entities that discriminate against health care providers who refuse to provide abortions). Moreover, the recent Patient Protection and Affordable Care Act includes a number of provisions designed to prevent indirect public funding of abortions. See James Comstock & Sloane Kuney Rosenthal, *Health Care Access After Health Care Reform*, 12 GEO. J. GENDER & L. 667, 675–76 (2011). Only seventeen states permit the use of state funds for all or most medically

The other three examples from Part I—child abuse, hate speech, and domestic violence—differ from abortion rights in that they involve positive rights to state protection from private aggressors who, unlike fetuses, are not likely to be viewed with sympathy by anyone within the constitutional conversation. For child abuse and domestic violence, the objection to constitutionalized rights for victims of these acts is largely grounded in federalism rather than solicitude for the competing rights of other private actors.¹⁶⁴ For hate speech, the objection is indeed grounded in competing constitutional rights, but they are those of an unpopular rights bearer. The Thirteenth Amendment may therefore serve as a somewhat more promising political frame for these issues than for abortion rights.

There is no reason, in principle, why Thirteenth Amendment analysis cannot inform the hate speech debate in ways that can influence the politics surrounding the issue. Previous efforts to integrate Fourteenth Amendment analysis into the constitutional conversation over hate speech have suffered from the familiar problem of characterizing private actions as state-sanctioned. The Thirteenth Amendment suggests an affirmative right on the part of African-Americans, at a minimum, to be free from the race-based intimidation characteristic of the antebellum South, even if that intimidation is accomplished (as it often was then) through speech. The difficulty, as ever, is in defining both the class of persons who may benefit from a Thirteenth Amendment analysis and the class who may be disadvantaged by it. In a rapidly diversifying nation, is it either appropriate or politically feasible to limit hate speech legislation to previously enslaved groups like blacks or, arguably, women? Historically, among the biggest opponents of hate speech legislation have been civil rights groups for whom incautious language is necessary to get their point across.¹⁶⁵ Would Thirteenth Amendment-based hate speech legislation be asymmetrical as to race?¹⁶⁶ Not if it wants to pass Congress.

The federal hate crimes law passed in 1969 reaches beyond race, to religion and national origin, and the amendment to that law passed explicitly on Thirteenth Amendment grounds—the Matthew Shepard Act—covers hate crimes based on gender, sexual orientation, gender identity, and disability.¹⁶⁷ The original bill applied to hate crimes that interfered with federally protected activities, but the amendment eliminated that jurisdictional requirement. It is not obvious that the amendment could have been passed without Thirteenth Amendment optimism,

necessary abortions. *See* Guttmacher Institute, *State Funding of Abortion Under Medicaid*, Jan. 1, 2012, at http://www.guttmacher.org/pubs/spib_SFAM.pdf.

¹⁶⁴ *See* Siegel, *supra* note 93, at 2197.

¹⁶⁵ *See generally* SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (1994).

¹⁶⁶ Amar raises this possibility. *See* Amar, *supra* note 3, at 159–60.

¹⁶⁷ Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§4701-4713, 123 Stat. 2190, 2835-44 (codified at 18 U.S.C. § 249 (2011)).

but it would be surprising indeed if it were to be upheld as applied to crimes against gays or transgendered people on Thirteenth Amendment grounds. The political environment in which that holding is plausible has no need for Thirteenth Amendment optimism, but the legislative mobilization that created the Act may well have required it.

Among the most resourceful and promising uses of Thirteenth Amendment optimism was, as described, in contemplation of VAWA. In his testimony Neuborne offered a Thirteenth Amendment framework that, among others, could justify a political intervention on behalf of victims of gender-motivated violence. A Thirteenth Amendment argument situates VAWA or its equivalent not just as constitutionally permitted—proponents needed no such persuasion—but as constitutionally mandated, in order to combat ineffectual modern state-based remedies for acts that were historically shielded by state laws that sought to preserve a master-servant spousal relationship. VAWA in fact passed Congress with bipartisan support and, although the civil redress component was defeated in *Morrison*,¹⁶⁸ the broader Act, which funds support services and provides training programs to benefit victims of gender-related violence, remains in place today.

We might imagine a parallel effort in support of a “Violence Against Children Act,” on behalf of victims of child abuse. Child welfare and safety is a

¹⁶⁸ It might be argued, then, that the Supreme Court’s jurisprudence regarding the scope of congressional enforcement provisions undermines the argument that the best outlet for Thirteenth Amendment optimism runs through Section 2. The dichotomy I have suggested between the relative narrowness of Section 1 and the relative generativity of Section 2 may be one that the Court refuses to appreciate. But even apart from the unsettled application of *City of Boerne v. Flores* to the Thirteenth Amendment, see Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010); Sager, *supra* note 16, I do not view *Flores* and its progeny as a significant hindrance to this article’s claims for two principal reasons. First, the paper’s chief claim, again, is not that legislation should formally be premised on the Thirteenth Amendment or that judges will or should revitalize Section 2 jurisprudence; it is rather that such argument can provide a constitutional frame to claims involving positive rights, and thereby invigorate legislative advocacy. The jurisdictional hooks, or lack thereof, that motivate members of Congress need not constrain either federal judges or the Office of the Solicitor General. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) (upholding the constitutionality of the Bank of the United States without reference to any jurisdictional bases mentioned in the statute of incorporation). *But see Florida v. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1313–20 (11th Cir. 2011) (relying on text and legislative history to determine whether the Affordable Care Act’s minimum coverage provision is a “tax” or a “penalty”). Indeed, some of the legislative proposals that Thirteenth Amendment optimism can motivate, such as a relaxation on Title X funding restrictions, require no constitutional justification. Second, even if Thirteenth Amendment Section 2 arguments lose in federal court, a fight that situates progressives as adhering to the will of the people in the face of an “activist” Supreme Court is one that progressives should, relatively speaking, be willing to have.

frequent topic of federal legislative proposals, but it is uncommon for such proposals to address domestic violence as such against children. For example, Senator Barbara Boxer of California has twice introduced a bill with the precise title just proposed.¹⁶⁹ The Violence Against Children Act would provide federal funding to investigate, prosecute, and prevent crimes involving children. At this level of generality, it is difficult to justify such an act under the Thirteenth Amendment; the argument that violence against children generally reflects the lingering effects of a slavery regime is not credible. The politics of this effort are therefore more difficult than for VAWA. Many of the arguments once used to resist laws against spousal abuse—*e.g.*, that it intrudes upon the sovereignty of the man over his family affairs—have analogues in the debate over child abuse. Corporal punishment of children remains popular, indeed immune from Eighth Amendment scrutiny,¹⁷⁰ and even child victim advocates concede the need for a residuum of parental control over child discipline and socialization.¹⁷¹ Still, VAWA points the way forward in the use of Thirteenth Amendment arguments in this domain; the Thirteenth Amendment can emphasize that, whatever the ultimate structure of a regulatory response to child abuse, legislative silence is not an option.

Conclusion

The Thirteenth Amendment is unusual in several ways that make it a popular location for creative constitutional argument. Virtually unique among the Constitution's rights-conferring provisions, it lacks a state action requirement. Its bold prohibition on the "existence" of slavery burdens both states and the federal government with a responsibility to prosecute certain affronts to personal freedom. It nominally remains the case, moreover, that the Supreme Court's decisional law grants Congress broad authority to eliminate the "badges and incidents" of slavery. Whatever such badges and incidents include, *Jones* makes clear that they are not nearly exhausted by practices that approximate chattel slavery.

As Daniel Farber writes, however, "there is something inherently suspect about an interpretation so clever that it never would have occurred to the speaker

¹⁶⁹ See Press Release, U.S. Senator Barbara Boxer, Boxer Reintroduces Violence Against Children Act, (Sept. 30, 2010), at <http://boxer.senate.gov/en/press/releases/093010b.cfm>.

¹⁷⁰ *Ingraham v. Wright*, 430 U.S. 651 (1977); see Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 576–77 (2003) (reporting that ninety percent of American parents—more than in any other industrialized nation—use some form of corporal punishment).

¹⁷¹ See Lisa A. Fontes & Margarita R. O'Neill-Arana, *Assessing for Child Maltreatment in Culturally Diverse Families*, in HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS 627, 647–48 (Lisa A. Suzuki, Joseph G. Ponterotto & Paul J. Meller eds., 3d ed. 2008).

or the audience.”¹⁷² This, in a nutshell, is the difficulty with Thirteenth Amendment optimism. Whatever original meaning originalism means in theory, it does not easily justify an interpretation of the Thirteenth Amendment that is inconsistent with how everyone at the time, and indeed the vast majority of people today, would have expected it to apply. Thirteenth Amendment optimism is, largely for this reason, unlikely to persuade skeptics or to infiltrate judicial doctrine as such. Still, there may be limited ways to put the unique features of the amendment to work for Thirteenth Amendment optimists. The capacity of the Thirteenth Amendment to constitutionalize affirmative rights may lend constitutional heft to what would otherwise be policy arguments, and may thereby motivate advocates to push legislation inspired (if not ultimately justified) by the amendment’s special, perhaps too special, promise.

¹⁷² Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 927 (1986).